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The Nineteenth Amendment and the Democratization of the Family

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ABSTRACT. This Essay recovers debates over the family connecting the Reconstruction Amendments and the Nineteenth Amendment, and considers how this lost history can guide the Constitution's interpretation, in courts and in politics.

A woman's claim to vote contested a man's prerogative to represent his wife and daughters, and so was a claim for democratization of the family. Suffragists argued that women needed the vote to change the ways that law structuring the family governed their lives. They argued that law should recognize women's right to voluntary motherhood and to be remunerated equally with men for work performed inside and outside the household. Suffragists sought to create a world in which adult members of the household could be recognized and participate in democratic life as equals. And they debated how to realize these goals when women faced different and intersectional forms of discrimination. Claims for democratic reconstruction of the family that began in the quest for

the vote continued in the immediate aftermath of the Nineteenth Amendment's ratification and in 1970 during its half-century anniversary, and continue today in the era of its centennial.

Courts can draw on this history and interpret the Amendments synthetically. For example, judges can integrate the history of suffrage struggle into the equal-protection framework of *United States v. Virginia*. The Essay shows how an historical and intersectional understanding of suffrage struggle could change the way courts approach cases concerning the regulation of pregnancy, contraception, sexual violence, and federalism.

The Essay closes by looking beyond the courts to continuing claims for the democratization the family in politics, which it connects to suffrage struggle. How would we understand these claims if we recognized that liberty and equality claims about the family began in the decades before the Civil War, and if we recognized the disenfranchised Americans who voiced them among our Constitution's esteemed Framers?

INTRODUCTION

The Nineteenth Amendment changed the shape of our constitutional community. As the Reconstruction Amendments illustrate, the nation's understanding of transformative amendments may evolve with the constitutional community they help reshape.[1] The Nineteenth Amendment transformed We the People—not simply by adding voters,[2] but by democratizing the family so that women could represent themselves in government.[3] Yet we interpret the Constitution in ways that take no account of these institutional dimensions of the suffrage debate. We have forgotten the family-related equal-citizenship claims that began in the decades before the Nineteenth Amendment's ratification, and continued for decades after. This Essay considers how these family-related equal-citizenship claims could be more fully incorporated into our constitutional tradition. A century after its ratification, we can read the Nineteenth Amendment together with the Reconstruction Amendments, informed by the voices and concerns of the disenfranchised as well as the enfranchised, as we enforce the Constitution in a wide variety of contexts.

That is far from our current practice. Today, we read the Nineteenth Amendment as a rule prohibiting government from discriminating on the basis of sex in determining who can vote. Since the era of sex discrimination in suffrage has ended, we see no reason to consult the Nineteenth Amendment in construing the Constitution. This reading of the Nineteenth Amendment is anchored by

1. It was nearly a century after the Fourteenth Amendment's ratification when the Court made clear that equal protection prohibited laws imposing racial segregation in cases such as *Brown v. Board. of Education,* 347 U.S. 483 (1954) (public schools) and *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage).

2. U.S. CONST. amend. XIX.

3. *See infra* Parts I & II.

our collective memory of the suffrage campaign as concerned with voting only.[4] But this narrow reading of the constitutional history and text represses a tradition of constitutional argument, rooted in the suffrage campaign and now nearly two centuries old, that sought equal citizenship through democratic reconstruction of the family.

The debate about women voting in the decades after the Founding centrally concerned the family. A male head of household was enfranchised to represent his wife, children, and other members of the household. A woman's claim to vote was a challenge to this system of "virtual representation," and for this very reason, was a claim for democratic reconstruction of the family. By endowing women with the capacity to represent their own interests in politics, the Nineteenth Amendment gave the family new democratic form.[5] In seeking the vote, suffragists raised other far-reaching challenges to family and social structure. 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.[6] These family-related equal-citizenship claims persisted long after the Nineteenth Amendment's ratification, and implicated a wide range of laws. 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.[7]

Suffragists' claims about the family expressed a complex understanding of equal citizenship. Suffragists challenged laws that enforced male household headship and women's dependency on men, and proposed reforms that would enable adult members of the household to participate as equals in the family,

4. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1019-24 (2002).

5. *See infra* Part I. On the debate on virtual representation, see *infra* notes 32-36 and accompanying text.

6. *See infra* Part II.

7. See the image of "Uncle Sam, Suffragee" opening this Essay. Women voting and a system of direct, rather than virtual, representation is depicted as feminizing "Uncle Sam"—the most popular symbol of the United States government—who is shown cross-dressing, without facial hair, and bereft of masculine power. Women's challenge to virtual representation would emasculate the state. The image is one of a twelve-card set of lithographic cartoon postcards satirizing woman suffrage; each postcard in the series depicts the destabilization or inversion of gender roles in politics or the family. *See* Catherine H. Palczewski, *The Male Madonna and the Feminine Uncle Sam: Visual Argument, Icons, and Ideographs in 1909 Anti-Woman Suffrage Postcards*, 91 Q.J. SPEECH, 365, 366, 379-81 (2005).

market, and politics.[8] Their claims for equal citizenship addressed voting—and property, sex, reproduction, and carework. Suffragists advocated reforming the law to recognize women's right to voluntary motherhood and to be remunerated equally with men for work outside and inside the household. They sought to create a world in which women would be free to say yes or no to motherhood without undermining their status as equal citizens.[9] Today, presidential candidates propose to achieve these same ends through legislation that protects contraception, abortion, equal pay, paid family leave, and government-supported childcare.[10] Then as now, many, but not all, of these claims were claims for equal treatment, which may be necessary, but not sufficient, for equal citizenship.

Suffragists asserted family-related equal-citizenship claims in the decades before and after the Civil War, but today they play no part in the way we interpret the Constitution; instead, we discuss women's disenfranchisement as if it principally concerned prejudice about who was fit to vote.[11] The Essay's first goal is to reconstruct the rich debate about family and equal citizenship that the suffrage campaign provoked. To do so, I rely in part on my earlier work—principally, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*.[12] This history shows that the movement's long quest for the vote generated wide-ranging conversation about the law reforms that would enable members of the polity to participate in the family, market, and politics as equal citizens. After ratification of the Nineteenth Amendment, many women argued that an equal right to vote was not sufficient to secure equal citizenship, and they continued to press claims for democratic reconstruction of the family as necessary to their

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8. The movement advanced a complex array of equality claims. Some were for equal treatment, while others were for treatment as equals. Woman's rights advocates sought equal treatment in respect to the right to vote, but treatment as equals in respect to women's household labor. Suffragists claimed joint property rights in family assets on the ground that women contributed equally to the family economy. *See* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-80*, 103 YALE L.J. 1073 (1994) (discussing joint-property claims that suffragists advanced in the decades before and after the Civil War).

9. *See infra* notes 45-51 and accompanying text; *infra* Parts III, IV.

10. *See infra* Section V.B. The account of suffrage struggle that this Essay offers focuses on the United States only. For transnational perspectives, consider THE STRUGGLE FOR FEMALE SUFFRAGE IN EUROPE: VOTING TO BECOME CITIZENS (Blanca Rodríguez-Ruiz & Ruth Rubio Marín eds., 2012) (discussing suffrage struggle in Europe, often with reference to the family); John Markoff, *Margins, Centers, and Democracy: The Paradigmatic History of Women's Suffrage*, 29 SIGNS 85 (2003); and Ruth Rubio Marín, Professor, Universidad de Sevilla, Gruber Distinguished Lecture in Women's Rights at Yale Law School: On Constitutionalism and Women's Citizenship (Sept. 12, 2019), https://law.yale.edu/yls-today/yale-law-school-videos/ruth-rubio-marin-constitutionalism-and-womens-citizenship [https://perma.cc/6D99-FLNU].

11. *See infra* Parts I & II.

12. Siegel, *supra* note 4.

equality and freedom. This Essay traces claims for democratic reconstruction of the family in the debates that occurred in the 1920s in the immediate aftermath of the Nineteenth Amendment's ratification, in 1970 during its half-century anniversary, and in the present, in the era of its centennial.

As this history makes clear, for nearly two centuries Americans have argued it was important to consider family structure in making good on commitments to liberty and equality, and have protested laws enforcing subordinating features of family roles, even as they spoke from different positions and perspectives, and with an understanding of freedom and equality that evolved over time. The Essay does not identify a single "woman's perspective" on these issues—but it does make clear that traditional family arrangements have not been fully consensual, and were, in important respects, coerced. Facing the historical record we are reminded that women made choices living under conditions of severe and intersecting inequalities, and those conditions shaped women's decisions whether to protest and whether to make common cause with one another and to bridge differences of position and perspective along lines of class, race, religion, age, and region. Women have differed as to ends, and often as to means, divided by inequalities,[13] and only intermittently mobilized en masse as they did in 1920 or 1970. Yet it is precisely as we recognize the challenges to women organizing that we can see the persistence of their family-related equal-citizenship claims as remarkable—as well as their claims' perpetual marginalization.

The Essay's second goal is to consider the constitutional implications of recovering this forgotten history. Women's quest for the vote engendered a tradition of argument about the family that shaped debate over the Fourteenth, Fifteenth, and Nineteenth Amendments,[14] continued across generations, and is ongoing in law and politics today. But this constitutional history is perpetually pushed to the margins—even in discussions of the coming centennial of the Nineteenth Amendment.

For nearly two centuries now, Americans have argued that liberty and equality of citizenship require changes in the family form. For long stretches of our nation's history, women who reasoned about the constitution of the family were voteless and, even after enfranchisement, lacked the authority to realize their claims in law. For this reason, the history this Essay explores has played little role in shaping our law.

But our constitutional tradition is a living one. Americans living today can decide whether women seeking democratic reconstruction of the family reasoned

13. *See, e.g.*, *infra* text accompanying notes 44 (race) and 85-91 (race and class).

14. For one account of the interconnections, see Siegel, *supra* note 4, at 968-76.

from the Constitution's margins or its core.[15] There are many ways to incorporate this history into constitutional argument.[16] We could read the record as a story of past wrongs for which we make present repair, or we could retrospectively enlarge the community of Americans we count among the Constitution's esteemed Framers and ratifiers. The critical first step is to recognize that we have a constitutional tradition addressing a wide variety of questions of gender justice nearly two centuries old on which we can build.

I conclude by discussing two of the many contexts in which we could recognize a claim for democratization of the family as a part of our constitutional tradition. Courts can integrate a history of suffrage struggle into the equal-protection framework of *United States v. Virginia*[17] that governs modern sex-discrimination law; an intersectional understanding of suffrage struggle could change the way courts approach cases concerning the regulation of pregnancy, contraception, sexual violence, and federalism. Outside courts, in politics, advocates can draw on history as they advocate a wide variety of policies promoting the democratization of family structure—a debate that on the Nineteenth Amendment's centennial will be nearly two centuries old.

The claims and voices the Essay recovers speak from past generations to future generations about the kind of community our constitutional commitments require. Including these claims and voices as part of our constitutional tradition is part of repairing disenfranchisement's legacy. They challenge settled assumptions about the family in quest for deeper forms of constitutional democracy.

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15. *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.").

16. *See* J.M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 641 (2013) ("[T]here is no single modality of 'historical argument.' Instead, history is relevant to many different kinds of constitutional argument.").

17. 518 U.S. 515 (1996).

I. TWO PERSPECTIVES ON WOMEN'S EXCLUSION FROM VOTING: THE ATTITUDINAL AND INSTITUTIONAL

We live in a constitutional democracy organized around the principle of "one person, one vote."[18] Yet most know that at the Founding, voting was a privilege of the few, not a right of all. How do we account for this discrepancy? Two accounts predominate, one attitudinal and the other institutional.

The attitudinal story explains the unequal distribution of the franchise at the Founding through prejudice. But for racial and gender stereotypes, the Founders would have enfranchised many more members of the community. As prejudice abates over time, Americans can extend and perfect the franchise. In 1920, Americans recognized women as voters. Someday soon — perhaps *after* the Nineteenth Amendment's 2020 centennial — Americans may finally find a woman "likeable" enough to elect as President.[19] This is a very important story to engage as we mark the Nineteenth Amendment's centennial, and I have no interest in detracting from it. Rather, my goal is to *add* to it, emphasizing what I call the institutional story.

The institutional story explains the unequal distribution of the franchise at the Founding by acknowledging that the Founders created a constitutional republic that was more egalitarian than its antecedents, yet still deeply hierarchical in structure. Unequal distribution of the franchise at the Founding was an expression of *institutional design* as well as attitude. The distribution of the vote empowered some members of the community — generally propertied white male heads of household — to control others. At the founding of our constitutional republic, state law looked to the head of household to govern and represent his legal dependents, not only children, but adults affiliated through institutions including slavery, employment, and marriage.[20] Our republicanism was *family-based*.[21] In redistributing the franchise, the government was not merely overcoming prejudice; it was emancipating some persons from the control of others, as it recognized slaves, servants, and wives as independent in the eyes of the law. This second account recognizes that the struggle to democratize access to the

18. *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964). *But see* Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

19. *See infra* note 171 and accompanying text.

