ARTICLE

DOMINANCE AND DEMOCRACY: THE LEGACY OF WOMAN SUFFRAGE FOR THE VOTING RIGHT

JoEllen Lind*

TABLE OF CONTENTS

* Professor of Law, Valparaiso University; A.B. Stanford University, 1972; J.D. University of California at Los Angeles, 1975; Candidate Ph.D. (political theory) University of Utah, 1994. I wish to thank Akhil Amar for the careful reading he gave this piece, and in particular for his assistance with Reconstruction history. In addition, my colleagues Ivan Bodensteiner, Laura Gaston Dooley, and Rosalie Levinson provided me with perspicuous editorial advice. Special acknowledgment should also be given to Amy Hague, Curator of the Sophia Smith Collection of Smith College, for all of her help with original resources. Finally, I wish to thank my research assistants Christine Brookbank, Colleen Kritlow, and Jill Norton for their exceptional contribution to this project.

"Men have kept women pure and noble by keeping them out of the world and its personal usage; when she enters politics she enters them, not as a woman, but as a voter and as a citizen." — A Lawyer, 1895 (anonymous).[1]

INTRODUCTION

The history of the voting right presents a telling irony of American political relations because it reveals that dominant groups used their power to limit access to the ballot,[2] even as the franchise came to symbolize full citizenship to women, African-Americans, and others excluded from participation in the governance of the nation.[3] While the vote acted as an icon, even a fetish, of democracy in the imagination of disenfranchised Americans, it was employed by ruling elites to maintain their superior

1. A LAWYER (ANONYMOUS), THE WOMAN-SUFFRAGE MOVEMENT IN THE UNITED STATES: A STUDY 116 (1893).

2. *See generally* CHILTON WILLIAMSON, FROM PROPERTY TO DEMOCRACY (1960) (detailing historic restrictions on the franchise); Elizabeth Mensch & Alan Freeman, *A Republican Agenda for a Hobbesian America?*, 41 FLA. L. REV. 581 (1989) (discussing the relevance of civic republican conceptions of political participation in the context of raw power relations in American society); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (tracing the substitution of standards based on pauperism rather than property ownership as limits on suffrage rights in the early American republic).

3. This symbolism became most intense in the era after the Civil War. *See infra* text accompanying notes 223–28.

position in the general society. In this Article, I use the long neglected story of the woman suffrage movement[4] to explore an overlooked aspect of this paradoxical situation — namely, the Supreme Court's role in maintaining and reinforcing traditional patterns of dominance in the United States by validating laws designed to keep women from voting. In doing so, I hope to reveal the Court's position as gatekeeper of the franchise under our scheme of federalism and to bring the account of women's struggle for suffrage from the "underside of history"[5] to the center of constitutional theory. Throughout my discussion, I depict the gender system as "a social system that divides power,"[6] and I relate that depiction to the grueling fight women waged for almost a century to secure political rights.

The story of the woman suffrage movement is in part the saga of what the franchise can and cannot do to bring about social change. In a truly inclusive democracy, voting ought to be transformative — electoral politics afford us the theoretic ability to assert our status as full citizens, to participate in political discourse, to obtain legislation capable of changing the private relations of individuals and groups in the civil society, and to mobilize the public around issues of importance.[7] Moreover, the possible transformative uses of the franchise are integral to es-

---

4. The movement's originators used the term "woman suffrage" to refer to the enfranchisement of women as a whole. It was meant to make the point that suffrage was a gendered category — that what people thought of as suffrage did not consist in the aggregation of individuals' rights to vote but was really a group privilege reserved to men. Women in the movement wanted a new kind of franchise category to be created in the form of a group right for women *qua* women, thus "woman" suffrage. This usage followed the custom of many early feminist writers to refer to "woman," not "women," in their work and is also found throughout the original history of the suffrage crusade, written and compiled by some of the key participants. *See* 1, 2 HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al. eds., 1881); 3 (Elizabeth Cady Stanton et al. eds., 1886); 4 (Susan B. Anthony & Ida Husted Harper eds., 1902); 5, 6 (Ida Husted Harper ed., 1922) [hereinafter STANTON ET AL.].

5. This phrase is taken from Elise Boulding. *See generally* ELISE BOULDING, THE UNDERSIDE OF HISTORY, A VIEW OF WOMEN THROUGH TIME (1976) (providing a comprehensive history of women from the Bronze Age to the present). Nancy Cott's recently published collection of contemporary historical articles on a variety of topics dealing with women in the United States will also do much to advance knowledge of women's history. *See* HISTORY OF WOMEN IN THE UNITED STATES (Nancy F. Cott ed., 1992) [hereinafter Cott, HISTORY].

6. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 160 (1989).

7. *See* Mary Fainsod Katzenstein, *Feminism and the Meaning of the Vote*, 10 SIGNS 4, 5–7 (1984).

tablishing the legitimacy of democratic governmental regimes.[8] As the history of women's fight for the ballot shows, however, the voting right can be withheld, manipulated, or weakened to promote and maintain the position of favored groups. On close examination, it is a disquieting fact that the value of the vote seems more symbolic than substantive and that rhetoric about popular sovereignty and majority rule merely obscures continuing massive inequalities in the American polity based on race, sex, and wealth.

The gap between our democratic oratory and our anti-democratic practices is widened by the general indifference of scholars to the way poor people, persons of color, and women have been kept from voting at various times throughout American history. While the civil rights movement generated some interest in the past treatment of African-American voting rights,[9] no event bearing on the franchise has been more overlooked or trivialized by academics than the woman suffrage movement, and no aspect of that event has been more neglected than the Supreme Court's treatment of women's legal demands for inclusion in the electorate. The effort to secure suffrage for women lasted some one hundred years.[10] It resulted in the enfranchisement of more persons than any other law reform in American history.[11] While some historians and political scientists now give serious attention

8. This is the case for two broad reasons. To the extent that a regime justifies its actions by reference to democratic norms of participation and consent, its failure to allow real participation erodes its moral justification. *See* BENJAMIN R. BARBER, STRONG DEMOCRACY 3–6 (1984) (discussing the conflicts inherent in liberal democracy). Even if one confines the notion of political legitimacy to governmental stability, excluding broad groups from the franchise destabilizes the regime in question. *See* Seymour M. Lipsett, *Social Conflict, Legitimacy and Democracy, in* LEGITIMACY AND THE STATE 89 (William Connolly ed., 1984).

9. Brown v. Board of Educ., 347 U.S. 483 (1954), and the 1960s civil rights movement generated interest among legal scholars in the neglected history of African-American political rights. *See, e.g.,* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

10. *See generally* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 41, 143 (Harvard Univ. Press 1968) (1959) (dating the beginning of feminist consciousness which led to the suffrage drive from the early Jacksonian period of the 1830s).

11. This is because it enfranchised half of the people in the United States. In 1920, when the Nineteenth Amendment was enacted, there were approximately 51.8 million women in the United States. *See* U.S. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, series A34–50, 9 (1961) [hereinafter CENSUS, HISTORICAL STATISTICS].

to it, legal scholars have engaged in almost no discussion about what the woman suffrage movement can teach regarding the potential and the limitations of electoral politics.[12] This is a serious omission because the Supreme Court's treatment of women's legal claims delayed the conclusion of the suffrage campaign into the Twentieth Century and consigned it to a condition of political isolation that was instrumental to its deradicalization.[13] This delay unjustly enriched dominant groups by giving them an additional half-century[14] to further entrench a political process resistant to the demands of women and others for power sharing. Thus the Court's attitude helped to preserve the non-franchise aspects of the gender system into the modern era, diluting the power of the vote decisively to emancipate women on its own.[15] The Court's role alone in creating these effects should make woman suffrage intriguing to constitutional scholars, but in addition

12. Very few law review articles deal at all with woman suffrage. *See, e.g.*, Martha Minow & Nell Minow, *Franchise Republics: The Examples of Shareholder Voting and Women's Suffrage*, 41 FLA. L. REV. 639, 651–56 (1989) (including a short discussion of woman suffrage in treatment of shareholder voting); Rogers M. Smith, *"One United People": Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1989) (using woman suffrage to explain conceptions of political participation founded in contrasting models of community). Recently, mention was made of the history of woman suffrage in a student note arguing that the Nineteenth Amendment should be given an emancipatory reading. Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 *passim* (1993). None of these works gives a detailed account of the history and none highlights the role of the Supreme Court in foreclosing access to the voting right for women. The absence of academic interest in women's legal history has been ameliorated to some extent by Joan Hoff's work. *See generally* JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF UNITED STATES WOMEN (1991) (providing a comprehensive account of the legal status of American women).

13. *See infra* text accompanying notes 335–53, 459–503.

14. The Court had an opportunity to strike gender restrictions on the franchise as early as 1874; the Nineteenth Amendment was not enacted until 1920. *See infra* text accompanying notes 335–53, 435–46.

15. Achieving the formal right to the franchise was a necessary, but not a sufficient condition of women's emancipation. This is the case because prohibiting women from having a symbolic claim to political power was a key piece of the entire network of male dominance operative in the last century. The longer that restrictions on voting were retained, the more the nonfranchise aspects of the gender system were reinforced. Thus, when women gained the vote, they were confronted with a well-established and formidable obstacle in the form of entrenched social institutions which retarded their ability to increase their status through direct voting power. Removing gender restrictions on the voting right could not transform such a complex entity, combining both public and private elements, overnight or by itself — it would take many years and enormous resources for the whole network of gender dominance to begin to erode and to afford women an actual chance for complete emancipation. *See infra* text accompanying notes 503–37.

the campaign for women's voting rights was a remarkable historical phenomenon that can generally increase our understanding of the gap between electoral realities and democratic appearances in American society.

The suffrage demand emanated from a broad crusade that arose in the Jacksonian era but is continuous with modern feminism.[16] The movement attacked all the factors that subordinated women. In the beginning, it was not only, or even primarily, about the right to vote.[17] As Elizabeth Cady Stanton put it: "The woman question is more than a demand for suffrage . . . . [It] is a question . . . of her work, her wages, her property, her education, her physical training, her social status, her political equalization, her marriage and her divorce."[18] Especially in its early stages, the movement often made systematic and frequently radical attacks on the whole system of gender.[19] Soon after the women's rights movement was organized in 1848, however, the vote took on a centrality to its efforts that stuns contemporary sensibilities unaccustomed to associating electoral politics with change.[20] Activists saw that voting was tied to one's status as a

16. Woman suffrage was concerned with issues that are strikingly similar to those absorbing the attention of contemporary feminists. The conflicts and divisions within it foreshadowed current disputes over rights and difference; sexuality, marriage, and the family; and the relevance of race and class to women's condition. For a general discussion of the birth of modern feminism out of the later stages of the suffrage movement, see NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1987) [hereinafter COTT, MODERN FEMINISM]. For a study distinguishing between the women's rights movement, which the author associates with abolition, and feminism, see BARBARA J. BERG, THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM (1978).

17. *See* 1 STANTON ET AL., *supra* note 4, at 13–24.

18. *See* REVOLUTION, Jan. 14, 1869 *in* ELISABETH GRIFFITH, IN HER OWN RIGHT, THE LIFE OF ELIZABETH CADY STANTON 140 (1984).

19. *See, e.g.*, AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920 *passim* (1965) [hereinafter KRADITOR, IDEAS].

20. Michael Parenti describes the historical uses of suffrage in the Nineteenth Century:

> The arguments of the more liberal-minded groups [for extending suffrage] prevailed in the United States and Great Britain, and popular suffrage was extended in both countries. But the British and American elites were motivated by something other than a gradualist, reformist vision. They had no desire to move toward a new social order but to consolidate the prevailing one under the same political management that had extended suffrage. They initiated changes only in response to serious public turmoil, and these changes — like those before and since — were intended not to be the *first* step in a series of reforms but the *last*. The reforms were designed to prevent widespread agitation while securing the rule of a slightly reconstituted oligarchy.

full citizen and that, without the direct influence over legislators provided by the ballot, women had little leverage over those who controlled the institutions that promoted the gender system.[21] To suffragists,[22] the franchise was the cornerstone of all other political rights,[23] and they judged that political rights were needed to end the widespread belief that women should be assigned an inferior status.

To explain the importance of the voting right to the women who were excluded from it and to cast light on what it could and could not achieve for them, Part I describes gender dominance as a complex of interlocking legal and extra-legal factors and identifies limitations on access to suffrage as highly important to the function of that complex. This section draws on the feminist jurisprudence of Catharine MacKinnon, the work of Gerda Lerner and other feminist historians, and the political theory of Judith Shklar connecting voting with full citizenship. Part II gives a detailed historical account of woman suffrage designed to acquaint the reader with the little known facts of last century's female emancipation effort and to connect women's exclusion from the franchise with the Nineteenth Century gender system. This history begins with the social upheaval of the Jacksonian era, spans the Civil War and Reconstruction, re-introduces long-forgotten legal challenges to restrictions on voting brought by women in the Reconstruction Era, and ends with the long campaign to pass

---

MICHAEL PARENTI, POWER AND THE POWERLESS 198 (1978). Many modern political theorists claim that voting is ineffective to reorder social relations or express the will of an actual majority of Americans. This is in part the result of the inherent problems of democracy on a large scale. *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 11 (1982). These problems are exacerbated by the power of the media to shape public opinion and the power of corporations, in turn, to determine media content. *See* MICHAEL PARENTI, INVENTING REALITY: THE POLITICS OF THE MASS MEDIA 20–23, 48–53 (1986). *See generally* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (describing the effect of advertising on the content of news reporting).

21. *See infra* text accompanying notes 40–41, 121–26, 214–17.

22. Many women involved in the American suffrage movement referred to themselves as "suffragists" and considered the diminutive "suffragette" to be insulting. *See* 1 KARLYN K. CAMPBELL, MAN CANNOT SPEAK FOR HER, A CRITICAL STUDY OF EARLY FEMINIST RHETORIC 3 (1989) [hereinafter 1 CAMPBELL, MAN CANNOT SPEAK].

23. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the franchise as "a fundamental political right, because [sic] preservative of all rights"). An argument can be made that speech rights are essential to all other rights; however, voting itself can be seen as continuous with political discourse outside of official institutions — that is, as a form of speech by proxy that takes place in a uniquely important forum.

the Nineteenth Amendment, which finally succeeded in 1920 after the First World War. This section shows the process by which the suffrage crusade was politically isolated and highlights the Supreme Court's role in limiting it when activists shifted the center of their focus from legislative institutions to the courts. Part III connects my theoretical and historical contentions with illustrative constitutional decisions on voting and other closely related issues affecting women that emanate from the Reconstruction Era up to the social protest movements of the 1960s. In the period before the Nineteenth Amendment was passed, the Court protected the complex of gender dominance by foreclosing legal challenges to discriminatory voting laws. After the amendment was enacted in 1920, the Court's failure to strike other aspects of the gender system — including discrimination in employment and education — helped to preserve much of women's subordinated status into the modern era. Thus, the purpose of Part III is twofold: to illuminate the Supreme Court's central role in maintaining the power of established groups in society through its approach to the franchise, and to show that the voting right standing alone can erode, but not completely remove, entrenched patterns of gender discrimination.

I. VOTING AND THE COMPLEX OF DOMINANCE

The fact of dominance[24] and the impulse to democracy have existed side by side in the United States and are reflected in the history of the voting right. In the United States, hierarchies based on wealth and race maintained disparities in economic resources and distorted the labor market to the advantage of those

24. By use of the term "dominance" here, I mean the exertion of social control by one person or group over another in order to force those dominated to live in conditions and on terms not of their own choosing. Domination is typically practiced to make those who are its object occupy an inferior position within a hierarchy so that through the restriction of the subordinated group's freedom and autonomy, its members become a resource to be appropriated for the use of others, rather than full citizens entitled to an equal voice in the governance of the political community. Gerda Lerner describes it in conjunction with the institution of slavery:

> Slavery is the first *institutionalized* form of hierarchical dominance in human history; it is connected to the establishment of a market economy, hierarchies, and the state. . . . The 'invention of slavery' consisted in the idea that one group of persons can be marked off as an out-group, branded enslaveable, forced into labor and subordination — and that this stigma of enslaveability combined with the reality of their status would make them accept it as a fact.

GERDA LERNER, THE CREATION OF PATRIARCHY 76–77 (1986) [hereinafter LERNER, PATRIARCHY].

who controlled property and industry.[25] Social stratification based on gender worked in an intricate fashion to make women sexually available to men and to facilitate their appropriation as resources for reproduction and unpaid labor within the confines of the family.[26] No aspect of the voting right more clearly reflects the social hierarchy of American culture than the historical limitations on access to it that were selectively applied to various groups. These limitations played a critical role in creating the social systems by which the poor, persons of color, and women were subjected to an inferior status. Moreover, the way gender subordination has operated in the context of the franchise is particularly complicated. This is the case because, as MacKinnon has described it, "[M]en's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life."[27] Thus dominance has involved forces of breadth, depth, and sophistication by which the political power of half the population has been blocked, blunted, and manipulated in a system allegedly committed to majority rule.

A. *The Nineteenth Century Gender System*

The gender system that functioned in the last century was constructed of private acts of physical and associational intimidation, discrimination, and sexist propaganda backed up by state supported forms of legal prejudice with which they were continuous.[28] It rested on the interaction between legal and extra-legal means of imposing subservience on select groups that itself was

---

25. *See* PARENTI, POWER AND THE POWERLESS, *supra* note 20, at 5–14, 65, 97.

26. *See* MACKINNON, *supra* note 6, *passim* and especially chs. 2 & 3. Once again as Lerner portrays it:

> [T]he confluence of a number of factors leads to sexual asymmetry and to a division of labor which fell with unequal weight upon men and women. Out of it, kinship structured social relations in such a way that women were exchanged in marriage and men had certain rights in women, which women did not have in men. Women's sexuality and reproductive potential became a commodity to be exchanged or acquired for the service of families . . . .

LERNER, PATRIARCHY, *supra* note 24, at 77. It is Lerner's thesis that the successful subordination of women made the cognitive model of slavery possible. *Id.* In this way, the forced inferior position and commodification of women by men provides the foundational instance of dominance for political theory.

27. *See* MACKINNON, *supra* note 6, at 161.

28. *See, e.g.*, MACKINNON, *supra* note 6, at 157–70. This is the reason why feminists treat the public/private distinction, so central to classic liberal theory, as specious when applied to the condition of women. *See* Carole Pateman, *Feminist*

made possible by material and ideological aspects of the general society.[29] At the material level, women's expressive freedom was circumscribed by the threat of violence against those daring to venture into the public domain without male protection or approval,[30] while at the same time women's economic independence was largely foreclosed through an ideology that kept them confined in the private sphere of the family, almost completely excluded from paid work.[31] The close connection between the material and ideological aspects of the social construct known as "woman's sphere"[32] was assisted by the dogma that females were

---

Critiques of the Public/Private Dichotomy, in FEMINISM AND EQUALITY 103–09 (Anne Phillips ed., 1987).

29. *See* James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982).

30. The law of rape in the Nineteenth Century gave men a privilege to force sex on unprotected women in all but the most egregious circumstances. *See, e.g.,* Mills v. United States, 164 U.S. 644, 648 (1897) (Peckham, J.) (reversing a criminal conviction for rape on grounds that an instruction finding "simply non-consent . . . and no real resistance whatever" was erroneous). Unaccompanied women were frequently treated as prostitutes. *See infra* text accompanying note 144. Fathers and husbands were given rights to use physical force to subdue and control wives and daughters without fear of legal reprisal. *See* Henry B. Blackwell, *Legal Redress for Assaulted Wives*, 10 WOMAN'S J., Jan. 18, 1879. When women first began speaking in public in front of mixed audiences, they were physically assaulted and intimidated. *See infra* text accompanying notes 143–46. Even today the constant threat of violence is a theme in women's lives. *See* MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR (1989); MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980). The feminist critique of pornography characterizes it as purveying a political ideology promoting force and violence against women that interacts with other aspects of dominance to prevent women from achieving equality in social relations by silencing them. *See* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); *see also* PORNOGRAPHY AND SEXUAL AGGRESSION (Niel M. Malamuth & Edward Donnerstein eds., 1984) (investigating the connection between pornography and violence against women).

31. *See infra* text accompanying notes 134–41.

32. The phrases "woman's sphere," "domestic sphere," "separate sphere," and "private sphere" all refer to the idea that gained acceptance in the mid-Nineteenth Century that men and women should have different zones, or spheres, of existence and activity. Men were to be masters of and active in the public world of trade, commerce, and politics, while women were to be secluded in the home away from the corrupt influences of the public domain, where they could realize their true nature and value as mistresses of the household, wives, and mothers. The net result of this ideological innovation was to decrease women's freedom, mobility, and power. Thus the politics of domesticity have been closely associated with female subordination. *See* Barbara L. Epstein, THE POLITICS OF DOMESTICITY, WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH CENTURY AMERICA 73–87 (1981). Notwithstanding these negative characteristics of "woman's sphere," many suffragists tried to mount arguments for women's emancipation by exploiting its message and redirecting it. *See infra* text accompanying notes 329–33, 365–69, 380–84.

an almost separate species, different and apart from men, with a limited cognitive capacity, unlimited emotional capacity, and a natural fitness for reproduction and mothering.[33] To insure that women would not be exposed to ideas and conditions challenging these notions, they were excluded from access to education[34] and prevented from having any real control over their sexuality and reproduction.[35]

B. *The Vote and the Complex of Dominance*

The Nineteenth Century gender system was threatened by women's demands for suffrage rights. If women were entitled to vote, their vulnerability to being "marked off as an out-group"[36] and treated almost as a separate species[37] would be limited. As Judith Shklar has shown, throughout American history voting has been associated with one's status as a citizen, and citizenship, in turn, with conceptions of personhood.[38] By claiming the right to vote, last century's feminists hoped to acquire a symbol that could erode the notion that females were somehow not as human as males. In addition, because voting is imbued with public purpose, giving women the franchise was tantamount to giving them a claim to a seat in the public forum where they could affect the ongoing discourse and promote the conditions for equality of re-

33. *See infra* text accompanying notes 153–55.

34. The parallel between the techniques used to control African-Americans before the Civil War and the forms of control exerted over women in antebellum America is instructive. At the same time that women were denied access to education and suffered significantly higher rates of illiteracy than did men, Southern states were passing laws making it a crime to teach a slave to read and Black children in Northern states were not being given access to the public education offered to white children. *See* E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 419 (1969). *See generally* JoEllen Lind, *Symbols, Leaders, Practitioners: The First Women Professionals*, 28 VAL. U. L. REV. 1327 (1994) (discussing how women created educational opportunity for themselves and eventually gained access to higher education and professional training).

35. *See infra* text accompanying notes 140–41, 147–51.

36. *See* LERNER, PATRIARCHY, *supra* note 24, at 76–77.

37. This phenomenon is central to Simone de Beauvoir's classic work in feminism and her discussion of the "Other." SIMONE DE BEAUVOIR, THE SECOND SEX at xxix–xxxvi (Vintage ed., 1989) (1952).

38. This is the point of her treatment of the voting right and American citizenship. Shklar is careful to point out that voting alone does not guarantee that one achieves the status of a full citizen; access to paid work is also necessary. *See* JUDITH SHKLAR, AMERICAN CITIZENSHIP 3 (1991). The connection between gradations of personhood — pseudo-speciation, if you will — and degrees of involvement in the polity's governance can be traced back to Aristotle. *See* ARISTOTLE, THE POLITICS Book 3 (Carnes Lord trans., 1984).

spect between the sexes.[39] Soon after organizing their movement for female emancipation, activists were quick to apprehend this and to see the vote as a means for women symbolically to escape the confines of the domestic sphere. Finally, if women obtained the vote they might develop a group interest identity and ally with other marginalized persons to pass laws reordering private relations and redistributing political power in the civil society.[40] In this capacity, suffrage could function in their hands as an entitlement right with a group dimension to be used to change the actual interactions of men and women.[41] As the history shows, women who agitated for the reform of divorce and property laws found that without possessing suffrage rights on their own, it was extremely difficult to get legislation sponsored and passed that addressed their interests.[42] They wanted the right to vote to insure that women's views and needs would be represented. In all these ways — through its symbolic effect, its impact on public

39. It is a central theme of political theories focused on the unique attributes of communicative discourse that good faith political deliberation can promote conditions fostering equality of respect between persons. *See* Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1723–26 (1990) (discussing the importance of women's inclusion in the public dialogue). But see TIMOTHY V. KAUFMAN-OSBORN, POLITICS SENSE EXPERIENCE: A PRAGMATIC INQUIRY INTO THE PROMISE OF DEMOCRACY 158–216 (1991), for a critical discussion of what he calls the "politics of talk." *See generally* THOMAS MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS (1978) (providing a general description of Habermas's basic theory).

40. One of the most important aspects of suffrage is that it can function as a group right. *See* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1418 (1991).

41. The political right of the franchise does not stand for an official promise of noninterference in one's private activities or associations; it is an affirmative grant from government to the citizen, entitling her to seek the passage of laws and the promotion of policies that are sensitive to her situation, practices, and norms. For a discussion of the difference between "positive" or entitlement rights, and negative, noninterference rights, see ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

42. To get some idea of the difficulty women faced in influencing legislation, see *Report of the Select Committee in Assembly, 1854, in* 1 STANTON ET AL., *supra* note 4, at 616–18. This was a report issued in response to a petition presented on behalf of almost 6000 women's rights activists asking the New York legislature to change certain laws relating to women's rights. The requests of the petition were denied, with some limited exceptions. A relevant section of the report reads:

> A higher power than that from which emanates legislative enactments has given forth the mandate that man and woman shall not be equal; that there shall be inequities by which each in their own appropriate sphere shall have precedence to the other . . . . Both alike are the subjects of Government, equally entitled to its protection; and civil power must, in its enactments, recognize this inequality. We cannot obliterate it if we would, and legal inequalities must follow.

Id. at 616.

discourse, and its potential as a tool for changing the behavior of persons in the civil society — women's access to suffrage threatened the ideological aspects of patriarchal dominance, while it also suggested the possibility of transforming the material conditions necessary to its operation.

After the emergence of an organized women's movement in the middle of the Nineteenth Century, activists came to understand the potential impact of the voting right on the gender system and to see suffrage as the pivotal piece of their entire program for emancipation.[43] Adversaries shared their assessment and worked to preclude them from any access to political participation.[44] However, although women eventually obtained the vote in 1920 through the enactment of the Nineteenth Amendment, no immediate transformation of their condition occurred — women were still discriminated against in employment, in education, and in other opportunities, and the assumptions of separate sphere ideology dominated American popular culture into the modern era.[45] As a result of the ineffectiveness of the ballot to transfigure relations between the sexes on its own, many theorists have difficulty understanding the obsession of suffragists with voting and the resistance of the American power structure to their achieving it. In particular, modern feminists often characterize the suffrage movement as reformist rather than radical due to its preference for achieving political rights over challenging basic institutions associated with patriarchy, such as the family.[46] Their attitude is supported by additional sources of cynicism about modern elections — political scientists and others are quite familiar with barriers to effective use of the ballot that operate in the contemporary era to blunt the real power of out-

43. *See infra* text accompanying notes 207–28.

44. *See infra* text accompanying notes 298–301, 354–60, 387–94.

45. *See* COTT, MODERN FEMINISM, *supra* note 16, at ch. 5.

46. *See* Ellen DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, 3 FEMINIST STUDIES 63 (1975–76) [hereinafter DuBois, *Radicalism*]. DuBois argues that focusing on the vote rather than directly attacking the institution of the patriarchal family actually gave suffragists a strategic advantage that was significant:

> [T]he significance of the woman suffrage movement rested precisely on the fact that it bypassed women's oppression within the family, or private sphere, and demanded instead her admission to citizenship, and through it admission to the public arena. . . . For women, the emergence of a public sphere held out the revolutionary possibility of a new way to relate to society not defined by their subordinate position within the family.

Id. at 63–64.

groups without directly limiting their access to the franchise.[47]

Skepticism about the franchise makes it easy to overlook the importance of voting to women's early attempts to gain recognition of their personhood, to enter into the official political discourse, and to work to create group political power. Thus, the paradox of the ballot plays itself out in the history of woman suffrage in a way that obscures the role of formal political rights in the long process of women's emancipation. However, if women still were prevented from voting today, it is likely that their status as citizens, their entree to the public forum, and their ability to influence political institutions would be severely limited. This demonstrates that although being invested with the voting right bears significantly on a group's social situation, voting alone does not insure democratic inclusion. What is it about suffrage in the United States that makes it a necessary condition of political emancipation, but not a sufficient one?

C. *Political Theories About the Vote*

Theories that identify electoral politics as a form of social control, not a means to locate majority will or to empower underrepresented groups, capture the utility of suffrage as a tool for manipulating the electorate.[48] According to these theories, elections present no real possibility for significant change but hold out the semblance of participation to legitimize the governmental regime and give the average voter a sense of belonging.[49] Similarly, demands by marginalized groups for power sharing can be blunted and delegitimized by techniques that discourage them from voting or afford them limited choices when they do vote; the absence of meaningful choice between parties (or candidates) is one key to this strategy and is reflected in America by political associations that are extremely limited in number, viewpoint, and inclusiveness.[50] Classic devices diluting the power of the ballot also include restrictions on eligibility that are passed off as voter

47. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 265–79 (1989) (describing and criticizing theorists from Marx to Gramsci).

48. *See* PARENTI, POWER AND THE POWERLESS, *supra* note 20, at 197–213.

49. *Id.* at 201–04.

50. *See* IRA KATZNELSON & MARK KESSELMAN, THE POLITICS OF POWER: A CRITICAL INTRODUCTION TO AMERICAN GOVERNMENT 279 (1975); American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Williams v. Rhodes, 393 U.S. 23 (1968) (demonstrating how signature requirements encourage the dominance of the two major political parties).

competency standards,[51] cumbersome procedures for registering to vote that impose residency restrictions,[52] burdensome conditions that must be satisfied before a candidate may qualify to run for office,[53] private financing of campaigns,[54] malapportionment, and gerrymandering.[55]

---

51. These typically involve the payment of a poll tax and/or demonstration of literacy, often in the English language. In upholding the constitutionality of North Carolina's literacy test in Lassiter v. Northampton County Bd. of Elections, Justice Douglas wrote:

> The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . [I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.

360 U.S. 45, 51–52 (1959). In order to preclude the kind of reasoning used in *Lassiter*, Congress passed the historic Voting Rights Act of 1965, 42 U.S.C.A. § 1973b–1973g (West 1993).

52. These issues are raised currently by the debate over the National Voter Registration Act of 1993, 42 U.S.C.A. § 1973g (West 1993), the so-called "motor-voter" bill. *Compare* Carrington v. Rash, 380 U.S. 89 (1965) (invalidating residency requirements preventing members of the military from voting in Texas elections) *with* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (rejecting the equal protection claims of persons living in an unincorporated area adjacent to the city of Tuscaloosa's municipal boundaries who were unable to vote, but subject to its legal authority). Confusion over the appropriate standard of review in cases involving residency requirements also causes difficulty in this area. In Gallagher v. Indiana State Election Bd., 598 N.E. 2d 510 (Ind. 1992), *cert. denied.* 113 S. Ct. 1051 (1993), the Indiana Court of Appeal struck down a law disenfranchising those who move into the state within thirty days of an election, using a strict scrutiny standard. The Indiana Supreme Court reversed and validated the law, imposing a rational relation test. *See Gallagher*, 598 N.E. 2d at 515–16.

53. *Compare* Clements v. Fashing, 457 U.S. 957 (1982) (refusing to hold candidacy a fundamental right) *with* Turner v. Fouche, 396 U.S. 346 (1970) (invalidating a Georgia constitutional provision requiring candidates for school board to own real property in the state). The Supreme Court's affirmation of the right of states to restrict write-in candidates can be seen as a recent example of this phenomenon. *See* Burdick v. Takushi, 112 S. Ct. 2059 (1992). Filing fees and the requirement that candidates either be affiliated with a major political party or get a threshold number of signatures to qualify for the ballot are yet other examples. *See* Jenness v. Fortson 403 U.S. 431 (1971) (validating affiliation and signature requirements). *But see* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (striking down an Illinois law that would have required political parties attempting to qualify for a Chicago election to secure 25,000 signatures before being eligible to appear on the ballot); Norman v. Reed, 502 U.S. 279 (1992) (invalidating an Illinois law requiring more signatures for multi-district, political subdivision (county) elections than for state elections).

