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ARTICLE

SHE THE PEOPLE: THE NINETEENTH AMENDMENT,  
SEX EQUALITY, FEDERALISM, AND THE FAMILY

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# SHE THE PEOPLE: THE NINETEENTH AMENDMENT, SEX EQUALITY, FEDERALISM, AND THE FAMILY

Reva B. Siegel\*

*Americans debated questions of women's citizenship for over a half century before adopting the Nineteenth Amendment, but neither the Amendment nor its history now plays any role in modern interpretations of the Constitution. Instead, the Supreme Court addresses questions of women's citizenship under the Fourteenth Amendment, reasoning about problems of sex discrimination by analogy to problems of race discrimination. This framework denies sex discrimination law a foundation in constitutional history, and in so doing, weakens its apprehension of issues affecting women's status and its authority to address them. The debates over woman suffrage that began with the drafting of the Fourteenth Amendment and concluded with the ratification of the Nineteenth Amendment are plainly relevant to understanding how the guarantee of equal citizenship applies to women. At the Founding and for generations thereafter, Americans believed women did not need the vote because they were represented in the state through male heads of household. By adopting the Nineteenth Amendment, Americans were breaking with traditional conceptions of the family that were rooted in coverture, as well as with understandings of federalism that placed family relations beyond the reach of the national government. The debates over the Nineteenth Amendment thus memorialize the nation's decision to repudiate traditional conceptions of the family that have shaped women's status in public as well as private law and that are inconsistent with equal citizenship in a democratic polity. If concepts of sex discrimination were informed by the experience and deliberative choices of past generations of Americans, equal protection doctrine would better recognize forms of discrimination historically directed at women; and the law of federalism would take a more critical approach to claims that the family is a local institution, beyond the reach of the national government. The Article closes by considering how this new, historically grounded approach to questions of sex discrimination under Sections One and Five of the Fourteenth Amendment would enable a different constitutional analysis of the portions of the Violence Against Women Act struck down in United States v. Morrison.*

## INTRODUCTION

**I**t has now been three decades since the Court first invalidated a law under the Fourteenth Amendment on the ground that it unconstitutionally discriminated against women, a quarter century since the Court first declared that questions of sex discrimination would receive

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\* Nicholas deB. Katzenbach Professor, Yale Law School. I am indebted to friends and colleagues who discussed this Article in draft, including Bruce Ackerman, Akhil Amar, Jack Balkin, Nancy Cott, Michael Dorf, Ariela Dubler, William Forbath, Jill Hasday, Laura Kalman, Neal Katyal, Linda Kerber, Michael Klarman, Larry Kramer, Pnina Lahav, Sandy Levinson, Serena Mayeri, Robert Post, Judith Resnik, and Seana Shiffrin, as well as the participants in faculty workshops at Columbia, Fordham, NYU, and Yale Law Schools. I would particularly like to thank the students who, at various points in the life of this project, helped me explore the legislative history of the Nineteenth Amendment: Kristin Collins, Shoshana Gillers, Janna Hansen, Charles Lansing, Amanda Pustilnik, Rebecca Rix, Mathew Segal, and Sarah Song.

special scrutiny under the Equal Protection Clause. This body of constitutional law has without a doubt induced important changes in the forms of state regulation in the modern era. There is far less open public ordering of institutions and activities along lines of sex than there once was; women have opportunities that they did not a quarter century ago.

But like the law of race discrimination, the law of sex discrimination is highly selective. Sex discrimination law identifies as wrongful only some of the practices and understandings that maintain inequality in the social position of women and men, and obscures — or affirmatively vindicates — many others.

During the 1970s, the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination. Today, the sex discrimination paradigm remains limited, in constitutional legitimacy and critical acuity, by the ahistorical manner in which the Court derived it from the law of race discrimination. Both bodies of law remain overly and indiscriminately preoccupied with formal acts of classification. And it remains commonplace to rationalize compromises of sex equality by pointing to the secondary or peripheral status of sex discrimination under the Fourteenth Amendment. Most recently, I have heard this kind of explanation offered for the Supreme Court's holding in *United States v. Morrison*<sup>1</sup> that Congress lacked power under the Fourteenth Amendment to enact the Violence Against Women Act.

This Article proposes, as an additional foundation for sex discrimination doctrine, a synthetic reading of the Fourteenth and Nineteenth Amendments that is grounded in the history of the woman suffrage campaign. Recovering this lost chapter of our constitutional history supplies sex discrimination doctrine with enactment history: a narrative of political struggle in which we can see women asserting rights claims that "We the People" steadfastly repudiated for over a half century until finally recognizing women as equal citizens in our constitutional order. At the same time, recovering this lost chapter of our constitutional history enables us to reason about equal citizenship for women in a manner that is sociohistorically grounded, as current sex discrimination doctrine is not. In short, recovering this chapter of our constitutional development alters our collective self-accountings as a nation and gives sociohistorical particularity to the master concept of "equal citizenship" for women.

Today, women's struggle for enfranchisement plays no role in the ways we understand or interpret the Constitution. Even though the quest for the vote spanned generations and provoked the most sus-

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<sup>1</sup> 120 S. Ct. 1740 (2000).

tained dialogue about women's position in the constitutional community that the nation has ever conducted, the Nineteenth Amendment has been utterly excluded from the constitutional canon.<sup>2</sup> I have elsewhere drawn on collective memory concepts to explore the cultural dynamics at work in the erasure of this struggle over "the woman question" from the ways we read the Constitution.<sup>3</sup> This Article un-

<sup>2</sup> For decades after its ratification, the Nineteenth Amendment was not discussed in casebooks or law reviews. In 1970, just prior to the Equal Rights Amendment campaign and the rise of modern sex discrimination jurisprudence, William Hodes, a student of Ruth Bader Ginsburg, wrote an article arguing that the Nineteenth Amendment supplied the textual basis of a constitutional sex-equality norm. W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26 (1970). No other articles on the Nineteenth Amendment were published in a law review over the next quarter century, during the rise of sex discrimination doctrine under the Fourteenth Amendment.

In recent years, a small but growing number of notes and articles on the Nineteenth Amendment have appeared in law reviews, primarily authored by students. See, e.g., JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103 (1994); Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment*, 7 COLUM. J. GENDER & L. 185 (1998); Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993); Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783 (2000).

Apart from these pieces, there are only several pages of commentary on the Nineteenth Amendment in the law review literature. Reasoning from the standpoint of common law constitutionalism, David Strauss has recently endeavored to show that the Nineteenth Amendment, along with all other constitutional amendments, is "irrelevant." David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1466-68, 1489 (2001); *id.* at 1500 (stating that there is "less to the Nineteenth Amendment than meets the eye"). The only other commentary is by Akhil Amar and Vik Amar, who for some years now have offered brief readings of the Amendment with an interest in giving effect to all elements of the Constitution's text. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201-03 (1991) [hereinafter Amar, *The Bill of Rights as a Constitution*] (suggesting that the Nineteenth Amendment's sex-equality principle should apply to political rights including militia and jury service); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 51-52 (2000) [hereinafter Amar, *The Document and the Doctrine*]; Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 471-73 (1995) [hereinafter Amar, *Women and the Constitution*] (arguing that the Nineteenth Amendment stands not only for voting rights, but also for "full rights of political participation" for women); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 241-42 (1995) (elaborating this theory with respect to the Nineteenth Amendment); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 956-72 (1998) (arguing that the women's suffrage crusade demonstrates that political rights embrace group-based as well as individual interests).

Breaking with conventions of casebook coverage, Jack Balkin added to the new edition of *Processes of Constitutional Decisionmaking* a discussion of conflicts over gender status law, from the Founding to the present, including narrative treatment of the Nineteenth Amendment. PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 390-92, 397-99 (4th ed. 2000) [hereinafter BREST, ET AL.]; see also SAMUEL ISSACHAROFF, PAMELA S. KALLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 26-37 (2d ed. 2001) (notes on the woman suffrage movement).

<sup>3</sup> 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*

dertakes the project of doctrinal reconstruction, demonstrating how including this chapter of our constitutional development in our reasoning about the Constitution in turn alters how we understand questions of equal citizenship for women.

Women began seeking the right to vote under the federal Constitution during the drafting of the Fourteenth Amendment but did not secure recognition of this right until ratification of the Nineteenth Amendment over a half century later.<sup>4</sup> If we reconstruct the understandings that made women's disfranchisement reasonable to the framers of the Reconstruction Amendments, we are in a better position to describe the constitutional significance of women's enfranchisement.

Americans who adopted the Reconstruction Amendments believed it was unnecessary to enfranchise women under the federal Constitution because women were represented in the state through male heads of household and because enfranchising women would harm the marriage relationship.<sup>5</sup> Congresses of the late nineteenth and early twentieth centuries also opposed amending the Constitution to enfranchise women on grounds of federalism, explaining that matters concerning the franchise and family were for "local self-government."<sup>6</sup> Women's quest for constitutional recognition of their right to vote directly challenged these conceptions of family life. When Americans finally voted to ratify the Nineteenth Amendment, they were breaking with understandings of the family that had organized public and private law and defined the position of the sexes since the founding of the republic.

The history of women's struggle for enfranchisement thus teaches that equal citizenship for women includes freedom from subordination in or through the family. Yet modern sex discrimination law, fashioned in the image of race discrimination law, does not treat laws concerning the family as warranting any form of special scrutiny. And in recent years, the Supreme Court has emphasized that the domain of

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LAW 131, 133 (Austin Sarat & Thomas R. Kearns eds., 1999) [hereinafter Siegel, *Collective Memory*]. As I there observed:

[W]e do not understand gender relations to have a political history in anything like the way we understand race relations to have a political history: the narrative structures through which we explain the relations of the sexes depict gender arrangements as the product of consensus and custom rather than coercion and conflict. Our understanding of the Nineteenth Amendment both reflects and sustains these habits of reasoning. Because of these habits of reasoning, we read the suffrage amendment as a text shorn of the semantically informing context that an understanding of the struggles over its ratification might supply. And interpretive construction of the suffrage amendment as a rule, rather than a *transformative constitutional commitment*, in turn sustains the prevailing understanding of gender arrangements as the product of evolving social consensus rather than legal coercion and political conflict.

*Id.*

<sup>4</sup> See *infra* Part II, pp. 960-77.

<sup>5</sup> See *infra* Part III, pp. 977-97.

<sup>6</sup> See *infra* Part IV, pp. 997-1006.

the family might somehow be beyond the reach of federal law,<sup>7</sup> even federal civil rights law.<sup>8</sup>

This Article proposes a synthetic reading of the Fourteenth and Nineteenth Amendments that would bring to the interpretation of the Equal Protection Clause a knowledge of the family-based status order through which women were disfranchised for most of this nation's history and from which they were emancipated after over a half century of struggle. Interpreted from this sociohistoric standpoint, a core meaning of equal protection for women is freedom from historic forms of subordination in the family. Reconstructing sex discrimination doctrine in this way has consequences for both judicial and legislative enforcement of the Equal Protection Clause, as this Article illustrates using the recently invalidated Violence Against Women Act as a case study.

I develop my argument in three stages. The Article opens by offering a brief account of how the modern law of sex discrimination is limited, in constitutional authority and critical acuity, by the ahistorical manner in which the Court derived it from the law of race discrimination.

In Part II, I begin to explore the constitutional history that would support a different, sociohistorical approach to sex discrimination law. The argument for reading the Fourteenth and Nineteenth Amendments together starts with a demonstration that they are linked in the history of the Constitution's development: the beginning and end points in a struggle over women's status in our constitutional community that started with the drafting of the second section of the Fourteenth Amendment and concluded with the ratification of the Nineteenth Amendment. As I show, grounding sex discrimination doctrine in the developments that link the Fourteenth and Nineteenth Amendments orients doctrine to our constitutional and common law history in different ways than does the race/gender analogy on which sex discrimination doctrine presently rests.

In Parts III and IV, I examine the history of the suffrage campaign to demonstrate that, for the generations of Americans who debated the woman suffrage amendment, the question of women voting was a question concerning the family. As Part III recounts, antisuffragists opposed a woman suffrage amendment on the grounds that women were represented in the state through male heads of household and

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<sup>7</sup> In *United States v. Lopez*, 514 U.S. 549 (1995), the Court repeatedly described an overly expansive conception of the commerce power as one that would allow the federal government to regulate "family law (including marriage, divorce, and child custody)." *Id.* at 564. For variations on this assertion, see *id.* at 565.

<sup>8</sup> See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the civil rights remedy of the Violence Against Women Act).

that conferring the right of self-representation on women would threaten the institution of marriage. And as Part IV recounts, opponents of the amendment asserted that federalism principles precluded enfranchising women under the United States Constitution, contending that doing so would impermissibly interfere with local control of the franchise and the family. Thus, when Americans adopted the Nineteenth Amendment, they were breaking with common law traditions that subordinated women to men in the family and were intervening in matters of domestic relations that many believed were reserved to state control.

In Part V, I trace the juridical erasure of this constitutional history. I demonstrate that, in the immediate aftermath of ratification, at least some courts understood the Nineteenth Amendment to have implications for practices other than voting, including matters concerning the law of marriage, but that soon thereafter the Amendment came to be interpreted as a nondiscrimination rule governing voting with no bearing on questions of women's citizenship outside the context of the franchise.

Part VI considers how this history might bear on the way we interpret the Constitution today. I begin by illustrating how erasure of the constitutional history recounted in this Article has weakened guarantees of equal citizenship for women, using litigation surrounding the Violence Against Women Act as a case study. I then consider how recovery of this constitutional history might alter our self-accountings as a nation, and so come to shape the ways we make claims about the Constitution's meaning. Finally, I consider how these changes in our self-accountings as a nation might make a practical difference in doctrines concerning federalism and sex equality, demonstrating, in particular, how the law governing the constitutionality of the Violence Against Women Act might differ if we read the Constitution with an understanding of the woman suffrage campaign, and thus, a sociohistorical understanding of the equal protection guarantee. On this view — one that reads the Fourteenth Amendment's Equal Protection Clause in light of the Nineteenth Amendment — a core meaning of equal citizenship for women is freedom from subordination in and through the family.

## I. THE SEX DISCRIMINATION PARADIGM

The modern law of sex discrimination is built on the understanding that there is no constitutional history of relevance to the question of women's citizenship.

In the early 1970s, as women were beginning to campaign for an Equal Rights Amendment, the Court "suddenly" discovered a constitutional basis for interpreting the Equal Protection Clause of the Fourteenth Amendment to bar sex-based state action. It did so by recog-

nizing that sex discrimination was like race discrimination. Justice Brennan made this argument in 1973 in a plurality opinion in *Frontiero v. Richardson*<sup>9</sup> that would have applied strict scrutiny to sex-based state action, just as the Court was then applying strict scrutiny to race-based state action.<sup>10</sup> But Justice Brennan failed to secure the votes needed to make this opinion law; some Justices thought the Court should wait to see the outcome of the ERA campaign.<sup>11</sup> By 1976, however, Justice Brennan had persuaded a majority of the Court to apply heightened scrutiny to sex-based state action. *Craig v. Boren*<sup>12</sup> adopted a new "intermediate" scrutiny standard that differed somewhat from the strict scrutiny standard applied in race discrimination cases. Henceforth, sex-based state action would have to be "substantially related to achievement of" "important governmental objectives"<sup>13</sup> rather than "necessary to achieve a compelling end." The Court never explained why it had chosen to apply a different standard to sex and race discrimination cases.

The intermediate standard of scrutiny that emerges from *Frontiero* and *Craig* expresses the intuition that sex discrimination is just like race discrimination — but, in the end, not *exactly* like race discrimination. Commentators commonly invoke several differences between sex and race discrimination to justify this difference in doctrinal standards. *First*, the framers of the Fourteenth Amendment were thinking about questions of race discrimination, not sex discrimination.<sup>14</sup> Thus, it is

<sup>9</sup> 411 U.S. 677 (1973).

<sup>10</sup> *Id.* at 682–88 (plurality opinion) (drawing the comparison by emphasizing factors such as the history of discrimination directed at the group, the immutability of the group's distinguishing trait, and the group's underrepresentation in the political process).

Feminist advocates drew on analogies between race and sex in arguing for the application of civil rights law to discrimination against women. For an early and influential use of this analogy, see Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). The ACLU Women's Rights Project drew on the race/sex comparison in their briefs. Brief of American Civil Liberties Union, Amicus Curiae at 7, *Frontiero*, 411 U.S. 677 (No. 71-1694) ("Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference."); Brief for Appellant at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (same). Serena Mayeri has explored feminist uses of the race-sex analogy in the 1960s and 1970s, especially by Pauli Murray and Ruth Bader Ginsburg. Mayeri demonstrates how the analogy was transformed as it was taken up into the Fourteenth Amendment case law in this era. Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 111 YALE L.J. 1045 (2001).

<sup>11</sup> *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

<sup>12</sup> 429 U.S. 190 (1976).

<sup>13</sup> *Id.* at 197.

<sup>14</sup> EDWARD L. BARRETT, JR., CONSTITUTIONAL LAW: CASES AND MATERIALS 897 (5th ed. 1977) ("Certainly elimination of sex bias was not one of the purposes of the framers of the Fourteenth Amendment.") (citation omitted) (quoting Edward L. Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection?*, 1976 BYU L. REV. 89,



appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women; bluntly put, the nation never made a collective constitutional commitment to respect women as equals of men. *Second*, and very much related to this lack of constitutional history, the difference in standards reflects a pervasive intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination.<sup>15</sup> The case law presents sex discrimination as a problem involving old-fashioned ways of thinking — “archaic and overbroad” generalizations” about differences between the sexes.<sup>16</sup> Sex discrimina-

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106) (internal quotation marks omitted); BREST, ET AL., *supra* note 2, at 998 (“[T]he Fourteenth Amendment was not understood by most of its framers to grant women political rights.”); GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 682 (13th ed. 1997) (“If the history and immediate purpose of the 14th Amendment were all that counted, only racial classifications directed against blacks would be suspect.”); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 709 (3d ed. 1996) [hereinafter STONE, ET AL.] (“[I]t is hard to make the case that the framers had any intention of bringing into question laws that discriminated on the basis of gender.”). Many casebooks quote an early article of Justice Ginsburg’s in which she asserts, “Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment’s equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities.” Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161, quoted in STONE, ET AL., *supra*, at 709; see also PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 817 (3d ed. 1992) (quoting same); Earl Maltz, *Some New Thoughts on an Old Problem — The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 813 (1983) (“[T]here is no evidence that the [Fourteenth Amendment] Framers intended to prohibit state-imposed sex discrimination.”).

<sup>15</sup> As Justice Powell put it in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), “[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.” *Id.* at 303.

<sup>16</sup> *Craig*, 429 U.S. at 198 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)). The *Craig* Court asserted that such “generalizations” about women’s roles “could not justify use of a gender line in determining eligibility for certain governmental entitlements,” nor could “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’” justify “state statutory schemes that were premised upon their accuracy.” *Id.* at 198–99 (citing *Stanton v. Stanton*, 421 U.S. 7 (1975)). The assumption that sex discrimination arises out of traditional, old-fashioned, or outmoded habits of thinking is commonplace in equal protection case law. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (“[T]he decision to exempt women from registration was not the ‘accidental by-product of a traditional way of thinking about females.’” (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment))); *Michael M. v. Superior Court*, 450 U.S. 464, 471 n.6 (1981) (plurality opinion) (“Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is ‘current’ and what is ‘outmoded’ in the perception of women.”); *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (“[T]he ‘old notio[n]’ that ‘generally it is the man’s primary responsibility to provide a home and its essentials,’ can no longer justify a statute that discriminates on the basis of gender.” (quoting *Stanton*, 421 U.S. at 10)); cf. *The Supreme Court, 1973 Term—Leading Cases*, 88 HARV. L. REV. 71, 137–38 (1974) (“Unlike other forms of invidious discrimination, sex discrimination has been characterized more by paternalistic overprotection than by callous deprivation. Employment opportunities have been closed to women not simply because they have been considered inferior, but also because of the assumption that a woman’s place is in the home.” (footnote omitted)).

tion, so understood, grows out of evolving customary norms, rather than a long trail of state-sponsored coercion.<sup>17</sup> *Third*, underneath it all, there is a sense that sex discrimination is at root *different* from race discrimination. Sex distinctions are not always harmful (or based on animus) the way race distinctions are;<sup>18</sup> it is not clear that we are prepared to embrace a model of sex blindness, in matters of love or war.<sup>19</sup>

Thus, just beneath the faux precision of the "intermediate scrutiny" standard, we discover deep confusion about the positive and normative foundations of sex discrimination doctrine. Does intermediate scrutiny express a judgment about the gravity of sex discrimination and the depth of our collective commitment to its eradication, or does the standard instead express the inchoate intuition that the kinds of practices that count as race and sex discrimination differ?

Note how, from this vantage point, the central constitutional question about sex discrimination is whether it is really like race discrimination.<sup>20</sup> Note further that this inquiry is premised on a historically particular conception of what race discrimination *is*. If we think about *Washington v. Davis*,<sup>21</sup> *Regents of the University of California v. Bakke*,<sup>22</sup> and other cases of the mid-1970s, race discrimination is

<sup>17</sup> For extended development of this argument, see Siegel, *Collective Memory*, *supra* note 3.

<sup>18</sup> For example, as Justice Stewart observed in *Michael M.*:

[D]etrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. . . . By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.

*Michael M.*, 450 U.S. at 478 (Stewart J., concurring) (citations omitted).

<sup>19</sup> See RICHARD WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES* 24-43 (1980) (arguing that the assimilationist ideal often employed to conceptualize a nonracist society is not appropriate for conceptualizing a nonsexist society because there are contexts in which sex differences legitimately matter); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 183-85 (1982) ("[S]peculate for a moment about where society might draw the line and refuse to proceed further with gender equality. What does our culture identify as quintessentially masculine? . . . Surely, one rather indisputable answer to that question is 'war': physical combat and its modern equivalents. . . . [P]erhaps even more fundamental than our definition of man as aggressor in war is man as aggressor in sex.").

<sup>20</sup> See BREST, ET AL., *supra* note 2, at 1000 ("The first instinct of many judges, commentators, and students in addressing the constitutionality of sex discrimination is to treat race discrimination as a point of comparison and to inquire to what extent gender classifications share the characteristics that call racial classification into disfavor."); GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 771 (9th ed. 1975) ("Are the reasons that make racial classifications suspect fully applicable to the use of sex criteria?"); GUNTHER & SULLIVAN, *supra* note 14, at 683 ("Consider especially the similarities and differences between race and sex discrimination."); STONE, ET AL., *supra* note 14, at 709 ("Should gender discrimination be treated like racial discrimination . . . ?").

<sup>21</sup> 426 U.S. 229 (1976).

<sup>22</sup> 438 U.S. 265 (1978).

group-based differentiation, a practice of regulatory classification or cognitive distinction, that is to be rectified by a countervailing practice of “race-blindness.”<sup>23</sup> Of course, race inequality in this country was sustained by a complex network of institutions, practices, stories, and reasons that involved both more and less than group-based classification.<sup>24</sup> The concept of group classification hardly captures what is at stake in the institution of slavery and ignores the role played by facially neutral regulation (for example, vagrancy laws, poll taxes, literacy tests, zoning restrictions and the like) in maintaining the many institutional dimensions of Jim Crow.<sup>25</sup>

But during the 1970s, the decade sex discrimination doctrine was born, the law of equal protection had begun to contract around segregation as the archetypal scene of racial harm, group classification as its technology, and blindness as its remedy. A particular — and highly stylized — memory of race discrimination thus supplied the legal template for constitutional debates about sex discrimination.

During the 1970s, constitutional debates over sex discrimination continually referred back to this historically particular conception of race discrimination. In debates over the ERA, a litmus test for commitment to the sex equality principle was willingness to treat sex like race, which in turn translated into the question, reiterated in debate after debate: but would you eliminate sex-segregated bathrooms?<sup>26</sup> In

<sup>23</sup> Two classic essays of the era capture the preoccupations of antidiscrimination law during this period. See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (arguing that the purpose of antidiscrimination law is and should be to eliminate “race-dependent decisions and conduct”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (discussing doctrinal conflicts arising out of race discrimination challenges to affirmative action and facially neutral state action and arguing that the Equal Protection Clause should be interpreted through a “group disadvantage principle”); cf. Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 113–14 (2000) [hereinafter Siegel, *Discrimination in the Eyes of the Law*] (discussing the shift in rules and rhetoric of status-enforcing practices that prompted debate over the antidiscrimination principle in the 1970s).

<sup>24</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–29 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*].

<sup>25</sup> See, e.g., Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 889 (1998) (“Beginning with the Mississippi constitutional convention of 1890, southern states adopted formal measures such as poll taxes, literacy tests, and residency requirements to supplement the de facto disfranchisement of blacks already accomplished through violence and fraud by the late 1880s.”).

<sup>26</sup> JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 114 (1986) (“[U]nisex toilets became one of the four major themes that activists speaking to reporters and writing in the newspapers stressed as central to their opposition.”). Proponents of the ERA denied that the amendment would necessarily lead to unisex bathrooms, and argued that privacy doctrine would protect bathrooms from sex desegregation. Barbara Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80

like fashion, the emergent law of sex discrimination under the Fourteenth Amendment took as its central question courts' willingness to eliminate group-based classifications from law. Just as the law of race discrimination removed "white" and "colored" signs from schools and water fountains, so, too, the law of sex discrimination would remove "men" and "women" signs from a variety of social practices. In *Craig v. Boren*,<sup>27</sup> the case announcing the intermediate scrutiny standard, for example, the Court liberated young men from the indignities of a regulatory regime that prohibited boys aged 18-21 from buying 3.2% beer when girls of the same age could.<sup>28</sup>

Conversely, the Court was quite ready to dismiss practices that injured women but did not fit this model as simply "not sex discrimination." A law that discriminated "on the basis of sex" treated all women within its ambit differently than it treated all men within its ambit, the Court reasoned. And so, the Court announced, laws that penalize pregnant employees do not discriminate on the basis of sex because they harm some but not all women;<sup>29</sup> laws that bestow civil service hiring preferences on veterans do not discriminate on the basis of sex because they advantage some but not all men.<sup>30</sup>

YALE L.J. 871, 901 (1971) (arguing that "the right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces"); Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 ("Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.").

But the "potty issue," *id.*, did not die with the ERA. Scholars continued to raise the question of segregated bathrooms to highlight the difference between race discrimination and sex discrimination. WASSERSTROM, *supra* note 19, at 21. And constitutional law casebooks continued to discuss the potty issue, canonizing it as a central question of sex discrimination law. *E.g.*, PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 594 (1975) (quoting Brown, Emerson, Falk & Freedman, *supra*); GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 884 n.2 (10th ed. 1980) (quoting Ginsburg, *supra*); *id.* at 885 n.4 (quoting Brown, Emerson, Falk & Freedman, *supra*); GERALD GUNTHER, *CONSTITUTIONAL LAW* 669 n.15 (11th ed. 1985) (quoting Ginsburg, *supra*); WILLIAM LOCKHART, YALE KAMISAR & JESSE H. CHOPER, *THE AMERICAN CONSTITUTION: CASES-COMMENTS-QUESTIONS* 968 (5th ed. 1981) (citing WASSERSTROM, *supra* note 19); STONE ET AL., *supra* note 14, at 708 (quoting WASSERSTROM, *supra* note 19).

<sup>27</sup> 429 U.S. 190 (1974).

<sup>28</sup> *Id.*

<sup>29</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974). The *Geduldig* Court reasoned:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

*Id.* at 496 n.20.

<sup>30</sup> *Pers. Adm'r. v. Feeney*, 442 U.S. 256, 275 (1979) ("Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and nonveterans — male as well as female — are placed at a disad-

Reasoning about equal protection as a problem concerning group-based classifications produced other intriguing anomalies in the emergent law of sex discrimination. If the state exempts from punishment men who rape or beat their wives, equal protection doctrine invites the state to cure the sex discrimination in the law by exempting from punishment women who rape or beat their husbands. Sex distinctions eliminated, spousal rape exemptions and spousal battery policies are immunized from equal protection challenge.<sup>31</sup>

When equal protection doctrine sees sex discrimination in a law that prevents boys from buying watered-down beer when girls of the same age can — but does not see sex discrimination in a law that denies pregnant workers employment benefits or a law that criminalizes abortion or a law that allows rape or assault in marriage — we can safely say that equal protection doctrine constrains only some of the forms of state action that regulate the social position of the sexes. The sex discrimination paradigm is thus a lens that makes visible certain features of social practice and utterly occludes others. The way we understand sex discrimination in turn shapes judgments about its gravity and about our collective commitment to its eradication.

In the remainder of this Article, I would like to consider a different approach to analyzing equal protection questions concerning sex discrimination — one grounded in the history of constitutional struggle over women's citizenship, one that unfolds under the auspices of both the Fourteenth and Nineteenth Amendments. Grounding the law of

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vantage. Too many men are [adversely] affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.”)

<sup>31</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1500–03 (2000) (discussing facially neutral spousal rape policies); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2189–90 (1996) [hereinafter Siegel, *The Rule of Love*] (discussing facially neutral domestic violence policies); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45–51, 63–71 (1990) (discussing facially neutral spousal rape policies). For similar problems in the rules of interspousal tort immunity, see Siegel, *The Rule of Love*, *supra*, at 2163 & n.163.

Like race discrimination doctrine, sex discrimination doctrine assumes that eliminating group-based classifications from law will rectify status harm. While this may be the case when the state uses law to segregate or separate members of different social groups who are engaged in performing the same activity, it is not clear that eliminating group-based classifications from law has significant transformative consequences where the state is regulating activities that are primarily or exclusively performed by members of one social group — where the group-based classification merely describes the group of persons who perform the regulated activity but otherwise has little directive or distributive force. *Id.* at 2193 n.276 (observing that the consequences of making a race- or gender-specific law facially neutral may vary, depending on “the nature of the law, the nature of the social practice it regulates, and the ways in which the regulated practice allocates dignitary and/or material privileges”). For this reason, the law of equal protection has had scant impact on the regulation of rape and pregnancy and has only marginally affected the law of the family. *Cf. id.* at 2189–94 (demonstrating, in the context of domestic violence, the limited impact of equal protection doctrines requiring gender neutrality in laws regulating highly gender-salient family roles).

sex discrimination in this history orients it to the institutional sites and social practices that have been central to disputes over women's status in our constitutional order.

## II. TOWARD A SYNTHETIC READING OF THE FOURTEENTH AND NINETEENTH AMENDMENTS: A NEW HISTORICAL FOUNDATION FOR SEX DISCRIMINATION DOCTRINE

The body of sex discrimination doctrine the Court developed in the 1970s played a pivotal role in modernizing Fourteenth Amendment jurisprudence so that the Equal Protection Clause might speak to questions of gender justice in the twentieth century. Yet the manner in which the Court derived sex discrimination doctrine from the race discrimination paradigm produced foundational weaknesses in this body of law that continue to haunt it to the present day. Many of these weaknesses — in constitutional authority and critical acuity — flow from the ahistorical manner in which the case law reasons about questions of equal citizenship for women as it derives sex discrimination doctrine from race discrimination doctrine.

In arguing that equal protection doctrine concerning race discrimination ought to be extended to cover the analogous case of sex discrimination, Justice Brennan's pathbreaking opinion in *Frontiero* emphasized commonalities between race and sex discrimination.<sup>32</sup> This way of building the case for heightened scrutiny obscured the extent to which gender status regulation had its own constitutional and common law history and distinctive social forms. Doctrinal effacement of this history had two important consequences. By enjoining sex discrimination on the ground that it resembled race discrimination prohibited by the Fourteenth Amendment, the Court suggested that the new body of sex discrimination doctrine lacked independent grounding in our constitutional history. At the same time, the Court's effort to reason by analogy deflected attention from the ways that race and gender status regulation intersect and differ — differences that a more historically grounded case for heightened scrutiny might have illuminated.