20. *See* Siegel, *supra* 4, at 981-83; *infra* Part II.

21. *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 101 (2000) ("Being a householder, being someone who cared for and controlled a family, gave a man political significance. It was a foundation for republican political virtue."); Rebecca Rix, Gender and Reconstruction: The Individual and Family Basis of Republican Government Contested, 1868-1925 (2008) (unpublished Ph.D. dissertation, Yale University) (on file with author).

franchise is an integral part of a struggle to democratize institutions of work and family in our constitutional republic, still ongoing in our own day.

We generally understand African Americans' quest for voting rights on this second, institutional model. The story of the Fifteenth Amendment's ratification and belated enforcement a century later is part of the story of the struggle over slavery and segregation, which we recognize continues in the fight over felon disenfranchisement and mass incarceration.[22] But we often recount women's quest for the vote through the first attitudinal account, as a story about overcoming sexism in voting. These narrative forms shape our constitutional law. When our collective memory of conflict over the family is repressed, choices about family roles appear to be "natural," a domain of custom and consensus,[23] rather than a locus of law, struggle, and power, having a constitutional history like all other important institutions of our constitutional republic.

Women's quest to vote concerned much more than suffrage. As I show, women's quest for the vote is better understood on this second model, just as we understand African Americans' quest for the vote: as part of a struggle to democratize the institutions of our constitutional republic. As we know, ratification of the Nineteenth Amendment certainly did not enfranchise all women,[24] as many are intersectionally subordinated. It would take reconstruction of multiple institutions of social life to enable women of color or disabled women to participate fully in public life. If we return to the suffrage campaign and examine the struggle over voting from an institutional standpoint, we can begin to understand the centrality of the family in women's claims for equal citizenship.

II. VOTING AND THE FAMILY

What made it seem reasonable, right, and just to deny emancipated women the vote in a constitutional democracy born in a revolutionary break from England on the principle of "no taxation without representation"? The customary

22. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014) (discussing carceral consequences of economic sanctions); Doha Madani, *Civil Rights Groups Sue Florida over "Poll Tax" Law to Restore Felon Voter Rights*, NBC NEWS (June 28, 2019, 9:52 PM EDT), https://www.nbcnews.com/politics/politics-news/civil-rights-group-sue-florida-over-poll-tax-law-restore-n1024866 [https://perma.cc/7DKH-BGQK].

23. This is especially so where the account focuses on gender relations, and not intersecting questions of race, and so is inclined toward "stories of evolving custom and consensus rather than conflict." Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, *in* HISTORY, MEMORY, AND THE LAW 131, 142 (Austin Sarat & Thomas R. Kearns eds., 1999).

24. On the delayed enfranchisement of African American women, *see infra* notes 86-89 and accompanying text.

answer, at the Founding and for decades after, pointed at the family: women, whether married or single, were represented by men.

The Founding generation understood the domestic relations of the household (husband/wife, parent/child, master/servant/slave) as relations of governance.[25] As head of household, a male property holder who voted was thought to represent the interests of all who depended upon him — not only his sons and daughters, but also his wife, servants, and slaves.[26] Over the course of the nineteenth century, American states expanded the franchise, first eliminating the property requirement for voting and then, in the wake of the Civil War, adopting constitutional amendments that enfranchised freedmen — a promise soon broken with the end of Reconstruction.[27] Yet resistance to enfranchising women remained fierce in the decades before and after the Civil War. This resistance was focused on the family. Allowing women to vote was thought not only redundant, but destructive. Women were already represented by male heads of household, and, men argued, enfranchising women would destroy the harmony and good order of the household.[28] 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."[29]

Women's demand for political voice, and the deep resistance it provoked, exposed the family as an institution at odds with the nation's growing commitments to individual representation. As Ellen DuBois has observed, "Woman suffrage carried with it the unmistakable message of women's desire for independence, especially from men within the family."[30] Women were persons too,

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25. CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA, at xiii (2002) ("Most inhabitants of early America had no direct access to the state; the household head mediated between his dependents, whether children, wife, servants, slaves, or wards and formal governmental bodies."); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 56-69 (1991); *see also* sources cited *supra* note 21 (noting the political rights attached to men's status as the heads of households).

26. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5-6, 9 (2009).

27. *Id.* at 29, 87-116.

28. Siegel, *supra* note 4, at 980-97.

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

30. 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).

entitled to self-government in matters concerning politics, markets, and sex.[31] Suffragists emphasized the contradiction between the nation's founding principles and its practices. After all, the American Revolution began when the colonists rejected the British Crown's claims that they were virtually represented in the British Parliament.[32] Yet opponents of woman suffrage, seemingly without irony, appealed to virtual representation—women's representation through the family—to justify denying women the vote.

The suffrage movement invoked the principles and precedent of the American Revolution to attack claims of virtual representation.[33] The movement's Declaration of Sentiments, read in 1848 at Seneca Falls, offers an early and powerful expression of this argument. The Declaration of Independence indicted the King for his relations with the American colonies,[34] and the Declaration of Sentiments took the text of the Declaration of Independence and transformed it into an incendiary indictment of patriarchy:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. . . .
>
> Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.
>
> He has made her, if married, in the eye of the law, civilly dead.

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31. *See id*. at 86-89; *infra* notes 45-54 and accompanying text.

32. For an example from the Revolutionary Era, see Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament*, *in* SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 24, 26 (S.E. Morison ed., 1923) ("[T]he notion of a *virtual representation* of the colonies is a mere cob-web, spread to snatch the unwary, and intangle [sic] the weak."). The colonies repudiated virtual representation in some contexts, but not others. *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50 (1989); Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS 59, 63 (1987) ("[C]olonial political thought rejected the argument that the colonies were virtually represented in parliament, that they shared a community of interests with England . . . . However, these leaders continued to apply theories of virtual representation to colonial legislatures and to families.").

33. *See* Siegel, *supra* note 4, at 988 ("Suffragists recalled the relations of colonists and king as they demanded 'self-government' and 'no taxation without representation' and as they demonstrated how virtual representation provided women no effective representation at all.").

34. The Declaration of Independence proclaims: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration of Sentiments adapts much of this passage verbatim.

> He has taken from her all right in property, even to the wages she earns.[35]

As suffragists appealed to the memory and principles of the American Revolution to assert women's right to vote, they advanced politically explosive claims about relations between men and women. By applying the constitutional principles of the American Revolution to the family, the suffragists depicted the family in a new light. Men did not represent women; men oppressed women, in politics and in the household. "Male superordination was not benign, but tyrannical and fundamentally unjust."[36]

The Civil War focused debate over equal citizenship on the federal Constitution. During Reconstruction, suffragists combined the individualism of the revolutionary constitutional tradition with the radical egalitarianism of the antislavery constitutional tradition[37] to propose a Fourteenth Amendment recognizing universal suffrage[38]: 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 underwrote the movement's claims — asserted in Congress, at the ballot box, and in courts — that the Fourteenth Amendment enfranchised women.[39]

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."[40] Harper spoke proudly of the "wrongs" she suffered "as

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35. *Report of the Women's Rights Convention*, NAT'L PARK SERV. (Feb. 26, 2015), https://www.nps.gov/wori/learn/historyculture/report-of-the-womans-rights-convention.htm [https://perma.cc/WLR8-7AKN]. After protesting women's disenfranchisement, the Declaration details the many ways that the law of marriage subordinates women. *Id*.

36. Siegel, *supra* note 4, at 989 (footnote omitted).

37. For suffragist appeals to the collective memory of the Revolution and to the provisions of the Constitution that abolitionists emphasized as prohibiting status hierarchy, see, for example, *id.* at 988-91; *see also id.* at 971-72 & n.66 (discussing the constitutional provisions on which abolitionists relied in challenging slavery, which then formed the basis of the case for woman suffrage before and after the Civil War amendments).

38. This debate over universal suffrage continued into the drafting of the Fifteenth Amendment. *See* ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869, at 53-161 (1978); DUBOIS, *supra* note 30, at 91-94; Siegel, *supra* note 4, at 969-70 & nn.59-60.

39. *See* Siegel, *supra* note 4, at 969-74 (discussing the New Departure, a movement in which women claimed their right to vote under the newly ratified Fourteenth Amendment).

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

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 . . . ."[41]

Led by Elizabeth Cady Stanton, Victoria Woodhull, Mary Ann Shadd Cary, Sojourner Truth, Susan B. Anthony, and Virginia Minor, a wave of women began to vote in the early 1870s. The Supreme Court acted swiftly to reject the movement's claims on the newly ratified Fourteenth Amendment, combining its ruling in the *Slaughter-House Cases*[42] and arguments from coverture and custom to deny that the Constitution protected Myra Bradwell's right to practice law and Virginia Minor's right to vote.[43]

With its claims of universal suffrage spurned, the movement bitterly divided over whether to support a Fifteenth Amendment that failed to recognize women's right to vote,[44] but suffragists persisted in their quest for women's enfranchisement. After the Civil War, as before, suffragists argued that women

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with an attack on the segregation of freed people). Leaders of the abolitionist movement convened the meeting to intervene in the drafting of the Fourteenth Amendment and to oppose restrictions on suffrage "on account of color or sex," and its afternoon session created the American Equal Rights Association (AERA) to pursue this end. *Id*. at 5, 96-97.

41. *Id.* at 9.

42. 83 U.S. 36 (1872).

43. On "New Departure" claims to vote under the Fourteenth Amendment, see Siegel, *supra* note 4, at 971-74 (reviewing primary and secondary sources) and ROSALYN TERBORG-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). Reasoning in the tradition of the abolitionist movement, the plaintiffs brought claims on the Privileges or Immunities Clause of the Fourteenth Amendment. *Cf. supra* note 37. The Supreme Court narrowly interpreted the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. at 74-80, and that same day rejected Myra Bradwell's privileges or immunities claim to practice law in *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872). In a now-famous concurring opinion, Justice Bradley reasoned about women's constitutional rights through the common-law doctrine of coverture, which understood a wife's identity as merged with her husband's: "[A] woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . ." *See id.* at 141 (Bradley, J., concurring in the judgment). Two years later, the Court shut down the New Departure in *Minor v. Happersett*, when it rejected suffragist Virginia Minor's claim to vote under the Privileges or Immunities Clause of the Fourteenth Amendment. *See* 88 U.S. 162, 171, 178 (1874). For claims by women of color to vote under the Fifteenth Amendment, see TERBORG-PENN, *supra*, at 40-41.

44. For a glimpse of the debates within the suffrage movement, which provoked divisions among whites and for a time among blacks as well, see Bettye Collier-Thomas, *Frances Ellen Watkins Harper: Abolitionist and Feminist Reformer, 1825-1911*, *in* AFRICAN AMERICAN WOMEN AND THE VOTE, 1873-1965, at 41, 49-51 (Ann D. Gordon & Bettye Collier-Thomas eds., 1997) and DUBOIS, *supra* note 38, at 162-202. While Stanton and Anthony led a wing of the movement in opposing the Fifteenth Amendment, Harper "supported the Fifteenth Amendment at the

were not represented in the state because the laws men enacted did not represent women's interests. These arguments served at one and the same time to refute claims of virtual representation, and to demonstrate to women why they needed to mobilize for the vote. Most of these arguments focused on the family. Suffragists protested the sex-based restrictions on women's work and pay that forced women into marriage; they attacked laws that gave a husband rights in his wife's property and in her labor inside and outside the home, making a wife totally dependent on her husband; and they protested the ways that the law of marriage authorized husbands to coerce their wives, exposing women to domestic violence, marital rape, and "forced motherhood."[45]

In 1875, the *Woman's Journal*, the newspaper of the American Woman Suffrage Association, published by Lucy Stone and other abolitionist supporters of the Fifteenth Amendment,[46] contained a column entitled "A Wife's Protest":

> As a mother, a woman goes through the tragedy of giving birth to her son, watches over and cares for his helpless infancy, brings him through all the diseases incident to childhood, is his nurse, physician, seamstress, washerwoman, teacher, friend, and guide, spending the cream of her days to bring him up to be a voter with no provision in law for her own support in the mean time, with not so much as "I thank you." Then he leaves home and marries a wife, whom it took some other mother twenty-one years to raise, educate, and teach to cook his meals, to make and wash his clothes, to furnish him with a bed, and to fill the house with comforts, of which he has the larger share, at her own expense. And all this done for him up to this period of his life without any cost to himself. Then he votes to help make a law to disfranchise his wife and these two mothers, who have unitedly spent forty-two years of the prime of their

1869 AERA anniversary, reported by the *New York World* as stating that 'when it was a question of race she let the lesser question of sex go.'" Stuart Galloway, The American Equal Rights Association, 1866-1870: Gender, Race, and Universal Suffrage 178 (June 2014) (unpublished Ph.D dissertation, University of Leicester) (on file with author) (noting contemporaneous evidence suggesting "Harper was strongly committed to women's rights throughout this period"); *see also* C.C. O'Brien, *'The White Women All Go for Sex': Frances Harper on Suffrage, Citizenship, and the Reconstruction South*, 43 AFR. AM. REV. 605 (2009) (describing Harper's position in these debates). Racial divisions grew in the postwar suffrage movement, *see* TERBORG-PENN, *supra* note 43; LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848-1898 (2014), even as suffrage advocacy continued, *see* MARTHA S. JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900, at 141-47 (2007).