54. Buckley v. Valeo, 424 U.S. 1 (1976) (determining the constitutionality of the Federal Election Campaign Act dealing with the amount of money that individuals and groups may directly contribute to a campaign).

55. This was the evil sought to be remedied in Reynolds v. Sims, 377 U.S. 533 (1964), and Baker v. Carr, 369 U.S. 186 (1962).

The antidemocratic effect of these devices is magnified by American political institutions disproportionately influenced by money and established patterns of power.[56] This phenomenon is further exacerbated by an approach to rights in constitutional theory that generally prohibits any intervention by government in the private sphere to redress the very imbalances in money and power between the sexes, the races, or the classes that produced those institutions.[57] Although it is important not to be naive about the utility of the voting right for disadvantaged groups, it is also necessary to understand why and how the franchise has been weakened to assess the possibilities for a genuinely participatory governmental regime today in America. The history of woman suffrage is significant to this assessment in three major ways: It shows (1) that past discrimination in access to the ballot contributes to a group's relative powerlessness even after the right to vote is secured; (2) that the franchise cannot be completely insulated from the controlling influence of dominant groups; and (3) that ambiguity in American culture over what counts as representative government complicates the task of any group seeking to use the vote to improve its condition.

As MacKinnon has pointed out, de jure forms of discrimination operate to stabilize de facto patterns of dominance in the private sphere.[58] When a group is subjected to laws that overtly consign it to a second-class status, the strategy of successfully resorting to litigation in order to disrupt the system effectuating that status is practically foreclosed. However, the interaction of the public and private factors of the complex is not simply one of stabilization; unchecked private domination results in effects — like poverty, lack of education, and lack of social authority — that make it difficult for a group to wield effective political power, even when formal political rights are finally ceded. Thus, de facto relations in turn affect the actual de jure policies pursued by governmental entities even when formal franchise rights have been acquired.[59] These effects function in this way because

56. *See* Stephan L. Darwall, *Equal Representation*, *in* LIBERAL DEMOCRACY 56–59 (J. Roland Pennock & John W. Chapman eds., 1983).

57. For a discussion of the historical underpinnings of the American penchant for limited, rather than expansive democracy, see Mensch & Freeman, *supra* note 2, at 590–600.

58. *See* MACKINNON, *supra* note 6, at 167.

59. The contrast between de jure and de facto discrimination refers to the difference between discrimination occurring overtly through formal laws, such as the laws requiring segregation in the South before the Supreme Court's decision in

they create conditions that make it very difficult for an inferior group to obtain substantive legislation that deviates from the status quo.[60]

The history of the woman suffrage movement also underscores the fact that the franchise cannot be separated from patterns of dominance and discrimination that exist in the general society. Exclusion from political rights is both a symptom of and a key contributing factor to the phenomenon of social subordination that is constructed of numerous components — some economic, some ideological, some public, and some private. Seen in this light, attempts to legitimize the American political system by focusing on formal access to suffrage and seeking a "fair" and "neutral" process in which all citizens may *now* participate[61] suffer from ahistoricism, ignore the reality that formal access impacts on just one element within the syndrome of domination, and do nothing to require that the benefits of past discrimination be disgorged.[62] This is the chief defect of process theories which try to solve problems arising from disparities in raw political

---

Brown v. Board of Educ., 347 U.S. 483 (1954), and discrimination perpetrated by informal private acts of individuals in the civil society, such as an individual's decision not to move into a neighborhood populated by members of a different race. In addition, the term "de facto discrimination" is sometimes meant to refer to governmental policies or programs that have disparate, but indirect and allegedly unintentional, discriminatory effects on ascertainable groups. Under current constitutional jurisprudence, de facto discrimination is not treated as a violation of principles of equal protection. *See* Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). In addition, the state action doctrine makes private acts of discrimination difficult to reach because it requires some form of state action before the equal protection clause of the Fourteenth Amendment can be implicated. It is MacKinnon's point that overt, legally enforced discrimination stabilizes and reinforces patterns of "private" de facto discrimination existing in the nongovernmental civil society. *See* MACKINNON, *supra* note 6, at 167–68.

60. *See generally* ANGELA Y. DAVIS, WOMEN, RACE AND CLASS (1981) (analyzing barriers women and minorities encounter in achieving political power). The denigration of women's interests is most clearly seen in the federal tax laws, which function to create disincentives for women to work outside the home. *See* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 617–19, 664–66 (1993).

61. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782–91 (1983).

62. Robert Ely has developed a form of process theory that is sensitive to the problem of discrete and insular political minorities, but that still suffers from a theoretic inability to reach power distributions in the civil society. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–104, 172–75 (1980) (developing a representation reinforcing theory of individual rights). As MacKinnon's work demonstrates, under liberal process theory "gender as a status category was simply assumed out of legal existence, suppressed into a presumptively pre-constitutional

power with solutions limited by the norm of formal equality. To make the voting right more meaningful and effective in the hands of women, all aspects of gender subordination — the public and the private, the de jure and the de facto — ought to be subjects of concern and addressed explicitly in constitutional theory. Finally, the woman suffrage movement reveals the way conflicting ideas of political participation that lie at the core of the American conception of democracy hampered the efforts of disadvantaged groups to gain a toehold in governmental institutions. These are the intertwined but contrasting norms of civic republicanism[63] and liberal individualism[64] that have made up the uniquely American understanding of democracy since the Revolutionary period.

1. Two Understandings of Political Participation

Under civic republican notions of political participation and governmental legitimacy, representative government can be achieved without the inclusion of all adults in the franchise because those members of the community invested under its norms with the role of "citizen" are entitled directly to engage in political discourse and deliberation on behalf of others to affect the realization of the communal good.[65] This view expresses a form of republican solidarism. As the public good redounds to the individual good of all the community's persons, their virtual representation by "citizens" ethically legitimizes the authority of the

social order through a constitutional structure designed not to reach it." *See* MACKINNON, *supra* note 6, at 163.

63. Frank Michelman argues that a republican solidaristic conception of participation is an element of the American attitude toward voting, which treats suffrage and the political dialogue it engenders as the means by which citizens constitute themselves, their community, and the community's notion of the good. Moreover, the community represents an independent public interest that is different from and more than the sum of the individual interests of the persons who compose it. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445, 452 (1989) [hereinafter Michelman, *Conceptions of Democracy*].

64. Under this view it is quixotic to believe that communal goods can be determined without division and controversy between the members of the polity. Hence, personal freedom is not to be sacrificed to unjustifiable notions of the common good and the only legitimate government is one formed with the "consent of the governed." For the most significant modern treatment of social contract theory, and one that treats the social contract as hypothetical, not actual, see JOHN RAWLS, A THEORY OF JUSTICE (1971).

65. This rests on the notion that the community can access or construct a communal good. *See* Michelman, *Conceptions of Democracy, supra* note 63, at 445–46.

community.[66] In this way, persons or groups thought to lack the capacity to deliberate meaningfully or whose participation is believed to be divisive of the community's homogeneity can be justifiably deprived of the vote.[67] "Democracy" takes on a substantive, not procedural, meaning under such a regime as the wise pursue the common good on behalf of the many.

Contrasting with these ideas are principles of self-government and interest representation stemming from classic liberalism that are also significant, perhaps even governing, in the American understanding.[68] According to this vision, individuals are invested with pre-social, natural rights of self-determination and autonomy that cannot be justly overborne by others.[69] Hence a legitimate government is one that functions pursuant to the consent of the governed.[70] In cases of conflict, consent is determined by consulting the majority's wishes, and instances in which individuals are forced to observe state policy against their will are reduced to a minimum by severely limiting the scope of

66. *See* Frank I. Michelman, *The Supreme Court 1985 Term, Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 50–51 (1986) (discussing notions of virtual representation affecting the American constitutional understanding).

67. For a discussion of the opposing liberal and communitarian views of restrictions on the franchise stemming from communal needs for homogeneity, see Sanford Levinson, *Suffrage and Community: Who Should Vote?* 41 FLA. L. REV. 545 (1989).

68. An intense debate among legal scholars and historians has been ongoing over the political norms that most characterize the Constitution. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1989). Much of this controversy was ignited by the work of Gordon Wood and Bernard Bailyn on the ideological orientations of Americans in the Revolutionary Era. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969). This contention relates broadly to the communitarian critique of liberalism that is current in political theory. *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (criticizing what he takes to be the metaphysical commitments central to liberalism); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992) (cataloging and analyzing the various forms and levels of communitarianism).

69. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (Nozick's work constitutes the most influential modern statement of these claims).

70. Consent or social contract theories of governmental authority are typically traced to the political philosophy of John Locke. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., student ed. 1988) (3d ed. 1698). There are difficult problems with social contract theories, the most significant of which is the fact that most persons cannot in any sense be said to have consented to the governmental regime to which they are subject. Hence, consent theories are often treated as aspirational or hypothetical. *See* WILL KYMLICKA, CONTEMPORARY POLITICAL THEORY 58–70 (1990).

governmental powers.[71] Finally, individual rights trump official interference in areas thought to be essential to personal liberty, regardless of the majority's desires.[72] Under this view, voting is the decision procedure for ascertaining the public will on issues representing conflict among the segments of a pluralistic society, and all rational adult persons are to be imbued with the franchise.

Both the communitarian and the liberal models of political participation have proven problematic as sources for women's empowerment. As positive as the communitarian norms behind republican solidarism may be, republican solidarism itself has been used to legitimize hierarchies of wealth, race, and gender. Within the American polity, this ideology functioned to exclude women from politics and relegated them to the status of a communal resource[73] by creating a continuum of relative personhood that expressed itself in a hierarchy of ascending statuses carrying with them entitlement to more and more rights. Americans of the Nineteenth Century made distinctions between degrees of personhood and citizenship, based on the civic republican conception. Full citizens were entitled to full political rights — including the right to vote, to sit on a jury, and to participate in the citizen militia.[74] Civil rights, on the other hand, were those privileges that one enjoyed as a consequence of the recognition of one's personhood, and consisted of the right to own property, to sue and be sued, to speak freely, and to petition one's government for redress.[75] Individuals whose very personhood was in doubt, such as women, children, and slaves, possessed neither civil nor political rights. In a parallel fashion, as promising as ideas of political participation founded in natural rights and individualism might have been for proponents of suffrage, Nineteenth Century liberalism proved almost as incapable of

71. This is the libertarian twist on consent theory that in its most extreme form leads to the conclusion that the sole justified state is a minimal one, invested with the authority only to provide for the national defense and protection against criminals. *See* NOZICK, *supra* note 69, at 26, 320–23.

72. *Id.*

73. *See infra* text accompanying notes 452–58.

74. *See* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments,* 25 LOY. L.A. L. REV. 1207, 1208 (1992).

75. *Id.* For a discussion of the historical basis of rights as naturally or socially defined, see MICHAEL FREEDEN, RIGHTS 12–23 (1991). Today we make little distinction between civil and political rights, but these theoretical differences were critical in the drafting of the Fourteenth Amendment. *See infra* text accompanying notes 253–89.

accommodating the realities of women's claims to political autonomy as did civic republicanism. Liberalism's emphasis on rationality, taken together with the widespread belief that women were irrational, created an exception to the requirement that all adults exercise the franchise. More importantly, as MacKinnon has pointed out, liberalism's penchant for privacy and its preference for formal over actual equality fostered an approach to politics that ignored patterns of dominance in the nongovernmental civil society — especially the family — and was ill-suited to justify state intervention in private relations to redress imbalances between men and women.[76]

2. Our Federalism

From the founding of our nation to the present, neither civic republican nor liberal principles have wholly dominated the American understanding; both have existed in an uneasy and complex relation.[77] Most importantly for my purposes, their push-pull effect on American politics contributed to the creation of the two-tiered system of "our federalism"[78] in which a collection of quasi-sovereign states was united under an overarching federal government.[79] This structure had profound implications for the strategy and direction of the woman suffrage movement. The system of federalism was a product of the struggle over the new Constitution between framers who wished to form a strong central government capable of overriding regional differences and facilitating the nation's economic development and those who feared a dominating national authority and wanted to retain the states as safeguards of local political community.[80] Their

76. *See* MACKINNON, *supra* note 6, at 157–70.

77. *See* ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM, POLITICAL IDEOLOGY IN LATE EIGHTEENTH CENTURY ENGLAND AND AMERICA 35–40 (1990); *see also* Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1 (1989).

78. This phrase is associated with Chief Justice Marshall. *See* First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 349 (1968).

79. For an example of the way federalism served to limit federal intervention in a California state criminal prosecution of members of the Progressive Party, see the celebrated case of Younger v. Harris, 401 U.S. 37, 44 (1971).

80. These were the Federalists and the Anti-Federalists. While the ideologies of competing Federalist and Anti-Federalist factions do not fall into neatly opposed categories, they reflect in some sense civic republican and liberal principles of governmental legitimacy and political participation. *See* JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1290–93 (1994) [hereinafter *Ninth Amendment*]; *see also* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Carol M. Rose, *The Ancient Constitution vs. The Federalist*

contrasting approaches resulted in a scheme for power sharing that limited the reach of the new national government and retained the plenary authority of states over persons within their borders.[81] This strategy included giving the states the right to determine voter qualifications, not just for the state franchise but for federal elections as well.[82] Thus, Article I, section 2 of the Constitution, governing the election of the House of Representatives and the electoral college, and related provisions were interpreted to delegate to the states the authority to determine standards and qualifications for a person's eligibility to vote in *all* political contests — *federal* as well as state.[83] Under this pattern, states were free to exclude persons within their boundaries from eligibility to vote without fear of federal intervention, until the passage of the Fourteenth Amendment after Reconstruction created the possibility of a Copernican Revolution in governmental relations.[84] Until the enactment of that amendment, there was significant confusion over whether an individual possessed an independent citizenship relationship with the new national government, or whether citizenship was only obtained at the state level.[85] As a result of this constitutional blueprint for state-fed-

---

Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74, 96–97 (1989).

81. *See Ninth Amendment, supra* note 80, at 1288–96.

82. U.S. CONST. art. I, § 2, cl. 1; *see also* U.S. CONST. art. I, § 4, cl. 1 (governing state authority over the time, place, and manner of elections); U.S. CONST. art. I, § 2, cl. 3 (dealing with the basis of representation).

83. *See* Pope v. Williams, 193 U.S. 621, 632 (1904), *overruled by*, Dunn v. Blumstein, 405 U.S. 330 (1972); Darby v. Daniel, 168 F. Supp. 170, 176 (D. Miss. 1958).

84. There was no constitutional provision authorizing federal intervention to protect the voting right before the ratification of the Fourteenth and Fifteenth Amendments, in large part because of the limited interpretation given the Privileges and Immunities Clause in Article IV as originally drafted. U.S. CONST. art IV, § 2, cl. 1. With the exception of Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), which used a natural rights theory to validate the right to travel in dictum, the Privileges and Immunities provision of Article IV was not used to vindicate fundamental rights, including voting rights. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173 (1869); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), *overruled in part by*, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

85. As Justice Miller said in *The Slaughter-House Cases*:

> The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges

eral power sharing, when women began to test the conditions of their subordination in the Jacksonian era, they were confronted not only with varying ideologies of democratic participation, but also with concrete and established political institutions linked together in intricate and baffling ways through the franchise. This state of affairs complicated women's ability to secure the vote on their own terms in various respects.

At the level of ideology, the uneasy marriage forged between civic republican and liberal norms obscured the disparity in power that lay at the heart of the struggle in the United States over the ballot and lent an aura of legitimacy to women's exclusion from politics.[86] At the same time, these twin poles of republican solidarity and liberal individualism engendered doctrinal dispute within the suffrage movement itself over which ideal should govern the fight. They also provided opponents with an imposing and shifting array of arguments against the women's vote.[87] In addition, the complex apparatus that reflected the amalgamation of republican and liberal principles and created the state-federal power sharing arrangement presented suffragists with difficult and divisive tactical choices over whether a strategy focused on local or national governments would best insure success.[88] Moreover, that structure gave foes a powerful, gender-neutral position against woman suffrage premised on states' rights.[89] Finally, the conception of political participation that was reflected in the two-tiered governmental system enshrined in the Constitution combined with the Reconstruction Amendments after the Civil War to make the Supreme Court the gatekeeper of the franchise for the American polity.[90] With the

---

that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union.

83 (16 Wall.) 36, at 72; *see also* ROBERT FRIDLINGTON, THE RECONSTRUCTION COURT, 1864–88, at 90 (1987). In *The Slaughter-House Cases*, the Court sharply distinguished between national and state citizenship and used that distinction to limit severely the use of the Privileges or Immunities Clause of the Fourteenth Amendment as a source of new substantive federal rights. 83 U.S. (16 Wall.) at 78–80.

86. *See infra* text accompanying notes 457–58.

87. *Id.*

88. This issue generated one of the major points of division between the "National" and the "American" suffrage organizations. *See infra* text accompanying notes 354–56, 371–74.

89. This was one of the most effective arguments used against the Fourteenth Amendment and women's inclusion within its protections. *See Is Suffrage a National Issue?* SUFFRAGIST, Mar. 20, 1915, at 6.

90. *See infra* text accompanying notes 452–58.

passage of these amendments, state prerogatives on access to the vote became vulnerable to constitutional scrutiny by the Supreme Court for the first time.

Part II details the origin and evolution of last century's struggle for women's rights that came to center on suffrage. There I show the process by which activists identified suffrage as an essential first step on their road to emancipation and by which they embarked on a long political fight to secure it. Along the way, they came to appeal to the federal legal system for the vindication of their claims. Through these events, the Supreme Court had the opportunity to assist women's political liberation as early as 1874. I argue that the Court's refusal to take up that opportunity delayed the conclusion of the suffrage campaign into the Twentieth Century and consigned the movement to a condition of political isolation that had profound effects on its nature and achievements.

II. A Suffrage History Primer

As the new American nation faced the beginning of the Nineteenth Century, it presented the irony of a political regime committed to the norm of representative government under which most adults were not allowed to vote. After the Revolution, states enacted constitutions that imposed a variety of restrictions on eligibility for the suffrage right. Property and religious qualifications were imposed, women were excluded from the franchise regardless of their wealth or other characteristics, slaves had no civil or political rights, and Native Americans were not considered a part of the citizenry.[91] With the beginning of the new century however, demands by disenfranchised white males for participation in government arose. These men argued that their exclusion from the electorate violated principles of autonomy and self-rule upon which the American polity had been founded.[92] Their agitation together with evolving conceptions of personal independence and changing social conditions combined to bring about the almost complete enfranchisement of white

91. For a discussion of the restrictions on voting premised in requirements that persons own a certain amount of property that later evolved into the requirement that they not be paupers, see Steinfeld, *supra* note 2, at 337–42. For a catalogue of state constitutional provisions in the early days of the nation, see Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s (Merill D. Peterson ed., 1966).

92. *See* Steinfeld, *supra* note 2, at 351–53.

men by the middle of the 1800s.[93] In this way, these new voters attained an official relationship with their government — that of citizen[94] — which was reinforced with each trip to the ballot box.

In contrast, the condition of women was conceived of so differently from that of men that it was unclear whether they were citizens in their own right or had *any* political relationship with the state.[95] Females were expected to marry, and under principles of coverture they were subjected to the physical and mental authority of their husbands and confined to the private sphere of home and family.[96] These notions were reflected in the idea that a woman experienced a civil death on marriage[97] and so ceased to have a legal existence separate and apart from her spouse.[98] Thus, the domination of women by men through the operation of law and custom was quite explicit in the last century, and women were largely invisible in the political realms of the American society. The founders of the women's rights movement sought to change this reality. They needed a symbol of autonomy and independence to use as a tool to escape their dominated status. That symbol was the voting right.

---

93. *Id.* at 350–53.

94. This relationship was produced through the connection between the voter and his state. Full blown notions of federal citizenship were not established until the ratification of the Fourteenth Amendment. *See infra* text accompanying notes 283–89.

95. In the early case of Martin v. Commonwealth, an argument was made against the confiscation of a Loyalist married woman's land that was premised on the notion that her dependent status precluded any culpability. The attorney for the son of the woman seeking to regain the property said:

> Upon the strict principles of law, a *feme couvert* is not a member [of the citizenry]; has no *political* relation to the *state* any more than an alien; upon the most rigid and illiberal construction of the words, she cannot be a member within the meaning of the statute.

Martin v. Commonwealth, 1 Mass 347, 362 (1805), *overruled in part by*, Commonwealth v. Barnes, 369 Mass. 462 (1976). The Court agreed that *feme couvert* provided a good defense, on a different, but related ground. *Id.* at 390–99. In an 1809 case also involving the property rights of a woman married to a Loyalist, the wife's lawyer argued that women could not even be inhabitants of a state — only their husbands were inhabitants. Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 178 (1809). Hoff points out that the response of early American courts to the tension between coverture and citizenship established a pattern of denigration of women's citizenship in favor of their dependent status. *See* HOFF, *supra* note 12, at 90–94.

96. For a more detailed discussion of the notion of *feme couvert*, see *infra* text accompanying notes 127–32.

97. *Id.*

98. Ellen DuBois argues that this established the principle that the basic unit of political organization was the family and that representation of families was to come from giving voting rights to their male heads. *See* DuBois, *Radicalism, supra* note 46, at 64–65.

A. *From Invisibility to Organization: The Woman's Movement in Antebellum America*

In the first phase of the woman suffrage movement, activists sought to establish their status as persons, to move from the private into the public sphere, and to make their open involvement in the large political questions of the day acceptable. These were the initial steps of a larger project aimed at general emancipation. Early activists came to fix on the franchise as both a symbol *of* and a means *to* political participation because it was a key emblem of full citizenship. In addition, through their attempts to achieve changes in the laws on divorce, married women's property, and other issues, these early activists discovered that without the vote they were largely without political influence. However, an organized and discernible social movement for women's rights had to emerge before the importance of voting became apparent.

1. Early Causes

It is common to date the stirring of American interest in women's situation to 1792, when Mary Wollstonecraft's *Vindication of the Rights of Women* made its way to the United States and was widely read and discussed,[99] but there had been signs of dissatisfaction even in the colonial era.[100] In 1796, Charles Brockden Brown wrote *Alcuin: A Dialogue of the Rights of Women*;[101] in 1776 Abigail Adams made her plea to John to "remember the ladies" in his political dealings;[102] and many years before, Anne Hutchinson had been expelled from the Massachusetts Colony for presuming to preach.[103] These were individual expressions of embryonic feminist conduct and concerns that pre-dated any organized social protest movement for women's

99. *See* GERDA LERNER, THE WOMAN IN AMERICAN HISTORY 85 (1971) [hereinafter LERNER, AMERICAN HISTORY]; ROBERT E. RIEGEL, AMERICAN FEMINISTS 9 (1963).

100. *See generally* LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980) (discussing the political attitudes, experiences, and embryonic feminism of the women of revolutionary America).

101. *See* RIEGEL, *supra* note 99, at 7.

102. *See* Letter from Abigail Adams to John Adams, Braintree, (Mar. 31, 1776), *in* THE FEMINIST PAPERS 10–11 (Alice S. Rossi ed., 1973). The extent to which this admonition was meant as a general feminist statement is complicated by the private nature of the correspondence. *See* KERBER, *supra* note 100, at 84–85.

103. BILL SEVERN, FREE BUT NOT EQUAL: HOW WOMEN WON THE RIGHT TO VOTE 18–20 (1967).

rights. *That* phenomenon was not to emerge until the middle of the Nineteenth Century and the appearance of an organized drive for female emancipation at the Seneca Falls Convention in 1848.

Years later, when Matilda Joslyn Gage described the beginnings of the women's rights movement,[104] she attributed it to three "immediate" causes: (1) public discussion of whether the property laws relating to married women ought to be reformed; (2) the impact on women's thinking caused by the lecture tours of Frances Wright in the 1820s and Ernestine Rose in 1836; and (3) women's participation in the abolition movement.[105] These factors undoubtedly helped to precipitate the first women's rights convention, but the broad social/historical forces that made woman suffrage possible at all remain a source of controversy today. Historians grapple with questions of how many women already had an understanding of their subordinate status at the dawning of the Jacksonian Period, how many were stirred by the ideas of the times to a new comprehension of their situation, and how many were motivated to alter their condition as a result of material changes in the American society associated with urbanization and industrialization.[106]

Many historians treat the social and economic upheaval of the Jacksonian era as the catalyst for organized efforts aimed at

104. Gage did so in a history of woman suffrage written and compiled by some of its main activists — Elizabeth Cady Stanton, Susan B. Anthony, and herself. The work on the history began in 1876 and reflected their belief in the need for a memorialization that did not depend on the will of male historians. It eventually stretched to six volumes and was finished by Ida Husted Harper, Susan B. Anthony's biographer. The history contains a wealth of original materials — reports of conventions and meetings, letters, and other documents — but these were never compiled in a scholarly fashion. Moreover, it slights the American Woman Suffrage Association's contribution to the movement, which was the competing faction led by Lucy Stone. *See infra* text accompanying notes 327–33. Nonetheless, the history is still one of the premier sources for suffrage historiography. For a general description of the history and its impact on the historiography of woman suffrage, see THE CONCISE HISTORY OF WOMAN SUFFRAGE xviii–xxi (Mari Jo Buhle & Paul Buhle eds., 1978); *see also* ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE 323–36 (Schocken Books 1971) (1898) [hereinafter STANTON, EIGHTY YEARS].

105. *See* 1 STANTON ET AL., *supra* note 4, at 14–19, 35–36, 39–40, 95–100. *See generally* WOMAN SUFFRAGE: HISTORY, ARGUMENTS AND RESULTS 6–8 (Frances M. Bjorkman & Annie B. Porrit eds., 1917) (canvassing the arguments relating to the woman suffrage movement, and describing its progress).

106. These factors became even more significant as a result of the Civil War. *See infra* text accompanying notes 234–41, 354–56, 395–403.

improving women's condition.[107] It is a truism that the Jacksonian age was one of economic growth, dislocation, and unrest that reflected the erosion of old feudal forms of society in the face of an emerging middle class that had a taste for industrialism and an ethic of individualism.[108] As Robert V. Remini described it: "The American of the early Nineteenth Century was a hustler, a man on the make, invariably alert to any opportunity which might improve his station in life.... It was a materialistic society Americans were building, one dedicated to business, trade, and the acquisition of wealth."[109] As a result, there were greater demands for democratization, while at the same time people yearned to make society more moral and altruistic in the face of its increasing mercantilism.[110] It was in this period that reform movements associated with the Nineteenth Century had their birth — abolition, temperance, religious revivalism, and early organized labor.[111] One of the assessments of these phenomena is that as women were drawn up in the reform fervor of the age, especially abolition, they came to see the limitations of their own existence, to apply emerging doctrines of individual rights to their own situation, and to embark on self-conscious reformism in their own interest.[112] Such a view assumes that women's emergent concern with improving their status resulted from the contagion of ideas that were spawned by the economic and social/historical liberalization of American society in the Jacksonian era. Undoubtedly, the presence of an emerging human rights philosophy did benefit many women seeking to make sense of their own situation, but women's access to the education necessary to make their exposure to these ideas meaningful was just as important as the ideas themselves.

The Jacksonian era saw the birth of a female education movement that was critical to the later women's rights crusade. A general push for wider access to education took place at the beginning of the Nineteenth Century. Public schools began to be

107. GRIFFITH, *supra* note 18, at 15; PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 3 (1980).

108. *See* GRIFFITH, *supra* note 18, at 14–15.

109. ROBERT V. REMINI, THE JACKSONIAN ERA 70–71 (1989).

110. *See generally* EDWARD PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS (rev. ed. 1978) (profiling American society in the Jacksonian Era).

111. *See* Buhle & Buhle, *supra* note 104, at 1.

112. *See, e.g.*, FLEXNER, *supra* note 10, at 71 (treating the ideas of the Jacksonian Era as a significant factor in creating the suffrage cause).

widely established, the idea of land grant colleges started to take hold, and literacy levels among men increased.[113] Unfortunately, women were often excluded from this democratization of educational opportunity on the theory that, being primarily suited for home and family life, they did not need the skills a good education could provide.[114] Although women made inroads in receiving rudimentary schooling in this period, they had little opportunity to obtain a more sophisticated, higher education.[115] Nonetheless, in the early decades of the Nineteenth Century, the female seminary movement gained ground and a number of institutions devoted to giving women training to improve their domestic skills were created.[116] These institutions also included courses of study in topics previously thought to be outside the purview of woman's sphere, such as mathematics and history. As a result, in the first half of the century some significant educational opportunities opened up for middle- and upper-class-women, many of whom later became activists in the woman suffrage movement.[117]

Another group of scholars questions the power of ideas alone to generate a social phenomena like the suffrage movement — even in the context of women's greater educational opportunity. They argue that woman's history does not demonstrate the steady linear progression commonly associated with economic expansion and the changes in ideas that it engenders.[118] They assert that women were in many ways better off during the feudal era than they were in the heyday of the Nineteenth Century bourgeoisie and that the liberalization of economic conditions in American society did not directly translate

113. *See* REMINI, *supra* note 109, at 78–80.

114. *See* 1 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 451–52 (Octagon Books 1980) (1929).

115. *See* 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 137–38 (Octagon Books 1980) (1929).

116. The most famous of these was Emma Willard's Troy Female Seminary established in 1821. It offered a curriculum competitive with those found in men's schools, but its general philosophy did not challenge the notion of a domestic sphere. Nonetheless, the women it educated came to constitute a reservoir of females desirous of more and more advanced educational opportunity, and their existence created pressure for the development of women's colleges. *See* GERDA LERNER, THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO 1870, at 42–43 (1993).

117. *See* FLEXNER, *supra* note 10, at 28–36.

118. *See* LERNER, PATRIARCHY, *supra* note 24, at 8.

into a change in attitude toward women's nature and role.[119] For them, the possibility that reforms in the laws governing the property rights of married women accidently functioned both as a foundation for and an impetus to the eventual formation of an organized woman's rights movement in 1848 deserves more attention.[120] During the Jacksonian era, property laws relating to women indeed began to change, but it is unclear how important these changes were as a causal factor in the emerging crusade.

Revisions in the property laws relating to married women that began to be made in the late 1830s were a by-product of the Field Code movement.[121] This was a movement to limit the primacy of the common law by enacting statutes to reflect settled legal rules, thus limiting judicial discretion to establish or "make" law through case decisions.[122] This effort reflected distrust of the judiciary, more than an emerging consciousness of women's situation.[123] The main reform occurred in 1848 when the New York legislature enacted provisions to codify trust principles stemming from equity that had allowed limited protection of women's property interests.[124] However, husbands still "owned" the earnings of their wives; hence, the reform was not a feminist innovation, but an effort initiated by wealthy men to protect their own

---

119. *See* WILLIAM L. O'NEILL, EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA 3–5 (1969).

120. *See* MARY R. BEARD, WOMAN AS FORCE IN HISTORY: A STUDY IN TRADITION AND REALITIES *passim* (1946); KEITH E. MELDER, BEGINNINGS OF SISTERHOOD: THE AMERICAN WOMAN'S RIGHTS MOVEMENT 1800–1850, at 143 (1977); RABKIN, *supra* note 107, *passim*. For an in-depth study of the property rights of married women in the colonial period, see Richard H. Chused, *Married Women's Property Law*: 1800–1850, 71 GEO. L.J. 1359 *passim* (1983); Marylynn Salmon, The Property Rights of Married Women in Early America (1980) (unpublished Ph.D. dissertation, Bryn Mawr College). For a discussion that touches on the property rights of Southern women, see Suzanne D. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J.S. HIS. 195 (1977).

121. *See* ELIZABETH B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861, at 57 (1987).

122. *See generally* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,* 6 LAW & HIST. REV. 311 (1988) (noting that the Field Code movement became an expression of the interests of the upper classes).

123. *See* RABKIN, *supra* note 107, at 40–49; *see also* WARBASSE, *supra* note 121, at 57–60. Some men argued for the changes on the basis of women's entitlement to basic human rights. *See* ELISHA P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTEES 144–72 (New York, Greeley & McElrath 1845).

