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## Article

# Reclaiming the Long History of the “Irrelevant” Nineteenth Amendment for Gender Equality

Tracy Thomas<sup>†</sup>

### INTRODUCTION

The Nineteenth Amendment has been called an “irrelevant” amendment.<sup>1</sup> The women’s suffrage amendment has been deemed irrelevant as a constitutional authority and reduced to a historical footnote.<sup>2</sup> As Supreme Court Justice John Harlan noted, “The Nineteenth Amendment merely gives the vote to women.”<sup>3</sup> With that simple task accomplished, the amendment has been assumed to offer little guidance to modern constitutional analysis or gender equality law. The Nineteenth Amendment has become a “constitutional orphan,” disconnected from its historical origins and legal place in the Constitution.<sup>4</sup>

This constricting view of the Nineteenth Amendment ignores the structural implications and significant history of this gendered amendment and women’s fight for civil rights. Women battled for sev-

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1. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 965 (2002); see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1500 (2001) (“[T]here is less to the Nineteenth Amendment than meets the eye.”); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 471–73 (1995).

2. Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 508–09 (2016).

3. *Gray v. Sanders*, 372 U.S. 368, 386 (1963) (Harlan, J., dissenting).

4. PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 3 (2020).

enty-two years to demand recognition of their rights from a lawmaking group of men from which they were excluded.<sup>5</sup> It was not pretty. Women marched in the streets, facing violence and protestors; they were jailed, treated inhumanely, ridiculed in the press, demeaned by ministers and leaders, and reviled by other women. Women were not given the right—they fought for it.

The Nineteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”<sup>6</sup> It includes an enforcement clause, providing that “Congress shall have power to enforce this article by appropriate legislation.”<sup>7</sup> It was first envisioned by feminist pioneer Elizabeth Cady Stanton as a proposed Sixteenth Amendment that would be part of the radical Reconstruction Amendments of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>8</sup> Stanton’s original Sixteenth Amendment had broader language, providing that the right to vote “shall be based on citizenship, and shall be regulated by Congress,” and all citizens of the United States “shall enjoy this right equally, without any distinction or discrimination whatever founded on sex.”<sup>9</sup> It was this language nationalizing suffrage that was first introduced into Congress by Representative George W. Julian of Indiana, as the Sixteenth Amendment in March 1869.<sup>10</sup> Almost ten years later, in January 1878, Senator Aaron Sargent of California introduced the women’s suffrage amendment into the Senate, changing the language to match the text of the Fifteenth Amendment, successfully ratified in 1870.<sup>11</sup> The women’s suffrage

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5. ELLEN CAROL DUBOIS, *SUFFRAGE: WOMEN’S LONG BATTLE FOR THE VOTE* (2020); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920*, at 5 (1965) (reporting that suffrage women conducted 480 state legislative campaigns, 277 state convention campaigns, 19 campaigns to Congress, and 41 state amendment campaigns).

6. U.S. CONST. amend. XIX.

7. *Id.*

8. Kimberly A. Hamlin, *The Nineteenth Amendment: The Fourth Reconstruction Amendment?*, 11 CONLAWNOW 103, 103 (2020); see also ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

9. Ann D. Gordon, *Many Pathways to Suffrage, Other Than the 19th Amendment*, 11 CONLAWNOW 91, 96 (2020); Elizabeth Cady Stanton, *The Sixteenth Amendment*, REVOLUTION, Apr. 29, 1869, reprinted in 2 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 236, 236–38 (Ann D. Gordon ed., 2000).

10. H.R.J. Res. 15, 41st Cong. (1st Sess. 1869); see LISA TETRAULT, *THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN’S SUFFRAGE MOVEMENT, 1848–1898*, at 32 (2014); Gordon, *supra* note 9, at 95–96.

11. S. Res. 12, 45th Cong. (2d Sess. 1878); TETRAULT, *supra* note 10, at 103; Gordon, *supra* note 9, at 95.

amendment languished in congressional committees, including the Senate Committee on Woman's Suffrage formed in 1882, despite women's annual pilgrimages and continuous lobbying of Congress.<sup>12</sup> It came to the Senate floor for a vote only twice, in January 1887 where it was crushed in defeat by a two-thirds majority, and defeated again in March 1914.<sup>13</sup> The amendment would finally arise out of the post-World War I haze. It was passed by Congress as the Nineteenth Amendment on June 4, 1919, fifty years after it was first introduced, and ratified by the required two-thirds of the states on August 26, 1920.<sup>14</sup> Tennessee was the final state to ratify the amendment, where the entire national movement came down to one state, and one man, who ultimately changed his vote to support women's suffrage because of his mother.<sup>15</sup>

Yet, the long history of the Nineteenth Amendment and its representation of women's broader civil rights is so much more than a simple legislative account of the passage of a constitutional amendment. The conventional narrative misses much of the story. Students from elementary to high school learn only few sentences about Susan B. Anthony or the Seneca Falls Convention, where women's suffrage was first proposed on July 19, 1848.<sup>16</sup> Few, if any, law students study the Nineteenth Amendment. Historical and legal narratives ignore the social, legal, and normative effects of the amendment. And we white-wash the history, omitting the Black and minority women leading the movement, and ignoring the racism encapsulated in a separate Fifteenth Amendment and the political movement for and against it.