45. Siegel, *supra* note 4, at 992 (providing illustrations).

46. *See* Katharine Rodier, *Lucy Stone and* The Woman's Journal, *in* BLUE PENCILS & HIDDEN HANDS: WOMEN EDITING PERIODICALS, 1830-1910, at 99, 107-08 (Sharon M. Harris ed., 2004).

> days for his benefit, without any compensation. And then he makes another law to compel his wife to do all the same kind of drudgery whieh [sic] his mother had done, with the addition of giving birth to as many children as in his good pleasure he sees fit to force upon her. And all her earnings and the fruit of her labor are his, his wife being the third woman who spends her life to support him. It takes three, and sometimes four women to get a man through from the cradle to the grave, and sometimes a pretty busy time they have of it, too. It is time we stated facts and called things by their right names, and handled this subject without kid gloves.[47]

In objecting to the way the law of marriage enabled a husband to expropriate the value of his wife's household labor and to force her to bear children, the letter writer is voicing demands for changes in *law*. In the 1870s, suffragists regularly asserted claims for joint property rights in marriage (which would have abolished a husband's rights to his wife's services and compensated a wife for her contribution to the household economy)[48] and for voluntary motherhood (which would have abolished a husband's right to consortium and recognized a wife's right to choose when to engage in sexual relations with her husband).[49] In supporting voluntary motherhood, movement leaders claimed for women the

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47. Siegel, *supra* note 4, at 991-92 (quoting *A Wife's Protest*, WOMAN'S J., Mar. 6, 1875, at 74).

48. For suffragists asserting joint property claims based on wives' household labor in the decades before and after the Civil War, see Siegel, *supra* note 8; *see also* Reva B. Siegel, *Valuing Housework: Nineteenth-Century Anxieties About the Commodification of Domestic Labor*, 41 AM. BEHAV. SCI. 1437, 1437 (1998) (exploring "the role that law has played in insulating wives' household labor from market exchange"); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 1860-1930, 82 GEO. L.J. 2127, 2210 (1995) (illustrating "how a movement for egalitarian law reform can work to modernize and so naturalize an antiquated body of status law"). For materialist feminist efforts to reimagine the home in this period, see DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES (1981).

49. For a classic discussion of voluntary motherhood, see LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 55-71 (2002). 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).

right "to decide when she shall become a mother, how often & under what circumstances"[50] and attacked the law of marriage "which makes obligatory the rendering of marital rights and compulsory maternity."[51] As Lucy Stone put it,

> 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 can do that now, & so long as she suffers this bondage, all other rights will not help her to her true position.[52]

Suffragists objected to the way the law of marriage structured the social relations in which women conceived and raised children, depriving women of "self-ownership" in sex and motherhood, and forcing women into economic dependency on men—leading some to condone, even as they condemned, abortion.[53] These challenges to the law of marriage grew out of and intersected with

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50. Sarah M. Grimke, *Marriage (1852-1857)*, *in* THE FEMALE EXPERIENCE: AN AMERICAN DOCUMENTARY 89, 91 (Gerda Lerner ed., 1977) (emphasis omitted).

51. *See* LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 104 (1976) (quoting Paulina Wright Davis, Address to a Convention of the National Woman Suffrage Association Convention (1871)).

52. Letter from Lucy Stone to Antoinette Brown Blackwell (July 11, 1855), *in* FRIENDS AND SISTERS: LETTERS BETWEEN LUCY STONE AND ANTOINETTE BROWN BLACKWELL, 1846-93, at 143-44 (Carol Lasser & Marlene Deahl Merrill eds., 1987). Stone protested coverture by postponing marriage, and she and her partner, the abolitionist Henry Blackwell, repudiated the legal hierarchies of marriage before wedding. *See* Hasday, *supra* note 49, at 1423-25.

53. A claim for voluntary motherhood in Stanton and Anthony's suffrage journal *Revolution*—published just a few years before "A Wife's Protest"—virtually condoned abortion under prevailing conditions of marriage, endorsing suffrage, joint property, and "making the mother the guardian of her own children, the owner of her own body in short, the controller of her own destiny." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 306 n.179 (1992) (quoting M. Brinkerhoff, *Woman and Motherhood*, REVOLUTION, Sept. 2, 1869, at 138). In the 1870s, as doctors were advocating criminalization of abortion and contraception to enforce women's duties as wives and mothers and to ensure that "native" Americans continued to reproduce, *see id.* at 280-322, suffragists responded by showing how the conditions of conception and family life gave women reasons to seek abortion, *see id.* at 304-14. Given their views about the unequal conditions in which women conceived and raised children, many suffragists "publicly condemned, yet tacitly condoned, women who turned to abortion." *Id.* at 307.

Suffragists did not support abortion rights as modern feminists do, yet they did not join the doctors in advocating criminalization of abortion, either. As sources quoted in text and in sources in this note illustrate, prominent suffragists instead sought to change law to empower women by protecting the wife's right to choose whether to have sex and to become a mother ("voluntary motherhood"). *See* Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U.L. REV. 1, 27-30 (2012). Opponents of abortion have claimed that Stanton and Anthony were opponents of abortion, *id.* at 8-9, 13-16, but frequently mischaracterize their views by reporting them out of context, and without mention of

challenges to the law of slavery: marriage and slavery each gave men property rights in persons, authorizing coercion in intimate relations and the expropriation of labor.[54]

Many other women, perhaps reticent to employ the individualist language of woman's rights, turned the altruistic care ethic of domesticity to suffrage ends. A broad-based temperance movement advocated for a "Home Protection" ballot, raising issues of domestic violence, sexual abuse, and women's need for empowerment in the household and the public sphere.[55] Frances Watkins Harper employed the language of Christian motherhood to cultivate intraracial and interracial alliances—her project of "home protection" included campaigning for federal intervention against lynching.[56] As the suffrage movement widened its class base, suffragists also began to represent the enfranchisement of women as a means to "social housekeeping": a world in which women would have a say in the regulation of municipal services and the industrial conditions in which they and their children worked.[57]

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suffragists' interest in empowering women and expanding their rights, rather than in criminalizing their conduct, *see id*. at 60-63.

54. For the stories of slaves and of abolitionists who challenged how the law of slavery ordered—and violated—the family relationships of slaves, see PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1998). *See also* 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 slaves resisted rape and forced pregnancy by their masters, and discussing women's decisions about abortion during slavery). For an account of how abolitionists drew on this critique to challenge marriage, see Siegel, *supra* note 8, at 1098-108.

55. 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.").

56. *See* Collier-Thomas, *supra* note 44, at 55-60; *see also id*. at 41 (observing that Harper was "the single most important black woman leader to figure in both the abolitionist and feminist reform movements," playing a role in "the abolitionist, suffrage, temperance, peace, civil and woman's rights movements"). For more on Harper's work with the WCTU, see Alison M. Parker, *Frances Watkins Harper and the Search for Women's Interracial Alliances*, *in* SUSAN B. ANTHONY AND THE STRUGGLE FOR EQUAL RIGHTS 145, 151-65 (Christine L. Ridarsky & Mary M. Huth eds., 2012).

57. ELLEN CAROL DUBOIS, HARRIOT STANTON BLATCH AND THE WINNING OF WOMAN SUFFRAGE 88-121 (1997); Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political,"* 2 YALE. J.L. & FEMINISM 25 (1989); Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FLA. ST. U. L. REV. 957, 958-71 (2005).

III. AFTER RATIFICATION: THE 1920s

After ratification of the Nineteenth Amendment in 1920,[58] new voters converged to support certain family-focused legislation, such as a law beginning to recognize the principle that a woman marrying a man of another nationality should retain her U.S. citizenship[59] and the first program providing health care for poor new mothers and infants.[60] Suffrage leaders discussed whether the broad coalition of women that had come together in support of the vote would find common aims in the aftermath of the Nineteenth Amendment's ratification. To illustrate the range of political choices facing movement leadership in this period, I share the diagnosis of one leader, Crystal Eastman — a socialist-feminist of the era who plainly understood women's enfranchisement in institutional terms, as a stage in women's emancipation from legally enforced dependence on men in the family.

Eastman was an early woman graduate of New York University Law School. After graduating second in her class of 1907, Eastman was unable to secure employment as a lawyer; however, her prodigious legal talent and creativity is evident in the remarkable range of projects in which she immersed herself in just the first decade after her graduation from law school.[61] Eastman wrote a pathbreaking book on worker's' compensation, and was given a central role in drafting New York State's first worker's' compensation law.[62] She then began to explore the ways that law might alter women's status in education, work, family, and politics. Eastman worked with Charlotte Perkins Gilman and other members of Greenwich Village's radical feminist Heterodoxy Club, and with Henri-

58. U.S. CONST. amend. XIX.

59. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1464-68 (1998) (discussing the passage of the Cable Act of 1922, which restricted the application of marital status principles in federal citizenship law, yet was riddled with exceptions, many of which incorporated the racial prejudice of naturalization policy toward Asians).

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

61. *See* Sylvia A. Law, *Crystal Eastman: NYU Law Graduate*, 66 N.Y.U. L. REV. 1963, 1983 n.139 (1991); John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 717-18 (2004). The first full-length biography of Eastman has only just been published. *See* AMY ARONSON, CRYSTAL EASTMAN: A REVOLUTIONARY LIFE (2019).

62. *See* Law, *supra* note 61, at 1988-90; Witt, *supra* note 61, at 718-23 ("Between 1908 and 1910, Eastman did as much as any American lawyer to direct public discourse about work accidents away from tortured inquiries into the rights and duties of employer and employee, toward the aggregate treatment of social needs.").

etta Rodman and the Feminist Alliance to advocate for women's access to medical and law school, employment opportunities, and household living arrangements that would enable women to combine family and market labor.[63] In 1914, the Alliance wrote President Wilson urging him to introduce a constitutional amendment that "no civil or political right shall be denied to any person on account of sex," the first proposal for an Equal Rights Amendment (ERA).[64] At the same time, Eastman was working with Alice Paul to found the National Woman's Party and to redirect women's quest for the vote from the states back to a federal constitutional amendment.[65] During World War I, Eastman also played a central role in leading the international Woman's Peace Party,[66] and worked with Roger Baldwin to found the National Civil Liberties Bureau, which he reorganized in 1920 as the American Civil Liberties Union.[67]

In the winter of 1920, as the National Woman's Party was debating its next steps, Eastman delivered a speech entitled *Now We Can Begin*,[68] in which she announced that the Nineteenth Amendment's ratification was not, in fact, the end of a quest, but instead its beginning—the first step in attaining "[w]oman's freedom, in the feminist sense."[69] Women had just secured political independence from their husbands in voting. Eastman now offered a program for securing

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63. JUDITH SCHWARZ, RADICAL FEMINISTS OF HETERODOXY: GREENWICH VILLAGE 1912-1940, at 25-32 (1986); JUNE SOCHEN, THE NEW WOMAN: FEMINISM IN GREENWICH VILLAGE, 1910-1920, at 46-49 (1972). For the inaugural meeting of the Feminist Alliance, see *Feminists Design a New Type Home*, N.Y. TIMES, Apr. 5, 1914, at C4 (reporting that the Alliance was committed to the view that "Feminism is a movement, which demands the removal of all social, political, economic, and other discriminations which are based upon sex, and the award of all rights and duties in all fields on the basis of individual capacity alone," and was advocating a new constitutional amendment in support of these principles). For Eastman's work as a member of the Alliance led by Rodman, see *infra* note 73.

64. *See Women Urge Amendment*, N.Y. TIMES, Apr. 13, 1914, at 6; *see also supra* note 63. For more on the ERA's first introduction in the 1920s, see *infra* notes 90-92.

65. Phyllis Eckhaus, *Restless Women: The Pioneering Alumnae of New York University School of Law*, 66 N.Y.U. L. REV. 1996, 2004-05 (1991) (describing Crystal Eastman's role in spearheading the drive for a federal suffrage amendment, first persuading the movement and then getting the amendment debated in Congress for the first time in twenty-six years).

66. *See* Witt, *supra* note 61, at 733 ("Between August 1914 and March 1917, Eastman became perhaps the leading organizer of the radical internationalist movement in the United States.").

