

PAPERS

The Politics of Constitutional Memory

REVA B. SIEGEL*

ABSTRACT

Those who sought votes for women made claims for liberty and equality in the family on which constitutional law might now draw—but there is no trace of their voices or claims in constitutional law. The Supreme Court scarcely mentions the Nineteenth Amendment when interpreting the Constitution. Nor do Supreme Court opinions mention those who led women’s quest for political voice or the constitutional arguments they made in support of women voting, even though these arguments spanned two centuries. There is no method of interpretation that the Justices employ with sufficient consistency to account for this silence in our law.

This Article introduces the concept of constitutional memory to explain this silence in our law. Constitutional interpreters produce constitutional memory as they make claims on the past that can guide decisions about the future. It is the role of constitutional memory to legitimate the exercise of authority; but constitutional memory plays a special role in legitimating the exercise of authority when constitutional memory systematically diverges from constitutional history. Systematic divergence between constitutional memory and constitutional history can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance. Though women contested their lack of political authority in the constitutional order over two centuries, there is no trace of their arguments in constitutional law.

To illustrate, the Article examines a long-running tradition of suffrage argument that began before the Reconstruction Amendments and continued in evolving forms after the ratification of the Nineteenth Amendment: that women needed the vote to democratize the family. Two centuries of constitutional arguments are nowhere reflected in the United States Reports. As a consequence, constitutional doctrines about liberty and equality in the family appear to lack historical antecedents.

But argument, inside and outside of courts, can counter the politics of memory. Justices across the spectrum regularly make heterodox claims on the past. Constitutional interpreters can invoke the voices of the disfranchised and the

* Nicholas deB. Katzenbach Professor of Law, Yale University. I am grateful for the research assistance of Nicholas Bernold, Duncan Hosie, Rekha Kennedy, Chelsea Thompson, Aubrey Stoddard, and Sruthi Venkatachalam. © 2022, Reva B. Siegel.

concerns that the disfranchised brought to the democratic reconstruction of America. Imagine how we might understand our Constitution in another generation if we did.

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INTRODUCTION

[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.

Justice Lewis Powell, *University of California v. Bakke*.¹

When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

Robert Bork, *Neutral Principles and Some First Amendment Problems*.²

We often ask about the relationship between constitutional law and history.³ In this Article I consider how constitutional argument, inside and outside of courts, makes claims on the past through *constitutional memory*. Constitutional memory is not coextensive with history, and often excludes history, sometimes intentionally.⁴ The Constitution's interpreters are continuously producing constitutional memory as they make claims on the past to guide decisions about the future—as they tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values.⁵ Constitutional memory plays a special role in organizing a polity and in

1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) (Powell, J., concurring).

2. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971).

3. See Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COM. 345, 345 (2020) (“The quarrel between lawyers and historians about the proper use of history in constitutional law is an old one. It predates the rise of conservative originalism in the 1970s and 1980s.”).

4. Timothy Snyder recently analyzed laws banning the teaching of critical race theory as “memory laws” enacted in other countries to guide public understanding of the past, either by mandating a particular interpretation of events or forbidding discussion of certain events. See Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. TIMES MAG., June 29, 2021, at 38, <https://www.nytimes.com/2021/06/29/magazine/memory-laws.html> [<https://perma.cc/HAE5-RXVV>].

5. We could describe constitutional memory as a form of collective memory forged through constitutional interpretation. See generally Chris Weedon & Glenn Jordan, *Collective Memory: Theory and Politics*, 2 SOC. SEMIOTICS 143 (2012) (reviewing recent scholarship on collective memory). See also Allan Megill, *History, Memory, Identity*, 11 HIST. HUM. SCI. 37, 42 (1998) (“‘Memory’ arises as a special preoccupation in situations where people find themselves engaged in self-designation, for it serves as a stabilizer of and justification for the self-designations that people claim.”); Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning about “the Woman Question” in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 134 (Austin Sarat & Thomas R. Kearns eds., 1999) (“[N]arratives about the genesis of social arrangements help constitute social groups as collective subjects and, in so doing, construct their commonsense intuitions about the actual and proper organization of social relations. Scholars call this narrative matrix ‘collective’ or ‘social’ memory.”).

Benedict Anderson famously described nations as “imagined communities” that give people a sense of “history, place, and belonging.” Weedon & Jordan, *supra* note 5, at 143 (citing BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2006)). These constructions of the nation's past are of course the object of perpetual contest. Recent work in post-colonial studies, for example examines “the cultural politics of memory, in particular what motivates the

authorizing its law. Judicial decisions are products of constitutional memory, and, at the same time, they are one of the many social institutions that produce constitutional memory. A nation forges its future through these claims on its past.⁶

When facing each other in the thick of disagreement, leaders, judges, lawyers, and advocates often appeal to constitutional memory, to the memories that constitute the community.⁷ The memories, principles, and values of a constitutional tradition acquire new meaning through struggles of this kind.⁸ Appealing to constitutional memory, the Trump White House authorized the 1776 Commission to produce “a definitive chronicle of the American founding” to ensure “rebuttal of reckless ‘re-education’ attempts that seek to reframe American history around the idea that the United States is not an exceptional country but an evil one.”⁹ Appealing to constitutional memory, John Eastman titled an article calling for the transformation of Establishment Clause law, “We are a Religious People Whose Institutions Presuppose a Supreme Being.”¹⁰ Appealing to constitutional memory, Justice Scalia’s dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey* observed that “*Dred Scott* was ‘very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.’”¹¹ Constitutional memory is entrenched, yet open and contestable—it is a field of meaning in which we continuously negotiate who we are and what we are to do together.

ways in which nations remember the past . . . how collective memory is constituted via processes that involve both forgetting and remembering.” *Id.* at 144.

6. See Reva B. Siegel, *2005-06 Brennan Center Symposium Lecture, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1350 (2006) (“Disputes about forging a common future are . . . expressed as claims about the meaning of a shared past.”).

7. See *id.* at n.70 (“Claims on the Constitution are often expressed in the historical register, as claims of original understanding, national history, or precedent. But disputants seeking to unseat or defend reigning constitutional understandings can also invoke the Constitution as a text, as a system of representative government, as judicial doctrine, as a way of life, or as justice; they can tap powerful analogies, deploy iconography, reference narrative, and summon collective memory.”).

8. See Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1757 (2017) (observing how the understandings of constitutional culture mediate disagreement and enable community in conflict as adversaries argue their case by appeal to constitutional values and memories that can persuade others who do not share their views).

9. *1776 Commission Takes Historic and Scholarly Step to Restore Understanding of the Greatness of the American Founding*, WHITEHOUSE.GOV (Jan. 18, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/1776-commission-takes-historic-scholarly-step-restore-understanding-greatness-american-founding/> [https://perma.cc/8JNX-PQDA]. Since the Commission released its report, five states have passed laws barring the teaching of Critical Race Theory (CRT). See Snyder, *supra* note 4.

10. John C. Eastman, *We Are a Religious People Whose Institutions Presuppose a Supreme Being*, 5 NEXUS 13, 13, 17 (2000) (quoting Justice Douglas in *Zorach v. Clausen*, 343 U.S. 306, 313 (1952) to argue that the “Establishment Clause of the First Amendment was designed simply to prevent the federal government from establishing a national church—that is, from giving preference by federal law to one religious sect over others with tax funds or otherwise, or from compelling attendance at such a church”).

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 271 (1985)).

Because constitutional memory is employed to legitimate the exercise of authority, constitutional memory has a politics. Because constitutional memory helps make sense of who we are and what we are to do, it can help rationalize all manner of governmental and societal relationships, whether hierarchical or egalitarian, centralizing or decentralizing, tradition-preserving or tradition-perfecting, whether structured on identification or repudiation, agonism or antagonism.

Considered from this vantage point, claims on the past play wide-ranging roles in our constitutional law and are not confined to one “originalist” or historical modality of argument.¹² Even within originalist arguments there are many kinds of claims on the past, just as there are many forms of claims on the past at work in dynamic interpretation.¹³ When judges who style themselves “originalists” attack *Roe* asserting that substantive due process is “oxymoronic” and the grounds for *Lochner* and *Dred Scott*, these originalists are not examining original meaning or engaged in any practice resembling what they claim is originalist method. Rather, they are engaging in dynamic interpretation and appealing to post-ratification history, invoking a powerful stock of cautionary stories about the judicial role.¹⁴

This Article considers how constitutional memory excludes centuries of suffrage argument about liberty and equality in the family from our constitutional tradition—and one day might yet come to include it. It demonstrates that those who sought votes for women made claims for liberty and equality in the family on which constitutional law might now draw—but there is no trace of their voices or claims in constitutional law. The Supreme Court scarcely mentions the Nineteenth Amendment when interpreting the Constitution. Nor do Supreme Court opinions mention those who led women’s quest for political voice or the constitutional arguments they made in support of women voting, even though these arguments spanned two centuries. There is no method of interpretation that the Justices employ with sufficient consistency to account for this silence in our law.

The concept of constitutional memory that this Article introduces can explain this silence in our law. Constitutional interpreters produce constitutional memory as they make claims on the past that can guide decisions about the future. It is the

12. Cf. Balkin, *supra* note 3, at 359 (“[T]here is no single modality of ‘historical argument.’ Rather arguments using all of the modalities may invoke history to support their claims. [Moreover], how one uses history will differ depending on the modality of argument one uses.”).

13. See *id.* at 360 (“[E]ven if we restrict ourselves to originalist arguments or arguments from adoption history, there is not a single kind of originalist argument.”).

14. See Siegel, *supra* note 8, at 1764 (“[W]e often disagree about what counts as a breach of role authority, and debates over this question figure prominently in constitutional memory. Examples include the Court’s decision in *Lochner v. New York*, President Roosevelt’s proposal for Court-packing, the Court’s decision in *Brown v. Board of Education* and resistance to its enforcement, the Court’s decisions in *Roe v. Wade*.”) (citations omitted). For a genealogy of the claim that substantive due process is oxymoronic, see Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 276–77 (2016); Douglas NeJaime & Reva B. Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1916–17, 1917 n.58 (2021). For discussion of the many ways that the Justices draw on history in interpreting the Fourteenth Amendment, analyzed with particular attention to the substantive due process opinions of Justices who identify as originalists, see *infra* text accompanying notes 135–149.

role of constitutional memory to legitimate the exercise of authority; but constitutional memory plays a special role in legitimating the exercise of authority when constitutional memory systematically diverges from constitutional history. Systematic divergence between constitutional memory and constitutional history can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance. Though women contested their lack of political authority in the constitutional order over two centuries, there is no trace of their arguments in constitutional law.

To illustrate, the Article examines a long-running tradition of suffrage argument that began before the Reconstruction Amendments and continued in evolving forms after the ratification of the Nineteenth Amendment: that women needed the vote to democratize the family. Two centuries of constitutional arguments are nowhere reflected in the *United States Reports*. As a consequence, constitutional doctrines about liberty and equality in the family appear to lack historical antecedents.

But argument, inside and outside of courts, can counter the politics of memory. Justices across the spectrum regularly make heterodox claims on the past. Constitutional interpreters can invoke the voices of the disfranchised and the concerns that the disfranchised brought to the democratic reconstruction of America. Imagine how we might understand our Constitution in another generation if we did.

To demonstrate how constitutional memory shapes constitutional interpretation, I begin in Part I by showing that our case law erases women's role in building the modern constitutional order. Part II then considers one tradition of constitutional argument thereby excluded from the *United States Reports*. This tradition of argument grew out of suffrage advocacy before ratification of the Reconstruction Amendments and continued in various forms after ratification of the Nineteenth Amendment; advocates connected voting, family, and citizenship¹⁵ in claims that called for the democratization of the family.¹⁶ Part III shows that this history could credibly be included in the interpretation of the Fourteenth Amendment but is not. As a consequence, constitutional doctrines about liberty and equality in the family appear to lack historical antecedents. Part IV closes by illustrating a few ways this history might be incorporated in constitutional argument—both as it enlarges our stories of constitutional change and as it enlarges our cast of constitution makers—and what might be at stake in such an effort.

15. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

16. See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 452 (2020) (“As suffragists demonstrated why women needed to represent their own interests in politics, they argued that women needed to vote to make changes in the law structuring the family, so that all adult members of the household could be recognized and participate in democratic life as equals. . . . Perhaps the most vivid evidence of the suffragists’ transformative claims is the backlash they provoked. Antisuffrage cartoons depicted the challenge to virtual representation and the prospect of women voting as threatening to queer both family and the state.”) (citations omitted).

I. CONSTITUTIONAL MEMORY: OF NAMING, SPEAKING, VOTING, LEADING

Susan B. Anthony's name is mentioned in nine cases in the *United States Reports*.¹⁷ Eight of these are references to the Susan B. Anthony List, an organization that raises money for anti-abortion candidates¹⁸ and was sued by a former congressman who alleged the organization unlawfully characterized his vote for the Affordable Care Act as a vote in favor of "taxpayer funded abortion."¹⁹ (Justice Thomas delivered an opinion for a unanimous Court holding that the organization had standing to raise a First Amendment claim.²⁰) Apart from these references to the Susan B. Anthony List as party or precedent, the only other mention of Susan B. Anthony occurs in Justice Stevens's dissent in *Texas v. Johnson*, in which he argues that the First Amendment allowed a law criminalizing flag burning.²¹

17. See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *California v. Texas*, 141 S. Ct. 2104, 2114 (2021); *Trump v. New York*, 141 S. Ct. 530, 535 (2020); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153 (2014); *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting).