In the following sections, I examine briefly the peripheral role that history plays in the contemporary sex discrimination framework, and then begin to build the case for regrounding sex discrimination doctrine in constitutional history — in the history of the Fourteenth and Nineteenth Amendments.

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<sup>32</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (plurality opinion) (Brennan, J.).

### A. Frontiero's *Use of History in Building the Race Analogy*

Justice Brennan's plurality opinion in *Frontiero* discusses the history of women's treatment in the American legal system as it makes the argument for applying heightened scrutiny to sex-based state action. The opinion points to the nation's "long and unfortunate history of sex discrimination"<sup>33</sup> in an effort to demonstrate that sex discrimination is sufficiently like race discrimination to warrant similar doctrinal treatment under the Equal Protection Clause. Justice Brennan completes the analogy by arguing that sex, like race, is "an immutable characteristic determined solely by accident of birth" and "frequently bears no relation to ability to perform or contribute to society."<sup>34</sup>

To demonstrate that sex-based state action should trigger strict scrutiny just as race-based action does, Justice Brennan argues that the history of discrimination directed against women resembles the history of discrimination directed against blacks. Quoting separate-spheres discourse in the opinions of the Supreme Court ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."<sup>35</sup>), Justice Brennan's opinion in *Frontiero* then observes:

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, 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. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later.<sup>36</sup>

In this passage, Justice Brennan depicts the nation's "long and unfortunate history of sex discrimination" as constitutionally significant because women's "position . . . was . . . comparable to that of blacks." It is the collective memory of *race* relations that makes women's experience in the American legal system intelligible as a "history of sex discrimination" and that invests that history with normative significance it otherwise presumptively lacks. Thus, as deployed in *Frontiero*, the race/gender analogy represents and effaces the history of

<sup>33</sup> *Id.* at 684.

<sup>34</sup> *Id.* at 686.

<sup>35</sup> *Id.* at 685 (quoting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)) (internal quotation marks omitted).

<sup>36</sup> *Id.* (citations and footnote omitted).

women's treatment in the American legal system and obscures the historical experiences of women of color.<sup>37</sup>

Precisely as analogies dramatize similar features of different practices, they work both to illuminate and occlude. The race/gender analogy no doubt helped the Court see features of sex discrimination which, to that point in history, it had not seen. But the Court relied upon the race/gender analogy in ways that ultimately worked to limit the critical acuity and constitutional legitimacy of the emergent law of sex discrimination.

Because *Frontiero* invokes the history of sex discrimination in terms that emphasize its similarity to the history of race discrimination, it situates equal protection doctrine in an analytical framework that is in some tension with historical evidence suggesting that forms of status regulation vary within and across groups.<sup>38</sup> (We know, for example, that African-American men and women were subject to gender-differentiated treatment in slavery and during the Jim Crow era.<sup>39</sup>) If historical evidence were considered relevant in understanding sex discrimination, such differences might well emerge over time in the litigation of sex discrimination claims; this knowledge would in turn sharpen our judgments about the ways in which it is appropriate to rely on the race discrimination analogy. But the *Frontiero* opinion does not invite us to consider history in this fashion. There is no suggestion in *Frontiero*, or in subsequent opinions of the Court, that history might help identify the traditional sites or distinctive forms of discrimination directed against women.

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<sup>37</sup> Analogical argument need not do this, as Serena Mayeri has demonstrated in a legal history of the race/sex analogy in the American civil rights tradition. To illustrate how the semantic content and political salience of the race/sex analogy are shaped by the manner and context in which the analogy is invoked, Mayeri compares use of the analogy by Pauli Murray, an African-American activist in the civil rights and women's movements during the 1960s, and by Justice Brennan in the *Frontiero* opinion. Mayeri, *supra* note 10, at 1074-76 (discussing *Frontiero*).

<sup>38</sup> For a sociohistorical account that emphasizes the ways that status regulation can vary by group and within groups, see Siegel, *Discrimination in the Eyes of the Law*, *supra* note 23, at 83 & n.24. For analysis of some of the ways that the equal protection framework represses heterogeneity in the forms of discrimination different groups encounter, see Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 115 (David Kairys ed., 3d ed. 1998); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 *HARV. C.R.-C.L. L. REV.* 283, 285 (1994); and Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 *YALE L.J.* 485, 500 (1998).

<sup>39</sup> E.g., GLENDA GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920* (1996) (examining the interconnected roles of race and gender in a North Carolina community during the era of Jim Crow); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY, FROM SLAVERY TO THE PRESENT* 11-43, 79-151 (1985); Barbara Y. Welke, *When All the Women Were White and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 *LAW & HIST. REV.* 261, 266-67 (1995) (analyzing the intertwined forms of gender- and race-based segregation in public transportation during the era of Jim Crow).



After resolving the threshold question of whether to apply heightened scrutiny, the Court adopted an intermediate scrutiny framework for determining what forms of sex-based state action violate the Equal Protection Clause that is generally inattentive to history. This body of doctrine enjoins sex-based state action that is rooted in “archaic,” “overbroad” generalizations about the roles of women,<sup>40</sup> but apart from this general injunction against class-based regulation that is rooted in customary or “old-fashioned” ways of thinking, the modern law of sex discrimination does not take its warrant or its critical bearings from the past. Instead it asks whether the state’s use of sex classification is substantially related to an important governmental end.<sup>41</sup> In the two decades of cases decided after *Frontiero*, the Court never again revisited the nation’s “long and unfortunate history of sex discrimination” or referred to the Nineteenth Amendment — a pattern unbroken until decisions of the late 1990s, as I discuss below.<sup>42</sup> Instead, development of the Court’s sex discrimination jurisprudence proceeded without grounding in the nation’s common law, statutory, or constitutional history.

The manner in which the Court derived sex discrimination doctrine from race discrimination doctrine thus deflected attention from the ways that the state has historically regulated the social position of men and women, and so obscured a body of regulatory practice that might have illustrated how race-based regulation resembles, diverges from, and intersects with sex-based regulation. Just as importantly, the Court’s reliance on the analogy between race discrimination and sex discrimination to justify applying heightened scrutiny to sex-based state action produced a new body of equal protection law whose silences uneasily suggested that the nation had never before deliberated about women’s status as citizens in the constitutional community.

The Court seems to have founded sex discrimination jurisprudence on the assumption that the framers of the Fourteenth Amendment were such “romantic paternalists”<sup>43</sup> that they never thought about questions of women’s citizenship in their otherwise noble deliberations over the Constitution. Simply put, the analogy between race and sex that founds sex discrimination jurisprudence would seem to be premised on the assumption that there is no constitutional history of relevance to sex discrimination law.<sup>44</sup>

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<sup>40</sup> See *supra* p. 955 & n.16.

<sup>41</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>42</sup> See *infra* pp. 1043–44.

<sup>43</sup> Cf. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

<sup>44</sup> Neither *Frontiero* nor *Craig* discusses the ratification history of the Fourteenth Amendment nor even refers to the use of the term “male” in the suffrage provisions of the Fourteenth Amendment’s second section. See *infra* note 45.

In the years since the *Frontiero* decision at least some constitutional lawyers have come better to appreciate that the question of women's enfranchisement was at issue in debates over the Fourteenth Amendment — enough so that the Amendment's framers introduced gender distinctions into the Constitution for the first time in the Fourteenth Amendment's second section, which seems to authorize women's disfranchisement.<sup>45</sup> Of course, this post hoc understanding now stands as something of an embarrassment for modern sex discrimination jurisprudence, as it suggests that the framers of the Fourteenth Amendment were not terribly interested in enfranchising women. And even if the Amendment's framers did contemplate that its provisions would apply to women, they did not discuss the question in terms that would suggest that they expected or intended the Equal Protection Clause to disturb settled forms of gender status regulation.<sup>46</sup>

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<sup>45</sup> The Amendment's second section provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice president of the United States, Representatives in 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 male citizens shall bear to the whole number of such male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

<sup>46</sup> It is difficult to translate the record of debate over the Fourteenth Amendment into the doctrinal framework in which courts reason about the meaning of the Amendment today. There is no doubt that the framers of the Fourteenth Amendment understood that the Amendment could have implications for groups other than African-Americans. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 163 (1988) ("Those who discussed the amendment were aware of its implications for other groups, such as Chinese, Indians, women, and religious minorities."). The record of debate further suggests that the framers of the Fourteenth Amendment expected it to apply to laws regulating the relations of the sexes, for example, the law of marriage. See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1394-95 (1998) (reviewing debates over the Fourteenth Amendment's application to marriage law); Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 *YALE L.J.* 1153, 1157-58 (1988) (arguing that the framers of the Fourteenth Amendment intended that Section One would apply to civil but not to political rights such as voting).

On the other hand, there is little in the record to suggest that the framers of the Fourteenth Amendment intended it to disturb traditional forms of gender status law. See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 *NW. U. L. REV.* 1229, 1254-60 (2000) (reviewing debates and concluding that, although the Amendment was said to protect civil rights, its framers did not speak as if it would affect the ways that marriage law restricted women's legal capacities and property rights); see also Siegel, *Collective Memory*, *supra* note 3, at 147 ("Republican leaders such as Thaddeus Stevens took the position that while the Fourteenth Amendment might govern family law, provisions such as the equal protection clause would not disturb traditional forms of marital-status regulation. . . . [T]he architects of Reconstruction were more alarmed about giving women political than civil rights; they specifically drafted the Four-

Accordingly, casebooks regularly advise their readers that the framers of the Fourteenth Amendment had no intention of authorizing the body of constitutional law students are about to study.<sup>47</sup> From this standpoint, the ratification history of the Fourteenth Amendment is either irrelevant to modern sex discrimination jurisprudence, or worse.

But this constitutional history is an embarrassment to sex discrimination jurisprudence only if we read the Constitution in a clause-bound way — on the model of a Christmas advent calendar. If we reason about the Fourteenth Amendment *this way*, we learn that the framers of the Fourteenth Amendment did not intend to enfranchise women — and we are left to reason about the meaning of the Fourteenth Amendment in a manner that takes no account of the fact that women persisted in seeking constitutional recognition of the right to vote, and after another half century, persuaded men to amend the Constitution and to repudiate the understandings of citizenship that made women's disfranchisement so reasonable to the Fourteenth Amendment's framers.

*B. Analogical and Synthetic Interpretation: A New Role for History in Sex Discrimination Doctrine*

How might the history of the woman suffrage campaign bear on the ways that we understand the Constitution today? Doctrine currently treats this history as constitutionally irrelevant because it occurred after ratification of the Fourteenth Amendment and concerns women's right to vote rather than the meaning of the Fourteenth Amendment's guarantee of equal protection of the laws. In the following sections, I develop an argument for basing sex discrimination doctrine on a reading of the Constitution that emphasizes connections between the Fourteenth and Nineteenth Amendments. This alternative basis for sex discrimination doctrine draws on history in different ways than does the argument by analogy elaborated by Justice Brennan's *Frontiero* opinion.

In *Frontiero*, as we have seen, Justice Brennan invoked the history of gender status regulation to demonstrate that women have suffered discrimination sufficiently like the discrimination directed at blacks to justify reviewing sex-based state action under the same strict scrutiny standards the Court applies to race-based state action. The analogy justifies enlarging the Fourteenth Amendment's sphere of concern to include questions of sex discrimination as well as race discrimination,

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teenth and Fifteenth Amendments so as to enfranchise freedmen without enfranchising women." (footnote omitted).

<sup>47</sup> See sources cited *supra* note 14.

even if questions of sex inequality were not the moving cause of the Amendment's adoption.

Sex discrimination doctrine presently depends on the race/gender analogy to deflect attention from deficiencies in the ratification history of the Fourteenth Amendment. By contrast, this Article proposes to strengthen the historical foundations of sex discrimination doctrine by grounding it in the constitutional developments that link the Fourteenth and Nineteenth Amendments. Sex discrimination doctrine could then take its critical and normative bearings from the debates over women's citizenship that began with the drafting of the Fourteenth Amendment and culminated over a half century later with the ratification of the Nineteenth Amendment. While interpretation that links provisions of the Constitution is less common than clause-bound interpretation,<sup>48</sup> it has substantial precedent.

Synthetic interpretation of the Constitution endeavors to interpret one clause or provision in light of another — attending especially to relations among different parts of the Constitution as they are interpreted or amended over time. For example, in *Bolling v. Sharpe*,<sup>49</sup> the Court held that the interpretation of the Equal Protection Clause announced in *Brown v. Board of Education*<sup>50</sup> not only bound states under the Fourteenth Amendment, but henceforth, would also bind the federal government under the Due Process Clause of the Fifth Amendment.<sup>51</sup> Despite the fact that the Fifth Amendment has no Equal Protection Clause and was adopted nearly a century before the Fourteenth Amendment, the Court now maintains that “[e]qual protec-

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<sup>48</sup> Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 748, 788 (1999) (“Textual argument as typically practiced today . . . [focuses] intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them.”).

<sup>49</sup> 347 U.S. 497 (1954).

<sup>50</sup> 347 U.S. 483 (1954).

<sup>51</sup> In *Bolling*, the Supreme Court held that the equal protection standards announced in *Brown* would apply to the District of Columbia public schools:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

*Bolling*, 347 U.S. at 499. While *Bolling* anticipates some differences in the Fifth and Fourteenth Amendments' equal protection standards, more recently the Court has ruled that equal protection standards governing the conduct of federal and state governments are “the same.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (ruling that there should be “congruence” in the constitutional standards governing affirmative action programs adopted by federal and state governments).

tion analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.<sup>52</sup>

Of course, styles of synthetic interpretation vary along with other elements of interpretive method. One might endeavor to read the Constitution as if it were written at one time by one author and to pay special attention to reconciling and integrating its various parts.<sup>53</sup> Alternatively, one could approach the Constitution as a charter of government forged in history by successive generations of authors and emphasize the ways that they modified the Constitution's meaning by amending the document over time.<sup>54</sup> Indeed, one could hold a very different view of the Constitution's authority as law — emphasizing extratextual sources of constitutional meaning and pathways of constitutional change — and nonetheless consider it crucial in making claims about the Constitution's meaning to relate and integrate the constitutional understandings of different generations.<sup>55</sup>

The synthetic interpretation I develop in this Article brings the history of constitutional debates about women's citizenship status to bear

<sup>52</sup> *Adarand*, 515 U.S. at 217.

<sup>53</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986) ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author — the community personified — expressing a coherent conception of justice and fairness."); cf. Amar, *supra* note 48, at 795 (explaining that intratextualism "takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses . . . [for it] is a (single, coherent) Constitution we are expounding").

<sup>54</sup> For an account of the Constitution's text within a temporally self-conscious framework, see Amar, *The Document and the Doctrine*, *supra* note 2:

Instead of directly rewriting Articles I through VII via deletions and insertions, later generations of Americans have chosen to make amends at the end of the document in a series of postscripts inscribed in chronological order. Although this mode of textual alteration has generated certain ambiguities that direct rewriting might have avoided, there is an offsetting virtue in the postscript approach: The practice of inscribing amendments in chronological order visually dramatizes the distinct improvements of each generation and makes the temporal trajectory of the overall document much easier to identify at a glance. The document itself thus takes pains to draw attention to the vector of constitutional change, to highlight the arc of constitutional history. Sensitive documentarians should not ignore this arc.

*Id.* at 52–53 (footnotes omitted). For arguments that doctrinal elaboration of the Constitution's various provisions ought to reflect an understanding of the Constitution's revision over time, see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1284 (2001), which argues that a "holistic approach to constitutional interpretation needs to reflect in its understanding of 'basic' values those values that are implicit in later-enacted amendments, and, where they are in conflict with earlier values, to give weight to the later-enacted amendments within the traditions of the interpretive discourse"; and Michael C. Dorf, *Equal Protection Incorporation* (Nov. 24, 2001) (unpublished manuscript, on file with the Harvard Law School Library), which argues for an "incorporationist" account of the Equal Protection Clause that reads the Fourteenth Amendment in light of the nondiscrimination provisions contained in the First, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.

<sup>55</sup> See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 86–130 (1991) (discussing the problem of intergenerational synthesis in constitutional jurisprudence of the Reconstruction and the New Deal eras).

on the way we understand the constitutional guarantee of equal protection for women. I argue for reading the Fourteenth and Nineteenth Amendments together because the two Amendments are linked in subject matter concern: each secures constitutional protection for values of equal citizenship. Even more importantly, as I show, the two Amendments are linked in the history of the Constitution's development. Disputes about the terms of women's citizenship in our constitutional order that began at the time of the Fourteenth Amendment's drafting continued for decades and across generations until women finally secured an amendment to the Constitution guaranteeing their right to vote. These debates, I argue, are plainly relevant to understanding how the Fourteenth Amendment's guarantee of equal citizenship applies to women. By reconstructing the debates that link the Fourteenth and Nineteenth Amendments, we can identify the institutions, practices and understandings that have played a key role in controversies about women's status in our constitutional order; with this knowledge, we can better appreciate the choices the nation made when it amended the Constitution to enfranchise women. Sex discrimination doctrine can thus take its critical and normative bearings from the history of struggle over women's citizenship in our constitutional community. Rooting sex discrimination doctrine in the experience and deliberative choices of past generations of Americans who struggled with questions of sex equality enables us to enrich and, in some respects, to modify the conceptual framework that doctrine currently draws from the race/gender analogy.

I begin the case for reading the Fourteenth and Nineteenth Amendments together by locating the roots of the woman suffrage amendment in conflicts over the drafting and early interpretation of the Fourteenth Amendment. After recounting the sequence of constitutional initiatives to enfranchise women that links the Fourteenth and Nineteenth Amendments, I examine congressional and popular argument about "the woman question" in this period to identify the gendered forms of constitutional reason at stake in the question of whether women should vote.

### *C. Historical Ties Between the Fourteenth and Nineteenth Amendments*

The quest for the vote began in the antebellum era but did not focus on the federal Constitution until the Civil War. The roots of the Nineteenth Amendment can be traced to a conflict among longtime abolitionist allies over reconstructing the postwar Constitution. From the moment Robert Dale Owen tipped off Elizabeth Cady Stanton, Susan B. Anthony, and other officers of the Loyal League who had organized petition drives for the Thirteenth Amendment that early drafts of the Fourteenth Amendment's second section referred to "male" suf-

frage,<sup>56</sup> the woman's rights movement began a campaign for the enfranchisement of women under the federal Constitution that did not abate until ratification of the Nineteenth Amendment over a half century later.

While Stanton and Anthony immediately responded to Owen's news by petitioning Congress for a constitutional amendment "that shall prohibit the several States from disfranchising any of their citizens on the ground of sex,"<sup>57</sup> they were not prepared to acquiesce in the apparent exclusion of women's right to vote from the terms of the Fourteenth Amendment — an exclusion that would be especially provocative coming at the hands of abolitionist friends and allies in the Republican Party. After the movement failed to prevent the Republican Party from using gender as a measure of suffrage in Section Two of the Fourteenth Amendment,<sup>58</sup> woman suffrage advocates then sought to persuade the party to adopt a universal suffrage framework for the Fifteenth Amendment,<sup>59</sup> and divided over the question

<sup>56</sup> 2 HISTORY OF WOMAN SUFFRAGE 91 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., photo. reprint 1985) (1882).

<sup>57</sup> *Id.* at n.\*.

<sup>58</sup> *History of Woman Suffrage* reports that Robert Dale Owen gave Stanton and Anthony the following "behind the scenes" report of discussions on the drafting of Section Two: "One of the Committee proposed 'persons' instead of 'males.' 'That will never do,' said another, 'it would enfranchise all the Southern wenches.' 'Suffrage for black men will be all the strain the Republican party can stand,' said another." *Id.* at 91.

Stanton and Anthony attempted to intervene. During the debates over the Fourteenth Amendment, "[t]he woman suffragists . . . sent out forms for a petition that the resolution might be amended by striking out the word 'male.' Before the session was over they had secured and presented 10,000 names." *Hearing Before the U.S. Senate Comm. on Woman Suffrage*, 56th Cong. 2 (1900) (suffrage movement history presented by Susan B. Anthony and Clara Colby). *History of Woman Suffrage* reports that "Charles Sumner said, years afterward, that he wrote over nineteen pages of foolscap to get rid of the word 'male' and yet keep 'negro suffrage' as a party measure intact; but it could not be done." 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 91.

For a discussion of the strategic considerations underlying the Republican Party's decisions about expanding the franchise during the Reconstruction Era, see Lind, *supra* note 2, at 154–67. Rebecca Edwards analyzes the gender understandings that linked and differentiated men in the Democratic and Republican Parties during the tumultuous years of the Civil War and Reconstruction. See REBECCA EDWARDS, ANGELS IN THE MACHINERY: GENDER IN AMERICAN PARTY POLITICS FROM THE CIVIL WAR TO THE PROGRESSIVE ERA 12–38 (1997). For accounts of women's efforts to prevent the Republican Party from including gender as a basis for suffrage in Section Two of the Fourteenth Amendment, see ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848–1869, at 58–62 (1978) [hereinafter DUBOIS, FEMINISM AND SUFFRAGE]; and ELLEN CAROL DUBOIS, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, in WOMAN SUFFRAGE & WOMEN'S RIGHTS 81, 91–94 (1998) [hereinafter DUBOIS, *Outgrowing the Compact*].

<sup>59</sup> The debate began in 1865–1866, after the drafting of the Fourteenth Amendment, as a dispute about reforming the suffrage laws for the District of Columbia. As the Republican Party moved to eliminate racial restrictions on the franchise, some of its members proposed, and debated at length, removing gender restrictions on the franchise as well. For a sample of this debate, see pp. 984–86, below.

whether to support the Amendment when the Republican Party refused.<sup>60</sup>

In early 1869, immediately after Congress sent the Fifteenth Amendment to the states for ratification, Stanton and Anthony secured the introduction of a bill for a sixteenth amendment that would have guaranteed women's right to vote.<sup>61</sup> Outside Washington, however,

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Debate over the text of a constitutional amendment regulating suffrage began in late 1868, after ratification of the Fourteenth Amendment. On January 29, 1869, Senator Pomeroy offered the most radically egalitarian proposal for the Fifteenth Amendment. Instead of specifying that the franchise should not be denied on the basis of "race, color, or previous condition of servitude," he submitted: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State for any reasons not equally applicable to all citizens of the United States." CONG. GLOBE, 40th Cong., 3d Sess. 708 (1869). Other senators also proposed drafting the Fifteenth Amendment in terms that might have allowed for the enfranchisement of women. *See, e.g., id.* at 828 (remarks of Senator Fowler) (proposing that "[a]ll citizens of the United States residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside, (the period of such residence as a qualification for voting to be decided by each State,) except such citizens as shall engage in rebellion or insurrection, or shall be duly convicted of treason or other infamous crime"). Throughout the debates on the Fifteenth Amendment, Senator Pomeroy and others introduced petitions proposing extension of the franchise to women. There was not, however, the same kind of sustained floor debate on the question of enfranchising women under the Fifteenth Amendment as there had been two years earlier when Congress revised the franchise laws of the District of Columbia.

<sup>60</sup> Ellen DuBois has provided the most detailed account of the movement's effort to make common cause around the universal suffrage creed and the internal conflicts that ensued when the Republican Party refused to enfranchise women. *See* DUBOIS, *FEMINISM AND SUFFRAGE*, *supra* note 58, at 53-78 (describing efforts of the American Equal Rights Association to advance the universal suffrage creed in the aftermath of the Civil War). When the Republican Party did not yield, Stanton and Anthony refused to support the Fifteenth Amendment, and former anti-slavery allies in the Republican Party split into two rival woman suffrage associations: Stanton and Anthony assumed leadership of the National Woman Suffrage Association (NWSA), while Lucy Stone, Henry Blackwell, and others organized the American Woman Suffrage Association (AWSA), which continued to support the Fifteenth Amendment and the policies of the Republican Party. *See id.* at 162-64. As DuBois emphasizes, it was during this period of wrenching internal conflict that the movement first formed organizations dedicated to the woman suffrage cause. *See id.* at 162-202. She also emphasizes the ways the conflict revealed racist attitudes in Stanton, Anthony, and others who were enraged that the Republican Party had privileged the suffrage claims of black men over those of (white) women. *See id.* at 93-99. For the most detailed account of the predicament of African-American members of the woman suffrage movement in this period of conflict, see ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920*, at 24-35 (1998). *See also id.* at 36-53 (discussing African-American members of AWSA and NWSA). For other accounts of this conflict, see BETTINA APTHEKER, *Abolitionism, Woman's Rights and the Battle over the Fifteenth Amendment, in WOMAN'S LEGACY: ESSAYS ON RACE, SEX, AND CLASS IN AMERICAN HISTORY* 9, 45-52 (1982); and Andrea Moore Kerr, *White Women's Rights, Black Men's Wrongs, Free Love, Blackmail, and the Formation of the American Woman Suffrage Association, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 61, 64-73 (Marjorie Spruill Wheeler ed., 1995).

<sup>61</sup> Congress passed the Fifteenth Amendment on February 27, 1869. On March 15, 1869, Representative George W. Julian of Indiana introduced a bill for a sixteenth amendment that would have granted women the vote. *See* CONG. GLOBE, 41st Cong., 1st Sess. 72 (1869); H.R.J. Res. 15, 41st Cong. (1869) (proposing a sixteenth amendment providing that "[t]he right of suffrage in the



movement activists remained focused on the text of the Fourteenth Amendment, drawn to the capacious language of its first section. Across the country, suffragists began a struggle to secure legal recognition of women's right to vote under Section One of the Fourteenth Amendment, using tactics that are remarkably bold even by today's standards.

In 1868, suffragists in Vineland, New Jersey, orchestrated a mock voting process for women near the site where the registrar was accepting male ballots.<sup>62</sup> Soon thereafter, pursuing a strategy devised by Francis and Virginia Minor, which the movement called "the New Departure under the Fourteenth Amendment," hundreds of women began to assert a constitutional right to vote.<sup>63</sup> "We no longer beat the air — no longer assume merely the attitude of petitioners. We claim a right, based upon citizenship."<sup>64</sup> The movement rested this claim principally on the Citizenship and the Privileges or Immunities Clauses of the newly ratified Fourteenth Amendment,<sup>65</sup> as well as on a variety of

United States shall be based upon 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").

<sup>62</sup> See TERBORG-PENN, *supra* note 60, at 37 (citing 2 REVOLUTION 307 (Nov. 19, 1868)).

<sup>63</sup> Stanton, Anthony, and Gage provide the most detailed account of this attempt to secure the right to vote, "the New Departure under the Fourteenth Amendment." 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 407; see also *id.* at 407–520 (reproducing constitutional argumentation before Congress); *id.* at 586–755 (reporting trials of women who attempted to vote under the Fourteenth Amendment). Francis Minor, one of the legal architects of the New Departure strategy, gives an analysis of the cases in her work, *The Law of Federal Suffrage*. FRANCIS MINOR, THE LAW OF FEDERAL SUFFRAGE: AN ARGUMENT IN SUPPORT OF (n.p., 1889). For a recent historical account of the New Departure, see Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the Living Constitution*, 76 N.Y.U. L. REV. 1456 (2001). See also ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 180–83 (2000); DUBOIS, *Outgrowing the Compact*, *supra* note 58, at 98–106; Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1364–75 (1995). For the most detailed discussion of the role of African-American women in the New Departure cases, see TERBORG-PENN, *supra* note 60, at 36–42.

<sup>64</sup> 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 407–08 (letter of Francis Minor to the editors of *Revolution* reporting on a woman suffrage convention in St. Louis in 1869 that announced the theory and strategy of the New Departure).

<sup>65</sup> NWSA adopted the resolutions of the 1869 St. Louis convention at which the Minors announced the New Departure strategy as its official position on the interpretation of the Fourteenth Amendment. It maintained this position until the Supreme Court's final repudiation of the claim in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 407–11. The St. Louis resolutions begin by articulating the movement's claims based on the Citizenship and the Privileges or Immunities Clauses of the Fourteenth Amendment and then proceed to detail all constitutional provisions on which the movement based the suffrage claim. See *id.* at 408–09. Quoting the Privileges and Immunities Clause of Article IV, the resolutions observe parenthetically: "The elective franchise is one of the privileges secured by this section — See *Corfield vs. Coryell*, 4 Washington Circuit Court Rep. 380." *Id.* at 409. For the movement's elaboration of this claim in various settings before Congress, see *id.* at 407–520.

other federal constitutional provisions, many of which abolitionists had invoked in challenging the institution of slavery.<sup>66</sup>

As controversies precipitated by women's efforts to vote made their way into courthouses across the nation, Victoria Woodhull and others petitioned Congress to use its power under Section Five of the Fourteenth Amendment to enact a statute declaring that women had a right to vote under the newly amended Constitution.<sup>67</sup> Again, the Privileges or Immunities Clause formed the principal ground of the constitutional claim.<sup>68</sup> (Here and elsewhere, suffragists added a Fifteenth Amendment argument for good measure, emphasizing that at common law, marriage *was* a "condition of servitude."<sup>69</sup>) The 1872 Senate Judiciary Committee hearing at which Stanton, Anthony, and Isabella Beecher Hooker testified — offering a dazzling fusion of constitutional theory and political oratory on behalf of the movement's

<sup>66</sup> The St. Louis resolutions also invoke, on behalf of women's right to vote, the Preamble ("We, the People" and the General Welfare Clause), the Privileges and Immunities Clause of Article IV, the Guarantee Clause, and the Titles of Nobility and Bills of Attainder Clauses. See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 408–09. Many of these clauses played a central role in abolitionist arguments that slavery was unconstitutional. See WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 265–71 (1977) (discussing abolitionist arguments based on the Due Process Clause of the Fifth Amendment, the Guarantee Clause, the Privileges and Immunities Clause of Article IV, and the General Welfare Clause); Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337, 345, 350–51 (1986) (discussing abolitionist arguments based on the Due Process Clause of the Fifth Amendment, the Preamble, and the Guarantee Clause).

<sup>67</sup> See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 443–61 (reproducing a hearing of the House Judiciary Committee from the *Congressional Globe*, Dec. 21, 1870); H.R. REP. NO. 41-22 (1871) (majority report by John Bingham, one of the principal authors of the Fourteenth Amendment's first section, rejecting the Woodhull memorial).

<sup>68</sup> Albert G. Riddle, who argued the suffragists' case before the House Judiciary Committee, rested their core claim on the ground that the Citizenship and the Privileges or Immunities Clauses of the Fourteenth Amendment enfranchised women. Riddle cited *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230), and its "canonization" by Chancellor Kent in support of the proposition that the constitutional language of "privileges or immunities" includes the privilege of voting and holding office. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 453. In further support of their case, Riddle invoked Justice Bradley's expansive reading of the Fourteenth Amendment's Privileges or Immunities Clause in the circuit opinion Bradley authored in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 457.

