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

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

INTRODUCTION

The history of the voting right presents a telling irony of American political relations because it reveals that dominant groups used their power to limit access to the ballot, even as the franchise came to symbolize full citizenship to women, African-Americans, and others excluded from participation in the governance of the nation. While the vote acted as an icon, even a fetish, of democracy in the imagination of disenfranchised Americans, it was employed by ruling elites to maintain their superior...
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position in the general society. In this Article, I use the long-neglected story of the woman suffrage movement to explore an overlooked aspect of this paradoxical situation — namely, the Supreme Court’s role in maintaining and reinforcing traditional patterns of dominance in the United States by validating laws designed to keep women from voting. In doing so, I hope to reveal the Court’s position as gatekeeper of the franchise under our scheme of federalism and to bring the account of women’s struggle for suffrage from the “underside of history” to the center of constitutional theory. Throughout my discussion, I depict the gender system as “a social system that divides power,” and I relate that depiction to the grueling fight women waged for almost a century to secure political rights.

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

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

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


7. See Mary Fainsod Katzenstein, Feminism and the Meaning of the Vote, 10 SIGNS 4, 5–7 (1984).
establishing the legitimacy of democratic governmental regimes. As the history of women's fight for the ballot shows, however, the voting right can be withheld, manipulated, or weakened to promote and maintain the position of favored groups. On close examination, it is a disquieting fact that the value of the vote seems more symbolic than substantive and that rhetoric about popular sovereignty and majority rule merely obscures continuing massive inequalities in the American polity based on race, sex, and wealth.

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

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


10. See generally Eleanor Flexner, Century of Struggle: The Woman's Rights Movement in the United States 41, 143 (Harvard Univ. Press 1968) (1959) (dating the beginning of feminist consciousness which led to the suffrage drive from the early Jacksonian period of the 1830s).

11. This is because it enfranchised half of the people in the United States. In 1920, when the Nineteenth Amendment was enacted, there were approximately 51.8 million women in the United States. See U.S. Bureau of Census, U.S. Dep't of Commerce, Historical Statistics of the United States: Colonial Times to 1957, series A34-50, 9 (1961) [hereinafter Census, Historical Statistics].
to it, legal scholars have engaged in almost no discussion about what the woman suffrage movement can teach regarding the potential and the limitations of electoral politics.\textsuperscript{12} This is a serious omission because the Supreme Court's treatment of women's legal claims delayed the conclusion of the suffrage campaign into the Twentieth Century and consigned it to a condition of political isolation that was instrumental to its deradicalization.\textsuperscript{13} This delay unjustly enriched dominant groups by giving them an additional half-century\textsuperscript{14} to further entrench a political process resistant to the demands of women and others for power sharing. Thus the Court's attitude helped to preserve the non-franchise aspects of the gender system into the modern era, diluting the power of the vote decisively to emancipate women on its own.\textsuperscript{15} The Court's role alone in creating these effects should make woman suffrage intriguing to constitutional scholars, but in addition

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{12} Very few law review articles deal at all with woman suffrage. See, e.g., Martha Minow \& Nell Minow, \textit{Franchise Republics: The Examples of Shareholder Voting and Women's Suffrage}, 41 FLA. L. REV. 639, 651–56 (1989) (including a short discussion of woman suffrage in treatment of shareholder voting); Rogers M. Smith, \textit{"One United People": Second-Class Female Citizenship and the American Quest for Community}, 1 YALE J.L. \& HUMAN. 229 (1989) (using woman suffrage to explain conceptions of political participation founded in contrasting models of community). Recently, mention was made of the history of woman suffrage in a student note arguing that the Nineteenth Amendment should be given an emancipatory reading. Jennifer K. Brown, Note, \textit{The Nineteenth Amendment and Women's Equality}, 102 YALE L.J. 2175 passim (1993). None of these works gives a detailed account of the history and none highlights the role of the Supreme Court in foreclosing access to the voting right for women. The absence of academic interest in women's legal history has been ameliorated to some extent by Joan Hoff's work. See generally \textit{Joan Hoff, Law, Gender, and Injustice: A Legal History of United States Women} (1991) (providing a comprehensive account of the legal status of American women).
\item \textsuperscript{13} See infra text accompanying notes 335–53, 459–503.
\item \textsuperscript{14} The Court had an opportunity to strike gender restrictions on the franchise as early as 1874; the Nineteenth Amendment was not enacted until 1920. See infra text accompanying notes 335–53, 435–46.
\item \textsuperscript{15} Achieving the formal right to the franchise was a necessary, but not a sufficient condition of women's emancipation. This is the case because prohibiting women from having a symbolic claim to political power was a key piece of the entire network of male dominance operative in the last century. The longer that restrictions on voting were retained, the more the nonfranchise aspects of the gender system were reinforced. Thus, when women gained the vote, they were confronted with a well-established and formidable obstacle in the form of entrenched social institutions which retarded their ability to increase their status through direct voting power. Removing gender restrictions on the voting right could not transform such a complex entity, combining both public and private elements, overnight or by itself — it would take many years and enormous resources for the whole network of gender dominance to begin to erode and to afford women an actual chance for complete emancipation. See infra text accompanying notes 503–37.
\end{enumerate}
\end{footnotesize}
the campaign for women’s voting rights was a remarkable historical phenomenon that can generally increase our understanding of the gap between electoral realities and democratic appearances in American society.

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

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


20. Michael Parenti describes the historical uses of suffrage in the Nineteenth Century:
The arguments of the more liberal-minded groups [for extending suffrage] prevailed in the United States and Great Britain, and popular suffrage was extended in both countries. But the British and American elites were motivated by something other than a gradualist, reformist vision. They had no desire to move toward a new social order but to consolidate the prevailing one under the same political management that had extended suffrage. They initiated changes only in response to serious public turmoil, and these changes — like those before and since — were intended not to be the first step in a series of reforms but the last. The reforms were designed to prevent widespread agitation while securing the rule of a slightly reconstituted oligarchy.
full citizen and that, without the direct influence over legislators provided by the ballot, women had little leverage over those who controlled the institutions that promoted the gender system. To suffragists, the franchise was the cornerstone of all other political rights, and they judged that political rights were needed to end the widespread belief that women should be assigned an inferior status.

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

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Michael Parenti, Power and the Powerless 198 (1978). Many modern political theorists claim that voting is ineffective to reorder social relations or express the will of an actual majority of Americans. This is in part the result of the inherent problems of democracy on a large scale. See Robert A. Dahl, Dilemmas of Pluralist Democracy 11 (1982). These problems are exacerbated by the power of the media to shape public opinion and the power of corporations, in turn, to determine media content. See Michael Parenti, Inventing Reality: The Politics of the Mass Media 20–23, 48–53 (1986). See generally C. Edwin Baker, Advertising and a Democratic Press (1994) (describing the effect of advertising on the content of news reporting).


22. Many women involved in the American suffrage movement referred to themselves as “suffragists” and considered the diminutive “suffragette” to be insulting. See 1 Karlyn K. Campbell, Man Cannot Speak for Her, A Critical Study of Early Feminist Rhetoric 3 (1989) [hereinafter 1 Campbell, Man Cannot Speak].

23. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the franchise as “a fundamental political right, because [sic] preservative of all rights”). An argument can be made that speech rights are essential to all other rights; however, voting itself can be seen as continuous with political discourse outside of official institutions — that is, as a form of speech by proxy that takes place in a uniquely important forum.
the Nineteenth Amendment, which finally succeeded in 1920 after the First World War. This section shows the process by which the suffrage crusade was politically isolated and highlights the Supreme Court’s role in limiting it when activists shifted the center of their focus from legislative institutions to the courts. Part III connects my theoretical and historical contentions with illustrative constitutional decisions on voting and other closely related issues affecting women that emanate from the Reconstruction Era up to the social protest movements of the 1960s. In the period before the Nineteenth Amendment was passed, the Court protected the complex of gender dominance by foreclosing legal challenges to discriminatory voting laws. After the amendment was enacted in 1920, the Court’s failure to strike other aspects of the gender system — including discrimination in employment and education — helped to preserve much of women’s subordinated status into the modern era. Thus, the purpose of Part III is twofold: to illuminate the Supreme Court’s central role in maintaining the power of established groups in society through its approach to the franchise, and to show that the voting right standing alone can erode, but not completely remove, entrenched patterns of gender discrimination.

I. VOTING AND THE COMPLEX OF DOMINANCE

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

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

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

GERDA LERNER, THE CREATION OF PATRIARCHY 76-77 (1986) [hereinafter LERNER, PATRIARCHY].
who controlled property and industry. Social stratification based on gender worked in an intricate fashion to make women sexually available to men and to facilitate their appropriation as resources for reproduction and unpaid labor within the confines of the family. No aspect of the voting right more clearly reflects the social hierarchy of American culture than the historical limitations on access to it that were selectively applied to various groups. These limitations played a critical role in creating the social systems by which the poor, persons of color, and women were subjected to an inferior status. Moreover, the way gender subordination has operated in the context of the franchise is particularly complicated. This is the case because, as MacKinnon has described it, “[M]en’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life.” Thus dominance has involved forces of breadth, depth, and sophistication by which the political power of half the population has been blocked, blunted, and manipulated in a system allegedly committed to majority rule.

A. The Nineteenth Century Gender System

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

25. See Parenti, Power and the Powerless, supra note 20, at 5–14, 65, 97.
26. See MacKinnon, supra note 6, passim and especially chs. 2 & 3. Once again as Lerner portrays it:

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

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

27. See MacKinnon, supra note 6, at 161.

28. See, e.g., MacKinnon, supra note 6, at 157–70. This is the reason why feminists treat the public/private distinction, so central to classic liberal theory, as spurious when applied to the condition of women. See Carole Pateman, Feminist
made possible by material and ideological aspects of the general society. At the material level, women's expressive freedom was circumscribed by the threat of violence against those daring to venture into the public domain without male protection or approval, while at the same time women's economic independence was largely foreclosed through an ideology that kept them confined in the private sphere of the family, almost completely excluded from paid work. The close connection between the material and ideological aspects of the social construct known as "woman's sphere" was assisted by the dogma that females were

Critiques of the Public/Private Dichotomy, in Feminism and Equality 103-09 (Anne Phillips ed., 1987).


30. The law of rape in the Nineteenth Century gave men a privilege to force sex on unprotected women in all but the most egregious circumstances. See, e.g., Mills v. United States, 164 U.S. 644, 648 (1897) (Peckham, J.) (reversing a criminal conviction for rape on grounds that an instruction finding "simply non-consent... and no real resistance whatever" was erroneous). Unaccompanied women were frequently treated as prostitutes. See infra text accompanying note 144. Fathers and husbands were given rights to use physical force to subdue and control wives and daughters without fear of legal reprisal. See Henry B. Blackwell, Legal Redress for Assaulted Wives, 10 Woman's J., Jan. 18, 1879. When women first began speaking in public in front of mixed audiences, they were physically assaulted and intimidated. See infra text accompanying notes 143-46. Even today the constant threat of violence is a theme in women's lives. See Margaret T. Gordon & Stephanie Riger, The Female Fear (1989); Murray A. Straus et al., Behind Closed Doors: Violence in the American Family (1980). The feminist critique of pornography characterizes it as purveying a political ideology promoting force and violence against women that interacts with other aspects of dominance to prevent women from achieving equality in social relations by silencing them. See Andrea Dworkin, Pornography: Men Possessing Women (1981); see also Pornography and Sexual Aggression (Niel M. Malamuth & Edward Donnerstein eds., 1984) (investigating the connection between pornography and violence against women).

31. See infra text accompanying notes 134-41.

32. The phrases "woman's sphere," "domestic sphere," "separate sphere," and "private sphere" all refer to the idea that gained acceptance in the mid-Nineteenth Century that men and women should have different zones, or spheres, of existence and activity. Men were to be masters of and active in the public world of trade, commerce, and politics, while women were to be secluded in the home away from the corrupt influences of the public domain, where they could realize their true nature and value as mistresses of the household, wives, and mothers. The net result of this ideological innovation was to decrease women's freedom, mobility, and power. Thus the politics of domesticity have been closely associated with female subordination. See Barbara L. Epstein, The Politics of Domesticity, Women, Evangelism, and Temperance in Nineteenth Century America 73-87 (1981). Notwithstanding these negative characteristics of "woman's sphere," many suffragists tried to mount arguments for women's emancipation by exploiting its message and redirecting it. See infra text accompanying notes 329-33, 365-69, 380-84.
an almost separate species, different and apart from men, with a
limited cognitive capacity, unlimited emotional capacity, and a
natural fitness for reproduction and mothering. To insure that
women would not be exposed to ideas and conditions challenging
these notions, they were excluded from access to education and
prevented from having any real control over their sexuality and
reproduction.

B. The Vote and the Complex of Dominance

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

33. See infra text accompanying notes 153–55.
34. The parallel between the techniques used to control African-Americans
before the Civil War and the forms of control exerted over women in antebellum
America is instructive. At the same time that women were denied access to educa-
tion and suffered significantly higher rates of illiteracy than did men, Southern states
were passing laws making it a crime to teach a slave to read and Black children in
Northern states were not being given access to the public education offered to white
children. See E. Franklin Frazier, The Negro in the United States 419
(1969). See generally JoEllen Lind, Symbols, Leaders, Practitioners: The First Wo-
men Professionals, 28 Val. U. L. Rev. 1327 (1994) (discussing how women created
educational opportunity for themselves and eventually gained access to higher edu-
cation and professional training).
35. See infra text accompanying notes 140–41, 147–51.
36. See Lerner, Patriarchy, supra note 24, at 76–77.
37. This phenomenon is central to Simone de Beauvoir's classic work in femi-
nism and her discussion of the “Other.” Simone de Beauvoir, The Second Sex
38. This is the point of her treatment of the voting right and American citizen-
ship. Shklar is careful to point out that voting alone does not guarantee that one
achieves the status of a full citizen; access to paid work is also necessary. See Judith
Shklar, American Citizenship 3 (1991). The connection between gradations of
personhood — pseudo-speciation, if you will — and degrees of involvement in the
polity's governance can be traced back to Aristotle. See Aristotle, The Politics
Book 3 (Carnes Lord trans., 1984).
spect between the sexes. Soon after organizing their movement for female emancipation, activists were quick to apprehend this and to see the vote as a means for women symbolically to escape the confines of the domestic sphere. Finally, if women obtained the vote they might develop a group interest identity and ally with other marginalized persons to pass laws reordering private relations and redistributing political power in the civil society. In this capacity, suffrage could function in their hands as an entitlement right with a group dimension to be used to change the actual interactions of men and women. As the history shows, women who agitated for the reform of divorce and property laws found that without possessing suffrage rights on their own, it was extremely difficult to get legislation sponsored and passed that addressed their interests. They wanted the right to vote to insure that women’s views and needs would be represented. In all these ways — through its symbolic effect, its impact on public


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

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

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

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

Id. at 616.
discourse, and its potential as a tool for changing the behavior of persons in the civil society — women's access to suffrage threatened the ideological aspects of patriarchal dominance, while it also suggested the possibility of transforming the material conditions necessary to its operation.

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

Their attitude is supported by additional sources of cynicism about modern elections — political scientists and others are quite familiar with barriers to effective use of the ballot that operate in the contemporary era to blunt the real power of out-

43. See infra text accompanying notes 207–28.
44. See infra text accompanying notes 298–301, 354–60, 387–94.
45. See COTT, MODERN FEMINISM, supra note 16, at ch. 5.
46. See Ellen DuBois, The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism, 3 FEMINIST STUDIES 63 (1975–76) [hereinafter DuBois, Radicalism]. DuBois argues that focusing on the vote rather than directly attacking the institution of the patriarchal family actually gave suffragists a strategic advantage that was significant:

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

Id. at 63–64.
Skepticism about the franchise makes it easy to overlook the importance of voting to women's early attempts to gain recognition of their personhood, to enter into the official political discourse, and to work to create group political power. Thus, the paradox of the ballot plays itself out in the history of woman suffrage in a way that obscures the role of formal political rights in the long process of women's emancipation. However, if women still were prevented from voting today, it is likely that their status as citizens, their entree to the public forum, and their ability to influence political institutions would be severely limited. This demonstrates that although being invested with the voting right bears significantly on a group's social situation, voting alone does not insure democratic inclusion. What is it about suffrage in the United States that makes it a necessary condition of political emancipation, but not a sufficient one?