124. For an in-depth discussion of the New York reforms of 1848 and the attempt to backtrack from them in 1860, see NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK (1982); 1 STANTON ET AL., *supra* note 4, at 14, 63–64; WARBASSE, *supra* note 121, at 224–27.

property from the reaches of often dissolute sons-in-law.[125] Moreover, significant modifications in the property rights of women were not effectuated by a majority of states until the 1870s.[126] Although there can be no doubt that increased economic independence made it possible for many women to agitate for reform, this factor acted in conjunction with a number of other conditions such as increased women's education, urbanization, and other demographic changes that existed in parallel and created the cognitive and material conditions of their revolt. More importantly, the property laws were part of a larger web of controls — the complex of dominance — that kept women largely confined to the private sphere, so that they were impeded from effectively organizing until the 1840s. Women's eventual claim to the voting right became a provocative symbol of their desire for emancipation — both to activists for women's rights and their opponents — because it stood as a challenge to many of the essential features of the intricate and interlocking web that was the gender system in the Nineteenth Century.

The reality of women's situation in Jacksonian America was grim. In later years, Elizabeth Cady Stanton compared it to slavery.[127] The married women's property laws were part of Blackstone's doctrine of *feme couvert*, which had been introduced to American law by his *Commentaries*[128] and became entrenched

125. As Peggy Rabkin stated: "The 1848 [New York] act in reality protected the property of the married woman's father rather than that which a married woman herself acquired." RABKIN, *supra* note 107, at 85. A majority in support of the bill could not be mustered until key conservatives in the legislature were convinced that their own interests would be served by the reform. *See* WARBASSE, *supra* note 121, at 226–29.

126. *See* KAY ELLEN THURMAN, THE MARRIED WOMEN'S PROPERTY ACTS 2–5 (1973). For a breakdown of property reforms made by states according to type and chronology, see HOFF, *supra* note 12, at 127–31.

127. *See* 1 STANTON ET AL., *supra* note 4, at 18. In a speech made before the American Anti-Slavery Society in 1860 Stanton said:

> [W]oman [is] more fully identified with the slave than man can possibly be, for she can take the subjective view. She early learns the misfortune of being born an heir to the crown of thorns, to martyrdom, to womanhood. For while the man is born to do whatever he can, for the woman and the negro there is no such privilege. . . . To you, white man, the world throws wide her gates . . . but the black man and the woman are born to shame. The badge of degradation is the skin and sex . . . .

ELIZABETH CADY STANTON, SUSAN B. ANTHONY: CORRESPONDENCE, WRITINGS, SPEECHES 83 (Ellen DuBois & Gerda Lerner eds., 1981) [hereinafter DUBOIS, CORRESPONDENCE].

128. Blackstone said:

there.[129] According to its tenets, a married woman was unable to own her own property, even her wages or her personal effects, to inherit from her husband on his death by intestate succession,[130] to enter into contracts without his consent, to sue or be sued, to obtain a divorce; or to have a right of custody over her children.[131] Moreover, American common law principles recognized the rights of husbands to beat their wives to subdue them.[132]

As bad as these formal legal limitations on married women's freedom were, exclusive focus on them gives an incomplete picture of the depth and breadth of the social control exercised over women in the early Nineteenth Century through noncodified "laws" of custom, from which there was no appeal. In fact, the formal legal containment to which women were subjected was continuous with the pervasive discrimination practiced against

---

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her baron, or lord, and her condition during her marriage is called her *coverture.*

1 WILLIAM BLACKSTONE, COMMENTARIES, ch. xv, *442; *see also* BERG, *supra* note 16, at 22.

129. Elizabeth Cady Stanton, Address to New York Legislature on Women's Rights (Feb. 14, 1854), *in* DUBOIS, CORRESPONDENCE, *supra* note 127, at 47–48; *see also* FLEXNER, *supra* note 10, at 7. For an illustration of the status of a woman after marriage, see L.P. BROCKETT, WOMAN: HER RIGHTS, WRONGS, PRIVILEGES AND RESPONSIBILITIES 67–72 (Books for Libraries Press 1970) (1869).

130. Although a husband could bequeath to his wife whatever he wanted by will, 1 BLACKSTONE, ch. xv, *442, she could not inherit from him if he died intestate, but was limited to her dower portion which typically gave her only a life estate in one-third of her husband's property. 2 BLACKSTONE, ch. viii, *129.

131. *See* 1 STANTON ET AL., *supra* note 4, at 108; *see also* LOIS W. BANNER, WOMEN IN MODERN AMERICA: A BRIEF HISTORY 2 (John Morton Blum ed., 1974); WARBASSE, *supra* note 121, at 7–8. Women had more control over their real estate than their personhood. *Id.* at 9.

132. This too is traceable to Blackstone. *See* 1 BLACKSTONE, ch. xv, *444. As Judge Powhattan Ellis stated in Bradley v. State, an 1824 Mississippi case:

> To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions . . . .

1 Miss. (1 Walker) 158 (1824), *in* WARBASSE, *supra* note 121, at 22. However, Elizabeth Pleck argues that by the middle of the Nineteenth Century the attitude of public authorities to wife beating had changed and that men were often not exonerated from legal liability for such acts. *See* Elizabeth Pleck, *Wife Beating in Nineteenth-Century America, in* COTT, HISTORY, *supra* note 5, at 190–91 (analyzing appellate decisions on spouse abuse from 1824 to 1893).

them through private acts perpetrated in the civil society which the state tacitly condoned, if not actively promoted.[133] This combination of discrimination in law and custom constituted a formidable barrier to women's emancipation and stood for the proposition that they possessed few civil and no political rights.

First, convention dictated that women be economically dependent on men. Although in the period from 1800 to 1840 more females began to work outside the home and factories began to provide a wage alternative to domestic service,[134] there was almost no decent employment available by which a lone woman could support herself and her children in the first half of the Nineteenth Century.[135] The few who worked outside the home as farm laborers, domestics, or mill workers[136] were afforded only a fraction of the wages available to men,[137] making prostitution one of the better paying "jobs" for those who had to support themselves.[138] When large groups of immigrants willing to work at low wages began arriving, even poorly paid factory jobs were lost by native-born American women.[139] Moreover, females were not able to make themselves more employable by pursuing a profession. In the America of the early 1830s, there was not

133. This was the point Elizabeth Cady Stanton attempted to convey when speaking before the New York lawmakers in 1854. *See* Elizabeth Cady Stanton, Address to the Legislature of New York on Women's Rights (Feb. 14, 1854), *in* DUBOIS, CORRESPONDENCE, *supra* note 127, at 44–52; Elizabeth Cady Stanton, *Woman's Protectors*, REVOLUTION, Jan. 21, 1869, at 40.

134. *See generally* LUCY MAYNARD SALMON, DOMESTIC SERVICE (Arno Press 1972) (1897) (describing domestic service as a job open to women).

135. *See* David Montgomery, *The Working Classes of the Pre-Industrial American City*, 1780–1830, 9 LAB. HIST. 3, 19–20 (1968).

136. Analysis of census data indicate that women made up only 4.6% of the paid work force in 1800. This figure rose to 9.6% by 1840. W. ELLIOT BROWNLEE & MARY M. BROWNLEE, WOMEN IN THE AMERICAN ECONOMY 3 (1976).

137. *See* CATHERINE G. WAUGH, WOMEN'S WAGES *passim* (1888); BROWNLEE & BROWNLEE, *supra* note 136, at 35–36.

138. *See* JILL K. CONWAY, THE FEMALE EXPERIENCE IN EIGHTEENTH- AND NINETEENTH-CENTURY AMERICA, A GUIDE TO THE HISTORY OF AMERICAN WOMEN 60 (1982). The connection between violence against women and forced prostitution should not be downplayed; however, it is difficult to tell how many women turned to prostitution for purely economic reasons and how many were physically forced into such a life. In any event, both violence and poverty are factors militating against any judgment that prostitution was or is a "victimless" crime. *See generally* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979) (describing the history and nature of the business of trafficking in women); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993) (constructing an argument based on the Thirteenth Amendment for the notion that forced prostitution is a form of slavery).

139. *See* BROWNLEE & BROWNLEE, *supra* note 136, at 17, 144.

one college or university that would admit them for matriculation.[140] Moreover, the education that was available to women in large part focused on "domestic sciences" so that only rudimentary reading and math skills were developed, while the housewifely arts were promoted.[141]

Second, women did not have freedom of speech or association. They were verbally and physically intimidated from appearing in public without appropriate escort[142] and it was considered indecent for them to speak in front of large audiences or gatherings of both sexes.[143] It was common for unaccompanied females to be treated as prostitutes,[144] and when women like Frances Wright or the Grimké sisters presumed to address mixed audiences, they were booed, bombarded with projectiles, and otherwise physically threatened.[145] As a result, women had to struggle to exercise First Amendment rights and were often hampered in organizing and spreading their ideas.[146]

---

140. In 1833 Oberlin was the first university to admit women, but under a separate, less rigorous course of study. Mount Holyoke was started in 1837, but did not attain the status of a chartered university until 1893. The "Harvard Annex" began as an informal arrangement in 1874 (whereby some Harvard faculty members offered courses for women) and became Radcliffe in 1894. Vassar was founded in 1865 and Smith in 1875. *See* 1 WOODY, *supra* note 114, at 343, 362; 2 WOODY, *supra* note 115, at 184, 231, 305–10.

141. *See* 1 WOODY, *supra* note 114, at 310, 400.

142. Even as late as the 1860s violence was a problem. *See* Letter from Susan B. Anthony to Martha Coffin Wright (Jan. 7, 1861), *in* SOPHIA SMITH COLLECTION, *Garrison Family Papers,* Box 45, Folder 1068.31 (describing her escape from "the mob" at a riot in Buffalo in 1861).

143. Sarah Moore Grimké, Province of Woman: The Pastoral Letter (Oct. 6, 1837) and Social Intercourse of the Sexes (Jan. 12, 1838), *reprinted in* UP FROM THE PEDESTAL 53–57 (Aileen S. Kraditor ed., 1968); Letter from Angelina Emily Grimké to Catherine E. Beecher (Aug. 28, 1837), *in id.* at 58–62.

144. In the 1860s this was one of the issues at the heart of the controversy over the Contagious Disease Acts of Victorian England. One commentator has described the Acts:

> The definition of common prostitute was vague, and consequently the metropolitan police employed under the acts had broad discretionary powers. When accosted by the police, a woman was expected to submit voluntarily to the medical and police registration system or else be brought before the local magistrates. If brought to trial for refusing to comply, the woman bore the burden of proving that she was virtuous
> . . . .

See JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE 2 (1980).

145. *See* EUGENE A. HECKER, A SHORT HISTORY OF WOMEN'S RIGHTS 150–51 (Greenwood Press 1971) (1914).

146. *See* INEZ HAYNES IRWIN, ANGELS AND AMAZONS: A HUNDRED YEARS OF AMERICAN WOMEN 107 (1933); SEVERN, *supra* note 103, at 18–19.

Third, women bore the brunt of housework, and married women were subjected to a lifetime of reproduction and child care.[147] The age of consent was as low as ten in most states and only seven in Delaware.[148] Married women had no legal right to refuse sexual intercourse with their husbands[149] and no form of birth control save abstinence was recognized.[150] As a result, a female could expect to have as many as seven or more pregnancies in her lifetime.[151] American women of the 1830s had no modern conveniences to help them with the ceaseless labor involved in maintaining a home. Water had to be pumped, soap made, clothes sewn and washed by hand, all cooking was from scratch, and even more work was necessary in the Western territories.[152]

In addition to these limitations, women were subjected to a barrage of propaganda from organized religion, the government, the press, and other social institutions, all devoted to perpetuating the myth of their inferiority.[153] It is an irony of this epoch of coercion and control that the "cult of true womanhood" arose devoted to purveying the ideological message that a woman should confine herself to the separate sphere of home and hearth and celebrate her femininity and dependence on male protection.[154] As the Congregationalist ministers put it:

---

147. *See* JANE G. SWISSHELM, LETTERS TO COUNTRY GIRLS 43–50, 75–79 (New York, J.C. Riker 1853).

148. *See* HECKER, *supra* note 145, at 168.

149. Spousal rape did not become a recognized crime until 1977. Most states maintained laws that defined rape as the forcible penetration of the body of a woman, not the wife of the perpetrator. *See, e.g.*, OKLA. STAT. ANN. tit. xxi, § 1111 (1983). As a result, rape in marriage was a legal impossibility. Progress was slow in modifying the marital rape laws, partially due to the insensitivity of state legislatures to the problem. *See generally* DIANA E. H. RUSSELL, RAPE IN MARRIAGE 17–24 (1982) (describing toleration of forced sex in marriage). Twenty-three states still recognized a spousal rape exemption in 1990 and eight states extended the exemption to cohabitants. *See* Rene I. Augustine, *Marriage: The Safe Haven for Rapists,* 29 J. FAM. L. 559, 578–80 (1990–1991).

150. *See* MARY P. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 163 (New Viewpoints 1975) (1963).

151. The average number of children born to a white woman was 7.04 in 1800, 6.92 in 1810, 6.73 in 1820, and 6.55 in 1830. Daniel S. Smith, *Family Limitation, Sexual Control, and Domestic Feminism in Victorian America, in* 1 FEMINIST STUDIES 40, 43 (1973).

152. *See* ARGUMENTS IN FAVOR OF WOMAN SUFFRAGE 5 (Marion M.B. Schlesinger comp., 1905).

153. *See* ANDREW SINCLAIR, THE BETTER HALF: THE EMANCIPATION OF THE AMERICAN WOMAN *passim* (1965); *see also supra* part II.B.

154. *See* BARBARA WELTER, DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY 21–41 (1976).

> The appropriate duties and influence of woman are clearly stated in the New Testament. Those duties and that influence are unobtrusive and private, but the source of mighty power. When the mild, dependent, softening influence of woman upon the sternness of man's opinions is fully exercised, society feels the effects of it in a thousand forms. The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for her protection, and which keeps her in those departments of life that form the character of individuals, and of the nation.[155]

As a theoretical understanding of the complex of dominance shows, it is not surprising that all of these factors — physical and associational intimidation, exclusion from the labor market, exclusion from educational opportunity, exclusion from political participation, an adulthood given over to childbearing and housework, and constant indoctrination as to their proper role and limited capabilities — combined to prevent most women in the early Nineteenth Century from escaping the control of husbands, fathers, or employers over their activities, their bodies, and often, their ideas. It was in this environment and under these conditions that the first women ventured forth to demand their right to engage in politics within the context of the abolition movement.

2. Women and Abolition

The connection between abolition and woman suffrage is disputed.[156] Like many other Nineteenth Century reforms, abolition began in earnest in the Jacksonian era, but it contributed to the great social upheaval that transformed the face of American society in that century — the Civil War. Some credit participation in the anti-slavery movement as the source for an emerging realization by women of their subordination as a group.[157]

---

155. *See* Pastoral Letter from the General Association of Massachusettes (Orthodox) to the Churches under their care, *in* 1 STANTON ET AL., *supra* note 4, at 81–82. This is an excerpt from the famous letter that was distributed in 1837 in response to the increasing practice of women appearing to speak in front of mixed audiences against slavery. *See infra* text accompanying notes 171–83.

156. *See, e.g.*, Ellen DuBois, *Women's Rights and Abolition: The Nature of the Connection, in* ANTISLAVERY RECONSIDERED, NEW PERSPECTIVES ON THE ABOLITIONISTS 238 (Lewis Perry & Michael Fellman eds., 1979) [hereinafter ANTISLAVERY RECONSIDERED] (analyzing the intricate connection between abolition and an emerging Ninteenth Century feminism).

157. *See* HAROLD K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 138 (AMS Press Inc. 1971) (1918).

Others see the relation as much more complex.[158] Regardless of the theory one holds about its contribution, an initial question must be posed — what was it about abolition that made it the vehicle by which women began to escape the confines of the separate sphere?

The anti-slavery movement changed significantly in the early Nineteenth Century due to the impact of religious revivalism.[159] Garrisonian abolitionists conceived of slavery as a personal sin, the only remedy for which was immediate emancipation.[160] These "immediatists" rejected the gradualism of earlier efforts together with their emphasis on recolonization of freed slaves.[161] Perhaps the focus on moral suasion and the rejection of the political process particularly suited Garrisonian abolition to women's participation — its norms were quite consistent with the ideal of females as loving, nurturing, spiritual, and apolitical.[162] Moreover, Garrisonians were radicals of a sort who had developed a human rights approach to slavery.[163] To the extent that any men in American society were open to arguments for women's emancipation, they were likely to be found in this group. Finally, it was only natural that women with relatives or friends active in abolition, or who themselves had moving personal conversions through religious revivalism, should become involved in what be-

158. *See* CONWAY, *supra* note 138, at 166–69; DuBois, ANTISLAVERY RECONSIDERED, *supra* note 156, at 239. In any event, as Blanche Glassman Hersh has said: "Only in the 1830s, when abolitionist women demanded an equal role with men in antislavery work, was the feminist gauntlet thrown down. The consciousness of even the earliest feminist-abolitionist women was 'woman-defined' . . . ." BLANCHE GLASSMAN HERSH, THE SLAVERY OF SEX: FEMINIST-ABOLITIONISTS IN AMERICA 4 (1978) [hereinafter HERSH, THE SLAVERY OF SEX].

159. *See* Ronald G. Walters, *The Boundaries of Abolitionism, in* ANTISLAVERY RECONSIDERED, *supra* note 156, at 3.

160. *See* Margaret H. Bacon, *Lucretia Mott: Holy Obedience and Human Liberation, in* THE INFLUENCE OF QUAKER WOMEN ON AMERICAN HISTORY, BIOGRAPHICAL STUDIES 208–09, 212 (Carol Stoneburner & John Stoneburner eds., 1986); Donald M. Scott, *Abolition as a Sacred Vocation, in* ANTISLAVERY RECONSIDERED, *supra* note 156, at 51.

161. *See* ELLEN C. DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848–1869, at 39 (1978) [hereinafter FEMINISM AND SUFFRAGE]; Bertram Wyatt-Brown, *Proslavery and Antislavery Intellectuals: Class Concepts and Polemical Struggle, in* ANTISLAVERY RECONSIDERED, *supra* note 156, at 322.

162. *See* BERG, *supra* note 16, at 6.

163. *See* GERDA LERNER, THE GRIMKÉ SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMAN'S RIGHTS AND ABOLITION 283–84 (Schocken Books 1971) (1967) [hereinafter LERNER, THE GRIMKÉ SISTERS].

came the dominating moral crusade of the 1830s.[164]

Almost every early circumstance where women addressed the public involved agitation against slavery.[165] In 1828 when Frances Wright embarked on her speaking tour, one of her primary themes was the evil of slavery.[166] She was vilified for her efforts, often being referred to as the "female monster."[167] Ernestine Rose too advocated abolition in public in 1836.[168] Both Wright and Rose were foreigners and socialists and so, to some extent, could be treated as interesting novelties who posed no real threat to American institutions and values.[169] This was not the case with the Grimké sisters. Their experience brought the twin themes of anti-slavery and women's emancipation together in a particularly intense way and forced the issue of women's right to engage in politics into the public's attention.[170]

Angelina Grimké and her sister Sarah were the first female anti-slavery agents to be appointed by abolition groups.[171] As Gerda Lerner has described them, they were not only "American born, White and Southern, but the offspring of wealth, refinement, and the highest social standing."[172] These attributes

164. *See* CATHERINE CLINTON, THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY 67–72 (Eric Foner ed., 1984); JUDITH PAPACHRISTOU, WOMEN TOGETHER: A HISTORY IN DOCUMENTS OF THE WOMEN'S MOVEMENT IN THE UNITED STATES 3 (1976).

165. Women were involved in all the major reform efforts of the 1830s, which included the education movement, the moral reform movement against prostitution, the temperance movement, a nascent peace movement, and abolition. *See* MELDER, *supra* note 120, at 49–61. It was primarily in the anti-slavery crusade that women aggressively sought entry to the public forum to present their views. *Id.* at 95–112.

166. *See* CELIA MORRIS ECKHARDT, FANNY WRIGHT: REBEL IN AMERICA 1 (1984).

167. *See* LERNER, THE GRIMKÉ SISTERS, *supra* note 163, at 3–4.

168. JANE RENDALL, THE ORIGINS OF MODERN FEMINISM: WOMEN IN BRITAIN, FRANCE AND THE UNITED STATES, 1780–1860, at 227 (1984).

169. *See* ISRAEL KUGLER, FROM LADIES TO WOMEN: THE ORGANIZED STRUGGLE FOR WOMAN'S RIGHTS IN THE RECONSTRUCTION ERA 8 (1987); LERNER, THE GRIMKÉ SISTERS, *supra* note 163, at 3–4.

170. *See* Ellen DuBois, *Struggling into Existence: The Feminism of Sarah and Angelina Grimké,* WOMAN: J. LIBERATION (Spring 1970), *reprinted in* SOPHIA SMITH COLLECTION, *Women's Rights and Suffrage Papers*, Box 1, Folder 10.

171. For a brief description of the introduction of the Grimké sisters to abolition, see MELDER, *supra* note 120, at 77–79.

172. LERNER, THE GRIMKÉ SISTERS, *supra* note 163, at 4. Not all abolitionists were white, nor were all feminists. Frederick Douglass and Sojourner Truth were both active in the movements of the period. *See* DAVIS, *supra* note 60, at 81–86. *See generally* CARLETON MABEE, SOJOURNER TRUTH, SLAVE, PROPHET, LEGEND (1993) (biography of Truth detailing her activities in abolition and suffrage); FREDERICK DOUGLASS ON WOMEN'S RIGHTS (Philip S. Foner ed., 1976) (collecting Douglass' writings on the condition of women).

made them exceptionally effective activists against slavery.[173] After freeing their own slaves, relocating in the North, and being introduced to the Quaker religion, Angelina first and then Sarah became involved in "radical" abolition.[174] In the beginning, they argued that women were uniquely suited to morally influence others for abolition.[175] Soon, however, they asserted women's entitlement to speak publicly against slavery, not simply on the basis of female moral superiority, but because of women's right to engage in politics. As Angelina Grimké said in an 1837 speech, when she appeared as the first woman ever to address a committee of the Massachusetts legislature:

> I hold, Mr. Chairman, that American women have to do with this subject [slavery], not only because it is moral and religious, but because it is *political*, inasmuch as we are citizens of this republic and as such our honor, happiness and well-being are bound up in its politics, government and laws.[176]

With this reasoning, the Grimkés made participation in the abolition movement a bridge to women's emancipation by claiming their right to enter the political forum as citizens.[177] At the time it was made, Angelina Grimké's demand was recognized as a radical claim.[178] In response, Massachusetts's powerful Congregationalist clergy initiated a showdown on the question of women's public appearances by issuing the *Pastoral Letter of the General Association of Massachusetts to the Congregational Churches Under Their Care,* which was read in pulpits through-

---

173. In one six-month period, they toured over sixty towns and spoke in front of more than 40,000 persons. *See* HERSH, THE SLAVERY OF SEX, *supra* note 158, at 18.

174. *See* RIEGEL, *supra* note 99, at 27–29; SEVERN, *supra* note 103, at 31–33; Celia Burleigh, *People Worth Knowing - No. 4: The Grimké Sisters*, 1 WOMAN'S J., July 23, 1870, at No. 29, 232; *A Reminiscence of Sarah Grimké*, 5 WOMAN'S J., Feb. 7, 1874, at No. 5, 42.

175. Angelina Grimké's first tract was entitled *An Appeal to the Christian Women of the Southern States* and caused a sensation when published in William Lloyd Garrison's abolition paper, THE LIBERATOR. *See* LERNER, THE GRIMKÉ SISTERS, *supra* note 163, at 138–41; JEANNE BOYDSTON ET AL., THE LIMITS OF SISTERHOOD: THE BEECHER SISTERS ON WOMEN'S RIGHTS AND WOMAN'S SPHERE 5 (1988).

176. LERNER, THE GRIMKÉ SISTERS, *supra* note 163, at 7.

177. *See* ANNE FIROR SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS 1830–1930, at 61–62 (1970) (describing Sarah Grimké's addresses as constituting the first public foray into women's rights by an American woman).

178. Some were so upset at Angelina's willingness to address a public crowd that they stormed the building where she was speaking before the national convention of the American Anti-Slavery Women, threw stones, and attempted to drown out the speakers. Later that night, they burned the building down. *See* SEVERN, *supra* note 103, at 33–34; *see also* Letter from Martha Coffin Wright to Matilda Joslyn Gage (Feb. 15, 1871), *in* SOPHIA SMITH COLLECTION, *Garrison Family Papers*, Box 43, Folder 1068.1 (describing the mob).

out the state and accused women of deviating from their "natural" role by engaging in politics.[179] Sarah Grimké responded by writing a series of letters in the *Spectator*,[180] which became the early feminist classic *Letters on the Equality of Sexes*[181] that advocated an end to women's subordination and women's rights to equal education and equal labor opportunities.[182] Following these publications, intense debate ensued in the press, in the churches, and in the abolition community[183] over woman's proper role and sphere. Within two years of Angelina's presentation to members of the Massachusetts legislature, the issue of women's participation broke the abolition movement in half and initiated the chain of events that precipitated Seneca Falls.

All of these incidents had a profound impact on Elizabeth Cady Stanton, who became the prime philosopher, revolutionary, and sometime strategist of the early woman suffrage movement.[184] Stanton's[185] introduction to the developing tensions be-

179. *See* ALMA LUTZ, CRUSADE FOR FREEDOM: WOMEN OF THE ANTISLAVERY MOVEMENT 115–18 (1968); ELIZABETH FROST & KATHRYN CULLEN-DUPONT, WOMEN'S SUFFRAGE IN AMERICA: AN EYEWITNESS HISTORY 28 (1992).

180. FROST & CULLEN-DUPONT, *supra* note 179, at 29.

181. *Id. See generally* SARAH M. GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN (Source Book Press 1970) (1838) (The original text was published by Isaac Knapp of Boston and was entitled LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN, ADDRESSED TO MARY S. PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY.).

182. She did so by using religious themes and analogizing to the enslaved condition of African-Americans. In one illustrative passage Sarah Grimké wrote:

> All history attests that man has subjected woman to his will, used her as a means to promote his selfish gratification, to minister to his sensual pleasures, to be instrumental in promoting his comfort; but never has he desired to elevate her to that rank she was created [by God] to fill. He has done all he could to debase and enslave her mind; and now he looks triumphantly on the ruin he has wrought, and says, the being he has thus deeply injured is his inferior.

Id. at 11.

183. Even as dedicated an abolitionist as Catherine Beecher was, in *An Essay on Slavery and Abolitionism with Reference to the Duty of American Women* she criticized Angelina Grimké's public appearances and argued that women should remain in their separate domestic sphere. FROST & CULLEN-DUPONT, *supra* note 179, at 29. *See* BOYDSTON ET AL., *supra* note 175 (discussing the willingness of some women, and especially the Beechers, to work for abolition, but not for women's rights).

184. *See* Letter from Susan B. Anthony to Elizabeth Cady Stanton (Jan. 2, 1871), *in* SOPHIA SMITH COLLECTION, *Garrison Family Papers*, Box 45, Folder 1103.

185. Stanton's life provides a textbook illustration of the issues, circumstances, affiliations, and coincidences that often combined to bring women to suffrage before the Civil War. She was the middle daughter of a successful jurist and a patrician mother, who lived in upstate New York. Born in 1815, Stanton entered young adulthood in the heyday of the Jacksonian period. She benefited from the woman's education movement by being allowed to attend Emma Willard's female seminary

tween women's rights and abolition occurred on the occasion of her honeymoon with Henry Stanton, a well-known anti-slavery agent and "political" or "New Organization" abolitionist, with whom she traveled to the world conference in London.[186] A division in anti-slavery ranks had been developing that was to erupt there.[187] Garrisonians insisted on the fundamental corruption of the political process, pointed out the fact that slavery was enshrined in the American constitution,[188] and eschewed political solutions to the slavery question for the method of using moral arguments alone to bring about social change.[189] This approach alienated many who concluded that political involvement was critical to ending slavery. It was not just their anti-political stance that rankled some; the willingness of Garrisonians to open their crusade to women was another point of division.[190] When the World Anti-Slavery Convention was called and convened in 1840, many in the international movement were spoiling for a fight; the question of whether the American women would be allowed to take their seats as delegates gave them the issue they wanted.[191]

Political abolitionists were particularly reluctant to include women in their activities, feeling that their participation would be so controversial as to hamper their own efforts to enter the political arena.[192] This willingness to sacrifice women and their

---

where she was given the best formal education then available to her. She was exposed to radical reformism through her older cousin, Gerrit Smith, who was one of the best known abolitionists in America. She also experienced the teachings of charismatic Charles Grandison Finney during the Great Troy Revival of 1831 and underwent a profound conversion away from the stern and punitive Protestantism of her forebearers to Finney's evangelical and inclusionist doctrine. The fact that women were allowed to pray in public at revival meetings and were considered to be equally able along with men to choose freely salvation over damnation was an added attraction. *See* GRIFFITH, *supra* note 18, at 4–5, 15–19.

186. *Id.* at 26, 32–33, 35–37. On the divisions between Garrisonian and "New Organization" or political abolitionists, see Walters, *supra* note 159, at 3–23.

187. *See* GRIFFITH, *supra* note 18, at 35–37.

188. U.S. CONST. Art. I, § 2, cl. 3 provides: "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons." For a discussion of the impact of slavery on the American Constitution and the development of constitutional law in general, see DONALD E. LIVELY, THE CONSTITUTION AND RACE 11–34 (1992).

189. *See* HERSH, THE SLAVERY OF SEX, *supra* note 158, at 25–27.

190. *Id.*

191. *See* GRIFFITH, *supra* note 18, at 35–37.

192. For a description of the complex conflicts over women's participation, see AILEEN S. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM: GARRISON AND HIS CRITICS ON STRATEGY AND TACTICS 1834–1850, at 39–62, 118–40 (1969).

interests in the name of expediency was an attribute that continued into Reconstruction, where it contributed to a major rift in suffrage forces.[193] In London, these New Organizationalists allied with traditionalists to oppose women's participation.[194] After a day of heated debate (one in which women were not allowed to speak on their own behalf),[195] the Garrisonian faction was defeated and the American women were consigned to the gallery.[196] Stanton witnessed these events, which outraged her emerging feminist sensibilities.[197] Eventually she and Lucretia Mott resolved that a separate convention devoted to the issue of women's rights ought to be organized.[198] Such a convention was not to take place until 1848, when Stanton and others published their notice calling people to the Seneca Falls meeting.[199]

From 1840 to 1848, women's attention was directed to causes other than women's rights.[200] Activists like Lucretia Mott, Abby Kelley Foster, and Sarah and Angelina Grimké worked against slavery, often in conjunction with the American Anti-Slavery Society, which had split off from the political abolitionists after the London meeting.[201] Growing temperance and labor movements also provided limited opportunities for women to learn the arts of political organization.[202] Still, their participation was divisive

---

193. *See* KRADITOR, IDEAS, *supra* note 19, at 3–4.

194. *See* HERSH, THE SLAVERY OF SEX, *supra* note 158, at 25–27.

195. 1 ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS, DIARY AND REMINISCENCES 78 (Theodore Stanton & Harriot Stanton Blatch eds., 1922).

196. *See* LUTZ, *supra* note 179, at 167.

197. *See* Blanche Glassman Hersh, *"Am I Not a Woman and a Sister?" Abolitionist Beginnings of Nineteenth Century Feminism, in* ANTISLAVERY RECONSIDERED, *supra* note 156, at 275 [hereinafter Hersh, *Abolitionist Beginnings*]; Mary Foulke Morrison, *Preliminary Agitation, in* VICTORY: HOW WOMEN WON IT, A CENTENNIAL SYMPOSIUM 1840–1940, at 17 (National American Woman Suffrage Association ed., 1940) [hereinafter VICTORY].

198. VICTORY, *supra* note 197, at 21.

199. *See* Hersh, *Abolitionist Beginnings*, *supra* note 197, at 275.

200. *See* HERSH, THE SLAVERY OF SEX, *supra* note 158, at 40–41; *see also* Letter from Susan B. Anthony to Martha Coffin Wright (July 6, 1856), *in* SOPHIA SMITH COLLECTION, *Garrison Family Papers*, Box 45, Folder 1101.

