

Why the Nineteenth Amendment Matters Today: A Guide for the Centennial

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Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise.

—*United States v. Virginia* (1996)¹

INTRODUCTION

The Nineteenth Amendment to the United States Constitution provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."² This year marks the one hundredth anniversary of the ratification of that radically pro-democratic amendment, which empowered roughly ten million women to vote in a general election for the first time.³ Given the practical and expressive significance of the "Susan B. Anthony Amendment," so named to honor the woman who wrote it and served as one of its most prominent champions, it is altogether fitting that the American Bar Association, numerous law schools, and a variety of public-spirited organizations are honoring the occasion.⁴ But all Americans—citizens, legislators,

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1. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (footnote omitted)). The omitted footnote is discussed *infra* note 26 and accompanying text.

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

3. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 419 (2005) (calling the Nineteenth Amendment "the single biggest democratizing event in American history" and noting that "[e]ven the most extraordinary feats of the Founding and Reconstruction eras had involved the electoral empowerment and/or enfranchisement of hundreds of thousands, not millions").

4. See, e.g., *19th Amendment Centennial of Women's Right to Vote*, A.B.A., <https://www.americanbar.org/>

lawyers, judges, and constitutional law scholars—might do more than honor their shared past. They might be encouraged to think about why the story of the Nineteenth Amendment matters to Americans living today. That story includes more than a half-century of social movement contestation over whether permitting women to vote would destroy or democratize the American family and the American constitutional structure. That story also includes pitched debates over the framing, ratification, and subsequent interpretation of the Nineteenth Amendment.⁵

This Essay revisits the story of the Nineteenth Amendment—an unfinished narrative of both disappointment and hope—in the service of identifying reasons why that story relates to the lives of contemporary Americans. The overarching objective of the Essay is to suggest that the full story of the Amendment—which is mostly absent from both public memory and the constitutional canon—has always involved much more than a narrow debate over a determinate decision rule regarding women’s access to the franchise. To accomplish that objective, the Essay makes four points in four parts. The first two explain when and how voting rights for all women slowly became a reality, and the final two identify some implications of that history for American constitutional law and contemporary constitutional politics.

Part I considers which women were enfranchised when and why it matters. It first notices the significance of the fact that adult, female citizens of the United States today possess a federal constitutional right to vote that did not exist for most of American history. This Part then emphasizes that women *plural* gained a constitutional right to vote not only because of enforcement of the Nineteenth Amendment, but also because of eventual enforcement of the Fifteenth Amendment—an addition to the Constitution that, to the nation’s shame, went unenforced throughout the American South for almost a century.⁶ It turns out that ratifying a constitutional amendment and enforcing it are not the same thing—whether in the case of the Fifteenth Amendment or, as discussed in Parts III and IV, in the case of the Nineteenth Amendment, which remains a work in progress.

Part II considers some of the social groups and constitutional structures that both impeded and facilitated woman suffrage. It first examines the role of men in undermining and advancing the equal citizenship stature of women. It then critiques the notion of virtual representation—the often-made argument that woman suffrage was unnecessary because their interests were already well-

groups/public_education/Programs/19th-amendment-centennial/(last visited Feb. 6, 2020).

5. For a discussion among Professor Nancy Cott, Professor Reva Siegel, and the author of the history of the Nineteenth Amendment and its bearing on issues affecting women in contemporary American society, see Nat’l Const. Ctr., *From Suffrage to Workplace Equality*, YOUTUBE (May 5, 2014), <https://www.youtube.com/watch?v=-zRnN9denQ&app=desktop>.

6. Technically, the Nineteenth Amendment prohibits sex-based disenfranchisements; it does not confer a fundamental right to vote. The difference between the two kinds of constitutional entitlements helped enable states—especially those of the former Confederacy—to pay lip service to the Fifteenth Amendment while preventing African Americans from voting through such facially race-neutral devices as poll taxes, literacy tests, and grandfather clauses. But the Nineteenth Amendment effectively confers a fundamental right to vote upon women because states have not used such shams to disenfranchise them, and in any event, subterfuges would not survive modern constitutional law’s policing of racist or sexist intent. See, e.g., *Virginia*, 518 U.S. 515.

represented by the men in their lives—as an argument for limitations on the franchise. Finally, this Part examines the role of federalism reasoning and rhetoric in thwarting and promoting women’s equality—and equality values more generally—as evidenced by recent, dramatic changes in social values on the constitutional status of sexual orientation minorities.

Part III explains the historical and conceptual link between restrictions on woman suffrage and the social subordination of women to men in the family and in American society. This Part shows how the history and anti-subordination rationale of the Nineteenth Amendment bears on both its own interpretation and the interpretation of the Equal Protection Clause by the courts. Constitutional interpretation that reads the Nineteenth Amendment purposively, not literally, can be described as structural. Constitutional interpretation that reads the Equal Protection Clause in light of the Nineteenth Amendment can be described as synthetic. Both kinds of interpretation are relatively common in constitutional law.

Part IV turns from contemporary constitutional law to the contemporary implications of the story of the Nineteenth Amendment for American constitutional politics. It first explores significant differences in the interpretive arguments of opponents of the Nineteenth Amendment before and after its ratification: they moved from decrying an affirmative answer to “the woman question” as radically transforming both the American family and American federalism to recasting the question as involving merely a decision rule about voting in elections. This Part cautions against permitting such a future recasting of current debates over the Equal Rights Amendment, should that proposed amendment be ratified in the years ahead. Part IV then underscores the slow, uneven pace of progress in disestablishing gender hierarchies. Finally, it suggests that the history and meaning of the Nineteenth Amendment, both standing on its own interpretive bottom and read synthetically with the Equal Protection Clause, should inspire contemporary Americans to ask whether current regulations of women reflect or reinforce their inferior social status within and outside the family.

The Conclusion suggests an additional reason why the Nineteenth Amendment matters today. As Americans wrestle with their collective past and conflict rages over how to remember luminaries like Woodrow Wilson and social movements like woman suffrage, the story of the Nineteenth Amendment illustrates that history is often a mixed bag; that most groups and movements are neither morally pure nor pure evil; that people who pursue even the most noble of causes can still be deeply flawed and partially blind, especially in a fallen world that demands compromise as the price of progress; and that sometimes people can change, at least somewhat and with respect to certain moral questions, if not others. The Conclusion also counsels introspection and circumspection in approaching the centennial of the Nineteenth Amendment.

I. THE CONSTITUTIONAL RIGHT OF WOMEN *PLURAL* TO VOTE

A. The Right of Women to Vote

In today’s United States, adult, female citizens possess a federal constitutional right to vote. Although that fact might seem so obvious as to go without saying, it is worth saying out loud because it was not true for most of

American history. At the Founding and throughout the nineteenth and early twentieth centuries, women were considered United States citizens but lacked a federal right to vote. Voting was not conceived of as a right that attached to American citizenship; rather, voting was considered a political privilege that was restricted to Americans who possessed enough independence to exercise the franchise responsibly.⁷ Initially, white men without property were thought to lack the independence required to be trustworthy in exercising the franchise,⁸ as were African Americans and, to this day, minors.⁹ Women, too, were thought to lack sufficient independence on the ground that their votes would be unduly influenced by the men on whom they depended for their subsistence—namely, their husbands.¹⁰

Federal constitutional voting rights for women matter today in part for expressive reasons. For example, parents can point to the text of the Constitution in explaining to their daughters, as well as their sons, that they will possess political equality when they become adults. By contrast, the original Constitution contained no such guarantee. Indeed, the constitutional text referred to the President as male at least in part because it was simply unimaginable that the President could be female.¹¹

Moreover, the reconstructed Constitution emancipated African American slaves, made them citizens, and protected the men among them from racial discrimination in voting (at least on paper), but declined to extend the franchise to women. Sorely disappointed by the message women's exclusion sent were suffragists led by Elizabeth Cady Stanton and Susan B. Anthony. They had worked toward abolition before the Civil War; they had led petition drives in support of

7. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 174 (2000) (“[W]omen . . . were excluded from the polity for the same reason that the poor and propertyless were disenfranchised in the late eighteenth century: they purportedly lacked the ‘independence’ necessary for participation in electoral politics.”).

8. See, e.g., JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 113 (2018) (observing that “many men of means” during the 1770s and 1780s “believ[ed] that poor men, like women, lacked the capacity to make good political decisions because, dependent on others, their will was not their own,” and that “Massachusetts’s constitution included property qualifications both for office seekers and for voters”); *id.* (“As [John] Adams explained, ‘Such is the Frailty of the human Heart, that very few Men, who have no Property, have any Judgment of their own.’”) (quoting Letter from John Adams to James Sullivan (May 26, 1776), in 4 *THE PAPERS OF JOHN ADAMS* 210 (Robert J. Taylor, Gregg L. Lint, & Celeste Walker eds., 1980)).

9. See, e.g., Ruth Bader Ginsburg, *Foreword* to *SUPREME COURT DECISIONS AND WOMEN’S RIGHTS: MILESTONES IN EQUALITY* xii (Clare Cushman ed., 2001) (quoting RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789*, 193 (1987) (writing that “a prime portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women”)).

10. See generally Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About “the Woman Question” in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131–82, 144 (Austin Sarat & Thomas R. Kearns eds., 1999) [hereinafter Siegel, *Collective Memory and the Nineteenth Amendment*] (arguing, among other things, that in the view of the founding generation, “persons in relations of dependency were unfit to govern because they were governed by others”).

11. See, e.g., U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years . . .”).

ratification of the Thirteenth Amendment; and they had initially advocated universalism in voting rights in the hope that securing voting rights for African American men would also mean gaining voting rights for women. Those hopes were soon dashed. In 1865, suffragists were told by the prominent abolitionist Wendell Phillips that “[t]his hour belongs exclusively to the negro,”¹² and “the negro’s hour” became a catch-phrase among abolitionists. During Reconstruction, the (male) leaders of the Republican Party did not see why women (as opposed to African Americans) needed the right to vote in order to protect themselves, nor did they see how enfranchising women (again, in contrast with African Americans) would give Republicans a partisan advantage.¹³

Indeed, the Fourteenth Amendment actually introduced facial sex classifications into the text of the Constitution for the first time in American constitutional history, making express what had previously been assumed:

[W]hen the right to vote at any election . . . 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.¹⁴

Those sex distinctions presupposed—and announced to the world—that being female was incompatible with being a voter. Expressive considerations matter because of the social meanings they convey to Americans about the character and destiny of America, as well as about their own status and the status of others in the national political community.¹⁵

But more important than the symbolism of whose rights reside—or do not reside—in controlling constitutional text are the practical reasons why voting

12. *The Anniversaries: Important Session of the Anti-Slavery Society*, N.Y. TIMES, May 10, 1865, at 1, <https://www.nytimes.com/1865/05/10/archives/the-anniversaries-important-session-of-the-antislavery-society.html> (speech of Wendell Phillips).

[T]hat we may check State Rights at the proper time and place, I want to have another amendment passed which shall read thus: no State shall at any time make a distinction of civil privileges between the children of parents living on or born on her soil, either of race, condition or color. [Applause.] I hope some day to be bold enough to add ‘sex.’ However, my friends, we must take up but one question at a time, and this hour belongs exclusively to the negro.

Id.

13. See KEYSSAR, *supra* note 7, at 180, 183 (emphasizing those differences).

14. U.S. CONST. amend. XIV, § 2 (emphases added). Apportionment penalties should have been triggered when (mostly ex-Confederate) states prevented African American men from voting, but Section Two of the Fourteenth Amendment was never enforced.