C. Political Theories About the Vote

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

48. See Parenti, Power and the Powerless, supra note 20, at 197–213.
49. Id. at 201–04.
competency standards,\(^5\) cumbersome procedures for registering
to vote that impose residency restrictions,\(^5\) burdensome condi-
tions that must be satisfied before a candidate may qualify to run
for office,\(^5\) private financing of campaigns,\(^5\) malapportionment,
and gerrymandering.\(^5\)

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

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

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

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

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

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

55. This was the evil sought to be remedied in Reynolds v. Sims, 377 U.S. 533
The antidemocratic effect of these devices is magnified by American political institutions disproportionately influenced by money and established patterns of power. This phenomenon is further exacerbated by an approach to rights in constitutional theory that generally prohibits any intervention by government in the private sphere to redress the very imbalances in money and power between the sexes, the races, or the classes that produced those institutions. Although it is important not to be naive about the utility of the voting right for disadvantaged groups, it is also necessary to understand why and how the franchise has been weakened to assess the possibilities for a genuinely participatory governmental regime today in America. The history of woman suffrage is significant to this assessment in three major ways: It shows (1) that past discrimination in access to the ballot contributes to a group's relative powerlessness even after the right to vote is secured; (2) that the franchise cannot be completely insulated from the controlling influence of dominant groups; and (3) that ambiguity in American culture over what counts as representative government complicates the task of any group seeking to use the vote to improve its condition.

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


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

58. See MacKinnon, supra note 6, at 167.

59. The contrast between de jure and de facto discrimination refers to the difference between discrimination occurring overtly through formal laws, such as the laws requiring segregation in the South before the Supreme Court's decision in
they create conditions that make it very difficult for an inferior group to obtain substantive legislation that deviates from the status quo.60

The history of the woman suffrage movement also underscores the fact that the franchise cannot be separated from patterns of dominance and discrimination that exist in the general society. Exclusion from political rights is both a symptom of and a key contributing factor to the phenomenon of social subordination that is constructed of numerous components — some economic, some ideological, some public, and some private. Seen in this light, attempts to legitimize the American political system by focusing on formal access to suffrage and seeking a “fair” and “neutral” process in which all citizens may now participate61 suffer from ahistoricism, ignore the reality that formal access impacts on just one element within the syndrome of domination, and do nothing to require that the benefits of past discrimination be disgorged.62 This is the chief defect of process theories which try to solve problems arising from disparities in raw political

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


62. Robert Ely has developed a form of process theory that is sensitive to the problem of discrete and insular political minorities, but that still suffers from a theoretic inability to reach power distributions in the civil society. See generally John Hart Ely, Democracy and Distrust 75–104, 172–75 (1980) (developing a representation reinforcing theory of individual rights). As MacKinnon’s work demonstrates, under liberal process theory “gender as a status category was simply assumed out of legal existence, suppressed into a presumptively pre-constitutional
power with solutions limited by the norm of formal equality. To make the voting right more meaningful and effective in the hands of women, all aspects of gender subordination — the public and the private, the de jure and the de facto — ought to be subjects of concern and addressed explicitly in constitutional theory. Finally, the woman suffrage movement reveals the way conflicting ideas of political participation that lie at the core of the American conception of democracy hampered the efforts of disadvantaged groups to gain a toehold in governmental institutions. These are the intertwined but contrasting norms of civic republicanism and liberal individualism that have made up the uniquely American understanding of democracy since the Revolutionary period.

1. Two Understandings of Political Participation

Under civic republican notions of political participation and governmental legitimacy, representative government can be achieved without the inclusion of all adults in the franchise because those members of the community invested under its norms with the role of “citizen” are entitled directly to engage in political discourse and deliberation on behalf of others to affect the realization of the communal good. This view expresses a form of republican solidarism. As the public good redounds to the individual good of all the community’s persons, their virtual representation by “citizens” ethically legitimizes the authority of the constitutional structure designed not to reach it.” See MACKINNON, supra note 6, at 163.

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

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

65. This rests on the notion that the community can access or construct a communal good. See Michelman, Conceptions of Democracy, supra note 63, at 445–46.
In this way, persons or groups thought to lack the capacity to deliberate meaningfully or whose participation is believed to be divisive of the community's homogeneity can be justifiably deprived of the vote.\textsuperscript{67} “Democracy” takes on a substantive, not procedural, meaning under such a regime as the wise pursue the common good on behalf of the many.

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


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

\textsuperscript{68} An intense debate among legal scholars and historians has been ongoing over the political norms that most characterize the Constitution. See, e.g., Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988); Symposium, Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory, 84 U. L. REV. 1 (1989). Much of this controversy was ignited by the work of Gordon Wood and Bernard Bailyn on the ideological orientations of Americans in the Revolutionary Era. See Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Gordon S. Wood, The Creation of the American Republic 1776–1787 (1969). This contention relates broadly to the communitarian critique of liberalism that is current in political theory. See generally Michael J. Sandel, Liberalism and the Limits of Justice (1982) (criticizing what he takes to be the metaphysical commitments central to liberalism); Stephen A. Gardbaum, Law, Politics, and the Claims of Community, 90 Mich. L. REV. 685 (1992) (cataloging and analyzing the various forms and levels of communitarianism).

\textsuperscript{69} See generally Robert Nozick, Anarchy, State, and Utopia (1974) (Nozick's work constitutes the most influential modern statement of these claims).

\textsuperscript{70} Consent or social contract theories of governmental authority are typically traced to the political philosophy of John Locke. See generally John Locke, Two Treatises of Government (Peter Laslett ed., student ed. 1988) (3d ed. 1698). There are difficult problems with social contract theories, the most significant of which is the fact that most persons cannot in any sense be said to have consented to the governmental regime to which they are subject. Hence, consent theories are often treated as aspirational or hypothetical. See Will Kymlicka, Contemporary Political Theory 58–70 (1990).
governmental powers.\textsuperscript{71} Finally, individual rights trump official interference in areas thought to be essential to personal liberty, regardless of the majority's desires.\textsuperscript{72} Under this view, voting is the decision procedure for ascertaining the public will on issues representing conflict among the segments of a pluralistic society, and all rational adult persons are to be imbued with the franchise.

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

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

\textsuperscript{72} Id.

\textsuperscript{73} See infra text accompanying notes 452–58.


\textsuperscript{75} Id. For a discussion of the historical basis of rights as naturally or socially defined, see Michael Freedren, Rights 12–23 (1991). Today we make little distinction between civil and political rights, but these theoretical differences were critical in the drafting of the Fourteenth Amendment. See infra text accompanying notes 253–89.
accommodating the realities of women's claims to political autonomy as did civic republicanism. Liberalism's emphasis on rationality, taken together with the widespread belief that women were irrational, created an exception to the requirement that all adults exercise the franchise. More importantly, as MacKinnon has pointed out, liberalism's penchant for privacy and its preference for formal over actual equality fostered an approach to politics that ignored patterns of dominance in the nongovernmental civil society — especially the family — and was ill-suited to justify state intervention in private relations to redress imbalances between men and women.76

2. Our Federalism

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

76. See MacKinnon, supra note 6, at 157-70.
79. For an example of the way federalism served to limit federal intervention in a California state criminal prosecution of members of the Progressive Party, see the celebrated case of Younger v. Harris, 401 U.S. 37, 44 (1971).
80. These were the Federalists and the Anti-Federalists. While the ideologies of competing Federalist and Anti-Federalist factions do not fall into neatly opposed categories, they reflect in some sense civic republican and liberal principles of governmental legitimacy and political participation. See JoEllen Lind, Liberty, Community, and the Ninth Amendment, 54 Ohio St. L.J. 129, 1290-93 (1994) [hereinafter Ninth Amendment]; see also Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991); Carol M. Rose, The Ancient Constitution vs. The Federalist
contrasting approaches resulted in a scheme for power sharing that limited the reach of the new national government and retained the plenary authority of states over persons within their borders.\textsuperscript{81} This strategy included giving the states the right to determine voter qualifications, not just for the state franchise but for federal elections as well.\textsuperscript{82} Thus, Article I, section 2 of the Constitution, governing the election of the House of Representatives and the electoral college, and related provisions were interpreted to delegate to the states the authority to determine standards and qualifications for a person's eligibility to vote in \textit{all} political contests — federal as well as state.\textsuperscript{83} Under this pattern, states were free to exclude persons within their boundaries from eligibility to vote without fear of federal intervention, until the passage of the Fourteenth Amendment after Reconstruction created the possibility of a Copernican Revolution in governmental relations.\textsuperscript{84} Until the enactment of that amendment, there was significant confusion over whether an individual possessed an independent citizenship relationship with the new national government, or whether citizenship was only obtained at the state level.\textsuperscript{85}


81. \textit{See Ninth Amendment, supra note} 80, at 1288–96.

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


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

85. As Justice Miller said in \textit{The Slaughter-House Cases}:

\begin{quote}
The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges
\end{quote}
eral power sharing, when women began to test the conditions of their subordination in the Jacksonian era, they were confronted not only with varying ideologies of democratic participation, but also with concrete and established political institutions linked together in intricate and baffling ways through the franchise. This state of affairs complicated women’s ability to secure the vote on their own terms in various respects.

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

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

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

86. See infra text accompanying notes 457–58.

87. Id.

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

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

90. See infra text accompanying notes 452–58.
passage of these amendments, state prerogatives on access to the vote became vulnerable to constitutional scrutiny by the Supreme Court for the first time.

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

II. A Suffrage History Primer

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

91. For a discussion of the restrictions on voting premised in requirements that persons own a certain amount of property that later evolved into the requirement that they not be paupers, see Steinfeld, supra note 2, at 337–42. For a catalogue of state constitutional provisions in the early days of the nation, see DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820s (Merill D. Peterson ed., 1966).

92. See Steinfeld, supra note 2, at 351–53.
men by the middle of the 1800s. In this way, these new voters attained an official relationship with their government — that of citizen — which was reinforced with each trip to the ballot box.

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

93. Id. at 350–53.
94. This relationship was produced through the connection between the voter and his state. Full blown notions of federal citizenship were not established until the ratification of the Fourteenth Amendment. See infra text accompanying notes 283–89.

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

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

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

96. For a more detailed discussion of the notion of feme couvert, see infra text accompanying notes 127–32.
97. Id.
98. Ellen DuBois argues that this established the principle that the basic unit of political organization was the family and that representation of families was to come from giving voting rights to their male heads. See DuBois, Radicalism, supra note 46, at 64–65.
A. From Invisibility to Organization: The Woman's Movement in Antebellum America

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

1. Early Causes

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


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

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

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

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

105. See 1 Stanton et al., supra note 4, at 14–19, 35–36, 39–40, 95–100. See generally Woman Suffrage: History, Arguments and Results 6–8 (Frances M. Bjorkman & Annie B. Porrit eds., 1917) (canvassing the arguments relating to the woman suffrage movement, and describing its progress).

106. These factors became even more significant as a result of the Civil War. See infra text accompanying notes 234–41, 354–56, 395–403.
improving women’s condition.\textsuperscript{107} It is a truism that the Jacksonian age was one of economic growth, dislocation, and unrest that reflected the erosion of old feudal forms of society in the face of an emerging middle class that had a taste for industrialism and an ethic of individualism.\textsuperscript{108} As Robert V. Remini described it: “The American of the early Nineteenth Century was a hustler, a man on the make, invariably alert to any opportunity which might improve his station in life.... It was a materialistic society Americans were building, one dedicated to business, trade, and the acquisition of wealth.”\textsuperscript{109} As a result, there were greater demands for democratization, while at the same time people yearned to make society more moral and altruistic in the face of its increasing mercantilism.\textsuperscript{110} It was in this period that reform movements associated with the Nineteenth Century had their birth — abolition, temperance, religious revivalism, and early organized labor.\textsuperscript{111} One of the assessments of these phenomena is that as women were drawn up in the reform fervor of the age, especially abolition, they came to see the limitations of their own existence, to apply emerging doctrines of individual rights to their own situation, and to embark on self-conscious reformism in their own interest.\textsuperscript{112} Such a view assumes that women’s emergent concern with improving their status resulted from the contagion of ideas that were spawned by the economic and social/historical liberalization of American society in the Jacksonian era. Undoubtedly, the presence of an emerging human rights philosophy did benefit many women seeking to make sense of their own situation, but women’s access to the education necessary to make their exposure to these ideas meaningful was just as important as the ideas themselves.

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

\begin{itemize}
\item \textsuperscript{107} Griffith, \textit{supra} note 18, at 15; Peggy A. Rabkin, \textit{Fathers to Daughters: The Legal Foundations of Female Emancipation} 3 (1980).
\item \textsuperscript{108} \textit{See} Griffith, \textit{supra} note 18, at 14–15.
\item \textsuperscript{109} Robert V. Remini, \textit{The Jacksonian Era} 70–71 (1989).
\item \textsuperscript{111} \textit{See} Buhle & Buhle, \textit{supra} note 104, at 1.
\item \textsuperscript{112} \textit{See}, e.g., Flexner, \textit{supra} note 10, at 71 (treating the ideas of the Jacksonian Era as a significant factor in creating the suffrage cause).
\end{itemize}
widely established, the idea of land grant colleges started to take hold, and literacy levels among men increased.\footnote{113} Unfortunately, women were often excluded from this democratization of educational opportunity on the theory that, being primarily suited for home and family life, they did not need the skills a good education could provide.\footnote{114} Although women made inroads in receiving rudimentary schooling in this period, they had little opportunity to obtain a more sophisticated, higher education.\footnote{115} Nonetheless, in the early decades of the Nineteenth Century, the female seminary movement gained ground and a number of institutions devoted to giving women training to improve their domestic skills were created.\footnote{116} These institutions also included courses of study in topics previously thought to be outside the purview of woman's sphere, such as mathematics and history. As a result, in the first half of the century some significant educational opportunities opened up for middle- and upper-class-women, many of whom later became activists in the woman suffrage movement.\footnote{117}

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

\begin{footnotes}
\footnote{113}{See Remini, supra note 109, at 78–80.}
\footnote{114}{See 1 Thomas Woody, A History of Women's Education in the United States 451–52 (Octagon Books 1980) (1929).}
\footnote{115}{See 2 Thomas Woody, A History of Women's Education in the United States 137–38 (Octagon Books 1980) (1929).}
\footnote{116}{The most famous of these was Emma Willard's Troy Female Seminary established in 1821. It offered a curriculum competitive with those found in men's schools, but its general philosophy did not challenge the notion of a domestic sphere. Nonetheless, the women it educated came to constitute a reservoir of females desirous of more and more advanced educational opportunity, and their existence created pressure for the development of women's colleges. See Gerda Lerner, The Creation of Feminist Consciousness: From the Middle Ages to 1870, at 42–43 (1993).}
\footnote{117}{See Flexner, supra note 10, at 28–36.}
\footnote{118}{See Lerner, Patriarchy, supra note 24, at 8.}
\end{footnotes}
into a change in attitude toward women’s nature and role.\textsuperscript{119} For them, the possibility that reforms in the laws governing the property rights of married women accidently functioned both as a foundation for and an impetus to the eventual formation of an organized woman’s rights movement in 1848 deserves more attention.\textsuperscript{120} During the Jacksonian era, property laws relating to women indeed began to change, but it is unclear how important these changes were as a causal factor in the emerging crusade.

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


\textsuperscript{123}. See Rabkin, \textit{supra} note 107, at 40–49; see also Warbasse, \textit{supra} note 121, at 57–60. Some men argued for the changes on the basis of women’s entitlement to basic human rights. See Elisha P. Hurlbut, \textit{Essays on Human Rights and Their Political Guarantees} 144–72 (New York, Greeley & McElrath 1845).