201. HERSH, THE SLAVERY OF SEX, *supra* note 158, at 28–29; PAPACHRISTOU, *supra* note 164, at 18.

202. *See* NANCY SCHROM DYE, AS EQUALS AND AS SISTERS: FEMINISM, THE LABOR MOVEMENT, AND THE WOMEN'S TRADE UNION LEAGUE OF NEW YORK 58–60 (1980); NANCY A. HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE: ROCHESTER NEW YORK, 1822–1872, at 163–64 (1984); Jack S. Blocker, Jr., *Separate Paths: Suffragists and the Women's Temperance Crusade* 10 SIGNS 460, 463 (1985). *See generally* Robin Miller Jacoby, *The Women's Trade Union League and American Feminism*, 3 FEMINIST STUD. 126 (1975) (describing the overlap of feminism and unionism within the Women's Trade Union League).

and controversial and their attempts to be treated as equal partners in the reform efforts of the era were repeatedly rebuffed.[203] These experiences convinced a number of activists that a movement devoted exclusively to women's emancipation was needed.[204] Finally in 1848, when Lucretia Mott's travels took her to Elizabeth Cady Stanton's home in Seneca Falls, New York,[205] they decided to call the first women's rights convention. They put out a modest newspaper advertisement announcing a meeting on "the social, civic, and religious conditions and rights of woman" which would be open to the public and held at the local Wesleyan Chapel on July 19th and 20th of that year.[206]

3. Seneca Falls — Political Discourse at the Margin

Seneca Falls was a pivotal event for the emerging women's movement. Although its organizers were not sure that anyone would respond to their call, people came great distances to discuss the rights of women.[207] Two days of speeches and debate followed, and the historic Seneca Falls "Declaration of Sentiments" was issued.[208] Among its resolutions was a demand for the voting right, which was perceived as the most radical claim for improving the status of women to come out of the convention.[209]

Local women's response to the modest notification indicated that the issue of female emancipation was ripe and that significant numbers of women were discontented enough with their situation to take active measures to change it.[210] The prime target

203. *See* MELDER, *supra* note 120, at 113–28.

204. *See* 1 CAMPBELL, MAN CANNOT SPEAK, *supra* note 22, at 47–48.

205. Elizabeth Cady Stanton spent the years from 1840 to 1848 outwardly involved in traditional domestic tasks. She bore two of an eventual seven children, ran a household on limited funds, supported her husband's emerging political career, and eventually moved with him to remote and rural Seneca Falls in 1847, where he attempted to establish a law practice. Inwardly, Stanton had come to resent the limitations placed on a woman by marriage. Her discontent became extreme in Seneca Falls, where she was isolated and alone much of the time. MELDER, *supra* note 120, at 146; BETH M. WAGGENSPACK, THE SEARCH FOR SELF-SOVEREIGNTY: THE ORATORY OF ELIZABETH CADY STANTON 17–19 (1989).

206. 1 STANTON ET AL., *supra* note 4, at 67. The idea arose from an informal discussion at Stanton's home between Stanton, Mott, Martha C. Wright, and Mary Ann McClintock. *Id.*

207. *See* WAGGENSPACK, *supra* note 205, at 18–21.

208. *Id.* at 20–21.

209. *See* DuBois, *Radicalism, supra* note 46, at 63.

210. *See* FLEXNER, *supra* note 10, at 146. *But see* MELDER, *supra* note 120, at 146 (arguing that the significance of Seneca Falls has been exaggerated).

of Seneca Falls was the system of gender hierarchy, and the convention marked the beginning of a broad social movement designed to change the general condition of women, not just incrementally improve it.[211] Seneca Falls' indictments and resolutions criticized discriminatory laws and customs that affected women's property and excluded them from the workplace, denied them educational opportunity, and created the double standard. This manifesto also included demands for the right to enter the public domain and to organize, an end to the custom of the separate sphere, and an end to patriarchal religion.[212] The right to vote was only one among many rights claimed, but it was one of the most controversial demands considered.[213]

Stanton, Mott, and the other women who organized Seneca Falls realized that the claim to suffrage would especially anger the forces arrayed against them.[214] Demanding the vote was tantamount to women asserting their full personhood and citizenship and the right to enter the public forum.[215] It was a bid for direct political power and the public expression of the judgment that the interests of men and women were in conflict.[216] Claiming women's right to vote signalled a rejection of the notion of virtual representation and the norm of male protection on which it was based.[217] Woman suffrage stood as a challenge to the assumptions and foundations of the whole system of patriarchy,

---

211. *See* O'NEILL, *supra* note 119, at 22; RYAN, *supra* note 150, at 184.

212. RENDALL, *supra* note 168, at 227–28, 300–01; 1 STANTON ET AL., *supra* note 4, at 70–71.

213. 1 STANTON ET AL., *supra* note 4, at 73; WAGGENSPACK, *supra* note 205, at 20–21.

214. Lucretia Mott demonstrated these sentiments when she declared in rebuttal to Stanton's proposal that a demand for the vote be made: "Thou will make us ridiculous. We must go slowly." FLEXNER, *supra* note 10, at 76.

215. For a catalog of the predicted horrors that would ensue, especially in respect to marriage, if women were given the vote, see A LAWYER (ANONYMOUS), *supra* note 1, at 64–70, 88–93.

216. The notion that women's and men's interests were in conflict, especially in sexual matters, was a particular theme of Stanton and Anthony's paper, *The Revolution*. *See* Stanton & Anthony, *The Revolution*, *reprinted in* THE REVOLUTION IN WORDS, RIGHTING WOMEN, 1868–1871, at 130–31, 134–36 (Lana Rakow & Cheris Kramarae eds., 1990).

217. As Ellen DuBois describes it:

> The right to vote raised the prospect of female autonomy in a way that other claims to equal rights could not. Petitions to state legislatures for equal rights to property and children were memorials for the redress of grievances, which could be tolerated within the traditional chivalrous framework that accorded women the 'right' to protection. . . . By contrast, the suffrage demand challenged the idea that women's interests were identical or even compatible with men's. As

and the participants in the suffrage controversy, both pro and con, understood it as such at the time.[218] Many of the women at the convention shrank from throwing down so clear a gauntlet. However, after Stanton's insistence and serious debate, the call for the vote was passed.[219]

Seneca Falls itself was the subject of publicity, much of it hostile.[220] Nonetheless, the gathering accomplished a number of critical things for the emerging movement. Most obviously, it marked the beginning of an association where women could learn to organize effectively for their own goals. However, the convention also achieved much more: It created the occasion for the first and most necessary step in any liberation process — it gave women entree to political discourse for the very first time, albeit at the margin of official institutions. Thus, it struck at one of the pillars of the complex of dominance by which women were subordinated, by making them visible in a way that connected their activities with voting, and in turn, full citizenship. Up to the late 1830s when women like the Grimkés and Abby Kelley Foster fought to speak in public, the invisibility of women had been a barrier to their emancipation.[221] By keeping women out of the public domain through a combination of custom and law, men

---

such, it embodied a vision of female self-determination that placed it at the center of the feminist movement.

FEMINISM AND SUFFRAGE, *supra* note 161, at 46; *see also* STEVEN M. BUECHLER, WOMEN'S MOVEMENTS IN THE UNITED STATES: WOMAN SUFFRAGE, EQUAL RIGHTS, AND BEYOND 93–94 (1990).

218. *See* FEMINISM AND SUFFRAGE, *supra* note 161, at 46–47.

219. *See* 1 STANTON ET AL., *supra* note 4, at 73.

220. For a collection of newspaper clippings discussing Seneca Falls and the subsequent Rochester Convention, see 1 STANTON ET AL., *supra* note 4, at 802–05. The following excerpt from Albany's *Mechanic's Advocate* constitutes a passage representative of the kind of reaction that ensued in the popular press:

> [T]his change [in women's rights] is impracticable, uncalled for, and unnecessary. *If effected*, it would set the world by the ears, make 'confusion worse confounded,' demoralize and degrade from their high sphere and noble destiny, women of all respectable and useful classes, and prove a monstrous injury to all mankind.

MELDER, *supra* note 120, at 148–49; 1 STANTON ET AL., *supra* note 4, at 803.

221. At the time when women's public speaking generated so much division in abolition circles, activists like the Grimkés, Abby Kelley Foster, and Maria Weston Chapman understood the importance of their ability to move into the public sphere for women's rights. *See* HERSH, THE SLAVERY OF SEX, *supra* note 158, at 29–30. In an early letter, Angelina claimed, "[W]e Abolition Women are turning the world upside down . . . ." Letter from Angelina Grimké to Sarah M. Douglas (Feb. 25, 1838), *in* 2 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD AND SARAH GRIMKÉ 1822–1844, at 574 (Gilbert H. Barnes & Dwight L. Dumond eds., Peter Smith 1965) (1934).

avoided engaging them in debate and thus were not required to acknowledge women's humanity — even as enemies — in a public setting. The Seneca Falls Convention continued the discussion of feminine nature and the domestic sphere that had emerged with abolition, and it did so as the result of women's initiative, not men's. In this way, women forced the opening of a public space, albeit a marginal one, where they could engage others in sustained dialogue about their situation and demands.[222] This feature of the early suffrage movement was paramount in the years before the Civil War.

Although women were excluded from state and federal legislative arenas, they created their own quasi-governmental fora for political organization and debate in the decade before the Civil War by convening a series of women's rights conventions, exercising their right of petition, and even informally lobbying legislators for changes in a variety of laws.[223] Women's rights conventions were called and held regularly from 1848 up until 1860, when the events leading to the Civil War captured their attention.[224] By 1851, the right to vote emerged as the central issue around which the women's emancipation drive was organized. This centrality was in large part due to the complex connection between voting and other forms of political dialogue occurring outside established political institutions.

By fomenting popular debate through conventions, petition drives and the like, activists added a public dimension to women's situation that was novel and thus made women's presence felt in a new way within American culture. They were to find, however, that discourse outside the boundary of official governmental institutions could be contained.[225] Regardless of how much agitation they mounted in the civil society to put pressure on officialdom for law changes improving their status, women had difficulty getting their views and positions considered by leg-

222. *See* PAPACHRISTOU, *supra* note 164, at 24–25.

223. *See* 1 STANTON ET AL., *supra* note 4, at 92, 172–73, 178, 344, 592, 595–605, 607, 679–85.

224. 1 CAMPBELL, MAN CANNOT SPEAK, *supra* note 22, at 49. One of the most moving speakers in this period was Sojourner Truth, a Black woman and former slave, who spoke eloquently about the connections between women's condition and slavery. For a recent biography of Truth which provides a complex analysis of the reliable historical facts surrounding Truth's most famous speech, see MABEE, *supra* note 172, at 67–82.

225. Women came face to face with this reality when they attempted to influence legislation dealing with the property rights of married women by lobbying the New York Legislature. *See* 1 STANTON ET AL., *supra* note 4, at 64–66.

islators because they were unable to affect directly the election of representatives.[226] Thus, these activists struggled to find some tool to thrust political debate over women's position into the core of governmental institutions. The device they fastened on was the voting right. Activists believed that by acquiring the franchise, they could inject their discourse into public fora and eventually affect political deliberation so as to produce laws capable of transforming the way men treated women in the context of marriage, employment, and myriad other situations. To them, the voting right was not only directly connected to speech outside official institutions, but also a way of projecting their concerns directly and materially into the halls of the government. Thus, they hoped it would someday produce more than rhetorical changes.[227] By the end of the Civil War, what began as a general women's rights movement, of which claims to suffrage were but one part, became a *suffrage* movement, where the enfranchisement of women became the key to beginning the process of eroding the whole complex of gender domination.[228]

B. *From Participation to Betrayal: The Impact of War and Reconstruction*

The Civil War and the Reconstruction that followed profoundly affected the women's movement. With the war came more opportunities for women to enter into activities outside the domestic sphere. These opportunities raised activists' expectations so that they believed women might obtain the franchise in the war's aftermath, but this was not to be. Suffragists discovered that their needs and goals would be sacrificed to political expediency. Just as African-Americans found that their enfranchisement would not be effectuated after the Civil War unless it benefited the strategy of the ruling elite, women learned that their claims to suffrage would be repudiated because giving women the vote did not promote the interests of those who controlled the national government. Thus, women's patriotism and work for the war effort was not a means to liberation from a subordinated status. The bitterness that resulted from this lesson broke the suffrage crusade in half, changed the theoretical basis

226. *See generally* Elizabeth Cady Stanton, *How Man Legislates for Woman*, *reprinted in* Rakow & Kramarae, *supra* note 216, at 81 (describing the inadequacy of representation of women's interests).

227. *See* Buhle & Buhle, *supra* note 104, at 89–90.

228. *Id.*

upon which women argued for the vote, and injected elements of racism, nativism, and classism into the movement that lingered into the Twentieth Century.[229]

1. Civil War and the Woman's Movement

By 1860, the impending Civil War made it difficult for even the most committed suffragists to focus all their efforts on the social crusade they had launched.[230] Women like Lucretia Mott, Elizabeth Cady Stanton, Susan B. Anthony, and Lucy Stone continued their involvement in abolition and other causes even as women's rights came to dominate their thinking. They decided to call a moratorium on suffrage activism until the war was over, judging that few women would work on a cause solely devoted to

229. *Compare* Elizabeth Cady Stanton, Speech to the American Anti-Slavery Society (1860) *in* DUBOIS, CORRESPONDENCE, *supra* note 127, at 78–85 (calling for universal suffrage) *with* Parker Pillsbury, *Educated Suffrage*, 1 REVOLUTION, June 18, 1868, No. 24, 376, 377–78, 388 (calling for a restriction of the suffrage to only educated, literate voters, after controversy arose over the Reconstruction Amendment). *See also* BUECHLER, *supra* note 217, at 142–43. The debacle of Reconstruction also sowed the seeds for the further exclusion of African-American women from full participation in the suffrage cause. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 64–68 (1984) (discussing tensions surrounding the Fifteenth Amendment).

To the extent that the history of woman suffrage has been studied and written about, the focus has been on the mainstream movement and has almost ignored women of color. There are complex reasons for this historical silence. One factor masking the participation of Black women was the presence of slavery in the South before the Civil War and the pressures that the historic Southern hostility toward political rights for Blacks put on the suffrage movement to exclude African-Americans from its ranks. Another factor was the patent and latent racism, classism, and nativism of many of the women enlisted in the suffrage cause. Nonetheless, the movement itself was first born out of an alliance between those wishing to emancipate slaves and those wishing to emancipate women. In the aftermath of the Civil War and the period of the conservative turn of American society the interests of women and African-Americans were put in increased competition by dominant political forces over the issue of the voting right. *See* DAVIS, *supra* note 60, at 70–86, 110–25. In response, African-American women formed their own suffrage organizations after the Civil War and worked tirelessly for the causes of rights for Blacks and for women. While it is beyond the scope of this Article to provide a discussion of the history of Black women in the suffrage crusade, significant works showing the contributions of women of color to the suffrage movement have been published. *See, e.g.*, GIDDINGS, *supra* (recounting the history of Black women in America from the 1700s to the present); BARBARA HOLKERT ANDOLSEN, DAUGHTERS OF JEFFERSON, DAUGHTERS OF BOOTBLACKS (1986) (generally describing racism in the American feminist movement); GERDA LERNER, BLACK WOMEN IN WHITE AMERICA (1972) (documenting a history of African-American women); *see also* MARY CHURCH TERRELL, A COLORED WOMAN IN A WHITE WORLD (1940) (an autobiography of one of the most prominent African-American suffragists).

230. *See* Buhle & Buhle, *supra* note 104, at 13–16.

female emancipation during wartime.[231] Although the yearly conventions of the previous decade ceased,[232] the movement's leaders soon embarked on another form of organization apart from the women's convention designed not only to protect the limited gains that had been made, but, more importantly, to capture the war fervor of average women and harness it for female emancipation.[233]

The Civil War made women's activities outside the home not only respectable, but also patriotic.[234] While men served away from home, women were needed to write to soldiers in the field, to form hospital and sanitary units, to act as nurses, to make and send bandages and other supplies to the front, and to work in traditional male occupations. The federal government's need for women's work created a window of opportunity that suffrage leaders were determined to exploit. They hoped to take advantage of the opportunity by interesting women newly experimenting with activities outside the home in suffrage as an issue and by enlarging public acceptance of a less traditional role for women.[235] However, the contributions that Northern women could make to the war effort were not just material — they were also political.[236] The victorious Republican party and abolitionists used women suffragists to promote key features of their own political agendas.[237] For the first time, women's involvement in public affairs was welcomed by the party in power.[238] To capitalize on all these conditions, Stanton and Anthony organized the

231. *See* 2 STANTON ET AL., *supra* note 4, at 50.

232. 1 CAMPBELL, MAN CANNOT SPEAK, *supra* note 22, at 49.

233. *See* Matilda Joslyn Gage, *Woman's Patriotism in the War, in* Buhle & Buhle, *supra* note 104, at 195–97 (describing women's war activities).

234. *Id.;* FLEXNER, *supra* note 10, at 107–08; 2 STANTON ET AL., *supra* note 4, at 1.

235. *See* Buhle & Buhle, *supra* note 104, at 14; ELIZABETH JANEWAY, WOMEN: THEIR CHANGING ROLES 61 (1973).

236. *See* FEMINISM AND SUFFRAGE, *supra* note 161, at 54; KUGLER, *supra* note 169, at 24–25.

237. In the early days of the war, women in the League lobbied for emancipation of the slaves. They argued that the war's bloodshed was senseless if not expended for a higher moral goal than preventing secession. After Lincoln signed the Emancipation Proclamation, they pushed to have emancipation extended to all states in the Union, not just those of the Confederacy. In 1863, in the closing days of the war, it was they who the leading Radical Republicans gave the task of collecting hundreds of thousands of signatures for presentation to Congress supporting the proposed Thirteenth Amendment, which would enshrine emancipation in the Constitution itself. *See* Buhle & Buhle, *supra* note 104, at 15, 193–94; FEMINISM AND SUFFRAGE, *supra* note 161, at 53–55.

238. *See* 2 STANTON ET AL., *supra* note 4, at 50–54.

Women's National Loyal League in 1863[239] and embarked on a series of projects to support the war effort. The League became a great success — it eventually had over 5000 members[240] — and was instrumental in the formation of the Sanitary Commission, which did much to reduce Northern casualties.[241]

At the same time that the exigencies of war were creating new opportunities for women, a division in suffrage forces was developing that emerged full blown only later in the period of Reconstruction.[242] Early in the movement during the pre-Civil War years, activists like Stanton and Anthony pursued a vision of female emancipation that was founded in the notion that women were individuals with the same human character as men and with the same claims to rights as men.[243] Their arguments constituted a prototypical form of equal rights feminism which appealed to liberal conceptions of political participation.[244] In contrast, later suffragists like Antoinette Blackwell Brown, Lucy Stone, and Julia Ward Howe accepted the notion of women's special nature and unique fitness for the family.[245] They made arguments for woman suffrage designed to resonate with republican notions of political community,[246] believing that women had special contri-

239. *See* Memoranda from Elizabeth Cady Stanton & Susan B. Anthony to Loyal Women of the Nation (May 14, 1863), *in* Buhle & Buhle, *supra* note 104, at 198; *see also id.* at 193–94 (describing the two principal events that led up to the League's creation).

240. *See* FLEXNER, *supra* note 10, at 110.

241. The most significant vehicle for Northern women's participation in war time activities was the Sanitary Commission, which was vital to the Union effort as its activities resulted in fewer Union mortalities. Its work was supported by over 7000 local societies in the West and North. It provided nursing services, set up hospitals and convalescent homes, searched for missing soldiers, furnished supplies, and provided consistent auxiliary logistical support for the Union army. Women made up its rank and file and provided some of its most important leaders. Women also raised more than $50,000,000 to support its efforts. LERNER, AMERICAN HISTORY, *supra* note 99, at 93; *see also* FLEXNER, *supra* note 10, at 106–07; 2 STANTON ET AL., *supra* note 4, at 13–18 (crediting women with raising $92,000,000 to support the Commission). For a discussion of how one woman's war time experience sensitized her to woman suffrage, see J. Christopher Schnell, *Mary Livermore and the Great Northwestern Fair,* 4 CHI. HIST. 34 (1975) (describing the war work of Mary Livermore, who became a prominent midwestern suffragist).

242. *See supra* text accompanying note 229.

243. That women were human beings with the same claims to moral and human worth as men was the theme of Stanton's historic speech at Seneca Falls. *See* Elizabeth Cady Stanton, *Address Delivered at Seneca Falls*, *in* DUBOIS, CORRESPONDENCE, *supra* note 127, at 28–35.

244. *See* KRADITOR, IDEAS, *supra* note 19, at 43–52.

245. *See* Rakow & Kramarae, *supra* note 216, at 49.

246. *See* DuBois, *Radicalism*, *supra* note 46.

butions to make to public virtue due to their superior moral qualities and altruistic world views. In a sense, this group's philosophy comprised a nascent difference feminism.[247] When the propriety of divorce became the subject of debate at the Tenth National Women's Rights Convention in 1860, these two approaches came into particular tension over the legitimacy of marriage and the family.[248] These matters arose again in the aftermath of the war and contributed to a schism between suffrage forces.[249] During the war, however, suffragists put aside their differences and concentrated on using their contributions to the war effort to establish women's entitlement to political rights.

When Reconstruction began in earnest, it seemed to suffragists that the voting right was due as a fitting thanks for the efforts of American women and as an appropriate pay-back to political allies who had performed as promised.[250] These expectations were disappointed when leaders of the new Republican Party[251]

247. For a discussion of the way the equality and difference themes intertwined with and paralleled each other, see COTT, MODERN FEMINISM, *supra* note 16, at 18–20.

248. For a record of the debates, see 1 STANTON ET AL., *supra* note 4, at 716–35. Stanton argued that the institution of marriage ought to be separated from its religious origin and viewed as a simple civil contract that could be dissolved. Understood on that basis, divorce ought to be an option freely open to women and the states ought to reform their laws to make it more available. *Id.* at 716–22. In contrast, Brown and many of the male abolitionists also active in the women's movement conceived of marriage as a divine and eternal institution, one not to be sundered by human laws. For an expression of this viewpoint, see the remarks of Antoinette Blackwell Brown, *id.* at 724–28; KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST 137–41 (1988). Wendell Phillips was so upset over the controversy that he made a motion to remove all remarks relating to marriage and divorce from the record of the convention. The motion was defeated. *Id.* at 139.

249. *See infra* text accompanying notes 322–33.

250. BARRY, *supra* note 248, at 54–55.

251. The Republican Party of the Civil War and Reconstruction should not be confused with those Jeffersonians who adopted the descriptive label "Republican" for their political views during the founding era of the nation. *See* MALCOLM MOOS, THE REPUBLICANS: A HISTORY OF THEIR PARTY 6 (1956). Neither should it be associated with Henry Clay's National Republicans. *Id.* The Republican Party of the Civil War was a new political association. Between 1836 and 1848 the Whig and Democratic parties dominated the American political landscape. *See* GEORGE H. MAYER, THE REPUBLICAN PARTY 1854–1964, at 22 (1964). The issue of slavery, however, broke up old political patterns and was one of the factors that made the emergence of the new Republican Party possible by the mid-1850s. *Id.* at 22–27. Horace Greeley and his paper, the *New York Tribune*, were also instrumental in promoting the Republican Party's emergence — he first editorialized using the term "Republican Party." Other factors were temperance, mercantilism, a concern for free labor and free soil, and nativism. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR

put the interests of women and African-American men in zero-sum competition. The immediate cause of this conflict was the issue of whether the Reconstruction Amendments would be used not only to enfranchise Black males, but also to enfranchise women.[252] The Republican strategy for maintaining control over the national government resulted in new federal constitutional provisions explicitly associating the word "male" with citizenship and voting for the first time.[253]

2. The Fight Over the Fourteenth and Fifteenth Amendments

When in the waning days of the Civil War it became clear that a Northern victory was forthcoming, the Republicans who controlled the Union government turned their attention to the terms under which Confederate states could re-enter the republic and the issue of what the status of the freed slaves should be. Accepting the Southern states back into the Union raised numerous issues: Black civil and political rights, the basis of congressional representation, and the Confederate and Union war debt.[254] The need for their settlement created a dilemma for the Republican Party. With Lincoln's victory and the secession that followed, the dominant political power of Southern states was ended and the influence of the Democratic Party was greatly eroded. Regardless of their ideological sympathies,[255] most Republicans wished to organize the Reconstruction in a way that would maintain their power.[256] To radicals within the Party, the

---

3–5, 9–10 (1970); ANDREW WALLACE C. RANDALL, THE EARLY HISTORY OF THE REPUBLICAN PARTY 13–16 (1960). Abraham Lincoln was the first Republican president. *See* MAYER, *supra*, at 23.

252. *See* FEMINISM AND SUFFRAGE, *supra* note 161, at 59–63.

253. *See* BUECHLER, *supra* note 217, at 139; *see also* FEMINISM AND SUFFRAGE, *supra* note 161, at 60. *See generally* Elizabeth Cady Stanton, *Manhood Suffrage*, REVOLUTION, Dec. 24, 1868 (explaining the significance of the gender restrictions in the Fourteenth Amendment).

254. *See* JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 22–33 (1965). For a general description of the complexity of these questions, see FONER, *supra* note 251, at 35–76.

255. Some were abolitionists, some moderates, and some sympathized and often voted with the Democratic party. These latter were "Johnson Republicans." *See* Earl M. Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 935 (1984).

256. The history, description, and interpretation of Reconstruction have been hotly contested by historians almost from the beginning. Although a few scholars such as W.E.B. DuBois saw a positive value in Reconstruction, until the emergence of revisionist accounts of the era the dominant view was that Congressional Reconstruction constituted a tragedy visited upon the South by vindictive Republican politicians bent on maintaining their political power, seeking revenge, or imposing

solution was a new bloc of Republican voters in the South that they believed could be obtained from the ranks of former slaves.[257] Moderate Republicans within the Party were less punitive in their attitude toward the rebels and ambivalent, if not hostile, to Black suffrage.[258] However, even if there had been unanimity in the party toward political rights for freed slaves, straightforwardly enfranchising them was a difficult task given the multifarious social and demographic factors the Thirty-Ninth Congress faced.[259] These conflicting conditions produced the Fourteenth and Fifteenth Amendments,[260] with all their benefits and limitations.

Republicans met severe challenges in drafting the new Fourteenth Amendment, and the purposes that the amendment was designed to serve were complex and varied.[261] First, the emanci-

---

unrealistic notions of race relations on society. *See Introduction* to RECONSTRUCTION IN RETROSPECT viii–xxii (Richard N. Current ed., 1969); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1–8 (1988). With the changing attitude toward race that the civil rights movement engendered in the academy came a changed evaluation of the value and effect of Reconstruction. *See* Current, *supra*, at x–xi. For a compilation of significant works designed to revise the canonical account of Reconstruction, see RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS (Kenneth M. Stampp & Leon F. Litwack eds., 1969) [hereinafter RECONSTRUCTION, AN ANTHOLOGY]. The debate over the nature, effect, and morality of Reconstruction policy has infiltrated controversies over the intended scope of the Fourteenth Amendment, where it has impacted on legal scholars. *See* NELSON, *supra*, at 3. The debate continues today. *See* Symposium, *One Hundred Twenty-Five Years of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1135 (1992); Symposium, *The Reconstruction Amendments: Then and Now*, 23 RUTGERS L.J. 231 (1992). *See generally* FONER, *supra* note 251 (providing one of the most significant recent historical works on the period); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 21–31 (1965) (describing the political forces affecting the enactment of the Fifteenth Amendment). It is a matter of some dispute among historians whether humanitarian concerns or desire for party power dominated the motivations of congressional Republicans in enacting key pieces of Reconstruction legislation. *See, e.g.*, LaWanda Cox & John Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, *in* RECONSTRUCTION, AN ANTHOLOGY, *supra*, at 156 (discussing the difficulty of ascribing motives to the members of the Reconstruction Congress).

257. *See* FONER, *supra* note 251, at 66, 178, 252.

258. *See* Derrick Bell, *Reconstruction's Racial Realities*, 23 RUTGERS L. J. 261, 262 (1992).

259. *See* JAMES, *supra* note 254, at 55–66.

260. U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

261. The Fourteenth Amendment was the "peace treaty" designed to bring the Confederate states back into the Union. It was crafted from a variety of sources, and it attempted to effectuate a number of different goals. Section 1 defined United States citizenship explicitly for the first time and created the possibility for federal protection of certain individual rights; § 2 changed the basis of representation to

pation of the slaves coupled with eventual re-entry of the Con-

---

reflect the freeing of slaves and the Southern states' re-entry to the Union; § 3 contained the provisions designed to exclude Confederate leaders from public office; and § 4 addressed the Civil War debt.

The actual process by which the Fourteenth Amendment was produced by the Thirty-Ninth Congress is intricate and confusing. When it convened in December of 1865, members introduced myriad proposals designed to effectuate a variety of policies. Some were contained in suggested legislation, others were presented as possible amendments to the Constitution. In the midst of these activities and events, a Joint Committee on Reconstruction was constituted of members of the House and Senate and charged with the duty to make proposals for Congressional Reconstruction. The overarching purpose of the Committee was to wrest control of Reconstruction from President Andrew Johnson and place it in Congress. By April of 1866, the Committee combined a variety of different proposals in various sections of a proposed Fourteenth Amendment. The most important of these were § 1 and § 2, although the question of Civil War debt was also controversial. For a step-by-step description of the drafting of the Fourteenth Amendment, see JAMES, *supra* note 254. The final text of the Fourteenth Amendment as enacted reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Section 3. No person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
>
> Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or eman-

federate states into the Union had the potential to change the delicate balance the framers of the Constitution had struck over the question of the basis for each state's representation in Congress and its resulting power in the Electoral College.[262] Originally under Article I, section 2 of the Constitution, slaves counted as three-fifths of a person for calculating a state's authorized number of House representatives.[263] With the cessation of hostilities, Republicans were faced with the galling possibility that, because the slaves had been freed and now might be counted as whole persons, the rebelling Southern states could increase their power in Congress after their restoration to the Union because they would be entitled to more representatives than before.[264] Moreover, if the voting rights of the freedmen were not secured and protected by some means, those additional seats would inevitably be held by Democrats.[265] Republicans feared that Southerners would ally with Northern Democrats to control the Congress.[266] Thus, only a few short years after winning the War, Republicans faced the possibility that Southerners could snatch victory from them by political means.[267]

One solution was immediately to enfranchise and protect freed slaves, whose voting power would presumably neutralize that of Southern whites loyal to the Democratic party.[268] Additionally, Republicans could promote a Republican majority in the South by coupling the slaves' enfranchisement with the disen-

---

cipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

262. This was a result of the effect of the Thirteenth Amendment on the representation provisions of Article I, § 2, cl. 3 of the Constitution. *See* NELSON, *supra* note 256, at 46.

263. U.S. CONST. art. I, § 2, cl. 3.

264. *See* DAVID DONALD, THE POLITICS OF RECONSTRUCTION 1863–1867, at 17 (1965) [hereinafter DONALD, THE POLITICS]; JAMES, *supra* note 254, at 22–23.

265. Rebelling Southerners were overwhelmingly loyal to the Democratic Party. In contrast, it was assumed that freed slaves would be faithful to the Republican Party. *See* DONALD, THE POLITICS, *supra* note 264, at 17; FONER, *supra* note 251, at 31–32.

266. *See A Plain Statement*, CHI. TRIB., Aug. 5, 1865, at 2. This was a fear as early as 1862, when the Democratic party gained control of New York, Pennsylvania, New Jersey, and Indiana and dramatically increased its number of representatives in Congress. *See* DONALD DAVID, CHARLES SUMNER AND THE RIGHTS OF MAN 88 (1970).

267. *See* NELSON, *supra* note 256, at 46–47.