15. See generally Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 U. CONN. L. REV. 1025 (2015) (clarifying, from within the horizon of both American society and the individual, what is expressively at stake in ensuring that people are free from race or sex discrimination); *id.* at 1032–33 (“In prohibiting race discrimination, the public also expresses the identity and values of the polity as a whole, defending and furthering its form of life as a community. Shared understandings of this kind are essential if a society is to realize its claims to provide equal citizenship and to practice democracy.”); *id.* at 1034 (“Also at stake for [individuals] is their standing in the community. Whether they possess or lack equal citizenship stature determines whether they live as outsiders looking in, or as insiders looking around.”).

rights for women are vitally important today. Whatever one thinks of the legislative conduct of American politicians toward women as a general matter, it is hard to see how women (or any other group of people for that matter) would be better off materially if those politicians did not require any of their votes in order to obtain re-election.

Certain issues disproportionately affect women. Examples, which are discussed in the final Part of this Essay, include the problems of unequal pay for equal work and a lack of paid family- and self-care leave to help women (and men) negotiate their responsibilities at work and at home, where women continue to do more than their fair share of parenting and household maintenance. Another example is statutory impediments to accessing effective, affordable contraception, which is used by a solid majority of adult women in the United States. An additional example is abortion-restrictive regulations. Despite being controversial among women, such regulations include draconian limitations—such as bans as early as six weeks into pregnancy and no exceptions for rape or incest—that most women (and men) oppose.¹⁶

Other issues do not disproportionately affect women in particular. For example, budgets reflect the values of those who create or seek to benefit from them. Demagogic politicians who stoke hatred and division diminish civic life for everyone, but especially the most vulnerable among us—regardless of gender. And men and women both are affected by the circumstances in which they or their children are sent to war. Whether or not an issue of particular concern to women is at stake, the interests and values of women collectively (when their interests and values converge) and individually (when they do not) are better protected by their possession of a federal constitutional entitlement to vote, which helps them to hold politicians accountable for the decisions they make that affect women's lives and the lives of the people women care about.

B. The Right of Women *Plural* to Vote

As developed in the work of black women scholars such as Kimberlé Crenshaw, the concept of intersectionality directs attention to the fact that various forms of discrimination may overlap and so differentially affect members of multiple traditionally excluded groups.¹⁷ For example, African American women may be discriminated against for being both black and female, and so may be differently situated from both African American men and white women in a

16. See, e.g., Daniel Bush, *New Abortion Laws Are Too Extreme for Most Americans, Poll Shows*, PBS NEWSHOUR (June 7, 2019, 5:00 AM), <https://www.pbs.org/newshour/politics/new-abortion-laws-are-too-extreme-for-most-americans-poll-shows>; Ariel Edwards-Levy, *Here's Why Alabama's New Abortion Law Is So Unpopular*, HUFFINGTON POST (May 22, 2019), https://www.huffpost.com/entry/alabama-abortion-law-poll_n_5cdee283e4b00e035b8f7452; Emily Guskin & Scott Clement, *Abortion Support Is the Highest It's Been in Decades as Challenges Mount*, WASH. POST (July 10, 2019), <https://www.washingtonpost.com/politics/2019/07/10/abortion-support-is-highest-its-been-two-decades-two-decade-high-challenges-roe-mount/>.

17. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). For an example of another black woman scholar who made similar claims at the same time about the intersectional impact of race and gender, see generally Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

variety of contexts, such as certain opportunities for employment. The idea of intersectionality has been extended beyond the intersection of race and gender to illuminate the particular struggles for equal citizenship of members of a variety of different groups. For instance, gay African American men may be differently situated in certain respects from both gay people generally and African Americans generally.

An intersectional sensibility resists uncritical acceptance of the claim one often hears that women as a group gained a constitutional right to vote with the ratification of the Nineteenth Amendment in 1920. In point of fact, the right of women of color to vote, like the right of people of color more generally to vote, was not vindicated until after passage of the Voting Rights Act of 1965, which finally committed the nation to enforcing the Fifteenth Amendment's prohibition on racial discrimination in voting. That amendment had been ratified in 1870, but it was defied by Southern states that effectively disenfranchised African Americans for the better part of a century. It was not until the second half of the twentieth century that women *plural* were able to vote, as a result of federal enforcement of *both* the Nineteenth Amendment *and* the Fifteenth Amendment.

Put differently, some Southern politicians, in vehemently opposing ratification of the Nineteenth Amendment, suppressed the ways in which white women and black women were differently situated. Ratification of the Amendment was most strongly opposed in the American South, where "the issue of white supremacy dominated all other political considerations."¹⁸ When, on August 18, 1920, Tennessee became the decisive thirty-sixth state required for ratification of the Amendment, it was only the third of the eleven states of the former Confederacy to vote in favor of woman suffrage. Three geographers of the American South put the data into historical and cultural perspective:

The South not only resisted the extension of voting rights to African Americans after the Civil War, but largely refused to ratify the Nineteenth Amendment enfranchising women in 1920. Of the 11 former Confederate states only the legislatures of Texas, Arkansas, and Tennessee voted in favor of the amendment. Fifty years later during the debates over the Equal Rights Amendment only the states of Tennessee and Arkansas voted in favor [of] amending the Constitution. Thus, the southern states have been historically resistant to the entry of all groups into the realm of political activity except for those white males already among the elite.¹⁹

During the debate over the Nineteenth Amendment, some Southern politicians spoke as if they did not understand how, if the Nineteenth Amendment were ratified, they could continue to disenfranchise black women.²⁰ They argued expressly that they could not sensibly preach defiance of the Fifteenth Amendment

18. ALAN P. GRIMES, *THE PURITAN ETHIC AND WOMAN SUFFRAGE* 124 (1967). Notably, "the doctrine of white supremacy was not confined to the South alone in 1914," *id.*, nor was it confined to only one side of the debate over woman suffrage, *see id.* at 124–25.

19. Gerald L. Ingalls, Gerald R. Webster & Jonathan I. Leib, *Fifty Years of Political Change in the South: Electing African Americans and Women to Public Office*, 37 *SE. GEOGRAPHER* 140, 141 (1997).

20. Whether those Southern politicians actually did not understand the basic insight of intersectionality is another matter. As noted in the text, after ratification of the Nineteenth Amendment, states that wanted to prevent African Americans (but not white women) from voting continued to succeed in doing so.

while supporting ratification of the Nineteenth Amendment. As South Carolina Senator Ellison D. Smith stated bluntly on the Senate floor in 1919, in an extended, unapologetic outpouring of white supremacy, “Here is exactly the identical same amendment applied to the other half of the Negro race. The southern man who votes for the Susan B. Anthony Amendment votes to ratify the fifteenth amendment.”²¹ Smith deemed it his “duty” to “warn southern Democrats—southern white men—that this day they solemnly ratify what they have for the last 50 years denounced as the crime of the century”²²—that is, the Fifteenth Amendment.²³ As some suffragists had insisted, Smith’s professed concerns turned out to be unfounded: ratification of the Nineteenth Amendment did not disable states like his own from continuing to disenfranchise African Americans, women and men alike. Only white women were permitted to vote.²⁴

II. THE ROLES OF MEN AND FEDERALISM IN UNDERMINING AND ADVANCING WOMAN SUFFRAGE

A. Men

Men as a group, it should not be controversial to observe, have been primarily responsible for the social subordination of women over the course of millennia. In the United States, for example, it was men who decided at the time of the Founding that adult women would be citizens but would not be permitted to vote or to participate in other basic ways in the educational, economic, and political life of the nation—a state of affairs that Abigail Adams famously called out to her husband, John.²⁵ As Justice Ginsburg pointedly remarked in her majority opinion in *United States v. Virginia* (a decision that is discussed in detail in Part III), Thomas Jefferson “stated the view prevailing when the Constitution was new”; he wrote in private correspondence in 1816 that “[w]ere our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men.”²⁶ It was men, most of whom eventually could vote, who

21. 58 CONG. REC. 618 (1919).

22. *Id.* at 619. For additional expressions of virulent white supremacy by members of Congress opposed to woman suffrage, see GRIMES, *supra* note 18, at 126–27.

23. For discussions of the contributions of African American women to the woman suffrage movement and the fight for gender equality more generally, see generally AFRICAN AMERICAN WOMEN AND THE VOTE (Ann D. Gordon et al. eds., 1997); ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920 (1998).

24. See KEYSSAR, *supra* note 7, at 219 (“[T]he suffragists’ prediction that the enfranchisement of women would not jeopardize white supremacy in the South proved to be on the mark: although some (but not many) black women were able to register to vote, the Democratic Party remained firmly in power, segregation and black disenfranchisement persisted, and the federal government steered clear of voting rights issues for another four decades.”).

25. See FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS, DURING THE REVOLUTION 148–150, 153–55, 168–70 (Charles Francis Adams ed., 1876) (reproducing a letter from Abigail to John of March 31, 1776, John’s response of April 14, 1776, and Abigail’s reply of May 7, 1776).

26. *United States v. Virginia*, 518 U.S. 515, 531 n.5 (1996) (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 WRITINGS OF THOMAS JEFFERSON 45–46, n.1 (Paul Leicester Ford ed., 1899)).

refused to elect politicians who would support gender equality, including woman suffrage. And it was conservative, traditionalist men in particular who most strongly opposed the Nineteenth Amendment and who succeeded in preventing its ratification until 1920, a mere one hundred years ago.²⁷

Less obvious, perhaps, has been the role of men in *advancing* women's equality, including woman suffrage. Women such as Susan B. Anthony, Elizabeth Cady Stanton, Lucy Stone, and Alice Paul led the suffrage movement, but men also played pivotal roles. Most fundamentally, the Nineteenth Amendment had to garner the widespread support of male politicians in order to survive the extraordinarily demanding process of constitutional amendment. The Nineteenth Amendment followed the typical Article V procedure, earning the support of at least two-thirds of each house of Congress and three-quarters of the state legislatures, all but one of which (Nebraska) were bicameral.²⁸

Perhaps no one embodied the conflicting—and evolving—relationship of men to the woman suffrage movement than the first Southerner elected President since the Civil War, Woodrow Wilson of Virginia, whose deeply troubling views on race underwent no transformation even as his views on woman suffrage did.²⁹ Wilson began as an obstacle to women's enfranchisement, labeling women who campaigned for suffrage “totally abhorrent” and believing that the issue should be left to the states.³⁰ But a combination of factors—including daily picketing of the White House by the National Woman's Party beginning in 1917, World War I, and, potentially, his daughter (suffragist Jessie Woodrow Wilson Sayre)—changed him, eventually prompting him to intervene in dramatic fashion to support the Nineteenth Amendment.³¹

27. See KEYSSAR, *supra* note 7, at 217 (noting that the Nineteenth Amendment's “last-ditch opponents were almost entirely Southerners and old-stock, probusiness Republicans such as Henry Cabot Lodge”).

28. U.S. CONST. art. V. Nebraska was the fourteenth state to ratify the Nineteenth Amendment (on August 2, 1919).

29. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 6–12 (2001) (describing Wilson's speech on the battlefield at Gettysburg during the fiftieth anniversary Blue-Gray reunion, in which he said that “we shall not forget the splendid valor, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes”); see also, e.g., Dick Lehr, *The Racist Legacy of Woodrow Wilson*, ATLANTIC (Nov. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549/> (describing how Wilson oversaw unprecedented racial segregation in the executive branch and once threw William Monroe Trotter, an African American civil rights leader, out of the Oval Office).

30. For discussions of Wilson's evolution, see KEYSSAR, *supra* note 7, at 213–17; Elizabeth Cobbs, *19th Amendment Anniversary: Evaluating Woodrow Wilson's Complicated Contributions to Women's Equality*, NBC NEWS (Aug. 26, 2018, 10:20 AM), <https://www.nbcnews.com/think/opinion/19th-amendment-anniversary-evaluating-woodrow-wilson-s-complicated-contributions-women-ncna903746>; Global Women's Leadership Initiative Staff, *Woodrow Wilson and the Women's Suffrage Movement: A Reflection*, WILSON CTR. (June 4, 2013), <https://www.wilsoncenter.org/article/woodrow-wilson-and-the-womens-suffrage-movement-reflection>; *Women's Suffrage and WWI*, NAT'L PARK SERV., <https://www.nps.gov/articles/womens-suffrage-wwi.htm> (last updated Oct. 15, 2018).