Beyond correcting the historical record, appreciating the relevance of the long history of the Nineteenth Amendment is significant for two key reasons. First, the full history of the Nineteenth Amend-

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12. *Timeline: The Senate and the 19th Amendment*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/People/Women/Nineteenth\\_Amendment\\_Vertical\\_Timeline.htm](https://www.senate.gov/artandhistory/history/People/Women/Nineteenth_Amendment_Vertical_Timeline.htm) [<https://perma.cc/8DYU-Q29G>].

13. 49 CONG. REC. 1002-03 (1887); Gordon, *supra* note 9, at 96 (reporting the 1887 Senate vote of sixteen yeas to thirty-four nays). The 1914 vote was thirty-five to thirty-four, but still eleven votes less than the required two-thirds majority. *Timeline*, *supra* note 12.

14. H.R.J. Res. 1, 66th Cong. (1919); Amendment to the Constitution, 1920, 41 Stat. 1823, 1823 (1920) (certifying ratification by three-fourths of the state legislatures on August 26, 1920).

15. ELAINE WEISS, *THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE* 1-4 (2019); Anastasia Sims, *Armageddon in Tennessee: The Final Battle over the Nineteenth Amendment*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 333, 336, 346 (Marjorie Spruill Wheeler ed., 1995).

16. *Timeline*, *supra* note 12.

ment is relevant and important for appreciating women's longstanding demands for legal rights. They sought the vote for seventy-two long years. Suffrage was not obtained over polite tea, but actively demanded by women in rough protests in the streets; protests that saw opposition, violence, and imprisonment. Women were denied rights over and over again, with states retracting rights even as they granted them. Nevertheless, they persisted. Women started a civil rights movement, and it began long before the women's liberation of the 1970s.

The long history of the Nineteenth Amendment is also relevant and important for interpreting modern constitutional guarantees of gender equality. Legal scholars have argued for a more robust reading of the Nineteenth Amendment, substituting a "thick" construction of the amendment for the existing "thin" construction which improperly neutralizes the law.<sup>17</sup> This thicker meaning would recognize a broader constitutional norm about women's citizenship and gender equality.<sup>18</sup> Reading the Nineteenth Amendment in harmony with the Constitution's equality amendment and incorporating the history of the women's suffrage movement justifies this more expansive understanding and interpretation of constitutional gender equality.

Understanding the full, long history of the Nineteenth Amendment is thus critical on many levels. This history is the history of much more than the vote.<sup>19</sup> It is the history of women's civil rights, their demand for social, legal, and religious rights.<sup>20</sup> It is the history of women's social movements, with suffrage activism predating and modeling activism like today's #MeToo and Women's Marches. And it

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17. MONOPOLI, *supra* note 4, at 2; Siegel, *supra* note 1, at 1022; Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450 (2020); Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL'Y 235, 243–45 (2020) [hereinafter Siegel, *Why the Nineteenth Amendment Matters Today*]; Richard L. Hasen & Leah M. Litman, *Thick and Thin Conceptions of the Nineteenth Amendment Right To Vote and Congress's Power To Enforce It*, 108 GEO. L.J. 27, 32–33 (2020).

18. MONOPOLI, *supra* note 4, at ix, 2–3.

19. Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STAN. J.C.R. & C.L. 349, 350, 355–58 (2020).

20. W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 49 (1970) (“[I]t is clear that much more than the right to vote was at stake—a whole new way of life was being established for women.”).

is the history of feminist legal theory, birthing the theoretical foundations of situating women's place in the law and deconstructing and criticizing laws of male bias and women's oppression.<sup>21</sup>