67. *See id.* at 733, 750, 760. Eastman was also a journalist and co-founder and co-editor with her brother Max Eastman of the radical arts and politics magazine, *The Liberator* (named after William Lloyd Garrison's abolitionist newspaper). *See* John F. Callahan, *"A Long Way from Home": The Art and Protest of Claude McKay and James Baldwin*, 34 CONTEMP. LITERATURE 767, 771 (1993).

68. 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/TSL9-9QY3].

69. *Id.*

women's economic independence from their husbands in work.[70] Women should be free to explore life pursuits outside their traditional family roles. And, women should be free to engage in traditional family work without suffering subordinating dependence on their husbands because of it. As a lawyer, Eastman saw law playing a crucial part in all these changes.

To bend gender outside and inside the family, Eastman offered the NWP a four-part plan. First, to open economic opportunities for women, feminists had to challenge all barriers to occupations and unions, as well as all inequality in pay.[71] Eastman's work with the Feminist Alliance anticipated modern antidiscrimination law; the group challenged sex-based exclusion from professional education, sought a constitutional amendment prohibiting denials of rights "on account of sex,"[72] and mounted what is likely the first sustained campaign against pregnancy discrimination in employment.[73]

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70. *Id.* (emphasizing "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").

71. *Id.* at 23.

72. *See supra* text accompanying note 64.

73. The New York City Board of Education barred married women from teaching and then, after Rodman challenged that practice, barred women from returning to teach after they bore children. During the 1914-15 school year, Rodman and the members of the Feminist Alliance mobilized opinion leaders such as John Dewey, the press, and ultimately the public in their fight against the Board's new policy of discriminating against pregnant teachers; they succeeded in reinstating seventeen teacher-mothers with full pay for their suspended time, and securing maternity leave. But the Board suspended Rodman for speaking out on behalf of a working mother's right to keep her job.

    To arouse public opinion against Board policies discriminating against pregnant teachers and new mothers, Rodman published a letter addressed to the sports columnist of the *New York Tribune* inviting him to accompany her to a game of "mother-baiting." The object of the game, Rodman explained, "[when] played according to the rules of the Board of Education" was "to kick the mothers out of their positions in the public schools." The game was "rather rough, but, like wife-beating, which used to be so popular . . . is always played for the good of the women." Henrietta Rodman, Sporting Note, N.Y. TRIB., Nov. 10, 1914, at 8, https://chroniclingamerica.loc.gov/lccn/sn83030214/1914-11-10/ed-1/seq-8 [https://perma.cc/X7HT-N2WP]. The Board of Education responded to this newspaper letter by suspending Rodman without pay for a year, provoking widespread outcry. The conflict played a role in the genesis of our modern understanding of free speech. *See Free Speech for Teachers*, NEW REPUBLIC, June 26, 1915, at 193 [https://perma.cc/TZN7-PXFE].

    For further details on the teacher-mother campaign, see SOCHEN, *supra* note 63, at 52-60; Patricia A. Carter, *Henrietta Rodman and the Fight to Further Women's Economic Autonomy*, *in* WOMEN EDUCATORS, LEADERS AND ACTIVISTS: EDUCATIONAL LIVES AND NETWORKS 1900-1960, at 152-178 (Tanya Fitzgerald & Elizabeth M. Smyth eds., 2014); *More Pleas for Teacher-Mother; Feminist Alliance Members Want Absence Leave Granted in Stork Cases*, N.Y. TRIBUNE, Oct. 19, 1914, at 7 (reporting Eastman among Alliance members advocating that the Board of

Second, to challenge sex roles so that working wives were not obliged to perform a double shift, feminists had to "institute a revolution in the early training and education of both boys and girls."[74] Eastman urged, "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."[75] Across classes, "breadwinning wives have not yet developed home-making husbands."[76] [W]e must bring up feminist sons."[77]

Third, and critically, Eastman emphasized, "[t]he immediate feminist program must include voluntary motherhood. Freedom of any kind for women is hardly worth considering unless it is assumed that they will know how to control the size of their families. 'Birth control' is just as elementary and essential in our propaganda as 'equal pay.'"[78] Eastman allied herself with the early birth-control movement in declaring birth control "essential" to "freedom of occupational choice."[79]

Finally, Eastman reasoned that women who did choose the work of parenting should not suffer subordinating dependence on men because of it. She termed this fourth element a "motherhood endowment,"[80] a concept that infused

Education grant leave to pregnant school teachers and recognize "the most fundamental rights of women--to work and bear children").

74. Eastman, *supra* note 68, at 23.

75. *Id.*

76. *Id.*

77. *Id.* at 24.

78. *Id.*

79. *Id.* Eastman and other socialist-feminists mobilized for birth control as a way for the working class to address exploitative work conditions; birth control increased women's freedom, improving their ability to coordinate family and workforce participation and to devote more time to raising individual children. *See* Cynthia Bolger Schmidt, Socialist-Feminism: Max Eastman, Floyd Dell and Crystal Eastman (Mar. 1983) (unpublished Ph.D. dissertation, Marquette University). Birth-control advocates broke the Comstock laws and publicly distributed information about means of controlling birth, participating in civil disobedience and risking arrest to publicize their cause. *See* Eckhaus, *supra* note 65, at 2007-08. Support for birth control spread within the suffrage movement during the years prior to ratification. *See* TERBORG-PENN, *supra* note 43, at 70-72 (discussing Angelina Weld Grimké and other African American suffragists who wrote for feminist journals on the eve of World War I, including Margaret Sanger's periodical *Birth Control Review*); *see also* Jessie M. Rodrique, *The Black Community and the Birth Control Movement*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 138, 145-50 (Kathy Peiss & Christina Simmons eds., 1989) (discussing race-conscious advocacy of birth control within African American communities beginning in the Progressive Era).

80. Eastman, *supra* note 68, at 24.

the private family with a public dimension inspired by the teachings of Charlotte Perkins Gilman and by Russia's then-new experiments in collectivization:[81]

> It seems that the only way we can keep mothers free, at least in a capitalist society, is by the establishment of a principle that the occupation of raising children is peculiarly and directly a service to society, and that the mother upon whom the necessity and privilege of performing this service naturally falls is entitled to an adequate economic reward from the political government. It is idle to talk of real economic independence for women unless this principle is accepted.[82]

Eastman summed her vision: "with a generous endowment of motherhood provided by legislation, with all laws against voluntary motherhood and education in its methods repealed, with the feminist ideal of education accepted in home and school, and with all special barriers removed in every field of human activity," she concluded, "there is no reason why woman should not become almost a human thing."[83]

It is as if Eastman, writing a half century after the woman who penned *A Wife's Protest*, was determined to find a way to emancipate the letterwriter. Eastman reaffirmed the claims of the nineteenth-century movement, yet, in 1920, Eastman more openly challenged sex roles, as she would have allowed even a sexually active woman to retain control over the decision whether to become a mother and she offered women a path to economic independence through work outside the home as well as inside it.

Yet change was not simple, then as now. Under the leadership of Alice Paul, the NWP voted down Eastman's proposals almost two to one, in favor of the program that Paul supported and that more narrowly focused on removing sex-based disabilities from the law of marriage and

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81. Eastman and others in the Feminist Alliance were students of the materialist feminist Charlotte Perkins Gilman, a member of Heterodoxy. *See supra* note 63. For more information on Gilman, see HAYDEN, *supra* note 48, at 183-205. *See generally* Julia L. Mickenberg, *Suffragettes and Soviets: American Feminists and the Specter of Revolutionary Russia*, 100 J. AM. HIST. 1021 (2014) (describing the intrigue of the then-recent Russian revolution, inside and outside the suffrage movement).

82. Eastman, *supra* note 68, at 24.

83. *Id.*; *see also id.* at 23 ("[W]e cannot make woman free by changing her economic status. What we can do, however, is to create conditions of outward freedom in which a free woman's soul can be born and grow.").

other legislation.[84] The NWP voted to pursue formal equality in law, without addressing law and norms governing sex, reproduction, and the relation of market and family labor.[85]

Alice Paul's commitment to a single-issue strategy, deployed to great effect in pursuit of the vote in the closing years of the suffrage campaign, now exerted a narrowing force on the ambit of the women's movement. At the same convention where Paul resisted Eastman's effort to place the new birth-control movement on the NWP agenda, Paul also engaged in parliamentary maneuvers that sidelined efforts of black woman suffragists to address the group, turning back efforts by white members including Mary White Ovington, a socialist who was a founding member of the NAACP, as well as Florence Kelley, to enable black women suffragists to speak about their continuing disenfranchisement in the South.[86] Paul's insistence on a single-issue politics perpetuated racial exclusion in the suffrage movement that had grown in the aftermath of Reconstruction.[87] As Crystal Eastman reported: "Supremely neglectful of respectability during the long fight [over suffrage], Alice Paul saw to it that the victory celebration should be supremely respectable. All doubtful subjects, like birth control and the rights

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84. Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 J. AM. HIST. 43, 48 (1984). The minority resolution that Eastman introduced as a substitute for the Executive Committee's proposal tracked the outlines of her speech, but provided more detail in its antidiscrimination commitments. The proposal introduced reform of marriage to recognize equal partnership between the spouses, to recognize the right of divorce, and to legitimize all children. It also sought to "rid the country of all laws which deny women access to scientific information concerning the limitation of families" and to "re-write the . . . laws for the regulation of sexual morality and disease, on the basis of equality—equal rights, equal responsibilities, equal standards." Crystal Eastman, *Alice Paul's Convention*, LIBERATOR, Apr. 1921, at 9, 10.

85. The NWP reasoned sympathetically about birth control but the organization refused to deviate from its single-issue commitment to the ERA in order to endorse birth control. *Feminism and Birth Control*, EQUAL RTS. XIV, Aug. 20, 1927 (affirming "the right of the wife equally with the husband to determine the number of children they shall have," but elevating the single-issue pursuit of equal rights over pursuit of birth control, on the ground that "[w]e believe that women cannot exercise the right to limit their families if they choose unless they have Equal Rights in all the relations of life").

86. NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 68-72 (1987). For a closer look at the decisions of Alice Paul resisting the efforts of Florence Kelley, Mary White Ovington, and Mary Church Terrell to intervene on behalf of disenfranchised black women voters in the wake of ratification, see PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 25-37 (forthcoming 2020) (on file with author).

87. *See* TERBORG-PENN, *supra* note 43, at 7-12 (tracing the evolving shape of race relations in the suffrage movement before and after the Civil War); *see also* Rosalyn Terborg-Penn, *African American Women and the Woman Suffrage Movement*, *in* ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT 135, 152-54 (Marjorie Spruill Wheeler ed., 1995) (describing the disenfranchisement of many African American women voters after 1920, and the failure of the national woman suffrage organizations to advocate for them).

of Negro women, were hushed up, ruled out, or postponed until the affair at the Capitol was over."[88] Many women interested in black rights, pacifism, and birth control departed the NWP.[89]

Single-minded in focus, Paul did lead the post-suffrage movement in attacking women's remaining legal disabilities, introducing state legislation, and in 1923, the first ERA. As Paul and Florence Kelley negotiated drafting the ERA, they initially sought to avoid invalidating sex-based protective labor legislation by focusing on discrimination on account of sex or marriage.[90] By mid-decade, Paul's drive for the ERA had divided the movement, with social-welfare feminists concerned that it 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. It is not clear what further law-reform possibilities then existed given the resistance among men that enfranchising women engendered; but it is clear that embrace of an ERA in the immediate aftermath of the Nineteenth Amendment's ratification shattered alliances among women.[91]

For a flickering moment, the Court took account of the Nineteenth Amendment's ratification in reasoning about women as constitutional rights holders, but then proceeded as if the decades of wide-ranging debate over ratification had no implications for the Constitution's interpretation.[92] With ratification of the

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88. Eastman, *supra* note 84, at 9. By contrast, Eastman led the Women's Freedom Congress in writing President Wilson advocating woman suffrage and "also recommending that no discrimination be made against negresses in the South." *Cristal [sic] Eastman and Gurley Flynn Seeking Freedom*, N.Y. TRIB., Mar. 2, 1919, at 14.

89. Cott, *supra* note 84, at 55.

90. 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, 211, 223 (1991) (quoting early drafts of the Equal Rights Amendment, with debate over its language continuing until its introduction in 1923).

91. For a classic account of this conflict, see *id.* In a forthcoming book, Paula Monopoli argues that the Nineteenth Amendment might have had a more significant impact if the groups that advocated for its ratification had stayed focused on securing its enforcement rather than turning to other goals, such as the ERA. *See* MONOPOLI, *supra* note 86.

92. In the Fourteenth Amendment due-process case of *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923), the Supreme Court, Justice Sutherland writing, struck down a sex-based minimum-wage law citing "the great—not to say revolutionary—changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment." The following year, in *Radice v. New York*, 264 U.S. 292 (1924), a unanimous Court held that New York could still prohibit night work for women. Justice Sutherland, writing for the majority, distinguished *Adkins* on the ground that the latter involved a "wage-fixing law, pure and simple. It had nothing to do with the hours or conditions of labor." *Id.* at 295. Thus, in the immediate aftermath of ratification, the Supreme Court depicted the Nineteenth Amendment as intervening in the marital status traditions of the common law, but the Court did not reason consistently from this account, even within substantive due-process law.

suffrage amendment, the coalition of women's groups that had united in pursuit of the vote splintered, its leadership dividing in the effort to articulate an account of women's concerns that could speak across lines of race and class and diverging social and political commitments.