268. *See* JAMES, *supra* note 254, at 31.

franchisement of those who had participated in the rebellion.[269] However, many saw a federal policy disenfranchising the rebels as too great an intrusion on a state's prerogative to determine eligibility for the ballot.[270] Moreover, virulent racial prejudice in Union states made directly giving African-Americans the vote politically inexpedient.[271] A double standard regarding race relations prevailed in the nation after the war. While many Northerners believed it was a form of just retribution to force Southerners to cede the ballot to those they had previously enslaved, most were extremely hostile to the notion of giving the vote to Blacks in their own states.[272] Thus many Republicans were not willing to extend the franchise to Blacks unless it could be done under conditions that would both promote the dominance of their party and maintain the status quo of race relations in the North.[273] What the drafters of the Fourteenth Amendment searched for to relieve this impasse was a way to tie the basis of representation to voting in a race-neutral manner, one that would indirectly punish Southern states for refusing to allow African-Americans to vote by reducing their entitlement to political representation proportionally.[274] The demographics of race in the United States at the time of the Civil War made this strategy possible. Southern states contained almost all the African-Americans in the country.[275] Using race-neutral language to reduce a state's representation because it denied the franchise to a group of males otherwise eligible to vote would presumably hit

269. There were so few white Loyalists in the South that, if rebels were disenfranchised and kept from office without freed slaves receiving the vote, there would hardly be enough persons eligible to participate in governance for government to function. *See* DONALD, THE POLITICS, *supra* note 264, at 17. Section 3 of the proposed Fourteenth Amendment disenfranchising rebels from voting was deleted from the final version in favor of a compromise that prevented rebel leaders from holding office. *See* JAMES, *supra* note 254, at 128–31.

270. *See* JAMES, *supra* note 254, at 106–07. Some Republicans also believed that a punitive approach to Southern whites would preclude their party from gaining adherents among former Confederates in the future. *See* RICHARD H. ABBOTT, THE REPUBLICAN PARTY AND THE SOUTH, 1855–1877: THE FIRST SOUTHERN STRATEGY 51, 79–80 (1986).

271. *See* FONER, *supra* note 251, at 222–24, 226.

272. *See* James, *supra* note 254, at 61.

273. *See* ABBOTT, *supra* note 270, at 55.

274. *See* JAMES, *supra* note 254, at 67–80.

275. In 1870 there were approximately 4,421,000 Blacks living in the South as compared to approximately 460,000 living in other parts of the United States. *See* CENSUS, HISTORICAL STATISTICS, *supra* note 11, at Series A95–122, 11–12.

Southern states the hardest, since it was assumed that the Southern states would continue to deny the vote to former slaves.

Given the benefits of an indirect approach compared to the risks of one focused on African-Americans, it is not surprising that proposals for solving the representation problem couched overtly in terms of race were eventually rejected.[276] A more serious contender was an approach tying representation to "voters," not "persons," so that the basis for determining a state's entitlement to representation would be its registered voters, not its total population.[277] When this voter-counting method was coupled with a provision denying voter status to participants in the rebellion, it offered a race-neutral means of controlling the entitlement of Southern states to representation, while it simultaneously exerted pressure on them to allow Blacks to vote. However, as appealing as this strategy was, it created other problems.

Just as the high concentration of Blacks in the South was a factor affecting the options for drafting the Fourteenth Amendment, so was the distribution of women throughout the country. Women (who were not voters) were unevenly spread across various regions.[278] If the basis of representation were changed to "voters,"[279] Eastern states with higher proportions of women to men in their general populations would lose representation to states with fewer women, disrupting the balance of sectional power and making the ratification of any amendment based on "voters" unlikely. These demographic realities put pressure on the Joint Committee on Reconstruction[280] to find a second race-neutral means for achieving their goals.[281] Gender provided the answer. Section 2 of the proposed new Fourteenth Amendment dealing with the representation problem determined entitlement to representation by reference to "persons," thus including women in a state's total count, so that the regional balance of power among the former Union states was preserved. It then specified that any state refusing voting rights to *male* citizens who had not participated in the rebellion — read "Black males" — should

276. *Id.*

277. From the beginning of the Thirty-Ninth Congress through the final passage of the Fourteenth Amendment, race-based language vied with terminology keying the representation on voters. *See* JAMES, *supra* note 254, at 55–80, 91–116.

278. *See* FONER, *supra* note 251, at 252.

279. *See Amend the Constitution*, CHI. TRIB., Oct. 10, 1865, at 2.

280. *See supra* note 261.

281. *See* FONER, *supra* note 251, at 256.

have its entitlement to representation proportionally reduced.[282] This preserved a state's prerogative to determine voter eligibility and maintained the sectional balance between Union states, while it avoided an increase in Democratic power in Congress.

As important as the representation problem was, the Fourteenth Amendment was not enacted to solve it alone. From the beginning of the Thirty-Ninth Congress, a variety of goals produced myriad proposals that had an impact on the omnibus measure the new amendment finally became.[283] Aside from being the "peace treaty"[284] that Republicans intended to govern Southern states' re-entry to the union and a first weak attempt at moving toward voting rights for African-Americans,[285] the Fourteenth Amendment was also designed to establish the general principle that citizenship was a federal, as well as a state, phenomenon[286] and to create the possibility of federal protection for individual rights.[287] These goals found their expression in section 1 of the Amendment with its references to "privilege or immunities," "due process," and "equal protection."[288] The differing

---

282. Section 2 of the Amendment reads as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in anyway abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

283. *See* NELSON, *supra* note 256, at 40–63; *see also* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–91 (1986) (detailing the evolution of § 1 of the Fourteenth Amendment).

284. *See* JAMES, *supra* note 254, at 21–22.

285. *Id.* at 110–11.

286. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 115–21 (1960).

287. The intention of the Fourteenth Amendment's framers regarding federal protection of individual rights against state intrusions is even today a point of keen controversy between constitutional scholars, who often focus on that intent to settle questions over the incorporation doctrine. *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1218–59 (1992).

288. The section reads:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

purposes of the first two sections of the Fourteenth Amendment resulted in a constitutional provision whose internal structure was confusing, if not contradictory.[289]

The ambiguities of the Fourteenth Amendment aside, the explicit association of the word "male" with citizenship and voting for the first time in American constitutional history was a great setback for the woman suffrage movement. Robert Dale Owen, Indiana representative and son of the socialist reformer, leaked news of the new amendment's emphasis on gender to the woman suffrage leadership.[290] Elizabeth Cady Stanton immediately recognized the language contained in section 2 of the proposed draft as a problem for the efforts of women to obtain suffrage through state legislation.[291] Before the Fourteenth Amendment, the criteria for voter eligibility had been left to the states to determine.[292] Thus, any state could theoretically have taken steps to qualify women as voters.[293] The right to vote had never been federally guaranteed, even in the case of federal elections. Suffragists had believed that any national movement to control voting would enlarge, not restrict, the franchise.[294] Now, the very law which through its race-neutral language marked a step toward political rights for African-American men imposed new barriers to the voting rights and status of women. If states were not to be forced to give women the vote by federal action,

---

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV (1868). See *supra* text accompanying notes 77–85 for a general discussion of the impact of federalism on the voting right.

289. *See* FONER, *supra* note 251, at 257.

290. *See* 2 STANTON ET AL., *supra* note 4, at 91.

291. *Id.;* STANTON, EIGHTY YEARS, *supra* note 104, at 243–44. For an analysis of the impact of the Reconstruction Amendments on women's attempt to gain voting rights and the reaction of suffragists to the amendments, see HOFF, *supra* note 12, at 147–49.

292. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. amend. XII.

293. As Theodore Tilton wrote in the *New York Independent*:

> [T]he Constitution has never laid any legal disabilities upon woman. Whatever denials of rights it formerly made to our slaves, it denied nothing to our wives and daughters . . . . Two bills, however, now lie before Congress proposing to array the fundamental law of the land against the multitude of American women by ordaining a denial of the political rights of a whole sex.

2 STANTON ET AL., *supra* note 4, at 93.

294. *See* FLEXNER, *supra* note 10, at 143.

suffragists wanted at the very least to keep references to gender out of the Fourteenth Amendment to defuse any argument that the Constitution contemplated restrictions on access to the ballot based on sex.

Suffrage activists demanded that reference to males be taken out of the proposed amendment, but Republicans were ultimately unwilling to accede to their requests.[295] Agreeing to suffragists' demands would propel drafters back to the race-based language that was too controversial for Northerners hostile to Black voting rights. In any event, they could not simply enfranchise all former slaves *en masse*, without impliedly enfranchising former *female* slaves.[296] To enfranchise all former slaves — including females — would go beyond the gender-neutral language of the antebellum Constitution to set the stage for the enfranchisement of all American women. Those few Republicans sympathetic to voting rights for females found giving women the vote too politically risky to tolerate — it might cost the allegiance of enough white men to offset the expected benefit of new African-American voters in the South, loyal to the Republican cause.[297] In the midst of these events, Kansas held the first state referenda on both Black and female suffrage. Its disappointing results portended the political abandonment of the women's rights movement by men in power.

Kansas represented the first test of the popularity of woman suffrage with male voters. Lucy Stone, her husband Henry Blackwell, Anthony, Stanton and others campaigned tirelessly for the female franchise there.[298] They assumed that local political officials and organizations would support their efforts be-

295. Wendell Phillips responded with his famous comment that it was "the Negro's hour" and women should stand aside. *See* FEMINISM AND SUFFRAGE, *supra* note 161, at 59.

296. Robert Dale Owen reported that when it was suggested that the word "person" be used, one unnamed representative replied: "That will never do, it would enfranchise all the Southern wenches." 2 STANTON ET AL., *supra* note 4, at 91.

297. *See* NANCY E. MCGLEN & KAREN O'CONNOR, WOMEN'S RIGHTS: THE STRUGGLE FOR EQUALITY IN THE NINETEENTH AND TWENTIETH CENTURIES 45 (1983); VICTORY, *supra* note 197, at 49. Charles Sumner, who elicited the support of the Loyal League for the Thirteenth Amendment, confessed years later that he "wrote over nineteen pages of foolscap to get rid of the word 'male' and yet keep 'negro suffrage' as a party measure intact, but that it could not be done." 2 STANTON ET AL., *supra* note 4, at 91.

298. ANDREA M. KERR, LUCY STONE: SPEAKING OUT FOR EQUALITY 124–26, 128–32 (1992); 2 STANTON ET AL., *supra* note 4, at 229.

cause Republicans controlled the state.[299] They judged incorrectly. In the beginning, the state party was merely indifferent. Later it developed an attitude of outright hostility, which was underscored by the treatment of the female vote in the Kansas press.[300] When the results of the two referenda were made known, both Black and woman suffrage lost, but voters rejected extending the franchise to females by a greater margin.[301] In the aftermath of the Kansas referendum, the woman suffrage leadership was more politically isolated than ever in the face of the impending crisis over the Fourteenth Amendment. Nonetheless, Stanton and Anthony determined not to acquiesce quietly in its passage.[302]

Stanton and Anthony refused to stop making the linkage of woman suffrage and Black suffrage an issue.[303] They raised it in the press, they raised it in women's rights meetings, they forced debate on the question in the American Equal Rights Association ("AERA")[304] gatherings, and they lobbied in Congress.[305]

---

299. 2 STANTON ET AL., *supra* note 4, at 230. *See* Letter from Elizabeth Cady Stanton to Ithaca Convention, (n.d.), *in* SOPHIA SMITH COLLECTION, *Frank Carpenter Papers*, Box 1, Folder 12.

300. *See* CARRIE C. CATT & NETTIE R. SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 54–56 (Univ. of Wash. Press 1969) (1923).

301. The referendum for woman suffrage received only 9070 votes of the 30,000 possible, while the Black suffrage referendum secured 10,843. 2 STANTON ET AL., *supra* note 4, at 229. Stanton felt that if the issues of woman suffrage and Black suffrage had not been separated both would have won. *See* STANTON, EIGHTY YEARS, *supra* note 104, at 254.

302. *See* BUECHLER, *supra* note 217, at 177.

303. *See* MCGLEN & O'CONNOR, *supra* note 297, at 46. Even Sojourner Truth, the most famous African-American suffragist of the pre-Civil War period, opposed the Fourteenth Amendment due to its focus on males. She explained her reasons for disapproving it, even as a Black woman:

> There is a great stir about colored men getting their rights, but not a word about the colored women; and if colored men get their rights, and not colored women theirs, you see the colored men will be masters over the women, and it will be just as bad as it was before.

2 STANTON ET AL., *supra* note 4, at 222. By the time of the debate over the Fifteenth Amendment, Sojourner Truth had become more disturbed by the racist strain she perceived in the opposition of radical suffragists to the Reconstruction Amendments than about the exclusion of women from their protection. *See* DAVIS, *supra* note 60, at 83.

304. The American Equal Rights Association ("AERA") was formed at the instigation of Theodore Tilton to preserve the old alliance between feminists and abolitionists despite the controversy over the Fourteenth Amendment. The AERA came out of the first Women's Rights Convention held after the war. It was formed from the ranks of woman suffrage activists and Garrisonian abolitionists like Wendell Phillips, Julia Ward Howe, Lucy Stone, Susan B. Anthony, Elizabeth Cady Stan-

To support these efforts, they initiated a petition drive designed to produce hundreds of signatures against "male suffrage."[306] When it became evident that no changes in the Amendment would be forthcoming,[307] they actively campaigned against its passage.[308] Nonetheless, the Amendment was ratified in 1868. The bitterness engendered by the Fourteenth Amendment grew when Republicans decided to push for another measure to better protect the voting rights of Black males. This was the Fifteenth Amendment, finally and expressly prohibiting race-based limitations on the franchise.

The Fifteenth Amendment[309] involved political puzzles, compromises, and dilemmas as complex and intractable as those

---

ton, Lucretia Mott, and Henry Beecher. At a superficial level, the AERA was committed to the notion of universal suffrage, the belief that voting was a basic human right to be accorded to all without regard to race, gender, or creed. This conception was expressed within the context of the AERA by the argument that since the slaves had been freed but were without formal political rights, their condition paralleled that of women, who also were nominally free but deprived of full status as citizens. The AERA failed in its mission to hold together the abolitionist-feminist alliance. The theoretical unity between the claims of women and freed slaves could not be sustained in the face of the proposed Fourteenth Amendment. This put a strain on the already conflicted membership of the AERA that it could not withstand. *See* Buhle & Buhle, *supra* note 104, at 16–20.

305. *Id.* at 18.

306. *See* Letter from Elizabeth Cady Stanton to the Editor of THE STANDARD (Jan. 2, 1866), *in* PAPACHRISTOU, *supra* note 164, at 49.

307. Political abolitionists had always viewed the women's movement as a liability and many were now powerful in the Republican party. Their disapproval of the attitude of Stanton and others toward divorce planted the seeds of division in suffrage forces as early as 1860. *See infra* text accompanying notes 322–33. Many of these same men had been critical of the feminist orientation of the Loyalist League and had no intention of enlisting in the woman suffrage cause after the Civil War. As early as 1865, Wendell Phillips rejected Stanton's suggestion that abolitionists and women's rights activists should join forces to work for Black and female suffrage together. Phillips judged that recalcitrant Republicans could be convinced to support Black male suffrage on the grounds of party strategy and pure political expediency, but that linking African-American voting rights with women's voting rights would alienate them altogether. *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 161, at 54–55; JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 40–41 (1964).

308. ANNE F. SCOTT & ANDREW M. SCOTT, ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE 15 (1982).

309. The Fifteenth Amendment reads as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

of the Fourteenth Amendment. The goal was the same — maintenance of Republican control over the national government — but the political terrain had changed.[310] Although the 1866 elections had seemed to show reasonably strong constituent support for the manner in which Congress was handling Reconstruction, by 1867, Democrats made significant inroads on Republican party strength in Northern and border states by stirring whites up over Black suffrage.[311] Soon, Republican political control was in jeopardy in the North, and the Republicans were forced more explicitly to protect the suffrage rights of African-Americans in order to pick up key new Black voters in Northern states.[312] Thus, Republicans were in no mood to support woman suffrage when they drafted the Fifteenth Amendment — that might cost them even more white male voters in the North. Thus, in drafting the Fifteenth Amendment, they refused to prohibit state restrictions imposed on the franchise on the basis of gender.[313]

The experience of being excluded from two political deals involving suffrage by the very men they had helped in the past deeply embittered Stanton and her supporters. As they had done with the Fourteenth Amendment, Stanton and Anthony began actively to campaign against the Fifteenth Amendment in their paper, *The Revolution*,[314] and elsewhere. More importantly, Stanton changed the ideological basis of her arguments for woman suffrage. Having been precluded from political alliance with Black males, she issued a series of racist statements designed to show that Republicans had staked their political fortunes on the wrong group. In the future she would attempt to appeal to the ruling stratum in American society by arguing that their interests were better served by giving the vote to educated

310. *See* FONER, *supra* note 251, at 263.

311. *See* GILLETTE, *supra* note 256, at 32–33.

312. *Id.* at 71.

313. Like the Fourteenth Amendment, the Fifteenth Amendment reflected the needs of the Republican party and the white elite more than that of Black or other Americans in a subordinated position. Thus, it was not drafted affirmatively to require that Blacks be given the vote, nor were other restrictions on the franchise such as poll taxes, literacy tests, and property qualifications prohibited. State prerogatives were left intact so that Northern ruling groups could selectively disenfranchise those they wanted to exclude from power, like Asians and Irish immigrants. *Id.*; *see also* FONER, *supra* note 251, at 447–49.

314. *See, e.g., Fifteenth Amendment Celebrations, reprinted in* Rakow & Kramarae, *supra* note 216, at 67 (describing the response of radical suffragists to the new amendment).

women rather than to Black and immigrant men.[315] Arguments for woman suffrage based on principles of abstract justice gave way in her thinking to the demands of *realpolitik* — if the Republican party was only willing to end the domination of subordinated groups when that served its goal of maintaining power, she was ready to appeal to its crude self-interest.

Stanton's emergent hostility to Black male voters cannot be condoned, but it can be explained. At a psychological level, it reflected her sense of abandonment and betrayal by Republicans, abolitionists, and men like Frederick Douglass whose interests she had fought for throughout her life.[316] From her perspective, the unwillingness of so many in the reform community to see the fortunes of freed slaves and women in anything other than a zero-sum relationship placed women in a position where they were forced to fight for survival.[317] If she had to choose between votes for Black men and votes for women, she would choose the latter.[318] However, Stanton's attitudes toward Black male suffrage were not just a reflection of her feelings of betrayal, abandonment, and desperation. They also expressed her judgment that men and women were engaged in a political struggle that race could not transcend.[319] Stanton expected the new voters created by the Republican party's Reconstruction strategy to be just as opposed to woman suffrage as their white counterparts.[320] One tragedy of the Reconstruction debacle was that it acted as a factor promoting the eventual exclusion of African-American women from the mainstream suffrage movement, along with other pressures that would reorient the crusade generally away from its human rights perspective to one focused on

315. *See* 2 STANTON ET AL., *supra* note 4, at 353–55.

316. *See generally* Elizabeth Cady Stanton, Address at the American Equal Rights Association First Annual Meeting (May 9, 1867), *in* 2 STANTON ET AL., *supra* note 4, at 188–90 (describing "male" suffrage as another form of class legislation).

317. *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 161, at 103.

318. *See* ROSSI, *supra* note 102, at 46; *see also* Letter from Susan B. Anthony to Martha Coffin Wright (June 13, 1872), *in* SOPHIA SMITH COLLECTION, *Garrison Family Papers*, Box 45, Folder 1105.

319. She believed that, if nothing else, men's sexual exploitation of women created conflict between the genders. DUBOIS, CORRESPONDENCE, *supra* note 127, at 94; *see also* DUBOIS, FEMINISM AND SUFFRAGE *supra* note 161, at 175; Elizabeth Cady Stanton, *Women and Black Men*, 3 REVOLUTION, Feb. 4, 1869.

320. Letter from Elizabeth Cady Stanton to Wendell Phillips (Dec. 26, 1865), *in* 1 Stanton & Blatch, *supra* note 195, at 109–11; *see also* STANTON, EIGHTY YEARS, *supra* note 104, at 255–56.

expediency.[321]

3. Schism

The disappointments and tensions of the Reconstruction acted synergistically with the latent conflicts within the suffrage movement to cause a schism in 1869 that would not be repaired until the 1890s.[322] The occasion of the rupture was an AERA meeting at which former abolitionists called for Stanton's and Anthony's expulsion from the group. Soon after this event, Stanton, Anthony and other women associated with a more radical brand of activism formed the National Women Suffrage Association ("NWSA" or "the National"), which was dedicated to pursuing a federal strategy.[323] Women like Lucy Stone and Julia Ward Howe,[324] who had sided with male abolitionists over the Reconstruction Amendments controversy, opposed the NWSA.[325] Reconstruction policy was not the only point of disagreement between these groups — a radical critique of marriage, a focus on individual rights, a willingness to discuss birth control and sexuality, a curiosity concerning socialism and the laboring classes, and a growing antipathy to religion were all attitudes associated with the NWSA. These attitudes combined to alienate the "Boston" bloc of suffragists.[326]

Soon after the AERA meeting, Stone's group split off as well, took the name American Women Suffrage Association ("AWSA" or "the American"), and embarked on a different course of suffrage work.[327] The AERA itself collapsed.[328] The American was more patrician, more sympathetic to organized religion, and more sanguine about separate sphere ideology than the National.[329] Men were welcome participants in its activities and it sought no fundamental reordering of sex roles or social

321. *See* DAVIS, *supra* note 60, at 70–86; *see also* KRADITOR, IDEAS, *supra* note 19, at 38–39, 140–41.

322. For an account of how this schism drove African-American women from the movement, see DAVIS, *supra* note 60, at 70–86.

323. WAGGENSPACK, *supra* note 205, at 30; *see also* GRIFFITH, *supra* note 18, at 137.

324. 1 IDA H. HARPER, THE LIFE AND WORK OF SUSAN B. ANTHONY 328–29 (Indianapolis, The Bowen-Merrill Co. 1899).

325. *See* GRIFFITH, *supra* note 18, at 138.

326. *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 161, at 192.

327. *See* Bjorkman & Porrit, *supra* note 105, at 16; *What is the Aim of the Woman Movement?*, WOMAN'S J., Apr. 9, 1870, at 108.

328. *See* DUBOIS, CORRESPONDENCE, *supra* note 127, at 91.

329. *See also* GRIFFITH, *supra* note 18, at 140–41.

institutions, like the church or the family.[330] Stone and her followers avoided critiques of women's situation that focused on power relations and male dominance in favor of analyses that attributed women's subordination to a lack of education or a want of virtue in the general society.[331] The American saw the feminine element as under-represented in politics and sought the vote to bring womanly values into public life in an effort to effectuate a more healthy balance between the masculine and the feminine in government. They wanted the vote to promote civic virtue by making the family true to its ideals, by promoting temperance, and by combating prostitution, child labor and the like.[332] They insisted on the centrality of "feminine" norms to the public sphere and they had no doubt that male aggression ought to be subjected to control through legislation.[333]

From 1869 through 1890, the NWSA and the AWSA took separate paths in the struggle to secure full citizenship for American women. At times they worked together, but more often each proceeded in isolation from the other in the sometimes overwhelmingly difficult pursuit of a goal that seemed unattainable. However, before women would become resigned to their increasing political isolation and the compromises it would bring, one further possible means of emancipation remained. In the 1870s, amid the struggles and frustrations of Reconstruction, some activists instituted a series of test cases designed to vindicate women's status as full citizens and voters. This tactic was known as the "New Departure" because it represented a whole new strategy departing from the tactics suffragists had used in the past to convince men to give women the vote voluntarily. Eventually this strategy would bring women before the Supreme Court of the United States seeking vindication of their rights.

---

330. ALICE S. BLACKWELL, LUCY STONE: PIONEER OF WOMAN'S RIGHTS 216–17, 225 (1930); *see also* DAVID MORGAN, SUFFRAGISTS AND DEMOCRATS: THE POLITICS OF WOMAN SUFFRAGE IN AMERICA 16 (1972).

331. *See* O'NEILL, *supra* note 119, at 24.

332. *See* FLEXNER, *supra* note 10, at 97. These characteristics have often caused historians to describe the AWSA as bourgeois, not radical in outlook. MCGLEN & O'CONNOR, *supra* note 297, at 46. This is in some sense an inaccurate description. The women of the American Women Suffrage Association campaigned ceaselessly for women's rights from the formation of their group to the passage of the Nineteenth Amendment and beyond. *See* DuBois, *Radicalism*, *supra* note 46, *passim*.

333. *See* MCGLEN & O'CONNOR, *supra* note 297, at 56.

4. *Minor v. Happersett*[334] and the New Departure

By the mid-1870s, when women turned to the courts for relief, the political marginalization of the suffrage movement that began with the Reconstruction controversy was almost complete. Both the Republican and Democratic parties shut women out of their activities and rejected their claims to the vote.[335] The hope of refuge within the new Peoples' Party, a third party devoted to populism, proved vain.[336] Few other reformers would ally with suffrage activists. The Kansas referendum showed a lack of popular support among men for women's right to vote,[337] and the demands of political expediency underscored women's exclusion from state and federal legislative processes. The expectations raised by the Civil War had been cruelly disappointed, and the movement split in half. Thus, the courts represented the last best hope for activists to pursue their vision of women's emancipation on their own terms. Ironically, the new Fourteenth Amendment provided the legal basis for their claims.

While the Fourteenth Amendment connected gender with citizenship and voting for the first time, it did so in a clumsy and confusing way that did not clearly settle the question of women's political status.[338] To exploit the resulting vagueness in the federal constitutional law on voting, suffragists constructed an argument for female suffrage that they presented in Congress, publicized in their periodicals, and used in litigation.[339] This argument employed some aspects of the Fourteenth Amendment and discarded others.[340] The argument had several key parts.

---

334. 88 U.S. (21 Wall.) 162 (1874).

335. *See* Buhle & Buhle, *supra* note 104, at 213–14, 281.

336. *Id. See generally* WILLIAM A. PEFFER, POPULISM, ITS RISE AND FALL (Peter H. Argersinger, ed., 1992) (giving a contemporaneous account of the Peoples' Party and its demise).

337. *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 161, at 57.

338. This was due to the clash between its §§ 1–2 and the ambiguity over Congress's intent concerning the distinction between civil and political rights. *See supra* text accompanying notes 261–67, 283–89. *See generally* Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988) (arguing that the framers of the Fourteenth Amendment may have intended for it to reach sex discrimination).

339. Suffragists also disseminated this argument to the public by describing it in their publications. *See, e.g.*, Francis Minor, *Fundamental Rights*, REVOLUTION, Jan. 2, 1870, at 38–39 (describing the legal arguments of the New Departure).

340. Some of the legal arguments for the New Departure were suggested by the notorious Victoria Woodhull in 1871 when she presented a petition to the House Judiciary Committee. The Petition asserted that women possessed the voting right under the new Fourteenth and Fifteenth Amendments taken together with other

First, suffragists claimed that women did have a political relationship with their government, that they were and always had been "citizens." Second, they argued that the Fourteenth Amendment clarified any ambiguities regarding whether the citizenship relation existed between the federal government and the citizen in favor of federal citizenship. Then they asserted that through the Privileges or Immunities Clause of the Fourteenth Amendment's first section, the federal government had power to intervene in state prerogatives to protect basic rights of federal citizenship. Finally, they claimed that voting was such a right because it was inextricably tied to citizenship.[341] In making this latter argument, activists rejected the notion that a meaningful distinction could be made between civil and political rights. Virginia Minor, leader of the Missouri suffragists, raised all these issues when she brought a civil action challenging her state's restriction of the franchise to men.

The difficulty of the task to be accomplished by the New Departure was indicated by two decisions that were handed down before Minor's claim was determined. In *The Slaughter-*

---

constitutional principles. Her arguments for woman suffrage were both naive and complex, relying on a literal reading of only one section of the Fourteenth Amendment, together with an illogical interpretation of the Fifteenth, all buttressed with inferences drawn from the pre-Reconstruction Constitution itself. Woodhull's association with the New Departure, coupled with her unorthodox attitude toward sexuality and marriage, was so distasteful to Lucy Stone that it influenced her against the strategy. *See* KERR, *supra* note 298, at 121. For an analysis of the New Departure that characterizes it as contributing to the transformation of the woman suffrage movement from a radical to a mainstream phenomenon because it was founded on male-inspired arguments, see HOFF, *supra* note 12, at 146–50, 177. In contrast, I argue that the Court's refusal to take up women's legal claims presented through the New Departure was a significant factor forcing activists into a posture of expediency. *See infra* text accompanying notes 354–70.

341. This strategy was foreshadowed in 1866, when legislation was introduced in Congress to give women the vote in the District of Columbia on the theory that Congress had the power to enact it because women were, and always had been, citizens. Although the measure did not pass, it was followed by several instances where women simulated real voting by depositing unofficial ballots in boxes set aside for them. A more aggressive approach ensued when women attempted actually to vote in several states and occasionally succeeded. Susan B. Anthony and a number of friends registered and voted in Rochester, New York, with the help of a sympathetic official. Anthony was prosecuted for her action in what became an outrageous proceeding, riddled with procedural deficiencies. Due to the manipulation of her light criminal sentence by the presiding judge, Anthony lost the right to appeal and test the question of women's status under the Constitution. *See* Buhle & Buhle, *supra* note 104, at 281–82; *see also* Godfrey D. Lehman, *Susan B. Anthony Casts Her Ballot for Ulysses S. Grant*, 37 AM. HERITAGE, Dec. 1985, at 25 (providing a detailed account of Anthony's experience).

House Cases[342] the Supreme Court severely limited the Privileges or Immunities Clause of the new Fourteenth Amendment as a tool for protecting individual rights from state intrusions.[343] In *Bradwell v. Illinois*[344] it applied this restrictive interpretation to women's rights when it held that Illinois could refuse Myra Bradwell permission to practice law in its courts on the basis of her sex, because the ability to pursue a profession was not a privilege or an immunity of federal citizenship.[345] Both of these cases portended trouble for women's attempts to appeal to the Court to vindicate their entitlement to voting rights.

The case of *Minor v. Happersett* resulted from the chain of events set in motion when, in 1872, Virginia Minor applied to register to vote in the presidential election of that year in order to bring a legal challenge to Missouri's gender restrictions on voter registration. When refused registration by Happersett, the Missouri registrar, Minor claimed that she *was* eligible to vote, being over twenty-one, white, and a citizen of the United States and Missouri. When Happersett maintained that she was not eligible on the basis of her gender, Minor challenged Missouri's gender restriction under section 1 of the new Fourteenth Amendment, claiming that it violated provisions protecting the privileges or immunities of United States citizens. When Minor's case reached the Supreme Court, the Court had to rule on the issue of whether women were citizens under the new federal definition and whether the voting right was to be given federal protection through the privileges or immunities language of the new amendment.[346]

Though noting that the Constitution did not expressly define citizenship, the justices quickly dispensed with the question of women's nominal status, pointing out that at the founding of the nation all loyal, free colonists were intended to be citizens, be they male or female.[347] It also noted that a variety of federal

342. 83 U.S. (16 Wall.) at 36.

343. It did so by limiting its application to federal citizenship and by giving the incidents of that citizenship a very narrow reading, relying on references to the framers' original intent. *Id.* at 78–80.

344. 83 U.S. (16 Wall.) 130 (1872).

345. For a biography that details Myra Bradwell's fascinating life, see JANE M. FRIEDMAN, AMERICA'S FIRST WOMEN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993). For more discussion of the *Bradwell* case itself, see *infra* text accompanying notes 467–72.

346. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 163 (1874).

347. *Id.* at 166, 167.

laws were consistent with citizenship status for women. Then it turned its attention to the question of whether access to the voting right is a necessary incident of citizenship. Just as it had done one year previously in *The Slaughter-House Cases*,[348] the Court reiterated that the Privileges or Immunities Clause in the new amendment was not a source of additional, substantive rights to be given federal protection against state intrusions. Only if the framers had considered the vote a necessary incident of citizenship would it be given protection from state intrusions through the new Fourteenth Amendment.[349] In settling *this* question, the Court invoked past limitations on the franchise to justify the constitutionality of the gender restrictions before it for review, implying that the new Fourteenth Amendment did not necessarily protect political rights like voting because they had never been treated as comprising the federally protected inalienable rights of citizens.