18. The Susan B. Anthony list fundraises for Republican candidates and was originally started by Feminists for Life as a non-partisan pro-life organization. See Caroline Kelly, *Anti-Abortion Group Announces \$52 Million Budget to Reelect Trump and Anti-Abortion Senate Majority*, CNN (Jan. 17, 2020), <https://www.cnn.com/2020/01/17/politics/anti-abortion-sba-list-52-million-2020-budget/index.html> [<https://perma.cc/EMJ7-WEF9>]; Kate Sheppard, *Susan B. Anthony List Founder: Republicans Hijacked My PAC!*, MOTHER JONES (Feb. 22, 2012), <https://www.motherjones.com/politics/2012/02/susan-b-anthony-list-sharp-right-turn-rachel-macnair/> [<https://perma.cc/Y7FK-UK6K>]. As the name of the organization suggests, the pro-life movement has claimed suffragists, including Anthony, as anti-abortion. For an account of the important ways that these claims on the collective memory of the suffrage movement diverge from the historical record, see Reva Siegel & Stacie Taranto, *What Antiabortion Advocates Get Wrong About the Women Who Secured the Right to Vote*, WASH. POST (Jan. 22, 2020), <https://www.washingtonpost.com/outlook/2020/01/22/what-antiabortion-advocates-get-wrong-about-women-who-secured-right-vote/> [<https://perma.cc/V7TT-WJ96>] ("As scholars, including the editor of Elizabeth Cady Stanton and Susan B. Anthony's archival papers have shown, many of these claims are based on repeated factual errors. The claims often mislead in another way as well: by omitting essential features of the suffragists' beliefs about gender, justice and the law."). See also Lynn Sherr & Ann D. Gordon, *No, Susan B. Anthony and Elizabeth Cady Stanton Were Not Antiabortionists*, TIME (Nov. 10, 2015), <https://time.com/4106547/susan-b-anthony-elizabeth-cady-stanton-abortion/> [<https://perma.cc/8TX2-A4GE>].

19. *Susan B. Anthony List*, 573 U.S. at 149.

20. See *id.* at 149–50.

21. 491 U.S. at 439 ("The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach.").

There is no mention in the *United States Reports* of Elizabeth Cady Stanton,²² Sarah Grimké,²³ Sarah Parker Remond,²⁴ Lucretia Mott,²⁵ Lucy Stone,²⁶ Sojourner Truth,²⁷ Frances Ellen Watkins Harper,²⁸ Mary Church Terrell,²⁹ Alice Paul,³⁰ Crystal Eastman,³¹ Florence Kelley,³² Ida B. Wells,³³ or Mary McLeod Bethune.³⁴

Women seeking to vote faced deep and entrenched resistance in contests beginning before the Civil War, spanning several constitutional amendments and countless state and local laws and ordinances, and continuing into the late

22. Search Results for Elizabeth Cady Stanton in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Susan /2 Anthony) (last visited Mar. 31, 2021).

23. Search Results for Sarah Grimké in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Sarah Grimké) (last visited Apr. 14, 2021).

24. Search Results for Sarah Parker Remond in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Sarah /2 (“Parker” or “Remond”)) (last visited Apr. 14, 2021).

25. Search Results for Lucretia Mott in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Lucretia /2 Mott) (last visited Mar. 31, 2021).

26. Search Results for Lucy Stone in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Lucy /2 Stone) (last visited Mar. 31, 2021).

27. Search Results for Sojourner Truth in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Sojourner /2 Truth) (last visited Mar. 31, 2021).

28. Search Results for Francis Ellen Watkins Harper in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> [<https://perma.cc/K3DC-WG4W>] (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Francis /2 “Watkins Harper”) (last visited Mar. 31, 2021).

29. Search Results for Mary Church Terrell in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Mary /2 Terrell) (last visited Mar. 31, 2021). Mary Church Terrell appears in one case, where she is one of several plaintiffs being sued in their capacity as members of the board of education for the District of Columbia. *See Nalle v. Oyster*, 230 U.S. 165 (1913).

30. Search Results for Alice Paul in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Alice /2 Paul) (last visited Mar. 31, 2021).

31. Search Results for Crystal Eastman in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Crystal /2 Eastman) (last visited Mar. 31, 2021).

32. Search Results for Florence Kelley in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Florence /2 Kelley) (last visited Mar. 31, 2021).

33. Search Results for Ida B. Wells in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Ida /2 Wells) (last visited Mar. 31, 2021).

34. Search Results for Mary McLeod Bethune in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select “U.S. Supreme Court” as the jurisdiction and search for: Mary /2 Bethune) (last visited Mar. 31, 2021).

twentieth century.³⁵ Yet despite this intergenerational struggle, no Supreme Court opinion has named—much less quoted—the leaders of women’s quest for political voice in our constitutional order, except Justice Stevens’s passing mention of Susan B. Anthony in his flag-burning dissent. Nor, to my knowledge, has anyone ever noticed this omission. The erasure is so fundamental it passes without notice. We are still living within semantic structures that equate democracy with male suffrage. Men’s personal letters and post-ratification reflections are regularly quoted,³⁶ while no Justice seems to have named or quoted women who sought to extend founding principles of liberty, equality, and self-government to women.³⁷

This silence reflects understandings that continue to shape women’s authority in politics, law, the academy, the household, and other social spheres. Constitutional memory depicts a world in which men speak for women; women lack political voice and have yet to exercise authority to lead.

We watch women in politics shadowbox with these persisting status constraints. As more women exercise political authority, resistance at times becomes quite violent. A century after the Nineteenth Amendment’s ratification, women campaigning for—or serving in—high office are judged unsuited for office

35. See, e.g., ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN’S LONG BATTLE FOR THE VOTE* (2020); MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* (2020); *VOTES FOR WOMEN: A PORTRAIT OF PERSISTENCE* (Kate Clarke Lemay ed., 2019).

36. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020) (citing the “private writings” of James Madison); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2092 (2015) (citing a letter from Alexander Hamilton to George Washington and cabinet opinions of Thomas Jefferson); *NLRB v. Canning*, 573 U.S. 513, 513–57 (2014) (citing letters from George Washington, Thomas Jefferson, John Adams, Alexander Hamilton, John Adams’s Attorney General Charles Lee, James McHenry, John Armstrong, and James Madison); *id.* at 569–615 (Scalia, J., concurring) (discussing the same letters); *Hamdi v. Rumsfeld*, 542 U.S. 507, 564–65 (Scalia, J., dissenting) (citing a 1788 letter from Thomas Jefferson to James Madison); *City of Boerne v. Flores*, 521 U.S. 507, 560–62 (1997) (O’Connor, J., dissenting) (citing the personal writings of Thomas Jefferson and James Madison, and the letters of George Washington); *id.* at 541–42 (Scalia, J., concurring) (contesting the dissent’s account of the writings of Jefferson and Madison); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (citing the personal writings of Thomas Jefferson); *Griswold v. Connecticut*, 381 U.S. 479, 488–90 (1965) (Goldberg, J., concurring) (citing the speeches of James Madison); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 661–62 (1952) (Clark, J., concurring) (citing the letters of Abraham Lincoln and Teddy Roosevelt).

Martin Luther King, Jr. appears in Supreme Court opinions as he embodies the struggle for racial justice. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (discussing passage of the Fair Housing Act at the time of King’s assassination); *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 323 (2013) (Thomas, J., concurring) (observing that historically Black colleges “produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders”); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 581–82 (2013) (Ginsburg, J., dissenting) (discussing Martin Luther King, Jr.’s role in “Bloody Sunday” and quoting “King’s words” on the “arc of the moral universe”); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991) (listing King and Emma Goldman as prominent authors who wrote significant works while incarcerated). For decisions quoting Frederick Douglass, see sources cited *infra* note 162.

37. For what may be the sole exception in the *United States Reports*, see *supra* note 21.

because they are “not likeable”³⁸ or, more ominously, they are greeted with chants of “Lock Her Up,”³⁹ “Nasty Woman,”⁴⁰ and “Send Her Back.”⁴¹ Called a “Bitch”⁴² on a private Facebook page frequented by thousands of Michiganders, Governor Gretchen Whitmer was targeted for kidnapping and killing for her role in enforcing the state’s COVID shutdown policies.⁴³ “‘You hear, ‘hey, this isn’t a nanny state.’ . . . ‘I didn’t elect a mommy to take care of the state.’ You’ve never heard someone refer to a male governor or the president saying ‘I don’t need my dad telling me what to do,’” one state senator explained.⁴⁴ The chair of

38. Ella Nilsen & Li Zhou, *Why Women are Feeling So Defeated After Elizabeth Warren’s Loss*, Vox (Mar. 6, 2020), <https://www.vox.com/2020/3/6/21166338/elizabeth-warren-loss-2020-primary-sexism> [<https://perma.cc/L297-HJW2>] (“For instance, a July poll of likely New Hampshire voters found good favorability numbers for both Warren and then-candidate Sen. Kamala Harris (67 percent for Warren, 54 percent for Harris) but dismal ‘likability’ ratings for them. Just 4 percent of likely voters thought Warren was ‘likable,’ and 5 percent for Harris. Compared to that, 20 percent of likely voters thought Biden and Sanders were likable.”).

As Senator Elizabeth Warren withdrew from the Democratic primary for president in the spring of 2020, many, including Warren, recognized the electorate’s ambivalence about women candidates. With “voter after voter quoted in the media saying they’d vote for a woman, just not Warren,” Warren observed: “If you say, ‘Yeah, there was sexism in this race,’ everyone says, ‘Whiner.’ And if you say, ‘There was no sexism,’ about a bazillion women think, ‘What planet do you live on?’” *Id.*

39. An article parodying the gendered backlash both Clinton and Warren faced was *McSweeney’s* most read article of 2019. See Devorah Blachor, *I Don’t Hate Women Candidates—I Just Hated Hillary and Coincidentally I’m Starting to Hate Elizabeth Warren*, MCSWEENEY’S (Jan. 2, 2019), <https://www.mcsweeneys.net/articles/i-dont-hate-women-candidates-i-just-hated-hillary-and-coincidentally-im-starting-to-hate-elizabeth-warren> [<https://perma.cc/HV3L-UDHC>] (“[T]he thought of this accomplished woman behind bars with all her agency stripped away from her was funny to me.”); see also Brett Samuels, *Trump Says He Agrees ‘100 Percent’ With ‘Lock Her Up’ Chants About Clinton*, THE HILL (Oct. 16, 2020), <https://thehill.com/homenews/administration/521436-trump-says-he-agrees-100-percent-with-lock-her-up-chants-about> [<https://perma.cc/54HY-777S>].

40. Starr Rhett Rocque, *Kamala Harris is Biden’s VP Nominee, So Naturally, the “Nasty Woman” Meme is Back*, FAST CO. (Aug. 12, 2020), <https://www.fastcompany.com/90539508/kamala-harris-is-bidens-vp-nominee-so-naturally-the-nasty-woman-meme-is-back> (“Joe Biden’s campaign announced on Tuesday that Kamala Harris would be his VP pick. Predictably, Donald Trump sputtered out his reaction via Twitter, referring to her as a ‘nasty woman.’ And like that, it was 2016 all over again.”).

41. Monica Hesse, *What Do ‘Lock Her Up’ and ‘Send Her Back’ Have in Common? It’s Pretty Obvious.*, WASH. POST (July 20, 2019), https://www.washingtonpost.com/lifestyle/style/what-do-lock-her-up-and-send-her-back-have-in-common-its-pretty-obvious/2019/07/19/74bc4790-a999-11e9-9214-246e594de5d5_story.html [<https://perma.cc/X392-5B6Z>].

42. Malachi Barrett, *Sexist Attacks Cast Michigan Gov. Whitmer as Mothering Tyrant of Coronavirus Dystopia*, MLIVE (May 22, 2020), <https://www.mlive.com/public-interest/2020/05/sexist-attacks-cast-whitmer-as-mothering-tyrant-of-coronavirus-dystopia.html> [<https://perma.cc/EXG2-Y77Q>].

43. See Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 157 (2021).

44. Barrett, *supra* note 42; see also Blocher & Siegel, *supra* note 43, at 157 (“Online, the governor was attacked as an overbearing mother, witch, queen, a menopausal teacher, ‘that woman’ (Donald Trump’s sneering referent for Hillary Clinton), and ‘Tyrant b–h.’ Threats of violence supercharged this stream of misogyny, with protesters boasting to one another about how it would be most satisfying to kill the governor.”).