IV. REMEMBERING THE NINETEENTH AMENDMENT ON ITS FIFTIETH ANNIVERSARY: THE STRIKE FOR EQUALITY, AUGUST 26, 1970

Fast forward fifty years. On August 26, 1970, a second-wave women's movement, emerging out of the antiwar, civil-rights, and labor movements, declared a strike for women's equality on the half-century anniversary of the Nineteenth Amendment's ratification that continued debates about equal citizenship from the 1840s, 1870s, and 1920s.[93]

In 1970, women had the vote, yet were barely represented in Congress or the courts,[94] and there was as yet not a single Supreme Court decision striking down a sex-based law under the Equal Protection Clause, whether statutes reserved jobs or jury duty to men, or declared men entitled to higher pay for equal work. Women in the market still faced what civil-rights lawyer and feminist Pauli Murray termed "Jane Crow" in working conditions.[95]

The 1970 Strike for Equality was many things. Organized to mark the fiftieth anniversary of the Nineteenth Amendment's ratification, the emerging "second wave" of the movement used the day to stage protests around the nation. Over

For a more wide-ranging account of the Amendment's erasure in constitutional interpretation, see Siegel, *supra* note 4.

93. For historical literature on the movement in this transition and one account of the Strike, see 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, 1986-93 (2003).

94. *Demography of Article III Judges, 1789-2017: Gender*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/gender [https://perma.cc/37RX-AM7Q] (reporting that in 1970, seven of the 619 Article III judges—1.13%—were women); *Women Representatives and Senators by Congress, 1917-Present*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress [https://perma.cc/PT4C-SW2N] (listing only eleven women elected to the 91st Congress, spanning the years 1969 to 1971).

95. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). For a pathbreaking account of the intersectional advocacy of Pauli Murray, "a largely unsung architect of second wave feminism's legal and constitutional strategy," see Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J.F. 512 (2020).

10,000 marched in New York City.[96] Betty Friedan, the first president of the National Organization for Women (NOW), spoke in New York City; Toni Carabillo, president of Los Angeles NOW, spoke in Los Angeles; and Aileen Hernandez, NOW's second president, spoke in San Francisco.[97] The mass mobilization was designed to attract press attention, and did, though much of it was bemused, if not mocking.[98]

The strike cannily tied past and present. It featured surviving suffragists.[99] Friedan walked down Fifth Avenue with Dorothy Kenyon, an early birth-control activist, who had opposed an ERA strategy and had recently begun, with Pauli Murray, to litigate for women's rights under the Fourteenth Amendment on a race analogy—a strategy Ruth Bader Ginsburg would carry forward to great effect.[100] Yet even as the strike looked backward, it was future-focused, led by NOW's second president, civil-rights activist Aileen Hernandez, who arrived by way of the labor movement and her role as the only woman EEOC Commissioner.[101]

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96. Linda Charlton, *Women March Down Fifth in Equality Drive*, N.Y. TIMES (Aug. 27, 1970), https://timesmachine.nytimes.com/timesmachine/1970/08/27/76782304.pdf [https://perma.cc/T3FS-WUFR].

97. 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).

98. *See, e.g.*, *Leading Feminist Puts Hairdo Before Strike*, N.Y. TIMES (Aug. 27, 1970), https://www.nytimes.com/1970/08/27/archives/leading-feminist-puts-hairdo-before-strike.html [https://perma.cc/9GD6-CU99]. *See generally* BONNIE J. DOW, WATCHING WOMEN'S LIBERATION 1970: FEMINISM'S PIVOTAL YEAR ON THE NETWORK NEWS 144-67 (2014) (analyzing media coverage of the strike). For local coverage of the strike, see Bernard, *supra* note 97.

99. *See* Bernard, *supra* note 97, at 263 ("The strike was used as a vehicle to educate the general public about some of women's history. Many of the strike day activities included former suffragists. Their stories were heard and applauded. Their sacrifice appreciated. Their victory acclaimed. Many newspapers ran articles on the history of woman suffrage and the major figures of the suffrage movement.").

100. *Id.* at 37. On Kenyon's birth-control and abortion-rights activism, see LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 124-28 (2012), and SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 13-29 (2011), which recounts how Murray and Kenyon's work litigating jury cases for the ACLU on the race analogy ironically helped persuade many holdouts of the necessity of an ERA. Ginsburg's brief in *Reed v. Reed* acknowledges the contributions of Murray and Kenyon by listing them as co-authors. *See* Brief for Appellant at Cover Page, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4).

101. *Aileen Hernandez*, MAKERS (2019), https://www.makers.com/profiles/591f2765bea177716237f48/554890e6e4b0f61941d18562 [https://perma.cc/QA8F-EAU3]; Emily Langer, *Aileen Hernandez, Former NOW President Who Fought for Women's and Minority Rights, Dies at 90*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/national/aileen-hernandez-former-now-president-who-fought-for-womens-and-minority-rights

The strike memorialized the Nineteenth Amendment's ratification in an institutionally self-conscious way. Strikers asserted demands including ratification of the ERA and three movement claims: (1) equal opportunity in jobs and education, (2) access to abortion without restriction, and (3) free twenty-four-hour childcare centers.[102] Through these demands, the movement argued that equal votes do not secure equal citizenship; equal citizenship required transformation of the conditions in which women bear and rear children.

Eleanor Holmes Norton, then chairwoman of the New York City Commission on Human Rights, explained, "My mandate to enforce the law against sex discrimination is an empty mandate unless women can have twenty-four-hour day-care centers to leave their children while they work."[103] As Norton's observations illustrate, the feminist movement understood that formal equality without institutional change is "an empty mandate." The movement's claims make clear its diagnosis: laws prohibiting discrimination against women in voting, education, or work would not secure for women equal citizenship without changes that would (1) give women control over whether to have children and (2) redistribute, in part, the work of childcare. In 1970, the feminist movement sought structural changes in the family form that would secure women's independence, much as Crystal Eastman had in 1920, when she proposed voluntary motherhood through the embrace of birth control as part of "freedom of occupational choice" and endorsed state remuneration of childcare through a motherhood endowment.

The feminist movement acted on the strike's agenda in the early 1970s. Much of this story is familiar. The ERA was reported out of Congress in 1972 with broad-based support in the women's movement of the time.[104] (As the women's movement pressed for the EEOC to enforce the sex-discrimination provisions of federal employment-discrimination laws, federal courts had already begun to

-dies-at-90/2017/03/01/e093637e-fe95-11e6-8f41-ea6ed597e4ca_story.html [https://perma.cc/2WD6-RBE4].

102. DOW, *supra* note 98, at 149-50.

103. Post & Siegel, *supra* note 93, at 1989 (quoting *The Talk of the Town: Liberation*, NEW YORKER, Sept. 5, 1970, at 25, 27).

104. For example, though Murray was litigating to secure recognition of sex-discrimination claims under the Fourteenth Amendment, by 1971 she also supported the ERA. *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 253 (1971). On feminist support for the "dual strategy" of pursuing sex equality under the Equal Protection Clause and the ERA, see MAYERI, *supra* note 100, at 36-40, and Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 794-96 (2004) (describing how in the late 1960s feminists changed course and began to align ERA advocacy in support of their Fourteenth Amendment claims).

preempt sex-based protective labor legislation.)[105] The Burger Court was visibly aware of the ERA debates as, a century after the Fourteenth Amendment's ratification, the Court began for the very first time to interpret the Equal Protection Clause to prohibit sex discrimination.[106]

In this same time period, feminists began to bring lawsuits emphasizing that abortion bans violated equal protection because they discriminated on the grounds of poverty, race, and sex, as well as violating the right to privacy[107] — in this era, there were even claims brought on Nineteenth Amendment grounds.[108] As we know, in 1973, the Court extended the privacy right to cover abortion in *Roe v. Wade*.[109]

Yet many forget that, even as the feminists sought protection for women's decisions about abortion, the movement's claims for reproductive justice included protection for women who sought to raise children as well as to postpone having them. Feminists sought job security for working pregnant women,[110] and

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105. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1345 (2012). By the time NOW was formed in 1966 to secure enforcement of the sex-discrimination provisions of federal employment-discrimination law, even labor feminists were moving away from the protectionist model. *See* DOROTHY SUE COBBLE, LINDA GORDON & ASTRID HENRY, FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN'S MOVEMENTS 60 (2014).

106. *See* Frontiero v. Richardson, 411 U.S. 677, 690-92 (1973). On the relation of the ERA and the Court's equal-protection decisions, 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 (2006).

107. *See* Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of* Roe v. Wade, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 63-65, 68 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); Sherie M. Randolph, *Not to Rely Completely on the Courts: Florynce "Flo" Kennedy and Black Feminist Leadership in the Reproductive Rights Battle, 1969-1971*, 27 J. WOMEN'S HIST. 136, 137-38 (2015).

108. *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1889 n.64, 1890-92, 1892 n.75, 1898 (2010) (surveying different kinds of equality claims in early movement-affiliated briefs). For a decision invoking the Nineteenth Amendment, see *Abele v. Markle*, 342 F. Supp. 800, 802 & n.8 (D. Conn. 1972). For a note on the Nineteenth Amendment by a student of Ruth Bader Ginsburg', see W. William Hodes, Note, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26 (1970).

109. 410 U.S. 113 (1973).

110. Neil Siegel and Deborah Dinner have recently recounted the efforts of Ruth Bader Ginsburg, Wendy Williams, and others to secure job security for pregnant employees in the 1970s. *See* Deborah Dinner, *Sex Equality and The U.S. Welfare Regime: The Story of* Gedulgig v. Aiello, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 107, at 77; Neil S. Siegel, *The Pregnant Captain, the Notorious REG, and the Vision of RBG: The Story of* Struck v. Secretary of Defense, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 107, at 33. On the Burger Court's resistance to pregnancy-discrimination claims, see MICHAEL J. GRAETZ & LINDA

government support for childcare on a cross-class basis.[111] These claims to democratize motherhood and the family were less well-received—and played a role in the great backlash the movement engendered.

Many know of feminist efforts to move the Burger Court to recognize pregnancy discrimination under equal protection and Title VII. These efforts failed and ultimately required the movement to appeal to Congress to enact the 1978 Pregnancy Discrimination Act.[112]

Fewer are aware of how close to fruition claims for government-financed childcare came. By 1971, as the ERA was moving through Congress, so too was national childcare legislation that would have provided early childhood education free to families below the poverty line and on a sliding scale for families above it. In 1971, the Comprehensive Child Development Act (CCDA) was enacted by Congress and vetoed by President Nixon; it was again reenacted by Congress and vetoed by President Ford in 1976.[113]

As these votes indicate, there was national support for a federal role in childcare in the early 1970s. Support for the federal childcare program grew from the civil-rights, antipoverty, and women's movements; and the program attracted opposition accordingly. Its defeat over the course of the decade was tied to the rise of the new right.[114] Pat Buchanan seems to have persuaded President Nixon to veto the CCDA on the ground that it 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."[115] And Phyllis Schlafly wrote one of her first attacks on the ERA as an attack on feminists for their support of abortion and day care: "Women's lib is a total assault on the role of the American woman

GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 162-65, 175-85 (2016).

111. Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966-1974*, 28 L. & HIST. REV. 577, 579 (2010).

112. *See, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (holding that employers have the right to exclude any condition, including pregnancy, from a disability plan given reasonable basis). For this history, see *supra* note 110.

113. *See* Post & Siegel, *supra* note 93, at 2008-11. Mobilization for childcare took many forms in this era, both local and national. *See* Dinner, *supra* note 111, at 601-13.

114. *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, 219 (2001).

115. For the text of Nixon's veto, see Post & Siegel, *supra* note 93, at 2009 & n.203 (quoting Veto of the Economic Opportunity Amendments of 1971, 1971 PUB. PAPERS 1174, 1176 (Dec. 10, 1971)).

as wife and mother and on the family as the basic unit of society. Women's libbers . . . are promoting Federal 'day-care centers' for babies instead of homes. They are promoting abortions instead of families."[116]

V. THE CENTENNIAL AND THE INSTITUTIONAL NINETEENTH AMENDMENT IN COURTS AND POLITICS

So far, this Essay has identified claims on equal citizenship seeking democratization of the family that grew out of the suffrage movement—and has shown that this constitutional tradition was vibrant during the antebellum period, Reconstruction, World War I, and the Civil Rights era. Even this brief account suggests that the claims at the heart of this constitutional tradition are the locus of deep conflict and perpetual erasure.