The history discussed here seeks to provide this significant legal history in one concise overview. This format limits the rich detail and robust understanding of all the permutations of a century of activism, but it provides a starting point for a more complete picture that moves beyond the single sentences in our conventional understanding. This Article first discusses the advent of the women's suffrage movement, officially begun at Seneca Falls, New York in 1848 arising out of the abolitionist movement against slavery. It reveals the diversity of supporters and comprehensive feminist issues in this nascent movement that promised a broad social revolution for women's rights. Part II then follows this bright promise into the darker years of schism, as women's suffrage organizations and women's issues splintered across political divides. Coalitions with conservative women's groups advanced the cause of suffrage even as they doused the promise of feminism. Part III then addresses the continued opposition and barriers to women's suffrage from sexism, racism, and Reconstruction politics. It highlights women's persistence and increasing militancy to push the public and political will to support suffrage. Part IV then traces the post-Nineteenth Amendment period, and its Jane and Jim Crow restrictions of women's suffrage and civil rights. Post-ratification interpretations of the Nineteenth Amendment restricted corollary political rights for women like jury service and denied minority women the right to vote. And labor activism led away from the original feminist promise of the demand for systemic change. This history of the Nineteenth Amendment ultimately stands for the deep persistence of feminism, legal reform for women's rights, and the demand for gender equality that has achieved tangible success even as its full promise was never realized.

### I. IN THE BEGINNING: IGNITING THE SUFFRAGE FIRE

The beginning of the women's suffrage movement is typically located at the first woman's rights convention held at Seneca Falls, New York, in July 1848.<sup>22</sup> This was not, however, the first time women had

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21. Tracy A. Thomas, *The Long History of Feminist Legal Theory*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., forthcoming 2021) (manuscript at 1, 12), <https://ssrn.com/abstract=3740082> [<https://perma.cc/V7G6-V7XX>].

22. JUDITH WELLMAN, THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION 10–11, 183 (2004).

considered voting. Women had voted for thirty years in colonial New Jersey beginning in 1776, where the state constitution allowed “all inhabitants” to vote and statutes defined voters inclusively as “he or she.”<sup>23</sup> Subsequent constitutional revisions retracted this original contract, despite women’s legal challenge.<sup>24</sup>

Women had also previously demanded the right to vote, from socialist feminist Frances Wright to abolitionists Sarah and Angelina Grimké, to a handful of women petitioning the New York State Constitutional Convention in 1846.<sup>25</sup> At Seneca Falls, pioneering feminist Elizabeth Cady Stanton revived this idea of suffrage as central to women’s citizenship and equality.

Stanton and her mentor Lucretia Mott organized at Seneca Falls a convention of three hundred people to discuss the social, civil, and religious oppressed condition of women.<sup>26</sup> They issued a written document, the *Declaration of Sentiments*, declaring the wrongs against women and demanded legal rights of gender equality in marriage, parenting, employment, education, and the removal of social barriers of separate spheres created by religion and society.<sup>27</sup> The revolutionary declaration demanded systemic reform in multiple systems of the state, family, market, and church as together they created “a fourfold bondage” with “many cords tightly twisted together, strong for one

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23. Campbell Curry-Ledbetter, Note, *Women’s Suffrage in New Jersey 1776–1807: A Political Weapon*, 21 GEO. J. GENDER & L. 705 (2020); Judith Apter Klinghoffer & Lois Elkis, “*The Petticoat Electors*”: *Women’s Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUBLIC 159 (1992).

24. See *Carpenter v. Cornish*, 83 N.J.L. 254 (1912) (challenging denial of women’s state voting rights on grounds that the original state constitution authorized such voting and was improperly overturned by subsequent legislation; argument by first woman lawyer in the state, Mary Philbrook); PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 438 (N.J. Writers’ Project of the Work Projects Admin. ed., 1942) (reporting a petition to restore women’s voting rights).

25. Jacob Katz Cogan & Lori D. Ginzberg, *1846 Petition for Woman’s Suffrage, New York State Constitutional Convention*, 22 SIGNS 427, 429 (1997); Gerda Lerner, *The Meanings of Seneca Falls, 1848–1998*, DISSENT, Fall 1998, at 35, 38 (stating that abolitionists Sarah and Angelina Grimké advocated women’s rights to vote and hold office in 1838 as did feminist theorist Frances Wright in the 1830s).

26. TETRAULT, *supra* note 10, at 31–33; NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA, at xviii (1998); see also TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 7–8 (2016).