Michigan's Republican Party refers to the highest-ranking women office-holders in the state as "the three witches."⁴⁵

Explaining the significance of her own presence in the Virginia General Assembly, Jennifer McClellan pointed out that she did not "think Thomas Jefferson ever envisioned nursing mothers in this Capitol, but he never would have envisioned me here, period."⁴⁶ In her 2021 race for governor in Virginia, McClellan presented herself as "standing on the shoulders of . . . black women [who] first set foot in this country, whether it's Sojourner Truth or Harriet Tubman or Ida B. Wells or Fannie Lou Hamer."⁴⁷ Both McClellan and Jennifer Carroll Foy, McClellan's opponent for the Democratic gubernatorial nomination, broke boundaries as among the few state representatives who served in office while pregnant.⁴⁸ Only ten members of Congress have given birth while serving their terms, and only two in the last decade.⁴⁹ In a 2018 Pew Research Center survey, fifty-one percent of respondents reported it would be better for a woman seeking high political office to have children before entering politics; about a quarter said a female candidate should wait until she is politically well-established before having children, with an additional nineteen percent reporting it would be better for her not to have children at all.⁵⁰

The chants and epithets women face in politics certainly seem more virulent than voter judgments about mothers serving in office or the genteel silences of the *United States Reports*, but silence can police the boundaries of authority with blunt force. We recount the making of our fundamental law, whether the Declaration of Independence or the Constitution, as the work of men. Beyond some quaint claims about Abigail Adams reminding her husband John to "*Remember the Ladies*,"⁵¹ we tell the story of the country's Founding without mentioning women. High-brow constitutional law differs little from public school

45. Craig Mauer, *Michigan GOP Chair Weiser Rebuffs Attacks on Assassination, 'Three Witches' Quips*, DETROIT NEWS (Mar. 26, 2021), <https://www.detroitnews.com/story/news/politics/2021/03/26/michigan-gop-chair-quips-assassination-3-witches-video/7011870002/> [<https://perma.cc/S6VJ-HDNA>] ("Weiser responded the party is focused on beating the 'three witches' in 2022, apparently referring to Gov. Gretchen Whitmer, Attorney General Dana Nessel and Secretary of State Jocelyn Benson—the three statewide Democratic leaders who are up for re-election next year. . . . '[O]ther than assassination, I have no other way . . . other than voting out. OK?' Weiser said.").

46. Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 167, 186 (2020).

47. Maya King, *Jennifer McClellan Launches Virginia Governor Bid*, POLITICO (June 18, 2020), <https://www.politico.com/news/2020/06/18/virginia-jennifer-mcclellan-launches-gubernatorial-bid-326673> [<https://perma.cc/BKR5-8B2Z>].

48. See Siegel, *supra* note 46.

49. See *id.* at 187.

50. See *id.* at 188.

51. Letter from Abigail Adams, to John Adams (Mar. 31, 1776) (emphasis added), <https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa> [<https://perma.cc/3MGG-FZU7>]. Abigail Adams also disappears from constitutional history, appearing in Supreme Court opinions only as a recipient of letters from men. See Search Results for Abigail Adams in Supreme Court Opinions, WESTLAW EDGE, <https://www.westlaw.com/> (in the search bar, select "U.S. Supreme Court" as the jurisdiction and search for: Abigail /2 Adams) (last visited Mar. 31, 2021).

education. It is not only stories of the founding that feature an all-male cast of characters. The cases of the constitutional canon barely and rarely feature women.

Just as women are absent from the stories we tell about the making of our Constitution and our constitutional law, so too is the Nineteenth Amendment itself. The constitutional text and history of the Nineteenth Amendment explicitly concern women and model women as constitution-makers—yet the Nineteenth Amendment plays scarcely any role in constitutional interpretation, *even in the law of sex discrimination*.⁵² Think about that erasure. It is impressive evidence of women’s near-perfect exclusion as acknowledged makers of our constitutional law.

II. VOTING AND THE FAMILY—A BRIEF HISTORY

Today, the discourse of individualism masks the ways that family organizes citizenship. But for much of our history debates over citizenship focused on the family. The debate over women voting—known to nineteenth-century Americans as “the woman question”⁵³—concerned the family. As I have observed, a “woman’s claim to vote contested a man’s prerogative to represent his wife and daughters, and, therefore, was a claim for democratization of the family.”⁵⁴ Suffragists argued that men did not virtually represent women in the state; women needed the vote to change the ways that law structured the family and women’s dependent membership in the polity.⁵⁵

Arguments seeking democratization of the family began well before the debates over the Reconstruction Amendments. They continued on the path to the Nineteenth Amendment, exploded at ratification, and played a prominent role in the Amendment’s half-century anniversary.⁵⁶ Advocates expressed these claims in many voices, forms, and movements over time.⁵⁷ Debates about family and citizenship remain alive in the era of the Amendment’s centennial, as women reckon with structural inequalities the COVID-19 pandemic has exacerbated.⁵⁸

52. See Siegel, *supra* note 15, at 953–68 (showing that modern sex discrimination law developed from the Fourteenth Amendment’s Equal Protection Clause).

53. See generally ELIZABETH K. HELSINGER, ROBIN LAUTERBACH SHEETS & WILLIAM VEEDER, *THE WOMAN QUESTION: SOCIETY AND LITERATURE IN BRITAIN AND AMERICA, 1837–1883* (1983); MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830–1900* (2007); Francis Parkman, *The Woman Question*, 129 N. AM. REV. 303 (1879); Julia Ward Howe, Lucy Stone, Thomas Wentworth Higginson, Elizabeth Cady Stanton & Wendell Phillips, *The Other Side of the Woman Question*, 129 N. AM. REV. 413, 415 (1879) (“Why should one sex assume to legislate for both? . . . Because the political enfranchisement of the hitherto non-voting sex would overthrow the family?”).

54. See Siegel, *supra* note 16, at 458.

55. See Siegel, *supra* note 15; Siegel, *supra* note 16.

56. See Siegel, *supra* note 16. For the memorialization of the Nineteenth Amendment on its half-century anniversary, see *supra* note 16, at 473–78.

57. See, e.g., *id.* at 464–72.

58. See Jessica Grose, *America’s Mothers Are in Crisis*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/parenting/working-moms-mental-health-coronavirus.html> [<https://perma.cc/>

Yet even as these debates about family and citizenship recur from generation to generation in American constitutional *history*, they play scarcely any part in American constitutional *memory*—the ways that Americans make claims on the past as they argue about the Constitution’s meaning. Just as arguments about the family played important roles in the debate over slavery yet seem to play no part in the modern understanding of the Reconstruction Amendments,⁵⁹ so, too, arguments about the family that were prominent in the debate over women voting are missing as well. In making constitutional arguments, advocates do not commonly invoke abolitionists or suffragists.⁶⁰ Americans do not generally assume that claims of reproductive justice have important historical antecedents.⁶¹ Nor do

Q4VH-5LQX]; Ernie Tedeschi, *The Mystery of How Many Mothers Have Left Work Because of School Closings*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/upshot/mothers-leaving-jobs-pandemic.html> [<https://perma.cc/U47G-YXCN>] (estimating that 1.6 million mothers have left the labor force due to home/family care issues); *A Year of Strength & Loss*, NAT’L WOMEN’S L. CTR. (Mar. 2021), https://nwlc.org/wp-content/uploads/2021/03/Final_NWLC_Press_CovidStats.pdf [<https://perma.cc/K55V-WQGF>].

59. Peggy Cooper Davis has brilliantly endeavored to demonstrate that Fourteenth Amendment substantive due process law can find its bearings in “neglected stories” about family in the fight over slavery. See generally PEGGY COOPER DAVIS, *THE CONSTITUTION AND FAMILY VALUES* (1997); see also Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 318–20 (1993) (discussing the focus on “the devastating effect of slavery upon the African-American family [as] paramount concerns of the anti-slavery movement” in the writings of Harriet Beecher Stowe and others); Patricia A. Broussard, *Unbowed, Unbroken, and Unsung: The Unrecognized Contributions of African American Women in Social Movements, Politics, and the Maintenance of Democracy*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 631, 642–43 (2019) (describing how enslaved people resisted rape and forced pregnancy by their masters and discussing women’s decisions about abortion during slavery); Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights*, 115 AM. HIST. REV. 732 (2010) (analyzing historical questions of slavery and freedom under the Thirteenth Amendment through a gender lens). For a study of Reconstruction offering a cautionary account of the freedom to marry, see KATHERINE M. FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (2015).

60. Ruth Ginsburg’s early Supreme Court briefs in *Reed v. Reed* and *Frontiero v. Richardson* did endeavor to incorporate the voices of those who preceded her. The briefs excerpted portions of the 1848 Seneca Falls Declaration of Sentiments that condemned women’s disfranchisement and doctrines of marital status, and quoted Sojourner Truth at a woman’s rights convention in 1851. See Brief for Appellant at 30–31, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); Brief of American Civil Liberties Union as Amicus Curiae at 15–17, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694).

61. This is a generalization, which of course the reproductive justice movement has mobilized to resist. See, e.g., JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* (2003); SHERI RANDOLPH, *FLORYNCE “FLO” KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL* (2015); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Maya Manian, *The Story of Madrigal v. Quilligan: Coerced Sterilization of Mexican-American Women*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 97–116 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019). See also sources cited *supra* note 59 and *infra* note 110.

Melissa Murray has just published what promises to be a debate-shaping article addressing constitutional memories associating abortion and genocide that may play a role in *Roe*’s demise. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021). In it, she offers an “account of the role that race has played on both sides of the abortion debate” and counters “the thin historical account that Justice Thomas provides in the *Box* concurrence with a more robust and nuanced discussion of the history of abortion criminalization, the birth control movement, and the association of reproductive rights with Black

they view the childcare crisis during the COVID-19 pandemic as having a long history growing out of women’s challenges to laws enforcing their dependent citizenship in politics and the market.⁶² Women’s civil rights activism is so completely excluded from constitutional memory—no matter the constitutional clause—that arguments advocates advanced do not inform or shape contemporary judgments about the Constitution’s meaning.

Over the generations, advocates advanced many arguments for women’s right to vote. This Part samples one important tradition—arguments beginning before Reconstruction and extending after the ratification of the Nineteenth Amendment arguing that women needed the vote to democratize the family. Parts III and IV, *infra*, show that there is no principled reason why this history has been effaced from constitutional memory—and suggest the stakes of attempting to integrate it into our law.

A. *The Republican Household: Voting and the Family*

Arguments about the family played a core role in debates about voting spanning the nineteenth and twentieth centuries. Of course, the word “family” never appears in the text of the Amendment’s rights or powers-bearing provisions. Section 1 of the Nineteenth Amendment provides: “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.”⁶³ Section 2 provides: “Congress shall have power to enforce this article by appropriate legislation.”⁶⁴ On its face, the Amendment certainly seems to concern voting, not families.

But what was the problem for which this amendment was a remedy? Today, we think of the United States as a constitutional democracy in which the principle of one-person-one vote governs.⁶⁵ But at the Founding, only a minority of United States citizens were able to vote.⁶⁶

genocide [including] the emergence of the reproductive justice movement and the co-optation of reproductive justice themes by those opposed to abortion rights.” *Id.* at 2030–31.

62. *But see* Reva B. Siegel & Julie C. Suk, Opinion, *Women Won the Vote But Not the Suffragists’ Larger Goal*, L.A. TIMES (Aug. 26, 2020), <https://www.latimes.com/opinion/story/2020-08-26/womens-equality-day-suffrage-19th-amendment-childcare-shirley-chisholm> [<https://perma.cc/6MRU-ZWF9>]. Anne-Marie Slaughter has also located the care crisis in critical historical context. *See* Anne-Marie Slaughter, *Rosie Could Be a Riveter Only Because of A Care Economy. Where is Ours?*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/opinion/care-economy-infrastructure-rosie-the-riveter.html?referringSource=articleShare> [<https://perma.cc/777H-YB67>] (observing that “when the government was actively recruiting women into factories to produce the equipment and weapons needed to fight World War II [Congress] passed the Defense Public Works law of 1941 (known as the Lanham Act) to provide for the building of infrastructure like . . . housing and schools, all of which were recognized as necessary supports to the war effort [and] Congress relied on this authorization to allocate \$52 million (about \$800 million today) to build over 3,000 federally subsidized day care centers”).

63. U.S. CONST. amend. XIX, § 1.

64. U.S. CONST. amend. XIX, § 2.

65. The principle of one-person-one-vote grew out of the Warren Court’s equal protection decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

66. *See* Siegel, *supra* note 16, at 456–57.

On one account of women's disfranchisement, the founders based the country on principles of individualism and equality of voice among its members, but prejudice restricted full expression of the principle for a century or two. On a different institutionalist account, the household is an organizing structure of a republic in which household heads speak for their members. Here, *inequality of voice is a structural feature of the plan*, not an accident in its implementation. On this account, unequal distribution of the vote at the founding was not a matter of accident or even of prejudice but of *institutional design* in a republic that gave some members of the polity power and authority over others. This institutional account offers the best descriptive account of our constitutional order and clarifies the structural foundations of family-based forms of inequality that persist to this day.

Today, we think of the family as a private sphere having little to do with politics or the market, but at the founding, the reverse was the case. At the founding the household was a site of governance and commerce. The law of coverture authorized a husband to represent his wife in legal and market transactions; the law of suffrage empowered him to speak for her in politics.⁶⁷

A woman was a dependent member of the polity—her standing defined in relationship to a household member who had authority over her *inter se* and was thought to represent her in dealings with others, the state and all those who would transact with the household.⁶⁸ Women's standing was defined through men, before marriage, after marriage, and outside of marriage.⁶⁹ Even after (some) women were allowed to vote, dependent or derivative citizenship persisted, understood as a feature of marriage, motherhood, or the body.⁷⁰

67. See Siegel, *supra* note 15, at 981–83.

68. On the law of marital status, see NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982). A married woman's citizenship status followed her husband's; this law was incrementally reformed, in racialized ways that took national origin into account, after the Nineteenth Amendment's ratification. See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 98–99 (1987).

69. See, e.g., Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1645 (2003) (“I tell the story of how the ideological functions of marriage—particularly, its imagined role in solving the problem of female economic dependency—have been extended to define and regulate the rights of unmarried women and their relationship to the state.”).