\textsuperscript{124}. For an in-depth discussion of the New York reforms of 1848 and the attempt to backtrack from them in 1860, see Norma Basch, \textit{In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York} (1982); 1 Stanton et al., \textit{supra} note 4, at 14, 63–64; Warbasse, \textit{supra} note 121, at 224–27.
property from the reaches of often dissolute sons-in-law.\textsuperscript{125} Moreover, significant modifications in the property rights of women were not effectuated by a majority of states until the 1870s.\textsuperscript{126} Although there can be no doubt that increased economic independence made it possible for many women to agitate for reform, this factor acted in conjunction with a number of other conditions such as increased women’s education, urbanization, and other demographic changes that existed in parallel and created the cognitive and material conditions of their revolt. More importantly, the property laws were part of a larger web of controls — the complex of dominance — that kept women largely confined to the private sphere, so that they were impeded from effectively organizing until the 1840s. Women’s eventual claim to the voting right became a provocative symbol of their desire for emancipation — both to activists for women’s rights and their opponents — because it stood as a challenge to many of the essential features of the intricate and interlocking web that was the gender system in the Nineteenth Century.

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

\begin{itemize}
\item \textsuperscript{125} As Peggy Rabkin stated: “The 1848 [New York] act in reality protected the property of the married woman’s father rather than that which a married woman herself acquired.” \textit{Rabkin, supra} note 107, at 85. A majority in support of the bill could not be mustered until key conservatives in the legislature were convinced that their own interests would be served by the reform. \textit{See Warbasse, supra} note 121, at 226-29.
\item \textsuperscript{126} \textit{See Kay Ellen Thurman, The Married Women’s Property Acts 2-5} (1973). For a breakdown of property reforms made by states according to type and chronology, see \textit{Hoff, supra} note 12, at 127-31.
\item \textsuperscript{127} \textit{See 1 Stanton et al., supra} note 4, at 18. In a speech made before the American Anti-Slavery Society in 1860 Stanton said:
\begin{quote}
[W]oman [is] more fully identified with the slave than man can possibly be, for she can take the subjective view. She early learns the misfortune of being born an heir to the crown of thorns, to martyrdom, to womanhood. For while the man is born to do whatever he can, for the woman and the negro there is no such privilege. . . . To you, white man, the world throws wide her gates . . . but the black man and the woman are born to shame. The badge of degradation is the skin and sex . . . .
\end{quote}
\item \textsuperscript{128} Blackstone said:
\end{itemize}
According to its tenets, a married woman was unable to own her own property, even her wages or her personal effects, to inherit from her husband on his death by intestate succession, to enter into contracts without his consent, to sue or be sued, to obtain a divorce; or to have a right of custody over her children. Moreover, American common law principles recognized the rights of husbands to beat their wives to subdue them.

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

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1 William Blackstone, Commentaries, ch. xv, *442; see also Berg, supra note 16, at 22.


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

131. See 1 Stanton et al., supra note 4, at 108; see also Lois W. Banner, Women in Modern America: A Brief History 2 (John Morton Blum ed., 1974); Warbasse, supra note 121, at 7–8. Women had more control over their real estate than their personhood. Id. at 9.

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

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

1 Miss. (1 Walker) 158 (1824), in Warbasse, supra note 121, at 22. However, Elizabeth Pleck argues that by the middle of the Nineteenth Century the attitude of public authorities to wife beating had changed and that men were often not exonerated from legal liability for such acts. See Elizabeth Pleck, Wife Beating in Nineteenth-Century America, in Cott, History, supra note 5, at 190–91 (analyzing appellate decisions on spouse abuse from 1824 to 1893).
them through private acts perpetrated in the civil society which
the state tacitly condoned, if not actively promoted.133 This com-
bination of discrimination in law and custom constituted a for-
durable barrier to women's emancipation and stood for the
proposition that they possessed few civil and no political rights.

First, convention dictated that women be economically de-
pendent on men. Although in the period from 1800 to 1840 more
females began to work outside the home and factories began to
provide a wage alternative to domestic service,134 there was al-
most no decent employment available by which a lone woman
could support herself and her children in the first half of the
Nineteenth Century.135 The few who worked outside the home
as farm laborers, domestics, or mill workers136 were afforded
only a fraction of the wages available to men,137 making prostitu-
tion one of the better paying "jobs" for those who had to support
themselves.138 When large groups of immigrants willing to work
at low wages began arriving, even poorly paid factory jobs were
lost by native-born American women.139 Moreover, females
were not able to make themselves more employable by pursing
a profession. In the America of the early 1830s, there was not

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

134. See generally Lucy Maynard Salmon, Domestic Service (Arno Press

135. See David Montgomery, The Working Classes of the Pre-Industrial Ameri-

136. Analysis of census data indicate that women made up only 4.6% of the paid
work force in 1800. This figure rose to 9.6% by 1840. W. Elliot Brownlee &
Mary M. Brownlee, Women in the American Economy 3 (1976).

137. See Catherine G. Waugh, Women's Wages passim (1888); Brownlee
& Brownlee, supra note 136, at 35-36.

138. See Jill K. Conway, The Female Experience in Eighteenth- and
Nineteenth-Century America, A Guide to the History of American Wo-
men 60 (1982). The connection between violence against women and forced prostitu-
tion should not be downplayed; however, it is difficult to tell how many women
turned to prostitution for purely economic reasons and how many were physically
forced into such a life. In any event, both violence and poverty are factors militating
against any judgment that prostitution was or is a "victimless" crime. See generally
Kathleen Barry, Female Sexual Slavery (1979) (describing the history and
nature of the business of trafficking in women); Neal Kumar Katyal, Note, Men Who
Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 Yale
L.J. 791 (1993) (constructing an argument based on the Thirteenth Amendment for
the notion that forced prostitution is a form of slavery).

139. See Brownlee & Brownlee, supra note 136, at 17, 144.
one college or university that would admit them for matriculation. Moreover, the education that was available to women in large part focused on “domestic sciences” so that only rudimentary reading and math skills were developed, while the housewifely arts were promoted.

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

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

141. See 1 Woody, supra note 114, at 310, 400.

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


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

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


146. See INEZ HAYNES IRWIN, ANGELS AND AMAZONS: A HUNDRED YEARS OF AMERICAN WOMEN 107 (1933); SEVERN, supra note 103, at 18-19.
Third, women bore the brunt of housework, and married women were subjected to a lifetime of reproduction and child care.\textsuperscript{147} The age of consent was as low as ten in most states and only seven in Delaware.\textsuperscript{148} Married women had no legal right to refuse sexual intercourse with their husbands\textsuperscript{149} and no form of birth control save abstinence was recognized.\textsuperscript{150} As a result, a female could expect to have as many as seven or more pregnancies in her lifetime.\textsuperscript{151} American women of the 1830s had no modern conveniences to help them with the ceaseless labor involved in maintaining a home. Water had to be pumped, soap made, clothes sewn and washed by hand, all cooking was from scratch, and even more work was necessary in the Western territories.\textsuperscript{152}

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

\begin{itemize}
\item \textsuperscript{147} See Jane G. Swisshelm, Letters to Country Girls 43–50, 75–79 (New York, J.C. Riker 1853).
\item \textsuperscript{148} See Hecker, supra note 145, at 168.
\item \textsuperscript{150} See Mary P. Ryan, Womanhood in America: From Colonial Times to the Present 163 (New Viewpoints 1975) (1963).
\item \textsuperscript{151} The average number of children born to a white woman was 7.04 in 1800, 6.92 in 1810, 6.73 in 1820, and 6.55 in 1830. Daniel S. Smith, Family Limitation, Sexual Control, and Domestic Feminism in Victorian America, in 1 Feminist Studies 40, 43 (1973).
\item \textsuperscript{152} See Arguments in Favor of Woman Suffrage 5 (Marion M.B. Schlesinger comp., 1905).
\item \textsuperscript{153} See Andrew Sinclair, The Better Half: The Emancipation of the American Woman passim (1965); see also supra part II.B.
\item \textsuperscript{154} See Barbara Welter, Dimity Convictions: The American Woman in the Nineteenth Century 21–41 (1976).
\end{itemize}
The appropriate duties and influence of woman are clearly stated in the New Testament. Those duties and that influence are unobtrusive and private, but the source of mighty power. When the mild, dependent, softening influence of woman upon the sternness of man's opinions is fully exercised, society feels the effects of it in a thousand forms. The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for her protection, and which keeps her in those departments of life that form the character of individuals, and of the nation.155

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

2. Women and Abolition

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

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

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

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

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

\begin{itemize}
\item \textsuperscript{158} See Conway, supra note 138, at 166–69; DuBois, Antislavery Reconsidered, supra note 156, at 239. In any event, as Blanche Glassman Hersh has said: "Only in the 1830s, when abolitionist women demanded an equal role with men in antislavery work, was the feminist gauntlet thrown down. The consciousness of even the earliest feminist-abolitionist women was 'woman-defined' . . . ." Blanche Glassman Hersh, The Slavery of Sex: Feminist-Abolitionists in America 4 (1978) [hereinafter Hersh, The Slavery of Sex].
\item \textsuperscript{159} See Ronald G. Walters, The Boundaries of Abolitionism, in Antislavery Reconsidered, supra note 156, at 3.
\item \textsuperscript{160} See Margaret H. Bacon, Lucretia Mott: Holy Obedience and Human Liberation, in The Influence of Quaker Women on American History, Biographical Studies 208–09, 212 (Carol Stoneburner & John Stoneburner eds., 1986); Donald M. Scott, Abolition as a Sacred Vocation, in Antislavery Reconsidered, supra note 156, at 51.
\item \textsuperscript{161} See Ellen C. DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869, at 39 (1978) [hereinafter Feminism and Suffrage]; Bertram Wyatt-Brown, Proslavery and Antislavery Intellectuals: Class Concepts and Polemical Struggle, in Antislavery Reconsidered, supra note 156, at 322.
\item \textsuperscript{162} See Berg, supra note 16, at 6.
\end{itemize}
came the dominating moral crusade of the 1830s.\textsuperscript{164}

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

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

\begin{itemize}
\item 165. Women were involved in all the major reform efforts of the 1830s, which included the education movement, the moral reform movement against prostitution, the temperance movement, a nascent peace movement, and abolition. See Melder, supra note 120, at 49–61. It was primarily in the anti-slavery crusade that women aggressively sought entry to the public forum to present their views. Id. at 95–112.
\item 166. See Celia Morris Eckhardt, Fanny Wright: Rebel in America 1 (1984).
\item 170. See Ellen DuBois, Struggling into Existence: The Feminism of Sarah and Angelina Grimké, Woman: J. Liberation (Spring 1970), reprinted in Sophia Smith Collection, Women’s Rights and Suffrage Papers, Box 1, Folder 10.
\item 171. For a brief description of the introduction of the Grimké sisters to abolition, see Melder, supra note 120, at 77–79.
\item 172. Lerner, The Grimké Sisters, supra note 163, at 4. Not all abolitionists were white, nor were all feminists. Frederick Douglass and Sojourner Truth were both active in the movements of the period. See Davis, supra note 60, at 81–86. See generally Carleton Mabee, Sojourner Truth, Slave, Prophet, Legend (1993) (biography of Truth detailing her activities in abolition and suffrage); Frederick Douglass on Women’s Rights (Philip S. Foner ed., 1976) (collecting Douglass’ writings on the condition of women).
\end{itemize}
made them exceptionally effective activists against slavery.\textsuperscript{173} After freeing their own slaves, relocating in the North, and being introduced to the Quaker religion, Angelina first and then Sarah became involved in “radical” abolition.\textsuperscript{174} In the beginning, they argued that women were uniquely suited to morally influence others for abolition.\textsuperscript{175} Soon, however, they asserted women’s entitlement to speak publicly against slavery, not simply on the basis of female moral superiority, but because of women’s right to engage in politics. As Angelina Grimké said in an 1837 speech, when she appeared as the first woman ever to address a committee of the Massachusetts legislature:

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

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

\begin{itemize}
\item \textsuperscript{173} In one six-month period, they toured over sixty towns and spoke in front of more than 40,000 persons. \textit{See} Hersh, \textit{The Slavery of Sex}, \textit{supra} note 158, at 18.
\item \textsuperscript{174} \textit{See} Riegel, \textit{supra} note 99, at 27–29; Severn, \textit{supra} note 103, at 31–33; Celia Burleigh, \textit{People Worth Knowing - No. 4: The Grimké Sisters}, 1 \textit{Woman’s J.}, July 23, 1870, at No. 29, 232; \textit{A Reminiscence of Sarah Grimké}, 5 \textit{Woman’s J.}, Feb. 7, 1874, at No. 5, 42.
\item \textsuperscript{175} Angelina Grimké’s first tract was entitled \textit{An Appeal to the Christian Women of the Southern States} and caused a sensation when published in William Lloyd Garrison’s abolition paper, \textit{The Liberator}. \textit{See} Lerner, \textit{The Grimké Sisters, supra} note 163, at 138–41; Jeanne Boydston et al., \textit{The Limits of Sisterhood: The Beecher Sisters on Women’s Rights and Woman’s Sphere} 5 (1988).
\item \textsuperscript{176} \textit{Lerner, The Grimké Sisters, supra} note 163, at 7.
\item \textsuperscript{177} \textit{See} Anne Firor Scott, \textit{The Southern Lady: From Pedestal to Politics} 1830–1930, at 61–62 (1970) (describing Sarah Grimké’s addresses as constituting the first public foray into women’s rights by an American woman).
\item \textsuperscript{178} Some were so upset at Angelina’s willingness to address a public crowd that they stormed the building where she was speaking before the national convention of the American Anti-Slavery Women, threw stones, and attempted to drown out the speakers. Later that night, they burned the building down. \textit{See} Severn, \textit{supra} note 103, at 33–34; \textit{see also} Letter from Martha Coffin Wright to Matilda Joslyn Gage (Feb. 15, 1871), in Sophia Smith Collection, Garrison Family Papers, Box 43, Folder 1068.1 (describing the mob).
\end{itemize}
out the state and accused women of deviating from their “natural” role by engaging in politics. Sarah Grimké responded by writing a series of letters in the *Spectator*, which became the early feminist classic *Letters on the Equality of Sexes* that advocated an end to women’s subordination and women’s rights to equal education and equal labor opportunities. Following these publications, intense debate ensued in the press, in the churches, and in the abolition community over woman’s proper role and sphere. Within two years of Angelina’s presentation to members of the Massachusetts legislature, the issue of women’s participation broke the abolition movement in half and initiated the chain of events that precipitated Seneca Falls.

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

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181. Id. See generally Sarah M. Grimké, *Letters on the Equality of the Sexes and the Condition of Women* (Source Book Press 1970) (1838) (The original text was published by Isaac Knapp of Boston and was entitled *Letters on the Equality of the Sexes and the Condition of Women, Addressed to Mary S. Parker, President of the Boston Female Anti-Slavery Society.*).

182. She did so by using religious themes and analogizing to the enslaved condition of African-Americans. In one illustrative passage Sarah Grimké wrote: All history attests that man has subjected woman to his will, used her as a means to promote his selfish gratification, to minister to his sensual pleasures, to be instrumental in promoting his comfort; but never has he desired to elevate her to that rank she was created [by God] to fill. He has done all he could to degrade and enslave her mind; and now he looks triumphantly on the ruin he has wrought, and says, the being he has thus deeply injured is his inferior.

*Id.* at 11.

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


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

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

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

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

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

187. See Griffith, supra note 18, at 35-37.

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


190. Id.

191. See Griffith, supra note 18, at 35-37.

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

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

193. See Kraditor, Ideas, supra note 19, at 3–4.
194. See Hersh, The Slavery of Sex, supra note 158, at 25–27.
195. 1 Elizabeth Cady Stanton as Revealed in Her Letters, Diary and Reminiscences 78 (Theodore Stanton & Harriot Stanton Blatch eds., 1922).
196. See Lutz, supra note 179, at 167.
198. Victory, supra note 197, at 21.
199. See Hersh, Abolitionist Beginnings, supra note 197, at 275.
200. See Hersh, The Slavery of Sex, supra note 158, at 40–41; see also Letter from Susan B. Anthony to Martha Coffin Wright (July 6, 1856), in Sophia Smith Collection, Garrison Family Papers, Box 45, Folder 1101.
201. Hersh, The Slavery of Sex, supra note 158, at 28–29; Papachristou, supra note 164, at 18.
and controversial and their attempts to be treated as equal partners in the reform efforts of the era were repeatedly rebuffed. These experiences convinced a number of activists that a movement devoted exclusively to women's emancipation was needed. Finally in 1848, when Lucretia Mott's travels took her to Elizabeth Cady Stanton's home in Seneca Falls, New York, they decided to call the first women's rights convention. They put out a modest newspaper advertisement announcing a meeting on "the social, civic, and religious conditions and rights of woman" which would be open to the public and held at the local Wesleyan Chapel on July 19th and 20th of that year.