31. See KEYSSAR, *supra* note 7, at 214 (discussing the daily picketing of the White House beginning in January 1917 by the National Woman's Party, whose members “carr[ie]d signs contrasting Wilson's broadly stated democratic utterances with his position on women's suffrage”); Global Women's Leadership Initiative Staff, *supra* note 30 (discussing the three factors identified in the text in describing Wilson's “ethical metamorphosis” on the issue of woman suffrage).

On September 30, 1918, Wilson appeared personally before the Senate. In his brief, powerful address to “Mr. Vice President and gentlemen of the Senate,” he framed ratification as critical to the cause of American victory and leadership in World War I and to American leadership on the world stage after the war:

Through many, many channels I have been made aware what the plain, struggling, workaday folk are thinking, upon whom the chief terror and suffering of this tragic war falls. They are looking to the great, powerful, famous Democracy of the West to lead them to the new day for which they have so long waited; and they think, in their logical simplicity, that democracy means that women shall play their part in affairs alongside men and upon an equal footing with them. If we reject measures like this, in ignorance or defiance of what a new age has brought forth, of what they have seen but we have not, they will cease to follow or to trust us. . . .

Are we alone to refuse to learn the lesson? Are we alone to ask and take the utmost that women can give,—service and sacrifice of every kind,—and still say that we do not see what title that gives them to stand by our sides in the guidance of the affairs of their nation and ours? We have made partners of the women in this war; shall we admit them only to a partnership of sacrifice and suffering and toil and not to a partnership of privilege and of right? This war could not have been fought, either by other nations engaged or by America, if it had not been for the services of the women,—services rendered in every sphere,—not merely in the fields of effort in which we have been accustomed to see them work, but wherever men have worked and upon the very skirts and edges of the battle itself. We shall not only be distrusted but shall deserve to be distrusted if we do not enfranchise them with the fullest possible enfranchisement, as it is now certain that the other great free nations will enfranchise them. We cannot isolate our thought or our action in such a matter from the thought of the rest of the world. We must either conform or deliberately reject what they propose and resign the leadership of liberal minds to others.³²

In those rich passages, Wilson emphasized the fierce loyalty of American women; the fundamental fairness of enfranchising them in recognition of their many sacrifices on behalf of the nation; the basic capacity of women to occupy roles traditionally occupied by men, including in the sphere of public affairs; and the critical importance of paying “a decent respect to the opinions of [human]kind,” to (not) coin a phrase.³³ The Nineteenth Amendment, Wilson urged, was “vital to the winning of the war and to the energies alike of preparation and of battle,” as well as “to the right solution of the great problems which we must settle, and settle

32. President Woodrow Wilson, Equal Suffrage: Address of the President of the United States, Delivered in the Senate of the United States (Sept. 30, 1918), at 2, 3, <https://www.senate.gov/artandhistory/history/resources/pdf/WilsonSpeech1918.pdf>. Strikingly, Wilson did not view the race situation in the United States as threatening the moral leadership of the United States in World War I or beyond. A few decades later, the State Department in the *Brown* litigation would have a very different view of the matter. See generally Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32 (2004).

33. THE DECLARATION OF INDEPENDENCE para. 1 (U.S., 1776).

immediately, when the war is over.”³⁴ Wars have historically been helpful to advocates of expanded suffrage in the United States, and World War I was no exception.

There may be a lesson here about the necessary roles of both women and men in the broader struggle for gender equality. Of course, women cannot simply wait for a sufficient number of men to decide when it is time to afford women full inclusion and equality in public life; that is *not* the story of the Nineteenth Amendment. But nor, in all likelihood, can women achieve such inclusion and equality on their own in the face of unrelenting opposition or indifference from men. Fathers, husbands, sons, and male colleagues and friends also need to step up, as many of them eventually did in voting for the Nineteenth Amendment, and as many of them also did a half-century later in supporting second-wave feminism’s attacks on traditional gender roles. Relevant in that regard is the frequency with which Justice Ginsburg credits her late husband, Marty Ginsburg, for facilitating her professional career by recognizing its worth and by being fully present at home (and doing the cooking).³⁵

Then-Professor Ruth Bader Ginsburg understood well, in part from her time in Sweden, that if women were going to have more opportunities outside the home, then men would need to assume more caregiving responsibilities inside the home (among other things).³⁶ Decades later, when an admiring woman visited

34. Wilson, *supra* note 32, at 4. To be clear, Wilson’s views remained deeply gendered:

We shall need [when the war is over] a vision of affairs which is theirs, and, as we have never needed them before, the sympathy and insight and clear moral instinct of the women of the world. . . . We shall need their moral sense to preserve what is right and fine and worthy in our system of life as well as to discover just what it is that ought to be purified and reformed.

Id. See Melissa Murray, *The Equal Rights Amendment: A Century in the Making Symposium Foreword*, 43 REV. L. & SOC. CHANGE/HARBINGER 91, 92 (2019) (“For many, women’s enfranchisement was not animated by an unalloyed commitment to women’s equality, but rather by the view that women—the virtuous sex—were uniquely positioned to purify and uplift the tenor of American politics.”). Some suffragists made gender essentialist appeals. See KEYSSAR, *supra* note 7, at 188 (noting the emergence in the 1870s of a “more essentialist strand of argument: that women possessed particular qualities or virtues that would improve the character of politics and governance,” and observing that “[s]uch views began to be uttered by Stanton and other suffragists in the late 1860s”).

35. See, e.g., Justice Ruth Bader Ginsburg, *A Conversation with Associate Justice Ruth Bader Ginsburg*, University of Colorado Law School Annual Stevens Lecture (Sept. 19, 2012), in 84 U. COLO. L. REV. 909, 913 (2013) (“I was blessed for fifty-six years, married to a man who thought my work was as important as his—and who was a great chef.”); Stephanie Francis Ward, *Family Ties, the Private and Public Lives of Justice Ruth Bader Ginsburg*, 96 A.B.A. J. 37, 38 (2010) (stating, in talking about success in her career and in raising her children, that “[i]t really does take a man who regards his wife as his best friend, his equal, his true partner in life”); *id.* at 43 (“Many who knew the couple say his admiration and support for his wife, coupled with their determination to share home responsibilities, played a large role in Ginsburg’s success, both as a parent and a lawyer, and define who she is today.”); Irin Carmon, *Ruth Bader Ginsburg on Marriage, Sexism and Pushups*, MSNBC (Feb. 17, 2015), <http://www.msnbc.com/msnbc/ruth-bader-ginsburg-marriage-sexism-and-pushups> (“‘In the course of a marriage, one accommodates the other,’ Ginsburg said. ‘So, for example, when Marty was intent on becoming a partner in a New York law firm in five years, during that time, I was the major caretaker of our home and then child. But when I started up the ACLU Women’s Rights Project, Marty realized how important that work was.’”); see also generally RBG (Magnolia Pictures 2018), <https://www.imdb.com/title/tt7689964/>.

36. See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U.

Justice Ginsburg's chambers (during the year in which the author clerked for her) and remarked that her feminist girlfriends just loved the Justice for what she had done for American women, Ginsburg responded that she hoped the woman's male friends loved her as well.³⁷ Part of her point may have been that women, in order to advance, require the support of men. But another part of her point may have been that she worked to liberate men as well as women from the constraints of traditional sex-role stereotypes—work that every present father can appreciate. A key part of her litigation strategy was thus to bring cases on behalf of caregiving men.³⁸ Put differently, the stereotypes that supported male suffrage and the denial of woman suffrage also confined men.

Fortunately, men and women both increasingly understand that no one wins under a regime of gender-role stereotyping. Indeed, “[w]omen’s issues continue to show a lack of a gender gap in most cases.”³⁹ And both men and women have

L. REV. 83, 88–89 (2010) (“Ginsburg derived the anti-stereotyping principle in part from the philosophy of John Stuart Mill and the policy innovations of Sweden, which began in the early 1960s to wage an ambitious, decades-long campaign against sex-role enforcement.”).

37. See Neil S. Siegel, “*Equal Citizenship Stature*”: Justice Ginsburg’s Constitutional Vision, 43 NEW ENG. L. REV. 799, 855 (2009) (recounting that story) [hereinafter Siegel, *Equal Citizenship Stature*].

38. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972). For discussions of why Ginsburg represented male plaintiffs (especially male caregivers), see Franklin, *supra* note 36, at 120–25; Neil S. Siegel, *The Pregnant Captain, the Notorious REG, and the Vision of RBG: The Story of Struck v. Secretary of Defense*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, 33 47–48 (Melissa Murray, Kate Shaw, & Reva B. Siegel eds., 2019).

39. Barbara Norrander, *The History of the Gender Gaps*, in VOTING THE GENDER GAP 9, 14 (Lois Duke Whitaker ed., 2008). See *id.* at 13–14 (discussing, as of 2004, polling data surveying the views of men and women on the role of women in society, abortion, support for the Equal Rights Amendment, and whether they would vote for a woman candidate for President). More recent data paint a similar picture. For example, in 2016, 93 percent of men and 97 percent of women respondents favored equal pay for women. 2016 Time Series Study, AM. NAT’L ELECTION STUDIES, <https://electionstudies.org/data-center/2016-time-series-study/> (Variable: V162149) (Question wording: “Do you favor, oppose, or neither favor nor oppose requiring employers to pay women and men the same amount for the same work?”). See also *id.* (Variable: V162230x) (Question wording: “Do you think it is better, worse, or makes no difference for the family as a whole if the man works outside the home and the woman takes care of the home and family?”). The responses did not reveal a significant gender gap:

2016	Scale	% Men	% Women
	1 (Better)	20	22
	2	13	12
	3	9	5
	4	52	57
	5	2	1
	6	0	0
	7 (Worse)	0	0

become more gender egalitarian over time.⁴⁰

B. Virtual (Mis)Representation

A longstanding justification for preventing adult female citizens from voting sounded in virtual representation: women, it was asserted, were adequately represented in the political process by their husbands, who were the heads of their households.⁴¹ Virtual representation, of course, had previously been England's response to the American colonial mantra of "no taxation without representation."⁴² The political leaders of the American colonies were

40. See *Time Series Cumulative Data File*, AM. NAT'L ELECTION STUDIES, <https://electionstudies.org/data-center/anes-time-series-cumulative-data-file/> (Variable: VCF0834) (Question wording: "Some people feel that women should have an equal role with men in running business, industry and government. Others feel that women's place is in the home. Where would you place yourself on this scale or haven't you thought much about this?"). Respondents were given 7-point scale, with 1-3 representing those who lean towards an equal role for men and women and 5-7 representing those who fall towards the view that women's place is in the home. 4 was neutral. The percentage reported is those who answered 1, 2, or 3:

Year	% Men Saying Equal Role	% Women Saying Equal Role
1972	51	46
1974	56	51
1976	59	52
1978	63	57
1980	62	62
1982	61	62
1984	62	57
1988	68	68
1992	74	74
1994	72	67
1996	77	77
1998	82	74
2000	75	81
2004	80	83
2008	84	85

41. For a discussion of American men's persistent claims for virtual representation of women, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 991-93 (2002) [hereinafter Siegel, *She the People*].

42. For a discussion of the Crown's claims for virtual representation of the American colonists, see JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 67-72 (2011).

unpersuaded by that response, and those men risked their “Lives, . . . Fortunes and . . . sacred Honor” in a war of independence rather than resign themselves to a regime of virtual representation.⁴³ But when the existential risk they took was rewarded and they established a new nation, those same men (and others), in line with the received English common law of marital status (or coverture), determined that virtual representation was sufficient for adult female citizens of the new nation.⁴⁴

It might be thought that the role of men in helping secure ratification of the Nineteenth Amendment illustrates that the virtual representation argument had something going for it.⁴⁵ At both the state and federal levels, it was male politicians who eventually voted to enfranchise women. One could make a similar argument about the extent to which the American colonies were in fact virtually represented in Parliament, given that at least some of those unpopular taxes were arguably paying for services (especially military defense) that the colonists had previously received from the Crown.