<sup>69</sup> 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 455–56. On the Fifteenth Amendment argument more generally, see Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1148 (1994) [hereinafter Siegel, *Home as Work*] (discussing Susan B. Anthony's use of the Fifteenth Amendment argument at her trial for voting unlawfully and stating that "[i]f Anthony's argument that marital status law constituted a regime of servitude drew on a decades-old tradition of advocacy, its contemporaneity may be discerned in the fact that it had now been cast in the constitutional discourse of suffrage").

claims — was a dramatic event, overflowing with crowds convened by the National Woman Suffrage Association.<sup>70</sup>

While the Republican Party did not enact the declaratory statute the movement sought, it did give the woman suffrage cause prominence in the 1872 elections, and for the first time included a cautiously worded woman's rights plank in the party platform.<sup>71</sup> It was while campaigning for the National Committee of the Republican Party that Susan B. Anthony registered to vote with the assistance of local party officials and was prosecuted under the Enforcement Act for voting unlawfully.<sup>72</sup> Given the contemporary visibility of the woman suffrage cause, it is plain that the Supreme Court was already anticipating the claim that the Fourteenth Amendment enfranchised women when the Court narrowly interpreted the Privileges or Immunities Clause in its 1873 decisions in the *Slaughter-House Cases*<sup>73</sup> and *Bradwell v. Illi-*

<sup>70</sup> See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 498 (“[A]t the appointed hour the whole convention adjourned to the Capitol, crowding not only the committee room but the corridors, thousands of eager, expectant, women struggling to gain admission.”). The testimony at this hearing was a strikingly rich combination of constitutional theory and political rhetoric that drew heavily on the traditions of antislavery constitutionalism. See, e.g., *id.* at 505 (statement of Isabella Beecher Hooker) (“Having attempted a strictly legal view of this question, permit me, gentlemen, to say that in my heart my claim to vote is based upon the original Constitution, interpreted by the Declaration of Independence. . . . [T]he great principles of liberty and responsibility contained in the Declaration and the Constitution should have afforded protection to every human being living under the flag, and properly applied they would have been found sufficient. For my own part, I will never willingly consent to vote under any special enactment conferring rights of citizenship upon me as upon an alien.”); *id.* at 513 (statement of Elizabeth Cady Stanton) (“But with or without intent, a law stands as it is written. . . . The true rule of interpretation, says Charles Sumner, under the National Constitution, especially since its additional amendments, is that anything for human rights is constitutional.”); *id.* at 512 (statement of Elizabeth Cady Stanton) (“It is not safe to leave the ‘intentions’ of the Pilgrim fathers, or the Heavenly Father, wholly to masculine interpretation, for by the Bible and Constitution alike, women have thus far been declared the subjects, the slaves of men.”).

<sup>71</sup> Rebecca Edwards, who has written on gender in party politics of the era, observes of the 1872 election:

Grant's running mate, Henry Wilson of Massachusetts, was a known advocate of woman suffrage; Grant's delegates appeared sympathetic, and the national platform contained for the first time a plank on women's rights. “The Republican Party,” it stated, “is mindful of its obligations to the loyal women of America for their noble devotion to the cause of freedom; . . . the honest demand of any class of citizens for additional rights should be treated with respectful consideration.” GOP leaders offered funds for Anthony, Stanton, and other suffragists to tour on the party's behalf, and they reprinted thousands of copies of Lucy Stone's appeal for women to “throw the whole weight of their influence on the side of the Republican Party.”

EDWARDS, *supra* note 58, at 51. On the movement's response to the Republican Party platform, see 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 517–20.

<sup>72</sup> 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 520, 627–29. For a full account of Anthony's trial for voting unlawfully, see AN ACCOUNT OF THE PROCEEDINGS ON THE TRIAL OF SUSAN B. ANTHONY, ON THE CHARGE OF ILLEGAL VOTING, AT THE PRESIDENTIAL ELECTION IN NOV., 1872 (photo. reprint 1974) (1874).

<sup>73</sup> 83 U.S. (16 Wall.) 36, 74–80 (1873).

nois.<sup>74</sup> Two years later, the Court definitively rejected Virginia Minor's claim that she had a right to vote under the Fourteenth Amendment in *Minor v. Happersett*.<sup>75</sup>

It was only after the Court definitively rejected the claim that women had a constitutionally protected right to vote under the Fourteenth Amendment that the suffrage movement began concerted efforts to pursue a new constitutional amendment as its principal strategy for enfranchising women. Even then, the text of the "Sixteenth Amendment" — as it was then called — still bore the impress of its origins in an argument about the reach of the Fourteenth Amendment:

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.<sup>76</sup>

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<sup>74</sup> 83 U.S. (16 Wall.) 442, 445 (1873). Given the publicity generated by the civil disobedience strategies of the New Departure, the Court certainly knew about the movement's privileges or immunities claim. In all likelihood, the Justices were aware that in House Judiciary Committee hearings on the movement's petition for a Section Five statute, suffragists had substantiated their claim that the Fourteenth Amendment gave women the right to vote by pointing to Justice Bradley's expansive reading of the Privileges or Immunities Clause in his circuit opinion in the *Slaughter-House Cases*. See *supra* note 68. Indeed, the association of the suffragists' claims with the Privileges or Immunities Clause was tight enough that when Senator Matthew Carpenter argued Myra Bradwell's case, he assured the Supreme Court that it could interpret the Privileges or Immunities Clause to protect a woman's right to practice her occupation without having to rule that it also protected a woman's right to vote. Carpenter's brief for Bradwell opens by assuring the Court, "I do not believe that female suffrage has been secured by the existing amendments to the Constitution." Brief for Appellant at 2, *Bradwell*, 83 U.S. (16 Wall.) 442 (No. 67). The Court handed down its decision holding that the Privileges or Immunities Clause did not protect Bradwell's right to practice law the day after the *Slaughter-House* decision. BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR HOLMES NORTON & SUSAN C. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 8 (1st ed. 1975).

<sup>75</sup> 88 U.S. (21 Wall.) 162, 178 (1875). The Court held that "[t]he amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it." *Id.* at 171. The Court then undertook to demonstrate that women lacked the right to vote under the original Constitution, see *id.* at 170-74, and that their claim to vote under the Reconstruction Constitution was belied by the terms of the Fourteenth and Fifteenth Amendments, see *id.* at 174-75.

<sup>76</sup> *A Sixteenth Amendment to the Constitution of the United States, Prohibiting the Several States from Disfranchising U.S. Citizens on Account of Sex: Hearing Before the Senate Comm. on Privileges & Elections*, 45th Cong. 9 (1878) (statement of Elizabeth Cady Stanton) [hereinafter *1878 Senate Hearings*]. The woman suffrage amendment was first introduced in this form in 1869. *Id.* at 8; *supra* note 61. There seems to have been no alternative language proposed until 1880, when suffragists petitioned the Senate Judiciary Committee for a suffrage amendment providing that:

[T]he right of suffrage in the United States shall be based on citizenship and 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, or for any reason not equally applicable to all citizens of the United States.

*Arguments of the Woman-Suffrage Delegates Before the Senate Comm. on the Judiciary*, S. MISC. DOC. NO. 47-74, at 19-20 (1880) (remarks of Susan B. Anthony) [hereinafter *1880 Senate Hearings*]. The Senate Committee on Woman Suffrage incorporated this proposal into S. 19, the

Thus, in the years before and immediately after the ratification of the Fourteenth Amendment, there was ongoing dispute over whether the Amendment protected women's right to vote. For this ten-year period — from 1865, when Stanton and Anthony first learned of the gendered language of Section Two, to 1875, when the Supreme Court definitively ruled in *Minor v. Happersett* that the Fourteenth Amendment did not protect women's right to vote — the question of woman suffrage was a Fourteenth Amendment question. Only with the Court's decision in *Minor* did woman suffrage assume settled form, alongside the Reconstruction Amendments, as a "Sixteenth Amendment" question, or as it was known simply, the "woman question." (Indeed, even then, advocates continued to advance Fourteenth Amendment arguments for a constitutional amendment recognizing women's right to vote.<sup>77</sup>) It was in this form that the "woman question" persisted as the civil rights question of the late nineteenth and early twentieth centuries. Carrie Chapman Catt, who led the movement to victory in 1920, famously described that journey:

To get the word male . . . out of the constitution cost the women of the country fifty-two years of pauseless campaign . . . . During that time they

version of the amendment it proposed for adoption in 1884. See S. REP. NO. 48-399, at 27 (1884). In the House, however, Representative White proposed an amendment providing that "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." 47 CONG. REC. 5859 (1882). The Senate began to consider this version of the amendment — the version that ultimately became the Nineteenth Amendment — in February 1885. See 48 CONG. REC. 1322 (1885).

<sup>77</sup> The movement continued to advance arguments for enfranchising women based on the existing constitutional text, even as it sought a constitutional amendment protecting women's right to vote. See, e.g., 1880 Senate Hearings, *supra* note 76, at 10-11 (remarks of Mary A. Stewart) ("The fourteenth and fifteenth amendments give the right of suffrage to women, so far as I know, although you learned men perhaps see a little differently. . . . The fourteenth and fifteenth amendments, in my opinion, and in the opinion of a great many smart men in the country, and smart women, too, give the right to women to vote without any 'ifs' or 'ands' about it, and the United States protects us in it; but there are a few who construe the law to suit themselves, and say that those amendments do not mean that, because the Congress that passed the fourteenth and fifteenth amendments did not mean to do that."); *id.* at 12 (remarks of Susan B. Anthony) ("The Constitution of the United States as it is protects me. I do not come to you to petition for . . . any more amendments to the Constitution, because I think they are unnecessary, but because you say there is not in the Constitution enough to protect me."); *Hearing Before the Senate Comm. on Woman Suffrage*, 50th Cong. 3 (1888) (statement of Elizabeth Cady Stanton) [hereinafter 1888 Senate Hearings] ("By every principle of fair interpretation we need no amendment, no new definitions of the terms 'people,' 'persons,' 'citizens,' no additional power conferred on Congress to enable this body to establish a republican form of government in every State of the Union . . . ."); *infra* pp. 990-91 (noting various constitutional clauses the movement invoked as it argued for an amendment that would bar gender-based restrictions on suffrage). Arguments for constitutional interpretation and constitutional amendments are often fused in nonjuridical claims about the Constitution's meaning. See Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 321 & n.62 (2001) [hereinafter Siegel, *Text in Contest*] (discussing the interplay of interpretive and amendatory claims in constitutional advocacy of the nineteenth- and twentieth-century women's movements).

were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to urge Legislatures to submit suffrage amendments to voters; 47 campaigns to induce State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to persuade State party conventions to include woman suffrage planks; 30 campaigns to urge presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses.<sup>78</sup>

#### *D. Reading the Suffrage Debates: Some Preliminary Remarks*

The fact that the Fourteenth and Nineteenth Amendments are tied in the history of the Constitution's development supports the case for interpreting these two amendments together. How might examining the debates that link the Fourteenth and Nineteenth Amendments alter how we understand questions of equal citizenship for women?

Whether we interpret the Nineteenth Amendment standing alone or in conjunction with the Fourteenth Amendment, it is critical to begin by reconstructing the universe in which restricting the vote to men made constitutional sense. If we identify the traditions of reasoning about the American Constitution that made it *reasonable* for the men who adopted the Reconstruction Amendments to oppose enfranchising women, then we can better understand the nature of the suffrage debate: the arguments suffragists made on behalf of women's right to vote, the grounds on which their opponents resisted them, and finally, the significance of the nation's decision to amend the Constitution in order to protect women's right to vote. This understanding of our constitutional history, I argue, provides a foundation for interpreting the citizenship guarantees of the Fourteenth and Nineteenth Amendments.

At the Founding and for most of our constitutional history, only men could vote and hold office.<sup>79</sup> Unexamined and uncontested custom is generally assumed to explain this world, linked to, yet distant from, our own. But if custom explains the persistence of gender restrictions on voting in the early decades of the republic, by the decade before the Civil War, demands for woman suffrage were beginning to spread, and by the war's end, were vocally asserted as Americans de-

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<sup>78</sup> CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS* 107 (1923).

<sup>79</sup> Women were not allowed to vote anywhere except in New Jersey, which adopted qualified suffrage for women at the nation's founding and retained it for several decades. See Judith A. Klinghoffer & Lois Elkins, "The Petticoat Electors": *Women's Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159-60 (1992) (describing how this brief period of woman suffrage in New Jersey deviated from the "norm of exclusive male suffrage"). In New Jersey during this period, unmarried women — some of whom were heads of families — qualified for suffrage, while married women could not vote. *Id.* at 172.

bated the shape of the postwar Constitution.<sup>80</sup> Once women began passionately, regularly, and cogently to demand the right to vote, on what grounds did men resist including women's rights in postwar constitutional reform? And what reasons did subsequent generations advance for continuing to refuse women's demands for self-representation in a nation that proudly considered itself a democracy?

As we shall see, opponents of the woman suffrage amendment commonly invoked two kinds of reasons for denying women's demands for the vote, reasons rooted in prevailing understandings of family and of federalism. Parts III and IV reconstruct the conceptual universe in which these objections to enfranchising women by constitutional amendment made sense, in order to make visible the gendered understandings that structured the American constitutional order in this period and that were directly at issue in the suffrage debate. This history offers a foundation for an interpretation of the Fourteenth and Nineteenth Amendments that is rooted in the choices the nation made in amending the Constitution to recognize women's right to vote and that interprets the Equal Protection Clause with some knowledge of the institutions, practices, and understandings that have played a central role in enforcing women's subordinate social status.

### III. VOTING AND THE FAMILY

The question of women voting became "*the woman question*," as it was called, in mid-nineteenth-century America, an era when American law first claimed to enfranchise most men, as it did not at the Founding. As distribution of the vote came, in form at least, more perfectly to trace lines of gender, the practice of voting became a site in which to make and find meanings about the relations of men and women. Opposition to women voting was as much about preserving the arrangements that make men men and women women<sup>81</sup> as it was about

<sup>80</sup> See *supra* section II.C, pp. 968-76.

<sup>81</sup> Antisuffragists often argued that enfranchising women would make women less womanly. See, e.g., B.V. HUBBARD, SOCIALISM, FEMINISM, AND SUFFRAGISM, THE TERRIBLE TRIPLETS: CONNECTED BY THE SAME UMBILICAL CORD, AND FED FROM THE SAME NURSING BOTTLE 129 (1915) ("[The feminist suffrage advocate is] a woman who . . . [is] an Egotist with no motherly sentiments. Neither man, nor woman, but a being more correctly referred to as 'IT.'"); Rev. Justin D. Fulton, *Women vs. Ballot*, in THE TRUE WOMAN: A SERIES OF DISCOURSES: TO WHICH IS ADDED WOMAN VS. BALLOT 3, 6 (Boston, Lee & Shepard 1869) (claiming that the suffragist will "unsex herself, and render herself a monster"); see also L.P. BROCKETT, WOMAN: HER RIGHTS, WRONGS, PRIVILEGES, AND RESPONSIBILITIES 288 (Books for Libraries Press 1970) (1869) (arguing that if women vote, "the *timid, half-frightened* expression which is, to all right-thinking men, a higher charm than the most perfect, self-conscious beauty, will disappear, and in the place of it we shall have hard, self-reliant, bold faces" (emphasis added)); HORACE BUSHNELL, WOMEN'S SUFFRAGE; THE REFORM AGAINST NATURE 135 (photo. reprint 1978) (1869) ("The word *woman* of course will remain to denote the female sex of man, but the personal habit and type of the sex will be no more what

the deep pragmatic question of what women would do with the ballot if allowed to participate in matters of civic governance.

"What is this demand that is being made?" asked one representative to a California constitutional convention in 1879:

This fungus growth upon the body of modern civilization is no such modest thing as the mere privilege of voting, by any means. . . . The demand is for the abolition of all distinctions between men and women, proceeding upon the hypothesis that men and women are all the same. . . . Gentlemen ought to know what is the great and inevitable tendency of this modern heresy. . . . It attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood.<sup>82</sup>

In this same spirit, W.H. Smith, a Pennsylvania politician, objected to the "pernicious heresy" of woman suffrage because "my mother was a woman, and further, because my wife is a woman." If women were allowed to vote, "the family . . . would be utterly destroyed."<sup>83</sup>

Family was the ground on which gender conflicts about women voting converged. As suffrage historian Aileen Kraditor puts it:

Close to the heart of all antisuffragist orators, particularly congressmen, was a sentimental vision of Home and Mother, equal in sanctity to God and the Constitution. Although all four entities regularly appeared in

it is. The look will be sharp, the voice will be wiry and shrill, the action will be angular and abrupt . . . ."; *id.* at 136 ("[T]hey will become taller and more brawny, and get bigger hands and feet . . . ."); Emily P. Bissell, *Talk to Women on the Suffrage Question*, in DEBATEERS' HANDBOOK SERIES: SELECTED ARTICLES ON WOMAN SUFFRAGE 145, 147 (Edith M. Phelps ed., 2d ed. 1912) [hereinafter DEBATEERS' HANDBOOK] ("The woman, who might be a woman, is half a man instead."); Elihu Root, *Address Before the New York State Constitutional Convention, August 15, 1894*, in DEBATEERS' HANDBOOK, *supra*, at 120, 120-21 ("Put woman into the arena of [political] conflict and she . . . takes into her hands . . . weapons with which she is unfamiliar and which she is unable to wield. [She] becomes hard, harsh, unlovable, repulsive . . . .").

Less commonly, anti-suffragists also argued that enfranchising women would make men less manly. See BUSHNELL, *supra*, at 54 ("[T]he . . . determining mastership . . . must so far be with [the man], and it can not be anywhere else, without some very deplorable consequences to his manhood. If he has . . . no authority of will and council that enables him to hold the reins, he is no longer what nature means when she makes a man."). The threat that woman suffrage posed to masculinity is a clear theme in antisuffrage cartoons, which often depict women voting as a cause of gender confusion implicating men as well as women. For example, in one cartoon, George Washington is seated between Stanton and Anthony with all three wearing lap-rugs that look like skirts; in another, a husband and wife engage in political drag, with the aproned husband sitting at home with two wailing babies on his lap as his top-hatted and umbrella-wielding wife heads out the door to work. Am. Memory Div., Library of Cong., By Popular Demand: "Votes for Women" Suffrage Pictures, 1850-1920, <http://memory.loc.gov/ammem/vfwhhtml/vfwhome.html> (last visited Jan. 13, 2002).

<sup>82</sup> KEYSAR, *supra* note 63, at 192 (statement of Mr. Caples at the California Constitutional Convention of 1878-79); see also *id.* (quoting an Ohio politician who characterized woman suffrage as "this attempt to obliterate the line of demarcation . . . between the sexes" (alteration in original)).

<sup>83</sup> *Id.* (alteration in original) (quoting Pennsylvania Debates 1872-1873).



various combinations in antisuffragist propaganda, it was the link of woman to the home that underlay the entire ideology.<sup>84</sup>

What supported this symbolic linkage between voting and families for nineteenth-century Americans — a linkage so tight that the prospect of women voting meant the destruction of home life?

Opponents of woman suffrage frequently invoked the family as they described the ways that women voting would violate gender roles. Gender norms of the industrial era identified women with the family and men with the domains of market and politics.<sup>85</sup> The prospect of women voting thus threatened femininity and the family both. Anti-suffragists (“antis”) routinely emphasized that women were specially suited and exclusively destined for the work of family maintenance; in their view, women lacked the capacity for managing public affairs, and the very effort would distract them from their obligations as wives and mothers.<sup>86</sup> As the House Judiciary Committee explained in rejecting petitions for a sixteenth amendment in 1883: “To the husband, by natural allotment . . . , fall the duties which protect and provide for the household, and to the wife the more quiet and secluded but no less exalted duties of mother to their children and mistress of the domicile.”<sup>87</sup>

Such “separate spheres” arguments were commonplace in the anti-suffragist case. But family also figured in the woman suffrage debate in ways that are less intuitively apparent to us today. If we approach voting and family from the vantage point of nineteenth-century Americans, it is possible to discern deep connections between family and franchise that are no longer “common sense” to Americans in the twenty-first century.

Today, we think of the vote as a basic right of citizenship in a constitutional democracy. But most nineteenth-century Americans under-

<sup>84</sup> AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 15 (W.W. Norton & Co. 1981) (1965).

<sup>85</sup> For one discussion of separate spheres discourse, see Siegel, *Home as Work*, *supra* note 69, at 1092-94.

<sup>86</sup> See, e.g., BROCKETT, *supra* note 81, at 127-29 (“To the married woman, then, who understands her duties . . . there is no occasion, and indeed, no opportunity, for other employments . . . . ‘Like a man, when he chooses a profession, so, when a woman marries, it may in general be understood that she makes choice of the management of a household and the bringing up of a family . . . and that she renounces . . . all other objects and occupations . . . which are not consistent with the requirements of this.’”) (quoting JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869)); FRANCIS PARKMAN, *SOME OF THE REASONS AGAINST WOMEN SUFFRAGE* 8-9 (Norman E. Tanis ed., Santa Susana Press 1977) (1894) (“Women have great special tasks assigned them in the work of life, and men have not. . . . Everything else in their existence is subordinated to the indispensable functions of continuing and rearing the human race; and, during the best years of life, this work, fully discharged, leaves little room for any other. . . . When these indispensable duties are fully discharged, then the suffrage agitators may ask with better grace, if not with more reason, that they may share the political functions of men.”).

<sup>87</sup> H.R. REP. NO. 48-1330, at 3 (1884).

stood voting differently, as a privilege of citizenship exercised by some members of the polity on behalf of others. As the founding generations commonly explained the distribution of the franchise, 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.<sup>88</sup> In the early years of the republic, property owners were thought to possess the requisite degree of independence to vote; by the Jacksonian era, so too were “free laborers” — white men who were gainfully employed.<sup>89</sup> Household headship was another common criterion of “independence,”<sup>90</sup> one that came to play a central role in debates over woman suffrage.

Opponents of enfranchising women commonly invoked two stock arguments about the household, which, alongside claims about preserving sex difference, were the mainstay of the antisuffrage case. The

<sup>88</sup> As John Adams explained:

[V]ery few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest.

... [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.

Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS 375, 376–77 (Charles Francis Adams ed., 1854).

<sup>89</sup> See KEYSSAR, *supra* note 63, at 53–76; Robert Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 341 (1989) (tracing the expansion of the franchise among men from the late eighteenth to the early nineteenth century).

<sup>90</sup> Many sources discuss the tradition that equated independence with household headship in the nineteenth century. See, e.g., Rowland Berthoff, *Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820–1870*, 76 J. AM. HIST. 753, 757 (1989) (“[O]nly men . . . free to sustain the commonwealth ought to be citizens — not their dependent wives, children, tenants, employees, servants, or slaves.”); Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440, 1452 (1998) (“Independence . . . for the male household head existed in counterpoint to the dependence of others. Having and supporting dependents was evidence of independence.”); Laura F. Edwards, *“The Marriage Covenant Is at the Foundation of All Our Rights”: The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81, 83 (1996) (observing that in the antebellum South, “[t]he figure of a household head was an adult, white, propertied male” and that “[d]ependency tainted all those who lacked sufficient property to control their own labor and maintain households of their own”); Nancy Fraser & Linda Gordon, *A Genealogy of “Dependency”: Tracing a Keyword of the U.S. Welfare State*, in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST CONDITION” 121, 125 (Nancy Fraser ed., 1997) (“In a world of status hierarchies dominated by great landowners and their retainers, all members of a household other than its ‘head’ were dependents . . . .”); Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT’L LAB. & WORKING-CLASS HIST. 56, 73 (1995) (“The public realm was where economically independent heads of households met, their participation sanctified, democratized, and to a degree equalized in the polity’s civic guarantees. Relationships within households (master/servant, parent/child, husband/wife), in contrast, occurred within a separate domestic realm.”).

antis' foundational argument was the argument from virtual representation: women did not need the vote because they were already represented in the government by male heads of household.<sup>91</sup> It was this claim of virtual representation that women's demand to vote most directly challenged. Every time woman suffragists invoked American traditions of individualism, "self-government," and "self-representation" in defense of the right to vote — as when during the New Departure suffragists refused to pay taxes without representation<sup>92</sup> — they were challenging a centuries-old conception of the household that gave men authority to represent women in public and private law.<sup>93</sup> Antis answered suffragists' claims for self-government by emphasizing how changing the distribution of the franchise would threaten the unity of the family: granting women the right to vote would introduce domestic discord into the marital relation and distract women from their primary duties as wives and mothers.<sup>94</sup> Like the virtual representation argument, the marital unity argument linked public and private spheres. Examining the constitutional controversy over enfranchising women reveals that it was, from surface to core, an argument about the family.

#### *A. Virtual Representation: Male Household Headship in Public and Private Law*

The virtual representation argument invokes a model of the family with deep roots in the Western tradition and a much older lineage than the industrial-era discourse of separate spheres. Rather than depicting the domestic sphere as a feminine sphere separate from the male world of governance, these forms of antisuffrage discourse depict the family as a site of governance — *male* governance. As one Congressman put it in 1915: "Faithful to the doctrine of the old Bible and true to the teachings of the new, our fathers founded this Government upon the family as the unit of political power, with the husband as the recognized and responsible head."<sup>95</sup> Traditions of religion<sup>96</sup> and republican-

<sup>91</sup> See *infra* section III.A, pp. 981–87.

<sup>92</sup> See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 81–123 (1998); KEYSSAR, *supra* note 63, at 182.

<sup>93</sup> See *infra* section III.A, pp. 981–87.

<sup>94</sup> See *infra* section III.C, pp. 993–97.

<sup>95</sup> 52 CONG. REC. 1465 (1915) (statement of Rep. Heflin). Such claims were commonplace in antisuffrage arguments from the earliest days of constitutional debate. See, e.g., sources cited *infra* note 105 and accompanying text (observing that the same argument was advanced in 1866).

<sup>96</sup> For discussion of the role that biblical traditions played in shaping conceptions of male household headship in the work of political theorists such as Filmer, Hobbes, and Locke, see MARY BETH NORTON, FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 59–62 (1996). Religious conceptions of male household headship remained part of the antisuffrage argument throughout the campaign and in the final debates over ratification of the Nineteenth Amendment. See, e.g., 52 CONG. REC. 1413 (1915)

ism<sup>97</sup> supported this conception of the household, as did the common law of coverture.

The common law understood the family as a domain of law and governance, a kind of gendered jurisdiction.<sup>98</sup> Describing the ways the common law preserved the political understandings of an earlier era, Robert Steinfeld has observed:

Household dependents were . . . understood to come under the “government” of the head of household. In fact, speaking of household government was just another way of talking about the domestic authority of heads of households. From the perspective of [seventeenth century] contemporaries, references to household government did not seem strange; the household was understood to be a polity like other polities, and the head of household was understood to be like those who governed other polities. Household and wider polity were homologous, organized according to the same fundamental principles and along similar lines.<sup>99</sup>

The common law empowered the head of household to govern its dependent members and to represent them to third parties.<sup>100</sup> This was

(statement of Rep. Clark) (“God has decreed that man is to be the head of the family and woman is to be his ‘helpmeet,’ and any attempt to change this order of human affairs is an attempt to change and to overthrow one of the solemn decrees of God Almighty.”); Fulton, *supra* note 81, at 5 (“It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.”); Root, *supra* note 81, at 121 (“[I]n the divine distribution of powers, the duty and the right of protection rests with the male. It is so throughout nature.”).

<sup>97</sup> HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 101 (2000) (“Being a householder, being someone who cared for and controlled a family, gave a man political significance. It was a foundation for republican political virtue.”); Rogers M. Smith, *“One United People”: Second-Class Female Citizenship and the American Quest for Community*, 1 *YALE J.L. & HUMAN.* 229, 238 (1989) (“As the ancient republics and the American South show, many republicans believed that the citizenry’s economic independence, military security, and shared life of civic virtue would be impossible unless a body of subjects performed many of the most arduous, dangerous, or menial tasks. Since these subjects — conquered peoples, poor laborers, servants, slaves, and women — lacked the leisure, education, and economic freedom they made possible for others, they were unfit for the franchise or other aspects of full citizenship. They were properly subject to near-absolute rule, so that citizens could live in freedom.”).

The suffrage movement sought to efface these aspects of the republican tradition and, as Sarah Lawsky has recently demonstrated, vigorously and creatively invoked republicanism on behalf of the right to vote. See Lawsky, *supra* note 2, at 788–92. Drawing on traditions of anti-slavery constitutionalism, the movement invoked the Guarantee Clause on behalf of the right to vote. See *supra* note 66.

<sup>98</sup> See Siegel, *The Rule of Love*, *supra* note 31, at 2122–25.

<sup>99</sup> ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870*, at 56–57 (1991).

<sup>100</sup> Steinfeld observes that the common law viewed household relationships through the lens of governance:

Resident servants were like wives and children because all were members of the household and all were the legal dependents of its head. As household dependents, all were legally entitled to be maintained by the head of household while their relationship continued, and all were subject by law to his authority. . . . The responsibility for all of them rested on the head of their household.

*Id.* at 56.

no abstraction, but an ordinary part of everyday life: the law of marriage gave men control over women and the ability to represent and speak for their wives in dealings with other men.<sup>101</sup>

It is often said that the married women's property acts abolished the common law of coverture in the nineteenth century — a legal fiction if ever there was one. Even the briefest look at antisuffrage discourse reveals that core concepts of coverture were a vibrant part of American legal culture well into the twentieth century and shaped *public* as well as private law.<sup>102</sup> More specifically, this understanding of the family as a form of government was a robust part of our *constitutional* culture, repeatedly expressed by the framers of the Fourteenth Amendment as the reason that a democracy did not need to enfranchise one-half of its adult members.

As one Republican congressman put it during the debates on Reconstruction:

To constitute the required form of government, therefore, it is necessary that every citizen may either exercise the right of suffrage himself, or have it exercised for his benefit by some one who by reason of domestic or social relations with him can be fairly said to represent his interests. In one of these cases he is directly represented in the government, and in the other indirectly. This indirect representation is that possessed by women, children, and all those under the legal control of others.

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<sup>101</sup> Women's legal disabilities in marriage rested on this understanding of "family government." At common law, a husband acquired rights to his wife's paid and unpaid labor and to most property she brought into the marriage. A wife was obliged to serve and obey her husband, and a husband had a reciprocal duty to support her financially and represent her in the legal system. A wife was unable to file suit without her husband's consent and participation; he, in turn, was responsible for his wife's conduct — liable, under certain circumstances, for her contracts, torts, and even some crimes. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 51–55, 90, 99, 111–112 (1982). For an account of the many practical contexts in which the rules of representation and substitution shaped husband-wife relations, see HARTOG, *supra* note 97, at 142–49.

<sup>102</sup> Sometimes antis directly invoked coverture law as a basis for reasoning about the franchise. *E.g.*, BUSHNELL, *supra* note 81, at 68 (antisuffrage tract drawing on coverture's rules of representation as a basis for reasoning about woman's right to vote, observing that "[h]er personality is so far merged in his, that she can not bring a suit any more in her own name, for it is a name no longer known to the law. The assumption is that, being in and of her husband, he will both act and answer for her, except when arraigned for 'a' crime"). Sometimes antis invoked male suffrage as necessary to preserve the traditional order of coverture. Such arguments treated public and private law systems of male representation as interrelated or interdependent. *See infra* section III.C, pp. 993–97. (discussing marital unity arguments against woman suffrage). Often the links between gendered systems of representation in public and private law were tacitly assumed rather than explicitly elaborated. *Cf.* 52 CONG. REC. 1447 (1915) (statement of Rep. Borland) ("Mr. Speaker, the world moves. It is now nearly two full generations since the States of this Union have removed from woman the common-law restrictions, and yet we have heard some of the last echoes of that archaic system in this debate.")

For a wide-ranging account of the ways that federal law enforced policies respecting the institution of marriage during the period of the suffrage debate, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000).

However desirable it may be that every free agent should have by law an equal voice in the common government, yet the fact that women do not vote is not in theory inconsistent with republicanism. *The primary and natural division of human society is into families.* All forms of religion, all systems of law, recognize this arrangement. *By common consent or common submission, whether founded upon reason and justice or not, is not material to the argument, the adult males are supposed to represent the family, and the government is not bound to look further than this common consent or submission.* It receives as representation of the family those whom the family sets up in that capacity.<sup>103</sup>

In debates over expanding the franchise in the District of Columbia that occurred after ratification of the Fourteenth Amendment and that anticipated argument over terms of the Fifteenth Amendment,<sup>104</sup> advocates of woman suffrage pressed the Republican Party to adopt a universal suffrage creed. One congressman after another reasoned from the family as he expressed his objections to enfranchising women.