3. Seneca Falls — Political Discourse at the Margin

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

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

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203. See Melder, supra note 120, at 113–28.
204. See 1 Campbell, Man Cannot Speak, supra note 22, at 47–48.
205. Elizabeth Cady Stanton spent the years from 1840 to 1848 outwardly involved in traditional domestic tasks. She bore two of an eventual seven children, ran a household on limited funds, supported her husband's emerging political career, and eventually moved with him to remote and rural Seneca Falls in 1847, where he attempted to establish a law practice. Inwardly, Stanton had come to resent the limitations placed on a woman by marriage. Her discontent became extreme in Seneca Falls, where she was isolated and alone much of the time. Melder, supra note 120, at 146; Beth M. Waggenspack, The Search for Self-Sovereignty: The Oratory of Elizabeth Cady Stanton 17–19 (1989).
206. 1 Stanton et al., supra note 4, at 67. The idea arose from an informal discussion at Stanton's home between Stanton, Mott, Martha C. Wright, and Mary Ann McClintock. Id.
207. See Waggenspack, supra note 205, at 18–21.
208. Id. at 20–21.
209. See DuBois, Radicalism, supra note 46, at 63.
210. See Flexner, supra note 10, at 146. But see Melder, supra note 120, at 146 (arguing that the significance of Seneca Falls has been exaggerated).
of Seneca Falls was the system of gender hierarchy, and the convention marked the beginning of a broad social movement designed to change the general condition of women, not just incrementally improve it.211 Seneca Falls' indictments and resolutions criticized discriminatory laws and customs that affected women's property and excluded them from the workplace, denied them educational opportunity, and created the double standard. This manifesto also included demands for the right to enter the public domain and to organize, an end to the custom of the separate sphere, and an end to patriarchal religion.212 The right to vote was only one among many rights claimed, but it was one of the most controversial demands considered.213

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

211. See O'NEILL, supra note 119, at 22; RYAN, supra note 150, at 184.
212. RENDALL, supra note 168, at 227–28, 300–01; 1 STANTON ET AL., supra note 4, at 70–71.
213. 1 STANTON ET AL., supra note 4, at 73; WAGGENSPACK, supra note 205, at 20–21.
214. Lucretia Mott demonstrated these sentiments when she declared in rebuttal to Stanton's proposal that a demand for the vote be made: "Thou will make us ridiculous. We must go slowly." FLEXNER, supra note 10, at 76.
215. For a catalog of the predicted horrors that would ensue, especially in respect to marriage, if women were given the vote, see A LAWYER (ANONYMOUS), supra note 1, at 64–70, 88–93.
217. As Ellen DuBois describes it:
   The right to vote raised the prospect of female autonomy in a way that other claims to equal rights could not. Petitions to state legislatures for equal rights to property and children were memorials for the redress of grievances, which could be tolerated within the traditional chivalrous framework that accorded women the 'right' to protection. . . . By contrast, the suffrage demand challenged the idea that women’s interests were identical or even compatible with men’s. As
and the participants in the suffrage controversy, both pro and con, understood it as such at the time. Many of the women at the convention shrank from throwing down so clear a gauntlet. However, after Stanton’s insistence and serious debate, the call for the vote was passed.

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

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

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

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

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

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

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

221. At the time when women’s public speaking generated so much division in abolition circles, activists like the Grimkés, Abby Kelley Foster, and Maria Weston Chapman understood the importance of their ability to move into the public sphere for women’s rights. See HERSH, THE SLAVERY OF SEX, supra note 158, at 29–30. In an early letter, Angelina claimed, “[W]e Abolition Women are turning the world upside down . . . .” Letter from Angelina Grimké to Sarah M. Douglas (Feb. 25, 1838), in 2 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD AND SARAH GRIMKÉ 1822–1844, at 574 (Gilbert H. Barnes & Dwight L. Dumond eds., Peter Smith 1965) (1934).
avoided engaging them in debate and thus were not required to acknowledge women's humanity — even as enemies — in a public setting. The Seneca Falls Convention continued the discussion of feminine nature and the domestic sphere that had emerged with abolition, and it did so as the result of women's initiative, not men's. In this way, women forced the opening of a public space, albeit a marginal one, where they could engage others in sustained dialogue about their situation and demands.222 This feature of the early suffrage movement was paramount in the years before the Civil War.

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

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

223. See 1 Stanton et al., supra note 4, at 92, 172–73, 178, 344, 592, 595–605, 607, 679–85.
224. 1 Campbell, Man Cannot Speak, supra note 22, at 49. One of the most moving speakers in this period was Sojourner Truth, a Black woman and former slave, who spoke eloquently about the connections between women's condition and slavery. For a recent biography of Truth which provides a complex analysis of the reliable historical facts surrounding Truth's most famous speech, see Mabee, supra note 172, at 67–82.
225. Women came face to face with this reality when they attempted to influence legislation dealing with the property rights of married women by lobbying the New York Legislature. See 1 Stanton et al., supra note 4, at 64–66.
islators because they were unable to affect directly the election of representatives. Thus, these activists struggled to find some tool to thrust political debate over women’s position into the core of governmental institutions. The device they fastened on was the voting right. Activists believed that by acquiring the franchise, they could inject their discourse into public fora and eventually affect political deliberation so as to produce laws capable of transforming the way men treated women in the context of marriage, employment, and myriad other situations. To them, the voting right was not only directly connected to speech outside official institutions, but also a way of projecting their concerns directly and materially into the halls of the government. Thus, they hoped it would someday produce more than rhetorical changes. By the end of the Civil War, what began as a general women’s rights movement, of which claims to suffrage were but one part, became a suffrage movement, where the enfranchisement of women became the key to beginning the process of eroding the whole complex of gender domination.

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

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

226. See generally Elizabeth Cady Stanton, How Man Legislates for Woman, reprinted in Rakow & Kramarae, supra note 216, at 81 (describing the inadequacy of representation of women’s interests).
227. See Buhle & Buhle, supra note 104, at 89–90.
228. Id.
upon which women argued for the vote, and injected elements of racism, nativism, and classism into the movement that lingered into the Twentieth Century.\textsuperscript{229}

1. Civil War and the Woman's Movement

By 1860, the impending Civil War made it difficult for even the most committed suffragists to focus all their efforts on the social crusade they had launched.\textsuperscript{220} Women like Lucretia Mott, Elizabeth Cady Stanton, Susan B. Anthony, and Lucy Stone continued their involvement in abolition and other causes even as women's rights came to dominate their thinking. They decided to call a moratorium on suffrage activism until the war was over, judging that few women would work on a cause solely devoted to

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  \item \textsuperscript{229} Compare Elizabeth Cady Stanton, Speech to the American Anti-Slavery Society (1860) in DuBois, Correspondence, supra note 127, at 78–85 (calling for universal suffrage) with Parker Pillsbury, Educated Suffrage, 1 Revolution, June 18, 1868, No. 24, 376, 377–78, 388 (calling for a restriction of the suffrage to only educated, literate voters, after controversy arose over the Reconstruction Amendment).
  \item \textsuperscript{220} See also Buechler, supra note 217, at 142–43. The debacle of Reconstruction also sowed the seeds for the further exclusion of African-American women from full participation in the suffrage cause. See Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 64–68 (1984) (discussing tensions surrounding the Fifteenth Amendment).
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To the extent that the history of woman suffrage has been studied and written about, the focus has been on the mainstream movement and has almost ignored women of color. There are complex reasons for this historical silence. One factor masking the participation of Black women was the presence of slavery in the South before the Civil War and the pressures that the historic Southern hostility toward political rights for Blacks put on the suffrage movement to exclude African-Americans from its ranks. Another factor was the patent and latent racism, classism, and nativism of many of the women enlisted in the suffrage cause. Nonetheless, the movement itself was first born out of an alliance between those wishing to emancipate slaves and those wishing to emancipate women. In the aftermath of the Civil War and the period of the conservative turn of American society the interests of women and African-Americans were put in increased competition by dominant political forces over the issue of the voting right. See Davis, supra note 60, at 70–86, 110–25. In response, African-American women formed their own suffrage organizations after the Civil War and worked tirelessly for the causes of rights for Blacks and for women. While it is beyond the scope of this Article to provide a discussion of the history of Black women in the suffrage crusade, significant works showing the contributions of women of color to the suffrage movement have been published. See, e.g., Giddings, supra (recounting the history of Black women in America from the 1700s to the present); Barbara Holkert Andolsen, Daughters of Jefferson, Daughters of Bootblacks (1986) (generally describing racism in the American feminist movement); Gerda Lerner, Black Women in White America (1972) (documenting a history of African-American women); see also Mary Church Terrell, A Colored Woman in a White World (1940) (an autobiography of one of the most prominent African-American suffragists).

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  \item \textsuperscript{230} See Buhle & Buhle, supra note 104, at 13–16.
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female emancipation during wartime.\textsuperscript{231} Although the yearly conventions of the previous decade ceased,\textsuperscript{232} the movement's leaders soon embarked on another form of organization apart from the women's convention designed not only to protect the limited gains that had been made, but, more importantly, to capture the war fervor of average women and harness it for female emancipation.\textsuperscript{233}

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

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  \item \textsuperscript{231} See 2 Stanton et al., supra note 4, at 50.
  \item \textsuperscript{232} 1 Campbell, Man Cannot Speak, supra note 22, at 49.
  \item \textsuperscript{233} See Matilda Joslyn Gage, Woman's Patriotism in the War, in Buhle \& Buhle, supra note 104, at 195–97 (describing women's war activities).
  \item \textsuperscript{234} Id.; Flexner, supra note 10, at 107–08; 2 Stanton et al., supra note 4, at 1.
  \item \textsuperscript{235} See Buhle \& Buhle, supra note 104, at 14; Elizabeth Janeway, Women: Their Changing Roles 61 (1973).
  \item \textsuperscript{236} See Feminism and Suffrage, supra note 161, at 54; Kugler, supra note 169, at 24–25.
  \item \textsuperscript{237} In the early days of the war, women in the League lobbied for emancipation of the slaves. They argued that the war's bloodshed was senseless if not expended for a higher moral goal than preventing secession. After Lincoln signed the Emancipation Proclamation, they pushed to have emancipation extended to all states in the Union, not just those of the Confederacy. In 1863, in the closing days of the war, it was they who the leading Radical Republicans gave the task of collecting hundreds of thousands of signatures for presentation to Congress supporting the proposed Thirteenth Amendment, which would enshrine emancipation in the Constitution itself. See Buhle \& Buhle, supra note 104, at 15, 193–94; Feminism and Suffrage, supra note 161, at 53–55.
  \item \textsuperscript{238} See 2 Stanton et al., supra note 4, at 50–54.
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Women's National Loyal League in 1863 and embarked on a series of projects to support the war effort. The League became a great success — it eventually had over 5000 members — and was instrumental in the formation of the Sanitary Commission, which did much to reduce Northern casualties.

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

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

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

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

242. See supra text accompanying note 229.

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

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

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

246. See DuBois, Radicalism, supra note 46.
butions to make to public virtue due to their superior moral qualities and altruistic world views. In a sense, this group’s philosophy comprised a nascent difference feminism. When the propriety of divorce became the subject of debate at the Tenth National Women’s Rights Convention in 1860, these two approaches came into particular tension over the legitimacy of marriage and the family. These matters arose again in the aftermath of the war and contributed to a schism between suffrage forces. During the war, however, suffragists put aside their differences and concentrated on using their contributions to the war effort to establish women’s entitlement to political rights.

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

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

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

249. See infra text accompanying notes 322–33.

250. BARRY, supra note 248, at 54–55.

251. The Republican Party of the Civil War and Reconstruction should not be confused with those Jeffersonians who adopted the descriptive label “Republican” for their political views during the founding era of the nation. See MALCOLM MOOS, THE REPUBLICANS: A HISTORY OF THEIR PARTY 6 (1956). Neither should it be associated with Henry Clay’s National Republicans. Id. The Republican Party of the Civil War was a new political association. Between 1836 and 1848 the Whig and Democratic parties dominated the American political landscape. See GEORGE H. MAYER, THE REPUBLICAN PARTY 1854–1964, at 22 (1964). The issue of slavery, however, broke up old political patterns and was one of the factors that made the emergence of the new Republican Party possible by the mid-1850s. Id. at 22–27. Horace Greeley and his paper, the New York Tribune, were also instrumental in promoting the Republican Party’s emergence — he first editorialized using the term “Republican Party.” Other factors were temperance, mercantilism, a concern for free labor and free soil, and nativism. See ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR
put the interests of women and African-American men in zero-sum competition. The immediate cause of this conflict was the issue of whether the Reconstruction Amendments would be used not only to enfranchise Black males, but also to enfranchise women.252 The Republican strategy for maintaining control over the national government resulted in new federal constitutional provisions explicitly associating the word “male” with citizenship and voting for the first time.253

2. The Fight Over the Fourteenth and Fifteenth Amendments

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


252. See Feminism and Suffrage, supra note 161, at 59–63.

253. See Buechler, supra note 217, at 139; see also Feminism and Suffrage, supra note 161, at 60. See generally Elizabeth Cady Stanton, Manhood Suffrage, Revolution, Dec. 24, 1868 (explaining the significance of the gender restrictions in the Fourteenth Amendment).

254. See Joseph B. James, The Framing of the Fourteenth Amendment 22–33 (1965). For a general description of the complexity of these questions, see Foner, supra note 251, at 35–76.

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

256. The history, description, and interpretation of Reconstruction have been hotly contested by historians almost from the beginning. Although a few scholars such as W.E.B. DuBois saw a positive value in Reconstruction, until the emergence of revisionist accounts of the era the dominant view was that Congressional Reconstruction constituted a tragedy visited upon the South by vindictive Republican politicians bent on maintaining their political power, seeking revenge, or imposing
solution was a new bloc of Republican voters in the South that they believed could be obtained from the ranks of former slaves.\textsuperscript{257} Moderate Republicans within the Party were less punitive in their attitude toward the rebels and ambivalent, if not hostile, to Black suffrage.\textsuperscript{258} However, even if there had been unanimity in the party toward political rights for freed slaves, straightforwardly enfranchising them was a difficult task given the multifarious social and demographic factors the Thirty-Ninth Congress faced.\textsuperscript{259} These conflicting conditions produced the Fourteenth and Fifteenth Amendments,\textsuperscript{260} with all their benefits and limitations.

Republicans met severe challenges in drafting the new Fourteenth Amendment, and the purposes that the amendment was designed to serve were complex and varied.\textsuperscript{261} First, the emancipation of slaves was accompanied by unrealistic notions of race relations on society. \textit{See Introduction} to \textit{Reconstruction in Retrospect} viii–xxii (Richard N. Current ed., 1969); \textit{William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine} 1–8 (1988). With the changing attitude toward race that the civil rights movement engendered in the academy came a changed evaluation of the value and effect of Reconstruction. \textit{See} Current, \textit{supra}, at x–xi. For a compilation of significant works designed to revise the canonical account of Reconstruction, see \textit{Reconstruction: An Anthology of Revisionist Writings} (Kenneth M. Stampp & Leon F. Litwack eds., 1969) [hereinafter \textit{Reconstruction, AN Anthology}]. The debate over the nature, effect, and morality of Reconstruction policy has infiltrated controversies over the intended scope of the Fourteenth Amendment, where it has impacted on legal scholars. \textit{See Nelson, supra, at 3.} The debate continues today. \textit{See Symposium, One Hundred Twenty-Five Years of the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1135 (1992); Symposium, The Reconstruction Amendments: Then and Now, 23 Rutgers L.J. 231 (1992). See generally Foner, \textit{supra} note 251 (providing one of the most significant recent historical works on the period); \textit{William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment} 21–31 (1965) (describing the political forces affecting the enactment of the Fifteenth Amendment). It is a matter of some dispute among historians whether humanitarian concerns or desire for party power dominated the motivations of congressional Republicans in enacting key pieces of Reconstruction legislation. \textit{See, e.g., LaWanda Cox & John Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, in Reconstruction, AN Anthology, supra, at 156 (discussing the difficulty of ascribing motives to the members of the Reconstruction Congress).}

\textsuperscript{257} See Foner, \textit{supra} note 251, at 66, 178, 252.