The basic problem in both instances, however, was that virtual representation was not nearly as representative as actual representation, either expressively or materially. The influential British statesman Edmund Burke recognized that a British Parliament an ocean away could not competently represent the American colonies virtually.⁴⁶ And the inadequacy of virtual representation in the case of gender relations was unwittingly made plain by the alternative argument of opponents of woman suffrage that permitting women to vote would cause discord in the family when husbands and wives disagreed about political matters!⁴⁷ (A potential problem with arguments in the alternative outside the context of litigation is that they are actually inconsistent with one another.) No one would credit a virtual representation argument in the case of race just because white Americans voted to ratify the Fifteenth Amendment.

43. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

44. The common law understood the relationship between husband and wife as falling within the realm of “domestic relations.” According to the common law rules of coverture (or marital status), a husband was entitled to the labor of his wife, whether paid or uncompensated, as well as to most property that she brought into the marriage. A wife was required to obey her husband, and he was required to support her and represent her in the legal system. Wives were prohibited from suing in court or making contracts without the approval of their husbands. Husbands were legally liable for much of the conduct of their wives. The common law entertained the legal fiction of marital unity, so that a woman’s legal existence was “suspended during the marriage.” See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 186 (6th ed. 2015) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *430 (1765)).

45. See AMAR, *supra* note 3, at 422 (“The ultimate success of the indefatigable suffragists ironically proved that the old saw—that men would virtually represent the interests of women—contained at least a grain of truth. For had all men been implacably indifferent to the voices of women, suffrage would never have happened.”). In fairness, Professor Amar then immediately acknowledges that, “[o]f course, if virtual representation was a half-truth, it was also a half-lie.” *Id.*

46. For a discussion of the ways in which Burke’s own support for virtual representation was qualified, including his view that it was not possible in the case of America, see James Conniff, *Burke, Bristol, and the Concept of Representation*, 30 W. POL. Q. 329, 338–39 (1977). For a discussion of Burke’s views on the role responsibilities of elected representatives, see Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 129–32 (2018).

47. See Siegel, *She the People*, *supra* note 41, at 993–97.

Throughout American history, virtual representation arguments have ultimately been losing arguments. That is in no small measure because the United States—with important exceptions⁴⁸—has tended to become more democratic over long periods of time, not less so.⁴⁹ Americans might bear that lesson in mind in contemporary debates over statehood for Puerto Rico and the District of Columbia, as well as debates over other restrictions on the franchise. One should be very loath to conclude that certain groups of people in the United States are sufficiently represented virtually by another group of people. For example, seventeen-year-olds will live with the effects of climate change, school shootings, budget deficits, and partisan polarization for far longer than seventy-year-olds.⁵⁰

C. Federalism

Although the political orientation of men toward the Nineteenth Amendment is a very different phenomenon from the operation of the American federal system, they share an interesting similarity. Federalism, too, both reduced and enhanced the prospects of ratifying the Nineteenth Amendment. Opponents of the Amendment invoked federalism values in arguing that, by a longstanding tradition of respect for states' rights, the states should continue to decide for themselves whether and when to allow women to vote.⁵¹ The relationship between husband and wife, like the relationship between slave owner and slave and between employer and employee, had long been conceived of as part of state domestic relations law.⁵² Some prominent opponents of woman suffrage asserted

48. For examples of contractions in the right to vote at different points in American history, see generally KEYSAR, *supra* note 7.

49. See, e.g., U.S. CONST. amends. XV (prohibition on race-based disenfranchisements), XVII (popular election of U.S. Senators), XIX (woman's suffrage), XXIII (presidential electors for the District of Columbia), XXIV (abolition of poll tax qualification to vote in federal elections), XXVI (reduction of voting age qualification to eighteen). Of course, statutes like the Voting Rights Act of 1965 have also playing a pivotal role in making the United States more compliant (although far from fully compliant) with modern democratic norms.

50. Lack of capacity is the traditional justification for excluding minors from voting; in many areas, the law distinguishes between the child who must learn and the adult who can choose. But it is not clear that the capacity line should be drawn at eighteen years old, U.S. CONST. amend. XXVI, especially given the contrast between the views of most teenagers and the views of most older Americans on a range of public issues. See, e.g., QUINNIPIAC UNIV. POLL, MAJORITY OF VOTERS SAY CLIMATE CHANGE IS AN EMERGENCY QUINNIPIAC UNIVERSITY POLL FINDS; 72% SAY CONGRESS NEEDS TO ACT TO REDUCE GUN VIOLENCE 1 (Aug. 29, 2019), <https://poll.qu.edu/national/release-detail?ReleaseID=3639> ("A majority of registered voters nationwide, 56 percent, say that climate change is an emergency, while 42 percent do not. . . . Among 18 to 34 year old voters, who may expect to be the most affected by climate change, 74 percent say that climate change is an emergency, while 24 percent do not."); Kim Parker et al., *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RESEARCH CTR. (Jan. 17, 2019), <https://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/> ("On a range of issues, from Donald Trump's presidency to the role of government to racial equality and climate change, the views of Gen Z—those ages thirteen to twenty-one in 2018— mirror those of Millennials. In each of these realms, the two younger generations hold views that differ significantly from those of their older counterparts.").

51. See Siegel, *She the People*, *supra* note 41, at 997–1003 (canvassing the federalism objections of opponents of the Nineteenth Amendment).

52. See generally Janet Halley, *What Is Family Law? A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011)

that enfranchising women via an Article V amendment would impermissibly involve the national government in domestic matters.⁵³

As discussed in Part I, moreover, Southern states were (with few exceptions) steadfastly opposed to the Nineteenth Amendment. They likewise fervently fought to prevent the end of slavery, the Black Codes, and Jim Crow, and they rejected second-wave feminism and, more recently, the application of anti-discrimination norms to sexual orientation minorities. There are forceful historical and contemporary reasons why progressives tend to code federalism arguments as bigotry masquerading as something structurally more dignified.

And yet, the full story of the Nineteenth Amendment paints a more complex picture of the relationship between federalism and equality. It illustrates the potential (albeit contingent) of federalism dynamics to advance the equal citizenship stature of traditionally excluded groups. Beginning with Wyoming Territory in 1869, Western territories and states increasingly sought to entice women living in Eastern states to move west, in part to increase their populations and enhance their chances of obtaining statehood.⁵⁴ Notably, when Utah Territory permitted women to vote in 1870, many Mormon men supported the legislation in part because they thought it would show the rest of the country that women were not subordinated by the practice of polygamy.⁵⁵ As women gained the franchise and voted in Western territories and states, Americans saw that the doomsday predictions had no basis in reality.⁵⁶ The institution of marriage was made more egalitarian by woman suffrage, but it was hardly destroyed, and the same was true of the American federal system. That experimentation and result were possible only because the federalism of the time permitted Western territories and states to give women the right to vote.

More recently, advocates of marriage equality—which, among other things, is an issue of gender equality⁵⁷—achieved significant successes at the state level before obtaining favorable decisions from the federal courts at the national level, and the chronology is likely important and causally related.⁵⁸ The legislative and

(offering an account of how the law of Domestic Relations emerged as a distinct field in American law in the latter half of the nineteenth century); see also PAUL BREST ET AL., *supra* note 44, at 186 (discussing the common law rules of coverture).

53. See, e.g., HENRY ST. GEORGE TUCKER, *Meaning of Local Self-Government, in WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT* 106 (1916) (Storrs Lectures).

54. See AMAR, *supra* note 3, at 419–22.

55. See, e.g., *Utah and the 19th Amendment*, NAT'L PARK SERV., (Aug. 9, 2019), <https://www.nps.gov/articles/utah-women-s-history.htm>.

56. See KEYSSAR, *supra* note 7, at 193 (“By the mid-1870s, proponents frequently invoked the precedent of Wyoming, where women voted and nothing calamitous had occurred.”).

57. Not only did state prohibitions on same-sex marriage discriminate facially on the basis of sex (because who a person could marry depended on one’s sex or the sex of one’s partner), but some arguments against same-sex marriage sound in traditional sex-role stereotypes about men and women, including the stereotype that people are “supposed” to be attracted to members of the opposite sex. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (“Viewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.”).

58. For a discussion of how the operation of the American federal system advanced the cause of same-

judicial record that developed over time amply demonstrated the falsity of the claims by opponents of same-sex marriage that gay people posed a danger to children; that children raised by same-sex couples fared worse than children raised by opposite-sex couples; and that permitting gay people to marry would degrade the status of the institution of marriage, including by causing heterosexuals not to marry. In the cases of both woman suffrage and same-sex marriage, the once-unthinkable was not only thought, but also acted upon at the state level before the national level—and Americans saw with their own eyes that the sky did not fall.

III. CONTEMPORARY CONSTITUTIONAL LAW

A. Suffrage Restrictions as Status-Based Regulations

A vitally important point for Americans today, including legislators and legal professionals, to understand about past restrictions on the franchise is that those restrictions were regulations of social status. As Professor Reva Siegel has explained, having the right to vote meant holding a superior social status in the family and in American society; lacking the right to vote meant holding an inferior social status in the family and in American society.⁵⁹ Most adult male citizens had the right to vote (although, as noted in Part I, not propertyless white men initially and not African American men for much longer), because they were viewed as the heads of their households and so were thought to possess sufficient independence to exercise the franchise responsibly. Adult female citizens lacked the right to vote because, as also explained in Part I, they were regarded as dependent on their husbands for their subsistence and so were deemed to lack sufficient independence to vote responsibly.⁶⁰ Suffrage restrictions largely tracked the distinction between breadwinners and caregivers that defined the ideology of separate spheres for men and women. According to that ideology, men were destined for the world of education, the market, and public affairs while women were destined for the world of raising children, attending to their husbands, and maintaining a household.⁶¹

Suffragists understood that voting restrictions were status-based regulations. They insisted that freeing women educationally, economically, and politically

sex marriage, see generally Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133 (2014).

59. See Siegel, *She the People*, *supra* note 41, at 977–97; see also BREST ET AL., *supra* note 44, at 186.

60. See generally Siegel, *Collective Memory and the Nineteenth Amendment*, *supra* note 10.

61. In *Bradwell v. Illinois*, 83 U.S. 130 (1873), the Supreme Court rejected Myra Bradwell's claim that an Illinois law prohibiting women from practicing law violated the Fourteenth Amendment's Privileges or Immunities Clause. In a since-notorious concurrence, Justice Bradley read the Fourteenth Amendment in light of the common law of marital status and the ideology of separate spheres, and he invoked God as authority for the separate spheres tradition. See *id.* at 141 (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."). A century later, Professor Ruth Bader Ginsburg would write of *Bradwell* that "the method of communication between the Creator and the jurist is never disclosed," and that "'divine ordinance' has been a dominant theme in decisions justifying laws establishing sex-based classifications." Brief for the Petitioner at 39, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72–178), 1972 WL 135840. For a discussion of the ideology of the separate spheres, see DANIEL FARBER & NEIL S. SIEGEL, *UNITED STATES CONSTITUTIONAL LAW* 238, 324–25 (2019).

required freeing them from their inferior social status within the family.⁶² Voting rights were a critical part of their campaign for emancipation, and the Nineteenth Amendment was the eventual fruit of their labors. Were the Amendment understood today as its champions understood it then, it would be viewed as a crucial means of combatting the social subordination of women to men in the family and in public life.⁶³ Rather than *merely* setting forth a decision rule regarding voting, the Amendment would be viewed as more akin to a Declaration of Independence—beyond a Declaration of Sentiments⁶⁴—for female citizens of the United States.⁶⁵ As explored below, if that non-stingy reading were accepted, the reference to voting in the Amendment would be understood capaciously, and that reference would also be understood to illustrate, but not to exhaust, the meaning and implications of the Amendment.