27. REPORT OF THE WOMAN’S RIGHTS CONVENTION, HELD AT SENECA FALLS, JULY 19–20, 1848, *reprinted in* 1 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 75, 76–79 (Ann D. Gordon ed., 1998).

purpose” of woman’s oppression and subordination.<sup>28</sup> The *Declaration* also more philosophically “denounced the entrenched social norms that fostered male privilege, female inferiority, religious subjugation, and double standards of morality and sexuality.”<sup>29</sup>

The vote emerged as one key demand from Seneca Falls. Stanton identified the vote as central to protecting women’s rights because it granted them access to the lawmaking process and required lawmakers to be responsive to women’s issues and concerns.<sup>30</sup> She understood suffrage as the hallmark of citizenship, designating respect and power within society.<sup>31</sup> And she understood the vote as both a barrier and vehicle for legal change, based on her de facto legal education under the tutelage of her lawyer and jurist father.<sup>32</sup> Lucretia Mott viewed the vote with suspicion, for Mott, as a Quaker and Garrisonian abolitionist, considered politics morally corrupt and sought to persuade the public directly of the truth of abolition and equality rather than participate in a tainted political process.<sup>33</sup>

The first women’s rights convention was Stanton’s idea, arising initially out of discussions she had with Mott at the World’s Anti-slavery Convention in London in 1840.<sup>34</sup> Stanton traveled there on her honeymoon and met Mott and other American and English abolitionists.<sup>35</sup> At the convention, women were banned from participating on the floor, relegated to observing in the balcony, where leader William Lloyd Garrison joined them.<sup>36</sup> Many women followed Garrison and his organization more generally because “he insisted that women’s rights could not be separated from those of black people and of all humanity,

28. Thomas, *supra* note 19, at 350; Elizabeth Cady Stanton, The Degradation of Disfranchisement: Address by ECS to the National-American Woman Suffrage Association (Feb. 26, 1891), in 5 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 360, 366 (Ann D. Gordon ed., 2009).

29. Thomas, *supra* note 21 (manuscript at 4).

30. SUE DAVIS, THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON 64–66 (2008).

31. *Id.* at 90; JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 108–09 (1994).

32. THOMAS, *supra* note 26, at 41–42; Thomas, *supra* note 21 (manuscript at 4–5).

33. DAVIS, *supra* note 30, at 66; Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836, 840–41 (1987).

34. ELISABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON 8–11 (1984).

35. *Id.* at 48–50; LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE 34–41 (2009).

36. 1 HISTORY OF WOMAN SUFFRAGE, 1848–1861, at 61 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881).

while political abolitionists tended to see women's rights as a distraction.<sup>37</sup> The related so-called "woman question" arising at the convention and elsewhere debated whether women should have public roles within the abolitionist movement.<sup>38</sup> The same controversy had engulfed early anti-slavery reformers Angelina and Sarah Grimké, daughters of a Southern slave holding family who were persuasive speakers against the horrors of slavery.<sup>39</sup> Sarah Grimké would go beyond the mere question of women's public role, addressing a wider range of women's rights in her work, *Letters on the Equality of the Sexes*.<sup>40</sup> Stanton and Mott reconnected eight years later at Mott's sister-in-law's home near Stanton's hometown of Seneca Falls. Stanton was riled up from her frustration with domestic responsibilities and limited legal rights and was committed to starting a revolution.<sup>41</sup>

The "woman's suffrage movement," as it was called, using the singular term "woman," thus grew directly out of the anti-slavery movement.<sup>42</sup> Stanton later explained that in the early anti-slavery conventions, "the broad principles of human rights were so exhaustively discussed, justice, liberty, and equality, so clearly taught, that the women who crowded to listen, readily learned the lesson of freedom for themselves, and early began to take part in the debates and business affairs of all associations."<sup>43</sup>

Women reformers were allied with Black reformers, including Frederick Douglass who attended Seneca Falls, and women like Sojourner Truth and Frances Harper.<sup>44</sup> Civil and religious reformers worked together for universal suffrage. It was a united front for citizenship and enfranchisement without discrimination on the basis of race or gender.

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37. FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* 4 (2011).

38. 1 *HISTORY OF WOMAN SUFFRAGE, 1848-1861*, *supra* note 36, at 53.

39. *See generally* GERDA LERNER, *THE GRIMKÉ SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMEN'S RIGHTS AND ABOLITION* 11-19 (1971).

40. SARAH GRIMKÉ, *LETTERS ON THE EQUALITY OF THE SEXES* (1838).

41. ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE: REMINISCENCES 1815-1897*, 147-48 (1898).

42. ELLEN CAROL DUBOIS, *FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 31 (1978).

43. 1 *HISTORY OF WOMAN SUFFRAGE, 1848-1861*, *supra* note 36, at 52.

44. DUBOIS, *supra* note 5, at 153; *see* MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900*, at 135 (2007); ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920*, at 13-17 (1998).