\textsuperscript{259} See \textit{James, supra} note 254, at 55–66.

\textsuperscript{260} U.S. Const. amend. XIV; U.S. Const. amend. XV.

\textsuperscript{261} The Fourteenth Amendment was the “peace treaty” designed to bring the Confederate states back into the Union. It was crafted from a variety of sources, and it attempted to effectuate a number of different goals. Section 1 defined United States citizenship explicitly for the first time and created the possibility for federal protection of certain individual rights; § 2 changed the basis of representation to
The process by which the Fourteenth Amendment was produced by the Thirty-Ninth Congress is intricate and confusing. When it convened in December of 1865, members introduced myriad proposals designed to effectuate a variety of policies. Some were contained in suggested legislation, others were presented as possible amendments to the Constitution. In the midst of these activities and events, a Joint Committee on Reconstruction was constituted of members of the House and Senate and charged with the duty to make proposals for Congressional Reconstruction. The overarching purpose of the Committee was to wrest control of Reconstruction from President Andrew Johnson and place it in Congress. By April of 1866, the Committee combined a variety of different proposals in various sections of a proposed Fourteenth Amendment. The most important of these were § 1 and § 2, although the question of Civil War debt was also controversial. For a step-by-step description of the drafting of the Fourteenth Amendment, see James, supra note 254. The final text of the Fourteenth Amendment as enacted reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or eman-
federate states into the Union had the potential to change the
delicate balance the framers of the Constitution had struck over
the question of the basis for each state’s representation in Con-
gress and its resulting power in the Electoral College.262 Originally under Article I, section 2 of the Constitution, slaves
counted as three-fifths of a person for calculating a state’s au-
thorized number of House representatives.263 With the cessation
of hostilities, Republicans were faced with the galling possibility
that, because the slaves had been freed and now might be
counted as whole persons, the rebelling Southern states could in-
crease their power in Congress after their restoration to the
Union because they would be entitled to more representatives
than before.264 Moreover, if the voting rights of the freedmen
were not secured and protected by some means, those additional
seats would inevitably be held by Democrats.265 Republicans
feared that Southerners would ally with Northern Democrats to
control the Congress.266 Thus, only a few short years after win-
ning the War, Republicans faced the possibility that Southerners
could snatch victory from them by political means.267

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

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

U.S. CONST. amend. XIV.

262. This was a result of the effect of the Thirteenth Amendment on the repre-
sentation provisions of Article I, § 2, cl. 3 of the Constitution. See Nelson, supra
note 256, at 46.

263. U.S. CONST. art. I, § 2, cl. 3.

264. See David Donald, The Politics of Reconstruction 1863–1867, at 17
(1965) [hereinafter Donald, The Politics]; James, supra note 254, at 22–23.

265. Rebelling Southerners were overwhelmingly loyal to the Democratic Party.
In contrast, it was assumed that freed slaves would be faithful to the Republican
Party. See Donald, The Politics, supra note 264, at 17; Foner, supra note 251, at
31–32.

266. See A Plain Statement, Chi. Trib., Aug. 5, 1865, at 2. This was a fear as
early as 1862, when the Democratic party gained control of New York, Pennsyl-
vania, New Jersey, and Indiana and dramatically increased its number of repres-
entatives in Congress. See Donald David, Charles Sumner and the Rights

267. See Nelson, supra note 256, at 46–47.

268. See James, supra note 254, at 31.
franchisement of those who had participated in the rebellion. However, many saw a federal policy disenfranchising the rebels as too great an intrusion on a state’s prerogative to determine eligibility for the ballot. Moreover, virulent racial prejudice in Union states made directly giving African-Americans the vote politically inexpedient. A double standard regarding race relations prevailed in the nation after the war. While many Northerners believed it was a form of just retribution to force Southerners to cede the ballot to those they had previously enslaved, most were extremely hostile to the notion of giving the vote to Blacks in their own states. Thus many Republicans were not willing to extend the franchise to Blacks unless it could be done under conditions that would both promote the dominance of their party and maintain the status quo of race relations in the North. What the drafters of the Fourteenth Amendment searched for to relieve this impasse was a way to tie the basis of representation to voting in a race-neutral manner, one that would indirectly punish Southern states for refusing to allow African-Americans to vote by reducing their entitlement to political representation proportionally. The demographics of race in the United States at the time of the Civil War made this strategy possible. Southern states contained almost all the African-Americans in the country. Using race-neutral language to reduce a state’s representation because it denied the franchise to a group of males otherwise eligible to vote would presumably hit

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


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

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

273. See Abbott, supra note 270, at 55.

274. See James, supra note 254, at 67–80.

275. In 1870 there were approximately 4,421,000 Blacks living in the South as compared to approximately 460,000 living in other parts of the United States. See Census, Historical Statistics, supra note 11, at Series A95–122, 11–12.
Southern states the hardest, since it was assumed that the Southern states would continue to deny the vote to former slaves.

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

Just as the high concentration of Blacks in the South was a factor affecting the options for drafting the Fourteenth Amendment, so was the distribution of women throughout the country. Women (who were not voters) were unevenly spread across various regions.278 If the basis of representation were changed to "voters,"279 Eastern states with higher proportions of women to men in their general populations would lose representation to states with fewer women, disrupting the balance of sectional power and making the ratification of any amendment based on "voters" unlikely. These demographic realities put pressure on the Joint Committee on Reconstruction280 to find a second race-neutral means for achieving their goals.281 Gender provided the answer. Section 2 of the proposed new Fourteenth Amendment dealing with the representation problem determined entitlement to representation by reference to "persons," thus including women in a state's total count, so that the regional balance of power among the former Union states was preserved. It then specified that any state refusing voting rights to male citizens who had not participated in the rebellion — read "Black males" — should

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276. Id.
277. From the beginning of the Thirty-Ninth Congress through the final passage of the Fourteenth Amendment, race-based language vied with terminology keying the representation on voters. See James, supra note 254, at 55–80, 91–116.
278. See Foner, supra note 251, at 252.
280. See supra note 261.
281. See Foner, supra note 251, at 256.
have its entitlement to representation proportionally reduced.\textsuperscript{282} This preserved a state's prerogative to determine voter eligibility and maintained the sectional balance between Union states, while it avoided an increase in Democratic power in Congress.

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

\textsuperscript{282} Section 2 of the Amendment reads as follows: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in 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.

\textsuperscript{283} See Nelson, supra note 256, at 40–63; see also Michael K. Curtis, No State Shall Abridge, The Fourteenth Amendment and the Bill of Rights 57–91 (1986) (detailing the evolution of § 1 of the Fourteenth Amendment).

\textsuperscript{284} See James, supra note 254, at 21–22.

\textsuperscript{285} Id. at 110–11.


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

\textsuperscript{288} The section reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce
purposes of the first two sections of the Fourteenth Amendment resulted in a constitutional provision whose internal structure was confusing, if not contradictory.\textsuperscript{289}

The ambiguities of the Fourteenth Amendment aside, the explicit association of the word “male” with citizenship and voting for the first time in American constitutional history was a great setback for the woman suffrage movement. Robert Dale Owen, Indiana representative and son of the socialist reformer, leaked news of the new amendment’s emphasis on gender to the woman suffrage leadership.\textsuperscript{290} Elizabeth Cady Stanton immediately recognized the language contained in section 2 of the proposed draft as a problem for the efforts of women to obtain suffrage through state legislation.\textsuperscript{291} Before the Fourteenth Amendment, the criteria for voter eligibility had been left to the states to determine.\textsuperscript{292} Thus, any state could theoretically have taken steps to qualify women as voters.\textsuperscript{293} The right to vote had never been federally guaranteed, even in the case of federal elections. Suffragists had believed that any national movement to control voting would enlarge, not restrict, the franchise.\textsuperscript{294} Now, the very law which through its race-neutral language marked a step toward political rights for African-American men imposed new barriers to the voting rights and status of women. If states were not to be forced to give women the vote by federal action, any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV (1868). See \textit{supra} text accompanying notes 77–85 for a general discussion of the impact of federalism on the voting right.

289. See Foner, \textit{supra} note 251, at 257.
290. \textit{See 2 Stanton et al., supra} note 4, at 91.
291. \textit{Id.; Stanton, Eighty Years, supra} note 104, at 243–44. For an analysis of the impact of the Reconstruction Amendments on women's attempt to gain voting rights and the reaction of suffragists to the amendments, see \textit{Hoff, supra} note 12, at 147–49.
292. U.S. Const. art. I, § 2, cl. 1; U.S. Const. art. I, § 4, cl. 1; U.S. Const. amend. XII.
293. As Theodore Tilton wrote in the \textit{New York Independent}:

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

294. See Flexner, \textit{supra} note 10, at 143.
suffragists wanted at the very least to keep references to gender out of the Fourteenth Amendment to defuse any argument that the Constitution contemplated restrictions on access to the ballot based on sex.

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

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

295. Wendell Phillips responded with his famous comment that it was “the Negro’s hour” and women should stand aside. See Feminism and Suffrage, supra note 161, at 59.

296. Robert Dale Owen reported that when it was suggested that the word “person” be used, one unnamed representative replied: “That will never do, it would enfranchise all the Southern wenches.” 2 Stanton et al., supra note 4, at 91.

297. See Nancy E. McGlen & Karen O’Connor, Women’s Rights: The Struggle for Equality in the Nineteenth and Twentieth Centuries 45 (1983); Victory, supra note 197, at 49. Charles Sumner, who elicited the support of the Loyal League for the Thirteenth Amendment, confessed years later that he “wrote over nineteen pages of foolscap to get rid of the word ‘male’ and yet keep ‘negro suffrage’ as a party measure intact, but that it could not be done.” 2 Stanton et al., supra note 4, at 91.

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

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

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


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

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

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

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

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

304. The American Equal Rights Association ("AERA") was formed at the instigation of Theodore Tilton to preserve the old alliance between feminists and abolitionists despite the controversy over the Fourteenth Amendment. The AERA came out of the first Women's Rights Convention held after the war. It was formed from the ranks of woman suffrage activists and Garrisonian abolitionists like Wendell Phillips, Julia Ward Howe, Lucy Stone, Susan B. Anthony, Elizabeth Cady Stan-
To support these efforts, they initiated a petition drive designed to produce hundreds of signatures against “male suffrage.” After it became evident that no changes in the Amendment would be forthcoming, they actively campaigned against its passage. Nonetheless, the Amendment was ratified in 1868. The bitterness engendered by the Fourteenth Amendment grew when Republicans decided to push for another measure to better protect the voting rights of Black males. This was the Fifteenth Amendment, finally and expressly prohibiting race-based limitations on the franchise.

The Fifteenth Amendment involved political puzzles, compromises, and dilemmas as complex and intractable as those engaged by the Fourteenth Amendment, and in many respects the result was no different. The Fifteenth Amendment served primarily to address the exclusion of Black males from the political process. 


306. Id. at 18.

307. See Letter from Elizabeth Cady Stanton to the Editor of The Standard (Jan. 2, 1866), in PAPACHRISTOU, supra note 164, at 49.


309. The Fifteenth Amendment reads as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.
DOMINANCE AND DEMOCRACY

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

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

\footnote{310} See *Foner*, *supra* note 251, at 263.

\footnote{311} See *Gillette*, *supra* note 256, at 32–33.

\footnote{312} *Id.* at 71.

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

\footnote{314} *See, e.g.*, *Fifteenth Amendment Celebrations*, reprinted in *Rakow & Kramarae*, *supra* note 216, at 67 (describing the response of radical suffragists to the new amendment).
women rather than to Black and immigrant men. Arguments for woman suffrage based on principles of abstract justice gave way in her thinking to the demands of *realpolitik* — if the Republican party was only willing to end the domination of subordinated groups when that served its goal of maintaining power, she was ready to appeal to its crude self-interest.

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

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


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

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

expediency.\textsuperscript{321}

3. Schism

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

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

\begin{itemize}
  \item \textsuperscript{321} See Davis, supra note 60, at 70–86; see also Kraditor, Ideas, supra note 19, at 38–39, 140–41.
  \item \textsuperscript{322} For an account of how this schism drove African-American women from the movement, see Davis, supra note 60, at 70–86.
  \item \textsuperscript{323} Waggenspack, supra note 205, at 30; see also Griffith, supra note 18, at 137.
  \item \textsuperscript{324} 1 Ida H. Harper, The Life and Work of Susan B. Anthony 328–29 (Indianapolis, The Bowen-Merrill Co. 1899).
  \item \textsuperscript{325} See Griffith, supra note 18, at 138.
  \item \textsuperscript{326} See DuBois, Feminism and Suffrage, supra note 161, at 192.
  \item \textsuperscript{327} See Bjorkman & Porrit, supra note 105, at 16; What is the Aim of the Woman Movement?, Woman’s J., Apr. 9, 1870, at 108.
  \item \textsuperscript{328} See DuBois, Correspondence, supra note 127, at 91.
  \item \textsuperscript{329} See also Griffith, supra note 18, at 140–41.
\end{itemize}
institutions, like the church or the family. Stone and her followers avoided critiques of women's situation that focused on power relations and male dominance in favor of analyses that attributed women's subordination to a lack of education or a want of virtue in the general society. The American saw the feminine element as under-represented in politics and sought the vote to bring womanly values into public life in an effort to effectuate a more healthy balance between the masculine and the feminine in government. They wanted the vote to promote civic virtue by making the family true to its ideals, by promoting temperance, and by combating prostitution, child labor and the like. They insisted on the centrality of "feminine" norms to the public sphere and they had no doubt that male aggression ought to be subjected to control through legislation.

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

331. See O'Neill, supra note 119, at 24.
332. See Flexner, supra note 10, at 97. These characteristics have often caused historians to describe the AWSA as bourgeois, not radical in outlook. McGlen & O'Connor, supra note 297, at 46. This is in some sense an inaccurate description. The women of the American Women Suffrage Association campaigned ceaselessly for women's rights from the formation of their group to the passage of the Nineteenth Amendment and beyond. See DuBois, Radicalism, supra note 46, passim.
333. See McGlen & O'Connor, supra note 297, at 56.
DOMINANCE AND DEMOCRACY

4. *Minor v. Happersett*\textsuperscript{334} and the New Departure

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

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

\textsuperscript{334} 88 U.S. (21 Wall.) 162 (1874).
\textsuperscript{335} See Buhle & Buhle, *supra* note 104, at 213–14, 281.
\textsuperscript{337} See DuBois, *FEMINISM AND SUFFRAGE*, *supra* note 161, at 57.
\textsuperscript{338} This was due to the clash between its §§ 1–2 and the ambiguity over Congress’s intent concerning the distinction between civil and political rights. *See supra* text accompanying notes 261–67, 283–89. See generally Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 *YALE* L.J. 1153 (1988) (arguing that the framers of the Fourteenth Amendment may have intended for it to reach sex discrimination).
\textsuperscript{339} Suffragists also disseminated this argument to the public by describing it in their publications. *See, e.g.*, Francis Minor, *Fundamental Rights*, *REVOLUTION*, Jan. 2, 1870, at 38–39 (describing the legal arguments of the New Departure).
\textsuperscript{340} Some of the legal arguments for the New Departure were suggested by the notorious Victoria Woodhull in 1871 when she presented a petition to the House Judiciary Committee. The Petition asserted that women possessed the voting right under the new Fourteenth and Fifteenth Amendments taken together with other
First, suffragists claimed that women did have a political relationship with their government, that they were and always had been "citizens." Second, they argued that the Fourteenth Amendment clarified any ambiguities regarding whether the citizenship relation existed between the federal government and the citizen in favor of federal citizenship. Then they asserted that through the Privileges or Immunities Clause of the Fourteenth Amendment's first section, the federal government had power to intervene in state prerogatives to protect basic rights of federal citizenship. Finally, they claimed that voting was such a right because it was inextricably tied to citizenship. In making this latter argument, activists rejected the notion that a meaningful distinction could be made between civil and political rights. Virginia Minor, leader of the Missouri suffragists, raised all these issues when she brought a civil action challenging her state's restriction of the franchise to men.