In the Court's view, the first factor militating against an original intent to treat suffrage as a fundamental right was the delegation of authority to the states to determine voter eligibility criteria. Under Article I, section 2, clause 1 of the Constitution, states were invested with broad powers to establish standards for qualification of electors. These provisions had been interpreted to delegate to states the power to determine requirements for access to the voting right. Although the Constitution did reserve to Congress the authority to control the states' regulation of the "times, places, and manner" of electing members of Congress,[350] Congress had not exercised its power. Therefore, the extent to which the federal government could impose franchise policies by congressional legislation was not clear. That suffrage was not considered necessary to citizenship was further shown by the significant barriers to it that existed in the Colonies, and then the States, at the inception of the nation. The Court noted that at the time of the ratification of the Constitution no state permitted all citizens to vote. It then catalogued the various property qualifications for the franchise that had existed from Rhode Island to Georgia.[351] Given these widespread restrictions, it was inconceivable to the justices that the vote could have been considered

348. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 36 (1873).

349. *Minor*, 88 U.S. (21 Wall.) at 173.

350. U.S. CONST. art 1, § 4, cl. 1. However, the Constitution did not allow Congress to alter the location of choosing Senators. *Minor*, 88 U.S. (21 Wall.) at 171.

351. *Id.* at 172–73.

fundamental.[352]

The Court did not stop there. It went on to use the text of the Fourteenth and Fifteenth Amendments themselves as evidence against the notion that voting and federal citizenship were inextricably linked. Here, Elizabeth Cady Stanton's fears about the usefulness of the new amendments to the foes of woman suffrage proved well-founded. This portion of the analysis began with a query: If the states did not possess the authority to abridge the voting right under the pre-Reconstruction Constitution because the framers deemed voting fundamental, why was the Fourteenth Amendment necessary at all? Although section 1 added no new rights of citizenship to those that already existed, in the Court's view, section 2 *did* express a federal policy to impose its will on voting in the face of contrary state law — but only where males were concerned. And, if suffrage were so important an attribute of citizenship, why would the protections of section 2 only be extended to males? Moreover, if voting were an "absolute" right of citizenship, why would Congress have written the Fifteenth Amendment to prohibit only race-based restrictions on the franchise? In the Court's view, the national government's willingness to assert itself on voting policy only in limited circumstances showed that suffrage could not really be a fundamental attribute of citizenship. Thus, arguments *for* woman suffrage were turned upside down and became arguments *against* the connection between voting and citizenship, even federal citizenship. In simple but startling words, the Court concluded its opinion by holding that "the Constitution of the United States does not confer the right of suffrage upon any one"[353] and affirmed the lower court judgment that Missouri could constitutionally exclude women from the franchise, even in federal elections.

By its decision in *Minor*, the Supreme Court cast woman suffrage back to the forum of legislative institutions and popular referenda. By so doing, it destroyed the last hope of activists to transform women's condition on their own terms. Because women were now required to appeal to elites in order to succeed, the suffrage effort could not move forward without a strategic deviation from its original goal of reordering gender relations in the civil society. This would become obvious during the grueling

352. *Id.* at 173.
353. *Id.* at 178.

struggle for the vote that women embarked upon at the end of the Nineteenth Century and the beginning of the Twentieth.

C. *Compromise and Co-optation in the Aftermath of* Minor

In 1874, when the avenue of judicial intervention was exhausted, both factions of the movement were faced with the challenge of popularizing woman suffrage in order for the movement to succeed. Foreclosed from relief through the courts, women had only two paths to pursue. If a state strategy were to be followed, approval by male voters was required because the gender restrictions on eligibility to vote were usually found in the various state constitutions, and legislators believed that they lacked the power to modify such restrictions without a direct mandate from the voters.[354] Alternatively, suffragists could seek to change the federal Constitution, a process suggested by the Reconstruction Amendments themselves.[355] Both strategies required that suffragists somehow make women's political participation acceptable to men. Thus, in the period from the mid-1870s up to the passage of the Nineteenth Amendment, activists struggled to find arguments that made the women's vote palatable, to discover the strategy that would most efficiently put their cause forward, and to ascertain which political alliances to seek and which to avoid. They tried to meet these challenges in a historical period in which women had more freedom and were increasingly available to enlist in the suffrage cause.[356] Thus, the

354. Doubt over the power of state legislatures to enfranchise women by simple enactment plagued the suffrage movement, even regarding such limited forms of suffrage as provisions allowing females to vote in school and municipal elections. The Michigan Supreme Court invalidated municipal suffrage for women in 1893 on the ground that it exceeded the power of the legislature to enact it. *See* Coffin v. Board of Election Comm'rs, 56 N.W. 567 (Mich. 1893); *accord* People ex rel. Ahrens v. English, 29 N.E. 678 (Ill. 1892). For a discussion of the effect of state supreme court decisions on the suffrage cause, see generally KATHRYN A. LEE, LAW IN THE CRUCIBLE OF CHANGE: WOMEN'S RIGHTS AND STATE SUPREME COURT POLICYMAKING, 1865–1920 (1988). However, state legislatures were eventually persuaded that they did have the authority to pass laws granting women the right to vote in presidential elections without holding a referendum on the question, due to the specific wording of Article II, § 2 of the federal constitution. This became very important when in 1912 women were enfranchised in Illinois for this limited purpose. *See* CATT & SHULER, *supra* note 300, at 189–92.

355. Amendments to the Constitution can be initiated either by a vote of 2/3 of the members of both houses of Congress or upon application of the legislatures of 2/3 of the individual states and then must be ratified by 3/4 of the states, either through legislative action or state constitutional conventions. *See* U.S. CONST. art. V.

356. *See* FLEXNER, *supra* note 10, at 179–92.

claims and tactics of suffragists had to appeal *both* to the interests of the men who wielded power and influence *and* to the women who were involved in activities and organizations outside the home as never before. The need to appeal to these groups exerted pressure on suffrage forces to reformulate their goals in light of the values and beliefs of those who would determine their success.

Soon after the experience of Reconstruction and the disappointment of the New Departure, a more opportunistic set of claims began to crop up in the presentations and statements made by activists. These racist, nativist, and classist themes were designed to appeal to the vested interests of those who ran the political institutions on which franchise rights for women depended.[357] The best example of this phenomenon was the call for "educated suffrage" that Stanton made during the Reconstruction controversy and that the movement as a whole echoed from that time up to the Progressive Era at the turn of the century.[358] Educated suffrage was premised on the argument that if women were given the franchise while a literacy test was imposed on would-be voters, the number of educated white women passing the test would exceed the number of African-Americans and immigrants who could qualify to vote. The implication was that such a strategy maintained the existing political power of dominant groups in the face of significant demographic changes in the general society.[359]

While reactionary themes made suffrage more palatable to American-born white men and women, these themes vastly complicated the question of political alliances. To the extent that racist notes were sounded, they excluded African-American and other women of color from inclusion in the mainstream cru-

357. *See* KRADITOR, IDEAS, *supra* note 19, at 44–46, 52–55, 163–218.

358. An official resolution of the 1893 NAWSA Convention expressed the notion of educated suffrage this way:

> [W]ithout expressing any opinion on the proper qualifications for voting, we call attention to the significant facts that in every State there are more women who can read and write than the whole number of illiterate male voters; more white women who can read and write than all negro voters; more American women who can read and write than all foreign voters; so that the enfranchisement of such women would settle the vexed question of rule by illiteracy, whether of home-grown or foreign-born production.

4 STANTON ET AL., *supra* note 4, at 216.

359. *See* Elizabeth Cady Stanton, Address at the NAWSA Convention, Washington, D.C. (Feb. 12–18, 1902), *in* Buhle & Buhle, *supra* note 104, at 347.

sade.[360] Nativism functioned similarly to impose barriers on the active participation of immigrant women.[361] Insofar as woman suffrage became a "middle-class" issue, finding common cause with the emerging labor movement proved difficult.[362] Moreover, to court labor was tantamount to further alienating the business community, with whom woman suffrage had struggled almost from the beginning. Even more troublesome than these problems, however, was the fact that as the movement came to focus on the need to place women's political participation in a respectable light, the connection between voting and female emancipation was minimized and obscured. It would be an almost tacit promise of the mainstream suffrage crusade[363] in its later stages that by acquiring the franchise women would not upset the gender system.[364]

---

360. *See* GIDDINGS, *supra* note 229, at 123–29. As woman suffrage became more popular in Southern states, NAWSA arguments focused more on states' rights and appealed more to racial prejudices. *See* KRADITOR, IDEAS, *supra* note 19, at 163–218. Notwithstanding the barriers to their participation, there was always a significant African-American woman suffrage movement that attempted to challenge the reactionary and racist turn of the mainstream. *See generally* Rosalyn Terbor-Penn, *Nineteenth Century Black Women and Woman Suffrage*, 7 POTOMAC L. REV. 13 (1977) (describing the work of the Black woman suffrage movement and the attitudes of its leaders toward philosophic rationale for claims to the vote).

361. In the 1880s and 1890s when WASP Americans became virulently xenophobic, their attitudes affected the suffrage cause. This phenomenon was exacerbated by the belief of many suffrage leaders that immigrant men were particularly opposed to the idea of political rights for females. *See* CATT & SHULER, *supra* note 300, at 123; CLINTON, *supra* note 164, at 116–20.

362. As early as the 1860s, Stanton and Anthony had attempted to attract laboring women by sponsoring the formation of a Working Women's Association. *See The Working Women's Association, reprinted in* Rakow & Kramarae, *supra* note 216, at 105. This organization was short-lived, and women's attempts to be included in mainstream labor organizations were largely rebuffed. *See* FLEXNER, *supra* note 10, at 137. While white and upper-class women were ambivalent about whether and how to ally with female workers, laboring women often did not see the link between women's disenfranchisement and poor working conditions. However, by 1913 the Women's Trade Union League endorsed woman suffrage and working women became an extremely important part of the movement. *See* DYE, *supra* note 202, at 122–23. For a description and explanation of alliances made across class lines in the later stages of woman suffrage, see Ellen C. DuBois, *Working Women, Class Relations, and Suffrage Militance: Harriet Stanton Blatch and the New York Woman Suffrage Movement, 1894–1906*, 74 J. AMER. HIST. 34 (1987) [hereinafter DuBois, *Working Women*].

363. By 1890, the separate wings of the suffrage cause reunited and formed the National American Woman Suffrage Association. This organization would later contend for leadership with the more radical followers of Alice Paul and the Women's Party. *See infra* text accompanying notes 434–37.

364. *See* KRADITOR, IDEAS, *supra* note 19, at 96, 121–22.

From the post-Civil War period until 1890, women's indirect promise not to alter gender politics was most closely associated with the tactics of the American wing of the movement. Its members wanted to fashion arguments for women's political rights by exploiting traditional views of "feminine" essence. Not only were some more comfortable with the picture of reality that domestic sphere ideology implied, but they also believed that its tenets might be exploited to promote the suffrage cause, albeit on terms less focused on transforming conceptions of gender than on making feminine norms a part of the public domain.[365] In the post-Civil War era, women in the American faction began to push separate sphere rhetoric as a source of arguments for the female franchise. They did so by claiming that government had become imbalanced by being overly influenced by male values.[366] Allowing women to vote, they argued, would inject feminine spirituality, purity, and domesticity into the public sphere as an antidote to corruption and excessive mercantilism.[367] Moreover, voting itself would not require a change in women's traditional roles as wives and mothers but would allow them to better carry out these roles by supporting legislation that would increase civic virtue and protect home and hearth.[368] In this way, members of the American faction grounded woman suffrage in a picture of the two sexes that put them in a complementary, not an opposed,

365. Many early improvements in women's condition were achieved by exploiting the rhetoric of a special feminine essence and separate feminine sphere centered on home and family. In the first quarter of the Nineteenth Century, the push for female education gained much of its momentum from arguments designed to show that better educated women equipped with more general knowledge and more information about health, nutrition, and infant care would make better mothers. *See* 2 WOODY, *supra* note 115, at 303; *see also* PATRICIA S. BUTCHER, EDUCATION FOR EQUALITY, WOMEN'S RIGHTS PERIODICALS AND WOMEN'S HIGHER EDUCATION 1849–1920, at 15–17 (1989). These sorts of notions were critical to the female seminary movement promoted by Frances Willard. *Id.* at 307–15. The moral reform spirit which so captivated the imagination of Americans in the Jacksonian era itself can be seen as an attempt to feminize society in response to the increasing hardheadedness of an emerging market ideology by asserting norms of altruism and community beyond the confines of the family. These themes were especially important to the temperance movement. *See* Blocker, *supra* note 202, *passim*.

366. This was one of Lucy Stone's major strategies. *See* KERR, *supra* note 298, at 167.

367. *See* BARBARA L. EPSTEIN, THE POLITICS OF DOMESTICITY 4 (1981).

368. The rejection of essentialism was what differentiated so-called "domestic" or "social" feminism from its more radical counterpart. Daniel Scott Smith argues that domestic feminism represented a "significant and positive development for nineteenth century women." Smith further argues that by developing domestic feminism, women attained more power, at least within the family, than is often realized. *See* Smith, *supra* note 151, at 52–54.

relation and tried to make the movement more attractive and less threatening to the many "respectable" middle-class women who were becoming active in women's clubs and in the temperance effort.[369] In contrast, members of the National were repelled by these essentialist arguments and worried that they would ultimately backfire.[370]

The ideological division in suffrage forces parallelled their disagreement over whether focusing on the states or the federal government would more likely produce victory. By the 1870s, each group had focused on different levels of officialdom. Notwithstanding Kansas, the American forces believed that the vote could be obtained through state referenda.[371] This plan assumed that the Fourteenth Amendment did not restrict a state's right to designate criteria for voter qualification.[372] In contrast, Stanton and Anthony thought that the state strategy was too costly, uncertain, and impermanent to be effective.[373] They decided that only a federal constitutional amendment would accord women status as full citizens, so they concentrated their efforts

369. For a discussion that emphasizes the importance of women's organizations to the eventual success of the suffrage cause, see FLEXNER, *supra* note 10, at 179–92.

370. Arguments rooted in traditional notions of women's special essence and suitability for home and hearth clashed with Elizabeth Cady Stanton's individual-rights philosophy. Her speech *Solitude of Self* made before Congress in 1892 was the most famous and extreme statement of her view that women were, first of all, individuals. There she stated: "In discussing the rights of woman, we are to consider, first, what belongs to her as an individual, in a world of her own, the arbiter of her own destiny, an imaginary Robinson Crusoe with her woman Friday on a solitary island." 4 STANTON ET AL., *supra* note 4, at 189; *see also* Mercy B. Jackson, *Sex Versus Humanity*, 3 WOMAN'S J., Aug. 24, 1872, at No. 34, 272; Gail Hamilton, *Woman's Individuality*, 8 WOMAN'S J. May 26, 1877, at No. 21, 163.

371. AWSA's logic was explained by Lucy Stone this way: "[W]e cannot expect a congress composed solely of representatives of States which deny suffrage to women, to submit an amendment which their own States have not yet approved." *See* 3 STANTON ET AL., *supra* note 4, at 104.

372. MCGLEN & O'CONNOR, *supra* note 297, at 46.

373. Anthony described the National's strategy:

> [I]nstead of insisting that a majority of the individual voters must be converted before women shall have the franchise, you will give us the more hopeful task of appealing to the representative men in the Legislatures of the several States. . . . [If] Congress submits the proposition, . . . even then we shall have a long siege in going from Legislature to Legislature to secure the vote of three-fourths of the States necessary to ratify the amendment. It may require twenty years after Congress has taken the initial step, to obtain action by the requisite number, but once submitted by Congress it always will stand until ratified by the States.

See 4 STANTON ET AL., *supra* note 4, at 40.

on lobbying to get one passed.[374]

As a result of the later woman suffrage movement's conservative turn, its tendency to exclude alliances with other marginalized groups, and the inability of its factions to present a unified front, historians dealing with the crusade differ over how to characterize its nature and achievements after the Civil War.[375] Early suffrage, generally dated from 1848 to the period of Reconstruction, is associated with radical feminism, while its second stage is treated as a social crusade controlled by middle-class whites single-mindedly focused on franchise rights, but not much concerned with anything else.[376] While this characterization captures the deradicalization and co-optation that affected suffrage, it is too simplistic a description of the nature and meaning of the later stages of the movement. Even though the effort turned to conservative and traditional themes in the decades ending the Nineteenth Century, its radical elements and goals were never totally submerged.[377] Moreover, assumptions about class relations are of doubtful applicability to women's history.[378] Middle-class women's views ran the spectrum from radical to traditionalist and were not merely carbon copies of their husbands' conceptions. In the closing days of the movement, this would be underscored by the intriguing alliances made between elite, professional, and laboring women.[379] In addition, charges that the leadership of the later suffrage movement overlooked fundamentally changing gender relations neglect the fact that the "conservative" turn of the crusade — which began after the dual disappointments of Reconstruction and the New Departure and became most extreme in the reactionary period of the 1890s — was a direct product of political necessity borne of its isolation after Reconstruction and its abandonment by the courts. Finally and most importantly, such a view fails to recognize the importance of the voting right to any successful movement for the emancipation of women, no matter how conservative or radical.

374. *See* GRIFFITH, *supra* note 18, at 168–69; *see also* PAPACHRISTOU, *supra* note 164, at 105–06; Bjorkman & Porrit, *supra* note 105, at 18.

375. *See, e.g.,* DuBois, *Radicalism*, *supra* note 46 (arguing that the suffrage movement's focus on the vote had a radical dimension).

376. For instance, DuBois argues that this is Kraditor's view of the movement. *Id.* at 63. Similarly, she asserts that O'Neill and Elsthain claim that woman suffrage was ultimately traditional because it accepted women's place within the home and so failed to challenge the public/private dichotomy. *Id.*

377. *See id. passim.*

378. *See* MACKINNON, *supra* note 6, at 13–36.

379. *See* DuBois, *Working Women*, *supra* note 362, at 35–40.

As Ellen DuBois has pointed out, while many suffragists in both wings of the movement thought that the domestic sphere was uniquely feminine in character,[380] they did not believe that women should be excluded from the public arena as a corollary of that character.[381] As a result, they used the vote to challenge male control of the public forum.[382] The "dialectical relationship between public and private spheres" created by their claims "transformed their demand . . . into a challenge to the entire sexual structure"[383] because the push-pull tension between both spheres in the context of women's claims to political rights presented a new opportunity for assessing women's situation. This was a phenomenon that emerged in the early days of the crusade, continued after the Civil War, and was employed in the ultimately successful fight to enact the Nineteenth Amendment.[384] Given the condition of women in the Nineteenth Century — their distribution across class, race, ethnic, and geographic lines, their confinement in the private sphere of the family, their lack of economic independence, and their inability to obtain legal redress — organizing them for a social movement aimed at general emancipation presented special challenges distinct from other subordinated groups.[385] Violent revolt was hardly a possibility for women in the Nineteenth Century. Women needed a political crusade directed at achieving a range of goals, one that included within it means for women to enter the public sphere, to assert their personhood, to affect the terms of the public discourse, and to challenge popular assumptions about their role in direct and indirect ways. The device that provided

380. Women who used domestic-sphere ideology to argue for female emancipation were more likely to be members of the American, while those relying on individual-rights theories gravitated to the National. These distinctions were blunted when both wings of the movement came together again in 1890. The successor of these two groups, the NAWSA, became the mainstream suffrage organization, and it was this group that took on a reformist character in the period from 1890 to 1920. However, some historians claim that NAWSA merely muted the radical elements within its ranks rather than obliterating them. Moreover, as DuBois argues, there was a limit to which its apparently gradualist message could obscure the essentially radical character of women's claims to political rights. The forces causing NAWSA's turn to the right were complex, and historians contest the nature and significance of this development. *See infra* text accompanying notes 404–08 (describing the birth and development of NAWSA).

381. *See* Dubois, *Radicalism*, *supra* note 46, at 65–66.

382. *Id.*

383. *Id.* at 66.

384. *See infra* text accompanying notes 390–94.

385. *See* DE BEAUVOIR, *supra* note 37, at *Introduction*, xxxi.

radicals and reformers alike with all of these tools was the voting right.[386] Without the vote, the demand for full citizenship would not have been possible. Although access to the ballot alone would not and could not decisively change women's situation, it is difficult to see how the female emancipation movement of last century would have progressed without giving a central role to political rights. That the vote had the potential to erode the subordination of women over time, if not immediately, and that the vote was a necessary but not a sufficient condition of women's emancipation are demonstrated by the long and strong opposition of men to giving women franchise rights.

With few exceptions,[387] neither the ideological nuances of the suffrage movement nor its varying tactics produced significant results in the period from *Minor* up to the First World War. From 1874 to 1910 there were hundreds of campaigns to get the woman suffrage question before male voters by way of state referendum. Seventeen actual referenda were held, and only two were victorious.[388] Similarly, from 1878 when the Anthony Amendment was first introduced in Congress until 1914, the amendment languished even though it was presented every year and a select committee was created to study woman suffrage.[389] In 1914, when the amendment finally did emerge, it was easily defeated on the floor of the Senate. It was not until 1919 that Congress passed the Anthony Amendment and sent it to the states for ratification. Ratification took many months and numerous costly state campaigns.[390] During the period between 1874 and 1914, the tactic of using woman's sphere ideology functioned as a double edged sword in suffrage strategy. Notwithstanding the potential of domestic sphere ideology as a source for presenting a challenge to women's exclusion from political rights,[391] its use had negative effects. While the appeal to feminine stereotypes might reassure men enough to make votes for women more acceptable, this benefit carried with it a retrograde

386. *See* Katzenstein, *supra* note 7, *passim.*

387. Four Western states accorded women voting rights before World War I. These were Colorado, Idaho, Utah, and Wyoming. *See infra* text accompanying notes 409–13.

388. *See* KUGLER, *supra* note 169, at 113.

389. An amendment designed to extend suffrage to women was first introduced in 1868 but soon ceased to be a focal point of activists' concerns given the predominant position of the New Departure in radical suffrage strategy. *Id.*

390. *See* CATT & SHULER, *supra* note 300, at 341–413, 422–61.

391. *See* DuBois, *Radicalism*, *supra* note 46, at 65–66.

effect because it portended no fundamental changes in gender relations.[392] On the other hand, to the extent that there were radical implications of imposing feminine values on the masculine sphere, many men were threatened by the possibility of a real gender gap in voting and so opposed women's enfranchisement.[393] It is no accident that as arguments for female suffrage came to revolve around the moral superiority of woman and her potential for cleaning up politics and industry by the vote, business interests became one of the most significant sources of opposition.[394]

By 1890, the influence of older suffragists like Stanton and Stone was waning as a new generation of leaders came to the fore.[395] Their coming of age coincided with demographic changes that began to make the lives of many women more free, especially those of the middle- and upper-classes.[396] By the last decade of the Nineteenth Century, most states had reformed their property laws so that married women enjoyed a more independent status.[397] To be sure, there were serious legal disabili-

---

392. *See* Bonnie J. Dow, *The "Womanhood" Rationale in the Woman Suffrage Rhetoric of Francis E. Willard*, 56 S. COMM. J. 298 (1991); *Woman's Subjugation*, 6 WOMAN'S J., July 17, 1875, at No. 29, 232.

393. *See* BUECHLER, *supra* note 217, at 178, 185.

394. This was the problem presented by the alliance between suffrage and temperance forces that occurred during Frances Willard's leadership of the WCTU. It caused the liquor industry to oppose strongly woman suffrage and to engage in election fraud and bribery to affect the outcomes of various state referenda on the topic. Temperance became a women's issue because women were economically and legally dependent on men and could not easily escape the effects of alcoholic husbands. The WCTU's call for "Home Protection" stood for the proposition that women should have the vote in order to effectuate laws designed to control or prohibit alcohol in their communities. As Frances Willard put it in a manual on home protection:

> [W]e are but *transferring the crusade from the saloon to the sources whence the saloon derives its guaranties and safeguards*. Surely this does not change our work from sacred to secular! Surely that is a short-sighted view which says: 'It was womanly to plead with saloon-keepers not to sell, but it is unwomanly to plead with law-makers not to legalize the sale and give us power to prevent it.'

PAPACHRISTOU, *supra* note 164, at 92. By the 1890s the liquor lobby along with others would support a well organized and financed campaign against votes for women. *See* Blocker, *supra* note 202, at 475–76; CATT & SHULER, *supra* note 300, at 277–80. It would not take long for leaders of the suffrage movement to conclude that in some circumstances open alliance with the WCTU was too costly to allow. *See* FLEXNER, *supra* note 10, at 185.

395. *See* BUHLE & BUHLE, *supra* note 104.

396. Their freedom was purchased largely at the expense of working class women. *See* STEPHANIE COONTZ, THE WAY WE NEVER WERE 11–12 (1992).

397. By as early as 1861, thirty-one states, mostly in the North, had reformed their laws. *See* WARBASSE, *supra* note 121, at 276.

ties attached to being female that, together with rampant sex discrimination in the civil society, circumscribed women's freedom. Nonetheless, women had more control over their property, and they had achieved lessening in the restrictions on divorce.[398] As a result of the female education movement, the literacy levels of women in the United States had risen significantly, and by the beginning of the 1890s a significant number of women had college educations.[399] Labor saving innovations and devices, always more available in cities, began to lessen the amount of back-breaking work involved in maintaining a home, and for middle- and upper-class women an increase in immigrants made cheap domestic help accessible.[400] Rudimentary birth control methods became more popular in this period, and the birthrate began to decline in certain sectors of the population.[401] As the temperance movement itself demonstrates, there were generally more women who had an interest in activities outside the home, surplus time, and money.[402] Finally, large increases in the numbers of laboring women paralleled the growing independence of middle- and upper-class women.[403]

These demographic forces, together with the natural changes in leadership and the failure of either faction of the movement to make significant headway, contributed to make a reunification of suffrage forces possible. In 1890 the NWSA and AWSA discarded their differences and reunited as one group known as the National American Woman Suffrage Association

398. *See* BASCH, *supra* note 124, at 16; CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 165–76 (1980).

399. *See* LERNER, AMERICAN HISTORY, *supra* note 99, at 106–17; CLINTON, *supra* note 164, at 128–35.

400. By 1900, foreign-born women made up a disproportionate share of domestic laborers. JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM 226–27 (1982).

401. The fertility rate was as low as 4.24 in 1880 and 3.56 in 1900. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 153–54 (1976). Smith argues that these low rates show that women must have had enough power within the family to control their fertility. *See* Daniel S. Smith, *supra* note 151, *passim*.

402. *See, e.g.*, Frances E. Willard, *Work of the W.C.T.U., in* WOMAN'S WORK IN AMERICA 399–410 (Annie N. Meyer ed., Arno Press 1972) (1891) (describing the varied activities of the Women's Temperance Union).

403. In 1870 there were approximately 1.9 million women working for wages; by 1890 their number had more than doubled to slightly over four million. *See* CENSUS, HISTORICAL STATISTICS, *supra* note 11, Series D 36–45, at 72.

("NAWSA").[404] NAWSA could have combined the radicalism of Stanton's vision with the traditionalism of Stone's approach in an uneasy amalgam. The conflicts and tensions that might have developed from this marriage of opposing views were blunted, however, by the ascendancy of more pragmatic women to leadership positions and the general societal trend toward conservatism. This made the radicalism of the past too politically risky.[405] The new generation of NAWSA members had distinctly different attributes than their forerunners. They benefitted from the improvements in women's education and employment, and they were one generation removed from the pain of the Civil War and Reconstruction.[406] Most importantly, they were determined to gain the vote by whatever means they could and they tended to de-emphasize ideology in favor of organization.[407] On the positive side, this new pragmatism made it possible for them to tailor suffragist arguments to fit different regions and social groups, thus increasing its overall support. On the negative side, it fostered a continuing willingness to compromise in order to move the suffrage effort ahead. This played into the hands of reactionary elements in American society.[408]

At the same time that the movement itself was becoming more unified, the woman suffrage effort was achieving progress in specific regions of the country. The Western states had always seemed more open to political rights for women. This may be a result of the fact that females were more highly valued because women were scarce there, or a function of the practical necessity

404. FLEXNER, *supra* note 10, at 220.

405. Nothing symbolized this better than the reaction of suffrage activists to Elizabeth Cady Stanton's critique of patriarchal religion. In 1887 Stanton began work on *The Women's Bible*. It constituted an indictment of Old Testament religious doctrine and was published in two volumes in 1895 and 1898. In 1896 a resolution was introduced at the NAWSA convention designed to disassociate that organization from Stanton's position. This move was motivated by some women's fears that Stanton's views would make it difficult to attract religious women to the suffrage cause. When the resolution passed on a close vote after heated debate, Stanton withdrew from active involvement in NAWSA activities and Anthony succeeded to the presidency. *See* 4 STANTON ET AL., *supra* note 4, at 75–77.

406. *See* O'NEILL, *supra* note 119, at 147–49.

407. Carrie Chapman Catt's views about the importance of organization over ideology typify this approach. *See* ROBERT B. FOWLER, CARRIE CATT: FEMINIST POLITICIAN (1986).

408. The most extreme example of this phenomenon was the manner in which the NAWSA tailored its message to appeal to the racist position of the Democratic party in the South so that President Wilson would not lose influence in that region, should he support woman suffrage. *See* MORGAN, *supra* note 330, at 105–14.

that women have a measure of independence in the rugged conditions of the West. Some territories provided women with franchise rights.[409] When Wyoming came into the union in 1890, it entered with a constitution that afforded women suffrage.[410] Similarly, Utah allowed women to vote during its territorial days.[411] In 1893 and 1896 Colorado and then Idaho approved of woman suffrage by referendum.[412] Success in the West was not easy or consistent. Voters turned back the female franchise on two occasions in Washington state.[413] One of the most heartbreaking efforts was made in 1896 in California when woman suffrage lost by less than 14,000 votes after the liquor lobby, concerned with the connection between woman suffrage and temperance, manipulated the immigrant and working-class votes to thwart it.[414] For many years afterward, no state would approve women's inclusion in the electorate. Then, at the end of the first decade of the new century, limited victories began to replace defeats.

In 1910, in a carefully organized campaign designed to minimize the opposition of entrenched business interests, Washington state's male voters finally approved the female franchise.[415] In 1911 the earlier loss in California was forgotten when woman suffrage was sanctioned by referendum.[416] A string of victories in Oregon, Kansas, and Arizona in 1912 followed these successes.[417] By 1913 women were authorized to vote in nine states west of the Mississippi and had an impact on seventy-four electoral votes.[418] These achievements reflected growing public support for woman

409. *See* CATT & SCHULER, *supra* note 300, at 127.

410. *See* VICTORY, *supra* note 197, at app. 4.

411. However, Utah women's suffrage rights were taken away by Congress as retaliation for the continued practice of polygamy in the territory. *See* FLEXNER, *supra* note 10, at 163. When Utah became a state, woman suffrage was returned by state constitutional provision. *See* VICTORY, *supra* note 197, at app. 4.

412. *See* CATT & SHULER, *supra* note 300, at 127.

413. *See* FLEXNER, *supra* note 10, at 254–55. Woman suffrage created through legislative enactment was invalidated by court decision on two other occasions. *See* VICTORY, *supra* note 197, at app. 4.

414. *See* FLEXNER, *supra* note 10, at 224–25. According to Catt and Shuler, in California Chinese-American men were enlisted to turn out against the female franchise, and in Oregon men on railroad gangs were transported to the polls *en masse* and paid to vote against it. *See* CATT & SHULER, *supra* note 300, at 123–24.

415. *See* FROST & CULLEN-DUPONT, *supra* note 179, at 294.

416. *See* FLEXNER, *supra* note 10, at 237; VICTORY, *supra* note 197, at 77–79.

417. *See* FROST & CULLEN-DUPONT, *supra* note 179, at 294.

418. FLEXNER, *supra* note 10, at 260–61.

suffrage and an increase in NAWSA organizational expertise.[419] All of these changes — the increasing numbers of women involved in organizations outside the home, improvements in their material conditions, the reunification of the suffrage factions, and the actual attainment of franchise rights in some states — took place against the backdrop of the emergence of progressivism in American society and politics.