The ideas of Seneca Falls were also inspired and influenced by the matriarchal governance of the Iroquois Nation.<sup>45</sup> The laws of the Native American Iroquois (Haudenosaunee) Confederacy, made up of the Seneca, Onondaga, Mohawk, Oneida, Cayuga, and Tuscarora living in the New York region, had a profound impact on suffrage leaders like Stanton, Mott, and Matilda Joslyn Gage.<sup>46</sup> The Iroquois had a Council of Matrons or Clan Mothers, women leaders who voted on the chief. A man could be elected leader only if nominated by a woman.<sup>47</sup> Women participated in all decision making, controlled the land and food resources, and had the power to veto war. Women could call for a man's removal from the community for murder, theft, or sexual assault.<sup>48</sup> A man who committed sexual assault was banished, scarred, or killed. The Iroquois believed that women as "life givers" had the right to decide when life was taken.<sup>49</sup> Women had control over their own bodies and choice of sexual partners, and were free to divorce. The Iroquois also had a constitution, which expressly gave rights to women.<sup>50</sup> All of this offered suffrage leaders early in the movement an alternative model of a successful, organized government that could equalize rights of women.

Following Seneca Falls, grassroots women's rights conventions proliferated.<sup>51</sup> Groups meeting in New York, Massachusetts, Pennsylvania, and Ohio began to construct a national network of organization and activism for women's suffrage.<sup>52</sup> Conventions would be held each

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45. See SALLY ROESCH WAGNER, *SISTERS IN SPIRIT: HAUDENOSAUNEE (IROQUOIS) INFLUENCE ON EARLY AMERICAN FEMINISTS* 28 (2001); *THE WOMEN'S SUFFRAGE MOVEMENT*, at xxiii, 2–22 (Sally Roesch Wagner ed., 2019).

46. *THE WOMEN'S SUFFRAGE MOVEMENT*, *supra* note 45, at 2–22; WAGNER, *supra* note 45, at 32; Jessica Nordell, *Millions of Women Voted This Election: They Have the Iroquois To Thank*, WASH. POST (Nov. 24, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/24/millions-of-women-voted-for-hillary-clinton-they-have-the-iroquois-to-thank> [<https://perma.cc/V8DU-TCT4>]; see also MATILDA JOSLYN GAGE, *WOMAN, CHURCH AND STATE* 10 (1893).

47. Nordell, *supra* note 46.

48. *Id.*

49. *Id.*

50. Renée Jacobs, Note, *Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers*, 16 AM. INDIAN L. REV. 497 (1991).

51. DUBOIS, *supra* note 5; DUBOIS, *supra* note 42, at 60.

52. 1 HISTORY OF WOMAN SUFFRAGE, 1848–1861, *supra* note 36, at 75, 103–04, 111, 201, 320.

year for decades, consistently and persistently acting for women's suffrage at the local to the national level.<sup>53</sup> At the conventions, women gathered, documented their concerns, and planned canvassing and petitioning work for the next year. The vote was a primary issue addressed in these conventions, although they also commonly discussed issues of marital property and marriage.<sup>54</sup>

One particular convention that history has remembered is that of the 1851 convention in Akron, Ohio, where former slave and activist Sojourner Truth emerged as the heroine. Truth is said to have taken the podium to decry the disconnect between Black and women's suffrage, stating "Ain't I a woman,"<sup>55</sup> a speech that has become "a canonical text in accounts of nineteenth century feminism and of the role of Black women in the fight for woman suffrage."<sup>56</sup>

Historians, however, have questioned whether this in fact happened in this way, noting that the white abolitionist and suffragist Frances Barker Gage who recorded the narrative may have manipulated the actual event by misquoting or infusing her own agenda and implicit bias into Truth's words.<sup>57</sup>

This history of woman's suffrage would later be mythologized by Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage in their *History of Woman Suffrage*.<sup>58</sup> The edited six-volume work was a dedicated effort of the suffrage leaders to preserve women's history, collecting reports and procedural histories from the affiliated state

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53. For example, Salem, Ohio (1850), Akron, Ohio (1851), Cleveland (1853), Cincinnati (1855). *Id.* at 103–04, 111, 124, 164.

54. *Id.* at 107; see THOMAS, *supra* note 26, at 53, 60, 77, 163.

55. 1 HISTORY OF WOMAN SUFFRAGE, 1848–1861, *supra* note 36, at 115–17.

56. Linda C. McClain, *What Becomes a Legendary Constitutional Campaign Most? Marking the Nineteenth Amendment at One Hundred*, 100 B.U. L. REV. 1753, 1755 (2020); see also Lolita Buckner Inniss, "While the Water Is Stirring": Sojourner Truth as Proto-Agonist in the Fight for (Black) Women's Rights, 100 B.U. L. REV. 1637, 1647 (2020).

57. See NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL 334 (1997); Inniss, *supra* note 56, at 1647 ("Perhaps one of the best known speeches attributed to Truth, the 1851 'Ain't I a Woman' speech, which highlighted both gender and racial discrimination, may have been misquoted or largely fabricated by white abolitionist and suffragist Frances Dana Barker Gage.").