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

341. This strategy was foreshadowed in 1866, when legislation was introduced in Congress to give women the vote in the District of Columbia on the theory that Congress had the power to enact it because women were, and always had been, citizens. Although the measure did not pass, it was followed by several instances where women simulated real voting by depositing unofficial ballots in boxes set aside for them. A more aggressive approach ensued when women attempted actually to vote in several states and occasionally succeeded. Susan B. Anthony and a number of friends registered and voted in Rochester, New York, with the help of a sympathetic official. Anthony was prosecuted for her action in what became an outrageous proceeding, riddled with procedural deficiencies. Due to the manipulation of her light criminal sentence by the presiding judge, Anthony lost the right to appeal and test the question of women's status under the Constitution. See Buhle & Buhle, supra note 104, at 281-82; see also Godfrey D. Lehman, Susan B. Anthony Casts Her Ballot for Ulysses S. Grant, 37 AM. HERITAGE, Dec. 1985, at 25 (providing a detailed account of Anthony's experience).
the Supreme Court severely limited the Privileges or Immunities Clause of the new Fourteenth Amendment as a tool for protecting individual rights from state intrusions. In Bradwell v. Illinois it applied this restrictive interpretation to women's rights when it held that Illinois could refuse Myra Bradwell permission to practice law in its courts on the basis of her sex, because the ability to pursue a profession was not a privilege or an immunity of federal citizenship. Both of these cases portended trouble for women's attempts to appeal to the Court to vindicate their entitlement to voting rights.

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

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

342. 83 U.S. (16 Wall.) at 36.
343. It did so by limiting its application to federal citizenship and by giving the incidents of that citizenship a very narrow reading, relying on references to the framers' original intent. Id. at 78–80.
344. 83 U.S. (16 Wall.) 130 (1872).
345. For a biography that details Myra Bradwell's fascinating life, see Jane M. Friedman, America's First Women Lawyer: The Biography of Myra Bradwell (1993). For more discussion of the Bradwell case itself, see infra text accompanying notes 467–72.
347. Id. at 166, 167.
laws were consistent with citizenship status for women. Then it turned its attention to the question of whether access to the voting right is a necessary incident of citizenship. Just as it had done one year previously in *The Slaughter-House Cases*, the Court reiterated that the Privileges or Immunities Clause in the new amendment was not a source of additional, substantive rights to be given federal protection against state intrusions. Only if the framers had considered the vote a necessary incident of citizenship would it be given protection from state intrusions through the new Fourteenth Amendment. In settling *this* question, the Court invoked past limitations on the franchise to justify the constitutionality of the gender restrictions before it for review, implying that the new Fourteenth Amendment did not necessarily protect political rights like voting because they had never been treated as comprising the federally protected inalienable rights of citizens.

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

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350. U.S. Const. art 1, § 4, cl. 1. However, the Constitution did not allow Congress to alter the location of choosing Senators. *Minor*, 88 U.S. (21 Wall.) at 171.
351. *Id.* at 172-73.
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The Court did not stop there. It went on to use the text of the Fourteenth and Fifteenth Amendments themselves as evidence against the notion that voting and federal citizenship were inextricably linked. Here, Elizabeth Cady Stanton’s fears about the usefulness of the new amendments to the foes of woman suffrage proved well-founded. This portion of the analysis began with a query: If the states did not possess the authority to abridge the voting right under the pre-Reconstruction Constitution because the framers deemed voting fundamental, why was the Fourteenth Amendment necessary at all? Although section 1 added no new rights of citizenship to those that already existed, in the Court’s view, section 2 did express a federal policy to impose its will on voting in the face of contrary state law — but only where males were concerned. And, if suffrage were so important an attribute of citizenship, why would the protections of section 2 only be extended to males? Moreover, if voting were an “absolute” right of citizenship, why would Congress have written the Fifteenth Amendment to prohibit only race-based restrictions on the franchise? In the Court’s view, the national government’s willingness to assert itself on voting policy only in limited circumstances showed that suffrage could not really be a fundamental attribute of citizenship. Thus, arguments for woman suffrage were turned upside down and became arguments against the connection between voting and citizenship, even federal citizenship. In simple but startling words, the Court concluded its opinion by holding that “the Constitution of the United States does not confer the right of suffrage upon any one” and affirmed the lower court judgment that Missouri could constitutionally exclude women from the franchise, even in federal elections.

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

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352. Id. at 173.
353. Id. at 178.
struggle for the vote that women embarked upon at the end of the Nineteenth Century and the beginning of the Twentieth.

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

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

³⁵⁴ Doubt over the power of state legislatures to enfranchise women by simple enactment plagued the suffrage movement, even regarding such limited forms of suffrage as provisions allowing females to vote in school and municipal elections. The Michigan Supreme Court invalidated municipal suffrage for women in 1893 on the ground that it exceeded the power of the legislature to enact it. See Coffin v. Board of Election Comm’rs, 56 N.W. 567 (Mich. 1893); accord People ex rel. Ahrens v. English, 29 N.E. 678 (Ill. 1892). For a discussion of the effect of state supreme court decisions on the suffrage cause, see generally Kathryn A. Lee, Law in the Crucible of Change: Women’s Rights and State Supreme Court Policy Making, 1865–1920 (1988). However, state legislatures were eventually persuaded that they did have the authority to pass laws granting women the right to vote in presidential elections without holding a referendum on the question, due to the specific wording of Article II, § 2 of the federal constitution. This became very important when in 1912 women were enfranchised in Illinois for this limited purpose. See Catt & Shuler, supra note 300, at 189–92.

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

³⁵⁶ See Flexner, supra note 10, at 179–92.
claims and tactics of suffragists had to appeal both to the interests of the men who wielded power and influence and to the women who were involved in activities and organizations outside the home as never before. The need to appeal to these groups exerted pressure on suffrage forces to reformulate their goals in light of the values and beliefs of those who would determine their success.

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

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

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

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

4 Stanton et al., supra note 4, at 216.
Nativism functioned similarly to impose barriers on the active participation of immigrant women. Insofar as woman suffrage became a "middle-class" issue, finding common cause with the emerging labor movement proved difficult. Moreover, to court labor was tantamount to further alienating the business community, with whom woman suffrage had struggled almost from the beginning. Even more troublesome than these problems, however, was the fact that as the movement came to focus on the need to place women's political participation in a respectable light, the connection between voting and female emancipation was minimized and obscured. It would be an almost tacit promise of the mainstream suffrage crusade in its later stages that by acquiring the franchise women would not upset the gender system.

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

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

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

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

364. See KRADTOR, IDEAS, supra note 19, at 96, 121–22.
From the post-Civil War period until 1890, women’s indirect promise not to alter gender politics was most closely associated with the tactics of the American wing of the movement. Its members wanted to fashion arguments for women’s political rights by exploiting traditional views of “feminine” essence. Not only were some more comfortable with the picture of reality that domestic sphere ideology implied, but they also believed that its tenets might be exploited to promote the suffrage cause, albeit on terms less focused on transforming conceptions of gender than on making feminine norms a part of the public domain. In the post-Civil War era, women in the American faction began to push separate sphere rhetoric as a source of arguments for the female franchise. They did so by claiming that government had become imbalanced by being overly influenced by male values. Allowing women to vote, they argued, would inject feminine spirituality, purity, and domesticity into the public sphere as an antidote to corruption and excessive mercantilism. Moreover, voting itself would not require a change in women’s traditional roles as wives and mothers but would allow them to better carry out these roles by supporting legislation that would increase civic virtue and protect home and hearth. In this way, members of the American faction grounded woman suffrage in a picture of the two sexes that put them in a complementary, not an opposed, 

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

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


368. The rejection of essentialism was what differentiated so-called “domestic” or “social” feminism from its more radical counterpart. Daniel Scott Smith argues that domestic feminism represented a “significant and positive development for nineteenth century women.” Smith further argues that by developing domestic feminism, women attained more power, at least within the family, than is often realized. See Smith, supra note 151, at 52-54.
relation and tried to make the movement more attractive and less threatening to the many "respectable" middle-class women who were becoming active in women's clubs and in the temperance effort.\textsuperscript{369} In contrast, members of the National were repelled by these essentialist arguments and worried that they would ultimately backfire.\textsuperscript{370}

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

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

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

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


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

See 4 Stanton et al., supra note 4, at 40.
on lobbying to get one passed.374

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

374. See Griffith, supra note 18, at 168–69; see also Papachristou, supra note 164, at 105–06; Bjorkman & Porrit, supra note 105, at 18.
375. See, e.g., DuBois, Radicalism, supra note 46 (arguing that the suffrage movement's focus on the vote had a radical dimension).
376. For instance, DuBois argues that this is Kraditor's view of the movement. Id. at 63. Similarly, she asserts that O'Neill and Elsthain claim that woman suffrage was ultimately traditional because it accepted women's place within the home and so failed to challenge the public/private dichotomy. Id.
377. See id. passim.
378. See Mackinnon, supra note 6, at 13–36.
As Ellen DuBois has pointed out, while many suffragists in both wings of the movement thought that the domestic sphere was uniquely feminine in character,\(^{380}\) they did not believe that women should be excluded from the public arena as a corollary of that character.\(^{381}\) As a result, they used the vote to challenge male control of the public forum.\(^{382}\) The "dialectical relationship between public and private spheres" created by their claims "transformed their demand... into a challenge to the entire sexual structure"\(^{383}\) because the push-pull tension between both spheres in the context of women's claims to political rights presented a new opportunity for assessing women's situation. This was a phenomenon that emerged in the early days of the crusade, continued after the Civil War, and was employed in the ultimately successful fight to enact the Nineteenth Amendment.\(^{384}\) Given the condition of women in the Nineteenth Century — their distribution across class, race, ethnic, and geographic lines, their confinement in the private sphere of the family, their lack of economic independence, and their inability to obtain legal redress — organizing them for a social movement aimed at general emancipation presented special challenges distinct from other subordinated groups.\(^{385}\) Violent revolt was hardly a possibility for women in the Nineteenth Century. Women needed a political crusade directed at achieving a range of goals, one that included within it means for women to enter the public sphere, to assert their personhood, to affect the terms of the public discourse, and to challenge popular assumptions about their role in direct and indirect ways. The device that provided

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

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

382. Id. at 66.

383. Id. at 66.

384. See infra text accompanying notes 390–94.

385. See De Beauvoir, supra note 37, at Introduction, xxxi.
Without the vote, the demand for full citizenship would not have been possible. Although access to the ballot alone would not and could not decisively change women’s situation, it is difficult to see how the female emancipation movement of last century would have progressed without giving a central role to political rights. That the vote had the potential to erode the subordination of women over time, if not immediately, and that the vote was a necessary but not a sufficient condition of women’s emancipation are demonstrated by the long and strong opposition of men to giving women franchise rights.

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

386. See Katzenstein, supra note 7, passim.
387. Four Western states accorded women voting rights before World War I. These were Colorado, Idaho, Utah, and Wyoming. See infra text accompanying notes 409–13.
388. See Kugler, supra note 169, at 113.
389. An amendment designed to extend suffrage to women was first introduced in 1868 but soon ceased to be a focal point of activists’ concerns given the predominant position of the New Departure in radical suffrage strategy. Id.
effect because it portended no fundamental changes in gender relations. On the other hand, to the extent that there were radical implications of imposing feminine values on the masculine sphere, many men were threatened by the possibility of a real gender gap in voting and so opposed women's enfranchisement. It is no accident that as arguments for female suffrage came to revolve around the moral superiority of woman and her potential for cleaning up politics and industry by the vote, business interests became one of the most significant sources of opposition.

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

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

393. See Buechler, supra note 217, at 178, 185.

394. This was the problem presented by the alliance between suffrage and temperance forces that occurred during Frances Willard's leadership of the WCTU. It caused the liquor industry to oppose strongly woman suffrage and to engage in election fraud and bribery to affect the outcomes of various state referenda on the topic. Temperance became a women's issue because women were economically and legally dependent on men and could not easily escape the effects of alcoholic husbands. The WCTU's call for “Home Protection” stood for the proposition that women should have the vote in order to effectuate laws designed to control or prohibit alcohol in their communities. As Frances Willard put it in a manual on home protection: ‘We are but transferring the crusade from the saloon to the sources whence the saloon derives its guaranties and safeguards. Surely this does not change our work from sacred to secular! Surely that is a short-sighted view which says: ‘It was womanly to plead with saloon-keepers not to sell, but it is unwomanly to plead with law-makers not to legalize the sale and give us power to prevent it.’

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

395. See Buhle & Buhle, supra note 104.

396. Their freedom was purchased largely at the expense of working class women. See Stephanie Coontz, The Way We Never Were 11-12 (1992).

397. By as early as 1861, thirty-one states, mostly in the North, had reformed their laws. See Warbasse, supra note 121, at 276.
ties attached to being female that, together with rampant sex discrimination in the civil society, circumscribed women's freedom. Nonetheless, women had more control over their property, and they had achieved lessening in the restrictions on divorce. As a result of the female education movement, the literacy levels of women in the United States had risen significantly, and by the beginning of the 1890s a significant number of women had college educations. Labor saving innovations and devices, always more available in cities, began to lessen the amount of back-breaking work involved in maintaining a home, and for middle- and upper-class women an increase in immigrants made cheap domestic help accessible. Rudimentary birth control methods became more popular in this period, and the birthrate began to decline in certain sectors of the population. As the temperance movement itself demonstrates, there were generally more women who had an interest in activities outside the home, surplus time, and money. Finally, large increases in the numbers of laboring women paralleled the growing independence of middle- and upper-class women.

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


401. The fertility rate was as low as 4.24 in 1880 and 3.56 in 1900. Linda Gordon, Woman's Body, Woman's Right: A Social History of Birth Control in America 153–54 (1976). Smith argues that these low rates show that women must have had enough power within the family to control their fertility. See Daniel S. Smith, supra note 151, passim.


403. In 1870 there were approximately 1.9 million women working for wages; by 1890 their number had more than doubled to slightly over four million. See Census, Historical Statistics, supra note 11, Series D 36–45, at 72.
NAWSA could have combined the radicalism of Stanton's vision with the traditionalism of Stone's approach in an uneasy amalgam. The conflicts and tensions that might have developed from this marriage of opposing views were blunted, however, by the ascendency of more pragmatic women to leadership positions and the general societal trend toward conservatism. This made the radicalism of the past too politically risky. The new generation of NAWSA members had distinctly different attributes than their forerunners. They benefited from the improvements in women's education and employment, and they were one generation removed from the pain of the Civil War and Reconstruction. Most importantly, they were determined to gain the vote by whatever means they could and they tended to de-emphasize ideology in favor of organization. On the positive side, this new pragmatism made it possible for them to tailor suffragist arguments to fit different regions and social groups, thus increasing its overall support. On the negative side, it fostered a continuing willingness to compromise in order to move the suffrage effort ahead. This played into the hands of reactionary elements in American society.

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

404. Flexner, supra note 10, at 220.
405. Nothing symbolized this better than the reaction of suffrage activists to Elizabeth Cady Stanton's critique of patriarchal religion. In 1887 Stanton began work on The Women's Bible. It constituted an indictment of Old Testament religious doctrine and was published in two volumes in 1895 and 1898. In 1896 a resolution was introduced at the NAWSA convention designed to disassociate that organization from Stanton's position. This move was motivated by some women's fears that Stanton's views would make it difficult to attract religious women to the suffrage cause. When the resolution passed on a close vote after heated debate, Stanton withdrew from active involvement in NAWSA activities and Anthony succeeded to the presidency. See 4 Stanton et al., supra note 4, at 75-77.
406. See O'Neill, supra note 119, at 147-49.
408. The most extreme example of this phenomenon was the manner in which the NAWSA tailored its message to appeal to the racist position of the Democratic party in the South so that President Wilson would not lose influence in that region, should he support woman suffrage. See Morgan, supra note 330, at 105-14.
that women have a measure of independence in the rugged conditions of the West. Some territories provided women with franchise rights. When Wyoming came into the union in 1890, it entered with a constitution that afforded women suffrage. Similarly, Utah allowed women to vote during its territorial days. In 1893 and 1896 Colorado and then Idaho approved of woman suffrage by referendum. Success in the West was not easy or consistent. Voters turned back the female franchise on two occasions in Washington state. One of the most heart-breaking efforts was made in 1896 in California when woman suffrage lost by less than 14,000 votes after the liquor lobby, concerned with the connection between woman suffrage and temperance, manipulated the immigrant and working-class votes to thwart it. For many years afterward, no state would approve women’s inclusion in the electorate. Then, at the end of the first decade of the new century, limited victories began to replace defeats.