B. The Race-Sex Analogy

The Supreme Court has not, however, grounded its modern equal protection, sex discrimination jurisprudence in the Nineteenth Amendment. The Court has, rather, grounded that jurisprudence in the race-sex analogy first developed by Pauli Murray⁶⁶ and given constitutional form by Ruth Bader Ginsburg.⁶⁷ According to the race-sex analogy, the sex-role stereotypes of the separate spheres

62. For a discussion of the claims on both sides of the debate over woman suffrage, see generally KEYSSAR, *supra* note 7, at 172–221; Siegel, *She the People*, *supra* note 41.

63. For expressions of antisubordination understandings of equality, see Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 38 (1987); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 151 (1976); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–76 (2004); see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003); Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”: A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 769–79 (2002).

64. The first social movements for women’s rights in United States history culminated in the first women’s rights convention, which took place at Seneca Falls, New York, in July 1848. The Declaration of Sentiments adopted by the convention, as well as Elizabeth Cady Stanton’s Keynote Address, sought to secure for women the same equal political and economic rights that radical abolitionists were then seeking for African American men. See Declaration of Sentiments and Resolutions, Seneca Falls Convention (1848), <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm>; Elizabeth Cady Stanton, Keynote Address at the Seneca Falls Convention (July 19, 1848), <https://susanbanthonyhouse.org/blog/wp-content/uploads/2017/07/Elizabeth-Cady-Stanton-Seneca-Falls-1848.pdf>.

65. Cf. Murray, *supra* note 34, at 91–92, 98 (discussing suffragist Crystal Eastman, who declared both purposefully and wistfully that “Now We Can Begin Again” after the 19th Amendment was ratified and she began working on the Equal Rights Amendment, because she realized that the Nineteenth Amendment would not generally be read nearly as broadly as suffragists had intended it) (quoting Crystal Eastman, *Now We Can Begin*, LIBERATOR, Dec. 1920).

66. See generally Pauli Murray, *The Negro Woman’s Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253 (1971).

67. See, e.g., Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971). Ginsburg included Murray as a signatory on Ginsburg’s brief in *Reed*. For an account of the intellectual relationship between the two, see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 58–63 (2014); *id.* at 61 (“In *Reed*, Ginsburg translated the analogical arguments that Pauli Murray had proposed almost a decade earlier into a document that would become known as the ‘grandmother brief.’”).

tradition cause harms that are analogous to those caused by racial stereotypes. On that view, both kinds of stereotypes erase the individuality of, and differences between, members of the group in question and simply ascribe certain characteristics, including negative characteristics, to all of them.

Grounding the Court's constitutional sex equality jurisprudence in the race-sex analogy had analytical and strategic advantages. Women, like African Americans, had suffered a long history of subordination and exclusion that was tolerated under the Constitution. Women, like African Americans, had lacked political power to remedy the discrimination to which they had long been subject. Sex, like race, was regarded as immutable and was mostly irrelevant to the ability of individuals to contribute to society. Those were the four criteria of suspect-ness that the Supreme Court had invoked to explain why racial classifications trigger heightened judicial scrutiny while almost all other classifications do not.⁶⁸ Notably, moreover, the constitutional litigation was occurring at a time when a nearly all-male federal judiciary was taking racial discrimination seriously and needed to be persuaded that sex discrimination was not invariably benign.⁶⁹

But there were also problems with reasoning from race in order to convince courts to combat the subordination of women. Racism and sexism in America have traditionally employed different means to enforce a status hierarchy: segregation is not the same thing as role differentiation, and degradation/disdain is not the same thing as paternalism. Moreover, certain biological differences between men and women are real (even though their relevance has traditionally been vastly overstated), while asserted biological differences between people of different races almost never have any basis in science or medicine. In addition, the race-sex analogy—at least as the Supreme Court has deployed it—does not capture the issue of intersectionality, discussed in Part I (although Pauli Murray herself did use the analogy in ways that made the intersections legible). And perhaps most critically, as Professor Reva Siegel has continuously underscored, the race-sex analogy unwittingly deprived the Court's equal protection, sex discrimination jurisprudence of the dignity, legitimacy, and analytical orientation that, in the American tradition, accompanies the interpretative community's recognition that a body of constitutional doctrine

68. For a discussion of most of those criteria, *see, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 685–88 (1973). Most controversial today, although obviously not prior to ratification of the Nineteenth Amendment, is whether women as a group are fairly characterized as politically powerless for equal protection purposes. On one hand, they constitute a numerical majority of the electorate and can vote as a group if they so choose. On the other hand, a distinct minority of Americans in positions of power in economic, educational, and political life are women, and American culture—in which girls and boys are socialized—remains deeply gendered in ways that limit opportunities for women. As discussed in Part IV, for example, to this day women are expected to care for children and ill family members to an extent that men are not.

69. During the 1970s, the Supreme Court learned from the women's movement and in turn sought to educate the lower federal courts and the public:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.

Frontiero, 411 U.S. at 684–85 (footnote omitted).

possesses a constitutional history all its own, as opposed to a history borrowed from elsewhere or no history at all.⁷⁰ According to the conventional wisdom among academic constitutional lawyers, *everybody knows* that the Fourteenth Amendment originally aimed to make citizens of slaves and afford them equal civil rights, not to protect women in any way.

That argument from original intent (although not necessarily from the text or the original semantic meaning⁷¹) is true as far as it goes. But it does not go far enough because the relevant founding history did not end with the ratification of the Fourteenth Amendment in 1868 or the Fifteenth Amendment two years later. On the contrary, the exclusion of women from the protections of the Reconstruction Amendments, first in Congress⁷² and then in the Supreme Court,⁷³ catalyzed a half-century debate over the “woman question” that ultimately culminated in the ratification of the Nineteenth Amendment.⁷⁴ Those many decades of struggle—of cultural and constitutional contest over gender roles in the family and over the legitimate claims of states to shape those roles—ended with the conferral of federal constitutional voting rights upon women. Self-consciously echoing the language of the Fifteenth Amendment, the Nineteenth Amendment disabled states from denying adult female citizens the right to vote just because they were female.

C. Alternative Approaches

What might it look like to analyze questions of constitutional sex equality in a way that is attentive to the pre- and post-ratification histories of the Fourteenth, Fifteenth, and Nineteenth Amendments? Two alternative approaches are briefly explored below. The first is structural, and the second is synthetic. Both are relatively common in constitutional law, which partially answers the objection that they license too much interpretive discretion.

First, the Nineteenth Amendment could be read not literally but structurally—that is, in light of its underlying purpose and its role in the constitutional structure. In determining the basic purpose of the Amendment,

70. See generally Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450 (2020) [hereinafter Siegel, *Democratization of the Family*]; Siegel, *She the People*, *supra* note 41, at 949, 953–60.

71. The Equal Protection Clause refers to “any person,” U.S. CONST. amend. XIV, § 1, and women are people. As for original meaning, see generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (distinguishing the original semantic meaning of the language of the constitutional text, which may exist at a very high level of abstraction, from the original intent or expected application of the words of the text, which typically exists at a much lower level of abstraction).

72. See *supra* notes 12–15 and accompanying text (discussing the rejection of claims for woman suffrage by prominent abolitionists and the Reconstruction Congress).

73. The post-Civil War Supreme Court was unreceptive to claims of gender equality. After ratification of the Fourteenth Amendment and continuing for much of the next century, the Court permitted state action discriminating between men and women as rationally reflecting real, natural differences in the roles of men and women. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1873), discussed *supra* note 61. Two years later, in *Minor v. Happersett*, 88 U.S. 162 (1875), the Court rejected Frances Minor’s constitutional claim that the Privilege or Immunities Clause guaranteed women the right to vote. The distinction between the public and private realms was invoked to justify prohibiting women from voting.

74. See generally Siegel, *Democratization of the Family*, *supra* note 70; Siegel, *She the People*, *supra* note 41.

interpreters could consult its pre- and post-ratification history, which (from the perspective of the subordinate group, as opposed to the superordinate group) reveals an animating objective to free women from subordination to men in the family and in political life. Structural interpreters of a relatively strict originalist orientation could obviously focus on the pre-ratification history of the three Amendments. Interpreters who believe that the authoritative meaning of those (and other) constitutional provisions does and should change over time could consult both the pre- and post-ratification history of those amendments, including the constitutional commitments of second-wave feminism in the 1960s and 70s. To be sure, the history, like other sources of constitutional argument, is not fully determinate; originalists and evolutionary constitutionalists alike would have to exercise at least some interpretive judgment and normative discretion in the present. But drawing attention to the existence of relevant constitutional history would help to legitimate the interpretive exercise, and using it would help to guide interpreters as they sought to discern what is—and is not—a question of constitutional sex equality covered by the Nineteenth Amendment.⁷⁵ The history would also offer interpreters normative guidance as they wrestled with how to resolve such questions.

As noted, non-literal, non-stingy interpretation of constitutional amendments is a relatively common practice. Consider, for example, the First Amendment, which begins by declaring that “Congress shall make no law.”⁷⁶ Read literally, it is directed at “Congress” alone, not “the United States” or the “federal government,” and the Constitution even defines “Congress” as “consist[ing] of a Senate and House of Representatives.”⁷⁷ Yet for structural, purposive, and other reasons, the Amendment has always been understood also to regulate the conduct of the President and the federal courts.⁷⁸

Consider next the Second Amendment, which provides that “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁷⁹ In *District of Columbia v. Heller*,⁸⁰ the majority and the dissent debated, among other things, the basic purpose and structural function of the Second Amendment, including whether it is a federalism provision that limits federal interference with state militias. That debate informed their diverging positions on the relationship between the prefatory clause and the operative clause of the Amendment.⁸¹

The Eleventh Amendment offers yet another example. It provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁸² The Supreme Court

75. See Siegel, *Democratization of the Family*, *supra* note 70, at 482.

76. See U.S. CONST. amend. I.

77. See U.S. CONST. art. I, § 1, cl. 1.

78. For a discussion, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1243–47 (2015).

79. See U.S. CONST. amend. II.

80. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

81. See *id.* at 577–78, 598–600; *id.* at 637, 640–44, 651–52 (Stevens, J., dissenting).

82. See U.S. CONST. amend. XI.

protects state sovereign immunity from private lawsuits well beyond what the semantic meaning of the language of the Amendment can bear. In doing so, the Court has not disputed that the text covers only suits by out-of-state residents and foreign citizens, or that it applies only to suits in the federal courts. But, because of a mix of historical, structural, purposive, and consequentialist considerations, the Court has rejected the position that the Amendment is best read as a comprehensive provision, as opposed to a targeted response to *Chisholm v. Georgia*, in which the Court permitted a state to be sued without its consent by a citizen of another state.⁸³ In other words, the Court has rejected the negative inference that the Eleventh Amendment operates as a ceiling on the extent of the states' immunity from suit. The Court instead enforces a structural principle of state sovereign immunity.⁸⁴ It insists that focusing exclusively on the words of the Eleventh Amendment would amount to "ahistorical literalism."⁸⁵

As for the Nineteenth Amendment, one plausible purposive and structural interpretation—one that does not license substantial interpretive discretion—is that it protects women not only from sex discrimination in voting, but also confers upon them (and, in Section Two, empowers Congress to protect) other political rights. They include the rights to serve equally with men on juries (jurors vote too), and to run for political office (and thereby be voted for). During the second half of the nineteenth century and the first half of the twentieth, serving on juries and running for elective office were established political rights that were thought to accompany voting rights for African Americans, even if those rights were not being respected by Southern states. It stands to reason that the same implications should follow when women, by an amendment that mimicked the language of the Fifteenth Amendment, were finally afforded similar constitutional protection from discrimination in voting in elections.⁸⁶

In addition (or alternatively) to structural interpretation, the Nineteenth Amendment could be interpreted synthetically with the Equal Protection Clause. Synthetic constitutional interpretation commends reading one constitutional provision in light of another. One variant of synthetic interpretation is what Professor Akhil Amar calls "intratextualism," which counsels interpreters to interpret a word or phrase in the Constitution partly in light of its meaning in another part of the Constitution.⁸⁷ Like structural interpretation, synthetic interpretation is also relatively common in constitutional law. For example, in *Heller*, the majority and the dissent debated the meaning of the phrase "the people" in the Second Amendment partly in light of the meaning of the same phrase in other amendments in the Bill of Rights.⁸⁸ In equal protection, race discrimination cases, the Court reads the Due Process Clause of the Fifth Amendment in light of the Equal Protection Clause of the Fourteenth Amendment.⁸⁹ In substantive due

83. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

84. For a discussion, see Bradley & Siegel, *supra* note 78, at 1252–56.

85. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019).