Senator Morrill spoke for many when he contended that allowing women to vote "would contravene all our notions of the family; 'put asunder' husband and wife, and subvert the fundamental principles of family government, in which the husband is, by all usage and law, human and divine, the representative head."<sup>105</sup> Representative Boutwell echoed this understanding: "[T]he creation of man . . . illustrate[s] most conclusively two facts — the existence of the family and the unity of the will of the family."<sup>106</sup> From this he concluded, "but one voice is needed for the expression of the one will of the family."<sup>107</sup>

Other congressmen discussed the "common sense" assumptions that made the family a reasonable unit of political representation as they explained why they were prepared to extend the franchise to blacks but not to women:

Ladies are a part of the family with most of us . . . [I]nasmuch as the negro is not even of the white family is of a different race and so treated, . . . you have no right to strip him of every attribute of manhood . . . You do not associate with him; you did not affiliate with him . . . you do

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<sup>103</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (statement of Rep. Broomall) (emphasis added).

<sup>104</sup> See *supra* pp. 969–70 & n.59.

<sup>105</sup> CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866); see also CONG. GLOBE, 39th Cong., 2d Sess. 307 (1867) (statement of Sen. Sherman) ("So far as the families, the women and children, are concerned, we know that they are represented by their husbands, by their parents, by their brothers, by those who are connected with them by domestic ties . . ."); CONG. GLOBE, 38th Cong., 1st Sess. 2243 (1864) (statement of Sen. Howe) ("I am willing to deprive those who are not males of the right of suffrage, because they exercise it by proxy, as we all know. Females send their votes to the ballot-box by their husbands or other male friends.").

<sup>106</sup> CONG. GLOBE, 39th Cong., 1st Sess. 309 (1866).

<sup>107</sup> *Id.*

not sympathize with him . . . . None of these causes operate in regard to the family.<sup>108</sup>

Or, as another put it:

[T]here is not the same pressing necessity for allowing females as there is for allowing the colored people to vote; because the ladies of the land are not under the ban of a hostile race grinding them to powder. They are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female.<sup>109</sup>

In reasoning about whether women needed the vote, congressmen often seemed to describe the circumstances of women in their *own* families, making the female at the heart of the debate in this early period, at least, known and white.<sup>110</sup> It was this reflexive imaginative structure that anchored arguments from virtual representation. As one congressman put it in 1866, “the women of America vote by faithful and true representatives, their husbands, their brothers, their sons; and no true man will go to the polls and deposit his ballot without remem-

<sup>108</sup> CONG. GLOBE, 39th Cong., 1st Sess. 410 (1866) (statement of Rep. Bromwell).

<sup>109</sup> CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866) (statement of Sen. Wade). Or, as Senator Williams put it: “Negroes in the United States have been enslaved since the formation of the Government. . . . [A] large minority of the people of this country today, if they had the power, would deprive them of all political and civil rights and reduce them to a state of abject servitude,” while:

Women have not been enslaved. Intelligence has not been denied to them; they have not been degraded; there is no prejudice against them on account of their sex; but, on the contrary, if they deserve to be, they are respected, honored, and loved. . . . Exceptions I know there are to all rules; but, as a general proposition, it is true that the sons defend and protect the reputation and rights of their mothers; husbands defend and protect the reputation and rights of their wives; brothers defend and protect the reputation and rights of their sisters; and to honor, cherish, and love the women of this country is the pride and glory of its sons.

CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866).

<sup>110</sup> In these and other moments in the suffrage debates, men agreed that women did not need the vote because women were adequately represented by the men of their families, a fact that the congressmen determined by considering the case most intimately known to them — the case of their own families. When woman suffrage is considered from this reflexive vantage point, the potential rights-holder assumes the race and class position of the congressmen debating the question.

Yet at other points in the campaign, considerable attention was devoted to the African-American members and potential beneficiaries of the woman suffrage movement. Segregationist practices spread within the women’s movement in the decades after the Civil War, and white women in the movement came under increasing pressure to distance themselves from African-American members — pressure to which white organizations increasingly succumbed. The closer the woman suffrage amendment came to passage, the more openly white supremacist groups attacked the woman suffrage amendment as a measure that would enfranchise blacks. See TERBORG-PENN, *supra* note 60, at 118–32. For an example of such attacks, see *infra*, p. 1003 (quoting a southern senator who opposed the Nineteenth Amendment on the ground that it is “exactly the identical same amendment applied to the other half of the Negro race. The southern man who votes for the Susan B. Anthony amendment votes to ratify the fifteenth amendment”).

bering the true and loving constituency that he has at home."<sup>111</sup> On this view, family relationships ensured that all women were enfranchised if all men were.<sup>112</sup>

When Senator Pomeroy introduced an early draft of the Fifteenth Amendment that would have enfranchised women,<sup>113</sup> it was this commonplace assumption that he sought to challenge:

Do not tell me that . . . the men will take care of the rights of the women. The rights of individuals allied to you may be or may not be safe, but of a class they never can be.

The property and character of your own wife and child may be safe in the hands of the husband and father; but would you trust the property and character of all other women and children in his hands?<sup>114</sup>

Such objections notwithstanding, the virtual representation argument remained the core of the antisuffrage case, and the institution of marriage lay at its heart.<sup>115</sup> Unmarried women were assumed to depend on male relatives for representation. As the House Judiciary Committee put it in 1883: "The exceptional cases of unmarried females are too rare to change the general policy, while expectancy and hope, constantly being realized in marriage, are happily extinguishing the exceptions and bringing all within the rule which governs wife and ma-

<sup>111</sup> CONG. GLOBE, 39th Cong., 2d Sess. 66 (1866) (statement of Sen. Frelinghuysen) (stating that in this regard, "there is a vast difference between the situation of the colored citizen and the women of America"); cf. PARKMAN, *supra* note 86, at 6 ("[W]oman is generally represented in a far truer and more intimate sense by her male relative than is this relative by the candidate to whom he gives his vote . . .").

<sup>112</sup> As one congressman explained, the ballot "is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother." CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866) (statement of Sen. Henderson). "The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own." CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866) (statement of Sen. Poland).

<sup>113</sup> See *supra* pp. 969-70 & n.59.

<sup>114</sup> CONG. GLOBE, 40th Cong., 3d Sess. 710 (1869).

<sup>115</sup> See, e.g., BROCKETT, *supra* note 81, at 263 ("We have, we think, demonstrated that the family, and not the individual, is the unit of all organized society and government; that this being the case, there is no such thing as an individual right of suffrage . . ."); *id.* at 271-72 ("[T]he exercise of the suffrage by woman would be an attempt to make suffrage individual instead of representative, and so against the natural order of things."); *id.* at 272 ("[T]his would inaugurate an entirely different principle; the right of the individual, as such, to participate in the government, a claim incompatible with the organization of society, and subversive of its best interests."); BUSHNELL, *supra* note 81, at 68 (stating that, under English common law, the husband acts for and speaks on behalf of his wife and that women were already represented through the votes of men); KRADITOR, *supra* note 84, at 24 ("A man voted not for himself alone but for all the members of his family, as their political representative."); PARKMAN, *supra* note 86, at 3 ("The man is the natural head of the family, and is responsible for its maintenance and order. Hence he ought to control the social and business agencies which are essential to the successful discharge of the trust imposed upon him.").



tron."<sup>116</sup> In his tract, *Women's Suffrage: Reform Against Nature*, Horace Bushnell was more blunt: "What we have to say is, that all women alike are made to be married, whether they are or not."<sup>117</sup>

In advocating the passage of a sixteenth amendment in 1886, the Senate Select Committee on Woman Suffrage tried presenting direct representation of women in government as logically compelled by simple facts of social structure:

Probably not more than five-eighths of the men of legal age, qualified to vote, are heads of families, and not more than that proportion of adult women are united with men in the legal merger of married life. It is therefore quite incorrect to speak of the state as an aggregate of families duly represented at the ballot-box by their male head. The relation between the government and the individual is direct; all rights are individual rights, all duties are individual duties.<sup>118</sup>

But the dispute *was* irreducibly normative. The claim that women were individual citizens with interests and agency independent of men was a challenge to male authority and to historic understandings of the marriage relationship, as both sides of the debate deeply appreciated.

#### B. "Self-Government": *The Woman Suffrage Rejoinder*

In claiming the right to vote, suffragists repudiated men's authority to represent women and rejected the republican conception of the state as an aggregation of households. As Mary Putnam Jacobi defined the revolutionary core of woman suffrage, the movement understood the state as based on "individual cells," not households:

Confessedly, in embracing in this conception women, we do introduce a change; a change in which, though in itself purely ideal, underlies all the practical issues now in dispute. In this essentially modern conception, women also are brought into direct relations with the State, independent of their "mates" or their "brood."<sup>119</sup>

The demand for the vote was, in short, a challenge to the order of coverture. Suffragists argued that women had a right to "direct relations with the state, independent of their 'mate' or 'brood,'" in terms at once conservative and explosive. At every turn, suffragists justified women's right to self-representation by appeal to the nation's revolutionary heritage. The movement first employed this strategy in the antebellum period, when it used the Declaration of Independence as a

<sup>116</sup> H.R. REP. NO. 48-1330, at 3 (1883).

<sup>117</sup> BUSHNELL, *supra* note 81, at 71.

<sup>118</sup> S. REP. NO. 49-70, at 2-3 (1886).

<sup>119</sup> MARY PUTNAM JACOBI, "COMMON SENSE" APPLIED TO WOMAN SUFFRAGE 138 (1894).

model for its inaugural Declaration of Sentiments.<sup>120</sup> From this first enumeration of women's grievances against men, suffragists invoked memories of the Revolution to challenge women's disfranchisement. Suffragists drew upon memories of the Revolution to dignify their claim and defend it from ridicule and, perhaps most importantly, to counter the familial discourse through which women's disfranchisement was justified.<sup>121</sup>

In challenging the order of family government, women self-consciously positioned themselves as colonists. Suffragists recalled the relations of colonists and king as they demanded "self-government" and "no taxation without representation" and as they demonstrated how virtual representation provided women no effective representation at all.<sup>122</sup>

<sup>120</sup> REPORT OF THE WOMAN'S RIGHTS CONVENTION (Seneca Falls, N.Y., July 19 & 20, 1848) (describing the "history of mankind [as] a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her"), reprinted in 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 66, 70 [hereinafter REPORT OF THE WOMAN'S RIGHTS CONVENTION].

<sup>121</sup> Cf. S. MISC. DOC. NO. 47-74, at 6 (1880) (testimony of Mrs. Elizabeth L. Saxon):

I beg of you, gentlemen, to consider this question [of the proposed woman suffrage amendment] apart from the manner in which it was formerly considered. We, as the women of the nation, as the mothers, as the wives, have a right to be heard, it seems to me, before the nation. We represent precisely the position of the colonies when they plead, and, in the words of Patrick Henry, they were "spurned with contempt from the foot of the throne." We have been jeered and laughed at, and ridiculed: but this question has passed out of the region of ridicule.

<sup>122</sup> See S. MISC. DOC. NO. 1211, at 25 (1894) (remarks of Mrs. Sara Winthrop Smith) ("The right of women to vote began with the first pronunciamento against the tyranny of England. It is as firmly placed in the fundamental laws of our country as is the same right of men."). Mary Stewart expressed a similar sentiment:

We are taxed without representation; there is no mistake about that. The colonies screamed that to England; Parliament screamed back, "Be still; long live the king, and we will help you." Did the colonies submit! They did not. Will the women of this country submit! They will not. Mark me, we are the sisters of those fighting revolutionary men; we are the daughters of the fathers who sang back to England that they would not submit. Then if the same blood courses in our veins that courses in yours, dare you expect us to submit!

S. MISC. DOC. NO. 74, at 6-7 (1880). Consider also Senator Anthony's remarks when debating suffrage for the District of Columbia prior to the drafting of the Fifteenth Amendment:

Nor is it a fair statement of the case to say that the man represents the woman in the exercise of suffrage, because it is an assumption on the part of the man; it is an involuntary representation so far as the woman is concerned. . . . A representation to which the represented party does not assent is no representation at all, but is adding insult to injury. When the American Colonies complained that they ought not to be taxed unless they were represented in the British Parliament, it would have been rather a singular answer to tell them that they were represented by Lord North, or even by the Earl of Chatham . . .

Nor have we any more right to assume that the women are satisfied with the representation of the men. Where has been the assembly at which this right of representation was conferred? Where was the compact made? What were the conditions?

CONG. GLOBE, 39th Cong., 2d Sess. 55 (1866).

The movement found in the nation's revolutionary heritage a powerful way to refute men's claim to represent women in the state. And yet, in so doing, suffragists were advancing a provocative — and in some respects quite radical — reinterpretation of gender relations in the family and in the state.<sup>123</sup> Male superordination was not benign, but tyrannical<sup>124</sup> and fundamentally unjust.<sup>125</sup>

In asserting the right to self-representation, suffragists thus turned the logic and language of individualism into a challenge to male authority, in the family and elsewhere. As Stanton put it in her testimony before the House Judiciary Committee in 1892:

The point I wish plainly to bring before you on this occasion is the individuality of each human soul: our Protestant idea, the right of individual conscience and judgment — our republican idea, individual citizenship. . . . *In discussing the sphere of man we do not decide his rights as an individual, as a citizen, as a man by his duties as a father, a husband, a brother, or a son, relations some of which he may never fill. . . . Just so with woman.*<sup>126</sup>

<sup>123</sup> Elizabeth Cady Stanton pursued this strategy quite self-consciously:

But what do lofty utterances and logical arguments avail so long as men, blinded by old prejudices and customs, fail to see their application to the women by their side? Alas! gentlemen, women are your subjects. Your own selfish interests are too closely interwoven for you to feel their degradation, and they are too dependent to reveal themselves to you in their nobler aspirations, their native dignity.

<sup>2</sup> HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 510.

<sup>124</sup> See REPORT OF THE WOMAN'S RIGHTS CONVENTION, *supra* note 120, at 70 (quoting the Declaration of Sentiments, which draws on the Declaration of Independence, to describe the "history of mankind [as] a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her").

<sup>125</sup> The movement emphasized this theme during the Centennial celebrations on July 4, 1876, when Susan B. Anthony stood in front of Independence Hall and read from NWSA's Declaration of Rights for Women:

*Universal manhood suffrage*, by establishing an aristocracy of sex, imposes upon the women of this nation a more absolute and cruel despotism than monarchy; in that, woman finds a political master in her father, husband, brother, son. The aristocracies of the old world are based upon birth, wealth, refinement, education, nobility, brave deeds of chivalry; in this nation, on sex alone; exalting brute force above moral power, vice above virtue, ignorance above education, and the son above the mother who bore him.

<sup>3</sup> HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 33; see also 1878 Senate Hearings, *supra* note 76, at 5 (testimony of Elizabeth Cady Stanton) ("When we place in the hands of one class of citizens the right to make, interpret, and execute the law for another class wholly unrepresented in the government, we have made an order of nobility. Universal manhood suffrage makes all men sovereigns, all women slaves — the most odious from [sic] of aristocracy the world has yet seen.").

<sup>126</sup> *Hearing of the Woman Suffrage Association Before the House Comm. on the Judiciary*, 52d Cong. 1 (1892) [hereinafter 1892 Hearings] (emphasis added). Stanton's testimony was widely circulated under the title "The Solitude of Self" and is reprinted in BETH M. WAGGENSPACK, THE SEARCH FOR SELF-SOVEREIGNTY: THE ORATORY OF ELIZABETH CADY STANTON 159-67 (1989).

In place of male protection, Stanton argued, women sought "self-sovereignty"<sup>127</sup> or "self-government." "Even the preamble of the Constitution," she emphasized, "is an argument for self-government."<sup>128</sup>

In using the language of "self-sovereignty" and "self-government," the woman's rights movement quite consciously employed American traditions of individualism to challenge relations of gender status.<sup>129</sup> But suffragists also attacked status inequality directly and, following the traditions of the antislavery movement,<sup>130</sup> often used the language of the American Constitution to do so. Male suffrage, Susan B. Anthony bluntly explained to the House Judiciary Committee in 1880, "establishes between the sexes that hateful thing of inequality; . . . it makes all men sovereigns and all women subjects; . . . it makes all men, politically, superiors and all women inferiors" and inflicts "not only political degradation, but . . . also social, moral, and industrial degradation" on women.<sup>131</sup> Or as Elizabeth Cady Stanton put it:

"No bill of attainder shall be passed." "No title of nobility granted." So says the Constitution; and yet you have passed bills of attainder in every State of the Union making sex a disqualification for citizenship. You have

<sup>127</sup> 1892 *Hearings*, *supra* note 126, at 1. Stanton went on to urge:

The strongest reason why we ask for woman a voice in the government under which she lives; in the religion she is asked to believe; equality in social life, where she is the chief factor; a place in the trades and professions, where she may earn her bread, is because of her birthright to self-sovereignty; because, as an individual, she must rely on herself. No matter how much women prefer to lean, to be protected and supported, nor how much men desire to have them do so, they must make the voyage of life alone, and for safety in an emergency they must know something of the laws of navigation. To guide our own craft, we must be captain, pilot, engineer; with chart and compass to stand at the wheel; to watch the wind and waves and know when to take in the sail, and to read the signs in the firmament over all. It matters not whether the solitary voyager is man or woman.

*Id.*

<sup>128</sup> Arguments from the Constitution's Preamble were a regular part of the suffrage case. See, e.g., 1888 *Senate Hearings*, *supra* note 77, at 4 (statement of Elizabeth Cady Stanton) (citing the Preamble); 1878 *Senate Hearings*, *supra* note 76, at 5 (statement of Elizabeth Cady Stanton) ("This is declared to be a government 'of the people.' . . . Our State constitutions also open with the words, 'We, the people.' . . . When we say people, do we not mean women as well as men?"); 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 630, 632 (reproducing text of the stump speech that Susan B. Anthony delivered in the weeks prior to her trial for voting unlawfully in 1873) ("It was we, the people, not we, the white male citizens, nor yet we, the male citizens, but we, the whole people, who formed this Union.").

<sup>129</sup> On the movement's use of the language of individualism to expose unequal status relations, see Siegel, *Home as Work*, *supra* note 69, at 1107, which explains that the antebellum woman's rights movement "used a rhetoric of autonomy to raise questions of equality, and used a rhetoric of individualism to explore conditions of group domination and to articulate aspirations of group emancipation." *Id.* (emphasis omitted). On the movement's frequent use of the language of caste, see *id.* at 1107 n.118.

<sup>130</sup> See *supra* pp. 971-72 & n.66.

<sup>131</sup> H.R. MISC. DOC. NO. 46-20, at 20, 19 (1880); see *id.* at 18-22 (statement of Susan B. Anthony).

granted titles of nobility to every male voter, making all men rulers, governors, sovereigns, over all women.<sup>132</sup>

Whether suffragists argued their case in the language of individualism or in the language of status hierarchy, one message was clear: 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.<sup>133</sup> This theme played a central part in appeals to women to join the suffrage movement.<sup>134</sup>

As the movement contested claims of virtual representation and undertook to demonstrate why women needed the vote, advocates offered an account of women's subordination that ranged well beyond the fact of disfranchisement. Especially when recruiting women to the suffrage cause, suffragists refuted the virtual representation claim with examples drawn from women's daily lives:

As a mother, a woman goes through the tragedy of giving birth to her son, watches over and cares for his helpless infancy, brings him through all the diseases incident to childhood, is his nurse, physician, seamstress, washer-woman, teacher, friend, and guide, spending the cream of her days to bring him up to be a voter with no provision in law for her own support in the mean time, with not so much as "I thank you." Then he leaves home and marries a wife, whom it took some other mother twenty-one years to raise, educate, and teach to cook his meals, to make and wash his clothes, to furnish him with a bed, and to fill the house with comforts, of which he has the larger share, at her own expense. And all this done for

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<sup>132</sup> 1880 *Senate Hearings*, *supra* note 76, at 5. For other examples of the Titles of Nobility claims, see S. REP. NO. 50-2543 app. I at 11 (1889) (hearing of Senate Committee on Woman Suffrage, April 2, 1888) (statement of Elizabeth Cady Stanton). This theme was a central part of the movement's case during the nation's centennial celebrations. See *supra* note 125. For examples of the Bill of Attainder claim, see 1878 *Senate Hearings*, *supra* note 76, at 5 (remarks of Elizabeth Cady Stanton) ("Notwithstanding these provisions of the Constitution, bills of attainder have been passed by the introduction of the word "male" into all the State constitutions, denying the woman the right of suffrage, and thereby making sex a crime. A citizen disenfranchised in a republic is a citizen attained.").

<sup>133</sup> As Lucy Stone argued before the House Judiciary Committee in 1892:

Men must know the value of votes and the value of the possession of power, and I look at them and wonder how it is possible for them to be willing that their own sisters, mothers, wives, and daughters should be debarred from the possession of like power. . . . [Legislators] respect the wants of the voter, but they care nothing about the wants of those who do not have votes. So, when we asked in Massachusetts for protection for wives beaten by their husbands . . . and that the husband should be made to give a portion of his earnings to support the minor children, again we had leave to withdraw.

*Hearing of the Woman Suffrage Association Before the House Comm. on the Judiciary*, 52d Cong. 6 (1892) (statement of Lucy Stone); see also source cited *supra* note 123, at 510 (Elizabeth Cady Stanton discussing the forms of self-interest that bias male judgment).

<sup>134</sup> See generally Siegel, *Home As Work*, *supra* note 69, at 1151 & n.281 (discussing articles in woman suffrage newspapers arguing that the deplorable state of marital property law illustrated women's need for political self-representation).

him up to this period of his life without any cost to himself. Then he votes to help make a law to disfranchise his wife and these two mothers, who have unitedly spent forty-two years of the prime of their days for his benefit, without any compensation. And then he makes another law to compel his wife to do all the same kind of drudgery which [sic] his mother had done, with the addition of giving birth to as many children as in his good pleasure he sees fit to force upon her. And all her earnings and the fruit of her labor are his, his wife being the third woman who spends her life to support him. It takes three, and sometimes four women to get a man through from the cradle to the grave, and sometimes a pretty busy time they have of it, too. It is time we stated facts and called things by their right names, and handled this subject without kid gloves.<sup>135</sup>

To counter the argument that women could rely on men to represent them and to demonstrate why women needed the vote, suffragists provided a detailed indictment of male privilege in the family and elsewhere. Suffragists protested the sex-based restrictions on employment and compensation that impoverished women and drove them into marriage.<sup>136</sup> They challenged women's legally enforced dependency in marriage, particularly property rules that vested in the husband a right to his wife's earnings and to the value of his wife's household labor.<sup>137</sup> They denounced the law's failure to protect women from physical coercion in marriage, including domestic violence, marital rape, and "forced motherhood."<sup>138</sup> Suffragists objected to conventions that held men and women to inconsistent standards of sexual propriety,<sup>139</sup> and they protested women's exclusion from juries, especially in cases involving women accused of committing crimes.<sup>140</sup>

<sup>135</sup> *Id.* at 1159–60 (quoting *A Wife's Protest*, WOMAN'S J., Mar. 6, 1875, at 74).

<sup>136</sup> For examples of this tradition of protest, see *id.* at 1121.

<sup>137</sup> See generally Siegel, *Home as Work*, *supra* note 69.

<sup>138</sup> *E.g.*, Hasday, *supra* note 31, at 1413–42 (describing the movement's protest of marital rape); Siegel, *Home as Work*, *supra* note 69, at 1104–06 (describing how the movement's demands for "self-ownership" supported a far-ranging critique of the marriage relation, including challenges to the expropriation of women's domestic labor, to marital rape, and to forced motherhood); Siegel, *The Rule of Love*, *supra* note 31, at 2127–32 (describing the movement's protest of domestic violence); see also source cited *supra* note 133 (quoting Lucy Stone's testimony on the movement's inability to persuade legislators to enact laws protecting women from domestic violence).

<sup>139</sup> Jane E. Larson, *Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 8–10 (1997).

<sup>140</sup> See generally DEBORAH L. RHODE, JUSTICE AND GENDER 48–50 (1989); Cristina M. Rodríguez, Note, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 YALE L.J. 1805 (1999). For examples of movement rhetoric protesting women's exclusion from juries, see 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 597–98 (address of Elizabeth Cady Stanton to the New York legislature), which discusses the plight of women charged with infanticide; *id.* at 708 n.\* (resolutions of the Tenth National Woman's Rights Convention), which demanded the right to serve on juries; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 56, at 687–88 (statement of Susan B. Anthony following her conviction for voting unlawfully), which criticized women's exclusion from juries.

Over the decades, arguments for the vote changed, to a degree, in focus and character. By the turn of the century, the movement was arguing that women needed the vote for purposes of "social housekeeping," to enable women to participate in decisions about new ways government might provide for the health and welfare of families living in America's growing cities.<sup>141</sup> As the movement broadened its class base, it began to devote more attention to discussing reforms that would serve the needs of working-class women.<sup>142</sup>

At the same time that suffragists challenged traditional conceptions of the family, they undertook to show how enfranchising women would not harm the family and could well strengthen and support it. The vision of family life that suffragists defended was not, of course, that of the common law: the movement was seeking to reform the common law of marital status at the same time it sought the vote. The two initiatives sprang from a common vision. The suffrage movement was exploring new, more egalitarian conceptions of the family that contemplated a far more prominent role for women in the nation's economic and political institutions.<sup>143</sup>

### *C. The Surrejoinder: Marital Unity Arguments Against Woman Suffrage*

With an understanding of the kind of arguments women were making on behalf of their claim to vote, it is easy enough to appreciate how antis viewed woman suffrage as a threat to traditional understandings of marriage. In the practical as well as the symbolic sense, enfranchising women was an affront to male household headship. Antis expressed this sense of threat in a second cluster of arguments contending that it would harm the family to enfranchise women. In the common locution, enfranchising women threatened the unity of the marriage relation, in which there could be only one will — that of the male head of household.<sup>144</sup>

<sup>141</sup> KRADITOR, *supra* note 84, at 65–71; see also Jane Addams, *Why Women Should Vote*, in ONE WOMAN, ONE VOTE 195, 195–202 (Marjorie Spruill Wheeler ed., 1995).

<sup>142</sup> On the expansion of the class base of the suffrage movement in the first decades of the twentieth century, see ELLEN CAROL DUBOIS, HARRIOT STANTON BLATCH AND THE WINNING OF WOMAN SUFFRAGE 88–121 (1997).

<sup>143</sup> Cf. Siegel, *Home as Work*, *supra* note 69, at 1116 (relating the movement's reform agendas for marital status law and suffrage). For a discussion of the suffrage movement's utopian proposals to restructure work performed in the family setting, see DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES 3–53, 67–89, 135–49, 183–205 (1981).

<sup>144</sup> E.g., 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 598–99 (1853) (statement of George Boutwell) ("[The family] can have but one will; and the man, who, by nature, is placed at the head of that government, is the only authorized exponent of that will. . . . [Because] the will of the whole fam-

Antis who argued that woman suffrage threatened marital unity were quite explicit in discussing how the prospect of women voting challenged male household authority. Either women would continue to submit to male governance,<sup>145</sup> or their self-assertion would produce conflicts in marriage. Discussion of this question was quite open, as this 1884 report of the House Judiciary Committee, rejecting petitions for a sixteenth amendment, reveals:

To permit the entrance of political contention into such a home would be either useless or pernicious — useless if man and wife agree, and pernicious if they differ. In the former event the volume of ballots alone would be increased without changing results. In the latter, the peace and contentment of the home would be exchanged for the bedlam of political debate and become the scene of base and demoralizing intrigue.<sup>146</sup>

While the virtual representation argument confidently supposes that men can speak for women, the marital unity argument expresses the fear that if women are allowed to speak for themselves, conflict will erupt in marriage. The virtual representation argument describes the family in ways that presume male and female interests converge; by contrast, marital unity arguments more openly acknowledge that male and female interests diverge. Deployed in tandem, as they generally were, the virtual representation and the marital unity arguments

ily is represented by the man, who is the head of the family . . . woman has no right to be directly consulted in public affairs.”), quoted in Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 488–89 (1997); BROCKETT, *supra* note 81, at 255 (“[I]t is plain that each family needs, at the utmost, but a single representative, its proper head and father, who represents the entire interests of the family, including himself, his wife, and his children, if he has any.”).

<sup>145</sup> BROCKETT, *supra* note 81, at 246 (“Perhaps no other rule is so extensively true, as that women are under influence. But further, women have no *political* interests apart from those of men . . . . As citizens, therefore, they are sufficiently represented already. To give them the franchise would just double the number of voters, without introducing any new interest . . . .”); PARKMAN, *supra* note 86, at 3–4 (“If, as many [suffrage] advocates complain, women are subservient to men, and do nothing but what they desire, then woman suffrage will have no other result than to increase the power of the other . . . sex . . . .”); Bissell, *supra* note 81, at 147 (“[A] woman must study up the subjects on which she is to vote and cast her ballot with a personal knowledge of current politics in every detail. She must take it all from her husband, which means that he is thus given two votes instead of one, *not equal suffrage, but a double suffrage for the man.*” (emphasis added)).

<sup>146</sup> H.R. REP. NO. 48-1330, at 3 (1884); accord S. REP. NO. 48-399, pt. 2, at 6–7 (1884) (minority report). The House Committee’s reasoning elicited this rejoinder from its dissenting members:

If it be urged that her interests are so bound up in those of man that they are sure to be protected, the answer is that the same argument was urged as to the merger in the husband of the wife’s right of property, and was pronounced by the judgment of mankind fallacious in practice and in principle. If the natures of men and women are so alike that for that reason no harm is done by suppressing women, what harm can be done by elevating them to equality? If the natures be different, what right can there be in refusing representation to those who might take juster views about many social and political questions?

H.R. REP. NO. 48-1330, at 5–6.



moved the anti's' argument seamlessly from the register of paternalism to the register of power.

Anti's were remarkably direct about how men would respond to wives who voted differently than their husbands did.

Should women vote in opposition to the men to whom they are bound . . . unpleasant consequences would sooner or later arise. No man would view with equanimity the spectacle of his wife or daughters nullifying his vote at the polls, or contributing their influence to sustain a policy of government which he should think injurious to his own well-being or that of the community.<sup>147</sup>

One anti wondered, "what remedy would be found for the *infections no law could reach or define, and which [women] would suffer at home for that exercise of their right* which was opposed to the interests or prejudices of their male relations?"<sup>148</sup>

Along similar lines, members of the Senate Woman Suffrage Committee who opposed the sixteenth amendment insisted that enfranchising women would not protect them from domestic violence and would only aggravate marital conflict. They argued that it was better to preserve a husband's marital authority than to undermine it by enfranchising women:

*If the husband is brutal, arbitrary, or tyrannical, and tyrannizes over her at home, the ballot in her hands would be no protection against such injustice, but the husband who compelled her to conform to his wishes in other respects would also compel her to use the ballot if she possessed it as he might please to dictate. The ballot could therefore be of no assistance to the wife in such case, nor could it heal family strifes or dissensions. On the contrary, one of the gravest objections to placing the ballot in the hands of the female sex is that it would promote unhappiness and dissensions in the family circle. There should be unity in the family.*

At present the man represents the family in meeting the demands of the law and of society upon the family. So far as the rougher, coarser duties are concerned, the man represents the family, and the individuality of the woman is not brought into prominence, *but when the ballot is placed in the hands of the woman her individuality is enlarged and she is expected to answer for herself* the demands of the law and of society on her individual account, and not as the weaker member of the family to answer by her husband. . . . This will introduce into the family circle new elements of disagreement and discord, which will frequently end in unhappy divisions, if not in separation or divorce.<sup>149</sup>

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<sup>147</sup> Edward D. Cope, *Relation of the Sexes to Government, in* DEBATERS' HANDBOOK, *supra* note 81, at 123, 126.