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

409. See CATT & SCHULER, supra note 300, at 127.
410. See VICTORY, supra note 197, at app. 4.
411. However, Utah women’s suffrage rights were taken away by Congress as retaliation for the continued practice of polygamy in the territory. See FLEXNER, supra note 10, at 163. When Utah became a state, woman suffrage was returned by state constitutional provision. See VICTORY, supra note 197, at app. 4.
412. See CATT & SHULER, supra note 300, at 127.
413. See FLEXNER, supra note 10, at 254–55. Woman suffrage created through legislative enactment was invalidated by court decision on two other occasions. See VICTORY, supra note 197, at app. 4.
414. See FLEXNER, supra note 10, at 224–25. According to Catt and Shuler, in California Chinese-American men were enlisted to turn out against the female franchise, and in Oregon men on railroad gangs were transported to the polls en masse and paid to vote against it. See CATT & SHULER, supra note 300, at 123–24.
415. See FROST & CULLEN-DuPONT, supra note 179, at 294.
416. See FLEXNER, supra note 10, at 237; VICTORY, supra note 197, at 77–79.
417. See FROST & CULLEN-DuPONT, supra note 179, at 294.
418. FLEXNER, supra note 10, at 260–61.
suffrage and an increase in NAWSA organizational expertise. All of these changes — the increasing numbers of women involved in organizations outside the home, improvements in their material conditions, the reunification of the suffrage factions, and the actual attainment of franchise rights in some states — took place against the backdrop of the emergence of progressivism in American society and politics.

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

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419. The increasing organizational expertise of the NAWSA, which became very important in the New York campaign for woman suffrage, did not prevent a growing rift between radical and moderate activists. See Jacqueline Van Voris, Carrie Chapman Catt: A Public Life 117–20 (1987).

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

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

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

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

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

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

\textsuperscript{425} The suffrage movement never became inclusive as that term is modernly
understood, especially with regard to incorporating African-American suffragists
into its ranks. The political stranglehold that the Southern states exerted over Con-
gress interacted with the reformist strategy of the NAWSA and the racism of some
of NAWSA’s members to produce a policy of appeasement of Southern politicians.
This policy resulted in the exclusion of African-American women from NAWSA’s
activities in the South and in the de-emphasis of their efforts in the North. See
DAVIS, supra note 60, at 110–26. Racism became so virulent that at the 1903
NAWSA convention held in New Orleans, a serious bid was made by white
supremacists to take over the organization. \textit{Id.} at 123–25. In response, Black wo-
men organized suffrage organizations of their own. \textit{Id.} at 127–48. Later in the Pro-
gressive Era, when the support of working women was courted (especially by
militant suffragists), working Black and immigrant women encountered slightly less
hostility to their involvement.
NAWSA did not address the federal amendment process. In 1916 Carrie Chapman Catt became President of NAWSA. She brought a unique organizational genius to bear to create a coordinated state and federal plan for bringing about the passage of a federal constitutional amendment. This plan had three main parts: first, suffrage forces would work to achieve validation of the woman's vote through state referenda only in those jurisdictions likely to approve it; second, suffragists would pressure state legislatures to authorize the right of women to vote in presidential elections; finally, these two strategies were to be combined synergistically with efforts to influence members of Congress to take action on a federal amendment. Catt's scheme also included a willingness to tailor the suffrage message to regional and

426. See Flexner, supra note 10, at 267-68.

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

428. See Fowler, supra note 407, at 143-44.

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

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

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

432. See Van Voris, supra note 419, at 82.

433. See Catt & Shuler, supra note 300, at 270; Van Voris, supra note 419, at 144.

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

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


The Women’s Political Union emphasized economic independence from men. From the beginning, its leaders attempted to appeal to the interests of laboring women and to look for opportunities to dramatize their cause by reference to the situation of women workers. They arranged for workers to testify in the New York legislature, canvassed the headquarters of every trade union organization in New York City to lobby for woman suffrage, staged public rallies outside manufacturing plants, actively campaigned against politicians who opposed the vote for women, and helped to organize the large suffrage parades that became so characteristic of the era. Id. In less than a year, the Women’s Political Union had almost 19,000 adherents and included labor leaders like Rose Schneiderman in its membership. See Flexner, supra note 10, at 244, 252. For a general discussion of the rising feminist consciousness of working-class women in the progressive era, see Sarah Eisenstein, Give Us Bread, But Give Us Roses: Working Women’s Consciousness in the United States, 1890 to the First World War (1983).

Alice Paul was a Quaker who had gone abroad to study and been drawn into militant suffragism as a participant. When she returned to the United States to work on her Ph.D at the University of Pennsylvania, she continued her interest in militant tactics, became active in the American movement and, in 1912, offered her services
The radical tactics of their British counterparts influenced militant American suffragists. These women focused most of their efforts on getting a federal amendment passed and putting the woman suffrage issue in the center of the public's attention. They lobbied intensely in Congress, organized women in suffrage states to vote against politicians opposed to the female franchise, staged large parades and other public demonstrations in major cities, and engaged in civil disobedience to sway public opinion to their cause. By 1916, when World War I loomed large, women had obtained voting rights in more than a dozen states as a lobbyist on the federal amendment to NAWSA. For a short biographical sketch of Paul, see id., at 263-65; INEZ HAYNES IRWIN, THE STORY OF THE WOMAN'S PARTY 13 (Kraus Reprint Co. 1971) (1921). Paul immediately galvanized NAWSA's moribund Congressional Committee to new action. She organized a parade of 5000 women in Washington, D.C., which took place the day before Woodrow Wilson's inauguration and led to a public melee, when the police refused to protect the marchers from a hostile crowd. Public disapproval of the way the authorities treated the suffrage women led to increased attention to the whole question. See Christine A. Lunardini & Thomas J. Knock, Woodrow Wilson and Woman Suffrage: A New Look, 95 POL. SCI. Q. 655, 658 (1980). NAWSA leaders eventually balked at Paul's willingness to engage in provocative tactics and her insistence that the national organization should focus all its efforts on Congress. In an attempt to assert control, NAWSA removed Paul as chair of the Congressional Committee and directed its members to conform to their guidelines. See FLEXNER, supra note 10, at 266. Rather than submit, they split off from the NAWSA and turned the Congressional Union into their own organization for militant suffragism. See IRWIN, supra, at 47-48.

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

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

437. See FLEXNER, supra note 10, at 252–54, 265–70, 282–86. One of the most notorious events of this period was the picketing of the White House by militant suffragists and their jailing under severe conditions. See Suffragists Wait at the White House for Action, SUFFRAGIST, Jan. 17, 1917, at 7; Suffrage Sentinels Arrested by the Government, SUFFRAGIST, June 30, 1917, at 6; Pickets Get Maximum Sentence from Administration, SUFFRAGIST, Oct. 20, 1917, at 4. For a general description of these events written by a participant, see DORIS STEVENS, JAILED FOR FREEDOM (1920).
and had a significant impact on the electoral votes needed to elect a president. By this point, politicians began to be concerned about the backlash that might be visited on a party opposing woman suffrage, should females receive the vote. When New York state finally approved voting rights for women, the tide turned. This decisive moment coincided with the specter of world war looming on the horizon.

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

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

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

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

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

441. Id. at 288.


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


446. See FLEXNER, supra note 10, at 321–24.
began to exercise their voting rights in ever increasing numbers, but their subordination as a sex did not end with formal political emancipation. Although more women would enter the job market, some would become professionals, and all were now entitled to minimum education, women as a group would continue to suffer discrimination in the form of private acts in civil society, low paying occupations, and socialized gender roles. Marriage and the family would endure as traditional patriarchal institutions, and woman's sphere ideology would reign unchallenged through the social changes of the first half of the Twentieth Century to limit the actual possibilities of average women. The goal of ending gender subordination would go underground, not to surface again until the feminist movement of the 1960s. One of the lingering questions plaguing historians who attempt to analyze the nature and achievements of the suffrage movement from Reconstruction up to the passage of the Nineteenth Amendment is the question of how and why more was not immediately achieved by the franchise rights that were finally acquired.

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

447. The reasons for this situation are intricate and disputed. For a discussion of the social forces retaining the gender system, as well as the Supreme Court's role in bringing this state of affairs about, see infra part III. For a discussion of the possible impact of suffragists' ideological choices on this result, see supra text accompanying notes 354–91.
how the Court dealt with cases affecting women not just in the context of suffrage controversies, but across the board from the time of Reconstruction to the dawn of the social protest movements of the 1960s.

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

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

\begin{itemize}
\item \textsuperscript{448} See supra text accompanying notes 28–35.
\item \textsuperscript{449} See \textsc{MacKinnon}, supra note 6, at 167.
\item \textsuperscript{450} For a description of what that window of opportunity might have afforded women, see infra text accompanying notes 476–83.
\item \textsuperscript{451} See infra text accompanying notes 504–24.
\end{itemize}
Before I detail how the Court's treatment of Minor and its other decisions continued to stabilize de facto forms of gender discrimination into the modern era, it is necessary to focus again on the general structural features of the governmental regime that made the Supreme Court the gatekeeper of the franchise for the American polity, thus giving it the power to rebuff women's claims to emancipation.

A. A Second Look at Federalism and the Voting Right

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

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

453. The Bill of Rights operated only to cabin the powers of the federal government. Prior to the adoption of the Fourteenth Amendment, with its provisions concerning due process of law and equal protection that have become so important in modern constitutional adjudication, individual rights were seldom protected through federal litigation. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). What protection against state deprivations was afforded was based on the Contract Clause (U.S. CONST. art. I, § 10), the Privileges and Immunities Clause of Article IV (U.S. CONST. art. IV, § 2), and natural law principles that the Court imported into its decisions. See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (using tenets of natural law to invalidate a Connecticut law setting aside a probate determination); McCloskey, supra note 286, at 116–18.
Moreover, the limited protection of individual rights that was afforded by the Court took the form of vindicating non-interference, or negative, rights, rather than conferring entitlement rights which were not recognized as a part of the positive law of individual states. This focus on negative rights was reinforced by the specific constitutional delegation to the states of the authority to determine voter qualifications in state and federal elections. This delegation stood for the general proposition that political rights were not inextricably tied to federal citizenship and so should not be the subject of federal regulation and control. Finally, the Court's unexamined assumptions about women's different essence and "natural" subordinate status, freely borrowed from theology and other natural law sources, precluded the notion that women might have a claim to equal protection of the laws. These phenomena greatly assisted a Court predisposed to ignore social relations between the sexes after the Civil War.

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

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

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

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

458. It is, of course, impossible to answer the question of motivation decisively; however, most historians of the Supreme Court agree that the period from the Civil War to the turn of the century was one of the Court's most conservative epochs. It was in this era that the Court developed the judicial doctrines making segregation in the South legally possible, that it interpreted the Fourteenth Amendment in such a manner that the main beneficiaries of its provisions were corporations and not persons, and that it aggressively promoted the doctrine of laissez faire economics so as to prohibit state laws designed to protect workers. See Plessy v. Ferguson, 163 U.S. 537 (1896) (validating the doctrine of "separate but equal"); Munn v. Illinois, 94 U.S. 113 (1877) (giving constitutional protection to corporations under the Fourteenth Amendment); Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York statute limiting the working hours of bakers); Bernard Schwartz, A History of the Supreme Court 158–84 (1993). See generally Stauton Lynd, Class Conflict, Slavery, and the United States Constitution (1967) (describing the constitutional response to race and class relations). It was in this sense that the Court was "predisposed" to ignore the realities of race, class, and gender in American society.
B. Pre-Minor Decisions

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

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

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459. The work of Rogers Smith brought many of these cases to my attention for the first time. See Rogers Smith, *supra* note 12.
461. See, e.g., *Gridley v. Wynant*, 64 U.S. (23 How.) 500, 502-03 (1859) (recognizing the right of a married woman to convey property in trust for another, but only so long as her husband's rights or responsibilities were unaffected); *Meegan v. Boyle*, 60 U.S. (19 How.) 130, 148 (1856) (passing on the validity of a property transfer by a married woman who had inherited); *Webb v. Den*, 58 U.S. (17 How.) 576, 577 (1854) (passing on the validity of a Tennessee law governing execution formalities for married women).
462. 62 U.S. (21 How.) at 582. There, a woman living in New York with a New York separation decree (a divorce *mensa et thoro*) sought to enforce an alimony award against her husband, who had moved to Wisconsin for the purpose of rendering the award uncollectible. Although the majority found that the facts justified treating her as a person independent of her husband, Justices Taney, Daniel, and Campbell dissented. Justice Daniel wrote:

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

*Id.* at 603.
name. Similarly, in Pennsylvania v. Ravenel,463 the Court reiterated in the context of a state taxation case that a woman takes her husband’s domicile during his lifetime.464 These attitudes were not disrupted by the Civil War, the passage of the Reconstruction Amendments, or the activities of the woman suffrage movement. In the 1868 case Kelly v. Owen,465 Justice Field construed the intent of Congress’s 1855 Naturalization Act to be that a woman’s citizenship is a function of her husband’s: “His citizenship, whenever it exists, confers, under the act, citizenship upon her.”466 In 1872 in Bradwell v. Illinois,467 the impact of woman’s sphere ideology,468 the Court’s negative approach to the Privileges or Immunities Clause of the new Fourteenth Amendment, and its continued deference to states’ rights combined to validate Illinois’ policy of prohibiting women from practicing law. Justice Bradley’s concurring opinion demonstrated the relevance of straightforward status arguments to the result:

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

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

463. 62 U.S. (21 How.) 103 (1858).
464. Id. at 110.
465. 74 U.S. (7 Wall.) 496 (1868).
466. Id. at 498.
467. 83 U.S. (16 Wall.) 130 (1872).
468. For a discussion of the notion of woman’s sphere, see supra text accompanying notes 32, 153–55.
469. Bradwell, 83 U.S. (16 Wall.) at 141.
470. Id.
ness to acquiesce in state legislation that frustrated women's attempts to secure economic freedom is not a theme limited to Nineteenth Century cases. Even after the turn of the century and the passage of the Nineteenth Amendment, the Supreme Court approved legislation that impeded job opportunities for women.\textsuperscript{472}

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

C. Minor (1874) to Enfranchisement (1920)

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

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

\textsuperscript{472} See infra text accompanying notes 505–25.
\textsuperscript{473} Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).
\textsuperscript{474} See supra text accompanying notes 338–53.
\textsuperscript{475} 83 U.S. (16 Wall.) 36 (1873).
Amendment passed with nineteen different Congresses, and the various state campaigns necessary to ratification. These activities cost women an immense amount of time and money and took up the energies of an entire generation of leaders.

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

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

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476. See CATT & SHULER, supra note 300, at 107.
477. Actually more than 36 referenda campaigns were necessary because no one could tell which states were solid for suffrage and parallel efforts had to be undertaken in various states to achieve the magic number. See id. at 371.
478. Stanton, Anthony, and Stone were in early middle age when they began their suffrage work in earnest in the 1850s. The next generation of leaders were women like Harriet Stanton Blatch, Carrie Chapman Catt, and Alice Paul. By the time the Nineteenth Amendment passed, many of the second generation were in early or late middle age. See VICTORY, supra note 197, at app. 8.
479. See supra text accompanying notes 387–90, 395–408.
480. I refer here to the reliance on arguments for "educated" suffrage and the like. See supra text accompanying notes 355–59. For a discussion of the effects of racism on American feminism, see generally ANDOLSEN, supra note 229.
males so dearly bought, but poorly protected, by the Reconstruction Amendments. In the large cities, corrupt political machines often controlled and brokered the votes of immigrants and laborers so that any possibility for real social change through their votes was often frustrated. By keeping African-Americans, ethnic minorities, poor laborers, and women from meaningfully exercising the franchise, the American power structure isolated and divided those groups most likely to form alliances against its interests. Because of women’s numerical strength in the general population, political coalitions between women and others could have effectuated significant redistribution of political power.

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

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

483. This is because females make up more than 50% of the population. See CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 (113th Ed. Washington D.C.) (1993) [hereinafter CENSUS, STATISTICAL ABSTRACT].
deny women protection from laws discriminating against them in myriad ways outside of the specific context of voting.