58. TETRAULT, *supra* note 10, at 112–44; see also 1 HISTORY OF WOMAN SUFFRAGE, 1848–1861, *supra* note 36; 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881); 3 HISTORY OF WOMAN SUFFRAGE, 1876–1885 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1886); 4 THE HISTORY OF WOMAN SUFFRAGE, 1883–1900 (Susan B. Anthony & Ida Husted Harper eds., 1902); 5 THE HISTORY OF WOMAN SUFFRAGE, 1900–1920 (Ida Husted Harper ed., 1922); 6 THE HISTORY OF WOMAN SUFFRAGE, 1900–1920 (Ida Husted Harper ed., 1922).

suffrage groups.<sup>59</sup> For women's history was otherwise excluded from mainstream history, a history dominated by military and political history of great men and great wars.<sup>60</sup> Stanton and Anthony wanted to make sure that the great women's political movement was not forgotten, and that it was appropriately revered.<sup>61</sup> Yet the *History of Woman Suffrage* also changes history by what it left out. It omitted many of the Black women leaders of the movement and those outside the immediate network of the editors working in rival, conservative suffrage organizations.

After the Civil War, the vote emerged as the key civil right and distinction of citizenship. Reconstruction and the Civil Rights Amendments focused the national conversation on federal constitutional change, and particularly on the power of the vote prioritized in the Fifteenth Amendment.<sup>62</sup> Women's rights advocates were drawn into this constitutional debate, forced to narrow their focus and prioritize the national dialogue on suffrage.<sup>63</sup> While thus elevating the movement for women's right to vote, it also diminished the broader feminist movement for women's citizenship and civil rights expansively envisioned at Seneca Falls.<sup>64</sup>

## II. SCHISM OVER THE CONSTITUTION: DOUSING THE FLAMES OF FEMINISM

Following the Civil War, the unified reformers and universal suffrage movement disintegrated.<sup>65</sup> The focus of the Civil War and Reconstruction on racial equality, at least for men, directed reformers efforts solely to Black suffrage.<sup>66</sup> Abolitionists championed Black suffrage only, claiming this was "the Negro's hour," and abandoning their past commitment to universal suffrage and women's rights.<sup>67</sup>

59. See sources cited *supra* note 58.

60. See generally Gerda Lerner, *Placing Women in History: Definitions and Challenges*, 3 FEMINIST STUD. 5 (1975) (discussing the early stages of development of "women's history as an independent field" in the 1970s).

61. 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861, *supra* note 36, at 7; see TETRAULT, *supra* note 10, at 4, 9, 112-13.

62. DUBOIS, *supra* note 42, at 54.

63. Thomas, *supra* note 19, at 351.

64. *Id.* at 352 ("As Stanton later recalled, the vote was not the central idea of Seneca Falls, but rather 'the social wrongs of my sex occupied altogether the larger place' in the early movement.").

65. DUBOIS, *supra* note 42, at 54-55.

66. *Id.* at 59.

67. DUDDEN, *supra* note 37, at 8.

The Civil Rights Amendments embodied this narrowed definition of human rights. The Fifteenth Amendment, passed in 1870, provided that the vote “shall not be denied or abridged . . . on account of race.”<sup>68</sup> A proposed universal suffrage amendment submitted to Congress in December 1868 by Senator Samuel Pomeroy of Kansas had been quickly tabled.<sup>69</sup> The Fourteenth Amendment, passed in 1868, protected privileges and immunities of citizenship, and guaranteed due process and equal protection.<sup>70</sup> But section 2 of the Fourteenth Amendment also enforced the right to vote in both federal and state elections by counting only “male inhabitants” and “male citizens.”<sup>71</sup>

Women’s rights advocates decried the new insertion of the word male into the Constitution and the creation of what Elizabeth Cady Stanton called an “aristocracy of sex” in its hierarchy privileging men’s citizenship.<sup>72</sup> Stanton felt so betrayed by her former colleagues that she left the abolition movement, and she and Anthony formed their own National Woman Suffrage Association (National Association) in May 1869.<sup>73</sup> “But standing alone,” they said, “we learned our power.”<sup>74</sup> The National Association opposed the Fifteenth Amendment due to its

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68. U.S. CONST. amend. XV, § 1.

69. *Timeline*, *supra* note 12. The proposed universal suffrage amendment would have provided that “[t]he basis of suffrage in the United States shall be that of citizenship, and all native or naturalized citizens shall enjoy the same rights and privileges of the elective franchise.” *Id.*

70. U.S. CONST. amend. XIV.

71. Section 2 of the Fourteenth Amendment provides:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives of 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.

*Id.* § 2 (emphasis added).