<sup>148</sup> BROCKETT, *supra* note 81, at 248 (emphasis added).

<sup>149</sup> S. REP. NO. 48-399, pt. 2, at 6-7 (emphasis added). Suffragists also invoked wives' fear of defying their husbands' authority to explain why many women did not demand the right to vote:

Here objections to the reform of coverture in public and private law converged. Just as state courts — and the United States Supreme Court — thought it reasonable to prevent wives from bringing tort claims against their husbands under the new married women's property acts in order to preserve the harmony of the marriage relationship,<sup>150</sup> so too did members of Congress think it reasonable to deny women the vote in order to preserve marital harmony. Of course, those who invoked marital harmony as grounds for denying women the vote or the right to sue a battering husband reasoned from a particular conception of marriage. Using law to inhibit women's capacity for self-assertion does not promote the unity, harmony, or well-being of any form of marital relationship except the male-headed household historically enforced by public and private law.

It is from this same standpoint that opponents of woman suffrage depicted the prospect of women voting as an expression of female egoism incompatible with the family's welfare — a misplaced individualism that betrayed a selfish disregard for a woman's responsibilities in sustaining family life. Women's assertion of individuality appeared socially problematic, in ways that men's did not, precisely because it called into question the traditional distribution of authority and division of labor in the family.<sup>151</sup> “[I]f . . . women vote as they see fit,

It has been said for a long time that Southern women do not want suffrage. There are women in every Southern State who do want it, and already in Georgia there is a respectable number of women who openly demand the ballot; and I can say to you that there are a great many more in Georgia who would make that demand openly if they were not so much afraid of their husbands, who declare themselves to be their absolute protectors. And I am sorry to say that the gentlemen of Georgia, most of those from whom we have heard on this question, do not seem to be protecting the right of their wives to entertain and openly express opinions of their own.

*Woman Suffrage: Hearing Before the Senate Select Comm. on Woman Suffrage*, 52d Cong. 13 (1892) (statement of H. Augusta Howard). On women's need for the ballot to obtain legislation redressing domestic violence, see the testimony of Lucy Stone, reproduced above in note 133.

<sup>150</sup> Siegel, *The Rule of Love*, *supra* note 31, at 2161–70. In *The Rule of Love*, I trace the rise of privacy discourse in marital status law as it was reformed during the nineteenth century. Where a husband's prerogative to chastise his wife was once justified in terms of his authority over her, a husband's immunity from his wife's tort claims under the married women's property acts was justified in a less overtly hierarchical discourse that emphasized the importance of preserving marital privacy and domestic harmony.

<sup>151</sup> See HUBBARD, *supra* note 81, at 167 (“[Suffragists] have a vision of the future . . . when each one shall be an individual and destroy the unity of the family, and the sanctity of marriage and the dependence of the child.”); *id.* at 173 (“The progressive woman and the Suffragette of today may see herein mirrored their characteristics in the near future after they have obtained the vote and broken up the family, and created themselves distinct individuals.”); Bissell, *supra* note 81, at 146 (“[N]o good woman lives to herself. She has always been part of a family as wife or sister or daughter from the time of Eve.”); *id.* at 148 (“The individualism of woman, in these modern days, is a threat to the family. There is . . . a fever for ‘living one's own life,’ that is unpleasantly noticeable. The desire for the vote is part of this restlessness, this . . . ignorant desire to do ‘the work of the world’ instead of one's own appointed work.”); Fulton, *supra* note 81, at 5 (“It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position

without regarding their husbands, then unhappy marriages will be multiplied and divorces redoubled."<sup>152</sup>

Along with arguments about the importance of preserving sex differences,<sup>153</sup> the virtual representation and marital unity arguments were the common reasons antis gave for denying women the vote. It is important to observe what counts as common sense in this story: American constitutional culture followed the common law of coverture in reasoning about the family as an institution of governance in which men have authority over women and the authority to represent women in public and in private dealings with other men.

#### IV. OF FAMILIES, FEDERALISM, AND "LOCAL SELF-GOVERNMENT"

There was another objection to women voting that was unique to suffrage claims based on the Constitution. Women who sought enfranchisement under federal rather than state law regularly encountered federalism objections to their constitutional claims.

Federalism arguments against enfranchising women by constitutional amendment developed in two phases. For the half century during which Americans debated whether women's right to vote should be protected under the federal Constitution, those who opposed enfranchising women by constitutional amendment invoked federalism values to argue that the question should be resolved by state law. By the end of the campaign, with ratification of the Nineteenth Amendment imminent, antis began to argue that the Nineteenth Amendment itself was unconstitutional on federalism grounds, a claim they litigated all the way to the Supreme Court.

The federalism objection to enfranchising women by constitutional amendment was in theory normatively independent of the objection to

and sphere assigned to woman by God himself."); Robert Afton Holland, *The Suffragette*, 17 SEWANEE REV. Q. 272, 282 (1909) ("The woman who does not rightly obey her husband, will not obey the God who enjoins her submission. Her rights-ism is simply sex-atheism, and can only generate atheistic minds."), quoted in KRADITOR, *supra* note 84, at 17.

<sup>152</sup> PARKMAN, *supra* note 86, at 4. Antis who talked about preserving the unity and harmony of marriages often fretted about the prevalence of divorce. Divorce in this conversation, however, was code for any threat to male authority and household headship in marriage. See, e.g., BROCKETT, *supra* note 81, at 279 ("[I]f the wife should . . . adopt the views, principles, and candidates of one party, and the husband those of another . . . how often would it break up the peace of families, and lead to separation, or, at least, to permanent estrangement!"); Bissell, *supra* note 81, at 145, 148 (ascribing divorce to women's agitation for suffrage and other rights). The charge that woman suffrage would increase divorce figured prominently in the antisuffrage case from Reconstruction until the final debates over ratification. *But cf.* 51 CONG. REC. S4140-42 (1914) (statement of Sen. Shafroth) (reading letters from judges in Colorado — a state where women had the right to vote — who testified that they had never presided over a divorce case that arose out of political differences between spouses).

<sup>153</sup> See *supra* pp. 977-78 & nn.81-82.

enfranchising women, but as we will see, there were deep ties between them. Throughout the campaign, the woman suffrage question was seen as a question concerning the family; and it was as a question concerning the family that federalism objections to a woman suffrage amendment were often articulated.

While woman suffragists invoked values of “self-government” as they petitioned for a constitutional amendment protecting the right to vote, antis invoked values of “local self-government” to oppose suffragist demands. Divergent conceptions of the family drove this struggle over the meaning of “self-government.” As I show, states’ rights proponents who invoked values of local self-government to defend the family from the reach of federal citizenship laws reasoned from the traditional understanding of the household that women’s claim to vote challenged. Recovering this lost chapter in the history of federalism thus sheds new light on the gender understandings that have informed arguments for maintaining local control of family law over the course of American history.

#### *A. Federalism and the Family in the Debate over the Woman Suffrage Amendment*

Antis most commonly argued that protecting women’s right to vote under the federal Constitution would violate states’ rights because the states controlled suffrage qualifications under the federal constitutional scheme. An 1884 report of the House Judiciary Committee explained:

By the original Constitution of 1789 . . . [w]hat class or portion of the whole people of any State should be admitted to suffrage, and should, by virtue of such admission, exert the active and potential control in the direction of its affairs, was a question reserved exclusively for the determination of the State.<sup>154</sup>

For some, this objection to enfranchising women by amending the federal Constitution was sufficient. But it left unanswered an important question: why couldn’t the procedures for constitutional amendment set forth in Article V be used to alter this feature of the federal constitutional scheme — as indeed they had been used in ratifying the Fifteenth Amendment? To answer this question, it was necessary to identify some reason why the genius of the federal system required preserving state control over questions of woman suffrage from alteration by constitutional amendment.

In answering this question, many “states’ rights” proponents offered federalism arguments for restricting the use of Article V that incorporated the gendered premises of the antisuffrage argument itself. For example, the 1884 Judiciary Committee report, quoted above, con-

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<sup>154</sup> H.R. REP. NO. 48-1330, at 1 (1884).

tinued explaining its objections to enfranchising women by constitutional amendment by emphasizing that the proposed reform involved questions of marital status law beyond the reach of federal power:

In respect to married women, it may well be doubted whether the influences which result from the laws of property between man and wife would not make it improbable that the woman should exercise her suffrage with freedom and independence. This, too, in despite of the fact that the dependence of woman under the common law has been almost entirely obliterated by statutory enactments. *At all events, the power proposed to pass laws to carry woman suffrage into effect would be held to give Congress the power to intrude upon the marital relations in the States and the rights of property incident thereto, and as to which your committee see great objection.*<sup>155</sup>

This objection was explored at some length in the Minority Report of the Senate Committee on Woman Suffrage in 1882 — a document committee members reprinted on at least three occasions in ensuing decades as a statement of the objection to enfranchising women.<sup>156</sup> The report explained:

*Great organic changes in government, especially when they involve, as this proposed change does, a revolution in the modes of life, longstanding habits, and the most sacred domestic relations of the people, should result only upon the demand of the people, who are to be affected by them. Such changes should originate with, and be molded and guided in their operation and extent by, the people themselves.*<sup>157</sup>

The question of women voting, the report reasoned:

[I]nvolves considerations so intimately pertaining to all the relations of social and private life — the family circle — the status of women as wives, mothers, daughters, and companions to the functions in private and public life which they ought to perform, and their ability and willingness to perform them — the harmony and stability of marriage, and the division of the labors and cares of that union — that we are convinced that the proper and safe discussion and weighing of them would be best secured by

<sup>155</sup> *Id.* at 3 (emphasis added). Similarly, the 1884 minority report for the Senate Committee on Woman Suffrage moved from reasoning about suffrage as a problem concerning family structure to characterizing the problem as a “local question”:

*It is said by those who have examined the question closely that the largest number of divorces is now found in the communities where the advocates of female suffrage are most numerous, and where the individuality of woman as related to her husband, which such a doctrine inculcates, is increased to the greatest extent. If this be true, and it seems to be well authenticated, it is a strong plea in the interest of the family and of society, against granting the petition of the advocates of woman suffrage. After all, this is a local question, which properly belongs to the different States of the Union, each acting for itself . . .*

S. REP. NO. 48-399, pt. 2, at 8 (1884).

<sup>156</sup> S. REP. NO. 47-686, pt. 2 (1882), reprinted in S. REP. NO. 52-1143, at 5-6 (1893); in S. REP. NO. 54-787, at 1-3 (1896); and in S. DOC. NO. 62-1035, at 10-12 (1913).

<sup>157</sup> S. REP. NO. 47-686, pt. 2, at 1 (emphasis added).

deliberations in the separate communities which have so deep an interest in the rightful solution of this grave question.<sup>158</sup>

The report explained that because the question of women voting implicated the structure of the family, the question was properly reserved within the federal constitutional scheme to “local self-government.” The report described the essence of “local self-government”:

Recent events, though tending strongly to centralization, have not destroyed nor impaired in the public mind the inestimable value of local self-government. Among the powers which have hitherto been esteemed as most essential to the public welfare, is *the power of the States to regulate, each for itself, their domestic institutions in their own way; and among those institutions none have been preserved by the States with greater jealousy than their absolute control over marriage and the relation between the sexes.*<sup>159</sup>

Note how the federalism argument against enfranchising women by constitutional amendment self-consciously deploys the concept of “domestic” institutions to refer to both the internal jurisdictional relations of the state and the family relations of the household. The phrase “local self-government” performs the same double function, referring at once to state governance of “domestic” affairs within its jurisdiction and to private governance exercised by the master of a household over its dependent members.<sup>160</sup> It is clear enough that, in the suffrage debates, the phrase “local self-governance” presumes a traditional, common law understanding of the family: the “self” that governs must refer to a male head of household *and* his dependents; otherwise, the phrase “local self-governance” would not make sense as a rallying cry *against* women’s demands for political self-representation.

Finally, note how the federalism arguments describe jurisdiction over domestic affairs in the language of jealousy — insisting upon “the power of the States to regulate, each for itself, their domestic institutions in their own way; and [contending that] *among those institutions none have been preserved by the States with greater jealousy than their absolute control over marriage and the relation between the sexes.*”<sup>161</sup>

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2 (emphasis added).

<sup>160</sup> Compare the use of “local self-government” in an 1893 Senate Report:

Every thoughtful man . . . will recognize the fact that the power to say who shall vote and under what conditions is one of the first and grandest attributes of the sovereignty and dignity and safety of the States, the very essence of home rule and local self-government. . . . All attempts on the part of the General Government to assume to itself, or in any way interfere with, this undoubted right and inestimable privilege of the States have been justly regarded with the greatest jealousy.

S. REP. NO. 52-1143, at 4 (1893)

<sup>161</sup> S. REP. NO. 47-686, pt. 2, at 2 (emphasis added).

On this account, the structure of federal jurisdiction is sexualized, with each of the several states retaining local control over its own women through local control of family law.

What kind of imaginative dynamics produce this sexualized talk about jurisdiction? As a general matter, citizens can either identify with the national government and experience it as expressing the collective identity, values, and will of the citizenry, or disidentify with the national government and experience it as an outside force that is imposing its identity, values, and will upon the citizenry. When federal law divests men of forms of traditional authority in the family long protected by the common law, the jurisdictional conflict can thus assume imaginative form as a conflict among men for control over women and children.<sup>162</sup>

This view of the matter was directly expressed in 1881 by a senator from Alabama who objected to the formation of the Senate's first Select Committee on Woman Suffrage. Senator Morgan imagined the federal government enfranchising women in the form of a man meddling in another's marital business. Morgan condemned any proposal that would ask the federal government "to draw a line of political demarkation [sic] through a man's household, through his fireside, and to open to the intrusion of politics and politicians that sacred circle of the family,"<sup>163</sup> and drove this point home by depicting federal intrusion as a dirty old man coming between a husband and his wife:

What picture could be more disagreeable or more disgusting than to have a pothouse politician introduce himself into a gentleman's family, with his wife seated at one side of the fireplace and himself at the other, and this man coming between to urge arguments why the wife should oppose the policy that the husband advocates, or that the husband should oppose the policy that the wife advocates? Sir, it would be unseemly and disgraceful to allow the families of this country to be intruded upon by any such evil and vile influence as must necessarily attend such intrusions upon the domestic circles of the land.<sup>164</sup>

In the Senator's view, the federal government no more had jurisdiction over woman suffrage than it had jurisdiction over married

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<sup>162</sup> Throughout American history, the law of federalism has generally recognized and respected the forms of authority expressed in the common law of domestic relations. *Cf.* *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 308 (1936) (holding that the regulation of "productive industries" is beyond federal power because "[t]he relation of employer and employee is a local relation[;] . . . [a]t common law, it is one of the domestic relations"). When the national government endorses policies that interfere with status prerogatives protected by the common law of domestic relations, it is especially vulnerable to the charge that it is interfering with "local self-government." National regulation that undermines status prerogatives protected at common law quite literally diminishes forms of "local self-government" — even if the forms of household governance protected by the common law of domestic relations are classically antidemocratic in form.

<sup>163</sup> 13 CONG. REC. 229 (1881).

<sup>164</sup> *Id.*

women's "separate estates."<sup>165</sup> He reminded the Senate that its jurisdiction in matters of suffrage and the family was restricted to "the Territories and . . . the District of Columbia,"<sup>166</sup> observing:

If you expect to proceed into the States you must have the Constitution of the United States amended so as to put our wives and our daughters upon the footing of those who are provided for in the fourteenth and fifteenth amendments. Your jurisdiction is limited to the Territories and to the District of Columbia.<sup>167</sup>

Note the Senator's curious suggestion that proponents of a woman suffrage amendment would have to amend the federal Constitution before they could enfranchise women by amending the federal Constitution. We might read the Senator's remarks simply as one of many efforts to differentiate federal involvement in matters of race and gender so as to undercut the constitutional precedent of the Fifteenth Amendment. Yet when the Senator argues, "If you expect to proceed into the States you must have the Constitution of the United States amended so as to put *our wives and our daughters* upon the footing of those who are provided for in the fourteenth and fifteenth amendments," we can also read this jurisdictional claim as continuing the sexualized argument for local control of family life — this time in an overtly racialized register. In the Senator's view, the federal government had no business involving itself in matters concerning woman suffrage because the question concerned the family, that is, *the wives and daughters of white men*. On this view, the prospect of the Senate taking jurisdiction of the woman suffrage question was especially noxious as it would involve men interfering in the household governance prerogatives — or, more colloquially, the "sexual business" — of their peers.<sup>168</sup>

The argument that enfranchising women by constitutional amendment would impermissibly involve the federal government in domestic concerns persisted in the closing decades of the campaign. For example, in 1916 Congressman Henry St. George Tucker gave a Storrs Lecture at Yale Law School entitled "Local Self-Government," in which he argued that enfranchising women by constitutional amendment violated a system of federalism premised on "local self government" — defined as "the recognition of the trusteeship of man as the defender of the home and the guardian of its sacred precincts."<sup>169</sup> But in the clos-

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> It seems to have been commonplace for congressmen to reason about woman suffrage with imaginative reference to their own families. The virtual representation argument was often expressed from this standpoint. See *supra* pp. 985–87.

<sup>169</sup> HENRY ST. GEORGE TUCKER, *Local Self-Government*, in *WOMAN SUFFRAGE BY CONSTITUTIONAL AMENDMENT* 106 (1916) (Storrs Lecture delivered at Yale Law School in



ing years of the suffrage campaign, the focus of federalism arguments often shifted from the family<sup>170</sup> to race, as southern states assumed centrality in federalism debates over the Nineteenth Amendment. As one Senator put it succinctly in 1919: "Here is exactly the identical same amendment applied to the other half of the Negro race. The southern man who votes for the Susan B. Anthony amendment votes to ratify the fifteenth amendment."<sup>171</sup>

*B. Challenging the Constitutionality of the Nineteenth Amendment:  
Leser v. Garnett*

As passage of the Nineteenth Amendment began to appear imminent, a group of its most passionate opponents, including the National Association Opposed to Woman Suffrage and its affiliates and allies across the country, began to employ referendum elections and litigation as strategies to prevent ratification.<sup>172</sup> Of the several lawyers who fea-

1916). Like his nineteenth-century forebears, St. George Tucker argued that Article V amending powers could not be used to alter control over questions of woman suffrage without violating deep structural underpinnings of the federal system that protected "local self-government." As St. George Tucker defined "local self-government" in his lectures of that title, he reasoned in explicitly gendered terms. The federal system protected local self-government, which St. George Tucker understood to be *a man's control over his home*:

The words "local self government" . . . are the guaranty of the safety of the home, the recognition of the trusteeship of man as the defender of the home and the guardian of its sacred precincts. They single out the individual, arm him with the greatest political power that can possibly be given to an individual, and hold him responsible for its exercise in the development of home and neighborhood . . . . It will be admitted that the nearer the government comes to the man — the closer it touches him in his home life — in his varied every day affairs — that here his power should be greatest for the protection of his home and his rights.

*Id.* at 105–06.

<sup>170</sup> *But see* 58 CONG. REC. 570 (1919) (statement of Sen. Underwood) ("[W]hen it comes to those powers of government which invade the family home and the fireside, that welcome the infant into life and carry old age to the cemetery, those laws of our intimate life and living, if we want just government, must be determined by the local people who live under them. That is the only way we can accomplish the desired result.")

<sup>171</sup> 58 CONG. REC. 618 (1919) (statement of Sen. Smith). On the entanglement of federalism arguments against the Fifteenth and Nineteenth Amendments, see especially H.R. REP. NO. 64-1216, pt. 2, at 8 (1916) (supporting the Nineteenth Amendment) ("The last census shows that there are more than six million more white women than colored women in the fifteen southern states, and two million more white women than Negro men and women combined. . . . [N]ational emancipation of women will in no way interfere with the policy of the Southern States in dealing with the negro problem."); 52 CONG. REC. app. at 149–50 (1915) (remarks of Rep. Hayden) (proposing to substitute for the suffrage amendment a resolution that would have allowed individual states to vote on the question of enfranchising women, declaring that "the question of State rights, when carefully analyzed with relation to the suffrage question, is really the great race problem, and this problem is no longer confined to the South, but is one seriously in the minds of Senators and Representatives from Western States, having to deal intimately and immediately with the race question growing out of immigration or attempted immigration to our shores by the Asiatic").

<sup>172</sup> CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900, at 53–63 (1972).

tured prominently in the litigation campaign, William Marbury played a central part in organizing the suit that led the Supreme Court to decide a federalism challenge to the Nineteenth Amendment itself.

Marbury, a longtime foe of the Fifteenth Amendment, brought to the task of challenging the Nineteenth Amendment a new cluster of federalism arguments that were, unlike their nineteenth-century precursors, based on the text of Article V itself.<sup>173</sup> Marbury first presented these arguments in 1920, in a *Virginia Law Review* article that opened with ominous predictions about the gender and racial consequences of women voting.<sup>174</sup> Observing that Article V expressly prohibits using the amending power to deprive any state of its equal suffrage in the Senate without that state's consent,<sup>175</sup> Marbury then reasoned:

If by an amendment of this kind women may be given the right to vote, the right to vote might be given *to women only, or even to a special class of women only, as to such women as owned no property — the "proletariat"*. In that case the original State which had been guaranteed perpetual equal representation in the Senate would have been destroyed and *an entirely new State substituted*.<sup>176</sup>

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<sup>173</sup> Marbury had recently challenged the Fifteenth Amendment's constitutionality while defending Maryland's grandfather clause in *Myers v. Anderson*, 238 U.S. 368, 368-74 (1915). For an account of Marbury's attempts to challenge the Fifteenth Amendment, see VOSE, *supra* note 172, at 39-40. Marbury's brief in *Myers* drew heavily on the work of another proponent of the Fifteenth Amendment's unconstitutionality: Arthur Machen. See Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910). Marbury's brief in *Myers* argued:

Assuming that the Fifteenth Amendment . . . is "an amendment" within the meaning of that term as employed in Article V of the Constitution, it falls within the express prohibition therein contained against any amendment which would deprive a State of its equal suffrage in the Senate, without its consent.

For it is submitted that any amendment which would have the effect under any possible circumstances of converting one of the States of the Union into an Asiatic State or an African State by compelling the white people to permit Asiatics or Negroes to vote upon the same terms as themselves, would be in substance and effect depriving the original State — the State which assented to and was contemplated and meant by the Constitution — of all representation in the Senate.

VOSE, *supra* note 172, at 39 (quoting Marbury's *Myers* brief) (emphasis omitted).

<sup>174</sup> See William L. Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 3-4 (1920) ("[T]he participation of women equally with men in political activities might have no ill effect, social or political. It might not have any tendency to destroy the unity of the family, to increase the frequency of divorce, to affect injuriously the training and welfare of children . . ."); see also *id.* ("No sane man will undertake to say . . . what the political or social effect of giving the right of suffrage to Japanese women would be fifty years hence.").

<sup>175</sup> *Id.* at 16; cf. U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

<sup>176</sup> Marbury, *supra* note 174, at 17 (emphasis added); cf. *id.* at 15 ("If this 'other power' has the right to say that women shall vote at State elections in States . . . which have rejected this Suffrage Amendment, it would have equally the right to say that *men* shall *not* vote in those States or that only *certain* men or *certain* women shall vote. What then becomes of those States? Can they be said to be indestructible States if their continued existence is thus 'at the mercy' of another?").

In short, Marbury argued that changing the gender composition of the electorate changed the fundamental identity of the state: using federal power to alter the gender composition of the state's electorate was to "substitute" "an entirely new State" in place of the original. A state with a female electorate was entirely different from a state with a male electorate — just as a state that restricted the franchise to *women without property* was organized in the mirror image of the United States at its founding, when the franchise was restricted to *men with property*. From this, Marbury reasoned that the Article V amendment process could not be used to change the gender composition of the electorate without destroying the states whose votes in the Senate Article V protected.<sup>177</sup>

Of the several cases that antisuffragists brought challenging the constitutionality of the Nineteenth Amendment,<sup>178</sup> it was Marbury's case, *Leser v. Garnett*,<sup>179</sup> that the Supreme Court decided on the merits. Marbury's brief in *Leser* advanced a new rendition of the argument that changing the gender composition of the electorate unconstitutionally changed the identity of the several states:

The right of suffrage previously possessed only by qualified male citizens has been *diluted to half strength*.

. . . The amendment . . . re-makes — re-constitutes — every State in the Union, that has not already by voluntary internal act re-made itself, *into a state governed equally by male and female votes*. It abolishes a distinction in political power that has been since the world began.<sup>180</sup>

The brief devoted considerable energy to the task of distinguishing the Fifteenth and Nineteenth Amendments,<sup>181</sup> and it is here that Marbury presented the traditional structural arguments that the woman suffrage amendment interfered with local control over matters concerning the family. There was a fundamental difference between race and sex discrimination, the brief argued. Race discrimination involved class discrimination of national concern,<sup>182</sup> whereas the gender dis-

<sup>177</sup> Marbury and others first advanced this argument as a basis for challenging the constitutionality of the Fifteenth Amendment. See *supra* note 173. For another example of its use to challenge the Nineteenth Amendment, see George Stewart Brown, *The Amending Clause Was Provided For Changing, Limiting, Shifting or Delegating "Powers of Government." It Was Not Provided For Amending "The People." The 19th Amendment Is Therefore Ultra Vires.*, 8 VA. L. REV. 237 (1922).

<sup>178</sup> See VOSE, *supra* note 172, at 55–63 (discussing several cases challenging the validity of the Nineteenth Amendment on federalism grounds).

<sup>179</sup> 258 U.S. 130 (1922).

<sup>180</sup> Brief for Plaintiffs in Error at 75, *Leser v. Garnett*, 258 U.S. 130 (1922) (No. 553).

<sup>181</sup> The brief argued that the Fifteenth Amendment was originally imposed as a war measure and then acquiesced in for decades without challenge, in a manner sufficient to demonstrate the consent of all states. *Id.* at 85–94.

<sup>182</sup> *Id.* at 94–96.

crimination addressed by the Nineteenth Amendment involved matters concerning the family that the Constitution reserved to local control:

The Nineteenth Amendment invades a totally new sphere from the constitutional point of view, — a sphere essentially belonging to municipal law and therefore to the States. It has no relation whatever to any national problem, past, present, or future. Women are not the “wards of the Nation.” *The family is, however, the foundation of the State and if an arbitrary rule of suffrage is imposed upon the State that may break into and overthrow its whole domestic law it is plain that the State has lost “in a general sense the power over suffrage which has belonged to it from the beginning and without the possession of which power . . . both the authority of the Nation and the State would fall to the ground.”*

Prohibiting race discrimination is a vitally different matter from imposing sexual equality. If any State can be coerced into rewriting its law of property or domestic relations so as to eliminate sex distinctions it has no independence in regard to legislation left.<sup>183</sup>

Justice Brandeis’s opinion for the Court rejected the plaintiff’s arguments in a passage remarkable for its terseness:

This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid . . . has been recognized and acted on for half a century. . . . The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.<sup>184</sup>

With that abrupt assertion, the Court disposed of the states’ rights argument against the woman suffrage amendment that had flourished for decades. It offered not a word affirming or negating the claims about the gendered structure of the federal system that opponents of the woman suffrage amendment had been advancing for decades.

## V. READING THE NINETEENTH AMENDMENT: CONSTITUTIONAL NORM OR RULE?

The campaign for woman suffrage dramatically altered the conceptual framework within which Americans reasoned about the question

<sup>183</sup> *Id.* at 98–99 (emphasis added). The argument continues:

The substantial difference then between the Fifteenth and Nineteenth Amendments is that one imposes conditions upon the exercise of the power over suffrage, while the other appropriates the power to itself, imposing upon the State and the Nation an arbitrary rule of sex uniformity from which there can be no relaxation or escape, creating a new electorate or body politic in all male suffrage states, and thus changing or depriving these States of their suffrage in the Senate, and making it impossible for them under their own laws to consent or refuse to consent to this or any other amendment whatever.

*Id.* at 99.

<sup>184</sup> *Leser*, 258 U.S. at 136.

of women voting. By the end of the campaign, the Nineteenth Amendment's supporters could appeal to forms of "common sense" that simply did not exist in the aftermath of the Civil War. In floor debate, congressmen argued, "Is it possible that any question could be more distinctly Federal than this? Is it possible that any question could go more directly to the source of the public welfare than the right of one-half of its population to vote?"<sup>185</sup> "There can be no logical objection to universal suffrage in a democracy. Indeed, a democracy is inconceivable without universal suffrage."<sup>186</sup> As one congressman observed in the final debates over the Nineteenth Amendment, dramatic changes in the ways Americans understood women's position in the family in turn produced changes in the common sense application of democratic principles to the question of their voting:

In the past the restriction of the right of suffrage to the male population was not contrary to democratic philosophy, because under the old order of civilization women derived their social status from their men and were economically dependent upon them. For the past half century a change in this regard has been taking place in the social structure, particularly in the last generation. The old conception of the place of woman in the scheme of existence was that she was the member of a household, which was ruled by a male head; that her place in the world was determined by the place held by this head; and that he was responsible for her economically. Among many this conception still obtains as a theory, and is still to an extent recognized in the law, but in reality has been substantially modified.<sup>187</sup>

Once inconceivable, women's enfranchisement was now understood by many as inevitable, reflecting and affirming important changes in the relations of the sexes and the role of the family in American life.

Of course, no major social change is experienced the same way by all who participate in it, and the ratification of the Nineteenth Amendment was no exception. Americans inside and outside the suffrage movement understood the Nineteenth Amendment to augur a shift in sex roles and family structure, but they understood and responded to this change in different ways.

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<sup>185</sup> 52 CONG. REC. 1418 (1915) (statement of Rep. Lafferty).

<sup>186</sup> 52 CONG. REC. 1437 (1915) (statement of Rep. Bryan).

<sup>187</sup> 56 CONG. REC. 788 (1918) (statement of Rep. Lehlbach). The congressman continued: The mass of women in this country are no longer entirely and solely dependent upon the men for their support and maintenance. . . . In the marriage relation the wife is no longer under such domination of her husband as he might exercise over an older child. She retains control of her own property, and her liberty of action in ordinary affairs is unchallenged. The restrictions of old conventions that limited her social activities no longer obtain. These strides toward social and economic independence do not result from the demands of women for them, but flow from industrial conditions. This status by women having been achieved, participation in political affairs is a necessary corollary.

*Id.*

This range of response is visible in the leadership of the women's movement itself. In the immediate aftermath of ratification, women activists turned to Congress for support in their campaign for progressive social reforms such as a federal maternal and infant health act, a child labor amendment, and the creation of federal agencies, including a Women's Bureau in the Department of Labor and a new Department of Education.<sup>188</sup> Creation of the Women's Bureau in 1920 and the enactment of the Sheppard-Towner infant health act in 1921 and the child labor amendment in 1924 thus represented early and highly visible political successes for newly enfranchised women.<sup>189</sup> Meanwhile, the National Woman's Party and the League of Women Voters identified sexually discriminatory legislation in states across the nation and targeted surviving elements of coverture in every jurisdiction for immediate statutory reform.<sup>190</sup> The National Woman's Party circulated early drafts of a proposed equal rights amendment,<sup>191</sup> while other organizations renewed proposals for a constitutional amendment that would give the federal government authority to enact uniform mar-

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<sup>188</sup> For a discussion of these advocacy efforts, see J. STANLEY LEMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S*, at 25-30, 45 (1973); ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM 1890-1935*, at xi-xiii (1991); Kim Nielsen, *The Security of the Nation: Anti-Radicalism and Gender in the Red Scare of 1918-1928*, at 72-83 (1996) (unpublished Ph.D. dissertation, University of Iowa) (on file with the Harvard Law School Library).