86. See AMAR, *supra* note 3, at 399–400, 426–28 (explicating the implications of ratifying the Fifteenth and Nineteenth Amendments for the political rights of African Americans and women, respectively).

87. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

88. See *Heller*, 544 U.S. 570, 579–81 (2008); *id.* at 644–46 (Stevens, J., dissenting).

89. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

process cases, the Court interprets the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments partly in light of equality values more naturally associated with the Equal Protection Clause.⁹⁰ In cases considering the constitutionality of state protectionism on the subject of alcohol, the Court interprets the Twenty-First Amendment in light of the dormant Commerce Clause.⁹¹ One could go on.

Notably, the Court's doctrine today protects political rights such as jury service under equal protection, not under the Nineteenth Amendment.⁹² In effect, the Court is interpreting the Equal Protection Clause in light of the Nineteenth Amendment.⁹³ Beyond political equality, synthesizing interpretation of the Nineteenth Amendment and the Equal Protection Clause provides a firmer constitutional foundation for modern constitutional sex discrimination doctrine more generally.⁹⁴ It would not have made great sense in historical context to give African American men the political rights of voting, running for office, and serving on juries but not the civil rights of owning property, contracting, suing, and testifying in court.⁹⁵ That is because political equality for African Americans was far more

90. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

91. See, e.g., *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (holding that Tennessee's two-year durational-residency requirement, which applies to applicants for retail liquor store licenses, violates the dormant Commerce Clause and is not saved by Section 2 of the Twenty-first Amendment, which provides that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited").

92. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the use of peremptory challenges to exclude jurors based solely on their sex violates the Equal Protection Clause); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that racial discrimination in jury selection violates the Equal Protection Clause); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that the Sixth Amendment prohibits women from being excluded or given automatic exemptions from jury service based solely on their sex if the result is that criminal jury venires are almost entirely male, and rejecting the contrary implications of *Hoyt v. Florida*, 368 U.S. 57 (1961), which held that the Equal Protection Clause permits the exclusion of women from jury service unless they volunteer).

93. For an argument that the Nineteenth Amendment should be interpreted in light of other amendments expanding voting rights (listed *supra* note 49), see Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, GEO. L.J. (forthcoming 2020) (manuscript at 20–22) (on file with author).

94. Professor Reva Siegel offers one synthetic account. She identifies the foundation in constitutional history of the Court's equal protection, sex discrimination jurisprudence by canvassing the debates over woman suffrage that began with the framing of the Fourteenth Amendment and culminated with the ratification of the Nineteenth Amendment. See generally Siegel, *Democratization of the Family*, *supra* note 70; Siegel, *She the People*, *supra* note 41. Professor Akhil Amar offers another synthetic account. He argues that the Constitution must be interpreted as a whole, including amendments, so that a new amendment can require reinterpretation of other provisions of the Constitution. In his view, the Nineteenth Amendment, reflecting a super-majoritarian recognition of gender equality, requires a reinterpretation of the Fourteenth Amendment's Equal Protection Clause to make gender discrimination in other contexts unconstitutional. See AMAR, *supra* note 3, at 426–28; Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465 (1995).

95. The lawmakers who debated constitutional equality in connection with the Reconstruction Amendments generally accepted mid-century conceptions distinguishing equality with respect to civil rights, social rights, and political rights. Although the precise contours of those categories were unclear, they

controversial at the time than was civil equality. Likewise, it does not make much historical sense to read the Constitution as protecting women's political equality but not their civil equality—and, indeed, the Court has not done that. Although the voting rights protected by the Fifteenth Amendment did not conceptually imply the civil rights protected by the Fourteenth Amendment, it is also true that it was untenable to extend the franchise to a group that lacked civil equality.

The most plausible implication for gender equality is that the political equality secured by the Nineteenth Amendment also implies the civil equality protected by the Fourteenth Amendment. The two provisions are tied together historically and by subject matter. The Nineteenth Amendment was the culmination of the suffragists' response—decades in the making—to the rejection by the Reconstruction Congress of their demand for the vote. Moreover, both provisions require interpreters to confront the meaning of equal citizenship. Reading the Nineteenth Amendment and the Equal Protection Clause synthetically reflects the historical and normative case for the proposition that the Constitution's equality guarantee protects women, too. One need not rely on the race-sex analogy in order to get there, although the analogy provides added support, as do certain originalist accounts.⁹⁶

D. *United States v. Virginia*

Justice Ginsburg gestured in the direction of a synthetic reading of the Nineteenth Amendment and the Equal Protection Clause in her opinion for the Court in *United States v. Virginia*.⁹⁷ In that 1996 decision, the Court held that the Equal Protection Clause barred the Commonwealth of Virginia from categorically excluding women from eligibility to enroll at the Virginia Military Institute,

provided a general framework for thinking about the meaning of constitutional equality. Those distinctions informed the congressional debate over, among other things, the Fourteenth Amendment. They also defined the debate between the majority and the dissent in *Strauder v. West Virginia*, 100 U.S. 303 (1880) (invalidating a state law providing that only whites could serve on juries), and *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation in railroad cars as long as the separate accommodations were "equal"). Although the boundaries among the categories were contested, the basic purpose of those distinctions was to expand *and* to limit constitutional guarantees of equality for African Americans. Those distinctions ensured that the Civil War Amendments would go only so far, but no farther. For a discussion, see generally Mark Tushnet, *The Politics of Equality in Constitutional Law*, 74 J. AM. HIST. 884 (1987); see also BALKIN, *supra* note 71, at 221–26 (2011); FARBER & SIEGEL, *supra* note 61, at 238, 288; RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 154–56 (Quentin Skinner et al. eds., 1999).

96. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011). Resorting to higher levels of generality is one way to square originalism with modern-day decisions that have established principles with deep normative appeal. For instance, Professor Calabresi and Ms. Rickert argue that modern decisions requiring heightened scrutiny in gender discrimination cases are consistent with original meaning. The core of their argument is that Fourteenth Amendment reaches "all special or partial laws that single out certain persons or classes for special benefits or burdens." *Id.* at 7. In a departure from standard originalist methodology, they also rely on the later-enacted Nineteenth Amendment to support their interpretation of the Fourteenth Amendment. In their view, the modern "change in our understanding of women's abilities has been constitutionalized by a monumental Article V amendment—the Nineteenth Amendment, which in 1920 gave women the right to vote." *Id.* at 9. In that respect, they follow Professor Siegel and Professor Amar. See *supra* note 94.

97. *United States v. Virginia*, 518 U.S. 515 (1996).

reasoning that Virginia's admissions policy reflected and reinforced both traditional stereotypes about women's nature and their exclusion from educational, economic, and political life. In the pivotal Part IV of the Court's opinion, Ginsburg invoked the Nineteenth Amendment in explaining why the Court's modern equal protection doctrine subjects sex-based state action to demanding judicial review:

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise.⁹⁸

In that stunningly suggestive but also under-developed passage, Ginsburg linked the Court's current interpretation of the Equal Protection Clause to the separate-spheres tradition that the Nineteenth Amendment repudiated. In contrast to Justice Scalia's valorization of deeply rooted history and tradition in his solo dissent,⁹⁹ Ginsburg's majority opinion invoked the history antecedent and subsequent to the Nineteenth Amendment as anti-tradition and "negative precedent," which is a repudiated precedent that is invoked as a mistake that the Court should not repeat.¹⁰⁰ That history matters, she implied, because it captures what the United States rejected—in principle, if not always in practice—when it wrote into its fundamental law the determination that women are not children—that women possess sufficient independence from men to be trusted to vote responsibly.

Ginsburg went on in Part IV to interpret the meaning of the heightened scrutiny that the Court applies to sex classifications. There has been much debate among the Justices and commentators over whether the Court was really applying intermediate scrutiny or was actually applying strict scrutiny.¹⁰¹ But far more significant than that issue is the fact that Ginsburg interpreted heightened scrutiny for sex-based state action as anti-subordination:

98. *Id.* at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (footnote omitted)).

99. *See id.* at 568–69 (Scalia, J., dissenting) ("[I]t is my view that 'when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.' The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.") (citations omitted).

100. For discussions, see generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998); Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237 (1998).

101. *See, e.g., Virginia*, 518 U.S. at 573 (Scalia, J., dissenting) ("Only the amorphous 'exceedingly persuasive justification' phrase [used by the Court], and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program.").

Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. *But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.*¹⁰²

The connection between the Nineteenth Amendment and the Court’s anti-subordination understanding of equal protection for women in *Virginia* is again not sharply drawn. But it becomes legible once one recalls that suffrage restrictions were status-based regulations, and that the Nineteenth Amendment rejected them.¹⁰³

More concretely and practically, judges are not offered much interpretive guidance when they are told to decide whether any and all sex classifications are “substantially related to an important governmental interest,” which is the Court’s constitutional test for sex discrimination (known as intermediate scrutiny).¹⁰⁴ By contrast, reading the Equal Protection Clause in light of the Nineteenth Amendment helps judges and other interpreters to discern which sex classifications are problematic and which are not. Part of Justice Ginsburg’s point in *Virginia* is that not all sex lines are equally suspect; the constitutionally troubling classifications reflect or reinforce women’s subordination in the family or, relatedly, their exclusion from public life. Instructing judges and other interpreters to ask whether a given sex classification is being used “to create or perpetuate the legal, social, and economic inferiority of women” provides a great deal more interpretive guidance. And that anti-subordination analytic is coming substantially from the pre- and post-ratification history of the Nineteenth Amendment.

IV. CONTEMPORARY CONSTITUTIONAL POLITICS

A. The Nineteenth Amendment and the Equal Rights Amendment

The proposed Equal Rights Amendment provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”¹⁰⁵ When initially introduced, the ERA was supported by well more than the required two-third majorities in both houses of Congress,¹⁰⁶ a significant majority of Americans,¹⁰⁷ and a solid majority of states. But it fell three states short of

102. See *id.* at 533–34 (majority opinion) (emphasis added) (citations and footnote omitted).

103. For a similar interpretation of the Court’s opinion in *Virginia*, see Siegel, *Democratization of the Family*, *supra* note 70, at 483–86.

104. The Court first adopted intermediate scrutiny for sex classifications in *Craig v. Boren*, 429 U.S. 190 (1976).

105. See EQUAL RIGHTS AMENDMENT, <https://www.equalrightsamendment.org> (last visited Feb. 2, 2020).

106. See U.S. CONST. art. V; Andrew Glass, *Equal Rights Amendment Clears Congress, Mar. 22, 1972*, POLITICO (Mar. 22, 2016, 12:00 AM), <https://www.politico.com/story/2016/03/equal-rights-amendment-clear-s-congress-march-22-1972-220981> (“The House had voted 354–24 in favor of the amendment. The Senate — after rejecting an exemption of women from the draft — voted for it 84–8.”).