72. 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 324, 335; see LAUREN E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 2–3 (2015) (discussing the Fourteenth Amendment’s gendered language); 2 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, *supra* note 9, at xxiii–xxiv (“Advocates of universal suffrage coined the phrase, ‘an aristocracy of sex,’ to express their belief that the basic precepts of American government had been violated. A ‘genuine Republic’ would not have created dominant and subordinate categories of citizenship for men and women.”).

73. 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 400–01; DUDDEN, *supra* note 37, at 180.

74. 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 267.

exclusion of women and lobbied against the amendment even though they and their members uniformly endorsed Black suffrage generally.<sup>75</sup>

Stanton's willingness to resort to racist extremes in her outrage led to further division between the formerly allied suffragists and abolitionists.<sup>76</sup> In challenging the Fifteenth Amendment, Stanton said that while white women had been staunch supporters of "freedom for the Negro," the "Negro was no longer the 'lowest in the scale of being'" and that it "becomes a serious question whether we had better stand aside and see 'Sambo' walk into the kingdom first."<sup>77</sup> Elsewhere she expressed outrage that "lower orders" of uneducated men like "Patrick and Sambo and Hans and Yung Tung" would legislate for white women.<sup>78</sup> Black leaders called out Stanton and Anthony for their denigration of Black men and their dismissal of Black voting rights, while others like Frances W. Harper, Mary Church Terrell, and anti-lynching activist Ida B. Wells-Barnett continued to affiliate with the National Association.<sup>79</sup> "Yet the race-gender split of 1869 cannot simply be explained as a product of racism among white feminists, although racism there was, and plenty of it."<sup>80</sup> For it was the broader political and legal movement that discounted and abandoned women's rights that contributed to the divorce.<sup>81</sup>

In response, Lucy Stone and her husband Henry Blackwell formed the competing American Woman Suffrage Association (American Association) that same year.<sup>82</sup> The American Association worked

75. *Id.* at 314–19, 334–38; DUDDEN, *supra* note 37, at 166, 168–69.

76. DUDDEN, *supra* note 37, at 3, 166–70.

77. E. Cady Stanton, *This Is the Negro's Hour*, NAT'L ANTI-SLAVERY STANDARD, Dec. 30, 1865.

78. E.C.S., *Manhood Suffrage*, REVOLUTION, Dec. 24, 1868, at 392; *see also* Elizabeth Cady Stanton, Anniversary of American Equal Rights Association: Address of Elizabeth Cady Stanton, in REVOLUTION, May 13, 1869, at 289, 290–91; Michele Mitchell, "Lower Orders," *Racial Hierarchies, and Rights Rhetoric*, in ELIZABETH CADY STANTON: FEMINIST AS THINKER 128, 137 (Ellen Carol DuBois & Richard Cándida Smith eds., 2007).

79. *See* LOUISE MICHELE NEWMAN, WHITE WOMEN'S RIGHTS: THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES 5 (1999); TERBORG-PENN, *supra* note 44, at 8; ANGELA Y. DAVIS, WOMEN, RACE & CLASS, 83 (1981); Christine Stansell, *Missed Connections: Abolitionist Feminism in the Nineteenth Century*, in ELIZABETH CADY STANTON: FEMINIST AS THINKER, *supra* note 78, at 32.

80. DUDDEN, *supra* note 37.

81. *Id.* at 3–12.

82. DUBOIS, *supra* note 42, at 195–96; TETRAULT, *supra* note 10, at 34. *See generally* Andrea Moore Kerr, *White Women's Rights, Black Men's Wrongs, Free Love, Blackmail, and the Formation of the American Woman Suffrage Association*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 61–78.

first for Black suffrage, turning to women's suffrage only after ratification of the Fifteenth Amendment.<sup>83</sup> It also disagreed with the National Association on process, allowing men in leadership, prioritizing state campaigns, and conservatively opposing the National's more radical agenda of marriage and divorce equality.<sup>84</sup> The rival organizations were fueled by personal animosities, complicating the tensions and slowing down the progress.<sup>85</sup>

Given the constitutional focus on voting, suffrage emerged after the Civil War as the key hallmark of political citizenship and civil equality.<sup>86</sup> Federal, not state law, became the primary guarantor of civil rights, and the Constitution the avenue for those rights.<sup>87</sup> Stanton's proposed Sixteenth Amendment advanced in 1869 was intended to be a part of this greater constitutional movement.<sup>88</sup> Necessitated by the textual gender gaps of the Fourteenth and Fifteenth Amendments, women's right to vote was still envisioned as part of the second reconstruction of the Constitution that emphasized the individual rights of citizenship, equality, and liberty.<sup>89</sup> The women's suffrage amendment has only failed to be appreciated as part of this larger constitutional reconstruction because it took another fifty years before it was passed, long after the Reconstruction era.