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

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

[T]he husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when... the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband’s rights as against the wrongdoer, and that an assault of this nature may be properly described as an injury to the personal rights and property of the husband. ... *Id.* at 481.

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

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

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

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

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

491. 208 U.S. at 421-22.
492. Id. at 422.
493. See supra text accompanying notes 409-18.
495. 223 U.S. 59 (1912) (The plaintiff in the case was a Chinese male.).
teenth Amendment does not interfere by creating a fictitious equality where there is a real difference.”\textsuperscript{496} Of course, the “lighter burden” was only meant to obtain in regard to women running small washing businesses within the domestic sphere of their home. It inflicted exactly the same burden on women who wanted to operate more public laundry businesses employing many workers, or who wanted to work in such an enterprise.\textsuperscript{497} Similarly, in the 1914 decision of \textit{Riley v. Massachusetts},\textsuperscript{498} the Court held that a state law restricting the time of day that women could work in a mill was no impairment of their right to contract, citing \textit{Muller} and ignoring \textit{Lochner v. New York}.\textsuperscript{499} In \textit{Miller v. Wilson},\textsuperscript{500} the Court approved a California law preventing women from being employed in hotels and hospitals for more than eight hours a day. The Court declared:

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

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

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

\begin{itemize}
\item \textsuperscript{496} \textit{Id.} at 63.
\item \textsuperscript{497} There seems no doubt that Montana's legislation was aimed directly at imposing a special tax on Chinese laundries. The challenge to legislators was how to discriminate against Chinese laundries employing many workers, while imposing a “lighter burden” on women washing clothes in their own homes. \textit{Id.}
\item \textsuperscript{498} 232 U.S. 671 (1914).
\item \textsuperscript{499} \textit{Id.} at 679. \textit{Lochner v. New York}, 198 U.S. 45 (1905) (holding that maximum hour limitations imposed on bakers were invalid and that the state's interest in the promotion of employee health was not directly related to the maximum hour legislation).
\item \textsuperscript{500} 236 U.S. 373 (1915).
\item \textsuperscript{501} \textit{Id.} at 377-78.
\item \textsuperscript{502} 239 U.S. 299 (1915) (interpreting the Citizenship Act of 1907, ch. 2534, § 3, 34 Stat. 1228 (1907) (repealed 1922)).
\end{itemize}
brought by a California woman who objected to her differential treatment. The Court had an opportunity to acknowledge that by giving women the franchise, Californians expressed their intention that women no longer be second-class citizens. In upholding the legislation in the face of her attack, the Court ignored the impact of laws changing the civil rights of females and imputed her with a dependent status, which it used as the ground for its decision:

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

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

D. 1920 to the Present

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

503. Id. at 311.
504. See Brown, supra note 12, passim.
505. 258 U.S. 130 (1922). Petitioner Oscar Leser filed suit in Maryland to strike the names of two women from the voter list, on the theory that their registration could not be constitutionally mandated by the Nineteenth Amendment. Maryland was one of the states that refused to ratify the Amendment and so had been forced to recognize women's voting rights over its objection. It was Leser's claim that including women in the franchise effectuated such a vast change in the basic rules of politics as to deny Maryland political autonomy in violation of fundamental principles. The Court rejected this contention, citing the changes wrought by the passage of the Fifteenth Amendment and implying that similar changes were theoretically permitted by the Nineteenth. Id. at 135–36.
Breedlove v. Suttles.\textsuperscript{506} 

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

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

\begin{itemize}
  \item \textsuperscript{506} 302 U.S. 277 (1937).
  \item \textsuperscript{507} Id. at 279–80. The poll tax was eventually prohibited by constitutional amendment. U.S. Const amend. XXIV.
  \item \textsuperscript{508} Breedlove, 302 U.S. at 280.
  \item \textsuperscript{509} The statute applied to those between 21 and 60 years of age, but it exempted the blind and females who did not register to vote. Id. at 279–80.
  \item \textsuperscript{510} Id. at 280.
  \item \textsuperscript{511} Id. A male, Nolan Breedlove, sued to have Georgia’s gender-based scheme declared unconstitutional. Perhaps because the Court was faced with a male petitioner, the possibility that Georgia’s scheme actually militated against women’s right to vote was even more obscured. See Leslie Friedman Goldstein, The Constitutional Rights of Women 99 (1988).
  \item \textsuperscript{512} Breedlove, 302 U.S. at 282.
  \item \textsuperscript{513} Id.
  \item \textsuperscript{514} See Friedman, supra note 345, at 100.
  \item \textsuperscript{515} Breedlove, 302 U.S. at 282.
\end{itemize}
did not register. There was no discussion about how voting might benefit a woman individually, or whether economic incentives put in place to reward women's non-registration functioned to impair their group power. Moreover, the Court relied on the notion that to extract a poll tax from women was tantamount to burdening their husbands: "The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. . . . To subject her to the levy would be to add to his burden." Justice Butler did not discuss the possibility that giving the husband an economic incentive to discourage his wife from voting might foreclose her access to the ballot. Finally, citing *Muller* and relying directly on status arguments about women's special function and different nature, the Court declared: "The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes." Once again, burdens were paraded as benefits, and women's separate and dependent condition was depicted as just and natural, in spite of the almost one hundred year fight for women's emancipation that had led to the enactment of the Nineteenth Amendment.

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

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

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516. *Id.*
517. *Id.*
519. *Adkins v. Children's Hospital* was something of an aberration. Adkins *v.* Children's Hospital, 261 U.S. 525 (1923) (invalidating legislation fixing a minimum wage for women as a violation of their freedom of contract).
DOMINANCE AND DEMOCRACY

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

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

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

521. Id. at 465–66.
522. 368 U.S. 57 (1961). In Hoyt, the defendant was a woman who killed her husband over his infidelity. She was forced to stand trial in front of an all male jury. Id. at 58. Hoyt was later overruled in Taylor v. Louisiana, 419 U.S. 522, 535 (1975) (allowing a man to successfully challenge a Louisiana statute automatically exempting women from jury duty).
523. The Court stated in support of its conclusion: “[W]oman is still regarded as the center of home and family life.” Hoyt, 368 U.S. at 62. Eventually, the Court disapproved of Hoyt and the sort of separate sphere ideology that it relied upon. See Taylor, 419 U.S. at 535. For a discussion of the manner in which the power of the civil jury itself was limited after juror selection processes became more inclusive through the process of feminizing its activities, see Laura Gaston Dooley, Our Juries Ourselves, 80 CORNELL L. REV. (forthcoming).
discrimination were enacted in this period. After a decade of social upheaval, the Supreme Court finally began to give up its reliance on old-fashioned notions of women's special nature and appropriate separate sphere. This shift in attitude surfaced in a number of decisions in the 1970s and led to the development of a higher standard of review for legislation differentially affecting women.

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

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526. The court found that the state's gender classification did not bear "a fair and substantial relation to the object of the legislation." Id. at 76 (Burger, Chief J., quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
528. See id. at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). But see Craig v. Boren 429 U.S. 190, 197 (1976) (adopting an intermediate standard of review for legislative distinctions based on sex).
529. 421 U.S. 7 (1975) (invalidating a Utah law providing for a later date of majority for men than for women).
530. Id. at 14–15.
531. 429 U.S. 190 (1976).
stantially related to achievement of those objectives.” 532

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

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

532. Id. at 197.
533. See generally Dworkin, supra note 30 (discussing the ideology of sexual objectification).
534. See MacKinnon, supra note 6, at 142–43.
majority group without majority power, what then is the real significance of the history of woman suffrage? Because it is my intention to begin rather than to end a dialogue on the importance of this history for constitutional theory, I suggest in my Conclusion several broad areas to which woman suffrage has relevance. In so doing, I hope to reveal the richness of the history of women’s struggle for the voting right as a source for a better understanding of constitutional adjudication.

CONCLUSION

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

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

540. See supra text accompanying note 207–24.
541. See supra text accompanying notes 36–42.
542. See supra text accompanying notes 395–403.
of the period dovetailed with this attitudinal evolution to produce a material improvement in the status and condition of women in American society that should not be minimized. Nonetheless, the dreams of the movement's founders were not realized with the passage of the Nineteenth Amendment — women were still not able to live and move freely in the culture without regard to their gender. Understanding why this is so brings home the fact that the voting right alone is no panacea for rectifying patterns of discrimination in American society and that formal access to it is no guarantee of democratic inclusion.

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

543. See generally Smith, supra note 12 (discussing historic limitations on the voting right).
the society by validating laws that deprived women of economic and other opportunities into the modern era. These unfortunate facts show that the voting right cannot be isolated from other factors making up patterns of domination in the American society. Moreover, the story of women’s long battle for suffrage and the Court’s resistance to it has general significance for mainstream constitutional theory in a number of different areas.

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

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

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

545. See generally Smith, supra note 12.

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

547. 429 U.S. 252 (1977) (action for injunctive and declaratory relief claiming that local authorities’ refusal to change zoning from single to multi-family housing had a racially discriminatory effect).
parate negative impact on historically dominated groups still pass constitutional muster if they are couched in neutral language and their disparate impact cannot be traced to an overtly discriminatory purpose. In this way constitutional theory has developed so that legislation that harms women, African-Americans, or other minority groups in effect rather than by overt purpose is immune from constitutional attack, regardless of how it functions to stabilize patterns of subordination in the general society.

The Court’s unwillingness to treat disparate impact as a basis for equal protection violations played a major role in Personnel Administrator of Massachusetts v. Feeney,\(^5\) when it upheld Massachusetts’ Veterans preference statute giving preference to veterans in state employment despite the fact that 98% of those benefitted were men.\(^6\) This approach conferred an additional benefit on males, who already occupied desirable positions in the job market far in excess of their numbers in the population. That women’s nonappearance in the ranks of veterans is *itself* the product of past de jure discrimination underscores the injustice of this result because women have been positively prevented from serving in the armed forces on the same basis as men.\(^7\) In this way, legal discrimination from a prior era created the conditions leading to a de facto form of discrimination in the present. Thus, one of the most important contributions that the history of woman suffrage makes to contemporary constitutional theory is to show in concrete and identifiable ways the historical relationship between legislation expressing overt discrimination and legislation “only” resulting in a disparate impact on a previously legally dominated group. This interpretation of history erodes the distinction between the two and removes the warrant for a constitutional doctrine that prohibits one and permits the other.

Similarly, the history of the woman’s suffrage movement provides a broader context within which to determine whether and how gender classifications can be appropriate in governmental legislation.\(^8\) If a particular legislative schema providing for differentiations based on sex can be linked to historic techniques

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549. *Id.* at 270.
550. For Justice Stewart, it was not dispositive that “[t]he enlistment policies of the Armed Services may well have discriminated on the basis of sex.” *Id.* at 278 (Stewart, J., citing Frontiero v. Richardson, 411 U.S. 677 (1973) and Schlesinger v. Ballard, 419 U.S. 498 (1976)).
551. For a discussion of how the tax laws promote gender differences, see McCaffery, *supra* note 60.
for keeping women in a subordinate status, then an even higher form of scrutiny than the intermediate level now typically applied might be appropriate. Such an approach might have dictated a different result in a case like *Rostker v. Goldberg*,\(^{552}\) which dealt with women's exemption from the military draft registration system. Until only recently, women have been excluded from eligibility for military service over their objection.\(^{553}\) However, many would argue that exempting women from the burden of registering for eventual mandatory service benefits them\(^ {554}\) and promotes a valid military objective of efficiency that overcomes the intermediate level of scrutiny applied in gender cases.\(^ {555}\) These arguments ignore the historical evidence, however. In the Nineteenth Century, women's forced exclusion from military service was used as an argument justifying their lack of entitlement to voting rights.\(^ {556}\) Moreover, this exclusion was based on stereotypes of women's "natural" weakness and fragility and their special fitness for reproduction and mothering. Hence, it promoted the ideology that was part of the complex of women's domination and provided an argument to foes of women's emancipation based on the notion that only those who can wield arms to protect the polity ought to be allowed to participate in governing its affairs.\(^ {557}\) Given this historic reality, women's exemption from the registration system loses much of its benign appearance.

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

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553. *Id.* at 90 n.7.
555. Given the special deference afforded Congress's conduct of its war powers in *Rostker*, it is not at all clear that the intermediate level of review was in fact applied there. *See Rostker*, 453 U.S. at 69–72.
556. Shklar has pointed out the close connection between the notion of citizen and soldier in the American conception of public virtue. *See Shklar, supra* note 38, at 31.
557. Women's ability to participate in the military involves one of the most intractable pockets of gender discrimination still left in the society; it is probably no accident that two of the recent cases in which the Court has shown little sensitivity to women, *Feeney* and *Rostker*, both touch on this subject. *Rostker*, 453 U.S. at 59; Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 269–70 (1979).
action. One of the most troublesome aspects of so-called reverse discrimination is that it requires the denigration of the opportunities of some to redress past legal bias and prejudice limiting the opportunities of others.\textsuperscript{558} By realizing that select groups have commandeered key institutions in American society through their exclusion of others from the franchise and that this process has led to their unjust enrichment in employment, education, and other opportunities, general principles of restitution become relevant to the controversy over the moral basis for affirmative action. As Thomas Nagel stated:

[A] social system may continue to deny different races or sexes equal opportunity or equal access to desirable positions even after the discriminatory barriers to those positions have been lifted. Socially-caused inequality in the capacity to make use of available opportunities or to compete for available positions may persist, because the society systematically provides to one group more than to another certain educational, social, or economic advantages .... Where there has recently been widespread deliberate discrimination in many areas, it will not be surprising if the formerly excluded group experiences relative difficulty in gaining access to newly opened positions, and it is plausible to explain the difficulty at least partly in terms of disadvantages produced by past discrimination.\textsuperscript{559}

What the history of woman suffrage shows is the connection between legal forms of overt discrimination and private patterns of dominance in the civil society. Removing one does not at the same time remove the other. "[D]isadvantages produced by past discrimination"\textsuperscript{560} and suffered by subordinated groups are accompanied by unjustly attained advantages enjoyed by others that continue long after the legal barriers are removed. Were the Court to take this phenomenon more seriously, its recent reluctance to support affirmative action principles enthusiastically as a fitting expression of restitutionary tenets would perhaps be obviated.\textsuperscript{561}

\textsuperscript{558}. See generally Lisa H. Newton, Reverse Discrimination as Unjustified, 83 ETHICS 308 (1973) (arguing that affirmative action is morally wrong).

\textsuperscript{559}. See Thomas Nagel, Equal Treatment and Compensatory Discrimination, 2 PHIL. \& PUB. AFF. 348, 349 (1973).

\textsuperscript{560}. Id.

\textsuperscript{561}. In certain circumstances, restitution may be had from "innocent" third parties. See, e.g., Newton v. Porter, 69 N.Y. 133 (1877) (constructive trust imposed on monies in the hands of attorneys paid to them by thieves for representation); Simonds v. Simonds, 45 N.Y.2d 233 (1978) (impressing a constructive trust on insurance proceeds held by an innocent third party).
Thus, the impact of the history of the woman suffrage movement on notions of judicial deference to majority rule, on equal protection doctrines insulating disparate impact legislation from invalidation, and on theoretical justifications for affirmative action are just three areas where its lessons have potentially serious and significant effects. There are perhaps many others that constitutional scholars and political theorists might develop. The problem has been that the story of women’s long struggle for civil rights has been consigned to the underside of history, where it has not been available to inform our understanding of fundamental constitutional principles on voting and myriad other issues. In this way, woman suffrage is relevant not only to teach us the limitations and the possibilities of the voting right, but also to allow us to see basic tenets of constitutional adjudication from another perspective, one that takes seriously how the phenomenon of dominance negatively impacts aspirations to democratic inclusion.

In recounting the tale of women’s fight for emancipation that began in the years before Seneca Falls and is ongoing, it has been my goal to bring the story of their efforts from the margin of constitutional theory to its center. By looking at the efforts of women to share in the governance of the American society over the objection of ruling groups, we can better understand not only what the women of last century did and did not accomplish through the voting right, but also the importance of insisting that democratic inclusion be a reality, not just an aspiration, in our political system. One of the means for taking us from illusion to reality is through appropriate attention to history.