In the Progressive Age, the same forces that propelled mainstream America toward reaction in the 1890s also generated increasing concern for social justice. As a result, the American polity at the turn of the century exhibited conflicting trends toward both conservatism *and* democratization that affected the suffrage movement.[420] To a great extent, the upper-class nature of the original impulse to progressivism created this perplexing combination of attributes. Reform efforts that began in the 1890s were instigated by wealthy Americans and directed at corruption in government stemming from the attempts of political machines to capture and manage the votes of poor immigrants and workers.[421] These wealthy reformers were motivated as much by their distrust of the prospect of increasing political power of American laborers as they were by the iniquity of such practices.[422] The machines injected an element in government beyond the command of the rich that they wished to control. By pursuing reforms designed to make corrupt political combinations more difficult to create and manage, wealthy persons with social sensibilities could take steps to re-exert their dominant po-

419. The increasing organizational expertise of the NAWSA, which became very important in the New York campaign for woman suffrage, did not prevent a growing rift between radical and moderate activists. *See* JACQUELINE VAN VORIS, CARRIE CHAPMAN CATT: A PUBLIC LIFE 117–20 (1987).

420. In the period from 1894 to 1909 there were simultaneous "gains for the masses and more power for the classes," which occurred as an influx of immigrants challenged the cultural and political hegemony of the white protestants who had dominated American society since colonial times. DuBois, *Working Women, supra* note 362, at 234. Cheap land ceased to be readily available as the Western territories were settled, and the gap between rich and poor widened in the cities with increasing industrialization and mechanization. All of these forces created an era in which elitism and progressivism co-existed in an uneasy relation. *Id.*

421. Political machines attempted to bribe voters with money and alcohol on a regular basis in this period. *See generally* Alexander B. Callow, Jr., *The Immigrants and the Bosses, in* THE BOSSES 16 (John D. Hagar & Michael P. Weber eds., 1974) (describing the complex political interrelationship between political machines in the large cities and immigrant groups).

422. *See* DOROTHY SCHNEIDER & CARL J. SCHNEIDER, AMERICAN WOMEN IN THE PROGRESSIVE ERA, 1900–1920, at 7 (1993).

sition in American society, while at the same time they could dedicate themselves to civic virtue.[423] However, the anti-democratic character of early reform would not continue unchallenged. By the first decade of the new century, a more democratic progressivism was underway, one fueled by the increasing political power and sophistication of working-class men and women.[424] This progressive theme in American politics contributed significantly to the gradual change in public attitudes toward women's political participation. It also created the conditions for the development of a more inclusive movement, one less hostile to women of different classes, ethnic backgrounds, and races.[425] Finally, in the period between 1914 and 1916 a number of disparate elements came together against this backdrop to make the passage of a constitutional amendment prohibiting gender limitations on the franchise a real possibility.

In this period, the mainstream suffrage movement represented by NAWSA was transformed from a disorganized, somewhat moribund phenomenon to a highly efficient political association for the suffrage cause. Although the reunification of suffrage forces in 1890 had made a well-planned and coordinated effort possible for the first time, a vacuum in NAWSA leadership at the national level coupled with an almost single-minded focus on the state referendum process meant that from 1904 to 1916

423. *See* ELLEN F. FITZPATRICK, ENDLESS CRUSADE: WOMEN SOCIAL SCIENTISTS AND PROGRESSIVE REFORM 140–45 (1990); *see also* JOHN W. CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1900–1917, at 15 (1980) (discussing how "good government" groups of upper-class citizens joined in civic reform associations to ensure their authority in municipal government).

424. The period from 1897 to 1904 was one of the most expansive periods for the American labor movement. At the turn of the century, organized workers quadrupled in number. *See* David Brody, *The Expansion of the American Labor Movement: Institutional Sources of Stimulus and Restraint, in* THE AMERICAN LABOR MOVEMENT 119, 122 (David Brody ed., 1971).

425. The suffrage movement never became inclusive as that term is modernly understood, especially with regard to incorporating African-American suffragists into its ranks. The political stranglehold that the Southern states exerted over Congress interacted with the reformist strategy of the NAWSA and the racism of some of NAWSA's members to produce a policy of appeasement of Southern politicians. This policy resulted in the exclusion of African-American women from NAWSA's activities in the South and in the de-emphasis of their efforts in the North. *See* DAVIS, *supra* note 60, at 110–26. Racism became so virulent that at the 1903 NAWSA convention held in New Orleans, a serious bid was made by white supremacists to take over the organization. *Id.* at 123–25. In response, Black women organized suffrage organizations of their own. *Id.* at 127–48. Later in the Progressive Era, when the support of working women was courted (especially by militant suffragists), working Black and immigrant women encountered slightly less hostility to their involvement.

NAWSA did not address the federal amendment process.[426] In 1916 Carrie Chapman Catt became President of NAWSA.[427] She brought a unique organizational genius to bear to create a coordinated state and federal plan for bringing about the passage of a federal constitutional amendment.[428] This plan had three main parts: first, suffrage forces would work to achieve validation of the woman's vote through state referenda only in those jurisdictions likely to approve it; second, suffragists would pressure state legislatures to authorize the right of women to vote in presidential elections;[429] finally, these two strategies were to be combined synergistically with efforts to influence members of Congress to take action on a federal amendment.[430] Catt's scheme also included a willingness to tailor the suffrage message to regional and

426. *See* FLEXNER, *supra* note 10, at 267–68.

427. Catt was quintessentially middle-class, protestant and white. She came from a region of the country with no large cities and few racial minorities or immigrants, and had an almost naive faith in the powers of education and self-reliance as ameliorative social forces. In the beginning of her long public career, which eventually spanned five decades, she had a strong bias against immigrants, which was fueled in part by her belief that they were against female emancipation. She was a practical person with little patience for ideology, and it came naturally to her to effect political compromises to move suffrage ahead. While by the turn of the century Catt would become genuinely progressive and would shed her nativist attitudes as the result of work in the international woman suffrage cause, in the 1890s she had yet to perceive the incompatibility of the ideal of female emancipation with the exclusionist tactics she was prepared to employ to achieve it. As limited as Catt's world view was in the beginning of her life, over time she repudiated her nativist beliefs and became one of the premier human rights activists of the Twentieth Century. After the passage of the Nineteenth Amendment in 1920, Carrie Chapman Catt would work tirelessly toward world peace, and the 1940s would find her using her formidable influence to promote the United Nations cause. *See* VAN VORIS, *supra* note 419, at 53–54, 161, 167–219.

428. *See* FOWLER, *supra* note 407, at 143–44.

429. "Presidential suffrage" was premised on the notion that state legislators could pass legislation approving women's qualifications to vote in presidential elections only, without having to call a state constitutional convention or putting a woman suffrage referendum before voters. This strategy first succeeded in Illinois. *See* FLEXNER, *supra* note 10, at 261, 281. The plan also provided that in the South, the focus was to be on obtaining women's right to vote in primary elections because, due to the dominant position of the Democratic Party in the South, that region was essentially governed under a one party system. *See* VICTORY, *supra* note 197, at 123–24. In addition, the Democratic Party was more hostile to women's attempts to gain political rights. This was caused by its relative traditionalism on the question of gender roles and its hostility toward any effort to enlarge the franchise due to fears that such efforts would stir up demands that the voting rights of African-Americans be promoted and protected. *See* ANDOLSEN, *supra* note 229, at 67–68.

430. *Id.*

group differences[431] and the ploy of making woman suffrage a bipartisan issue, in order to avoid alienating either of the political parties.[432] Catt also received a two million dollar bequest to be used for suffrage work.[433] In addition to these factors, NAWSA was goaded to greater and more effective action by the emergence of a militant suffrage movement, representing an alliance between elite, educated, and working-class women.[434]

---

431. This was especially apparent in her willingness to appease the states' rights concerns of the Southern states. *See* FOWLER, *supra* note 407, at 142; VAN VORIS, *supra* note 419, at 161–62.

432. *See* VAN VORIS, *supra* note 419, at 82.

433. *See* CATT & SHULER, *supra* note 300, at 270; VAN VORIS, *supra* note 419, at 144.

434. *See* FLEXNER, *supra* note 10, at 268, 274–75; *see also* DuBois, *Working Women*, *supra* note 362, at 36–37. Harriet Stanton Blatch, who was Elizabeth Cady Stanton's daughter, and Alice Paul were the two most prominent American militant suffragists. Blatch lived in England during her marriage and was exposed to militant tactics there. When she returned to New York, she became convinced that a new organization was needed and that, in order to move beyond impasse, the woman suffrage effort ought to tap more effectively the potential of working women and thrust the issue of the female franchise before the public through intense publicity. Fed up with the lassitude of NAWSA and unimpressed by the local New York state suffrage association, she formed her own group, the Equality League of Self-Supporting Women, which came to be known as the Women's Political Union. As Blatch explained it:

> We all believed that suffrage propaganda must be made dramatic, that suffrage workers must be politically minded. We saw the need of drawing industrial women into the suffrage campaign and recognized that these women needed to be brought in contact, not with women of leisure, but with business and professional women who were also out in the world earning their living.

HARRIET STANTON BLATCH & ALMA LUTZ, CHALLENGING YEARS: THE MEMOIRS OF HARRIET STANTON BLATCH 93–94 (1940).

The Women's Political Union emphasized economic independence from men. From the beginning, its leaders attempted to appeal to the interests of laboring women and to look for opportunities to dramatize their cause by reference to the situation of women workers. They arranged for workers to testify in the New York legislature, canvassed the headquarters of every trade union organization in New York City to lobby for woman suffrage, staged public rallies outside manufacturing plants, actively campaigned against politicians who opposed the vote for women, and helped to organize the large suffrage parades that became so characteristic of the era. *Id.* In less than a year, the Women's Political Union had almost 19,000 adherents and included labor leaders like Rose Schneiderman in its membership. *See* FLEXNER, *supra* note 10, at 244, 252. For a general discussion of the rising feminist consciousness of working-class women in the progressive era, see SARAH EISENSTEIN, GIVE US BREAD, BUT GIVE US ROSES: WORKING WOMEN'S CONSCIOUSNESS IN THE UNITED STATES, 1890 TO THE FIRST WORLD WAR (1983).

Alice Paul was a Quaker who had gone abroad to study and been drawn into militant suffragism as a participant. When she returned to the United States to work on her Ph.D at the University of Pennsylvania, she continued her interest in militant tactics, became active in the American movement and, in 1912, offered her services

The radical tactics of their British counterparts influenced militant American suffragists.[435] These women focused most of their efforts on getting a federal amendment passed and putting the woman suffrage issue in the center of the public's attention.[436] They lobbied intensely in Congress, organized women in suffrage states to vote against politicians opposed to the female franchise, staged large parades and other public demonstrations in major cities, and engaged in civil disobedience to sway public opinion to their cause.[437] By 1916, when World War I loomed large, women had obtained voting rights in more than a dozen

---

as a lobbyist on the federal amendment to NAWSA. For a short biographical sketch of Paul, see *id.*, at 263–65; INEZ HAYNES IRWIN, THE STORY OF THE WOMAN'S PARTY 13 (Kraus Reprint Co. 1971) (1921). Paul immediately galvanized NAWSA's moribund Congressional Committee to new action. She organized a parade of 5000 women in Washington, D.C., which took place the day before Woodrow Wilson's inauguration and led to a public melee, when the police refused to protect the marchers from a hostile crowd. Public disapproval of the way the authorities treated the suffrage women led to increased attention to the whole question. *See* Christine A. Lunardini & Thomas J. Knock, *Woodrow Wilson and Woman Suffrage: A New Look*, 95 POL. SCI. Q. 655, 658 (1980). NAWSA leaders eventually balked at Paul's willingness to engage in provocative tactics and her insistence that the national organization should focus all its efforts on Congress. In an attempt to assert control, NAWSA removed Paul as chair of the Congressional Committee and directed its members to conform to their guidelines. *See* FLEXNER, *supra* note 10, at 266. Rather than submit, they split off from the NAWSA and turned the Congressional Union into their own organization for militant suffragism. *See* IRWIN, *supra*, at 47–48.

435. *See* FLEXNER, *supra* note 10, at 250. Militant British suffragism both appealed to and borrowed from the strategies of organized labor and involved public demonstrations and confrontations with governmental authorities. It was started by the Pankhursts, an extraordinary trio — mother Emmaline and daughters Christabel and Sylvia — who were from an aristocratic English family with socialist sympathies. *See generally* DAVID J. MITCHELL, THE FIGHTING PANKHURSTS: A STUDY IN TENACITY (1967) (describing the political activities of the Pankhurst family); Rheta Childe Dorr, *Mrs. Pankhurst: The Personality and Meaning of England's Great Suffrage Leader*, SUFFRAGIST, Nov. 22, 1913, at 14–15 (providing a brief account of Emmaline Pankhurst's activities). The tactics they pioneered were designed to ignite public interest in the suffrage cause and to give the lie to the notions of male chivalry by showing that officials would use force to keep women from demanding political rights. For a biography of Sylvia Pankhurst written by her relatives, see RICHARD PANKHURST, SYLVIA PANKHURST: ARTIST AND CRUSADER (1979).

436. *See* IRWIN, *supra* note 434, at 292.

437. *See* FLEXNER, *supra* note 10, at 252–54, 265–70, 282–86. One of the most notorious events of this period was the picketing of the White House by militant suffragists and their jailing under severe conditions. *See Suffragists Wait at the White House for Action*, SUFFRAGIST, Jan. 17, 1917, at 7; *Suffrage Sentinels Arrested by the Government*, SUFFRAGIST, June 30, 1917, at 6; *Pickets Get Maximum Sentence from Administration*, SUFFRAGIST, Oct. 20, 1917, at 4. For a general description of these events written by a participant, see DORIS STEVENS, JAILED FOR FREEDOM (1920).

states[438] and had a significant impact on the electoral votes needed to elect a president. By this point, politicians began to be concerned about the backlash that might be visited on a party opposing woman suffrage, should females receive the vote.[439] When New York state finally approved voting rights for women, the tide turned.[440] This decisive moment coincided with the specter of world war looming on the horizon.

As the Civil War had almost sixty years before, the First World War unleashed social forces that further democratized the American polity and presented increased opportunities for women.[441] Suffrage leaders were determined not to let the opportunity go by and decided not to delay activism until after the conflict, when the public attitude might again become reactionary.[442] Although the association of militant suffragists with pacifism would be controversial and many would argue that any political action for causes other than war was unpatriotic,[443] the sustained efforts of the various groups and organizations determined to gain franchise rights for women bore fruit. Congress approved the Nineteenth Amendment in 1919, with no votes to spare.[444] After a series of ratification battles over months that brought the forces opposed to the woman's vote out for a last ditch opposition,[445] the Nineteenth Amendment became a reality in 1920 when Tennessee approved it by one vote.[446]

With the passage of the Nineteenth Amendment, women's right to vote became part of the constitutional framework, and the movement that had begun almost one hundred years before in the call for women's emancipation achieved the specific goal around which its activities had centered for so many years. However, the original vision of its founders was not fully realized. Women undoubtedly attained the status of nominal citizens and

438. By Carrie Chapman Catt's own count, in 1916 11 states accorded women full suffrage and two more, Illinois and North Dakota, authorized their vote in presidential elections. *See* CARRIE CHAPMAN CATT, A BRIEF HISTORY OF WOMAN SUFFRAGE - SECTION III - A SCHEDULE OF VICTORIES AND DATES, Sophia Smith Collection, *Catt Collection,* Box 1, Folder 9.

439. *See* CATT & SHULER, *supra* note 300, at 322–23.

440. This is Eleanor Flexner's term. *See* FLEXNER, *supra* note 10, at 276.

441. *Id.* at 288.

442. *See* 5 STANTON ET AL., *supra* note 4, at 513–15.

443. *See* IRWIN, *supra* note 434, at 208–09, 228–29.

444. The vote was 274 to 176. *See* FLEXNER, *supra* note 10, at 292; FROST & CULLEN-DUPONT, *supra* note 179, at 315–17.

445. *See* CATT & SHULER, *supra* note 300, at 387–97.

446. *See* FLEXNER, *supra* note 10, at 321–24.

began to exercise their voting rights in ever increasing numbers, but their subordination as a sex did not end with formal political emancipation. Although more women would enter the job market, some would become professionals, and all were now entitled to minimum education, women as a group would continue to suffer discrimination in the form of private acts in civil society, low paying occupations, and socialized gender roles. Marriage and the family would endure as traditional patriarchal institutions, and woman's sphere ideology would reign unchallenged through the social changes of the first half of the Twentieth Century to limit the actual possibilities of average women.[447] The goal of ending gender subordination would go underground, not to surface again until the feminist movement of the 1960s. One of the lingering questions plaguing historians who attempt to analyze the nature and achievements of the suffrage movement from Reconstruction up to the passage of the Nineteenth Amendment is the question of how and why more was not immediately achieved by the franchise rights that were finally acquired.

Understanding why the voting right was essential to any possibility of social progress for women even though it did not work an immediate transformation in their subordinate position requires a renewed focus on how political institutions in the American society have interacted to maintain patterns of dominance, notwithstanding improvements in the nominal condition of marginalized groups. To see why suffrage has functioned as a necessary but not a sufficient condition for the emancipation of women, one must attend to the techniques used to maintain the status quo in power relations. And, just as the Supreme Court was essential in keeping women from having any access to the vote in the Nineteenth Century, it proved instrumental in maintaining the nonfranchise aspects of the gender system well into the modern era. I close my discussion of what the woman suffrage movement can tell us about the democratic potential of the voting right by returning to the era that generated the *Minor* decision, in order to place that opinion in broader context and more generally to evaluate the Court's participation in the maintenance and preservation of the status quo. To do this, I focus on

447. The reasons for this situation are intricate and disputed. For a discussion of the social forces retaining the gender system, as well as the Supreme Court's role in bringing this state of affairs about, see *infra* part III. For a discussion of the possible impact of suffragists' ideological choices on this result, see *supra* text accompanying notes 354–91.

how the Court dealt with cases affecting women not just in the context of suffrage controversies, but across the board from the time of Reconstruction to the dawn of the social protest movements of the 1960s.

III. The Supreme Court, Dominance, and the Voting Right

Part I identified the intertwined social/political techniques of subordination practiced against women as a complex constructed of violence and intimidation, economic exclusion, propaganda, and governmental forms of legal discrimination, including disenfranchisement.[448] By describing in Part II the story of women's struggle for the voting right, it was my goal to demonstrate how, in the specific context of suffrage, de jure relations stabilized de facto relations by intertwining with and supporting the "private" aspects of the gender system.[449] When the Nineteenth Amendment was passed in 1920, a significant change in this stabilizing relation should have taken place because one of the most important aspects of women's inferior position — their inability to exercise franchise rights — was removed. In fact, women's accession to the vote did not immediately and significantly change their status, not even their de jure status. The Court's disposition of the *Minor* case was a crucial causal factor making this result possible. As a consequence of the Court's refusal to grant women the vote in 1874, women lost a critical half-century in their efforts to transform the gender system. Moreover, because the period from 1874 to 1920 was pivotal in establishing power relations in a changing American society, not only was that system further entrenched by the passage of so much time, but the Court also closed a window of opportunity to women seeking to redraw the political landscape of American society.[450] This entrenchment that *Minor* enabled made it easier for American governmental institutions, including the Supreme Court, to continue to subordinate women in many areas outside the specific context of the franchise, after voting rights finally were ceded to women in 1920.[451]

---

448. *See supra* text accompanying notes 28–35.

449. *See* MacKinnon, *supra* note 6, at 167.

450. For a description of what that window of opportunity might have afforded women, see *infra* text accompanying notes 476–83.

451. *See infra* text accompanying notes 504–24.

Before I detail how the Court's treatment of *Minor* and its other decisions continued to stabilize de facto forms of gender discrimination into the modern era, it is necessary to focus again on the general structural features of the governmental regime that made the Supreme Court the gatekeeper of the franchise for the American polity, thus giving it the power to rebuff women's claims to emancipation.

A. *A Second Look at Federalism and the Voting Right*

As I have described, the basic framework for the American constitutional system premised in "our federalism" established a national government of limited powers and reserved to the states plenary powers.[452] The states were invested thereunder with the authority to determine the substantive laws that provided the parameters for relations between the sexes in every day life — the laws of marriage and divorce and the garden variety provisions of contract, property, and tort. This authority, as with the voting right, was generally immune from federal supervision through the courts until the Fourteenth Amendment was ratified in 1868.[453] Thereafter, the Reconstruction Court was extremely reluctant to take up the opportunity presented by the Fourteenth Amendment to intercede in state affairs and so it issued decisions that limited the Amendment's utility as a tool for curbing state

452. This is perhaps the most fundamental feature of the American governmental system. At the Constitutional Convention, there were framers like Alexander Hamilton who wished to do away with the states as units of governmental organization altogether; they were not in the majority and the state federal scheme of power sharing became a basic assumption of the rest of the work of the Convention. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 284–86 (Max Farrand ed., 1911). One of the motivations for this was the desire of many framers to retain states as a structural safeguard against a dominating national authority. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (describing how the states function as structural safeguards of liberty).

453. The Bill of Rights operated only to cabin the powers of the federal government. Prior to the adoption of the Fourteenth Amendment, with its provisions concerning due process of law and equal protection that have become so important in modern constitutional adjudication, individual rights were seldom protected through federal litigation. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). What protection against *state* deprivations was afforded was based on the Contract Clause (U.S. CONST. art. I, § 10), the Privileges and Immunities Clause of Article IV (U.S. CONST. art. IV, § 2), and natural law principles that the Court imported into its decisions. *See, e.g.,* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (using tenets of natural law to invalidate a Connecticut law setting aside a probate determination); MCCLOSKEY, *supra* note 286, at 116–18.

excesses.[454] Moreover, the limited protection of individual rights that was afforded by the Court took the form of vindicating non-interference, or negative, rights, rather than conferring entitlement rights which were not recognized as a part of the positive law of individual states.[455] This focus on negative rights was reinforced by the specific constitutional delegation to the states of the authority to determine voter qualifications in state *and* federal elections. This delegation stood for the general proposition that political rights were not inextricably tied to federal citizenship and so should not be the subject of federal regulation and control.[456] Finally, the Court's unexamined assumptions about women's different essence and "natural" subordinate status, freely borrowed from theology and other natural law sources, precluded the notion that women might have a claim to equal protection of the laws.[457] These phenomena greatly assisted a Court predisposed to ignore social relations between the sexes after the Civil War.[458]

---

454. This was the significance of the distinction between federal and state citizenship made in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78–80 (1872); *see also* MCCLOSKEY, *supra* note 286, at 118–20.

455. From the earliest days, when the Court interceded in state affairs, it was in order to strike down legislation that it viewed as interfering with rights like freedom to contract and to hold property. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (holding that New York labor legislation affecting the working hours of bakers violated principles of contract and property); Barbier v. Connolly, 113 U.S. 27 (1885) (declaring in dicta that the Fourteenth Amendment protects freedom of contract); Calder v. Bull, 3 U.S. 386 (1798) (approving in dicta the use of the Contract Clause as a basis for invalidating state legislation).

456. This was the broader significance of *Minor*. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176–78 (1874).

457. *See infra* text accompanying notes 467–72, 484–523.

458. It is, of course, impossible to answer the question of motivation decisively; however, most historians of the Supreme Court agree that the period from the Civil War to the turn of the century was one of the Court's most conservative epochs. It was in this era that the Court developed the judicial doctrines making segregation in the South legally possible, that it interpreted the Fourteenth Amendment in such a manner that the main beneficiaries of its provisions were corporations and not persons, and that it aggressively promoted the doctrine of laissez faire economics so as to prohibit state laws designed to protect workers. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (validating the doctrine of "separate but equal"); Munn v. Illinois, 94 U.S. 113 (1877) (giving constitutional protection to corporations under the Fourteenth Amendment); Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York statute limiting the working hours of bakers); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 158–84 (1993). *See generally* STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION (1967) (describing the constitutional response to race and class relations). It was in this sense that the Court was "predisposed" to ignore the realities of race, class, *and* gender in American society.

B. *Pre-*Minor *Decisions*

The number of Supreme Court opinions directly dealing with the status of women is small[459] because laws governing that status were typically thought to be within the plenary power of states. Even when women might have been able to bring a case in federal court using diversity jurisdiction, the concern for state prerogatives on issues affecting women and the family gave rise to a "domestic relations" exception to that jurisdiction.[460] Nonetheless, the Court's attitude about the proper role and status of women was quite evident from the cases it did pass upon in the period before *Minor*.

In various pre-War decisions involving disputes over property, the Court treated the doctrine of *feme couvert* as completely unproblematic.[461] In *Barber v. Barber*,[462] the Court recognized an exception to the principle that a married woman takes the domicile of her husband, but only in the circumstance where the wife had obtained a separation decree (a divorce *mensa et thoro*), and even in that case the wife was not allowed to sue in her own

459. The work of Rogers Smith brought many of these cases to my attention for the first time. *See* Rogers Smith, *supra* note 12.

460. Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858). Recently, in Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992), the Court reaffirmed the general doctrine of the exception, while limiting the scope of its application. *Ankenbrandt*, 112 S. Ct. at 2208.

461. *See, e.g.*, Gridley v. Wynant, 64 U.S. (23 How.) 500, 502–03 (1859) (recognizing the right of a married woman to convey property in trust for another, but only so long as her husband's rights or responsibilities were unaffected); Meegan v. Boyle, 60 U.S. (19 How.) 130, 148 (1856) (passing on the validity of a property transfer by a married woman who had inherited); Webb v. Den, 58 U.S. (17 How.) 576, 577 (1854) (passing on the validity of a Tennessee law governing execution formalities for married women).

462. 62 U.S. (21 How.) at 582. There, a woman living in New York with a New York separation decree (a divorce *mensa et thoro*) sought to enforce an alimony award against her husband, who had moved to Wisconsin for the purpose of rendering the award uncollectible. Although the majority found that the facts justified treating her as a person independent of her husband, Justices Taney, Daniel, and Campbell dissented. Justice Daniel wrote:

> It has been suggested that by the decree for separation *a mensa et thoro,* the husband and wife have become citizens of different states, and that the allowance to the wife is in the nature of a debt.... This suggestion, to my mind, involves two obvious fallacies. The first is the assumption, that by the decree the wife is made a citizen at all, or a person *sui juris,* whilst yet she is a wife, still bound by her conjugal obligations.... The second error... is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife....

Id. at 603.

name. Similarly, in *Pennsylvania v. Ravenel*,[463] the Court reiterated in the context of a state taxation case that a woman takes her husband's domicile during his lifetime.[464] These attitudes were not disrupted by the Civil War, the passage of the Reconstruction Amendments, or the activities of the woman suffrage movement. In the 1868 case *Kelly v. Owen*,[465] Justice Field construed the intent of Congress's 1855 Naturalization Act to be that a woman's citizenship is a function of her husband's: "His citizenship, whenever it exists, confers, under the act, citizenship upon her."[466] In 1872 in *Bradwell v. Illinois*,[467] the impact of woman's sphere ideology,[468] the Court's negative approach to the Privileges or Immunities Clause of the new Fourteenth Amendment, and its continued deference to states' rights combined to validate Illinois' policy of prohibiting women from practicing law. Justice Bradley's concurring opinion demonstrated the relevance of straightforward status arguments to the result:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman's adopting a distinct and independent career from that of her husband.[469]

Justice Bradley's words comingle themes of dominance with republican norms in an uneasy and telling relation. Implicit in his remarks is the notion that a woman should be positively prevented access to a profession and economic autonomy in order to limit her ability to disrupt the "harmony" of the family by "adopting a[n] . . . independent career from that of her husband."[470] While it might be tempting to explain *Bradwell* as the result of antiquated civic republican attitudes about the contribution women can make to a virtuous polity,[471] the Court's willing-

---

463. 62 U.S. (21 How.) 103 (1858).
464. *Id.* at 110.
465. 74 U.S. (7 Wall.) 496 (1868).
466. *Id.* at 498.
467. 83 U.S. (16 Wall.) 130 (1872).
468. For a discussion of the notion of woman's sphere, see *supra* text accompanying notes 32, 153–55.
469. *Bradwell*, 83 U.S. (16 Wall.) at 141.
470. *Id.*
471. *See* Smith, *supra* note 12, at 236–39.

ness to acquiesce in state legislation that frustrated women's attempts to secure economic freedom is not a theme limited to Nineteenth Century cases. Even after the turn of the century and the passage of the Nineteenth Amendment, the Supreme Court approved legislation that impeded job opportunities for women.[472]

Bradwell of course portended bad results for the direct legal challenge brought by Virginia Minor against Missouri's authority to deny her the vote. I described the tightrope the Court walked there[473] to concede to women the nominal status of citizen and yet to deny them suffrage.[474] The Court's attempted nullification of the Fourteenth Amendment through its decision in the *Slaughter-House Cases*[475] was critical to the outcome as was its willingness to allow states to pursue a vision of community that resulted in the almost total exclusion of women from any sort of political power.

C. Minor (1874) to Enfranchisement (1920)

Minor and the cases described above were part of a larger pattern that was threatened, but not entirely disrupted, by the passage of the Nineteenth Amendment. Not only did *Minor* itself show the Court's willingness to subordinate women by depriving them of a basic incident of citizenship, *Minor* also indicated the Court's deep involvement in preserving nonfranchise elements of the system by which women were dominated into the modern era. A focus on what women might have obtained if the Supreme Court had chosen to promote their franchise rights in 1874 through *Minor* helps to explain the why and how such attempts often succeeded.

Had *Minor* been decided differently, the emerging women's movement would have been gifted with time, money, and the possibility of making political allies with other subordinated groups at a critical juncture in its history. From 1874 when the case was decided to 1920 when the Nineteenth Amendment was ratified, there were 480 campaigns to put the women's vote up by referendum, fifty-six actual referenda in thirty-three states, forty-seven campaigns to initiate state constitutional conventions to effectuate woman suffrage, nineteen efforts to get the Anthony

472. *See infra* text accompanying notes 505–25.
473. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).
474. *See supra* text accompanying notes 338–53.
475. 83 U.S. (16 Wall.) 36 (1873).

Amendment passed with nineteen different Congresses,[476] and the various state campaigns necessary to ratification.[477] These activities cost women an immense amount of time and money and took up the energies of an entire generation of leaders.[478]

Perhaps most importantly, if women had obtained the vote in 1874 through court action, their political discourse would not have had to be subverted into an articulation more acceptable to men. Almost immediately after their exclusion from the political deals of Reconstruction and relegation to the province of legislative institutions and popular referenda by the courts, the arguments that were made for woman suffrage changed.[479] Had the courts given activists relief from their political isolation, they would have obtained franchise rights without having to make political compromises to dilute the opposition of forces arrayed against them. Perhaps then the differences between the opposing factions of suffragists would not have led to the long-term schism that occurred under the pressure of the political isolation in the aftermath of Reconstruction, nor resulted in the barriers to African-American women's participation in the mainstream movement.[480] Had women obtained the vote they could have explored the theoretical bases for their feminism at the same time that they used their resources to secure legislation, to make women powerful in the two political parties (or perhaps to begin a third party), to elect women to public office, and perhaps most importantly, to mount a public information campaign capable of counteracting the sexist ideology rampant in the popular culture.

A different result in *Minor* would also have enabled women to explore political alliances that were natural in the aftermath of the Civil War. During the same time period when they were struggling to achieve suffrage, the regime of Jim Crow in the South was destroying the political rights of African-American

476. *See* CATT & SHULER, *supra* note 300, at 107.

477. Actually more than 36 referenda campaigns were necessary because no one could tell which states were solid for suffrage and parallel efforts had to be undertaken in various states to achieve the magic number. *See id.* at 371.

478. Stanton, Anthony, and Stone were in early middle age when they began their suffrage work in earnest in the 1850s. The next generation of leaders were women like Harriet Stanton Blatch, Carrie Chapman Catt, and Alice Paul. By the time the Nineteenth Amendment passed, many of the second generation were in early or late middle age. *See* VICTORY, *supra* note 197, at app. 8.

479. *See supra* text accompanying notes 387–90, 395–408.