70. On dependent and derivative citizenship, see Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134 (2014); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 *CALIF. L. REV.* 1277 (2015); Siegel, *supra* note 46, at 189 (“[I]n the century after the ratification of the Nineteenth Amendment, Americans continued to reason through traditional, gender-based family roles as they made decisions about employment and politics. These understandings were carried forward, not simply through custom and consent, but through laws that pushed resisting mothers and mothers-to-be out of employment on the assumption they were dependents of male wage earners.”); *id.* at 213 (demonstrating “how laws regulating pregnancy have long enforced women's role as economic dependents of wage earners rather than as households' economic providers, exacerbating sex-linked wage disparities”).

B. Suffrage Argument—Democracy and the Family

Because membership in the polity was organized through the household, women's claim to vote represented a fundamental challenge to foundational assumptions of the republic. Women were already represented by male heads of household, those defending the status quo argued, so that enfranchising women would destroy the harmony and good order of the household.⁷¹ Justin Smith Morrill, a senator from Vermont, spoke for many in the debates over Reconstruction when he contended in 1866 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."⁷²

1. Claims on the Constitution—Individualism, the Family, and the Claim for Equal Treatment

Men argued women were represented through husbands and fathers, who were supposed to vote in their wives' and daughters' interests. Women contested these claims of virtual representation on then-unfamiliar grounds that all adult members of the household were entitled to a voice in the state, to vote and participate directly as individuals, rather than derivatively as household members. When woman suffragists argued as individuals, they were making arguments about the family, challenging women's family roles as dependents of their husbands or fathers.⁷³

Suffragists attacked dependent citizenship by the simple but gender-disruptive strategy of appropriating the liberty and equality claims that men employed in the Revolutionary and Civil War eras—for example, "no taxation without representation."⁷⁴ Sometimes, women seeking the right to vote challenged dependent

71. For a sampling of these arguments, see Siegel, *supra* note 15, at 980–97.

72. *Id.* at 984 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866)).

73. *Cf.* Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836, 837 (1987) (discussing the discourse of individualism and the emergence of challenges to marital status law and the family).

74. The arguments of suffragists drew on constitutional memory, even if their arguments are not now part of our constitutional memory. See Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 335–36 (2001) (citations omitted).

As I have observed, a movement employs different forms of argument to mobilize its members and to persuade non-members of the group's aims; constitutional memory plays a critically important role in efforts to persuade audiences outside the movement's ranks of the justice of its claims.

In recruiting members to its ranks, a movement may emphasize the injuries or values that differentiate the group's members from the rest of society, but a movement cannot satisfy its aims or secure recognition of its constitutional claims by these same forms of appeal. Instead, advocates must defend their interpretation of the Constitution as vindicating principles and memories of a shared tradition. A movement's efforts to satisfy these conditions of argument will lead it to pursue its partisan aims in ways that can transform the meaning of the tradition and the self-understanding of those who make claims upon it. . . . [The suffrage movement's] mobilizing arguments emphasized differences of interest and position between the sexes. But in attempting to persuade men outside its ranks to enfranchise women, the movement emphasized the principles and memories that united citizens into a community rather than the values and interests that divided citizens in the

representation by speaking as individuals claiming “independence” and “self-government;” sometimes women seeking the right to vote attacked the status logic of dependent citizenship directly, by invoking the constitutional arguments of the abolitionist movement to argue that denying women suffrage violated the Preamble, the Due Process Clause, Privileges or Immunities Clause, the Guarantee Clause and the Titles of Nobility and Bills of Attainder Clauses.⁷⁵ Some of these claims on the Constitution sounded in liberty and others in equality values, but all were gender-disruptive, extending to the family forms of political reason never before thought to apply there.

One reason the Supreme Court may have narrowly interpreted the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*⁷⁶ and *Bradwell v. Illinois*,⁷⁷ handed down on successive days in April of 1873, was to block women’s claims to vote under the Fourteenth Amendment⁷⁸ asserted in the movement known as the “New Departure,” when masses of women attempted to vote in the elections of 1871 and 1872.⁷⁹ Two years after *Slaughter-House* and *Bradwell*, the Court rejected Virginia Minor’s claim that she had a right to vote under the Fourteenth Amendment in *Minor v. Happersett* on privileges or immunities, bill of attainder, and (substantive) due process grounds.⁸⁰

2. Claims on the Constitution—The Vote as a Claim for the Democratization of the Family

Women seeking the vote demanded equal treatment, claiming the forms of liberty and equality to which men were entitled. When told that men represented their interests, women disagreed, and, emphasizing how the circumstances of the

community. . . . Arguing in this discursive register, the suffrage movement urged that virtual representation inflicted the same injustice on women as it inflicted on men: a regime of male suffrage violated the principle of “no taxation without representation,” the principle for which the American revolution against the British crown was fought.

Siegel, *supra* note 6, at 1357–58 (citations omitted).

75. Siegel, *supra* note 15, at 971–72, 972 n.66 (describing constitutional claims of the New Departure and their roots in the abolitionist movement).

76. 83 U.S. (16 Wall.) 36 (1873).

77. 83 U.S. (16 Wall.) 130 (1873).

78. See Siegel, *supra* note 15, at 974 n.74 (“[T]he 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.”).

79. See *id.* at 971–74.

80. 88 U.S. (21 Wall.) 162 (1874). For the Court’s holding on Bill of Attainder and Due Process grounds, see *id.* at 175–76. For Virginia Minor’s complaint and the judgment of the Missouri Supreme Court, which was rendered before *Slaughter-House* and allowed the state’s male suffrage under section two of the Fourteenth Amendment, see *Minor v. Happersett*, 53 Mo. 58 (1873).

sexes diverged, demanded the vote for women's empowerment.⁸¹ Attacking claims of virtual representation, suffragists argued that women needed the vote precisely because men failed to vote in their wives' and daughters' interests. Virtual representation was *no* representation: the law entrenched male interests and perspectives that injured women.⁸²

The suffrage movement's long-running attack on virtual representation was self-consciously gendered. Because the justification for male suffrage depended on the claim of virtual representation, women's demand for the vote emphasized difference *and* dominance: all the ways that men failed fairly to represent women's interests in the state.⁸³

Showing that the law of marital status did not represent women's interests punctured the core claim of virtual representation—that men took their wives' and daughters' needs into account in crafting the law. At the same time, showing that the law of marital status did not represent women's interests demonstrated to women why they needed to mobilize for the vote.⁸⁴

As we sample women's account of why women need the vote—not only their appropriation of men's claims about democracy and the principle of self-representation, but their concrete claims about the injuries law inflicted upon them “as women” and their need for political “representation as women”—we uncover a record of constitutional consequence. We recover a vernacular account of liberty and equality spoken by women in different social classes over the decades, in

81. Aileen Kraditor famously drew a distinction between two classes of arguments in the suffrage movement: (i) justice-seeking arguments that emphasized equal treatment, and (ii) arguments from “expedience” that emphasized sex difference (e.g. women's gender-conventional authority as mothers). See generally AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* (1965). Kraditor's critique was aimed at progressive-era “social housekeeping” arguments. *Id.* at 65–71. It is simply a mistake to characterize all arguments for woman suffrage premised on gender difference as “expedient.” An advocate may focus on differences in group position and interest, and seek empowerment for reasons of justice, as woman's rights advocates did beginning in the antebellum era. As I illustrate in this section, when woman's rights advocates attacked claims of virtual representation, they reasoned about women's interests in sex-and-family role-based ways, seeking structural change that would address women's circumstances, rather than simple equal treatment. One can also read many progressive-era claims for “social housekeeping” similarly. See *infra* notes 100-102 and accompanying text.

82. See Siegel, *supra* note 16, at 460.

83. In an 1852 woman's rights convention held in Syracuse, N.Y., Antoinette Brown (who would later marry Henry Blackwell) argued that:

The law is wholly masculine The framers of all legal compacts are . . . restricted to the masculine stand-point of observation—to the thoughts, feelings, and biases of men. The law, then, could give us no representation as women, and therefore, no impartial justice, even if the present law-makers were honestly intent upon this; for we can be represented only by our peers.

Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1075 (1994).

84. See Siegel, *supra* note 76, at 1357 (“In recruiting members to its ranks, a movement may emphasize the injuries or values that differentiate the group's members from the rest of society, but a movement cannot satisfy its aims or secure recognition of its constitutional claims by these same forms of appeal.”).

which the household is a site of activities whose proper valuation and organization is critical to democratic citizenship.

From its beginning in the antebellum era, the suffrage movement talked about the necessity of the right to vote to making women materially and politically independent from men. At the first National Women's Rights Convention in 1850, the movement sought

1. That women ought to have equal opportunities with men for suitable and *well compensated* employment. 2. That women ought to have equal opportunities, privileges, and securities with men for rendering themselves *pecuniarily independent*. 3. That women ought to have equal legal and political rights, franchises, and advantages with men.⁸⁵

Abby Price attacked the market economy as “undervaluing our labor, —taking from us our right to choice in our industrial avocations,—inflict[ing] . . . pecuniary *dependence*, —shutting us from the trades, and the learned professions.”⁸⁶ Wendell Phillips objected that “[t]he woman of domestic life receives but about one third the amount paid to a man for similar or far lighter services. The woman of out-door labor has about the same. The best female employments are subject to a discount of some forty or fifty per cent on the wages paid to males.”⁸⁷

We can read in the movement's early demands for material independence from men a simple demand for the power to enact laws that secure for women equal treatment with men. There is more. From the movement's earliest days, the suffragists understood an additional aim and purpose of women's empowerment through voting would be to secure material as well as political independence, meaning freedom from legally enforced “pecuniary dependence” on men, and thus a remedy for the dependent citizenship that the law inflicted on women whether single or married.⁸⁸

Convention records and suffrage newspapers in the decades before and after the Civil War demonstrate that suffragists sought the vote to reform marital status law. They sought “self-ownership” to give women property rights in both their market earnings and in their household labor.⁸⁹ To end women's pecuniary

85. PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D & 24TH, 1850, at 21 (Boston, Prentiss & Sawyer 1851).

86. *Id.* at 34.

87. Wendell Phillips, Speech at the Convention Held at Worcester 17 (Oct. 15 & 16, 1851) (published transcript available in Woman's Archives, Schlesinger Library, Radcliffe College, Cambridge, Mass.).

88. See *supra* text at note 69 (observing that women's standing was defined through men, before marriage, after marriage, and outside of marriage).

89. See Siegel, *supra* note 83, at 1103–04.

But analyzing feminist arguments about autonomy and dependence as simple expressions of the liberal, republican, or communitarian traditions obscures the animating spirit of the movement's demands: a spirit of gender skepticism that led the movement into critical dialogue with the very traditions upon which it drew. As feminists explored women's experience of dependence in marriage and struggled to articulate a vision of autonomy responsive to women's concerns, they

dependence, suffragists called for the recognition of joint property rights in marriage. They would have used the vote both to abolish a husband's property rights in his wife's services and to recognize joint property rights in marital assets to remunerate a wife for her contribution to the household economy.⁹⁰ These joint property claims began in the first woman's rights conventions and extended into the post-Civil War period. They were also featured in national and regional suffrage newspapers, which included stories of the care work of women mingled with home-based production on family farms.⁹¹ A joint property claim seeking recognition and remuneration for care work played an important role in the early suffrage movement and was an important antecedent of contemporary claims seeking recognition and support for caregivers.

Another gendered mobilizing frame was the demand for sexual and reproductive autonomy in marriage, which may have become "speakable" and emerged as a ground of mobilization as abolitionists challenged the ways that slaveholders violated the sexual, reproductive, and family autonomy of slaves.⁹² In attacking claims of virtual representation, women argued that the law of marriage denied women voluntary motherhood. Letters, speeches, and stories guardedly—and sometimes quite openly—explained that women needed the vote to abolish a husband's marital right to his wife's sexual services and to recognize a wife's right to refuse sex with her husband—and thus to assert control over the timing of motherhood.⁹³ Echoing the movement's joint property claims, Lucy Stone described this right as a right of self-ownership:

It is very little to me to have the right to vote, to own property . . . if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand

exposed inequalities in family life that the political traditions the movement relied upon had never questioned. Thus, as the movement appropriated the discourse of self-ownership, it demonstrated that traditional concepts of liberty were in fact gendered; they tacitly referred to men. At the same time, as the movement used the discourse of self-ownership to demand liberty for women, feminists infused the concept of self-ownership with new gendered meaning. When Frances Gage insisted, "Let us assert our right to be free. Let us get out of our prison-house of law. Let us own ourselves, our earnings, our genius . . .," she was demanding freedom for wives, seeking an end to legally sanctioned coercion in matters of sex and motherhood, as well as to legally enforced dependency in marriage.

Id. at 1104–05. *See also id.* (offering a study of the joint property claims of suffragists in the decades before and after the Civil War).

90. *See id.* at 1076.

91. *See id.* at 1146–79.

92. *See supra* note 59 (discussing work of Peggy Cooper Davis).