107. See Louis Bolce, Gerald De Maio, & Douglas Muzzio, *The Equal Rights Amendment, Public*

the thirty-eight required for ratification, in part because it became entangled in the debate over abortion.¹⁰⁸ Nevada ratified in 2017, Illinois ratified in 2018, and Virginia ratified in 2020, although it is not clear whether those recent ratifications count or whether the time for ratification expired years earlier.¹⁰⁹

Would the Nineteenth Amendment, properly understood, render practically superfluous the proposed Equal Rights Amendment (ERA)? Put differently, would the Nineteenth Amendment—whether standing on its own or illuminating the implications of the Equal Protection Clause for gender equality—limit the ERA to expressively reaffirming what the Constitution already protects? Those are difficult questions, so much so that this Essay cannot responsibly take them on—other than to suggest that a full embrace by the interpretive community of structural and synthetic readings of the Nineteenth Amendment and the Equal Protection Clause would likely go far toward rendering the ERA less necessary as a source of substantive constitutional rights.

Instead, the Essay will identify another way in which the story of the Nineteenth Amendment potentially bears on contemporary debates over the ERA. There were significant differences in the interpretive arguments of opponents of the Nineteenth Amendment before and after its ratification. As discussed in Part II, during decades of contestation prior to ratification, gender traditionalists portrayed an affirmative answer to the “woman question” as radically transforming—and degrading—both the American family and American federalism. Traditionalists asserted confidently that woman suffrage would sow marital discord because husbands and wives would sometimes disagree on political matters. (To reiterate, the tension between that argument against woman suffrage and the argument from virtual representation typically went unnoticed by those who made the arguments.) As for federalism, recall the claim of conservatives that constitutionalizing the “woman question” would inappropriately take the matter away from the states. The states, they insisted, had long been deciding on their own whether and when to allow women to vote, in conformity with a deeply rooted history and tradition of federal deference to state domestic relations law.¹¹⁰

By striking contrast, not long after ratification of the Nineteenth Amendment, gender traditionalists recast the debate that was resolved by the Amendment as involving merely a decision rule about voting in elections—as concerning only whether women could vote for candidates for political office as well as in initiatives and referenda.¹¹¹ Beyond the scope of the Amendment, they insisted,

Opinion, & American Constitutionalism, 19 POLITY 551 (1987).

108. See, e.g., Twiss Butler, *Abortion Law: “Unique Problem for Women” or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 133–34 (1991).

109. See *Two Modes to Ratification*, EQUAL RIGHTS AMENDMENT, *supra* note 105.

110. See *supra* note 53 and accompanying text (citing one prominent commentator who opposed woman suffrage on federalism grounds).

111. Professor Reva Siegel has documented the Nineteenth Amendment’s short journey from norm to rule:

Within years of its adoption, one can see the Nineteenth Amendment progressively dissociated from questions concerning the family that governed the debate over woman suffrage from the antebellum period to ratification. And as courts proceeded to dissociate the Nineteenth Amendment from the concerns that dominated the debates over its

were the questions of whether women were constitutionally entitled to be candidates for political office and to serve on juries.¹¹² And *of course*, they further insisted, the Nineteenth Amendment had nothing to say about whether the civil rights protected by the Equal Protection Clause extended to women.

Part III identified some vulnerabilities of such traditionalist arguments. More relevant here is a lesson for recent debates over the ERA. Whatever one thinks of the arguments for and against ratification of the ERA, one can be confident that those arguments will change if the ERA is ultimately approved. Opponents will likely move from warning that the constitutional sky will fall if the ERA becomes fundamental law to engaging in damage control, reading the amendment narrowly. Likewise, proponents will likely move from reading the ERA more narrowly in order to secure ratification to reading it more expansively in order to secure a greater degree of gender equality as they understand such equality. There is nothing rare about that dynamic; it is, for example, characteristic of much constitutional litigation: litigants often try to persuade judges that a ruling in their favor would be narrow (or that a ruling against them would be broad), only to interpret the ruling broadly once they obtain it (or narrowly once they lose). But Americans who are moved to mark the centennial of the Nineteenth Amendment are well-advised to bear the dynamic in mind if they mean to prevent ratification of the ERA at some future time from signifying little. In that regard, the story to date of the Nineteenth Amendment should not become the story of the ERA.

B. The Halting Pace of Progress

The story of the Nineteenth Amendment is at least as sobering as it is inspiring—probably more so. As noted, women who sought to secure voting rights for women served in abolitionist organizations before the Civil War only to have their calls for female enfranchisement rejected first by the Reconstruction Congress and then by the post-Reconstruction Supreme Court. Suffragist women and their male allies then fought for half a century—from the ratification of the Fifteenth Amendment in 1870 until the ratification of the Nineteenth Amendment

ratification, they domesticated the woman suffrage amendment, erasing the deep structural and symbolic significance that for generations had been imputed to this constitutional reform. With interpretive construction of the Nineteenth Amendment as a rule dissociated from any larger normative concerns, one can see the containment of the Amendment's potential significance—its transformation from a systemically explosive reform to a systemically unremarkable, normatively insignificant, fragment of constitutional text.

Siegel, *She the People*, *supra* note 41, at 1012. Siegel goes on to observe that “[t]his process of domestication was not inevitable, as early cases such as *Adkins v. Children’s Hospital* illustrate.” *Id.* (citing *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)). In *Adkins*, the Court understood the Nineteenth Amendment as articulating a sex equality norm that had implications for constitutional questions other than voting. In holding that a minimum wage law for women violated economic substantive due process, the *Adkins* Court articulated a sex-equality rationale and expressly invoked the Nineteenth Amendment. *See id.* at 553. For a new history of how a thin conception of the Nineteenth Amendment emerged by the end of the decade after its ratification, see generally PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT (forthcoming 2020).

112. *See* Siegel, *She the People*, *supra* note 41, at 1019–22 (discussing decisions applying the Nineteenth Amendment to office holding and jury service, and concluding that a “narrow understanding of the Nineteenth Amendment, as a rule governing voting only, emerged as the dominant understanding of the Amendment”).

in 1920—for a suffrage amendment that was decried by traditionalist critics as destructive of both the American family and the American federal system. Then, when the Amendment was finally able to run the Article V gauntlet, it did not take long for jurists to recast the entire debate over the “woman question” as *always* having involved *only* the *mere* question of voting rights for women in elections, with no implications for women’s political equality or civil rights more generally.

With the constitutional history of the struggle over woman suffrage effectively excised from collective memory, the Supreme Court spent the next half-century upholding sexist laws and regulations as reflecting natural and admirable differences in the capacities and social roles of women and men. For example, in 1948, in *Goesaert v. Cleary*,¹¹³ the Court upheld as rational a Michigan law prohibiting women from being bartenders except in bars owned by their fathers or husbands. And in 1961, in *Hoyt v. Florida*,¹¹⁴ the Court upheld a Florida law allowing women (but not men) to opt out of jury service. The Court doubled down on the separate spheres ideology in such decisions without mentioning the Nineteenth Amendment or considering what it means and implies constitutionally for women to be declared the political equals of men. It was not until 1971 that the Court held, for the first time in American history, that the Equal Protection Clause protects women, too.¹¹⁵ Over the subsequent decades and to this day, the Court has not always been guided by Justice Ginsburg’s interpretation of the Equal Protection Clause for the Court in *Virginia*, which (to reiterate) held that government may not use sex classifications that reflect or reinforce women’s inferior social status in the family and in American society.¹¹⁶ Relatedly, the Court has not always been guided by the principle that Congress possesses ample authority to vindicate that substantive, anti-subordination vision of equal protection, including to combat violence against women.¹¹⁷

113. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

114. *Hoyt v. Florida*, 368 U.S. 57 (1961). *Hoyt* was not overruled until 1975, in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

115. *See Reed v. Reed*, 404 U.S. 71 (1971).

116. *See, e.g., Nguyen v. INS*, 533 U.S. 53 (2001) (rejecting an equal protection challenge to a sex classification in federal immigration law that requires unwed U.S.-citizen fathers, but not unwed U.S.-citizen mothers, to prove parentage in order to convey citizenship to children born outside the United States). *But see Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (holding that equal protection principles prohibit a sex classification in federal immigration law that creates an exception for unwed U.S.-citizen mothers, but not for such fathers, to the physical-presence requirement for the transmission of U.S. citizenship to a child born abroad, but that only Congress may convert the exception into the main rule displacing other relevant provisions of the law).

117. *See, e.g., Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (ignoring the links between pregnancy and sex-stereotyping in denying that Section Five of the Fourteenth Amendment authorized the self-care provisions of the federal Family and Medical Leave Act of 1993 (FMLA)); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacks power under either the Commerce Clause or Section Five of the Fourteenth Amendment to provide victims of gender-motivated violence with a federal civil damages remedy against their assailants). The Court’s Section Five holding in *Morrison* is especially worthy of reconsideration in light of the Me Too Movement. *See* ME TOO., <https://metoomvmt.org>. For discussions of the implications of the Nineteenth Amendment for the lawfulness of *Morrison*, see Siegel, *She the People*, *supra* note 41, at 1022–44; Siegel, *Democratization of the Family*, *supra* note 70, at 488. If the history of the suffrage movement were better known to lawyers, judges, and constitutional law scholars, it would not seem like a ridiculous question to ask whether the private civil damages remedy for victims of gender-

If moral and democratic progress means that women possess the same political and civil rights as men—that women possess full and equal citizenship stature¹¹⁸—then the story of the Nineteenth Amendment (the before, the during, and the after) is a sobering reminder that such progress is slow, uneven, and halting, not linear. Deeply rooted traditions, including the separate spheres tradition, are preserved even as they are transformed.¹¹⁹ Other parts of the history, such as heated debates over woman suffrage from the ratification of the Fifteenth Amendment to the ratification of the Nineteenth, are conveniently forgotten. Contemporary forms of gender subordination either are not perceived, or are ignored, or are rationalized away. Much work remains to be done. Traditionalists will rhetorically ask, for example, what the clear, determinate voting rule set forth in the Nineteenth Amendment could possibly have to do with current debates over unequal pay for equal work, paid family and self-care leave, and restrictions on access to effective, affordable contraception and abortion. This Essay's final section turns to those questions.

C. Gender (In)equality Today

The primary reason the Nineteenth Amendment matters today is that the struggle for gender equality is far from over. Girls (and boys) continue to be socialized in a popular culture that is pervaded by highly sexualized images of unrealistically thin and beautified women whose primary work in the world appears to be staying that way. Those same girls (and boys) watch as female candidates for political office are subjected to double standards and hatred that male candidates do not endure. During the run-up to the 2016 presidential election, for example, the author had to explain to his then-eleven-year-old daughter the meaning of a bumper sticker reading "Trump that Bitch," which adorned the rear of a pick-up truck being driven by a man. Those who deny that sexism and misogyny infect American politics might think harder about the social meaning of that bumper sticker.¹²⁰

motivated violence invalidated in *Morrison* was valid enforcement legislation under Section Two of the Nineteenth Amendment, either alone or in combination with Section Five of the Fourteenth Amendment. For a normative and then predictive exploration of the potential scope of Congress's enforcement power under Section Two of the Nineteenth Amendment, see Hasen & Litman, *supra* note 93, at 24–49.

118. See generally Siegel, "Equal Citizenship Stature," *supra* note 37 (arguing that the quest for equal citizenship stature is the defining feature of Justice Ginsburg's constitutional vision).