Today, we view claims for the democratization of family life as modern—and only tenuously connected to the Constitution—not as claims for liberty and equality voiced in the idiom of the Revolution and the abolitionist movement[117] that were an integral part of the movement for women's enfranchisement spanning the nineteenth and twentieth centuries and a core part of the pre- and post-ratification histories of the Reconstruction Amendments and the Nineteenth Amendment.[118] In what follows, I consider some implications of this history for our law.

Because of women's long exclusion from legal institutions—itself a legacy of votelessness—the nearly two centuries of argument we have just considered presently play no part in American constitutional law. Few know that the chants of "Equal Pay!" that broke out at the World Cup championship can be traced to the dawn of the suffrage movement, where they began as a critique of laws enforcing women's economic dependency on men in marriage.[119] Few know that

116. Phyllis Schlafly, *What's Wrong with "Equal Rights" for Women?*, PHYLLIS SCHLAFLY REP., Feb. 1972, at 4, *reprinted in* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 218, 219 (2012). Schlafly charged that the ERA would require the government to provide child care, protect the right to an abortion, and grant same-sex couples the right to marry. *See* PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 86, 89, 90-92 (1977). Schlafly continued to work against child care. *See* WHO WILL ROCK THE CRADLE? THE BATTLE FOR CONTROL OF CHILD CARE IN AMERICA (Phyllis Schlafly ed., 1990).

117. *See supra* text accompanying notes 33-39.

118. *See supra* text accompanying notes 37-41.

119. On the association of the World Cup championship with claims of equal pay, see Chuck Culpepper & Scott Allen, *For USWNT and Its Fans, a World Cup Parade About More Than Soccer*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/sports/2019/07/08/uswnt-parade-nyc [https://perma.cc/N44S-K5S4]. On antecedents, see, for example, *supra* text accompanying note 43 and *infra* text accompanying note 146; *see also* Eckhaus, *supra* note 65, at

suffragists talked about the law of marriage as expropriating women's household labor and enforcing childbearing,[120] or that they talked about working women's need for contraception.[121] No doubt because of women's exclusion from voting, political parties, governing, judging, and the academy for most of the nation's life, long-running debate about the family is perpetually erased from our understanding of our constitutional tradition and from our understanding of slavery as well as voting. As a result, questions of the family are made peripheral in our understanding of freedom and equality under the Thirteenth, Fourteenth, and Fifteenth Amendments,[122] as well as the Nineteenth.

It is not only women's exclusion from voting, but women's persistent exclusion from positions of authority in governing, judging, and the academy that has perpetuated the erasure of this constitutional history—so that those seeking democratic reconstruction of the family appear to be new claimants rather than participants in a quest for equality that reaches back to the antebellum era. These continuing exclusions of onetime disenfranchised citizens have fateful consequences in shaping constitutional meanings, as one example can illustrate. When John Hart Ely concluded in a widely-cited article that *Roe* had nothing to do with the Constitution,[123] he repeatedly invoked talking to his students as he

2005-06 (recounting the New York City women's teachers' association campaigning for "Equal Pay for Equal Work" in 1914).

120. *See supra* notes 45-51 and accompanying text.

121. *See supra* note 79.

122. For a history demonstrating how claims about family relations are at the heart of the Reconstruction Amendments, see DAVIS, *supra* note 54; *see also id.* at 4 (discussing a neglect of the motivating stories of antislavery struggle about the family and observing that the motivating stories "are stories of a subordinated people [and] we are not long past the time when histories were only stories of the superordinate."); 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 freedom and equality claims about sex and motherhood in the nineteenth-century woman's rights movement and in slavery, see sources cited *supra* notes 45-54.

123. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (criticizing *Roe* and famously concluding that *Roe* is "a very bad decision . . . because it is *not* constitutional law and gives almost no sense of an obligation to try to be"). Ely's article has exerted tremendous influence in the legal academy. *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (calculating that it is the twentieth most-cited law review article of all time). A HeinOnline search reports that the article has been cited in 1,521 law review articles. The article's fame extends well beyond the legal academy. Critics cite the article to discredit *Roe*, not only because of Ely's professional stature but his reputation as a liberal. Justice White invoked Ely's article when he called for the overruling of *Roe* in his 1986 *Thornburgh* dissent. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794-95 (1986) (White, J., dissenting). In an October 2019 piece for the Federalist Society, Judge Diarmuid O'Scannlain of the Ninth Circuit attacked *Roe* by quoting the article and reminding us of Ely's stature. Diarmuid F.

reasoned through the question.[124] In fact, Ely reasoned about the constitutional question in terms suggesting that he had never talked to the Yale Law students who were interested enough to challenge Connecticut's abortion ban in 1971,[125] and he had never read the district court opinion striking down Connecticut's abortion statute in 1972, which cited the Nineteenth Amendment and the sex-equality authorities then available, including *Reed v. Reed*[126] (the only equal-protection sex-discrimination decision at that time), and the ERA, just reported out to the states.[127] It was not then beyond the capacity of a Yale Law professor to talk with the handful of women students at the school; in 1971, Thomas Emerson, who litigated *Griswold*, co-authored a legislative history of the ERA with three women students, two of whom were organizers of the lawsuit challenging Connecticut's abortion ban.[128] Had Ely talked to these students, he would have heard an equality-themed story, his own preferred constitutional basis in the *Griswold* case — and not a story about substantive due process, threatening revival of *Lochner*, which he staunchly opposed.[129]

O'Scannlain, *The Future of the Federal Judiciary*, 20 FEDERALIST SOC'Y REV. 138, 140 (2019). And Clarke Forsythe, senior counsel at Americans United for Life and perhaps the nation's most prominent anti-abortion litigator, recently deemed the article "one of the most influential" and "classic" critiques of *Roe*. Clarke Forsythe, Opinion, *David Kaplan:* Roe v. Wade *Shows the Court Is 'Too Powerful,'* Am. United for Life (Feb. 13, 2019), https://aul.org/2019/02/13/roe-v-wade-shows-the-court-is-too-powerful [https://perma.cc/4UQF-APUH].

124. *See* Ely, *supra* note 123, at 933 ("My repeated efforts to convince my students that sex should be treated as a 'suspect classification' have convinced me it is no easy matter to state such considerations in a 'principled' way."); *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.").

125. Ely dismissed the impact of laws criminalizing abortion on women in an initial sentence and footnote in terms that show utterly no signs of having talked with the women law students who brought one of the earliest constitutional claims against Connecticut's abortion ban. *See id.* at 923 & n.26. Compare Ely's reasoning with WOMEN VS. CONNECTICUT ORGANIZING PAMPHLET (Nov. 1970), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 116, at 167.

126. 404 U.S. 71 (1971).

127. *See* Abele v. Markle, 342 F. Supp. 800, 802 (D. Conn. 1972). After advancing these sex-equality arguments, the *Abele* court also cited *Griswold*. *See id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)). For the story of the Connecticut case, see GREENHOUSE & SIEGEL, *supra* note 116, at 163-96. For the voluntary motherhood claim at the heart of the case, expressed with attention to the situation of poor women and women of means, see *id.* at 168-69.

128. Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). Ann Freedman and Gail Falk helped organize the Connecticut abortion case. *See* GREENHOUSE & SIEGEL, *supra* note 116, at 170; Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 33-35 (2018).

129. Ely was plainly opposed to *Roe* because it was based on substantive due process, and concluded the article by inveighing against "Lochnering." *See* Ely, *supra* note 123, at 943-49. In

If Americans recounted the story of We the People in ways that treated women's quest to vote as central, and understood women's quest to vote as a story about the democratization of the family, our constitutional tradition would include claims for self-ownership and voluntary motherhood at the root of the Reconstruction Amendments and the very heart of freedom and equality—not at their periphery. Imagine if the right to vote of half the population mattered in the telling of America's story. And imagine if women's views about the importance of voting mattered: "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."[130] Imagine if we consulted the disenfranchised about the meaning of our constitutional values.

Instead, the nearly two centuries of debate over the family surveyed in this Essay play no role in the interpretation of our Constitution. We recount women's quest for the vote on the attitudinal model, as a story about overcoming sexism in voting. With collective memory of conflict over the family repressed, the family appears to be "natural," a domain of custom and consensus, rather than a locus of law, struggle, and power, having a constitutional history like other important institutions of our constitutional republic.

Americans can mark the Nineteenth Amendment's centennial by changing the very premises on which they interpret the Constitution: by recognizing that women's fight for the vote involved generations of struggle over the family and other institutions of the republic and produced an intersectional body of gender-justice claims that properly bear on the ways the Constitution speaks to these questions today.

In these final sections of the Essay, I examine how this recovered constitutional history can orient our law. I open by considering a few of the many ways that judges might draw on this history as they are interpreting the Constitution. I then identify continuing expressions of this constitutional tradition outside the courts, in politics. I conclude by considering how the Constitution's meaning might evolve if we broke with continuing vestiges of virtual representation in practices of interpretation and recognized a wider community of Americans who played a role in forging our constitutional democracy.

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fact, as a clerk to Justice Warren, Ely had proposed resting *Griswold* on Equal Protection grounds. *See* Franklin, *supra* note 128, at 33-35.

130. *See* Letter from Lucy Stone, *supra* note 52, at 144. On claims for voluntary motherhood before and just after the ratification of the Nineteenth Amendment, *see supra* notes 49-53, 78-79 and accompanying text.

A. A Synthetic Reading of the Fourteenth and Nineteenth Amendments

Few constitutional interpreters pay any attention to the Nineteenth Amendment. We might change course and appeal to judges to read the Nineteenth Amendment, standing alone, as applying beyond the context of voting.[131] "In applying the Nineteenth Amendment to practices other than voting, we would be reading the language of the Amendment to identify, without exhausting, the practical contexts in which the constitutional values it embodies are to be vindicated," much as "the Court does when it applies the Eleventh Amendment to suits brought by citizens against their own states, or applies the First Amendment to the President or state governments."[132]

Yet this is not the only, or even the most intuitive, interpretive path. Rather than interpret the Nineteenth Amendment standing alone, interpreters could employ a synthetic approach that would integrate the Nineteenth Amendment's history with the Reconstruction Amendments. Women's quest for the vote starts well before Reconstruction, threads through the drafting and ratification of the Fourteenth and Fifteenth Amendments, and continues on through the ratification of the Nineteenth Amendment and the struggles over the enforcement of the Fifteenth Amendment during the Second Reconstruction and in our own day.[133] This long quest for the vote offers a rich body of pre- *and* post-ratification history. A synthetic interpretation might draw on this history in a variety of ways. Given our current constitutional convictions about the distribution of the franchise, we might retrospectively enlarge the community of Americans we count among the Fourteenth Amendment's ratifiers.[134] Or, more simply, we

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131. Akhil Amar reads the Nineteenth Amendment as extending beyond voting, in "letter and spirit . . . promising that women would bear equal rights and responsibilities in all political domains." Akhil Reed Amar, *How Women Won the Vote*, 29 WILSON Q. 30, 34 (Summer 2005). Amar explains,

> The Nineteenth at its core protects a right to vote in ordinary elections, but there are sound historical and structural reasons for reading it broadly beyond its narrow core. The amendment should be understood to protect not just a right to vote, but a right to be voted for—that is, a right to seek and hold office. It should be read to guarantee a right to vote in the judicial branch as well as for the legislature—that is, a right to vote and serve on juries. And finally, in tandem with the Second, it should be read to affirm a right to political equality in modern America's militia substitutes.

AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 227 (2015). For courts debating the amendment's scope of application in years after its ratification, see Siegel, *supra* note 4, at 1006-22.

132. Siegel, *supra* note 4, at 1039-40 (footnotes omitted).

133. *See* Collier-Thomas, *supra* note 44; *supra* Parts I, II, III.

134. *See, e.g.*, *supra* text accompanying notes 40-44 (discussing Harper).

could read women's long quest for political voice and for democratic reconstruction of the family as critical post-ratification history of the Fourteenth Amendment, as important for its interpretation and enforcement as *Brown v. Board of Education*.[135] Both approaches would seek to recover and include women's voices, not simply to recount wrongs we have rectified, but also to record the beliefs of generations of Americans who fought to democratize the American constitutional order.

In what follows, I suggest a few ways in which an institutional understanding of the Nineteenth Amendment can guide the Court's interpretation of the Equal Protection Clause. The Court's own decisions provide a natural framework.

As a Justice, Ruth Bader Ginsburg turned to the story of the women's suffrage struggle to explain the intermediate-scrutiny sex-discrimination framework in the 1996 case *United States v. Virginia*.[136] Where Justice Scalia argued that judges interpreting the Constitution ought to defer to traditional understandings,[137] endowing past practice with authority just as the Court did in *Minor v. Happersett*,[138] Justice Ginsburg writing for a six-Justice majority sharply differed. Where Justice Scalia saw the Constitution as entrenching past practice, the majority described a very different role for history in enforcing the Constitution's equal-protection guarantee:

> 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*

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135. 347 U.S. 483 (1954). *See* Siegel, *supra* note 4, at 1033 ("Arguably, the *post*-ratification history of the Fourteenth Amendment––the history of *Brown* and the civil rights movement––now plays a more important role in shaping interpretations of the Fourteenth Amendment's Equal Protection Clause than does anything in the debates attending its adoption.").