93. In the decades before and after the Civil War, suffragists asserting claims of "self-ownership" denounced law that authorized men to coerce sex in marriage and impose motherhood on women. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1413–64 (2000). On the husband's common-law right to consortium, *see* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923). For an account of nineteenth-century feminism examining the movement's demands for reproductive autonomy in light of its wider socio-political agenda, *see* Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 741 AM. HIST. 836, 842–44 (1987).

can do that now, & so long as she suffers this bondage, all other rights will not help her to her true position.⁹⁴

Suffragists viewed the law of marriage as depriving women of “self-ownership” in sex and motherhood, and forcing women into economic dependency on men; with this understanding, some condoned, even as they condemned, abortion.⁹⁵

Many other women, more comfortable arguing from the authority of family roles than in challenging family law, leveraged the maternal care ethic toward suffrage and group-empowerment ends. Under the leadership of Frances Willard, the temperance movement sought the vote under the banner of “home protection,”⁹⁶ and raised issues of domestic violence, sexual abuse, and women’s need for authority in private and public spheres.⁹⁷

Women of color addressed questions of family life as an integral element of strategies of racial uplift. Frances Watkins Harper sought to build cross racial alliances in her temperance work.⁹⁸ Mary Church Terrell, Ida B. Wells, and Harper founded the National Association of Colored Women to unite a network of Black women’s clubs that innovated strategies of racial uplift focused on child welfare, building a network of kindergartens that endeavored to solve challenges faced by Black children who attended segregated, poorly funded schools and whose care-givers worked long hours in the workforce.⁹⁹

C. Family and Citizenship: How Claims for Democratization of the Family Evolved in the Twentieth Century

By the early twentieth century, the suffrage movement developed a more broad-based coalition and proposed new forms of governance. Suffragists, arguing as mothers, asserted that women needed the vote to do care work that reached into the public sphere, work they termed “social housekeeping.” This new generation of suffragists talked about women’s need for the vote to have a voice in the

94. Lucy Stone, Letter to Antoinette Brown Blackwell (July 11, 1855), in *FRIENDS AND SISTERS: LETTERS BETWEEN LUCY STONE AND ANTOINETTE BROWN BLACKWELL, 1846–93*, at 144 (Carol Lasser & Marlene Deahl Merrill eds., 1987).

95. See Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 305–14 (1992) (reviewing suffragist statements of the 1870s); see also Siegel, *supra* note 16, at 464 n.53.

96. RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873–1900* (1981).

97. See Erin M. Masson, *The Woman’s Christian Temperance Union, 1874–1898: Combating Domestic Violence*, 3 *WM. & MARY J. WOMEN & L.* 163, 163 (1997) (“WCTU chapters provided the primary forum for protecting women from sexual abuse and exploitation as well as other social evils. Eventually, the WCTU turned this movement for protection of home into a cry for suffrage.”).

98. See Bettye Collier-Thomas, *Frances Ellen Watkins Harper: Abolitionist and Feminist Reformer, 1825–1911*, in *AFRICAN AMERICAN WOMEN AND THE VOTE, 1873–1965*, at 55–60 (Ann D. Gordon & Bettye Collier-Thomas eds., 1997) (observing that Harper played a role in “the abolitionist, suffrage, temperance, peace, civil and woman’s rights movements”).

99. See Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 *FLA. ST. U. L. REV.* 957, 960–61 (2005). On kindergartens, see *id.* at 967–70.

regulation of municipal services¹⁰⁰ and to address the industrial conditions in which they and their children worked.¹⁰¹ They began to imagine a vote that could enable women to do care work in a new scale and form, through the state. They proposed the first public health program for poor women and children, which was enacted in the immediate aftermath of ratification, but repealed by the decade's end.¹⁰²

In 1920, suffragist Crystal Eastman greeted ratification of the Nineteenth Amendment in a speech setting out a plan of action for the National Woman's Party entitled "Now We Can Begin."¹⁰³ A socialist, pacifist, civil libertarian, and lawyer who co-founded the American Civil Liberties Union (ACLU) and led the suffrage campaign through its final years, Eastman was part of a group of women who expanded nineteenth-century understandings of woman's rights into a new movement they called "feminism."¹⁰⁴

100. See, e.g., Jane Addams, *Women and Public Housekeeping*, NAT'L WOMEN'S SUFFRAGE PUBL'G Co. (1910), <https://link.gale.com/apps/doc/BFRRJD329393524/NCCO?u=29002&sid=NCCO&xid=c1568d7a> [<https://perma.cc/G27W-QGL7>] (flipping the shared frame of "housekeeping" in service of empowerment by extolling the skills women would bring to the task of "civic housekeeping"). Addams's tactical use of traditional gender stereotypes is interesting given her non-stereotypical life: Addams founded Hull House, one of the first American "settlement houses," where she lived communally with other women—including several with whom Addams had relationships—and provided social services such as childcare and vocational training to working-class women in the surrounding community. See Maureen P. Hogan & Jeanne Connell, *Hull-House as a Queer Counterpublic*, in INTERNATIONAL HANDBOOK OF PROGRESSIVE EDUCATION 713 (2015). See also Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political,"* 2 YALE J.L. & FEMINISM 25 (1989) (analyzing how Black women employed appeals to motherhood to support projects of racial uplift and to deal with the reality that for Black women, the "spheres" of work and home were never separate). Dorothy Roberts shows how Black club women organized kindergartens and other forms of youth education as a strategy for community empowerment and racial uplift. See Roberts, *supra* note 99.

101. Some of the most compelling arguments for suffrage came from working-class women and labor organizers like Clara Lemlich Shevelson, writing after the Triangle Shirtwaist Fire, who connected women's suffrage to their ability to control the conditions of their labor. See Clara Lemlich, *The Inside of a Shirtwaist Factory*, GOOD HOUSEKEEPING, Mar. 1912, at 367, https://digital.library.cornell.edu/catalog/hearth6417403_1340_004 [<https://perma.cc/R9EH-T5JV>]; see also ELLEN CAROL DUBOIS, HARRIET STANTON BLATCH AND THE WINNING OF WOMAN SUFFRAGE 88–121 (1997).

102. See MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930, 167–96 (1994) (discussing the Sheppard-Towner Maternity and Infancy Protection Act of 1921 and its subsequent repeal).

103. Crystal Eastman, *Now We Can Begin*, LIBERATOR, Dec. 1920, at 23–24, <https://www.marxists.org/history/usa/culture/pubs/liberator/1920/12/v3n12-w33-dec-1920-liberator.pdf> [<https://perma.cc/6LAH-C7F7>].

104. For Eastman's biography, see AMY ARONSON, CRYSTAL EASTMAN: A REVOLUTIONARY LIFE (2019). For other sources, especially focused on her career as a pioneering woman lawyer, see Siegel, *supra* note 16, at 466–67. On the emergence of feminism with all its many expressions, see Nancy Cott's important account. See COTT, *supra* note 68. For a snapshot of the many movements in which Eastman, Henrietta Rodman and the Feminist Alliance were engaged, see JUNE SOCHEN, THE NEW WOMAN IN GREENWICH VILLAGE, 1910–1920 (1972). One can get a sense of the breadth of the group's engagements and networks from a pair of posters for meetings held in Greenwich Village in 1914 that featured Eastman, Rodman, Frances Perkins Floyd Dell, Max Eastman, and Charlotte Perkins Gilman, the first entitled "What Is Feminism? Come and Find Out; First Feminist Mass Meeting." *What is Feminism?*, WOMEN & AM. STORY, <https://wams.nyhistory.org/modernizing-america/fighting-for-social-reform/what-is-feminism> [<https://perma.cc/3S3W-RFHR>] (last visited Oct. 18, 2021).

In “Now We Can Begin,”¹⁰⁵ Eastman described the vote as an instrument of women’s empowerment, continuing the long tradition of attacking virtual representation, in arguments now expressed in the register of feminism. The vote, Eastman announced, was the first step in attaining “[w]oman’s freedom, in the feminist sense.”¹⁰⁶ Like her nineteenth-century forebears, Eastman called for changes in the way law structured family roles and integrated family roles with other life activities to ensure that those who performed caregiving work would be recognized, included, and given the opportunity to participate in democratic life as equal citizens.

What, then, is “the matter with women”? What is the problem of women’s freedom? It seems to me to be this: how to arrange the world so that women can be human beings, with a chance to exercise their infinitely varied gifts in infinitely varied ways, instead of being destined by the accident of their sex to one field of activity—housework and child-raising. And second, if and when they choose housework and child-raising, to have that occupation recognized by the world as work, requiring a definite economic reward and not merely entitling the performer to be dependent on some man. This is not the whole of feminism, of course, but it is enough to begin with.¹⁰⁷

Eastman called upon the National Women’s Party to pursue a broad-based four-part plan in which one can recognize the nineteenth-century suffrage movement’s emancipatory demands for equal opportunity, for voluntary motherhood, and for pecuniary independence in performing care work expressed in new ways. Eastman urged the National Women’s Party to endorse plans:

- to challenge barriers to women’s access to education, unions, and employment;¹⁰⁸
- to begin a revolution in early childhood education, urging that “we must bring up feminist sons” (“It must be womanly as well as manly to earn your own living, to stand on your own feet. And it must be manly as well as womanly to know how to cook and sew and clean and take care of yourself in the ordinary exigencies of life.”);¹⁰⁹

105. See Eastman, *supra* note 103.

106. *Id.* at 23.

107. *Id.*

108. See *id.* The Feminist Alliance recognized the importance of gender-based coalition building across the class divide and had close ties to the labor movement, especially through Henrietta Rodman, who was a member of the Women’s Trade Union League and organized New York teachers to support garment industry strikes. See Patricia Carter, *Guiding the Working-Class Girl: Henrietta Rodman’s Curriculum for the New Woman, 1913*, 38 *FRONTIERS* 124, 129 (2017).

109. See Eastman, *supra* note 103, at 24.

- to change laws to recognize voluntary motherhood (Eastman argued that birth control “ensures freedom of occupational choice” and was “as elementary and essential . . . as equal pay”¹¹⁰); and
- to fund a new “motherhood endowment.” (Eastman advocated state support for those who were raising children so that they were not dependent on men,¹¹¹ while others continued to innovate ways to coordinate care work and market labor.¹¹²)

Alice Paul fatefully led the National Women’s Party in repudiating Eastman’s plan to develop an equality agenda that would address the concerns and interests of a broad-based coalition of women and went on to seek an Equal Rights Amendment (ERA), advancing a single-issue demand for equal treatment *without structural change*. At the same convention that Paul rejected Eastman’s four-part plan, Paul also refused to address the continued disfranchisement of Black women in the South, despite the efforts of other members to raise it.¹¹³ Paul’s single-issue focus on the ERA, effective in pursuit of the vote, now bitterly divided

110. *Id.* Support for birth control spread within the suffrage movement during the years prior to ratification. See Phyllis Eckhaus, *Restless Women: The Pioneering Alumnae of New York University School of Law*, 66 N.Y.U. L. REV. 1996, 2007–08 (1991). African-American suffragists spoke out in support of birth control as well. See ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920*, 70–72 (1998) (discussing Angelina Weld Grimké and others). By the time of ratification, some Black leaders had integrated voluntary motherhood into their message: “the future woman must have a life work and future independence. . . . She must have knowledge . . . and she must have the right of motherhood at her own discretion.” Jessie M. Rodrique, *The Black Community and the Birth Control Movement*, in *GENDERED DOMAINS* 244 (Dorothy O. Helly & Susan M. Reverby eds., 2018) (quoting W. E. B. Du Bois, *The Damnation of Women*, in *DARKWATER: VOICES FROM WITHIN THE VEIL* (Herbert Aptheker ed., Kraus-Thompson 1975) (1921)).

111. See Eastman, *supra* note 103, at 24. Woman’s rights claims seeking remuneration for wives’ labor in the household began with joint property claims in the nineteenth century, seeking redistribution within the family as part of the modernization of marital property law. See *supra* notes 89–91 and accompanying text. By the turn of the century, Charlotte Perkins Gilman, a member of Eastman’s circle, see *supra* note 104, had developed a materialist account of social reproduction. See CHARLOTTE PERKINS GILMAN, *WOMEN & ECONOMICS* (1898). A new generation of feminists began to imagine a role for government actually paying mothers for their labor, promising “a measure of economic independence to the mother” while “recogniz[ing] by a direct payment her services to society.” Eleanor Taylor, *Wages for Mothers*, *SUFFRAGIST*, November 1920, at 274. This same era saw the emergence of “mothers’ pensions.” See Michael B. Katz & Lorrin R. Thomas, *The Invention of “Welfare” in America*, 10 J. POL. HIST. 399, 402 (1998). A century later, this goal might finally be realized in the passage of a permanent, fully refundable child tax credit. See Jason DeParle, *In the Stimulus Bill, a Policy Revolution in Aid for Children*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/us/politics/child-tax-credit-stimulus.html> [https://perma.cc/4G85-TMDM].

112. Such innovation had long been necessary to meet the needs of working class women, leading to movements to provide free childcare and education. See *supra* note 98 and accompanying text (discussing the successful movement to establish free day care and kindergartens established by Mary Church Terrell and other Black women). Emancipating women of all classes from the demands of childcare led to a proposal for a “feminist apartment building” that would allow residents to outsource the majority of care work to trained staff, who themselves would work 7-hour days. See *Feminists Design A New Type Home*, N.Y. TIMES, Apr. 5, 1914, at C4.

113. For an account discussing Eastman’s efforts to work with Mary White Ovington, and Florence Kelley to oppose Paul on this decision, see Siegel, *supra* note 16, at 470–71.

the coalition of groups that had come together in support of the Nineteenth Amendment. Social-welfare feminists were concerned that an ERA would invalidate the sex-based protective labor legislation on which working women with family responsibilities depended at a time when unions would not organize women.¹¹⁴ Paul's decision gave class- and race-based meanings to "on the basis of sex" that proved an obstacle to coalition politics for decades.