119. For the seminal discussion of how efforts to reform a status regime produce changes in its rule structure and justificatory rhetoric, see Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996); see also generally Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

120. That bumper sticker might also have been sending the message to girls and women that politics is not for them. Males and females in the United States are socialized differently on the question of whether they should even be thinking about going into politics. For studies finding (among other things) that girls and women are socialized not to pursue political careers, see generally JENNIFER L. LAWLESS & RICHARD L. FOX, WOMEN & POLITICS INST., GIRLS JUST WANNA NOT RUN: THE GENDER GAP IN YOUNG AMERICANS' POLITICAL AMBITION, (2013), https://www.american.edu/spa/wpi/upload/girls-just-wanna-not-run_policy-report.pdf; Laurel Elder, *Why Women Don't Run: Explaining Women's Underrepresentation in America's Political Institutions*, 26 WOMEN & POLITICS 27 (2004).

Life hardly becomes less gendered as those girls (and boys) mature. Although the gender wage gap has declined in recent decades, women continue to earn unequal pay for equal work.¹²¹ Mothers continue to bear a disproportionate share of family-care responsibilities in an economy that continues to be organized primarily on the assumptions that employees do not have substantial family-care responsibilities and that good employees can prioritize work over any competing obligations because they have a supportive spouse or partner.¹²² The gendered organization of the family and the workplace—and the need of most women (and, increasingly, men) to negotiate both spheres in order to take care of themselves and their families—make it all the more essential that women and men be given paid parental leave and be able to control whether and when to become parents.¹²³ Yet paid parental leave is unavailable for most women and men who work,¹²⁴ and women face not just continuing, but increasing legal restrictions on access to effective, affordable contraception and abortion.¹²⁵

To be sure, abortion is a controversial topic, including among women, because abortion restrictions are shaped not just by gender bias but also by concerns about fetal life.¹²⁶ Likewise, abortion-restrictive regulations cause not just gendered impacts but also impacts on the unborn.¹²⁷ But as noted above, most women and men in the United States oppose draconian restrictions on access to

121. See generally Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LIT. 789 (2017).

122. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) (“[T]he ideal worker [is] someone who works at least forty hours a week year round. This ideal-worker norm, framed around the traditional life patterns of men, excludes most mothers of childbearing age.”); see also Siegel & Siegel, *supra* note 15, at 1037 (“Over the centuries in which law and custom dictated that women were to serve as caregivers and men as breadwinners, assumptions about the ‘ideal worker’ shaped the development of educational and employment institutions.”).

123. See *id.* (“Given these widespread and deeply entrenched norms and arrangements, control over the timing of childbearing and childrearing is now crucial to women’s full and equal participation in the educational and economic spheres. Contraception both enables and symbolizes women’s interest in coordinating work and family.”).

124. See Jill Cowan, *Paid Parental Leave, by the Numbers*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/us/california-today-paid-parental-leave.html> (reporting, *inter alia*, that only six states and Washington, DC, offer paid parental leave; that the longest state family leave program—Washington State’s—is twelve weeks; that only 16 percent of Americans receive paid parental leave from their employers; and, in contrast, that 80 percent of Americans support paid parental leave and that the average total paid leave available to mothers among O.E.C.D. countries in 2016 was fifty-five weeks).

125. See, e.g., Elizabeth Dias, Sabrina Tavernise, & Alan Blinder, “*This Is a Wave*”: *Inside the Network of Anti-Abortion Activists Winning Across the Country*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/us/anti-abortion-laws.html?module=inline> (“State after state is passing sweeping abortion restrictions this year, from Alabama’s near total abortion ban, to Ohio’s ban after a fetal heartbeat is detected, to Utah’s ban after a pregnancy reaches 18 weeks.”). On contraceptive access, see the next paragraph in the text.

126. See Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 163 (2013) (observing that “equality arguments do not suppose that restrictions on abortion are *only* about women” but instead “are premised on the view that restrictions on abortion may be about *both* women *and* the unborn—*both and*,” and that “equality analysis entertains the possibility that gender stereotypes may shape how the state pursues otherwise benign ends”).

127. See *id.* (discussing the gendered impacts of abortion restrictions).

abortion.¹²⁸ Moreover, contraception is not especially controversial among women in the United States: a solid majority of women use contraception or seek to use it, including a supermajority of Catholic women who are at risk of unintended pregnancy.¹²⁹ Even so, employers with religious or moral objections to what they deem to be “complicity” in their female employees’ use of contraception are gaining increasing authority, conferred by controversial judicial interpretations of federal or state law, to make it harder for female wage earners to access effective, affordable contraception and thereby not have to resort to abortion.¹³⁰ As for the response (one used to hear more frequently but still hears today) that abstinence is always a permissible option, Americans might be curious about why politicians, judges, and cultural norms in the United States have so seldom instructed men to abstain from sex; why governments have long permitted condoms, but not the most effective forms of female contraception, to be made widely and cheaply available;¹³¹ and why health insurance plans covered Viagra, but not contraceptives, with near-lightning speed.¹³²

The Nineteenth Amendment, whether read structurally in light of its history or synthetically with the Equal Protection Clause, does not determine a uniquely correct answer to all of the above questions, whether that answer is found in constitutional politics or in constitutional law. But the Nineteenth Amendment, including its history, bears on the proper resolution of those questions. That is because the Amendment—*if only it would be noticed*—calls upon Americans to ask themselves what it means to take women seriously as the equals of men, in both family life and public life. It is past time for American citizens, legislators, lawyers, judges, and scholarly keepers of the constitutional canon to take full account of the existence of the Nineteenth Amendment and its pertinence to the lives of Americans today.

128. See *supra* note 16.

129. See *Contraceptive Use in the United States*, GUTTMACHER INST. (July 2018), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states> (reporting, *inter alia*, that “more than 99% of women aged 15–44 who have ever had sexual intercourse have used at least one contraceptive method”; that “[s]ome 60% of all women of reproductive age are currently using a contraceptive method”; and that “eighty-nine percent of at-risk Catholics and 90% of at-risk Protestants currently use a method”).

130. See, e.g., *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (holding that the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception violate the federal Religious Freedom Restoration Act of 1993 (RFRA) as applied to closely held corporations).

131. See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 353–54 (2015) (observing that, during the 1940s, the Connecticut Supreme Court “advised women with a medical need for contraception that they should simply abstain from sex, but did not advise men to protect themselves from the risk of venereal disease in this fashion” and instead “allowed men to buy condoms on demand in the state’s drug stores, while making no effort to ensure that men (particularly married men) actually were using condoms to prevent disease, as opposed to conception”).

132. For a discussion, see generally Bailey Sanders, *Partisan Bridges to Bipartisanship: The Case of Contraceptive Coverage*, 43 LEG. STUD. Q. 521 (2018).

CONCLUSION

It turns out that there are many reasons why the Nineteenth Amendment is relevant to the lives of contemporary Americans. Surely there are additional reasons not discussed in this Essay. Another that comes to mind—as Americans increasingly reckon with their shared past in conflicts over how to remember the legacies of historic figures like Woodrow Wilson and historic social movements like woman suffrage—is that history is often a complicated, mixed bag; that most people and social movements are morally neither all good nor all bad; and that sometimes people can change, at least to some extent and on some issues.¹³³

Not just Woodrow Wilson, but prominent suffragists as well are morally complex figures from the vantage point of the centennial of the Nineteenth Amendment. Elizabeth Cady Stanton and Susan B. Anthony had worked for decades in the abolitionist movement, had advocated for emancipation, had petitioned for ratification of the Thirteenth Amendment, and had pushed for universal suffrage in the early years of the suffrage movement. But they were living in a society whose long persisting practices of racial and gender hierarchy severely constrained social and legal change in ways that made realizing their universalist goals very difficult and required compromises that fractured the suffrage movement. Although some white suffragists, including Lucy Stone, refused to play the race card and advocated for ratification of the Fifteenth Amendment, others, including Stanton and Anthony, let their class privilege, anger, and yes, racism, get the better of them. Tragically, they made arguments to the effect that it did not make sense to give black men the right to vote but not white women when white women were superior.¹³⁴ Moreover, during the decades after the Civil War, they and some other suffragists would at times make racist, xenophobic, and elitist appeals that were ineffective and ultimately self-defeating: the basic claim was that the votes of white women would outnumber the votes of blacks, foreigners, and ignorant workers.¹³⁵ Although the dark parts of the suffrage

133. See *supra* notes 29–34 and accompanying text (noting the complex, evolving relationship of President Woodrow Wilson to the suffrage movement, although not to the racial situation in the nation).

134. For example, Stanton wrote that “[w]e are moral, virtuous, and intelligent, and in all respects quite equal to the proud white man himself and yet by your laws we are classed with idiots, lunatics, and negroes.” Elizabeth Cady Stanton, Address to the Legislature of the State of New York (Feb. 14, 1854), reproduced in KATHERINE T. BARTLETT ET AL., *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 17 (7th ed. 2017). See KEYSSAR, *supra* note 7, at 178 (“[M]any feminists denigrated the abilities and qualifications of African Americans. Stanton herself objected to having ‘the colored man enfranchised before the women . . . I would not trust him with all my rights; degraded, oppressed himself, he would be more despotic with the governing power than even our Saxon rulers are.’”); *id.* (“[S]ome advocates of female suffrage, including Anthony, allied themselves with overtly racist Democrats who opposed black enfranchisement.”).

135. For a discussion, see KEYSSAR, *supra* note 7, at 190, 191, 194–95, 198–204, 210. As Professor Keyssar explains, it is no simple task to make sense of the appeals to white supremacy that were made by some suffragists:

To be sure, the relationship between women’s suffrage and black enfranchisement in the South was byzantine. Many white suffragists declined to play the race card, and even some who did were motivated less by a commitment to white supremacy than by the search for a potent line of attack. In addition, the ranks of southern suffragists included a growing number of African-American women. The most strident antagonists of black rights, moreover, belonged to the anti-women’s suffrage camp: one of the principal arguments

movement should not be whitewashed today, it also does not seem appropriate to focus on the racism, xenophobia, and elitism of some white suffragists to the exclusion of all the good things that they fought for—especially given the America in which they were socialized and that they were struggling to change in the face of relentless backlash. And to repeat a point from earlier in the Essay, the most virulent racists were steadfastly opposed to woman suffrage.

The primary purpose of this Essay has been to suggest that the full story of the Nineteenth Amendment has always involved much more than a narrow debate over a determinate decision rule regarding women's access to the franchise—as vitally important as that specific constitutional right is. Americans might bear in mind all of the reasons why the Nineteenth Amendment matters today as they mark the centennial of the Amendment. And as difficult as it may be for many Americans to do, they might honor the occasion without indulging in self-congratulatory celebration of all the moral and democratic progress that Americans have made on “the woman question.”¹³⁶ They might instead supplement their solemn pride in a measure of progress that has been genuinely substantial with profound gratitude for the women and men who have been responsible for it—and with circumspection and introspection about why the journey to equal citizenship stature for women in the United States has been so arduous. Americans might also maintain a keen appreciation of all the hard work that remains.¹³⁷

against female enfranchisement from 1890 to 1920 was that it would open an additional door to black voting and possibly to federal intervention in election laws. Nonetheless, the currency of the statistical argument, particularly coupled with NAWSA's own tolerance of segregation, highlighted the distance that the movement had traveled from the equal rights impulses of the 1860s.

Id. at 199. NAWSA was the National American Woman Suffrage Association, which in 1890 unified two competing suffrage organizations. Stanton and Anthony were the first two presidents of the association. *Id.* at 197. Notably, “[i]n the South, the statistical argument was simply no match for the frenzied political circus that was disenfranchising blacks and poor whites in one state after another.” *Id.* at 202. Moreover, “the anti-black, anti-immigrant, and anti-working class argument in favor of women's suffrage was inescapably weakened by its own internal contradictions.” *Id.*

136. Lacking a sense of shame about the past may be an unfortunate part of the American ethos. For a stark contrast, consider, for example, the basic attitude (albeit with anti-Semitic exceptions) of contemporary German society toward Nazism and the Holocaust.

137. For a subdued, critical perspective on the bicentennial of the U.S. Constitution that strikes a tone worthy of emulation, see generally Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).