136. 518 U.S. 515 (1996) (holding that the Virginia Military Institute's male-only admissions policy violated equal protection).

137. *Id.* at 568 (Scalia, J., dissenting); *see also id.* at 570 (discussing "longstanding national traditions as the primary determinant of what the Constitution means"); *id.* at 601-03 (ending his opinion by discussing at length and approvingly VMI's "attachment to such old-fashioned concepts as manly 'honor' . . . and the system it represents").

138. 88 U.S. 162, 177-78 (1874) ("If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here."); *id.* at 178 (unanimously holding that "the constitutions and laws of the several States which commit [the right of suffrage] to men alone are not necessarily void").

> *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*.[139]

In *Loving v. Virginia*, the majority reasoned about the past, as it often does in equal-protection race cases, as an era of wrongdoing requiring repudiation, invoking past practice as *negative* precedent.[140] The majority connected the long era of women's disenfranchisement to the passage of many sex-discriminatory laws, and ruled that the Equal Protection Clause forbids state action that perpetuates subordination of this kind: "Sex classifications . . . may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."[141]

These passages of *United States v. Virginia* invite synthetic interpretation. They expressly direct judges to consider the Nineteenth Amendment's belated enfranchisement of women as judges enforce the Equal Protection Clause. At *United States v. Virginia*'s direction, courts can read the Fourteenth and Nineteenth Amendments together, applying "skeptical scrutiny of official action denying rights or opportunities based on sex" to offset women's long exclusion from the franchise, and its continuing legacies in law and politics.[142] *Virginia* directs judges to consider history in scrutinizing sex-based state action, so that the government does not carry forward practices that perpetuate inferiority or second-class status in new forms. Women's long quest for the vote and for freedom and equality in the family can guide how judges apply equal-protection law. Just as the constitutional disestablishment of slavery and segregation orients race-discrimination law, so too can the disestablishment of male household headship—intersectionally understood—orient sex-discrimination law.[143]

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139. *Virginia*, 518 U.S. at 531 (emphasis added) (citations and notes omitted).

140. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that racial classifications are subject to close scrutiny and "if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate").

141. United States v. Virginia, 518 U.S. at 533-34 (citations omitted).

142. *Id.* at 531.

143. I first advanced this synthetic reading of the Fourteenth and Nineteenth Amendments, and suggested ways that history could guide enforcement of Equal Protection under *United States v. Virginia*, in Siegel, *supra* note 4. For examples illustrating how disestablishing male household headship and democratizing the family presents intersectional equality concerns, see *infra* notes 153-154 and accompanying text. On the role of collective memory in constitutional interpretation, see Siegel, *supra* note 4, at 1031-33.

Neil Siegel has recently developed a synthetic reading of the Fourteenth and Nineteenth Amendments in Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial* 27 DUKE J. GENDER L. & POL'Y (forthcoming 2020) (manuscript at 3), https://

Equal-protection doctrine presently asks whether a challenged law entrenches or destabilizes traditional gender roles. Since the 1970s—the era of the 1970 Strike and ERA mobilization—the Court's cases have asserted that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[144] 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.[145] Ratification of the Nineteenth Amendment was part of a movement to emancipate women from legally-enforced dependence on men and to recognize women as juridically, politically, and economically *independent* from men in matters of family life.[146] Whether the debate concerned a married woman's right to her person, her earnings, or her vote, the question was whether to preserve the principle of men's household headship or to reorganize family relations on the principle of women's co-headship, equality, and independence.[147]

Anchoring intermediate scrutiny in the institutional history of the suffrage campaign can provide courts additional guidance in applying equal-protection doctrine. In developing the equal-protection sex-discrimination cases, courts have faltered when physical difference seems salient[148]—a confusion in the case

papers.ssrn.com/abstract=3461919 [https://perma.cc/Q4QX-9Y8Y]. For an originalist account of this synthesis, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

144. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

145. *See* Calabresi & Rickert, *supra* note 143; *see also id.* at 99-100 (reporting that Calabresi and Rickert concur in offering a synthetic reading of Fourteenth and Nineteenth Amendments but disagree about the application of their argument to abortion).

146. For a classic and early statement of the suffragists' aspirations, see Siegel, *supra* note 8, at 1121-22 (quoting demands of an 1850 convention in which women sought equality in respect to employment opportunities and compensation, opportunities for women to render themselves pecuniarily independent of men, and political rights). For the roots of equal-pay demands in struggles about the family, see *id.* at 1121-22 (observing that "pecuniary independence" meant both "equal employment and educational opportunity that would alleviate economic pressure driving women to marriage" and "legal reform necessary to emancipate women from economic dependence in marriage").

147. *See supra* Part II. For sources detailing many of these claims, see *supra* text accompanying notes 36-53.

148. The sex-discrimination framework is built on a race-sex analogy that assumes physical difference is generally not germane. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society . . . .").

law that *Virginia* famously endeavors to correct.[149] The institutional history of the suffrage campaign can guide courts puzzling over how to apply the Equal Protection Clause in cases involving the regulation of pregnancy and contraception, where judges have focused on physiology and lost sight of social roles. In determining whether a law implicating an employee's fertility violates equal protection, a judge can ask if the law enables an employee's economic independence or enforces or presupposes an employee's economic dependence. A law excluding coverage of pregnancy from an otherwise-comprehensive disability benefits program presupposes a pregnant worker's economic dependence and departure from the labor force.[150] 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.[151] The institutional history of the Nineteenth Amendment can guide the application of *Virginia*'s anti-caste or 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."[152]

The institutional history of the Nineteenth Amendment shows us that there are intersectional forms of inequality among women as a class. Attention to these intersecting inequalities is crucial in enforcing equal protection in the family. Just as the conditions of women's struggle for freedom and equality diverged from men's, such that the Declaration of Independence inspired a Declaration of Sentiments, so too did the struggle for freedom and equality among women and men continue well after the Nineteenth Amendment's ratification, because some class members faced forms of discrimination that others did not. We can bring these concerns about intersecting inequalities to bear on laws regulating fertility; while controlling the timing of conception promises independence for many,

149. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (observing that "'[i]nherent 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" and citing a case upholding a law providing for pregnancy leave as an example of a sex classification that promotes equal opportunity).

150. *See* Geduldig v. Aeillo, 417 U.S. 484 (1974).

151. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 197 (Oct. 13, 2017).

152. *Virginia*, 518 U.S. at 533-34 (citations omitted).

there are many who focus on freedom from coercive sterilization,[153] and yet others who focus on equal parental recognition and access to the means of family formation.[154]

Looking beyond the Court's traditional case law enforcing Section One of the Fourteenth Amendment, a synthetic reading of the Amendments can guide the Court's interpretation of Congress's power under Section Five. In *United States v. Morrison*,[155] the Court struck down a statute recognizing women's civil right to freedom from gender-motivated violence because in deliberating about the law, Congress discussed its application to domestic violence and marital rape. Judges 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.[156] Courts brushed aside the question whether the Constitution authorized the federal government to address violence against women, as if women and men in the abolitionist, suffrage, and temperance movements had never raised the question on the path to the ratification of the Reconstruction Amendments or the Nineteenth Amendment and the ratification of those amendments had not changed federalism in matters of the family.[157]

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153. Given the history of coerced sterilization of low-income women and women of color, *see, e.g.*, Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 107, at 97-116, scholars have urged caution in the administration of long-acting contraception, with efforts to police bias in counseling and attention to background considerations of consent. *Cf.* Aline C. Gubrium et al., *Realizing Reproductive Health Equity Needs More than Long-Acting Reversible Contraception (LARC)*, 106 AM. J. PUB. HEALTH 18 (2016) (noting that providers can contribute to social inequality "through unquestioned assumptions about whose reproduction is valued and whose is not," and encouraging them to be mindful of LARCs' history as a mechanism of "long-standing devaluation of reproduction among a range of socially marginalized groups").

154. The Court has extended constitutional protections for liberty and equality to the family with attention to questions of sexuality, most recently by extending its same-sex marriage ruling to parentage, recognizing the status of nonbiological parents in married same-sex couples. *See* Pavan v. Smith, 137 S. Ct. 2075 (2017). For an account examining same-sex family formation and questions of parental recognition under *Virginia* and the same-sex marriage cases, see Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2352-57 (2017); and Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. (forthcoming 2020).

155. 529 U.S. 598 (2000) (invalidating the section of the 1994 Violence Against Women Act that provided a federal civil remedy for victims of gender-based violence and therefore determining that Christy Brzonkala, a Virginia Tech college student who alleged she was sexually assaulted by members of the school's varsity football team, was unable to sue her attacker in federal court).

156. Siegel, *supra* note 4, at 1024-39.

157. *Id.*

The history of our federalism is not frozen at the Founding in matters of the family any more than it is in matters of slavery. The history of the Nineteenth Amendment offers a rich account of the ways in which the national government has intervened in state regulation of the household to secure the citizenship rights of women, as I have argued in criticizing *United States v. Morrison*.[158] This decision demands renewed attention in light of #MeToo. *Morrison*'s claim that Congress lacks power under the Commerce Clause and the Reconstruction Amendments to address gender-motivated violence[159] preserves in amber the Constitution of Coverture that Justice Bradley celebrated in *Bradwell*.[160] *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. In so doing, the *Morrison* decision perpetuates the legacy of women's disenfranchisement as it denies Congress its power to legislate under many sources of law: the Commerce Clause, and the Thirteenth, Fourteenth, and Nineteenth Amendments.[161]

Given that the Roberts Court is not likely to reverse *Morrison* any time soon, Congress can start a conversation about the reach of its authority to legislate in support of women's equal citizenship under its combined powers to enforce the Commerce Clause, the Fourteenth Amendment, and the Nineteenth Amendment[162] by debating and enacting the Pregnant Workers Fairness Act

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158. For the history of the federalism debates provoked by the suffrage campaign, see *id.* at 997-1006.

159. *See* Morrison, 529 U.S. at 615-18; *id.* at 625-27.

160. *See supra* text accompanying note 43. The common law immunized a husband's violence toward his wife, even after repudiating the doctrine of chastisement. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Over time, the law began to "address domestic violence but only in ways that reinforced gender and marital hierarchies." Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 380 (2015). For a recent account of *Morrison* that shows how the Rehnquist Court defended tradition and refused to acknowledge the equality reasoning underlying the federal statute, see Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, 55 NOMOS 363, 375-84 (2014).

161. On federalism under the Commerce Clause and the Nineteenth Amendment, see Siegel, *supra* note 4, at 1025-44. On the Fourteenth Amendment, see Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000). On the Thirteenth Amendment, first see the work of Peggy Cooper Davis, COOPER DAVIS, *supra* note 54, and then my observations in this Essay, see *supra* notes 54-122 and accompanying text.

162. To date, the Court has not analyzed the power that Section Two of the Nineteenth Amendment gives Congress or how it would interact with Congress's powers under the Commerce

(PWFA).[163] The Act provides for reasonable accommodation of pregnancy in the workplace,[164] premised on the radical presumption that an employee who becomes pregnant will continue employment rather than leave the workforce—a claim first advanced by the Feminist Alliance in 1914.[165] A century later, this view of women's roles appears to be gaining increasing traction. Twenty-seven states, many of them "red," have recently enacted PWFAs.[166] A law providing for reasonable accommodation of pregnancy in the workplace seeks to structure the family in ways that allow all adult members of the household to be recognized and participate in democratic life as equals.

What better occasion than the Nineteenth Amendment's centennial to hold hearings on the scope of Congress's powers legislatively to enforce women's equal citizenship?

B. The Nineteenth Amendment and the Family in 2020

Debate over President Donald Trump's policies will shape the Nineteenth Amendment's centennial year. The 2016 election provoked a Women's March at

Clause or Section Five of the Fourteenth Amendment to enforce women's equal citizenship rights. The Court's opinion in *Katzenbach v. Morgan*, 384 U.S. 641, 650-56 (1966), illustrates the many ways Congress can secure equal citizenship rights, subject to the limitations of *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a forthcoming essay exploring Congress's enforcement powers under the Nineteenth Amendment, see Richard L. Hasen and Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. (*forthcoming* 2020).

163. *See* Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019).

164. *See* Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, NATION (Aug. 12, 2019), https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage [https://perma.cc/5XDQ-VWLM] (observing that a federal version of the PFWA has been introduced since 2012, but noting that there has been little legislative follow-through). Congress held the first—and only—hearing on the federal PWFA on October 22, 2019. *Long Over Due: Exploring the Pregnant Workers Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on Civil Rights and Human Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019).