480. I refer here to the reliance on arguments for "educated" suffrage and the like. *See supra* text accompanying notes 355–59. For a discussion of the effects of racism on American feminism, see generally ANDOLSEN, *supra* note 229.

males so dearly bought, but poorly protected, by the Reconstruction Amendments.[481] In the large cities, corrupt political machines often controlled and brokered the votes of immigrants and laborers so that any possibility for real social change through their votes was often frustrated.[482] By keeping African-Americans, ethnic minorities, poor laborers, *and* women from meaningfully exercising the franchise, the American power structure isolated and divided those groups most likely to form alliances against its interests. Because of women's numerical strength in the general population, political coalitions between women and others could have effectuated significant redistribution of political power.[483]

It is impossible to determine whether this redistribution would have occurred if a positive judicial response to women's claims to political rights had been forthcoming — especially given the presence of continued racism and classism in American society. At a very minimum, however, if *Minor* had been decided differently women would have had an additional half-century to experiment with using their vote transformatively to make their mark on American society. Instead, in the years following *Minor* the Supreme Court continued to use a complex and lethal amalgam of sexist status arguments, formal equality principles, civic republican norms, and tenets of states' rights to preserve women's dependent position. Cases from *Minor* up to the passage of the Nineteenth Amendment showed the Court's willingness to condone, if not promote, all of the aspects of the network by which women were kept in an inferior status, including their exclusion from the franchise. Even *after* women's accession to voting rights, it continued to use old status arguments to

481. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) (Woodward is generally credited with the classic study of the rise of segregation laws). For a series of articles on the development of Jim Crow laws, see THE AGE OF JIM CROW: SEGREGATION FROM THE END OF RECONSTRUCTION TO THE GREAT DEPRESSION (Paul Finkleman ed., 1992). For an analysis of the negative impact on the access of Black Americans to the vote in one state caused by these laws, see M. MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798–1901: A STUDY IN POLITICS, THE NEGRO AND SECTIONALISM 352–53 (1955).

482. For a contemporary account of the power of one political boss to prevent political change, see David G. Phillips, *Aldrich, the Head of it All, in* THE PROGRESSIVE MOVEMENT 1900–1915, at 108–12 (Richard Hofstadter ed., 1963).

483. This is because females make up more than 50% of the population. *See* CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 (113th Ed. Washington D.C.) (1993) [hereinafter CENSUS, STATISTICAL ABSTRACT].

deny women protection from laws discriminating against them in myriad ways outside of the specific context of voting.

In 1888, in the same general period that produced *Bradwell* and *Minor*, the Court continued its use of separate sphere ideology to justify women's discriminatory treatment in law and in custom. In the case of *Maynard v. Hill*,[484] Justice Field interpreted the Oregon Donation Law to treat a married woman's interest in settled land as entirely derivative of her husband's, so that a woman whose husband deserted and divorced her without any notice had no vested property interest in property that he claimed under the law and settled after he left her.[485] In a 1894 case, *In re Lockwood*,[486] the Court upheld Virginia's right to bar Belva Lockwood from obtaining a license to practice law, citing *Minor* and *Bradwell*.[487] By its 1904 decision in *Tinker v. Colwell*,[488] the Court concluded that a civil judgment owed by a debtor for committing adultery with another man's wife was based on an act so violative of a man's property right in her as not to be dischargeable in bankruptcy.[489] In *Muller v. Oregon*,[490] the 1908 case that made the "Brandeis" brief famous and is often

484. 125 U.S. 190 (1888).
485. *Id.* at 215–16.
486. 154 U.S. 116 (1894).
487. *Id.* at 117.
488. 193 U.S. 473 (1904).
489. Justice Peckham wrote with approval of the case law on adultery:

> [T]he husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when . . . the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may be properly described as an injury to the personal rights and property of the husband. . . .

Id. at 481.

490. 208 U.S. 412 (1908). Cases involving state regulation of working terms and conditions raise a strategic dilemma for feminists. To the extent that women have been dominated and their domination has resulted in the lowering of their welfare, they have special needs for protective legislation as a form of restitution. To the extent that they bear the brunt of responsibility for childbirth and childcare in the society, they have special needs for legislation that will counteract those burdens and make them employable in spite of pregnancy. However, many of the laws passed that continued to place women in a dominated status were historically justified on the grounds of protection. Cases premised in separate sphere ideology, thought to benefit women, have come back to haunt women as precedents justifying deviations from normal principles of equal protection. The best example of this latter phenomenon is *Muller*. Not surprisingly, feminists, then as now, have been split on whether labor and other legislation affecting women beneficially creates so many doctrinal problems that it is more harmful in the long run than it is worth. For a discussion of

lauded as opening the way for protective labor legislation, the Court upheld Oregon's law limiting the working hours of women on the ground of women's dependent position. Justice Brewer wrote:

> [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present .... Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions ... justify legislation to protect her from the greed as well as the passion of man.[491]

As in *Bradwell*, the fact of dominance in the relations between men and women revealed by the Court's own words is barely obscured by its rhetoric of protection and dependency. Justice Brewer did not recognize that the best tool for protecting women from the "greed as well as the passion"[492] of men might be full political rights, including suffrage.

At the time of *Muller's* appearance, women had begun to win the franchise in a number of states.[493] By that time most jurisdictions had reformed the property laws affecting married women thus eroding the legal basis of *feme couvert*.[494] Nonetheless, neither women's avoidance of civil death on marriage, nor their attainment of suffrage through state referenda, nor the ratification of the Nineteenth Amendment in 1920 were treated as reasons for striking down laws discriminating against women in areas outside the voting right. In 1911 *Quong Wing v. Kirkendall*[495] validated a Montana law that exempted hand laundries employing two or less women from paying a license fee that was not exacted of steam laundries. Justice Holmes wrote, citing *Muller*: "[I]f again [the State] finds a ground of distinction in sex, that is not without precedent.... If Montana deems it advisable to put a lighter burden upon women than upon men ... the Four-

these issues in the context of pregnancy, see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L. J. 1 (1985).

491. 208 U.S. at 421–22.

492. *Id.* at 422.

493. *See supra* text accompanying notes 409–18.

494. *See* Salmon, *supra* note 134, at 335–39.

495. 223 U.S. 59 (1912) (The plaintiff in the case was a Chinese male.).

teenth Amendment does not interfere by creating a fictitious equality where there is a real difference."[496] Of course, the "lighter burden" was only meant to obtain in regard to women running small washing businesses within the domestic sphere of their home. It inflicted exactly the same burden on women who wanted to operate more public laundry businesses employing many workers, or who wanted to work in such an enterprise.[497] Similarly, in the 1914 decision of *Riley v. Massachusetts*,[498] the Court held that a state law restricting the time of day that women could work in a mill was no impairment of their right to contract, citing *Muller* and ignoring *Lochner v. New York*.[499] In *Miller v. Wilson*,[500] the Court approved a California law preventing women from being employed in hotels and hospitals for more than eight hours a day. The Court declared:

> The limitation of the number of hours of woman's labor in gainful occupations to not over a half of her waking time may check the rapid decline in reproduction of the older American stocks and in any event leaves her free for the development of mind and body for wifehood and motherhood, and hence insures the increased intelligence and strengthening of the race through the mother . . . .[501]

By this argument, the Court conjoined racist assumptions about the superior status of white European "stock" with sexist assumptions about the dependent status of females to restrict women's access to employment opportunity.

In 1915, after California had approved woman suffrage, the Court was called upon to determine the validity of a federal law providing that an American women's marriage to a foreigner automatically deprived her of citizenship, when no similar deprivation was imposed on men who took foreign nationals as wives. *Mackenzie v. Hare*[502] presented a challenge to the statute

---

496. *Id.* at 63.

497. There seems no doubt that Montana's legislation was aimed directly at imposing a special tax on Chinese laundries. The challenge to legislators was how to discriminate against Chinese laundries employing many workers, while imposing a "lighter burden" on women washing clothes in their own homes. *Id.*

498. 232 U.S. 671 (1914).

499. *Id.* at 679. Lochner v. New York, 198 U.S. 45 (1905) (holding that maximum hour limitations imposed on bakers were invalid and that the state's interest in the promotion of employee health was not directly related to the maximum hour legislation).

500. 236 U.S. 373 (1915).

501. *Id.* at 377–78.

502. 239 U.S. 299 (1915) (interpreting the Citizenship Act of 1907, ch. 2534, § 3, 34 Stat. 1228 (1907) (repealed 1922)).

brought by a California woman who objected to her differential treatment. The Court had an opportunity to acknowledge that by giving women the franchise, Calfornians expressed their intention that women no longer be second-class citizens. In upholding the legislation in the face of her attack, the Court ignored the impact of laws changing the civil rights of females and imputed her with a dependent status, which it used as the ground for its decision:

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband . . . this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?[503]

Even the passage of the Nineteenth Amendment would not convince the Court to deviate from this point of view.

D. *1920 to the Present*

By 1920 when the Nineteenth Amendment became a reality, it might have been given a broad emancipatory meaning that women were no longer to be subordinated.[504] However, although *Leser v. Garnett*[505] upheld the Nineteenth Amendment, the Court continued to use status arguments premised in separate sphere ideology to limit the Amendment's potential for emancipating women outside the context of the franchise. The decision that best illustrates the interaction of the Court's traditional attitude toward women's nature and its willingness to ignore the significance of their newly won political rights is the 1937 case

503. *Id.* at 311.

504. *See* Brown, *supra* note 12, *passim*.

505. 258 U.S. 130 (1922). Petitioner Oscar Leser filed suit in Maryland to strike the names of two women from the voter list, on the theory that their registration could not be constitutionally mandated by the Nineteenth Amendment. Maryland was one of the states that refused to ratify the Amendment and so had been forced to recognize women's voting rights over its objection. It was Leser's claim that including women in the franchise effectuated such a vast change in the basic rules of politics as to deny Maryland political autonomy in violation of fundamental principles. The Court rejected this contention, citing the changes wrought by the passage of the Fifteenth Amendment and implying that similar changes were theoretically permitted by the Nineteenth. *Id.* at 135–36.

Breedlove v. Suttles.[506]

Breedlove is best known as a precedent validating the constitutionality of the poll tax. Georgia's version of the poll tax treated the tax as a fee to be exacted of all adults, with certain exceptions,[507] which could be collected by the registrar of voters prior to registration if it had not been previously remitted.[508] If the fee was not paid, the citizen could not vote. The statute did not just impose the tax on adult inhabitants[509] — it made distinctions based on gender that were exceptionally problematic because it provided that the tax was not assessable against women who did not register.[510] In this way, Georgia provided an economic incentive for women not to vote. The Supreme Court's analysis of Georgia's legislation illuminates its enthusiasm for separate sphere arguments almost twenty years after the Nineteenth Amendment's passage.

Breedlove presented a constitutional challenge to the statute based upon equal protection, privileges or immunities, and the Nineteenth Amendment.[511] Just as it did in *Minor*, the Court reiterated that voting is not a federally protected right under the Privileges or Immunities Clause.[512] It denied the relevance of the Nineteenth Amendment as well by arguing that if both sexes wanted to vote, then each had the same burden in that each must pay the tax.[513] Equal protection then became the focus of the Court's attention.[514] In regard to that and in Justice Butler's estimation, Georgia's scheme constituted a benefit for females that justified their differential treatment.[515] In coming to this conclusion, he did not consider the possibility that women would want or need to vote, so he did not recognize the problem created by a statute that taxed them for registering but forgave the tax if they

506. 302 U.S. 277 (1937).

507. *Id.* at 279–80. The poll tax was eventually prohibited by constitutional amendment. U.S. CONST amend. XXIV.

508. *Breedlove*, 302 U.S. at 280.

509. The statute applied to those between 21 and 60 years of age, but it exempted the blind and females who did not register to vote. *Id.* at 279–80.

510. *Id.* at 280.

511. *Id.* A male, Nolan Breedlove, sued to have Georgia's gender-based scheme declared unconstitutional. Perhaps because the Court was faced with a male petitioner, the possibility that Georgia's scheme actually militated against women's right to vote was even more obscured. *See* LESLIE FRIEDMAN GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN 99 (1988).

512. *Breedlove*, 302 U.S. at 282.

513. *Id.*

514. *See* FRIEDMAN, *supra* note 345, at 100.

515. *Breedlove*, 302 U.S. at 282.

did not register. There was no discussion about how voting might benefit a woman individually, or whether economic incentives put in place to reward women's non-registration functioned to impair their group power. Moreover, the Court relied on the notion that to extract a poll tax from women was tantamount to burdening their husbands: "The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. . . . To subject her to the levy would be to add to his burden."[516] Justice Butler did not discuss the possibility that giving the *husband* an economic incentive to discourage his wife from voting might foreclose her access to the ballot. Finally, citing *Muller* and relying directly on status arguments about women's special function and different nature, the Court declared: "The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes."[517] Once again, burdens were paraded as benefits, and women's separate and dependent condition was depicted as just and natural, in spite of the almost one hundred year fight for women's emancipation that had led to the enactment of the Nineteenth Amendment.

From *Breedlove* up to *Reed v. Reed*[518] in 1971, the Court continued to rely on caste arguments to deny women equal protection[519] and completely ignored the possibility that the Nineteenth Amendment itself precluded such an approach. In 1948, even after the impact on social relations caused by the Second World War and women's employment in jobs previously reserved for men, the Court denied women equal protection in job opportunity. The Court's decision in *Goesaert v. Cleary*[520] upheld a statute preventing single women from employment as bartenders and explicitly declared that women's progress toward emancipation was irrelevant to the state's power to restrict their employability. There, Justice Frankfurter wrote:

> The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the old-

516. *Id.*
517. *Id.*
518. 404 U.S. 71 (1971).
519. *Adkins v. Children's Hospital* was something of an aberation. Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating legislation fixing a minimum wage for women as a violation of their freedom of contract).
520. 335 U.S. 464 (1948) (disapproved by, Craig v. Boren, 429 U.S. 190 (1976)).

> est and most untrammeled of legislative powers. Michigan could, beyond question, forbid all working women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . . .[521]

Similarly, in 1961 in *Hoyt v. Florida*,[522] the Court upheld a statute excluding females from jury duty unless they requested it, refusing to invalidate the principle that states could constitutionally preclude women from service altogether.[523] By retaining status arguments as grounds for decisions in cases from *Bradwell* and *Minor* through *Hoyt*, in spite of the passage of the Nineteenth Amendment, the Court greatly assisted maintaining many of the nonfranchise aspects of the complex of dominance affecting women, while it put forward the appearance of their equality in voting rights. Thus, for women, the emancipatory potential of formal access to the vote was blunted by Supreme Court opinions and doctrines that left intact much of the social system subordinating them.

Only when the contemporary era was ushered in with the civil rights crusade did the Court begin to relinquish the view that women ought to be confined to home and hearth. *Hoyt* itself was decided at the same time that the social protest movements of the 1960s were getting off the ground. The grass roots political efforts initiated first by Black citizens and then by feminists raised expectations that, for the first time, old patterns of dominance would be exchanged for new, nonhierarchal modes of social interaction. The historic civil rights laws which now provide the source for modern litigation over race and gender dis-

---

521. *Id.* at 465–66.

522. 368 U.S. 57 (1961). In *Hoyt*, the defendant was a woman who killed her husband over his infidelity. She was forced to stand trial in front of an all male jury. *Id.* at 58. *Hoyt* was later overruled in Taylor v. Louisiana, 419 U.S. 522, 535 (1975) (allowing a man to successfully challange a Louisiana statute automatically exempting women from jury duty).

523. The Court stated in support of its conclusion: "[W]oman is still regarded as the center of home and family life." *Hoyt*, 368 U.S. at 62. Eventually, the Court disapproved of *Hoyt* and the sort of separate sphere ideology that it relied upon. *See Taylor*, 419 U.S. at 535. For a discussion of the manner in which the power of the civil jury itself was limited after juror selection processes became more inclusive through the process of feminizing its activities, see Laura Gaston Dooley, *Our Juries Ourselves*, 80 CORNELL L. REV. (forthcoming).

crimination were enacted in this period.[524] After a decade of social upheaval, the Supreme Court finally began to give up its reliance on old-fashioned notions of women's special nature and appropriate separate sphere. This shift in attitude surfaced in a number of decisions in the 1970s and led to the development of a higher standard of review for legislation differentially affecting women.

In the 1971 case of *Reed v. Reed*,[525] the Court invalidated on equal protection grounds an Idaho probate provision that gave preference to men over women in the administration of estates.[526] Similarly in *Frontiero v. Richardson*,[527] a federal statute providing for differential treatment of dependents of male and female military personnel was ruled unconstitutional as a violation of equal protection principles. In reaching that result, the Court indicated a new openness to treating gender classifications as suspect in some sense.[528] In its decision in *Stanton v. Stanton*,[529] the Court repudiated many of the assumptions stemming from separate sphere ideology that it had referred to in past decisions like *Hoyt*. There the Court struck down a Utah statute providing for a later age of majority for men than for women as violating tenets of equal protection. In an about face from *Hoyt*, the Court said: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[530] Likewise, *Craig v. Boren*[531] invalidated an Oklahoma statute providing a lower drinking age for women than for men. In so doing, the Court established that gender classifications are to be upheld only when they "serve important governmental objectives" and are "sub-

524. *See* Civil Rights Act of 1964, 42 U.S.C.A. § 1971, as amended (West 1993); Voting Rights Act of 1965, 42 U.S.C.A. 1973b–1973g, as amended (West 1993).

525. 404 U.S. 71 (1971).

526. The court found that the state's gender classification did not bear "a fair and substantial relation to the object of the legislation." *Id.* at 76 (Burger, Chief J., quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

527. 411 U.S. 677 (1973).

528. *See id.* at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). *But see* Craig v. Boren 429 U.S. 190, 197 (1976) (adopting an intermediate standard of review for legislative distinctions based on sex).

529. 421 U.S. 7 (1975) (invalidating a Utah law providing for a later date of majority for men than for women).

530. *Id.* at 14–15.

531. 429 U.S. 190 (1976).

stantially related to achievement of those objectives."[532]

Reed and its progeny established the Court's willingness to take steps to prevent women's de jure subordination in areas outside the specific context of franchise rights. Thus *Reed* opened the possibility that the highest tribunal in the land might become an ally in women's attempt to dismantle *all* the aspects of the gender system, be they public or private. In this way, *Reed* signalled a possible third stage in constitutional adjudication affecting women, one in which the Court might develop a sensitivity to the myriad ways in which past de jure discrimination still produces current discriminatory effects. The promise of *Reed*, *Frontiero*, and related cases dimmed, however, when in the Reagan era the Court lost its enthusiasm for issuing decisions that would continue to break down old hierarchies based on race, class, and gender.

Today, the effects of past gender discrimination effectuated by cases and statutes singling women out for separate treatment survive in the domain of de facto relations. The legacy of discrimination frustrates women's attempts to gain equality and demonstrates the tenacity of the social system by which women have been dominated. Even now, women live in a society that facilitates their subordination through sexist ideology purveyed in x-rated movies and beer commercials,[533] that tolerates violence against them,[534] that consigns the majority of female workers to pink-collar ghettos where they are underpaid and overworked,[535] and that still burdens women with primary responsibility for child care and the family.[536] Seventy-five years after the passage of the Nineteenth Amendment, women still do not wield political power in proportion to their numerical strength in the American population.[537] If women constitute a

532. *Id.* at 197.

533. *See generally* DWORKIN, *supra* note 30 (discussing the ideology of sexual objectification).

534. *See* MACKINNON, *supra* note 6, at 142–43.

535. *See* Diana Pearce, *Women, Work, and Welfare: The Feminization of Poverty, in* WORKING WOMEN AND FAMILIES 103 (KAREN W. FEINSTEIN ed., 1979).

536. *See* ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT 1–21 (1989).

537. Women make up only 10% of those in Congress, although they comprise over 50% of the total population in the United States. *See Women in Congress*, THE WASH. POST, Mar. 30, 1994, at 1; *see also Record Numbers of Women Take State House Seats*, THE WASH. POST, Nov. 22, 1992, § A at A4; CENSUS, STATISTICAL ABSTRACT, *supra* note 483.

majority group without majority power,[538] what then is the real significance of the history of woman suffrage? Because it is my intention to begin rather than to end a dialogue on the importance of this history for constitutional theory, I suggest in my Conclusion several broad areas to which woman suffrage has relevance. In so doing, I hope to reveal the richness of the history of women's struggle for the voting right as a source for a better understanding of constitutional adjudication.

CONCLUSION

Although women's attainment of the voting right did not end gender discrimination overnight, it is important not to forget what the movement did achieve. At the beginning of the suffrage effort, American society conceived of females as little more than adult children with no independent being and certainly no individual relation to their government. They were excluded from employment and education and consigned to the private sphere of the family, regardless of their talents or desires.[539] By the very act of demanding the vote, women symbolized their claims to full personhood and located a standard around which to mobilize and agitate for a change in the public perception of their nature and attributes.[540] The issue of women's access to the vote became a means of asserting their citizenship, their right to enter the public forum, and their claim to participate in political discourse.[541] Demanding the franchise was a key part of a general social movement through which women hoped to gain more freedom and opportunity.

Soon after that movement began, it produced significant results. Women started to speak in public about political issues. They began to surface in the halls of government with petitions. They lobbied for changes in the property and divorce laws and enrolled in the colleges that were established to educate them. By the turn of the century, there were women in many of the professions, more women in the labor force, and women joining groups and organizations by the thousands.[542] The public perception of the proper role and real nature of females was changing and the general economic, technological, and social changes

538. Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973).
539. *See supra* text accompanying notes 91–98, 127–55.
540. *See supra* text accompanying note 207–24.
541. *See supra* text accompanying notes 36–42.
542. *See supra* text accompanying notes 395–403.

of the period dovetailed with this attitudinal evolution to produce a material improvement in the status and condition of women in American society that should not be minimized. Nonetheless, the dreams of the movement's founders were not realized with the passage of the Nineteenth Amendment — women were still not able to live and move freely in the culture without regard to their gender. Understanding why this is so brings home the fact that the voting right alone is no panacea for rectifying patterns of discrimination in American society and that formal access to it is no guarantee of democratic inclusion.

That final accession to the voting right did not result in an immediate end to the system of gender subordination is not surprising when the depth, breadth, age, and complexity of the network of factors involved in women's subordination is taken into account, and when the unwillingness of dominant sectors to share governing authority through the ballot is recognized. Seeing the franchise in historical context shows that powerful groups will resist ceding any power to others in a number of ways — some overt and direct, others subtle and sophisticated. Initially, access to the vote was simply and directly precluded for those segments of society that were most often used as resources by others — poor people, African-Americans, and women.[543] After those groups obtained formal franchise rights, those who controlled key institutions still attempted to preserve as many as possible of the aspects of the social systems dominating these groups. They did so by discriminating in employment, in education, and in other areas. The courts supported these techniques by refusing to intervene to redress imbalances in power in the civil society. In the case of woman suffrage, preservation of the status quo was served by the fact that women were forced to blunt their demands for an end to the gender system in order to achieve formal access to the vote in the first place. By refusing to intervene to vindicate women's right to the ballot as an incident of federal citizenship, the Court both cooperated with dominant groups to contain and deradicalize the women's movement, and signalled its unwillingness to promote democratic values when functioning as the arbiter of the franchise for the American polity after the Civil War. Even after the passage of the Nineteenth Amendment, the Court continued its cooperation with ruling sectors of

543. *See generally* Smith, *supra* note 12 (discussing historic limitations on the voting right).

the society by validating laws that deprived women of economic and other opportunities into the modern era. These unfortunate facts show that the voting right cannot be isolated from other factors making up patterns of domination in the American society. Moreover, the story of women's long battle for suffrage and the Court's resistance to it has general significance for mainstream constitutional theory in a number of different areas.

First and most broadly, the story of women's struggle for the vote shows that attempts to justify the Court's failure to intervene in "private" relations cannot be justified by reference to majority rule and democratic values.[544] Attention to the history of the voting right shows that reference to majority rule is without factual support. For most of this country's history, a majority of its adult inhabitants have not been allowed to vote. From the time of the Constitution's ratification until 1920, women — one half the population — were prevented by law from participating in the governance of the system within which they were required to live. During that same period the poor were not allowed to mark their ballots, African-Americans had no meaningful political rights, and other marginalized persons were excluded from political power.[545]

Secondly, the Court's own complicity in maintaining the nonfranchise elements of the gender system intact after the Nineteenth Amendment and its cooperation in the process of preserving de jure discrimination against women to stabilize their continued subordination in de facto relations render the preference in constitutional theory for formal over actual equality unjustified. A preference for actual over formal equality has its most obvious application in the context of equal protection doctrine. In cases like *Washington v. Davis*[546] and *Arlington Heights v. Metropolitan Housing Development Corp.*,[547] laws with a dis-

544. It is a truism of constitutional theory that judicial activism is anti-democratic in conception and that legislative enactments are entitled to judicial deference as products of majority will. *See, e.g.,* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 10 (1971) (arguing against the enforcement of unenumerated fundamental rights by referring to majoritarian norms). For a sophisticated defense of majority rule, which also allows exceptions to it that are representation reinforcing, see generally ELY, *supra* note 62.

545. *See generally* Smith, *supra* note 12.

546. 426 U.S. 229 (1976) (class action brought by Black officers claiming written personnel tests were racially discriminatory).

547. 429 U.S. 252 (1977) (action for injunctive and declaratory relief claiming that local authorities' refusal to change zoning from single to multi-family housing had a racially discriminatory effect).

parate negative impact on historically dominated groups still pass constitutional muster if they are couched in neutral language and their disparate impact cannot be traced to an overtly discriminatory purpose. In this way constitutional theory has developed so that legislation that harms women, African-Americans, or other minority groups in effect rather than by overt purpose is immune from constitutional attack, regardless of how it functions to stabilize patterns of subordination in the general society.

The Court's unwillingness to treat disparate impact as a basis for equal protection violations played a major role in *Personnel Administrator of Massachusetts v. Feeney*,[548] when it upheld Massachusetts' Veterans preference statute giving preference to veterans in state employment despite the fact that 98% of those benefitted were men.[549] This approach conferred an additional benefit on males, who already occupied desirable positions in the job market far in excess of their numbers in the population. That women's nonappearance in the ranks of veterans is *itself* the product of past de jure discrimination underscores the injustice of this result because women have been positively prevented from serving in the armed forces on the same basis as men.[550] In this way, legal discrimination from a prior era created the conditions leading to a de facto form of discrimination in the present. Thus, one of the most important contributions that the history of woman suffrage makes to contemporary constitutional theory is to show in concrete and identifiable ways the historical relationship between legislation expressing overt discrimination and legislation "only" resulting in a disparate impact on a previously legally dominated group. This interpretation of history erodes the distinction between the two and removes the warrant for a constitutional doctrine that prohibits one and permits the other.

Similarly, the history of the woman's suffrage movement provides a broader context within which to determine whether and how gender classifications can be appropriate in governmental legislation.[551] If a particular legislative schema providing for differentiations based on sex can be linked to historic techniques

548. 442 U.S. 256 (1979).

549. *Id.* at 270.

550. For Justice Stewart, it was not dispositive that "[t]he enlistment policies of the Armed Services may well have discriminated on the basis of sex." *Id.* at 278 (Stewart, J., citing Frontiero v. Richardson, 411 U.S. 677 (1973) and Schlesinger v. Ballard, 419 U.S. 498 (1976)).

551. For a discussion of how the tax laws promote gender differences, see McCaffery, *supra* note 60.

for keeping women in a subordinate status, then an even higher form of scrutiny than the intermediate level now typically applied might be appropriate. Such an approach might have dictated a different result in a case like *Rostker v. Goldberg,*[552] which dealt with women's exemption from the military draft registration system. Until only recently, women have been excluded from eligibility for military service over their objection.[553] However, many would argue that exempting women from the burden of registering for eventual mandatory service benefits them[554] and promotes a valid military objective of efficiency that overcomes the intermediate level of scrutiny applied in gender cases.[555] These arguments ignore the historical evidence, however. In the Nineteenth Century, women's forced exclusion from military service was used as an argument justifying their lack of entitlement to voting rights.[556] Moreover, this exclusion was based on stereotypes of women's "natural" weakness and fragility and their special fitness for reproduction and mothering. Hence, it promoted the ideology that was part of the complex of women's domination and provided an argument to foes of women's emancipation based on the notion that only those who can wield arms to protect the polity ought to be allowed to participate in governing its affairs.[557] Given this historic reality, women's exemption from the registration system loses much of its benign appearance.

Finally, to the extent that the historic exclusion of women from political participation resulted in the unjust enrichment of dominant groups, it adds to the current debate over affirmative

552. 453 U.S. 57 (1981).

553. *Id.* at 90 n.7.

554. This was a theme in Congressional hearings on the issue of women in combat. *See Registration of Women (1980), Hearings on H.R. 6569 Before the Subcomm. on Military Personnel of the House Comm. on Armed Services,* 96th Cong., 2d. Sess. (1980); *see also* Caren Dubnoff, *Sex Discrimination and the Burger Court: A Retreat in Progress?*, 50 FORDHAM L. REV. 369, 398–408 (1982) (discussing *Rostker* and related decisions).

555. Given the special deference afforded Congress's conduct of its war powers in *Rostker*, it is not at all clear that the intermediate level of review was in fact applied there. *See Rostker,* 453 U.S. at 69–72.

556. Shklar has pointed out the close connection between the notion of citizen and soldier in the American conception of public virtue. *See* SHKLAR, *supra* note 38, at 31.

557. Women's ability to participate in the military involves one of the most intractable pockets of gender discrimination still left in the society; it is probably no accident that two of the recent cases in which the Court has shown little sensitivity to women, *Feeney* and *Rostker*, both touch on this subject. *Rostker*, 453 U.S. at 59; Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 269–70 (1979).

action. One of the most troublesome aspects of so-called reverse discrimination is that it requires the denigration of the opportunities of some to redress past legal bias and prejudice limiting the opportunities of others.[558] By realizing that select groups have commandeered key institutions in American society through their exclusion of others from the franchise and that this process has led to their unjust enrichment in employment, education, and other opportunities, general principles of restitution become relevant to the controversy over the moral basis for affirmative action. As Thomas Nagel stated:

> [A] social system may continue to deny different races or sexes equal opportunity or equal access to desirable positions even after the discriminatory barriers to those positions have been lifted. Socially-caused inequality in the capacity to make use of available opportunities or to compete for available positions may persist, because the society systematically provides to one group more than to another certain educational, social, or economic advantages . . . . Where there has recently been widespread deliberate discrimination in many areas, it will not be surprising if the formerly excluded group experiences relative difficulty in gaining access to newly opened positions, and it is plausible to explain the difficulty at least partly in terms of disadvantages produced by past discrimination.[559]

What the history of woman suffrage shows is the connection between legal forms of overt discrimination and private patterns of dominance in the civil society. Removing one does not at the same time remove the other. "[D]isadvantages produced by past discrimination"[560] and suffered by subordinated groups are accompanied by unjustly attained advantages enjoyed by others that continue long after the legal barriers are removed. Were the Court to take this phenomenon more seriously, its recent reluctance to support affirmative action principles enthusiastically as a fitting expression of restitutionary tenets would perhaps be obviated.[561]

---

558. *See generally* Lisa H. Newton, *Reverse Discrimination as Unjustified*, 83 ETHICS 308 (1973) (arguing that affirmative action is morally wrong).

559. *See* Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 349 (1973).

560. *Id.*

561. In certain circumstances, restitution may be had from "innocent" third parties. *See, e.g.*, Newton v. Porter, 69 N.Y. 133 (1877) (constructive trust imposed on monies in the hands of attorneys paid to them by thieves for representation); Simonds v. Simonds, 45 N.Y.2d 233 (1978) (impressing a constructive trust on insurance proceeds held by an innocent third party).

Thus, the impact of the history of the woman suffrage movement on notions of judicial deference to majority rule, on equal protection doctrines insulating disparate impact legislation from invalidation, and on theoretical justifications for affirmative action are just three areas where its lessons have potentially serious and significant effects. There are perhaps many others that constitutional scholars and political theorists might develop. The problem has been that the story of women's long struggle for civil rights has been consigned to the underside of history, where it has not been available to inform our understanding of fundamental constitutional principles on voting and myriad other issues. In this way, woman suffrage is relevant not only to teach us the limitations and the possibilities of the voting right, but also to allow us to see basic tenets of constitutional adjudication from another perspective, one that takes seriously how the phenomenon of dominance negatively impacts aspirations to democratic inclusion.

In recounting the tale of women's fight for emancipation that began in the years before Seneca Falls and is ongoing, it has been my goal to bring the story of their efforts from the margin of constitutional theory to its center. By looking at the efforts of women to share in the governance of the American society over the objection of ruling groups, we can better understand not only what the women of last century did and did not accomplish through the voting right, but also the importance of insisting that democratic inclusion be a reality, not just an aspiration, in our political system. One of the means for taking us from illusion to reality is through appropriate attention to history.