<sup>189</sup> On the passage of the legislation, see DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 254-261 (1996); LEMONS, *supra* note 188, at 25-30, 154; and MUNCY, *supra* note 188, at 93-123.

<sup>190</sup> For an account of the National Woman's Party's legislative aims, see Nat'l Woman's Party, *Declaration of Principles*, EQUAL RIGHTS, Feb. 17, 1923, at 5. For an assessment of the movement's legislative accomplishments at the decade's end, see *Report of Legislative Work from 1921 to 1929*, EQUAL RIGHTS, Jan. 4, 1930, at 379. As of 1924, the League of Women Voters reported that its state affiliates had secured enactment of eighty-six bills that would work to remove "legal discriminations against women." NAT'L LEAGUE OF WOMEN VOTERS, *A RECORD OF FOUR YEARS IN THE NATIONAL LEAGUE OF WOMEN VOTERS 1920-1924*, at 23 (1924).

<sup>191</sup> For a detailed historical account of the early drafting of an equal rights amendment and the jurisprudential and strategic debates attending this question, see 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 (1991).

Proposed drafts of an equal rights amendment that the National Woman's Party circulated in this period prohibited discrimination "on account of sex or marriage." *Id.* at 207, 213. An early draft modeled on the Thirteenth Amendment declared: "Neither political nor legal disabilities on account of sex or coverture shall exist within the United States or any place subject to its jurisdiction." *Id.* at 211 (observing that "[t]he idea lingering behind the use of the Thirteenth Amendment model was that marriage under the common law was a form of involuntary servitude for women"). As the National Woman's Party circulated drafts of a proposed constitutional amendment, it also urged state legislatures to adopt an omnibus "woman's rights bill" that prohibited inequalities in marriage in three of its four sections. See Gladys Wells, *A Critique of Methods for Alteration of Women's Legal Status*, 21 MICH. L. REV. 721, 737 & n.83 (1923) (reproducing model legislation).

riage and divorce legislation.<sup>192</sup> In the early 1920s, an expanded electorate was inviting government to play a new role in shaping the lives of women, children, and the family itself.

But, as is often the case, moments of major social reform precipitate diverse forms of containment and backlash. In the immediate aftermath of ratification, conservative groups, business associations, and politicians — including some who had actively campaigned against female suffrage — organized to oppose and, in some cases, to defeat social reforms supported by the women's movement.<sup>193</sup> Opponents of

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<sup>192</sup> Various groups seeking to restrict divorce proposed constitutional amendments that would give the federal government power to enact uniform marriage and divorce legislation. For some accounts, see NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES*, 130–51 (1962); WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA*, 238–61 (1967); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION*, 71–77, 108–44 (1991). See also MICHAEL MUSMANNO, *PROPOSED AMENDMENTS TO THE CONSTITUTION: A MONOGRAPH ON THE RESOLUTIONS INTRODUCED IN CONGRESS PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, 104–06 (1929) (listing proposed amendments granting Congress the power to enact marriage and divorce law). For the version of the amendment introduced in the post-ratification period, see *Marriage and Divorce—Proposed Amendment to the Constitution of the United States: Hearing on S.J. Res. 5, Proposing an Amendment to the Constitution of the United States Relative to Marriage and Divorce Laws Before Subcomm. of the Senate Judiciary Comm.*, 68th Cong. 1 (1924).

Proposed amendments to give Congress power to enact national marriage and divorce legislation elicited support from many prominent Americans. See BLAKE, *supra*, at 146–47 (listing among supporters of a federal divorce law President Theodore Roosevelt, Franklin Roosevelt (while still in the New York State Senate), and various governors and congressmen); RILEY, *supra*, at 134–35 (observing that the General Federation of Women's Clubs supported an amendment, while other women's groups were cautious about the proposal because of concerns about the terms of the federal divorce legislation that might be enacted). Not surprisingly, the proposals drew considerable criticism as well. Iredell Meares, Washington Counsel to the Sentinels of the Republic, assembled a lengthy critique of the amendment (as proposed by Senator Capper in 1924) that was printed in the *Congressional Record* by the Senate Judiciary Committee of the 70th Congress. Meares opposed federalizing marriage and divorce law for classic "states' rights" reasons, which he coupled with arguments infused with 1920s racism. See 70 Cong. Rec. 10,065–68 (1928).

<sup>193</sup> Groups that opposed the social transformations represented by the suffrage movement organized during the 1910s and 1920s to defeat a variety of reforms that the women's movement supported. Leadership of two of the most socially conservative groups of the 1920s, the Woman Patriots and the Sentinels of the Republic, consisted of men and women who formerly had played significant roles in the antisuffrage campaign. E.g., Nielsen, *supra* note 188, at 101, 106–108 (observing that the Woman Patriots was the "post-1920 descendent of the National Association Opposed to Woman Suffrage" and noting that Mary Kilbreth — who served on the board of directors of the Woman Patriots and was a member of the Sentinels — had been a president of the New York Association Opposed to Woman Suffrage and of the National Association Opposed to Woman Suffrage). For detailed accounts of the conservative reaction that ratification of the suffrage amendment elicited, see LEMONS, *supra* note 188, at 181–227; and Nielsen, *supra* note 188.

Spurred in part by the advocacy of such groups, during the 1920s politically prominent men such as Senator J. W. Wadsworth, Columbia University President Nicholas Murray Butler, Elihu Root, James A. Garfield, and Senator Henry Cabot Lodge joined Mary Kilbreth, Harriet Frothingham (of *Frothingham v. Mellon* renown) and other conservative women in defending the family and states' rights from encroachment by the federal government. See LEMONS, *supra* note 188, at 219; Bill Kauffman, *The Child Labor Amendment Debate of the 1920s; or, Catholics and*

reforms sponsored by the women's movement again presented themselves as defenders of traditional family values and states' rights. Their efforts derailed the child labor amendment, which fell victim in the ratification phase to a conservative network including the Sentinels of the Republic, the Woman Patriots, the National Association of Manufacturers, the American Farm Bureau Federation, and a small number of prominent religious leaders.<sup>194</sup> Opposition to the Sheppard-Towner Act also temporarily united groups such as the Sentinels of the Republic, the Woman Patriots, and the American Medical Association.<sup>195</sup> Conservatives stimulated anxieties about the federal government's growing role in shaping family life in order to encourage Americans to reject the child labor amendment and the new federal maternal infant health care program.<sup>196</sup>

*Mugwumps and Farmers*, 10 J. LIBERTARIAN STUD. 139, 157 (1992); Sheldon M. Stern, *The Evolution of a Reactionary: Louis Arthur Coolidge, 1900-1925*, 5 MID-AMERICA 89, 105 (1975).

<sup>194</sup> Kauffman, *supra* note 193, at 139-60 (describing the issues of federalism and states' rights in debates over the proposed Amendment); VOSE, *supra* note 172, at 247-52 (describing the opposition of the American Catholic Church and the Sentinels of the Republic to the child labor amendment); Nielsen, *supra* note 188, at 174-217 (arguing that the child labor amendment, like Sheppard-Towner and the Department of Education, were in part perceived as attacks on male power in the home); Richard B. Sherman, *The Rejection of the Child Labor Amendment*, 45 MID-AMERICA 3 (1963).

For some contemporary diatribes against the amendment, see Kauffman, *supra* note 193, at 140 (quoting the President of the American Bar Association's claim that the child labor amendment was "a communistic effort to nationalize children, making them primarily responsible to the government instead of to their parents"); *id.* at 155 (quoting a Congressman mocking the amendment as enjoining children to "Honor thy father and thy mother, for the Government has created them but a little lower than the Federal agent. Love, honor, and disobey them"); Sherman, *supra*, at 7-8 (quoting Georgia legislature as declaring that the child labor amendment "would place Congress in control in every home in the land between parent and child").

<sup>195</sup> For an account of the statute's defeat, see LEMONS, *supra* note 188, at 159 (observing of the Sheppard-Towner Act that "[b]ecause suffragists favored the bill, anti-suffragists opposed it"); *id.* at 163-64 (describing the medical establishment's opposition to federal maternity and infancy care); MUNCY, *supra* note 188, at 124-57 (offering a detailed account of the forces arrayed against Sheppard-Towner and the new understanding of the government's role it represented). See also Nielsen, *supra* note 188, at 221-22 (observing that "the foes of Sheppard-Towner understood the statute as another intrusion into the family home . . . Maternal health care, infant care, and child-raising pamphlets — provided by female government employees, legislated due to the lobbying of women, and funded by federal tax dollars — threatened patriarchy and the male duties which gave men power"). For some contemporary polemics against the statute, see 67 CONG. REC. 12,919-37 (1926) (petition of Harriet Frothingham) (quoted *infra* note 196); and Bentley W. Warren, *Destroying Our 'Indestructible States'*, 133 ATLANTIC MONTHLY 370, 375-77 (1924) (quoted *infra* note 196).

<sup>196</sup> Before assuming the presidency of the Sentinels of the Republic in 1925, Bentley Warren wrote a lengthy polemic in the pages of the *Atlantic Monthly* arguing that the legislative reforms supported by the women's movement and other progressive groups were "destroying our indestructible states." Warren, *supra* note 195; see also Stern, *supra* note 193, at 104 (discussing transition in the leadership of the Sentinels). The dystopia Warren envisioned began with the health care provisions of Sheppard-Towner and included the proposed Department of Education, the child labor amendment, and the amendment authorizing a national divorce law:



While the story of women's struggle to gain entry into politics and the party system during the 1920s is beyond the scope of this Article,<sup>197</sup> it is important to appreciate the ways that conflict over "the woman question" continued in the aftermath of the Nineteenth Amendment's ratification in order to understand the forces that

Even before the citizen of a state can now be born, he and his prospective mother are subject to rules and regulations established by a Federal bureau. After birth, the extent and method of his education will, under the Sterling-Towner bill, be fixed by a Federal Department of Education. However needy may be the condition of his parents, or however great his own ambition to earn something, the child-labor Amendment will enable Congress entirely to prohibit his labor until he is eighteen years old. On reaching manhood, his right to marry and, in the event of an unfortunate marriage, his resort to divorce, may be dictated by the Federal government. . . . Would it not be difficult to imagine a more complete invasion of those "more domestic and personal interests of the people" which the authors of the Constitution intended should be "provided for and regulated" by the States?

Warren, *supra* note 195, at 377. After failing in her suit challenging the constitutionality of the Sheppard-Towner Act, Harriet Frothingham expressed the Woman Patriots' objections to the Act's extension in a lengthy petition to Congress that decried a range of post-suffrage reforms affecting the family, which the petition characterized as "a triplet of socialist bills to cover education, maternity and infancy, and child labor": "The bills are different, but the backers are always the same, with the same general objective, nationalized care, control, and support of mothers and children." 67 CONG. REC. 12,919, 12,930 (1926). In the petition, the Woman Patriots argued that the feminist women proposing these new regulatory responsibilities for the federal government were in the thrall of communism. The group warned of:

[C]onclusive evidence that the communists designed to destroy the monogamous family (as the 'molecule' and 'economic' unit of society) by arousing women (as the 'proletariat') against men (the 'bourgeoisie'), precisely as they designed to destroy capitalism by abolishing private property through the class war of the proletariat against the bourgeoisie.

*Id.* at 12,945. The Woman Patriots condemned suffrage and post-suffrage activism as animated by the same dangerous impulse:

[It] has been shown that "the worst form of communism," as Senator King well calls it, is found in the feminist phase of communism — arousing women against men, wives against husbands, and providing community care for children, legitimate and illegitimate, to "remove the economic foundations of monogamous marriage," etc.

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It is also worthy of note that the feminist societies which originally proclaimed a desire for woman suffrage as their reason for existence, have not in the least discontinued their sex war campaigns, but, in fact, have intensified them, purporting to represent women voters — without ever consulting women voters on any feminist measure — en masse, as a class, aligned against men and the regular political parties, through a so-called "National League of Women Voters" and a "National Woman's Party" with the communist philosophy of sex war their only remaining excuse for existence.

*Id.* at 12,946.

<sup>197</sup> For accounts of women's early efforts to enter politics and the party system, see KRISTI ANDERSEN, *AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL* (1996); JO FREEMAN, *A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS* (2000); ANNA L. HARVEY, *VOTES WITHOUT LEVERAGE: WOMEN IN AMERICAN ELECTORAL POLITICS, 1920-1970* (1998); Nancy F. Cott, *Across the Great Divide: Women in Politics Before and After 1920*, in *WOMEN, POLITICS, AND CHANGE* (Louise A. Tilly & Patricia Gurin eds., 1990); Evelyn Brooks Higginbotham, *In Politics to Stay: Black Women Leaders and Party Politics in the 1920s*, in *WOMEN, POLITICS, AND CHANGE*, *supra*.

shaped reception of the Nineteenth Amendment itself. For like the Fourteenth Amendment, the Nineteenth Amendment was initially interpreted in ways that bore the impress of the conflicts that had given rise to constitutional reform.

In the immediate wake of its adoption, there were signs that courts — including the United States Supreme Court — interpreted ratification of the Nineteenth Amendment as changing the foundational understandings of the American legal system. These courts viewed the Nineteenth Amendment as a constitutional amendment with normative implications for diverse bodies of law, including the law of marital status.<sup>198</sup>

Yet judicial 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.

Within years of its adoption, one can see the Nineteenth Amendment progressively dissociated from questions concerning the family that governed the debate over woman suffrage from the antebellum period to ratification. And as courts proceeded to dissociate the Nineteenth Amendment from the concerns that dominated the debates over its ratification, they domesticated the woman suffrage amendment, erasing the deep structural and symbolic significance that for generations had been imputed to this constitutional reform. With interpretive construction of the Nineteenth Amendment as a rule dissociated from any larger normative concerns, one can see the containment of the Amendment's potential significance — its transformation from a systemically explosive reform to a systemically unremarkable, normatively insignificant, fragment of constitutional text.

This process of domestication was not inevitable, as early cases such as *Adkins v. Children's Hospital*<sup>199</sup> illustrate. In *Adkins* we can see an alternative path of reception — one that views women's enfranchisement as a constitutional change of deep systemic significance, one that understands the ties between the constitutional law of suffrage and the common law of marital status.

A. *Cases Reading the Nineteenth Amendment as Signaling a Shift in Understandings of Marriage: Adkins v. Children's Hospital*

While Brandeis's terse opinion in *Leser v. Garnett* was silent concerning the gendered significance of the Nineteenth Amendment's rati-

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<sup>198</sup> See *infra* section V.A, pp. 1013–19.

<sup>199</sup> 261 U.S. 525 (1923).

fiction, a year later the Supreme Court issued an opinion in *Adkins v. Children's Hospital* that treated ratification of the Amendment very differently. The Court's opinion in *Adkins* approached the Nineteenth Amendment as embodying a sex equality norm that had implications for constitutional questions other than voting. Further, the *Adkins* opinion discussed equality for women in the framework of the suffrage debates: as emancipation from the traditions of reasoning about gender embodied in the common law of marital status. But these aspects of the *Adkins* opinion have generally been forgotten because the Court offered its reading of the Nineteenth Amendment in the course of analyzing questions of substantive due process doctrine that the Court repudiated in the 1930s.

In the opening decades of the twentieth century, the Court restricted state regulation of the employment relationship to protect employees' freedom of contract. But the Court reasoned about the contractual liberties of male and female employees differently. In *Lochner*,<sup>200</sup> the Court struck down legislation restricting the number of hours a week employees could work,<sup>201</sup> while in *Muller*,<sup>202</sup> the Court held that states could validly impose such restrictions on female employees. To explain why states were constitutionally justified in regulating women's work as they could not regulate men's work, *Muller* pointed to women's role in bearing and rearing children.<sup>203</sup> *Muller* presented this physiological justification for gender-differentiated treatment of women's contracts as carrying forward the traditions of coverture. The Court reasoned that even if the old coverture rules that restricted wives' capacity to contract were then being repealed, states were still justified in imposing special restrictions on women's employment because of women's childbearing role.<sup>204</sup>

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<sup>200</sup> *Lochner v. New York*, 198 U.S. 937 (1905).

<sup>201</sup> *Id.* at 944-45.

<sup>202</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>203</sup> *Id.* at 422-23 ("The two sexes differ in structure of body, in the functions to be performed by each. . . . This difference justifies a difference in legislation.")

<sup>204</sup> *Muller* began with the observation that "[t]he current runs steadily and strongly in the direction of the emancipation of the wife." *Id.* at 418. The Court noted that Oregon had reformed the common law to allow wives to make contracts as if single. *Id.* But the Court then asserted that even if legislatures were reforming the marital status rules of the common law, there was still reason to treat women's contracts differently from men's: "Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights." *Id.* at 422. Elsewhere, I have argued that "[i]n *Muller*, the Court employed claims about women's bodies to reach a result which some decades earlier it might have justified by invoking the common law of marital status." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 323 (1992) [hereinafter Siegel, *Reasoning from the Body*].

*Adkins* involved a challenge to the gendered framework of substantive due process law. Did a law requiring employers to pay their female employees a minimum wage interfere with the employees' liberty of contract, or was it a valid exercise of the police power recognized in *Muller*? The question divided the women's movement. Many in the suffrage movement had supported protective labor legislation for women as the only form of protective labor legislation viable under prevailing constitutional doctrine; but in the immediate aftermath of the Nineteenth Amendment's ratification, some in the movement were beginning to question the wisdom of supporting sex-differentiated legislation and to call for a general prohibition on sex distinctions in law.<sup>205</sup> The critics of protective labor legislation who challenged the minimum wage law in *Adkins* drew on feminist criticism of sex-based legislation to attack the gendered assumptions on which substantive due process law rested.<sup>206</sup> The lower court found their objections persuasive and tied the need for doctrinal reform to ratification of the Nineteenth Amendment,<sup>207</sup> as did the Supreme Court.

Justice Sutherland, who had recently joined the Court, wrote the opinion in *Adkins* that struck down the sex-based minimum wage law on sex equality grounds. Before his appointment, Sutherland had counseled Alice Paul of the National Woman's Party on the suffrage amendment and, after its ratification, advised Paul about drafting an equal rights amendment.<sup>208</sup> The opinion he wrote for the Court in *Adkins* pointed to the changes in women's status culminating in the ratification of the Nineteenth Amendment as a reason for distinguishing *Muller* and for analyzing the regulation of women's employment in the same constitutional framework the Court used to analyze the regulation of men's employment:

But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller case* . . . , 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 un-*

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<sup>205</sup> For a detailed account of the political and jurisprudential aspects of this conflict, see Zimmerman, *supra* note 191. See also NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 117–42 (1987); Reva Siegel, Book Review, 3 *BERKELEY WOMEN'S L.J.* 171, 180–87 (1987–88) (reviewing SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925* (1987)). For a recent work on "maternalist" thought in the movement during the progressive era, see Lisa D. Brush, *Love, Toil, and Trouble: Motherhood and Feminist Politics*, 21 *SIGNS* 429, 433–35 (1996).

<sup>206</sup> See Zimmerman, *supra* note 191, at 220–21.

<sup>207</sup> See *Children's Hosp. v. Adkins*, 284 F. 613, 618 (D.C. Cir. 1922) ("No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by constitutional amendment . . .").

<sup>208</sup> See Zimmerman, *supra* note 191, at 212–13, 219–20.

*reasonable to say that these differences have now come almost, if not quite, to the vanishing point.* In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, *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.* To do so 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 that old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.*<sup>209</sup>

The *Adkins* opinion is historically significant, not simply because it reads the Nineteenth Amendment as conferring equality on women, but because the opinion understands sex equality as freedom from traditions of reasoning about gender rooted in the common law of marital status: the Court describes the changes culminating in ratification of the Nineteenth Amendment as according woman “emancipation from that old doctrine” that subjects her to “special protection or . . . restraint in her contractual and civil relationships.”<sup>210</sup> Because *Adkins* views the gender-differentiated framework of substantive due process law as carrying forward the traditions of coverture and understands the Nineteenth Amendment as repudiating those same traditions, the opinion concludes that substantive due process law should be modified to reflect the changes in women’s status expressed in the new constitutional amendment. With ratification of the Nineteenth Amendment, *Muller’s* reasoning no longer controls, and women may not be “subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.”<sup>211</sup>

Many criticized the Court’s reasoning in *Adkins*. Dissenters argued that the gender-differentiated framework of substantive due process law reflected differences in the physical and social roles of the sexes that were not eliminated by ratification of the Nineteenth Amendment.<sup>212</sup> But *Adkins* remains historically significant, however one judges substantive due process law or the gender distinctions within it. The opinion demonstrates that in the immediate aftermath of ratification, the Court interpreted the Amendment in light of the woman suffrage debates. In this period, the Court understood the Amendment to

<sup>209</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (emphasis added).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 567 (Taft, C.J., dissenting); *see also id.* at 569–70 (Holmes, J., dissenting).

confer equality on women by breaking with traditional ways of reasoning about women's roles rooted in the family relationship.

Reasoning from this standpoint, *Adkins* interpreted the Amendment as a change in the Constitution with significance for other bodies of constitutional doctrine. The *Adkins* opinion pointed to shifts "in the contractual, political and civil status of women culminating in the Nineteenth Amendment,"<sup>213</sup> and treated this positive account of the ratification campaign normatively — as a reason for similarly transformative interpretation of the due process jurisprudence of the Fifth and Fourteenth Amendments. *Adkins* thus offers the first synthetic interpretation of the Nineteenth Amendment.<sup>214</sup> The opinion understands the suffrage amendment as bringing about a major change in the terms of women's citizenship, a change having implications for the way the Court interprets diverse bodies of constitutional law.

The Supreme Court was not the only court to read the Nineteenth Amendment as embodying a sex equality norm that had implications for practices other than voting, or to suggest that the Amendment's ratification marked a break with the common law's marital status norms. For example, two years after the *Adkins* decision, a federal district court interpreted the suffrage amendment as abrogating coverture principles in federal law. Asked to apply the common law doctrine relieving a wife of liability for criminal conduct undertaken with her husband, the judge refused, observing that "since the adoption of the Nineteenth Amendment to the Constitution, it seems to me that the rule of common law has no application to crimes committed against the United States."<sup>215</sup> This same understanding of the Nineteenth Amendment moved a judge concurring in a federal tax case to reject the government's claim that, by marriage, a wife's tax domicile was her husband's.<sup>216</sup> Citing *Adkins* for the proposition that "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,"<sup>217</sup> the judge asserted that the Nineteenth Amendment "covers the right of woman to select and establish a resi-

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<sup>213</sup> *Adkins*, 261 U.S. at 553.

<sup>214</sup> *Cf. supra* pp. 966–67 (discussing synthetic interpretation).

<sup>215</sup> *United States v. Hinson*, 3 F.2d 200, 200 (S.D. Fla. 1925).

<sup>216</sup> *See McCormick v. United States*, 57 *Treas. Dec.* 117, 125–26 (1930) (Cline, J., concurring). I am indebted to Gretchen Ritter for drawing my attention to this decision. *See also* SOPHONISBA P. BRECKINRIDGE, *MARRIAGE AND THE CIVIC RIGHTS OF WOMEN: SEPARATE DOMICIL AND INDEPENDENT CITIZENSHIP* 4–5 (1931) (discussing state legislation allowing separate domicile).

<sup>217</sup> *McCormick*, 57 *Treas. Dec.* at 125 (quoting *Adkins*, 261 U.S. at 553) (internal quotation marks omitted).

dence wherever she chooses to vote."<sup>218</sup> Other courts deciding questions concerning coverture law invoked the suffrage amendment to authorize liberalizing interpretations of the common law.<sup>219</sup> In these cases, courts invoked the Nineteenth Amendment as a reason for exercising their discretion in interpreting the common law so as to restrict the authority of traditional coverture concepts.

But these decisions were not common. More often, courts treated constitutional and common law regimes as juridically independent. One federal court objected: "[I]n this age of the Nineteenth Amendment, rights of women, feminism, women office holders, and general emancipation of the sex, it is almost shocking to learn that in one form of conveyancing, 'the husband and wife are as one person in law' . . . ." <sup>220</sup> The court understood the Nineteenth Amendment as repudiating the gender understandings of coverture but observed the conflict without treating ratification of the suffrage amendment as a reason for adopting a liberalizing interpretation of the common law. In this respect, the opinion reflects what was shortly to emerge as the "common sense" view of the Amendment: that it had no direct bearing on marital status law. Indeed, soon after the Supreme Court invoked ratification of the Nineteenth Amendment as a reason for striking down the sex-based minimum wage law in *Adkins*, the Court upheld a law that prohibited women from working in restaurants at night, distinguishing *Adkins* and once again invoking the reasoning of *Muller*.<sup>221</sup>

Legislatures responded to ratification of the Nineteenth Amendment in similar terms. In the wake of the Amendment's ratification, the women's movement persuaded Congress to enact the Cable Act,

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<sup>218</sup> *Id.* The majority held that the woman had established an independent domicile for tax purposes because the husband had consented to the arrangement. *See id.* at 120.

The Virginia Supreme Court also recognized a married woman's right to select her own domicile for state tax purposes. In so holding, the court expressed concern that continued adherence to the marital unity principle would be "subversive of the statutory right of voting." *Commonwealth v. Rutherford*, 169 S.E. 909, 913 (Va. 1933) (quoting *Shute v. Sargent*, 36 A. 282, 283 (N.H. 1892)).

<sup>219</sup> For example, a New Jersey chancery court concluded that the legal changes culminating in ratification of the Nineteenth Amendment warranted giving a narrow construction to a clause in the state's married women's property act that preserved coverture restrictions on a wife's capacity to contract. *Hollander v. Abrams*, 132 A. 224, 229 (N.J. Ch. 1926) (observing that traditions in equity allowing a wife to act as a separate agent with respect to her separate property had been "enlarged and extended by both courts and legislative bodies to the point where, since the adoption of the Nineteenth Amendment to the federal Constitution, practically all of the disabilities of women, both married and single, have been removed, so that [today] she has practically all the rights and privileges of the male citizen"). The New Jersey court described the Nineteenth Amendment's ratification as the culmination of efforts to emancipate women from traditional forms of status regulation and then treated the Amendment as normative authority to extend these egalitarian commitments in private law, much as *Adkins* did in public law.

<sup>220</sup> *McNeil v. Conn. Fire Ins. Co.*, 24 F.2d 221, 223 (W.D. Tenn. 1928).

<sup>221</sup> *See Radice v. New York*, 264 U.S. 292, 295 (1924).

which allowed women who married certain foreign nationals to retain their American citizenship.<sup>222</sup> In providing that husband and wife could be citizens of different nations, the statute broke with coverture domicile rules, a departure justified by reference to the Nineteenth Amendment.<sup>223</sup> As one congressman put it, "there was no particular force in the demand for this bill until the nineteenth amendment became part of the organic law of the land. . . . At that moment the doctrine of dependent or derived citizenship became as archaic as the doctrine of ordeal by fire."<sup>224</sup> But the Cable Act abolished dependent citizenship for only some women. Congress retained the old common law domicile rules for women who married men of disfavored races or nationalities, compelling them to forfeit their American citizenship.<sup>225</sup> A number of states also reformed common law domicile rules in the wake of the Nineteenth Amendment's ratification, but like the Cable Act, the new state laws only partly abrogated the common law rule. They allowed married women to choose their own domiciles for voting purposes only, leaving the common law rule otherwise intact.<sup>226</sup>

Thus, in the immediate aftermath of ratification, both the Supreme Court and Congress understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law. But neither the Court nor Congress acted consistently on this understanding. Some federal and state courts viewed ratification of the suffrage amendment as a reason to repudiate, or interpret restrictively, coverture concepts in various pri-

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<sup>222</sup> See Act Relative to the Naturalization and Citizenship of Married Women, ch. 411, 42 Stat. 1021 (1922) [hereinafter Cable Act].

<sup>223</sup> See Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC'Y 1, 13 (1984).

<sup>224</sup> 62 CONG. REC. 9047 (1922) (statement of Rep. Rogers), quoted in Sapiro, *supra* note 223, at 12. For a contemporary account that analyzes the Cable Act in light of changes in the law of marriage as well as suffrage, see Cyril D. Hill, *Citizenship of Married Women*, 18 AM. J. INT'L L. 720, 725 (1924) (discussing changes in the law of marital status and observing that "[s]uch a revolution in civil rights could not be effected without a similar tendency in political rights").

<sup>225</sup> According to the Act, an American woman still lost her citizenship if she married a foreigner who was ineligible for United States citizenship, such as an Asian man. Cable Act, § 3, 42 Stat. at 1022. For a discussion of the exceptions to the Cable Act that emphasizes the connection between women's marital status and citizenship, see Cott, *supra* note 90, at 1464-68.

<sup>226</sup> Some state legislators attempted to resolve issues surrounding the determination of married women's domicile by providing statutory exceptions to the common law rule of marital unity. Many states established that married women could establish a separate domicile for voting purposes. See, e.g., 1929 Me. Acts 268; 1922 Mass. Acts 315-16; MICH. COMP. LAWS § 2755 (1929); 1927 N.J. Laws 325; 1929 N.Y. Laws 984; 1923 Ohio Laws 118-19; 1923 Pa. Laws 1034; VA. CODE ANN. § 82a (Michie 1924); 1921 Wis. Laws 869 (establishing that women have "the same rights and privileges under the law as men in the exercise of suffrage, [and] freedom of contract," and also allowing married women a "choice of residence for voting purposes"). But see N.C. CONS. STAT. § 5937(a) (Michie 1939) (stating that married women may only establish a separate domicile for voting purposes if their husbands are domiciled outside of the state).



vate law settings. But this understanding of constitutional reform never gathered significant momentum.

*B. From Norm to Rule: Cases Applying the Nineteenth Amendment to Office Holding and Jury Service*

If, however, one changes context — moving away from matters concerning marriage law to matters concerning “political” rights, such as the right to hold office and to serve on juries — one encounters new evidence of conflict about the meaning and scope of the Amendment in the immediate aftermath of its ratification.<sup>227</sup>

At least some states viewed the Nineteenth Amendment as conferring upon women full citizenship status in the political sphere. Consider the case of Maine. While that state’s courts had interpreted its constitution to prohibit women from holding office, the legislature responded to the ratification of the Nineteenth Amendment by enacting a statute declaring that the right to hold state office could not be denied on account of sex. The state’s highest court then ruled that its governor could appoint a woman as justice of the peace.<sup>228</sup> In upholding the appointment under the statute, the Supreme Judicial Court of Maine declared that the Nineteenth Amendment nullified the earlier interpretation of the state constitution: “Every political distinction based upon the consideration of sex was eliminated from the Constitution by the ratification of the amendment. Males and females were thenceforth, when citizens of the United States, privileged to take equal hand in the conduct of government.”<sup>229</sup> Other state courts joined Maine in ruling that the Nineteenth Amendment eliminated state-law restrictions on women holding office.<sup>230</sup>

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<sup>227</sup> For historical accounts of the Nineteenth Amendment’s interpretation in the jury cases, see LEMONS, *supra* note 188, at 69–73; Brown, *supra* note 2, at 2182–85; Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. (forthcoming 2002). For a more recent argument that the Nineteenth Amendment should be read to bestow on women the full panoply of political rights (for example, the right to hold office, serve on juries, and even serve in militias), see Amar, *Women and the Constitution*, *supra* note 2, at 471–72; and Amar, *The Bill of Rights as a Constitution*, *supra* note 2, at 1202–03. See also Vikram David Amar, *supra* note 2, at 241–42.