By the Nineteenth Amendment's fiftieth anniversary in 1970, when a growing number of women of different backgrounds and commitments were beginning to coalesce around an ERA, the movement was seeking structural change much as Crystal Eastman had urged in the 1920s. The National Organization of Women (NOW) organized a "Women's Strike" in which hundreds of thousands of women took to the streets in New York, Los Angeles, and forty other cities. Led by Betty Friedan and Aileen Hernandez, the first presidents of NOW, the strike sought adoption of the ERA and advanced three demands reflecting concerns Eastman had raised a half century earlier: equal opportunity in education and employment, access to abortion, and government-supported childcare.¹¹⁵

NOW staged the strike on August 26, the fiftieth anniversary of the Amendment's ratification. The event self-consciously connected past and present,¹¹⁶ including in a march in which contemporary movement leaders were paired with suffragists of earlier campaigns.¹¹⁷ The strike "invoked the suffrage struggle as a positive precedent, to illustrate that women acting in concert could change the world,"¹¹⁸ and "deployed the memory of suffrage struggle as negative precedent, pointing to the nation's past wrongs to raise questions about the justice of its present practices."¹¹⁹

Even as the strike emphasized its demand for equal treatment—a transformative demand at a time when the Court had never struck down a state law as sex discriminatory under the Equal Protection Clause, and the Equal Employment Opportunity Commission was not enforcing the sex discrimination provisions of federal employment discrimination law¹²⁰—its organizers emphasized that equal treatment in politics or the market would *not* secure equal citizenship for women.

114. 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, 207 (1991).

115. See Siegel, *supra* note 16, at 474–75.

116. Siegel, *supra* note 7, at 1374 (quoting organizer Shirley Bernard recalling in 1975 that "The significance of August 26th as an important date in women's history and its relationship with the women's strike was explained over and over in newspapers and rallies. It provided a bridge between the first movement and ours. It served as a structure to educate the general public about the conditions of life that had provoked both the suffrage movement and the present one").

117. See Shirley Bernard, *The Women's Strike: August 26, 1970*, at 5, 70, 86 (1975) (unpublished Ph.D. dissertation, Union Graduate School of Experimenting Colleges and Universities, Antioch College) (on file with ProQuest Dissertations and Theses).

118. Siegel, *supra* note 7, at 1373.

119. *Id.* at 1374.

120. See Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

Like nineteenth-century suffragists who sought the vote, joint property, and voluntary motherhood, twentieth-century feminists equated equal citizenship with structural change. They sought not only an ERA and equal opportunity in education and employment, but also government-funded abortion and childcare. A young Eleanor Holmes Norton emphasized that the prohibition of sex discrimination in employment was “an empty mandate unless the women can have twenty-four-hour day-care centers to leave their children while they work.”¹²¹

In the wake of the strike—the largest women’s protest in the United States until the 2017 Women’s March—Congress and the states took steps toward ratifying the ERA and enacted laws prohibiting discrimination in employment, education, and credit, while the courts decriminalized abortion.¹²² In 1971, Congress enacted the Comprehensive Child Development Act (CCDA), which brought about national childcare across income levels.¹²³ The bill was pushed by Representative Shirley Chisholm, who became the first Black woman elected to Congress in 1968 after helping domestic workers in New York win unemployment benefits.¹²⁴ She urged that “the day-care disaster we face in the United States is the result of America’s tradition of discrimination against women” and women’s severe underrepresentation in Congress.¹²⁵

The childcare bill passed both houses of Congress on a bipartisan basis, only to be vetoed by President Nixon. He sided with rising New Right conservatives and claimed that broadly accessible childcare “would lead toward altering the family relationship” and diminish “parental involvement with children.”¹²⁶ Phyllis Schlafly’s earliest broadsides against the ERA, which equated “women’s lib” with assaults on the traditional family including abortion *and* childcare, helped kill support for legislation like the CCDA for another half century.¹²⁷

121. *The Talk of the Town: Liberation*, NEW YORKER, Sept. 5, 1970, at 25, 27, quoted in Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1989 (2003).

122. See Siegel, *supra* note 16, at 475–76.

123. See Kimberly Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. POL’Y HIST. 215 (2001); Post & Siegel, *supra* note 121, at 2008–11.

124. See Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512, 523 (2020). Support for the federal childcare program grew from the civil rights, antipoverty, and women’s movements, which in turn provoked distinctive forms of opposition.

125. JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT 73* (2020) (quoting 1970 Comprehensive Preschool Hearings, 793). She pointed out that ten of the 435 members of the House were women. *Id.*

126. Post & Siegel, *supra* note 121, at 2009 (quoting Veto of the Economic Opportunity Amendments of 1971, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON* 1174, 1176 (1971)) (“[Nixon] concluded that ‘for the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach.’”).

127. Phyllis Schlafly, *Women’s Libbers Do NOT Speak for Us*, PHYLLIS SCHLAFLY REP. 4 (Feb. 1972), reprinted in *BEFORE ROE V. WADE* 218 (Linda Greenhouse & Reva B. Siegel eds., 2012), (“Women’s libbers are promoting free sex instead of the ‘slavery’ of marriage. They are promoting Federal ‘day-care centers’ for babies instead of homes. They are promoting abortions instead of families.”). Schlafly was still campaigning against federal involvement decades later. See *WHO WILL*

D. Constitutional Argument Lost to Constitutional Memory

My point in sampling material from the centuries of suffrage struggle is not to suggest that there was broad-based consensus about the family across movements, or over time. To the contrary, my aim is to disrupt the entrenched assumption of our constitutional culture that consensus and custom shaped family relations for much of the nation's history. Over the centuries, women objected to the ways laws structured the family and distributed resources, authority, and voice. There have been wide-ranging, intergenerational arguments about the forms of family life a constitutional democracy requires—a debate that helped motivate women's quest for political voice.

The arguments sampled here offer a vernacular account of the stakes of self-government and the meaning of freedom and equality for those denied political voice. Simply put, women demanded the vote to challenge their legally imposed dependence and to secure their economic and sexual independence from men. We can describe the changes women sought in more institutional terms. Women sought the vote to *democratize* the family. They sought to change family law—to redistribute political voice, legal authority, and legal title to resources in the household so its adult members would be equally empowered in politics, sex, parenting, and the market. They sought political power and a reorganization of the public sector to help protect the most vulnerable families in the community. They sought these changes on the understanding that the work of social reproduction was essential for democratic life and that the full and equal integration of those who perform such work is a necessary condition of their equal citizenship in a constitutional democracy.

Centuries before Susan Okin,¹²⁸ women seeking the vote understood that the household was a critical institution of a constitutional democracy, no less than the legislature, schools, or the press. They understood that certain minima of physical integrity—whether freedom from domestic violence, sexual assault, forced motherhood, or lynching—and a certain minima of physical security to enable a family to flourish were integral elements of the “home protection” that women believed the right to vote would secure. In seeking political voice, generations of women provided a vernacular account of liberty and equality under the United States Constitution—explaining why liberty and equality matter and where—that one does not encounter in American case law.

ROCK THE CRADLE? THE BATTLE FOR CONTROL OF CHILD CARE IN AMERICA (Phyllis Schlafly ed. 1989); George J. Church, *The Cradle's Rocking*, CHI. TRIB. (May 29, 1988), <https://www.chicagotribune.com/news/ct-xpm-1988-05-29-8801030308-story.html> [<https://perma.cc/3M8M-S46Q>] (“[A]ntifeminist Phyllis Schlafly . . . hysterically thunders that the Dodd bill would ‘Sovietize the American family by warehousing babies’ in day care centers.”).

128. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

III. INTEGRATING SUFFRAGE HISTORY INTO CONSTITUTIONAL LAW

Arguments of the kind we have been examining are for the better part lost to constitutional memory. Do these arguments—or *any* of women’s arguments for the vote—have any claim to be integrated into our constitutional law? Why are the names of woman suffragists missing from the pages of the *United States Reports*, and why does their absence go without notice?¹²⁹ In what follows, I briefly revisit the question of why the constitutional history we have just sampled plays no part in our constitutional law. I then consider several ways this history could be incorporated into constitutional memory, if advocates were to make sustained claims on it.

A. Erased or Irrelevant?

One common sense explanation for the absence of suffragists and suffrage arguments in the *United States Reports*, which we might term the standard account, is that these historical actors and their arguments are constitutionally immaterial. At a time when there was an all-male electorate, woman suffragists simply failed to move the Republican Party to draft the Fourteenth Amendment to recognize universal suffrage, nor did they move the Party to draft the Fifteenth Amendment to recognize women’s right to vote.¹³⁰ Nor was women’s popular constitutionalism—their spontaneous voting under the Fourteenth Amendment known as “the New Departure”¹³¹—enough to move the Supreme Court, which in *Minor v. Happersett*¹³² rejected women’s claim to vote under the Fourteenth Amendment’s Privileges or Immunities Clause and its Due Process Clause.¹³³ So, on this view, we would not look to woman suffragists’ arguments for historical evidence of the Reconstruction Amendments’ original meaning. And, the Nineteenth Amendment itself is no longer a significant source of constitutional

129. See *supra* Part I.

130. For accounts of the debates over the Fifteenth Amendment within the suffrage movement, which provoked divisions among whites and for a brief time among Blacks as well, see Collier-Thomas, *supra* note 98, at 41, 49–51, and ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869*, at 53–202 (1978); see also ELLEN CAROL DUBOIS, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, in *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 81, 86 (1998).

131. The story of the New Departure is a remarkable and remarkably early expression of popular constitutionalism that began after suffrage movement leaders failed to persuade Republican Party leadership to draft the Fourteenth or Fifteenth Amendments to recognize universal suffrage. At polling places across the country, women nonetheless claimed a right to vote under the newly ratified Fourteenth Amendment. They invoked suffragist and abolitionist arguments to interpret the Amendment as recognizing their right to do so. See Siegel, *supra* note 15, at 970–74; ROSALYN TERBERG-PENN, *AFRICAN-AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920*, at 36–41 (1998) (discussing African American women’s claims under the Fourteenth Amendment). For a thoughtful exploration of the New Departure as demonstrating “an unrecognized measure of women’s influence and creativity in constitutional thought,” see Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the Living Constitution*, 76 N.Y.U. L. REV. 1456, 1459 (2001).

132. 88 U.S. 162 (1874).

133. See *supra* text accompanying notes 75–80.

law because courts read it as a non-discrimination rule concerning voting with which the nation now complies.¹³⁴

Explanations of this kind could be mobilized to account for the absence of suffrage history, suffrage arguments, and even the mention of suffragists' names in the *United States Reports*. On this account, suffragists' arguments and names are simply not relevant to the meaning of the Reconstruction Amendments.

This argument might have superficial plausibility as an attempt to explain why these historical actors and their arguments have gone missing in Supreme Court decisions, and we fail even to notice their absence. But this common sense account assumes historical evidence is relevant only insofar as it reveals original understanding, an assumption that radically misdescribes the Court's case law, especially where interpretation of the Reconstruction Amendments is concerned.

In interpreting the Constitution, the Court regularly considers all manner of historical evidence, the kinds of historical evidence appropriate to the different modalities of interpretation that the Court commonly employs in deciding constitutional cases.¹³⁵ Perhaps because the Reconstruction Amendments were adopted to transform the demos and to give membership and voice to persons who had been excluded from their drafting, the Court typically follows doctrine rather than the understandings of the ratifiers in interpreting the Amendments.¹³⁶ In interpreting the Reconstruction Amendments, the Court reasons about history in ways that celebrate the nation's evolving understanding of its constitutional commitments.

134. See Siegel, *supra* note 15, at 1006–22 (showing the “thin conception” of the Nineteenth Amendment that emerged in the wake of ratification as a rule that prohibited sex discrimination in suffrage). For an important account exploring the ways that the choices of the women's movement in the wake of ratification contributed to the Amendment's narrow construction, see generally PAULA A. MONOPOLI, *CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT* (2020).

135. See Balkin, *supra* note 3, at 356 (“[T]here is no single modality of ‘historical argument.’ Rather arguments using all of the modalities may invoke history to support their claims. . . . [H]ow one uses history will differ depending on the modality of argument one uses.”).

136. In cases like *Brown* and *Loving*, the Court has read the Fourteenth Amendment

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. 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.

See Siegel, *supra* note 15, at 1042 (citations omitted). Cf. Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 198 (2013) (“After all, the Nineteenth Amendment itself, once enacted, rendered retroactively problematic the facts that most women had been excluded from the vote on whether women should vote and that all women had been excluded from the previous Reconstruction votes on the scope of human equality. . . . The amendment's plain (if deep) meaning counsels against exaggerating male voices *hors du texte* when construing a Constitution whose new big idea was precisely to affirm female equality.”).

Supreme Court Justices regularly cite to the dissenting opinions in *Plessy* and *Korematsu*,¹³⁷ and reason from post-ratification history, arguing about *Brown* as if it were the founders' understanding of the Equal Protection Clause.¹³⁸

Bracketing the forms of dynamic interpretation practiced by the Court's originalists and textualists,¹³⁹ it is important to observe how regularly even the Court's self-proclaimed originalists break from originalist methods in interpreting the Fourteenth Amendment's Equal Protection Clause.¹⁴⁰ They do the same in substantive due process cases.

The Justices who claim commitment to originalism have not approached debates over substantive due process through anything resembling originalist methods. This is true even as scholars have begun exploring originalist understandings of substantive due process under the Fifth and Fourteenth

137. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment); *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214, 236–40 (1944) (Murphy, J., dissenting)).