165. *See supra* note 73 and accompanying text (discussing public debates over pregnancy discrimination in the Feminist Alliance's 1914 campaign for "teacher mothers").

166. *See* Covert, *supra* note 164.

his Washington inaugural[167] and around the world,[168] with a sea of pink hats signaling resistance to President Trump's call to Make America Great Again.[169] After the nation elected the largest-ever number of women to the House in 2018, Democratic congresswomen wore "#SuffragetteWhite" at President Trump's State of the Union address.[170] A record-breaking six women launched presidential bids for 2020, yet a century after women won the right to vote, Americans were still uncertain whether voters were ready to elect a woman President.[171]

It does not take the pink hats of the Women's March, the glow of suffrage white suits, or even the spread of red robes[172] to recognize the persistence of the institutional Nineteenth Amendment in the year of its centennial. Think back to the wife's protest of the 1870s with its challenge to the expropriation of women's family labor and its protest of forced childbearing, to Crystal Eastman's claim for employment opportunities, voluntary motherhood, and a motherhood endowment, and to the Women's Strike demands for sex-equality law, abortion rights, and universal childcare.

These themes recur in the 2020 presidential campaign, where candidates have proposed policies that promote democratization of the family—seeking to structure family life in ways that enable adult members of the household to be recognized and participate in democratic life as equals. For example, Democratic candidates endorsed legislation going beyond the 1978 Pregnancy Discrimina-

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167. *Cf.* Tim Wallace & Alicia Parlapiano, *Crowd Scientists Say Women's March in Washington Had 3 Times as Many People as Trump's Inauguration*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/interactive/2017/01/22/us/politics/womens-march-trump-crowd-estimates.html [https://perma.cc/VN9E-4SQ6] ("The women's march in Washington was roughly three times the size of the audience at President Trump's inauguration.").

168. Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: "We're Not Going Away*," N.Y. TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/us/womens-march.html [https://perma.cc/D47X-P32D].

169. Cassie Spodak, *Two Very Different Meanings for Two Brightly Colored Hats*, CNN POL. (Jan. 22, 2017), https://www.cnn.com/2017/01/21/politics/womens-march-protest-hats/index.html [https://perma.cc/RK9V-DJLP].

170. Vanessa Friedman, *The Lessons of the Women in White at the State of the Union Address*, N.Y. TIMES (Feb. 6, 2019), https://www.nytimes.com/2019/02/06/fashion/state-of-the-union-white.html [https://perma.cc/39FG-83JD].

171. *See* Lisa Lerer, *It's a Question No One Says They Want to Ask. But the Women Running for President Keep Hearing It.*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/us/politics/women-presidential-candidates-2020.html [https://perma.cc/48HR-3GT3].

172. Jessica Valenti, *Why The Handmaid's Tale Is More Relevant One Year After the First Season*, GUARDIAN (Apr. 25, 2018), https://www.theguardian.com/commentisfree/2018/apr/25/handmaids-tale-season-2-return-trump-america-2018 [https://perma.cc/P5RW-6RHU].

tion Act to provide for the reasonable accommodation of pregnancy in the workplace;[173] and when conservatives questioned Elizabeth Warren's experience of pregnancy discrimination in the 1970s, they provoked a national speak-out about the pervasive forms of discrimination mothers-to-be and new mothers still face.[174] A number of the candidates proposed recognizing the work of at-home caregivers,[175] and Elizabeth Warren introduced a bill providing for federal support for locally managed childcare programs that would pay childcare workers as public-school teachers,[176] while Pete Buttigieg announced his support for paid family leave which, Buttigieg emphasized, he and his husband hoped to participate in.[177]

At the same time, candidates emphasized the importance of protecting voluntary motherhood as a core principle of equal citizenship. Elizabeth Warren has emphasized protection for abortion and contraception, and funding for those

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173. *See* Anna North, *Elizabeth Warren Says She Lost Her Job when She Got Pregnant. Thousands of Women Every Year Say the Same.*, VOX (Oct. 9, 2019, 11:40 AM EDT), https://www.vox.com/2019/10/9/20904789/elizabeth-warren-fired-pregnant-pregnancy-discrimination-firing [https://perma.cc/WU7Y-84FG] (reporting that many Democratic candidates support the Pregnant Workers Fairness Act but that the Act "currently has little chance of passing the Republican-controlled Senate").

174. Eli Rosenberg, *Conservatives Claim Elizabeth Warren Lied About Pregnancy Firing. Women Reality-Checked Them on Social Media.*, WASH. POST (Oct. 9, 2019, 6:47 PM EDT), https://www.washingtonpost.com/business/2019/10/09/conservatives-claim-elizabeth-warren-lied-about-pregnancy-firing-women-reality-checked-them-social-media [https://perma.cc/TJM7-UR9D] (reporting on speak-out about pregnancy discrimination).

175. *See, e.g.*, Claire Cain Miller, *Stay-at-Home Parents Work Hard. Should They Be Paid?*, N.Y. TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/upshot/paying-for-parenting.html [https://perma.cc/CS2W-WJ4T] (summarizing several Democratic presidential candidates' proposals to compensate unpaid caregiving).

176. Anna North, *Elizabeth Warren Just Introduced Her Child Care Plan in Congress*, VOX (June 18, 2019, 1:20 PM EDT), https://www.vox.com/policy-and-politics/2019/6/18/18683527/elizabeth-warren-universal-child-care-bill-congress [https://perma.cc/37G9-UXH2]; *see also* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 192-201 (2019) (advocating a universal public option for childcare).

177. On family leave, see Karma Allen & Kendall Karson, *2020 Hopeful Pete Buttigieg Says He and Husband Planning to Have a Child Soon*, ABC NEWS (Apr. 16, 2019, 1:43 PM EST), https://abcnews.go.com/Politics/2020-hopeful-pete-buttigieg-husband-planning-child/story?id=62421122 [https://perma.cc/7F24-UK89]. For an account that understands economic dignity with attention to the democratic reconstruction of the family, see Gene Sperling, *Economic Dignity*, DEMOCRACY (Spring 2019), https://democracyjournal.org/magazine/52/economic-dignity [https://perma.cc/8XEG-E4JH] ("While they were not components of FDR's Second Bill of Rights, support for child and elderly care and paid family leave should today be seen as essential to this first pillar—an ability for workers to bond with a new child or care for an elderly parent lies at the heart of economic dignity.").

who cannot afford to pay.[178] Kamala Harris introduced legislation designed to make sure that over-the-counter birth control is affordable and accessible, specifically designed to offset the Trump Administration's efforts to undermine the Title X program (which funds contraception and reproductive health care for low-income families) through new regulations that would replace providers of medically approved methods of family planning with providers of natural family planning.[179]

It is surely progress to see these proposals for the federal government to protect voluntary motherhood and to help organize and finance childcare as the positions of leading presidential candidates. One way or another, these proposals — as claims for freedom and equality — have recurred in legal, political, and constitutional debates since the decades before the Civil War, even as they continuously prompt repression and backlash.

Does the three-quarters of a century it took to win the vote teach us anything about the scale and duration of the backlash through which we are now living? Why, a century after the Nineteenth Amendment's ratification, does Crystal Eastman's vision of freedom and equality remain unrealized and unrealizable for so many? And what comes next? Who has proposals for democratic reconstruction of the family as far-reaching as Stanton's, Stone's, and Harper's, or Eastman's, Friedan's, and Hernandez's? And what will they look like?

If we recognized these women as architects of our constitutional order and were generally familiar with the proposals they have advanced for democratic

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178. Anna North, *Elizabeth Warren Just Announced Her Abortion Platform. It's Aggressive.*, VOX (May 17, 2019, 8:02 AM EDT), https://www.vox.com/2019/5/17/18628684/abortion-elizabeth-warren-platform-roe-v-wade [https://perma.cc/V36J-EFRT]. For an account of abortion funding as presenting intersectional questions of social justice, see *'This Week' Transcript 6-16-19: President Donald Trump and Rep. Alexandra Ocasio-Cortez*, ABC NEWS (June 16, 2019, 9:04 AM EST), https://abcnews.go.com/Politics/week-transcript-16-19-president-donald-trump-rep/story?id=63738621 [https://perma.cc/QHB2-5YG5], which quotes Representative Alexandra Ocasio-Cortez as stating, "The Hyde amendment . . . is truly about equality of health care and health care access for low-income women and women of color and women that get caught in our — in our mass incarceration system . . . . [T]his is not in the niche topic of women's issues anymore, this is an American issue."

179. Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7740 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59); Ariana Eunjung Cha, *Trump Administration Bars Clinics that Provide Abortions or Abortion Referrals from Federal Funding*, WASH. POST (Feb. 22, 2019, 1:51 PM EST), https://www.washingtonpost.com/health/2019/02/22/trump-administration-bars-family-planning-clinics-that-provide-abortion-referrals-million-program [https://perma.cc/7WQ8-XSQC]; *Harris, Colleagues Introduce Legislation Pushing for Affordable Over-the-Counter Birth Control*, U.S. SEN. KAMALA D. HARRIS (June 13, 2019), https://www.harris.senate.gov/news/press-releases/harris-colleagues-introduce-legislation-pushing-for-affordable-over-the-counter-birth-control [https://perma.cc/H2TS-F9KP].

reconstruction of the family over the last two hundred years, might the proposals now before us look less utopian—in fact, generations overdue?

CONCLUSION

The ratification of the Nineteenth Amendment did more than add voters; it gave new form to a conversation about the democratization of the family ongoing in our own day. This conversation began before the Civil War and continued through the debates over the Reconstruction Amendments and the Nineteenth Amendment and after. And yet we talk about our constitutional tradition as if these debates over the family never happened, as if Americans first raised questions of liberty and equality in the family in the 1960s and 1970s—rather than the decades before the Civil War.

As this Essay has demonstrated, recovering the memory of suffrage struggle can guide constitutional interpretation in many contexts. The story functions as negative precedent, making vivid wrongs that state action can perpetuate in modern forms. As *United States v. Virginia* holds,[180] and a federal district court has recently reminded us, the memory of suffrage struggle can help identify underlying gender bias[181] and racial bias[182] in practices today. The story of women's long quest for the vote demonstrates how gender inequality is enforced through the family, and how such inequalities can assume different forms as gender intersects with relations of race, class, citizenship, or sexuality. [183]

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180. *See supra* text accompanying note 152.

181. Judge Carlton Reeves pointed to Mississippi's long refusal to enfranchise women in a recent abortion case when he observed that the state that enacted a law banning abortion was closer to,

> the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries "'so they may continue their service as mothers, wives, and homemakers.'" *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966). The Mississippi that, in Fannie Lou Hamer's reporting, sterilized six out of ten black women in Sunflower County at the local hospital—against their will. And the Mississippi that, in the early 1980s, was the last State to ratify the 19th Amendment—the authority guaranteeing women the right to vote.

Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 541 n.22 (S.D. Miss. 2018) (citations omitted).

182. *Id.*

183. For an example of suffrage history supporting intersectional gender justice claims, see Jennifer L. McClellan, *Virginia Should Ratify ERA*, RICHMOND FREE PRESS (Aug. 30, 2018, 6:00 AM), http://richmondfreepress.com/news/2018/aug/30/virginia-should-ratify-era [https://perma.cc/TFE4-SG37].

Yet at the same time, the story of suffrage struggle offers us rich, positive precedent. It is 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. The long quest for suffrage features audacious dreamers who dared to claim new, more egalitarian forms of citizenship, family, and constitutional community that we are still struggling to realize today. Whether or not these constitutional architects of our present could vote in their day, we surely can recognize and honor them in our own.

It is time to break the vestiges of virtual representation in practices of constitutional interpretation—where we still reason about the framing and many other questions as if only men made the Constitution. When Justice Thomas quotes Fredrick Douglass in a debate over affirmative action,[184] Justice Thomas quotes Douglass without pausing to establish whether Douglass could vote,[185] despite Thomas's claimed fidelity to originalist methods. Douglass exerts a different form of authority for Justice Thomas and American audiences today—the same form of authority that Frances Harper, or even Crystal Eastman, might, if enough judges recounted *their* claims on liberty and equality. 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—embracing the disenfranchised 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.

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184. *See* Grutter v. Bollinger, 539 U.S. 306, 349-50 (2003) (Thomas, J., dissenting) (quoting Frederick Douglass speaking to abolitionists about "What the Black Man Wants" in 1865); Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, *reprinted in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991). For another example, see *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 speaking in 1865, before ratification of the Fourteenth and Fifteenth Amendments).

185. *See* David W. Blight, Opinion, *Voter Suppression, Then and Now*, N.Y. TIMES (Sept. 7, 2012), https://www.nytimes.com/2012/09/07/opinion/frederick-douglass-and-voter-fraud.html [https://perma.cc/G677-CNLM] ("We do not know when Douglass cast his first vote."). In the speech quoted, Douglass is arguing that African Americans should have the right to vote.

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