<sup>228</sup> See Opinion of the Justices, 113 A. 614, 615–16 (Me. 1921).

<sup>229</sup> *Id.* at 617.

<sup>230</sup> For an account of the different ways that states responded to ratification of the Nineteenth Amendment in matters concerning women’s eligibility to hold office, see LEMONS, *supra* note 188, at 68–69. For other office-holding cases, see *In re Opinion of the Justices*, 135 N.E. 173, 175–76 (Mass. 1922), which held that by striking the sex restriction on voting from the Massachusetts constitution, the Nineteenth Amendment removed the only source of law that might have precluded women from holding office; *Preston v. Roberts*, 110 S.E. 586, 586 (N.C. 1922), which held that a woman was qualified to serve as a notary public and deputy clerk of the superior court because the Nineteenth Amendment had removed the disqualification to hold public office; and *Dickson v. Strickland*, 265 S.W. 1012, 1023 (Tex. 1924), which cited the Nineteenth Amendment in holding that the wife of a former governor was not disqualified from holding public office by rea-

Jury service was another arena in which legislatures and courts wrestled with the implications of the Nineteenth Amendment's ratification. The common law barred women from serving on juries<sup>231</sup> — an exclusion long protested by the suffrage movement.<sup>232</sup> Ties between suffrage and eligibility for jury service were tight enough that in some states legislatures responded to ratification of the Nineteenth Amendment by enacting statutes that enabled women to serve as jurors.<sup>233</sup> But in states where no such legislation was enacted, courts disagreed about whether the Nineteenth Amendment made women eligible for jury service. Did women's enfranchisement signal that women were entitled to participate as citizens on the same terms as men, or did the Amendment address questions of voting only?

Courts divided. In some states where statutes provided that jurors were to be drawn from the pool of electors, courts reasoned that, after the Nineteenth Amendment enfranchised women, women were entitled to serve as jurors — even if the statutes discussed eligible jurors as “men.”<sup>234</sup> But courts in other states read the Amendment more narrowly. Interpreting a juror qualification statute that designated male residents as jurors, the Louisiana Supreme Court reasoned that the Nineteenth Amendment enfranchised women without making the new

son of sex or marital status. *But see* State *ex rel.* Buford v. Daniel, 99 So. 804 (Fla. 1924) (upholding a statute providing that the county welfare board was to be composed of five men and four women, over a dissenting opinion arguing that the rule was unconstitutional under the Nineteenth Amendment).

<sup>231</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*362.

<sup>232</sup> See Ritter, *supra* note 227 (discussing the jury claim after the ratification of the suffrage amendment); *supra* p. 992 (discussing the jury claim during the suffrage campaign).

<sup>233</sup> See, e.g., State v. James, 114 A. 553, 556 (N.J. 1921) (“The spirit of equality of the sexes which [the Nineteenth Amendment] breathes moved the Legislature of New Jersey in 1921 to amend our act concerning jurors so as to include . . . women as well as men.”); LEMONS, *supra* note 188, at 72 (observing that in the immediate aftermath of ratification, twenty states put women on juries, but that the momentum for change dissipated shortly thereafter).

<sup>234</sup> See, e.g., Browning v. State, 165 N.E. 566, 567 (Ohio 1929) (holding that women automatically became eligible to serve as jurors after the ratification of the Nineteenth Amendment, despite the word “men” in the jury statute, because the state statute provided that all electors were to serve as jurors); Cleveland, Cincinnati, Chi. & Saint Louis Ry. v. Wehmeier, 170 N.E. 27, 29 (Ohio Ct. App. 1929) (same). State courts also interpreted state suffrage amendments expansively to enable women to serve as jurors. See, e.g., People v. Barltz, 180 N.W. 423, 425 (Mich. 1920); Parus v. Dist. Court, 174 P. 706, 708–10 (Nev. 1918) (holding that the state constitutional amendment allowing women to vote enabled women to serve as jurors notwithstanding the use of “he” in the statute stipulating jury qualifications).

Because of a strong common law tradition in which only men served as jurors, courts also considered and rejected claims that *gender-neutral* juror statutes permitted only men to serve as jurors, even after women had become electors by federal or state constitutional amendment. See, e.g., Palmer v. State, 150 N.E. 917, 919 (Ind. 1926) (finding that where state law established gender-neutral juror qualifications, the Nineteenth Amendment made women electors and hence eligible for jury service); Commonwealth v. Maxwell, 114 A. 825, 829 (Pa. 1921) (holding that a pre-Nineteenth Amendment statute providing that “electors” are subject to jury duty applied prospectively to women following the passage of the Nineteenth Amendment).

electors jurors,<sup>235</sup> emphasizing that “[a] trial by jury, at common law, and as guaranteed by the Constitution, has been universally declared to mean a trial by a jury of men, not women, nor men and women.”<sup>236</sup> Illinois courts read the Nineteenth Amendment in this same narrow fashion. Even though Illinois law provided that electors would serve as jurors without referring to sex, the state’s highest court read a sex restriction into the statute: “The word ‘electors,’ in the statute here in question, meant male persons, only, to the legislators who used it.”<sup>237</sup> Ratification of the Nineteenth Amendment might have made women electors, but it did not make the new electors jurors: “The Nineteenth Amendment to the Constitution of the United States makes no provision whatever with reference to the qualifications of jurors.”<sup>238</sup> As a Massachusetts court explained: “The change in the legal status of women wrought by the Nineteenth Amendment was radical, drastic, and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication.”<sup>239</sup> This narrow understanding of the Nineteenth Amendment, as a rule governing voting only, emerged

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<sup>235</sup> *State v. Bray*, 95 So. 417, 417 (La. 1923) (finding that a state constitutional amendment allowing women to serve as jurors only if they had registered for jury duty did not violate the Nineteenth Amendment). For similar state court responses to the Nineteenth Amendment during the 1920s, see *State v. Dreher*, 118 So. 85, 92–93 (La. 1928), which held that a statute that only required women to register before being considered for jury service did not violate a female criminal defendant’s rights as secured by the Fourteenth, Fifteenth, and Nineteenth Amendments; *People ex rel. Fyfe v. Barnett*, 150 N.E. 290, 291 (Ill. 1925), which held that the Nineteenth Amendment had no effect on women’s eligibility for jury service; *State v. Mittle*, 113 S.E. 335, 337 (S.C. 1922), which held that the Nineteenth Amendment conferred upon women neither the right to vote nor the right to serve as jurors, but instead simply barred the state from discriminating against women in voting qualifications; and *Harper v. State*, 234 S.W. 909, 910 (Tex. Crim. App. 1921), which held that the Nineteenth Amendment had no effect on women’s eligibility for jury service.

<sup>236</sup> *Bray*, 95 So. at 418.

<sup>237</sup> *Fyfe*, 150 N.E. at 292.

<sup>238</sup> *Id.* at 291. Well into the 1930s, many state courts continued to interpret the Nineteenth Amendment as a rule that only concerned suffrage. See, e.g., *Hall v. State*, 187 So. 392, 400–01 (Fla. 1939) (observing that the Nineteenth Amendment did not alter juror eligibility, nor any laws “protective to women”); *Powers v. State*, 157 S.E. 195, 195 (Ga. 1931) (holding that a Georgia statute prohibiting women from serving on juries, passed after the Nineteenth Amendment, was not “obnoxious” to the Nineteenth Amendment); *People ex rel. Murray v. Holmes*, 173 N.E. 145, 147 (Ill. 1930) (“The Nineteenth Amendment has nothing to do with the qualification for service as jurors. . . . The federal government has nothing to do with [women’s] selection as jurors.”); *State v. Dolbow*, 189 A. 915, 918 (N.J. 1937) (holding that the Nineteenth Amendment “conferred no right on women to serve on the juries in our courts; it conferred nothing but the right of franchise”). For a similarly narrow interpretation of state constitutional amendments and statutes, see *State v. Kelley*, 229 P. 659 (Idaho 1924), which held that Idaho’s women’s suffrage amendment, in combination with changes to the state jury statute eliminating gendered references, had no bearing on women’s eligibility to serve as jurors, *id.* at 660.

<sup>239</sup> *Commonwealth v. Welosky*, 177 N.E. 656, 661 (Mass. 1931) (“When [legislators] used the word ‘person’ . . . to describe those liable to jury service, no one contemplated the possibility of women becoming so qualified.”).

as the dominant understanding of the Amendment. The Supreme Court never mentioned the Nineteenth Amendment in its cases upholding,<sup>240</sup> and then striking down,<sup>241</sup> statutes providing women automatic exemptions from jury service.

### VI. *Rereading the Fourteenth Amendment: Families, Federalism, and Equal Protection*

Modern 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. In developing sex discrimination doctrine under the Fourteenth Amendment, the Court seems to have proceeded from the understanding that there is no constitutional history that would support a constitutional commitment to equal citizenship for women — that such a commitment is to be derived, to the extent it can be derived at all, by analogizing race and sex discrimination. 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.

Erasure of the Nineteenth Amendment from our collective memory and constitutional canon<sup>242</sup> has helped produce a body of sex discrimination law that lacks foundation in our constitutional history and that defines equal protection formalistically, as a constraint on state action that draws group-based distinctions between men and women.<sup>243</sup> The Court’s failure to ground sex discrimination jurisprudence in anything approximating constitutional or social history gives us a law of sex discrimination that begins by according heightened scrutiny to a statute regulating the sale of watered-down beer.<sup>244</sup>

Of the twenty-nine equal protection cases involving sex discrimination that the Court has decided since *Reed v. Reed*,<sup>245</sup> nineteen have

<sup>240</sup> See *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding a statute giving women an absolute exemption from jury service unless they expressly waived the privilege, reasoning that “[d]espite 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”).

<sup>241</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (holding that Alabama’s use of gender as a basis for peremptory strikes in jury selection is unconstitutional under the Equal Protection Clause); *Taylor v. Louisiana*, 419 U.S. 522, 525–26 (1975) (finding that a statute providing women automatic exemption from jury service, waivable in writing, is unconstitutional under the Sixth and Fourteenth Amendments).

<sup>242</sup> See *supra* p. 950 & nn.2–3.

<sup>243</sup> See *supra* Part I, pp. 953–60.

<sup>244</sup> See *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>245</sup> 404 U.S. 71 (1971).

involved laws that in some way regulated family relationships,<sup>246</sup> but the sole question that the Court addressed in these cases was whether

<sup>246</sup> See *Tuan Anh Nguyen v. INS*, 121 S. Ct. 2053, 2065 (2001) (upholding a proof-of-paternity requirement for citizenship when the citizen-parent of a child born abroad is the father); *Miller v. Albright*, 523 U.S. 420, 445 (1998) (upholding the same proof-of-paternity requirement at issue in *Nguyen*); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 286-87 (1993) (overturning an injunction against protesters at an abortion clinic); *Heckler v. Mathews*, 465 U.S. 728, 750-51 (1984) (upholding a Congressional "pension offset" provision that applies to nondependent men but not to nondependent women); *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (upholding a New York procedure for contesting adoption proceedings as applied to a father); *Kirchberg v. Feenstra*, 450 U.S. 455, 462-63 (1981) (holding unconstitutional a Louisiana statute that allowed a husband to dispose of jointly owned community property without his wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980) (holding unconstitutional a provision of Missouri's workers' compensation law that granted a widow death benefits without her having to prove incapacitation or dependency, but that denied benefits to a widower in the absence of such proof); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional an Aid to Families with Dependent Children provision that granted benefits to families when dependent children were deprived of parental support because of the unemployment of their father, but not of their mother); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (holding unconstitutional a New York law that allowed unwed mothers, but not unwed fathers, to block adoption of their children simply by withholding consent); *Parham v. Hughes*, 441 U.S. 347, 358-59 (1979) (upholding a Georgia statute permitting the mother, but not the father, of an "illegitimate" child to sue for wrongful death of the child); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (holding unconstitutional an Alabama statute imposing alimony obligations on husbands but not on wives); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (holding unconstitutional a Social Security Act provision that allowed a widow benefits regardless of dependency but that allowed a widower benefits only if half or more of his support came from his working wife); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975) (holding unconstitutional a Utah statute that classified males as minors until age twenty-one and females as minors until age eighteen for child support purposes); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding unconstitutional a gender-based distinction in the Social Security Act that granted survivor benefits to widows but not to widowers); *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (upholding a California disability insurance system that excluded pregnancy from coverage); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (upholding Florida's differing treatment of widows and widowers for tax purposes); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (holding unconstitutional the uniformed services' policy of preventing married female officers from seeking benefits for "dependent" spouses); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding unconstitutional a provision of the Idaho probate code that gave preference to male relatives over female relatives as estate administrators).

The Supreme Court has also decided a variety of sex discrimination cases under the Equal Protection Clause that did not involve family relationships. See *United States v. Virginia*, 518 U.S. 515, 558 (1996) (holding unconstitutional Virginia's exclusion of women from its military college, the Virginia Military Institute); *J.E.B.*, 511 U.S. at 130-31 (holding that intentional discrimination on the basis of gender by state actors in exercising peremptory jury challenges violates the Equal Protection Clause); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631 (1984) (upholding application of the Minnesota Human Rights Act to compel a nonprofit organization to accept women); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (holding unconstitutional a Mississippi nursing school's single-sex admissions policy); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding the Military Selective Service Act, which registers and conscripts only men); *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (upholding California's statutory rape law that makes men and not women criminally liable for having sexual relations with an underage partner); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 280-81 (1979) (upholding Massachusetts's grant of absolute lifetime preference to veterans in civil service applications); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (allowing an implied private right of action for gender discrimination under the Due Process Clause of the Fifth Amendment); *Craig*, 429 U.S. at 210 (holding unconstitutional an Okla-

the state could distribute entitlements or obligations in a manner that employed group-based classifications. This question is not insignificant, but it is hardly the only question we might ask when considering whether a given state practice, especially one regulating family relations, accords women the equal protection of the law.

These omissions in equal protection law in turn have consequences in the law of federalism. Because sex discrimination doctrine does not identify the family as a historic site of status inequality for women, it exerts no constraints on federalism doctrines that identify the family as the paradigmatic site of state, rather than federal, jurisdiction. The interplay of equal protection and federalism doctrines can thus insulate state regulation of family life from Fourteenth Amendment scrutiny, thereby perpetuating traditional forms of status inequality between the sexes.

To illustrate how completely, and consequentially, prevailing understandings of the Constitution erase the constitutional history of the Nineteenth Amendment, I offer as a brief case study the litigation that produced and attended the provisions of the Violence Against Women Act (VAWA) that were recently invalidated by the Court in *United States v. Morrison*.<sup>247</sup> I then reflect on some of the ways that knowledge of the history recounted in this Article might alter our understanding of the Constitution. Finally, I examine some doctrinal pathways by which this new understanding of our constitutional history might manifest itself, considering in particular how the analytical framework of sex discrimination doctrine might vary if it were based on a synthetic interpretation of the Fourteenth and Nineteenth Amendments and a sociohistoric understanding of sex equality grounded in the history of the woman suffrage campaign.

#### *A. The Violence Against Women Act — and the Failures of Sex Discrimination Doctrine*

Congress enacted the provisions of VAWA that the Court struck down in *United States v. Morrison* to remedy deficiencies in the protections afforded women by sex discrimination doctrine under the Equal Protection Clause. As we have seen, during the 1970s the Supreme Court adopted a regime of heightened scrutiny under the Equal Protection Clause that prompted most states to remove sex distinctions from laws regulating family life, including policies governing sexual

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homa statutory scheme that authorized the sale of 3.2% beer to females over 18 and males over 21); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (holding unconstitutional the systematic exclusion of women from jury venires); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (upholding the United States Navy's policy of allowing women more time than men to achieve promotion before facing a discharge).

<sup>247</sup> 120 S. Ct. 1740 (2000).

assault and assault between intimates.<sup>248</sup> From the standpoint of equal protection doctrine, this change in policy amounted to the elimination of "sex discrimination" from the law. Yet, too often, the change was of little consequence because the sex distinctions in the policy were merely descriptive of the parties who engaged in the regulated conduct and had little other directive or distributive force. Making the exemption for husbands who rape their wives gender-neutral gives equal treatment to wives who rape their husbands, but does nothing for women who are raped in marriage.

Sex discrimination doctrine does not recognize the regulation of family relations as a site of special equal protection concern for women. Fashioned in the image of race discrimination doctrine, the law of sex discrimination sees status harm in state action that segregates or classifies citizens on the basis of group membership.<sup>249</sup> It does not recognize the forms of status harm that may be inflicted in relations of intimacy, nor does it understand how the state enforces status relations through the regulation of practices that are primarily or exclusively performed by members of one group. Sex discrimination doctrine may have prompted state actors to adopt gender-neutral terminology in regulating family relations, but too often this change has been cosmetic, exerting little or no effect on the regulatory incidence of the law. A constitutional regime that insists that the state regulate gender-specific conduct in gender-neutral language (for example, "spousal rape") may do little more than mask the gender-specificity of the regulated conduct.

In determining the kinds of state action that are "sex-based" and so warrant heightened scrutiny, the Court reasons formalistically, without reference to the history of women's treatment in the American legal system.<sup>250</sup> Thus, the Court ignores the fact that many nineteenth-century doctrines of marital status law were couched in facially neutral terms (for example, the doctrine of interspousal tort immunity that precluded "spouses" from suing each other for battery).<sup>251</sup> And the Court ignores the fact that, under the pressure of heightened scrutiny, many of the most infamous marital status doctrines of the common law have recently been redefined in gender-neutral terms. A rule that exempts spouses from criminal prohibitions on rape, treats spousal battery more leniently than other forms of assault, values "homemaker" services, or defines child support will not trigger heightened scrutiny, no matter how closely its history may be tied to the marital status rules

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<sup>248</sup> See Siegel, *The Rule of Love*, *supra* note 31, at 2189-91; *supra* Part I, pp. 953-60.

<sup>249</sup> See *supra* Part I, pp. 953-60.

<sup>250</sup> See *supra* pp. 958-59.

<sup>251</sup> See Siegel, *The Rule of Love*, *supra* note 31, at 2156-58.

of the common law.<sup>252</sup> The Court defers to legislative judgments so long as there is no evidence that the facially neutral policy is motivated by a discriminatory purpose, a concept that the Court has defined as tantamount to malice: state action is discriminatory only if undertaken "at least in part 'because of,' [and] not merely 'in spite of,' its adverse effects" on women.<sup>253</sup>

Thus, when women challenged policies that provided victims of domestic violence less protection than victims of other violent crimes, they had great difficulty proving that the policies discriminated on the basis of sex — despite the fact that it is women who are overwhelmingly the targets of assaults between intimates.<sup>254</sup> Federal courts have repeatedly ruled that facially neutral spousal assault policies do not trigger heightened review under the Equal Protection Clause.<sup>255</sup> Judicial interpretation of the Equal Protection Clause thus has played virtually no role in the campaign to reform the law of rape, to abolish the

<sup>252</sup> See *id.* at 2188–96.

<sup>253</sup> *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>254</sup> See Siegel, *The Rule of Love*, *supra* note 31, at 2172–73.

<sup>255</sup> See *Hynson v. City of Chester*, Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988) ("[I]f the categories used by the police in administering the law are domestic violence and nondomestic violence, this is not sufficient to raise a claim for gender-based discrimination absent a showing of an intent, purpose or effect of discriminating against women."); see also *Shipp v. McMahon*, 234 F.3d 907, 914–15 (5th Cir. 2000); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Navarro v. Block*, 72 F.3d 712, 716–17 (9th Cir. 1995) (reversing the district court's dismissal of an equal protection claim on summary judgment because issues of material fact remained as to whether the county had a custom of not classifying domestic violence 911 calls as emergencies, in which case the policy might fail even the rational basis test); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994); *Brown v. Grabowski*, 922 F.2d 1097, 1101 (3d Cir. 1990). For more on how discriminatory purpose is established, see *Watson v. City of Kansas City*, 857 F.2d 690, 696–97 (10th Cir. 1988), which required an equal protection plaintiff to show that the defendant police department had adopted a policy or custom of providing less protection to victims of domestic assault than to other assault victims, that discrimination against women was the motivating factor behind this policy or custom, and that the operation of the policy or custom caused the injury.

In an early case that stimulated public awareness of the discriminatory implications of traditional domestic violence policies, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), the court assumed for the purpose of denying a motion to dismiss that the plaintiff's allegations of gender-based discrimination were true, noting that in the vast number of cases, it is the husband who has abused his wife. The court observed that "[i]t may develop that the classification in the instant case is not one based on gender, but instead consists of all spouses who are victims of domestic violence — male and female." *Id.* at 1528 n.1; see also *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (noting that where a complaint alleged that responding police officer "stated that he 'did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on[,]'" . . . [s]uch remarks strongly suggest an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women" (quoting Balistreri's complaint)), *distinguished in Navarro*, 72 F.3d at 716–17 (stating that Navarro had failed to offer any evidence of the sort of "invidious intent or motive" found in *Balistreri*). Thus, a municipality defending a domestic violence policy couched in "gender neutral" terms need only show that such a policy satisfies the "rational relation" test.



marital rape exemption,<sup>256</sup> and to alter domestic violence policies,<sup>257</sup> which for the most part has been conducted in legislatures, administrative agencies, and on the streets.

With the courts silent, women asked Congress to exercise its powers under the Commerce Clause and Section Five of the Fourteenth Amendment to enact a statute recognizing women's civil right to freedom from gender-motivated violence. Advocates made the case for the civil rights remedy — whose terms did not reference the family<sup>258</sup> — by emphasizing the States' historic failure to enforce laws against rape and assault in marriage.<sup>259</sup> Precisely because advocates raised these concerns, the proposed civil rights statute met with a wave of federalism objections.

As soon as the civil rights remedy was proposed, the Conference of Chief Justices announced its opposition to the bill on the ground that "the federal cause of action . . . would impair the ability of state courts to manage criminal and family law matters traditionally entrusted to the states."<sup>260</sup> Speaking for the Judicial Conference of the United States, Chief Justice Rehnquist also objected to the civil rights remedy, complaining that the "new private right of action [is] so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes."<sup>261</sup> Facing objections such as these, the bill's

<sup>256</sup> Cf. Hasday, *supra* note 31, at 1381.

<sup>257</sup> See Siegel, *The Rule of Love*, *supra* note 31, at 2191-94.

<sup>258</sup> The civil rights remedy as it was eventually enacted provided that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b) (1994). It defined a "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1). Victims of gender-motivated violence were entitled to compensatory and punitive damages, as well as declaratory and injunctive relief. *Id.* § 13981(c).

<sup>259</sup> See S. REP. NO. 101-545, at 36 (1990) (first committee report on the proposed civil rights remedy to trace women's need for federal legislative redress to the legacy of the common law's approach to domestic violence). On the general background of the civil rights remedy, see Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000); and Siegel, *The Rule of Love*, *supra* note 31, at 2196-200.

<sup>260</sup> *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 83-84 (1993) [hereinafter *Crimes of Violence*] (statement by Conference of Chief Justices on S. 15, Violence Against Women Act of 1991, adopted by the State-Federal Relations Committee of the Conference of Chief Justices at the Fourteenth Midyear Meeting at Scottsdale, Arizona on Jan. 31, 1991).

<sup>261</sup> William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 1, 3. For more extended consideration of Chief Justice Rehnquist's role in lobbying against the Act, see Resnik, *supra* note 259, at 269-77.

scope was reduced over several years of hearings and negotiations before it was finally enacted.<sup>262</sup>

While most federal courts upheld the civil rights remedy on Commerce Clause grounds,<sup>263</sup> the courts that declared the statute beyond Congress's power emphasized that it intruded on areas of traditional state jurisdiction — criminal law and domestic relations law. The Fourth Circuit's lengthy opinion striking down the statute elaborated federalism objections to the civil rights remedy on a variety of doctrinal grounds; but at the heart of the court's constitutional objection was the claim that the federal statute intruded on the regulation of the family, a jurisdictional prerogative traditionally reserved to the states:

*[I]t is undisputed that a primary focus of section 13981 is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States. See, e.g., infra at 849–50 (discussing congressional findings on the extent and effects of domestic violence). Though such violence is not itself an object of family law — an area of law that clearly rests at the heart of the traditional authority of the States, see Lopez — issues of domestic violence frequently arise from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law. Although section 13981 explicitly precludes the federal courts from exercising the supplemental jurisdiction that might otherwise extend to such matters . . . , the fact that Congress found it necessary to include such a jurisdictional disclaimer confirms both the close factual proximity of the conduct regulated by section 13981 to the traditional objects of family law . . . and the extent of section 13981's arrogation to the federal judiciary of jurisdiction over controversies that have always been resolved by the courts of the several States. In the words of the Chief Justice of the United States, section 13981 creates a "new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes."<sup>264</sup>*

The Fourth Circuit thus concluded that a federal law allowing women to bring a civil action against assailants with whom they were or had been in intimate relation interfered with the states' traditional prerogative to regulate the family.

In the 1999 Term, the Supreme Court agreed and struck down VAWA's civil rights remedy. Congress could not employ its commerce power to enact the civil rights remedy, the Court reasoned, because the statute did not regulate an economic activity having a substantial ef-

<sup>262</sup> Nourse, *supra* note 259, at 28–33 (discussing how amendments restricted coverage of the civil rights remedy by linking the meaning of "gender motivated" violence to the concept of gender "animus" and by excluding jurisdiction over divorce proceedings).

<sup>263</sup> See, e.g., *Anisimov v. Lake*, 982 F. Supp. 531, 536–40 (N.D. Ill. 1997); *Doe v. Doe*, 929 F. Supp. 608, 612–16 (D. Conn. 1996).

<sup>264</sup> *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 842 (4th Cir. 1999) (emphasis added) (citation omitted) (quoting Rehnquist, *supra* note 261, at 3).

fect on interstate commerce,<sup>265</sup> and so intruded upon traditional areas of state regulatory concern — specifically, the regulation of violence and family life:

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. . . . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.<sup>266</sup>

The Court urged Congress to discriminate in its use of the commerce power: "The Constitution requires a distinction between what is truly national and what is truly local."<sup>267</sup> Further, the Court held that Congress could not enact the civil rights remedy by exercise of its power to enforce the Fourteenth Amendment, because, even if the statute did redress gender bias in criminal law enforcement, Congress could not remedy that discrimination by means of a statute that interfered with the states' authority to regulate the conduct of private actors.<sup>268</sup>

What is wrong with this picture? The Court's analysis of the Commerce Clause invokes separate spheres discourse to identify markets as a matter of "national concern" and families as a matter of "local concern"; its analysis of the Fourteenth Amendment discusses violence against women as occurring in a "private" realm beyond the proper reach of federal law; and the opinion as a whole concludes by sounding the familiar protectionist theme that any civilized society would protect its women against sexual assault:

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be

<sup>265</sup> *United States v. Morrison*, 120 S. Ct. 1740, 1751 (2000). The Court reasoned: Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

*Id.*

<sup>266</sup> *Id.* at 1753 (citing 42 U.S.C. § 13981(e)(4) (1994)).

<sup>267</sup> *Id.* at 1754.

<sup>268</sup> *See id.* at 1754–59. For an extended critique of the Court's Section Five reasoning, see Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 473–509, 522–26 (2000).

provided by the Commonwealth of Virginia, and not by the United States.<sup>269</sup>

*Morrison* reiterates federalism arguments that we saw expressed in struggles over the Nineteenth Amendment. But it does so rather bloodlessly, without all the picaresque talk about federal politicians stirring up discord between husband and wife.<sup>270</sup> The Court struck down a federal civil rights statute that allowed persons to bring a civil action against assailants, including assailants with whom they were or had been in intimate relation, and the Court did so on the ground that the civil rights statute interfered with the states' traditional prerogative to regulate the family. There is gender here, and gendered power here, but it is perfectly invisible when viewed through the lens of the sex discrimination paradigm — which quite remarkably treats the family as an institution devoid of gender and the regulation of family relationships as a practice devoid of equal protection concern for women, unless the state employs a practice the Court characterizes as a “sex-based classification.”

### *B. Regrounding Sex Discrimination Doctrine in the History of the Woman Suffrage Campaign*

The Fourth Circuit struck down VAWA's civil rights remedy in an opinion that opened:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves.<sup>271</sup>

A collective memory of nation formation gives shape to traditions of federalism. Collective memory gives shape to race discrimination law.<sup>272</sup> But the law of sex discrimination lacks such foundations, and constitutional commitments to equal citizenship for women are weaker because of it.

What would it mean to interpret the Nineteenth Amendment in terms that recollect, rather than repress, the history of the suffrage campaign? At present, we read the woman suffrage amendment as a text shorn of the semantically informing context that an understanding of the struggles over its ratification might supply. If instead we read the Nineteenth Amendment in light of the half century of arguments that attended its adoption, we might understand the woman suffrage

<sup>269</sup> *Morrison*, 120 S. Ct. at 1759.

<sup>270</sup> See *supra* p. 1001.

<sup>271</sup> *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 825–26 (4th Cir. 1999).

<sup>272</sup> See Siegel, *Collective Memory*, *supra* note 3, at 131–42.

amendment as having emancipated women from historic forms of subordination in the family.

This is how the Supreme Court approached the Amendment three years after its ratification in *Adkins*.<sup>273</sup> In *Adkins*, the Court interpreted the Amendment as emancipating women from the common law of coverture, describing the Amendment as an integral part of “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.”<sup>274</sup> Marriage was the ground of struggle over which “the woman question” was fought, with antis invoking the common law tradition of male household headship and marital unity to oppose the suffrage amendment, while suffragists challenged the common law of marital status at every step of their quest for “self government.”<sup>275</sup> This understanding of the controversy shaped federalism disputes over the Amendment, with opponents arguing that enfranchising women by constitutional amendment would involve the federal government in domestic relations matters properly reserved to local self-government.<sup>276</sup> Thus, when Americans adopted the Nineteenth Amendment, they were breaking with common law traditions that subordinated women to men in the family and intervening in domestic relations matters traditionally reserved to state control. Americans made these choices in order to secure equal citizenship for women.

If we understood the nature of the choice that We the People made in amending the Constitution to recognize women’s right to vote, and if we continued to affirm that choice and integrated it into our self-accountings as a nation, then the appeal to We the People that opens Judge Luttig’s opinion striking down the Violence Against Women Act would make considerably less sense.

This is because incorporating the story of the Nineteenth Amendment into our collective identity as a constitution-making people transforms our identity as a constitution-making people. We are a people who, in guaranteeing women’s right to vote, emancipated women from historic forms of subordination in the family that traditions of federalism once protected in the name of “local self-government.” Knowing this constitutional history does not compel a particular outcome in the *Morrison* case, but it surely ought to inform the way we reason about the constitutional questions *Morrison* presents.

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<sup>273</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923).

<sup>274</sup> *Id.* at 553.

<sup>275</sup> See *supra* Part III, pp. 977–97.

<sup>276</sup> See *supra* Part IV, pp. 997–1006.