138. See generally Jonathon L. Entin, *Parents Involved and the Meaning of Brown: An Old Debate Renewed*, 31 SEATTLE U. L. REV. 923 (2008).

139. See generally Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008). On the forms of dynamic interpretation textualists practice, see Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119 (2021).

140. Eric Segall, among others, has called Justice Thomas to account for deviating from originalist methods in his opinions on affirmative action:

There are other examples of Justice Thomas ignoring original intent and clear history to reach results he prefers, but by far the most obvious, and perhaps the most important, is his approach to affirmative action cases. . . . Rather than citing to text or history [in affirmative action cases], he has emphasized the stigmatizing effects of racial preferences and how they undercut the quest for racial equality. He feels so strongly about this policy position that he devoted almost an entire opinion to defending it [in his *Grutter v. Bollinger* dissent]. He may be right, or he may be wrong, but he has failed to justify such a reading through text or history. The only real history Justice Thomas has recounted in his affirmative action opinions focuses on the views of Frederick Douglass, a famous abolitionist. The problem is that Justice Thomas misrepresents Douglass's views.

Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion, or Both*, 3 WAKE FOREST L. REV. ONLINE 6, 10 (2013). A variety of commentators have observed that the originalists on the Court do not approach affirmative action cases through the lens of originalism. See Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 109 (2014) (arguing that "Justice Thomas simply has not invoked original intent, original understanding, original expected applications, or original public meaning in his opinions dealing with constitutional questions involving race to interpret the Equal Protection or Due Process Clauses."); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 76–81 (2014); *id.* at 81 ("Overall, then, Justice Thomas, like Justice Scalia, has not made a serious effort to show that the colorblindness approach is consistent with the original meaning."); Reva B. Siegel, *The Supreme Court, 2012 Term Foreword: Equality Divided*, 127 HARV. L. REV. 1, 31–32 (2013) (discussing Justice Scalia's failure to respond to Justice Marshall's arguments for affirmative action based on the original understanding of the Fourteenth Amendment).

Amendments,¹⁴¹ reopening the case for understandings of due process that are not narrowly procedural. Justices Scalia and Thomas have not acknowledged this growing body of originalist scholarship and have instead continued to attack the Court's decisions enforcing the Constitution's liberty guarantees, invoking accounts of due process that were advanced by liberal scholars in the progressive era and flowered in the twentieth century.¹⁴² Justices who claim fealty to originalism follow the views of a late twentieth-century liberal when they object that "the oxymoronic 'substantive' 'due process' doctrine has no basis in the Constitution."¹⁴³ Their arguments associating *Roe* with *Dred Scott* and *Lochner*¹⁴⁴ are appeals to post-ratification history; they are not inquiries into original meaning.

In attacking *Roe* and other due process decisions, Justices Scalia and Thomas are practicing dynamic interpretation—conservative living constitutionalism. They persuade by appeal to twentieth-century cautionary tropes about the judicial

141. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 311 (2007) ("In fact, the Due Process Clause, as originally understood, did have some substantive content. 'Due process of law' was a term of art thought to be roughly synonymous with the idea of 'law of the land' from Magna Carta."); Randy E. Barnett and Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1605 (2019) ("In this Article, we revisit the original meaning of the text—the 'letter'—of the Due Process of Law Clauses. We then apply our model of good-faith construction based on the clauses' original functions—their 'spirit'—of barring arbitrary exercises of power over individuals."); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 179 (2011) ("[T]he 'due process of law' requires an examination of the substance of legislation for irrationality or arbitrariness, or because it favors one group or discriminates against another."); Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1102–13 (2019) (summarizing the originalist case for due process); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 669 (2009) ("On balance, the historical evidence shows that one widespread understanding of the Due Process Clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action. . . . Perhaps most important, an original understanding of the Fifth Amendment Due Process Clause that includes substantive due process places on opponents of the doctrine the burden of explaining how that understanding was lost when the Fourteenth Amendment was drafted and ratified less than eighty years later."); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010) (arguing, from textual and historical evidence, that the Fourteenth Amendment Due Process Clause encompassed substantive due process).

142. For an account showing how conservatives have come to draw on liberal critiques of substantive due process law, see NeJaime & Siegel, *supra* note 14.

143. *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment); *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation."); see also Josh Blackman & Ilya Shapiro, *Is Justice Scalia Abandoning Originalism?*, WASH. EXAM'R (Mar. 9, 2010) ("Scalia has attacked substantive due process as an 'atrocious,' an 'oxymoron,' 'babble,' and a 'mere springboard for judicial lawmaking.'"). For histories of the oxymoron argument, see Greene, *supra* note 14; NeJaime & Siegel, *supra* note 14, at 1916–17, 1917 n. 58, 1932 n. 158, 1964 n. 310.

144. See *supra* text accompanying note 11; *Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in the judgment) (discussing fundamental rights in *Obergefell* and *Casey*—"some of the Court's most notoriously incorrect decisions"—as defined "so broadly as to border on meaninglessness," "oxymoronic," having "no basis in the Constitution," and lacking "any textual constraints").

role¹⁴⁵ and employ consequentialist reasoning to discredit cases enforcing the Constitution's liberty guarantees.¹⁴⁶ How persuasive would the argument be if, instead, Justice Thomas attacked substantive due process by observing that abolitionists and suffragists advanced liberty claims under the Due Process Clauses?¹⁴⁷

Simply put, when the Court's originalists debate the meaning of the Constitution's liberty and equality guarantees, they make no pretense of employing originalist methods. Instead, they offer all manner of reasons and draw on all manner of resources, including post-ratification history, dissenting opinions, and social-movement arguments.¹⁴⁸

As even this passing consideration of the Justices' interpretive methods might suggest, erasure of the suffrage history from Supreme Court opinions cannot be explained away on "neutral" methodological grounds. The Justices regularly consider the voices and views of Americans who have shaped the nation's understanding of equality without regard to their role in the Fourteenth Amendment's ratification—as when, in order to interpret the Equal Protection Clause, Chief Justice Roberts quoted Robert Carter's oral argument in *Brown v. Board of Education*, or Justice Thomas quoted Frederick Douglass calling for fair treatment of the emancipated slaves.¹⁴⁹ Yet no Justices mention much less quote the architects of women's inclusion in the political community, nor do they recognize

145. See *supra* note 14.

146. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700 (1976) ("The apogee of the living Constitution doctrine during the nineteenth century was the Supreme Court's decision in *Dred Scott v. Sanford*."). See also *id.* at 703–04 ("To the extent that one must, however, go beyond even a generously fair reading of the language and intent of that document in order to subsume these principles, it seems to me that they are not really distinguishable from those espoused in *Dred Scott* and *Lochner*.").

147. See, e.g., Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 L. & HIST. REV. 337, 357 (1986) (tracing the emergence in 1845 of Alvan Stewart's argument that slavery was unconstitutional under the Due Process Clause of the Fifth Amendment); Barnett, *supra* note 141, at 183 ("Like the other abolitionists discussed here, Stewart relied heavily on the Due Process Clause of the Fifth Amendment."); Dorothy E. Roberts, *The Supreme Court 2018 Term Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 56 (2019) (observing that Bingham and Weld invoked due process arguments against slavery). Suffragists made constitutional arguments appealing to the Privileges or Immunities Clause and the Due Process Clauses, building upon their constitutional practice as abolitionists. See *supra* notes 75 and accompanying text. In *Minor v. Happersett*, the Supreme Court denied women's right to vote under the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses. See *supra* notes 76–80 and accompanying text.

148. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (invoking Justice Harlan's statement in *Plessy* that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens"); *id.* at 527 ("A. DeFunis [sic] who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner . . . When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.") (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)). For a reading of *Croson* as an expression of the Reagan administration's living constitutionalism, see Siegel, *supra* note 140, at 29–44.

149. *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., dissenting) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts*, on 26 January

that for centuries Americans have called for the democratization of the family—seeking to structure family life to enable adult members of the household to be recognized and participate in democratic life as equals.¹⁵⁰

It is because of the politics of constitutional memory that John Hart Ely's claim that *Roe* had nothing to do with the Constitution¹⁵¹ had the power it did.¹⁵² Ely associated *Roe* with the constitutional memory of *Lochner*,¹⁵³ while scoffing at equality arguments for the abortion right.¹⁵⁴ There were then scarcely any women on the bench or in the academy to respond to Ely and show him why he was wrong, who could locate the regulation of abortion in larger social and historical context and express liberty and equality arguments for the abortion right, by appeal to the memory of slavery¹⁵⁵ and the many legacies of male suffrage.

Imagine, if you can, a world in which Ely had associated women's liberty and equality claims with abolitionists' and suffragists' due process claims¹⁵⁶ or with intergenerational arguments for voluntary motherhood,¹⁵⁷ perhaps quoting Lucy Stone's letter: "It is very little to me to have the right to vote, to own property &c. [sic] if I may not keep my body, and its uses, in my absolute right."¹⁵⁸ Imagine a world in which the Justices consulted the arguments of the excluded, subordinated, and disfranchised about the meaning of our constitutional values—a world

1865, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

150. See *supra* Part II.

151. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) ("[*Roe* is] . . . a very bad decision . . . because it is *not* constitutional law and gives almost no sense of an obligation to try to be."); see *id.* at 943 ("When I suggest to my students that *Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine, they tell me they've heard all that before."). While commentators do not draw the connection, Ely seems to have modeled his claims about *Roe* on a less pithy version of the argument that Robert Bork advanced two years earlier in criticizing *Griswold*. See text at *supra* note 2.

152. Ely's article has exerted tremendous influence in the legal academy. See Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (calculating that Ely's article is the twentieth most-cited law review article of all time).

153. Ely opposed *Roe* because it was based on due process, and concluded the article attacking "*Lochnering*." See Ely, *supra* note 151, at 943–49.

154. See *id.* at 934–35 ("Compared with men, women may constitute . . . a 'minority'; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.") (citations omitted). Ely did not mention that, the year before publication of his article, a federal court struck down Connecticut's abortion ban on liberty and equality grounds. See *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972). For the story of mobilization and litigation involving the Connecticut law, see LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 163–96 (2012).

155. See *supra* note 59.

156. See *supra* note 147 and accompanying text.

157. See *supra* notes 92–95 and accompanying text (discussing arguments for "self-ownership" and voluntary motherhood before and after the Civil War); see also *supra* text accompanying notes 110 (discussing claims for birth control in progressive era) and 115 (discussing claims for decriminalization of abortion in 1970s).

158. See *supra* note 94 and accompanying text.

we can glimpse in the work of Martha Jones,¹⁵⁹ Peggy Cooper Davis,¹⁶⁰ Dorothy Roberts,¹⁶¹ and, even in Justice Thomas's strategy of enlisting Frederick Douglass as constitutional authority against affirmative action and for gun rights.¹⁶²

B. Incorporating the Suffrage Argument as Positive and Negative Precedent

Our brief survey suggests that there is no method of interpretation that the Justices follow consistently enough to account for their failure to name or quote the architects of women's inclusion in the American constitutional order¹⁶³ or to discuss the many arguments for inclusion women advanced. But that very survey should itself be liberating. Sampling the Justices' interpretive practices identifies several ways to make claims about constitutional meaning that include the excluded.

One point stands out above all others: Justices of all perspectives appeal to the past to advance arguments from honored authority.¹⁶⁴ We can recognize that women lost political and legal battles in the Reconstruction era, that their arguments for the vote did not prevail in a classic law-making model, and still appeal to these leaders and their arguments today—just as the Justices honor the arguments of the dissenting Justices in *Plessy* and *Korematsu*.¹⁶⁵

Those seeking women's right to vote under the Fourteenth Amendment may have been shut out of Reconstruction, but in important respects, this was because they were ahead of their time. The abolitionist-suffragists were *pioneers of our modern constitutional order*. They combined the individualism of the

159. See MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); Jones, *supra* note 53; Jones, *supra* note 35

160. See *supra* note 61.

161. See Roberts, *supra* note 147 (grounding prison abolitionist arguments in slavery abolitionist arguments); cf. Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jurgen Habermas in Conversation*, 114 N.W. L. REV. 335, 374 (2019) (“I will draw from Frederick Douglass and his intellectual heirs in a robust Black American tradition of constitutional thought to argue that just such a conditional attachment to the constitution of an aspirant liberal democracy is available even in the face of persistent exclusion.”).

162. See *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J. dissenting) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blasingame & John R. McKivigan eds., 1991)); *McDonald v. City of Chicago*, 561 U.S. 742, 849–50 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting Frederick Douglass, *What New Skin Will the Old Snake Come Forth?: An Address Delivered in New York, New York, on May 10, 1865*, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 79, 83–84 (J. Blasingame & J. McKivigan eds. 1991)).

163. See *supra* notes 135–149 and accompanying text.

164. Jack Balkin counts “[a]rguments from honored authority” as a standard form of constitutional argument that uses history. See Balkin, *supra* note 3, at 354–55. For an example of an argument from honored authority, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 64 (1989) (“I take my stand firmly with Frederick Douglass, who defied Americans to find a single pro-slavery clause in the [Constitution].”). For additional examples from Supreme Court opinions of the last several decades, see *supra* note 36.

165. See *supra* note 137.

revolutionary constitutional tradition with the radical egalitarianism of the anti-slavery constitutional tradition to propose a Fourteenth Amendment recognizing universal suffrage:¹⁶⁶ a new understanding of the republic in which all adult members of the household would be equally and directly represented in the state.

This egalitarian understanding of the constitutional community underpinned the movement's claims—that the Fourteenth Amendment enfranchised women. As Frances Ellen Watkins Harper urged at the Eleventh National Woman's Rights Convention in 1866 during the drafting of the Fourteenth Amendment, "We are all bound up together in one great bundle of humanity, and society cannot trample on the weakest and feeblest of its members without receiving the curse in its own soul."¹⁶⁷ Harper spoke proudly of the "wrongs" she suffered "as a colored woman" through marriage law and segregation law, and envisioned the logic of the American Revolution culminating in a "color-blind" nation that would "have no privileged class, trampling upon and outraging the unprivileged classes, but will be then one great privileged nation."¹⁶⁸ This universalist vision of the Fourteenth Amendment was not embraced until the era of *Brown* and the Voting Rights Act of 1965 and is still contested today.

Harper's speech is a gripping one. She testified as a widow about bankruptcy and marital-property law, as an African American about segregation, and as a woman of color about her experience at the intersection of these structures of subordination. She was blunt about the limits of the ballot and coalition politics:

I do not believe that giving the woman the ballot is immediately going to cure all the ills of life. I do not believe that white women are dew-drops just exhaled from the skies. I think that like men they may be divided into three classes, the good, the bad, and the indifferent.¹⁶⁹

Like most suffrage arguments, Harper's concerned much more than the vote.

Given the long temporal arc of the woman suffrage campaign, and its wide-ranging and intersectional concerns, I have argued that it makes sense to read the Nineteenth Amendment and its history together with the Reconstruction Amendments—or to read the debates over women voting that continued through and long after the Nineteenth Amendment as critical *post*-ratification history of the Fourteenth Amendment, much as we read *Brown* and the civil rights movement.¹⁷⁰ But what matters most, whether reasoning clause by clause, or

166. This debate over universal suffrage continued into the drafting of the Fifteenth Amendment. See sources accompanying *supra* note 130.

167. PROCEEDINGS OF THE ELEVENTH NATIONAL WOMAN'S RIGHTS CONVENTION, HELD AT THE CHURCH OF THE PURITANS, NEW YORK, MAY 10, 1866, at 91 (1886) [hereinafter ELEVENTH NATIONAL WOMAN'S RIGHTS CONVENTION] (reporting the speech of Frances Ellen Watkins Harper, which begins with an attack on marital status law and ends with an attack on the segregation of freed people).

168. ELEVENTH NATIONAL WOMAN'S RIGHTS CONVENTION, *supra* note 167, at 9.

169. JONES, *supra* note 35, at 116.

170. See Siegel, *supra* note 15, at 965–68, 1039–44; Siegel, *supra* note 16, at 482–89; Siegel, *supra* note 46, at 214–17. At no point have I endorsed a model that would restrict the amendments' meaning to

synthetically, is recovering the constitutional memory of the different advocates and the wide-ranging forms of argument that varied across communities and over time.

Judges can incorporate the history of women's quest to vote as *positive precedent*, identifying constitution makers who model constitutional virtues and an understanding of our constitutional commitments we wish subsequent generations to emulate. Judges can also incorporate women's quest to vote as *negative precedent*, as a record of past wrongs that the nation strives to remedy and against which the nation defines itself.

United States v. Virginia,¹⁷¹ the central equal protection sex-discrimination case, offers one natural portal for incorporating the constitutional memory of suffrage struggle into equal protection analysis. In *Virginia*, Justice Ginsburg reasoned from the memory of women's disfranchisement as a justification for heightened scrutiny:

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." 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.¹⁷²

the understandings of their drafters or ratifiers. See Siegel, *supra* note 15, at 1042; *supra* quoted text accompanying note 136.

While I have emphasized the reasons for integrating the Nineteenth Amendment and its history into our understanding of the Reconstruction Amendments, this approach does not preclude reading the Nineteenth Amendment independently. In the end what is critical is recognizing how women's exclusion from political participation was for so long rationalized and then relating this history to ongoing practices of exclusion and to possibilities for rectification. See, e.g., Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465 (1995); Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 73, 73 (2020) ("Adoption of the Nineteenth Amendment marked a new social understanding that constitutional principles and democratic norms must apply to women's role in marriage as well as to women as citizens."); Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J.L. & PUB. POL'Y (forthcoming Feb. 2022) ("If one views the Nineteenth Amendment as the only express commitment to sex equality in our Constitution, it is worth considering—and restoring—its unique history when reasoning about its meaning. Moreover, an interpretive approach that examines the amendment's history, both before and after 1920, may well yield a thicker understanding of the Nineteenth Amendment [and] demonstrates fidelity to the dual purposes of the amendment: ensuring equality in political participation and expressing a commitment to sex equality in citizenship.").

171. 518 U.S. 515 (1996). See also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.").

172. *Virginia*, 518 U.S. at 531 (emphasis added) (internal citations omitted).

This passage expressly directs judges to consider the Nineteenth Amendment's belated enfranchisement of women as they enforce the Equal Protection Clause.

Reading the Fourteenth and Nineteenth Amendments together gives specific constitutional grounding to disestablishment of traditional sex roles in the family, amplifying the constitutional authority of sex-discrimination law in ways that those concerned with original understanding can respect. It is not only that, as Steven Calabresi has suggested, the judges concerned with original meaning can find additional authority in a synthetic reading of the two amendments for enforcing sex-discrimination law.¹⁷³ Combining the equal citizenship guarantees of the two amendments and the histories informing them *may help judges recognize the distinctive forms that sex discrimination takes*.

In the passage of *Virginia* quoted above, Justice Ginsburg invokes history as negative precedent, just as slavery and segregation are negative precedents in equal protection law. In *Virginia*, history also identifies the forms of sex differentiation that are unconstitutional. History—a history of wrongful, sex-discriminatory state action—*justifies* heightened scrutiny, and can even *guide* heightened scrutiny.

In its earliest sex-discrimination cases, the Court imagined sex equality ending with physical differences; *Virginia* confidently recognizes sex equality as extending to cases where the sexes differ. How then will the Court recognize discrimination? In *Virginia*, Justice Ginsburg explains, the Court looks to history to determine when sex-based state action subordinates:

'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 'promot[e] 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.*¹⁷⁴

An understanding of suffrage history can guide enforcement of the antidisubordination standard set forth in *Virginia*.

In a recent article, *The Pregnant Citizen, from Suffrage to the Present*,¹⁷⁵ I show how this history can guide equal protection analysis of pregnancy discrimination,¹⁷⁶ an area where judges applying equal protection had faltered in the past,

173. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 11 (2011) ("We conclude that the original public meaning of the Fourteenth Amendment is that it bans all systems of caste and of class-based lawmaking, much the way the Fourth Amendment bans unreasonable searches and seizures and the Eighth Amendment bans cruel and unusual punishments. The meaning is not static, and the adoption of the Nineteenth Amendment changed permanently the way courts ought to read the no-caste-discrimination rule of the Fourteenth Amendment.")

174. *Virginia*, 518 U.S. at 533–34 (emphasis added) (internal citations omitted).

175. Siegel, *supra* note 46.

176. *Id.* at 176–81.

because they focused only on the facts of physiological difference and failed to recognize that laws were enforcing sex-role stereotyping.

We can tell whether a law regulating pregnancy perpetuates the history of legally enforced dependent citizenship by asking what social roles the law assumes or imposes. For generations, law has regulated pregnant workers as dependent members of *families* and only temporary members of the workforce—to women’s severe economic detriment. *The Pregnant Citizen* is littered with examples of the economic injuries this history of state action has inflicted on women: repeatedly forcing women out of work, torquing their career paths and job prospects, and, of course, slashing their wages.¹⁷⁷ *Geduldig v. Aiello*¹⁷⁸ offers a modest example. A law excluding coverage of pregnancy from an otherwise comprehensive state disability benefits program presupposes a pregnant worker’s economic dependence and departure from the labor force. *Geduldig* perpetuates outmoded views of women. But as I show, the decision has in fact been superseded in the Supreme Court’s own case law. *United States v. Virginia* itself invokes a law regulating pregnancy leave in *Cal Fed* as an example of a sex classification that is subject to its anti-subordination principle: “[s]ex classifications . . . may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.”¹⁷⁹

We could extend this analysis of equal protection and social roles to heteronormative assumptions that law makes about a worker’s household relationships¹⁸⁰ and laws regulating fertility.¹⁸¹

Let me shift focus and consider another example, involving powers rather than rights—specifically, Congress’s power to address sexual violence. The Nineteenth Amendment’s Enforcement Clause could be invoked along with Congress’s power to enforce the Fourteenth Amendment to address regulation of sexual violence in ways that would overcome gaps in power produced by the Court’s ruling in *United States v. Morrison*.¹⁸² This example is worth highlighting

177. *Id.*

178. 417 U.S. 484 (1974).

179. 518 U.S. at 533-34. See Siegel, *supra* note 46, at 204–06. For a brief developing *Virginia*’s analysis of laws regulating pregnancy as sex-based state action into an equal protection challenge to an abortion ban, see Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2021 WL 4340072 (2021).

180. Siegel, *supra* note 46, at 216 (“[W]orkplace norms have long rested on law-backed understandings about the ideal family roles supporting workplace participation. Workers may choose to participate in these arrangements, but the Court’s equal protection cases tell us that it is unconstitutional for the state to impose traditional family roles on citizens as a condition of employment.”).

181. A law that authorizes an employer to object to his employees receiving health-insurance benefits covering contraception gives the employer control over the employee’s coordination of work and family roles. And we can extend this roles-based equal protection analysis in an intersectional way: while controlling the timing of conception promises independence for many there are many who focus on freedom from coercive sterilization, and yet others who focus on equal parental recognition and access to the means of family formation.

182. 529 U.S. 598 (2000).

because, like the pregnancy example, it taps the history of voting and the family I have sketched in this essay.

In *Morrison*, the Court struck down the Violence Against Women Act's civil rights remedy, which recognized women's civil right to freedom from gender-motivated violence. In deliberating about the civil rights remedy, Congress had discussed its application to domestic violence and marital rape. Justices repeatedly declared the civil-rights law, which would have applied to gender-motivated assault in a wide variety of contexts, including sexual assault on campus, to intrude upon states' traditional prerogative to regulate the family.¹⁸³

The Court's decision in *Morrison* reasons about the history of families and federalism as if the history of federalism stopped at the Founding. But the story of the Nineteenth Amendment provides a rich account of the ways in which the national government has intervened in state regulation of the family to secure the citizenship rights of women.¹⁸⁴ *Morrison* aligns the Constitution with the beliefs about family that men held at the Founding—making no mention of the freedom and equality claims of generations of Americans who challenged state laws empowering men over women through the family—or of the role that federal constitutional law played in recognizing their claims. The federalism story *Morrison* tells perfectly accords with the court citations I report in Part I. *Morrison* demands renewed attention in light of #MeToo.¹⁸⁵

IV. WOMEN AS CONSTITUTION-MAKERS

As I have suggested, recovering the memory of suffrage struggle can serve as *negative precedent*, making vivid wrongs that state action can perpetuate in modern forms. Yet at the same time, the story of suffrage struggle offers us rich *positive precedent*. Perhaps conservatives intuitively understand better than progressives how to draw on the past as positive precedent: as a source of revered authority that can guide us in debating who we are and what we are to do, and so give voice to our identity, our ideals, and our future. When we approach the story of suffrage struggle as positive precedent, we recognize it as a story of constitution-making, of Americans struggling to democratize the institutions of our constitutional republic whom we can honor as we define ourselves in the present. It is time we recovered the voices of these constitution makers whose only fault was

183. See Siegel, *supra* note 15, at 1024–25.

184. See *id.* at 1036–39.

185. The enforcement powers of the Fourteenth and Nineteenth Amendments, independently or synthetically enforced, could be employed in many ways to repair the ongoing and intergenerational legacies of women's disfranchisement, as it manifests in entrenched sex-role stereotyping in the domain of politics and across society as a whole. See, e.g., *supra* text accompanying notes 46–50. For important new accounts of the Nineteenth Amendment's enforcement clause, see Richard L. Hasen & Leah M. Litman, *Thick and Thin Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27 (2020); MONOPOLI, *supra* note 134; Monopoli, *supra* note 170.

to be so far ahead of their times that their peers were not yet ready to listen to them.

But *we* can listen to them. The generations of Americans who were not given a vote or authority to craft law in their own day had views about what constitutional democracy needs to be. They saw the household as a critical site of democratic citizenship, for those who perform care work and for those who receive it. They located voluntary motherhood and the value of care work at the core, not the periphery, of our constitutional order—a message all the more central in this time of insecurity, when the economy is in disarray, the line between paid and unpaid labor is destabilized, and the work of social reproduction and its centrality to our survival is now visible for all to see.

If we recovered these generations of constitution-making women—and men who supported them—we would have a radically different understanding of our constitutional tradition. Its complexion would be fundamentally different and so would its concerns. We would differently understand the wrongs that should guide equal citizenship law, and differently identify the leaders who might inspire that law—who would give voice to its values, stakes, roots, principles, and purposes—so that We the People would come to recognize it as *our* law.

As the Nineteenth Amendment enters its second century and we continue to argue over the meaning of our Constitution in courts and in politics, it is time to appeal to a wider cross-section of esteemed Americans—including in our national story the voices of the *disfranchised* as well as the enfranchised and the concerns they brought to the democratic reconstruction of America.

Imagine how we might understand our Constitution in another generation if we did.