Such appeals to history are a familiar part of our ordinary interpretive practice. We 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. It is through the past that we make pragmatic judgments about the ways we can best realize constitutional commitments and values in the present, and by appeal to the past that we know ourselves as a collective subject acting in history, united imaginatively and ethically across generations as well as communities. Collective memory thus plays a central role in constitutional reason.<sup>277</sup>

Past episodes of our constitutional development shape the ways we understand the Constitution's meaning; yet the actions of past generations of Americans who made or lived under the Constitution do not bind us in any simple sense. "While historical interpretation seemingly presents itself as self-denying submission to the identity of past ratifiers," Robert Post has observed, "closer analysis reveals that identity is authoritative only insofar as we can be persuaded to adopt it as our own."<sup>278</sup> History is a field in which we deliberate about the nature of the collective subject — We the People — realized through the ongoing process of constitutional interpretation. Our history as a people living under a constitution supplies the narrative resources through which we can make claims on each other's normative and practical judgment as we identify, or disidentify, with Americans who have struggled with constitutional questions in the past.<sup>279</sup>

To take one prominent example, modern race discrimination jurisprudence draws conceptual and moral orientation from our understanding that the nation adopted the Fourteenth Amendment to prohibit practices that perpetuated forms of race inequality associated with the institution of chattel slavery. The history of the Fourteenth

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<sup>277</sup> See Siegel, *Collective Memory*, *supra* note 3, at 133–34 ("By telling stories about a common past, a group can constitute itself as a group, a collective subject with certain experiences, expectations, entitlements, obligations, and commitments. The stories that help forge group identity also supply structures of ordinary understanding, frameworks within which members of a society interpret experience and make positive and normative judgments concerning it.").

<sup>278</sup> Robert C. Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 29 (1990).

<sup>279</sup> For a wide-ranging account of the role of narrative in legal reason, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000). See *id.* at 117 ("[C]ultures convert their plights and aspirations into narrative forms that represent both the culture's ordinary legitimacies and possible threats to them. Narratives function not simply to make experience communicable and thereby increase cultural solidarity, but also to give a certain practical predictability to the plights of communal life and a certain direction to the efforts needed to resolve them.").

Amendment thus shapes interpretation of the Equal Protection Clause today, but at a high level of generality. In the years since *Brown*,<sup>280</sup> the Court has not looked to the ratification debates over the Fourteenth Amendment for decision rules to use in determining the constitutionality of particular practices under the Equal Protection Clause, such as the miscegenation law at issue in *Loving v. Virginia*<sup>281</sup> or the affirmative action program in *City of Richmond v. J. A. Croson Co.*<sup>282</sup> Not only is it often impossible to ascertain how the Constitution's framers intended to resolve particular controversies,<sup>283</sup> but we are as a nation no longer willing to tie the Constitution to the racial mores of white Americans in the immediate aftermath of slavery.<sup>284</sup> Indeed, disidentifying with the racial mores of the white Americans who organized and authorized segregation now plays an important role in shaping modern interpretations of the Equal Protection Clause. As the Justices testified in *Casey*, "we think *Plessy* was wrong the day it was decided."<sup>285</sup> Arguably, the *post*-ratification history of the Fourteenth Amendment — the history of *Brown* and the civil rights movement — now plays a more important role in shaping interpretations of the Fourteenth Amendment's Equal Protection Clause than does anything in the debates attending its adoption.<sup>286</sup>

<sup>280</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In deciding *Brown*, the Court heard reargument on the question of whether the Fourteenth Amendment's framers intended to prohibit the racial segregation of public schools. *Id.* at 489. The Court ultimately concluded that the Fourteenth Amendment's ratification history was "[a]t best . . . inconclusive," asserting that "[w]hat others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty." *Id.* At the same time, the Court emphasized the extent to which the role of education in securing equality of citizenship had changed since the framing of the Fourteenth Amendment. *Id.* at 489-93.

<sup>281</sup> 388 U.S. 1, 9 (1967) (rejecting the argument that the framers of the Fourteenth Amendment did not intend to invalidate anti-miscegenation laws and relying on *Brown* for the proposition that the Fourteenth Amendment's enactment history is "[a]t best . . . inconclusive" as a guide to the Amendment's scope and purpose).

<sup>282</sup> 488 U.S. 469, 488 (1989) (analyzing the scope of the Fourteenth Amendment without reference to its enactment history or to legislative intent). *But cf. id.* at 491 (stating that the Amendment's framers "desired to place clear limits on the States' use of race").

<sup>283</sup> WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 6-7 (1988) (emphasizing that there are many constitutional questions that the ratification debates over the Fourteenth Amendment will not resolve).

<sup>284</sup> See *supra* note 280 (discussing the Court's reasoning in *Brown*).

<sup>285</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>286</sup> Cf. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 951-54 (1998) (discussing recent scholarship supporting the view that the Fourteenth Amendment's framers "intended it to permit segregation"). Michael McConnell has advanced an elaborate argument that *Brown* can be justified as consistent with the intentions of the framers of the Fourteenth Amendment. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). Michael Klarman criticizes McConnell's claim, while emphasizing that McConnell's argument, even if correct, does not offer support for the Court's civil rights

Our relation to past acts of constitution-making is thus irreducibly normative. Even if past generations of Americans have shaped the constitutional order we inherit, we continually make judgments about the ways in which we are prepared to adopt their choices and actions as our own. At the same time, our orientation toward the past has a deeply pragmatic cast. As we confront a changing array of constitutional questions, we look to the experiences of past generations living under the Constitution for practical insights concerning the ways we might best realize constitutional values in the present. As the Fourteenth Amendment illustrates, we forge these normative and pragmatic understandings in response to chapters of our constitutional development that occurred before and after the ratification of the Constitution and its amendments.

The authority of the past is thus continually unfolding, assuming new forms as we wrestle with the changing array of constitutional questions to which the collective deliberations and experience of prior generations might speak. With this understanding of the authority of the past, I consolidate the history recounted in this Article into a series of descriptive claims about the Nineteenth Amendment, whose contemporary doctrinal significance in resolving the *Morrison* case I then consider:

1. The Nineteenth Amendment was the product of a wide-ranging, multigenerational debate over the terms of women's citizenship in a democratic constitutional order. Debates over "the woman question" are part of the ratification history of the Nineteenth Amendment; at the same time, they are part of the post-ratification history of the Fourteenth Amendment, akin to the civil rights movement of the Second Reconstruction. Like the gains won by the civil rights movement, constitutional protections for women's right to vote grew out of decades of social movement activity; but unlike the gains the civil rights movement won, constitutional protections for women's right to vote were secured through Article V lawmaking. In neither case did the beneficiaries of constitutional reform have a full opportunity to speak; yet despite their widespread disfranchisement, women and minorities were able to make themselves heard through a variety of protest techniques to which the American legal system ultimately responded.

2. Americans who ratified the Nineteenth Amendment broke with understandings of coverture that had long structured public as well as private law. The Nineteenth Amendment's proponents persuaded Americans that a family-based order of virtual representation was no more just for women than was the regime of colonial power that pro-

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jurisprudence outside the area of school desegregation. Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).



voked American men to rebel against the British Crown. They made this case by demonstrating all the ways that laws enacted by men enforced a status order that harmed women.

3. Americans who ratified the Nineteenth Amendment intervened in matters concerning the franchise and family life, despite longstanding objections that such matters were properly a matter for "local self-government." In ratifying the Nineteenth Amendment, Americans decided that the national government would intervene in domestic relations regulated by the several states to secure for women equal citizenship with men.

4. Constitutional debate over the Nineteenth Amendment tied the justice of gender restrictions on the franchise to many other gender-organized institutions and practices, the male-headed household first among them. Both suffragists and antisuffragists linked the idea of women voting to the prospect of women's emancipation from laws and customs that restricted women's roles in marriage and the market, and to the prospect of women's participation in new forms of "social housekeeping." It was because the question of women voting was understood to symbolize and to facilitate a fundamental change in social structure that the debate over the Constitution lasted as long as it did.

There are a number of ways in which the history of the woman suffrage campaign might shape current constitutional understandings, as I now demonstrate.

### C. *Morrison Reconsidered*

In this section, I consider how the history we have examined alters our analysis of the constitutionality of the Violence Against Women Act. The following sections identify several strands of constitutional doctrine in *Morrison* that might well differ if we built our understanding of constitutional guarantees of equal citizenship for women on the history of the woman suffrage campaign.

1. *Federalism and the Family*. — In *Morrison*, the Court invoked the nation's history and traditions of federalism to limit Congress's powers under the Commerce Clause.<sup>287</sup> But once we include the struggles over enfranchising women in the history and traditions of "our federalism," that history no longer has the same power to shape interpretation of the Commerce Clause as the Supreme Court and the Fourth Circuit claimed in *Morrison*. The nation *has* intervened in matters concerning domestic relations, over claims that the family is a sphere of local self-government, to vindicate norms of equality among citizens. This was a long-considered and fully deliberated decision in which nationalist values decisively prevailed over claims of localism.

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<sup>287</sup> United States v. Morrison, 120 S. Ct. 1740, 1751–53 (2000); see also *supra* pp. 1028–29.

In debates over the suffrage amendment, Americans were asked to respect state regulation of the family rooted in traditions of coverture, but chose instead to protect values of equality among the nation's citizens. When this choice is included in the history and traditions of "our federalism," fidelity to tradition does not support invalidating VAWA, as the Fourth Circuit and the Supreme Court claimed. Indeed, if we continue to identify with the choice the nation made in ratifying the Nineteenth Amendment, we find in the history and traditions of federalism a basis for upholding VAWA and other federal laws that vindicate constitutional norms of sex equality — even, and perhaps especially, when they implicate matters of family life.

The Nineteenth Amendment is thus powerful precedent for federal regulation that enforces equal citizenship norms in matters concerning family life. At the same time, the Nineteenth Amendment demonstrates that the nation has not always adhered to a tradition of localism in matters concerning the family. In fact, history suggests that the nation has at best selectively adhered to such traditions; federal law has played a significant role in shaping family relations in the past and continues to do so in the present.<sup>288</sup>

Despite, or perhaps because of, the federal government's role in shaping family life, the nation might still wish to preserve traditions of localism in matters concerning the family. Should it seek to do so, the history of the Nineteenth Amendment demonstrates that there are compelling constitutional reasons to exercise caution about the contexts in which the nation vindicates values of localism in matters concerning the family.

Current federalism doctrines presume that deference to state regulation of the family is an unalloyed good. But as the history of the suffrage campaign demonstrates, the states long enforced women's subordinate status through the law of the family, and a tradition of federal deference to state law grew up at least in part to preserve the status order that state law enforced.<sup>289</sup> So considered, the problem changes constitutional complexion. Before courts restrict exercise of an enumerated power, like the Commerce Clause, to preserve traditional allocations of federal and state regulatory authority, courts need to ascertain that this is an appropriate context in which to preserve traditions

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<sup>288</sup> For detailed historical accounts of the ways in which the federal government has regulated family relations during the nineteenth and twentieth centuries, see COTT, *supra* note 102; and Hasday, *supra* note 46. For an analysis of the many ways national government is presently involved in regulating family relations, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); and Ann Laquer Estin, *Shared Governance? Congress and the New Family Law* (unpublished manuscript, on file with the Harvard Law School Library).

<sup>289</sup> See *supra* Part IV, pp. 997–1006; see also Siegel, *The Rule of Love*, *supra* note 31, at 2202–05.

of local control, given our evolving constitutional understandings and commitments.

When courts invalidate a federal law that is intended to secure equal citizenship for women on the ground that the federal law interferes with state control over domestic relations law, courts may well be perpetuating old common law understandings of marriage as the basis of citizenship in our constitutional order. The Fourth Circuit was quite explicit that it struck down VAWA's civil rights remedy to protect the states' traditional prerogative to regulate domestic relations:

*Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim. See § 13981(d)(2)(B); cf. Br. of Intervenor United States at 12 (noting that, "as of 1990, seven states still did not include marital rape as a prosecutable offense, and an additional 26 states allowed prosecutions only under restricted circumstances"). Although Congress may well be correct in its judgment that such defenses represent regrettable public policy, the fact remains that these policy choices have traditionally been made not by Congress, but by the States. By entering into this most traditional area of state concern, Congress has not only substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence, see Lopez, 115 S. Ct. 1624 (Kennedy, J., concurring), but has also substantially obscured the boundaries of political responsibility, freeing those States that would deny a remedy in such circumstances from accountability for the policy choices they have made, see id [at] 1624.<sup>290</sup>*

We might translate the Fourth Circuit's reasoning as follows:

States are traditionally responsible for regulating relationships among family members. One way states exercise this responsibility is by immunizing men who beat or rape their wives or girlfriends from any criminal or civil consequences. Congress could well be correct that allowing men who rape or beat their wives and girlfriends to escape without legal consequence is "regrettable public policy" — but the fact remains that in our nation it is *traditional* to allow states to administer the criminal law in this way. In our constitutional tradition, it is for the states to *calibrate the extent of judicial supervision of intrafamily violence*, and Congress has no business interfering in this policy choice, however "regrettable" it may be. Indeed, so deep and defining a part of our national constitutional tradition is this state prerogative to shield men from accountability for violence they inflict on family members that Congress's decision to create a private right of action vindicating women's right to be free of violence itself *violates* our national Constitution and is a threat to our most basic and cherished constitutional liberties.

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<sup>290</sup> Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 843 (4th Cir. 1999) (emphasis added).

Is deference to historic allocations of federal and state power consistent with our *present* constitutional commitments? Is such deference consistent with the federal Constitution as amended by the Fourteenth and Nineteenth Amendments? If we consider this problem with full understanding of the constitutional choices We the People made in enfranchising women, we might come to a different conclusion than did the judges of the Supreme Court and the Fourth Circuit in *Morrison*.

Keeping faith with our constitutional traditions is an ongoing and self-conscious process. After all, slavery was once denominated a "domestic relation" beyond the reach of federal law, as was the labor relationship as the Court reminded us in *Carter Coal*.<sup>291</sup> Domestic relations may traditionally be a matter for local self-government in our federal system, but, as history reveals, the particular relationships this tradition insulates from federal regulation are constantly in flux. Arguments for local control of domestic relations once shielded chattel slavery, gender restrictions on voting, and child labor from federal regulation, but none of these matters is thought beyond the reach of federal power today. As the nation's understanding of equal citizenship norms changed, the federal government intervened in state regulation of the family to vindicate those new understandings of its foundational commitments. In short, preserving a tradition of local control in matters concerning the family does not relieve the nation of responsibility for making normative judgments about the particular contexts in which it is appropriate to maintain that tradition.

Before restricting federal civil rights legislation enacted under the Commerce Clause on the ground that it intrudes upon the states' historic powers to regulate domestic relations, courts must determine whether protecting state control over domestic relations in this particular context preserves the legacy of coverture or carries forward traditions of federalism in a manner consistent with the nation's current constitutional commitments. This is the question the nation faced

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<sup>291</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936). The legal category of "domestic relations" has evolved over the last several centuries. The law of slaveholding states classified slavery as a private relation of the household. See COTT, *supra* note 102, at 62 ("Slavery fell under the 'master-servant' category in the law, which also included employer/employee relations. Master-servant and husband-wife relations were categorized together as domestic relations, because the authority vested in the household head determined them all."). Thus, southern states invoked the understanding that slavery was one of the "domestic relations" as they argued that slavery was properly governed by local, not federal law. See Hasday, *supra* note 46, at 1319.

Because the common law categorized the law of master-servant as one of the domestic relations, the discourse of domestic relations could also be invoked on behalf of local control of labor relations. See *Carter*, 298 U.S. at 299, 308 (noting that the regulation of "productive industries" is beyond federal power because "[t]he relation of the employer and employee is a local relation. At common law, it is one of the domestic relations"); cf. *supra* p. 983 & nn.97-98 (discussing the common law understanding of the labor relation as a domestic relation).

when it ratified the Nineteenth Amendment, and it remains no less significant today.

2. *Gender Status Inequality and the Family: A New Fourteenth Amendment Framework.* — Congress enacted the civil rights remedy in an exercise of its power to enforce the Fourteenth Amendment, as well as its power to regulate commerce. The question we now consider is how reading the Fourteenth Amendment in light of the Nineteenth Amendment and the history of debates about women's citizenship in our constitutional order might alter the way we understand Congress's powers to enforce the Equal Protection Clause under Section Five of the Fourteenth Amendment.

What shift in constitutional understanding would support this approach to interpreting the Equal Protection Clause? Today we pay no attention to the Nineteenth Amendment when interpreting the Equal Protection Clause because we read the Nineteenth Amendment as a nondiscrimination rule concerning voting with which we fully comply. We read the Nineteenth Amendment as a simple rule because we read the Amendment without any knowledge of the concerns and conflicts from which it sprang. But if we read the Nineteenth Amendment in light of the normative concerns that prompted its passage — for example, as the Court now reads the Eleventh Amendment<sup>292</sup> — we would recognize that the Nineteenth Amendment has implications for practices other than voting.<sup>293</sup>

We could give effect to these concerns directly under the Nineteenth Amendment as the amendment that emancipated women from traditional understandings of family life inconsistent with equal citizenship in a democratic order. In applying the Nineteenth Amendment to practices other than voting, we would be reading the language of the Amendment to identify, without exhausting, the practical con-

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<sup>292</sup> The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Yet in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court read the Eleventh Amendment to apply to suits against a state brought by one of its own citizens, and in *Monaco v. Mississippi*, 292 U.S. 313 (1934), to suits brought by a foreign state against one of the states of the union. In extending sovereign immunity doctrine beyond the express terms of the Eleventh Amendment, the *Monaco* Court reasoned: "Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. *Behind the words of the constitutional provisions are postulates which limit and control.*" *Id.* at 322 (emphasis added). The Court has recently reiterated its understanding that it is the principles giving rise to the Eleventh Amendment and not the Amendment's text alone that should govern its meaning. See *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) (criticizing "blind reliance upon the text of the Eleventh Amendment").

<sup>293</sup> For discussion of how the Nineteenth Amendment has been construed to bear on practices other than voting, see Part V, pp. 1007–22, above.

texts in which the constitutional values it embodies are to be vindicated — as the Court does when it applies the Eleventh Amendment to suits brought by citizens against their own states,<sup>294</sup> or applies the First Amendment to the President or state governments.

But we need not read the Nineteenth Amendment standing alone. Instead, we might ask whether the Amendment has implications for rights and powers enumerated elsewhere in the Constitution. The Court reasoned in this fashion in *Adkins*, when it decided that substantive due process doctrine under the Fifth and Fourteenth Amendments was altered by the Nineteenth Amendment's ratification.<sup>295</sup> Today we are no longer interested in understanding how ratification of the Nineteenth Amendment affects implementation of the *Lochner* decision.<sup>296</sup> The question that now concerns us is how the Nineteenth Amendment might bear on our understanding of the Fourteenth Amendment's Equal Protection Clause.

The debates culminating in ratification of the Nineteenth Amendment are plainly relevant to the ways we understand the Constitution's prohibition on sex discrimination, involving matters that today we would readily characterize as "equal protection" questions. Enlarging the historical foundations of sex discrimination doctrine to include the suffrage debates enables us to develop an understanding of the Fourteenth Amendment's equal protection guarantee that is directly informed by the history of struggles over equal citizenship for women<sup>297</sup>

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<sup>294</sup> See *Seminole Tribe*, 517 U.S. at 69–70 (reasoning that “[t]he text [of the Eleventh Amendment] dealt in terms only with the problem presented by the decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)]; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed . . . , it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States”).

<sup>295</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923).

<sup>296</sup> See *Lochner v. New York*, 198 U.S. 45 (1905) (discussed pp. 1012–16, above).

<sup>297</sup> In developing such an account, one could analyze the woman suffrage campaign as part of the Constitution's enactment or post-enactment history. If one reads the Constitution with an awareness of its amendment over time, one can read the enactment history of the Fourteenth Amendment as supplemented by the enactment history of the Nineteenth Amendment. Reservations about the terms of women's citizenship that were raised by the framers of the Fourteenth Amendment were fully debated during the campaign for the Nineteenth Amendment. Concerns that were peripheral to debates over the Fourteenth Amendment were central to debates over the Nineteenth Amendment.

One can also read the struggle over the Nineteenth Amendment as a particularly powerful chapter in the *post*-enactment history of the Fourteenth Amendment, a struggle over the meaning of equal citizenship that began with the ratification debates over the Fourteenth Amendment but that was not definitively resolved by them. The civil rights movement inaugurated a struggle over equal citizenship that occurred long after the ratification of the Fourteenth Amendment, a struggle of such persistence and passion and sheer jurisprudential force that today it has come to shape the meaning of the Fourteenth Amendment's equal citizenship guarantee. We might look to the history of the woman suffrage campaign in similar terms.

What is at stake in the choice between reading the woman suffrage campaign as enactment or post-enactment history? Perhaps most fundamentally it puts at issue the ways we imagine the

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Drawing on the history of the suffrage campaign, we can understand sex discrimination from a different vantage point than the race analogy allows. The suffrage campaign demonstrates that there are distinctive ways this nation has reasoned about gender relations over the course of its history. These modes of reasoning resemble, diverge from, and intersect with ways the nation has reasoned about race relations.<sup>299</sup> If we interpret the equal protection guarantee with knowledge of the institutions, practices, and understandings that have played a special role in enforcing women's social status, then we would enforce the equal protection guarantee with special attention to the ways that the state has regulated women's social position in and through the family. So understood, constitutional guarantees of equal citizenship would protect women against regulation that perpetuates traditional

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processes of constitutional lawmaking and the authority of those who engage in them. If groups are formally excluded from voting on an Article V amendment, or are otherwise politically inaudible in the process, whose voices should we attend to in interpreting the ratified amendment? What if, by reason of constitutionally suspect constraints on their political power or cultural authority, groups mobilize to advocate change in constitutional understandings in ways that do not satisfy Article V's rule of recognition? Must mobilized Americans engage in Article V lawmaking before their voices can shape our constitutional canon? Much of our understanding of the Equal Protection Clause derives from the actions of disfranchised or otherwise politically inaudible groups that mobilized to address constitutional questions in ways that did not always conform to conventional lawmaking processes — among them, the civil rights movement, the modern women's movement, and more recently, the gay rights movement. Acknowledging the role that these social movements have played in forging modern understandings of the Equal Protection Clause requires us to recognize that our constitutional order is co-authored by those with formal and less conventionally recognized forms of lawmaking power. See Siegel, *Text in Contest*, *supra* note 77 (exploring the influence of social movements on constitutional development).

<sup>298</sup> For a more detailed consideration of the difference this approach might make in the kinds of historical analysis that would support and shape sex discrimination doctrine, see Part II, pp. 960–77, above.

<sup>299</sup> Considered from the standpoint of history, the institutions, practices, and understandings that regulate the social status of groups vary by group, within groups, and over time. I discuss these matters at greater length in Siegel, *Discrimination in the Eyes of the Law*, *supra* note 23, where I observe:

When we analyze race and gender inequality from a historical standpoint, we encounter relations of group inequality embedded in the social organization of work, reproduction, and sexuality as such activities are structured in institutions such as slavery, the market, or marriage. Indeed, from the standpoint of history, what is perhaps most visible is the sheer heterogeneity of institutions, practices, stories, and reasons that sustain the unequal social position of different groups over time. Couched a bit more abstractly, we might say that social stratification is constituted through features of (1) social structure (institutions or practices) and (2) social meaning (stories or reasons). The elements of social structure and social meaning that sustain stratification vary by group and within groups, and they evolve over time as their legitimacy is contested. In short, when considered from a historical standpoint, discrimination has no transcontextual or fixed form.

*Id.* at 82.

understandings of the family that are inconsistent with citizenship in a democratic polity.

This approach grounds interpretation of the Equal Protection Clause in the experience and deliberative choices of past generations of Americans, drawing on the ratification history of the Nineteenth Amendment much as the Court presently draws on the ratification history of the Fourteenth Amendment. The constitutional decisions of past generations form a crucial part of our collective identity as a nation and so shape the manner in which we decide constitutional questions in the present. It is important to keep in mind, however, that the deliberations of past generations do not control our own constitutional choices in any mechanical way. The Court reads the Fourteenth Amendment in cases like *Brown*<sup>300</sup> and *Loving*<sup>301</sup> in ways that recall and honor the efforts of white Americans to repudiate the institution of slavery; yet it does not do so by endeavoring to build the constitutional order we now inhabit on the racial understandings of white Americans at the point that they first disavowed a deeply entrenched system of racial hierarchy.<sup>302</sup> Similarly, we should interpret the Constitution so as to honor the decision of the Nineteenth Amendment's framers to disavow traditional understandings of the family supporting women's disfranchisement; yet we need not, and ought not, do so by endeavoring to build the constitutional order we now inhabit on the gender understandings of men who had just concluded that gender restrictions on the franchise offended the first principles of our constitutional democracy. We honor these foundational acts of lawmaking by reading them as foundations, whose significance to us today is legible through the subsequent constitutional struggle that they inaugurated and enabled.

Like the Reconstruction Amendments, the Nineteenth Amendment embraced principles that would fundamentally alter the constitutional community that adopted it. The meaning of these Amendments is thus to be uncovered in the fullness of time, in the nation's experience of living with its new constitutional commitments.

Thus, incorporating the history of the woman suffrage campaign into our interpretation of the Fourteenth Amendment reorients normative and practical judgment concerning the meaning of equal citizenship for women. But this history should not serve as the exclusive ref-

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<sup>300</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See *supra* p. 1033 & nn.280-286.

<sup>301</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>302</sup> See *id.* at 9-10 (quoting *Brown*, 347 U.S. at 489, for the proposition that the evidence concerning the intentions of the Fourteenth Amendment's framers is "[a]t best . . . inconclusive" and emphasizing instead that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States" (internal quotation marks omitted)).



erence point in such deliberations. Rather, debates over the vote are significant because they represent the nation's first formal decision to repudiate gender-hierarchical institutions and practices in our constitutional tradition. Debates over the vote memorialize the collective deliberations of We the People about whether to include women as equal participants in the political process; they illuminate the centrality of family to questions of equal citizenship for women; they demonstrate the complex ways in which racial attitudes shape understandings about gender, and much more. The significance of this history is to be uncovered in the crucible of current constitutional conflicts and in light of subsequent constitutional mobilizations seeking equal citizenship for women<sup>303</sup> — much as we now read the constitutional history of the Fourteenth Amendment in light of subsequent efforts, inside and outside the courts, to give meaning to its terms.

What would it mean to reorient equal protection doctrine in this fashion? We might begin with *United States v. Virginia*,<sup>304</sup> a relatively recent sex discrimination decision authored by Justice Ginsburg. Unlike prior sex discrimination opinions, *Virginia* situates constitutional guarantees of equal protection for women in national and constitutional history, revisiting that history through a narrative of wrong and rectification:

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*. Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.<sup>305</sup>

Reasoning from this foundation in constitutional history, the opinion defines the purpose of heightened scrutiny under the Equal Protection Clause as ensuring women freedom from sex-based state action that denies "full citizenship stature" or that perpetuates the "legal, social, and economic inferiority of women":

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. Since *Reed*, the Court has repeatedly recognized that *neither federal nor state government acts compatibly with the equal protec-*

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<sup>303</sup> See Siegel, *Text in Contest*, *supra* note 77 (discussing constitutional mobilizations of the women's movement in the nineteenth and twentieth centuries).

<sup>304</sup> 518 U.S. 515 (1996).

<sup>305</sup> *Id.* at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), and *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)) (footnote omitted) (citations omitted).

tion principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. . . .

....

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. *Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promote equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.*<sup>306</sup>

Virginia addresses sex-based state action under the Equal Protection Clause. But the analytical framework the Court brings to the question could extend beyond state action that is “sex-based” within the meaning of current equal protection doctrine.<sup>307</sup> Specifically, sex discrimination doctrine grounded in a synthetic interpretation of the Fourteenth and Nineteenth Amendments, and in an understanding of the history of the woman suffrage campaign, might accord heightened scrutiny to state action regulating the family that denies women “full citizenship stature” or that perpetuates the “legal, social, and economic inferiority of women.”<sup>308</sup>

This revised framework for interpreting the equal protection guarantee in Section One of the Fourteenth Amendment has consequences for Congress’s power to enforce the Equal Protection Clause under Section Five. Under Section Five of the Fourteenth Amendment, Congress would have the authority to enact federal laws that redress state regulation of the family that denies women “full citizenship stature” or that perpetuates the “legal, social, and economic inferiority of women.” Considered from this standpoint, much of the state conduct that prompted enactment of the Civil Rights Remedy might have been understood to violate the Equal Protection Clause, and so would have been within Congress’s powers to remedy under Section Five of the Fourteenth Amendment — a conclusion rejected on various grounds by the Fourth Circuit and Supreme Court in *Morrison*.<sup>309</sup>

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<sup>306</sup> *Id.* at 532–34 (emphasis added) (citations omitted) (alteration in original) (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977), and *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987)).

<sup>307</sup> See *supra* pp. 358–59.

<sup>308</sup> *Virginia*, 518 U.S. at 532, 534.

<sup>309</sup> For extended consideration of the Section Five holding of the *Morrison* opinion, see Post & Siegel, *supra* note 268, at 473–522.

## CONCLUSION

What difference does it make to criticize a Supreme Court decision by the lights of a constitutional amendment so rarely cited that reference to it prompts many, if not most, constitutional law scholars to ask: "Which one is that?"

In the short run, quite plainly, it makes no practical difference at all. But the exercise may prompt us to wonder about the conventions of reasoning that regulate the Constitution's meaning, both as a narrative and as a constellation of decision-rules that guide our social practice. And if we take such questions seriously, we may ask whether we are well served by the conventions of reasoning that shape the Constitution as we presently understand it.

The Nineteenth Amendment grew out of struggles over the Fourteenth Amendment and was a long-resisted, fully deliberated, collective commitment to include women as equal members of the constitutional community. At a minimum, we might honor this commitment by reading the Amendment to answer unequivocally questions about women's citizenship that the legislative history of the Fourteenth Amendment is sometimes said to express.<sup>310</sup> We might abandon the habit of selectively invoking the legislative history of the Fourteenth Amendment whenever we want "principled" reasons to equivocate about the Constitution's commitment to sex equality. The Nineteenth Amendment may "only" concern voting, but that is hardly responsive to the historicist's objection. For nineteenth-century Americans, voting was *the* central question of women's citizenship — "the woman question." Nineteenth-century Americans knew what woman suffrage signified, even if its full significance to *them* is no longer legible to us today.

The generations of Americans who debated "the woman question" understood woman suffrage as a question concerning the family. As proponents and opponents of the Nineteenth Amendment well appreciated, the decision to enfranchise women under the federal Constitution involved breaking with common law traditions that subordinated women to men in the family and intervening in domestic matters traditionally reserved to state control. After more than a half century of debate, suffragists ultimately prevailed, persuading the nation to amend the Constitution to secure for women equal citizenship with men.

How might understanding the debates over the woman suffrage amendment change how we read the Constitution? Altering our self-accountings as a constitution-making people has effects on the ways we appeal to each other in disputes over the Constitution's meaning.

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<sup>310</sup> See *supra* pp. 954, 965 & nn.14, 46.

Over time, these differences in our self-understanding as a people might well come to reshape the doctrines that supply decision-rules in constitutional cases. If we understood the decision to enfranchise women as having fundamentally changed our constitutional order, we might, and as I argue, ought to, understand the traditions comprising "our federalism" differently and focus on different paradigm cases in arguing about the meaning of the Fourteenth Amendment's equal protection guarantee. So understood, the Constitution would protect women against regulation that perpetuates traditional understandings of the family that are inconsistent with equal citizenship in a democratic polity. Viewed from the standpoint of this constitutional history, our understanding of the rights protected by the Fourteenth Amendment might differ, as would our understanding of Congress's power.

But these differences in the meaning of the Constitution will occur, if they occur at all, because we understand the nature of the choices that past generations of Americans made in recognizing women's right to vote and because we choose to constitute ourselves as a nation in a way that keeps faith with those choices. In this sense, the history recounted in this Article will only truly become *constitutional* history as it begins to shape the choices through which we know ourselves as a nation and a people — as a collective subject acting in history, the collective subject of the Constitution's preamble.