At the same time, suffrage leaders affiliated with the National Association crafted a new strategy called the "New Departure."<sup>90</sup> This approach departed from the prior strategies of a federal suffrage amendment and state-by-state campaigns and instead focused on a legal argument of existing citizenship guaranteed under the new 1868 privileges and immunities clause of the Fourteenth Amendment.<sup>91</sup> The women argued that the plain text of the Fourteenth Amendment protected the "privileges or immunities of citizens of the United States"<sup>92</sup>

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83. DUBOIS, *supra* note 42, at 198.

84. *See id.* at 195–200 (describing the American Association's strategies and how they contrasted with the National Association).

85. *See* TETRAULT, *supra* note 10, at 7 ("Battles over the relationship of black men's suffrage and women's suffrage divided activists in an acrimonious split that would last the rest of the century.").

86. *See supra* text accompanying notes 62–63.

87. FONER, *supra* note 8, at xx, 11.

88. Hamlin, *supra* note 8, at 103.

89. DUBOIS, *supra* note 42, at 62. *See generally* FONER, *supra* note 10 (recounting the Reconstruction amendments and the universal suffrage movement).

90. DUBOIS, *supra* note 5, at 85.

91. 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 407, 520; *see also* Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1476 (2001).

92. *See* U.S. CONST. amend. XIV, § 1.

which included voting as the key privilege of citizenship and as interpreted within the analogous text of Article IV of the Constitution regarding state citizenship rights.<sup>93</sup> On the basis of this authority, many women nationwide went to the polls and attempted to vote.<sup>94</sup>

The most famous was Susan Anthony, who was arrested for illegal voting.<sup>95</sup> Anthony's case, however, would not be the legal test case as initially hoped, because an unusual procedural ruling by the trial judge refusing to enforce the criminal penalty cut off the opportunity for appeal and review.<sup>96</sup>

Instead, Virginia Minor became the test case in the U.S. Supreme Court. In *Minor v. Happersett*, the Court agreed that women were citizens, a proposition that had been in question.<sup>97</sup> However, it held the privileges and immunities of *federal* citizenship do not include the right to vote.<sup>98</sup> The right to vote, it held, was a right of state citizenship and thus was not protected by the Fourteenth Amendment.<sup>99</sup> The Court rejected what seemed plainly obvious to the women—that the privileges and immunities clause of the Fourteenth Amendment was intended to alter the original constitutional compact by shifting protection of civil rights like voting from the states to the federal government because the states had proven they could not be trusted to do so.<sup>100</sup>

93. Siegel, *supra* note 1, at 971–72. They relied on *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), which found the elective franchise to be one of the privileges and immunities of state citizenship protected against infringement by other states under Article IV of the Constitution. DuBois, *supra* note 33, at 852; 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 453.

94. CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE & POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 85 (Dover Publ'ns Inc. 2020) (1923).

95. *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459); see ANN D. GORDON, FED. JUD. CTR., THE TRIAL OF SUSAN B. ANTHONY 1 (2005), <https://www.fjc.gov/history/cases/famous-federal-trials/us-v-susan-b-anthony-fight-womens-suffrage> [<https://perma.cc/6ETU-ZFA8>]; see also DUBOIS, *supra* note 5, at 98–100.

96. DUBOIS, *supra* note 5, at 100.

97. 88 U.S. 162, 165, 169–70 (1874).

98. *Id.* A few lower courts had similarly rejected the privileges and immunities theory, following the lead of an 1871 House Judiciary report by Fourteenth Amendment drafter John Bingham stating that the amendment was not intended to grant women suffrage. DuBois, *supra* note 33, at 857; 2 HISTORY OF WOMAN SUFFRAGE, 1861–1876, *supra* note 58, at 461–63.

99. See also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138–39 (1873) (rejecting argument that Fourteenth Amendment privileges and immunities clause protects married woman's right to practice law).

100. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 52–53 (1873) (explaining that the Fourteenth Amendment privileges and immunities clause “struck at, and forever destroyed” state-only citizenship and instead incorporated the idea of national

The division between the American and National Associations was further entrenched by the integration of the conservative, alcohol prohibition group, the Woman's Christian Temperance Union (WCTU).<sup>101</sup> The WCTU supported women's right to vote as a way to bring women's moral superiority into the corrupt political arena of lawmaking and sought to elevate women's domestic role in the family and the larger family of society.<sup>102</sup> These maternalists reified women's mothering role and women's biological and caregiving difference. They stood in stark contrast to the radical feminists of the National organization, who challenged women's subordinate role in the family and society, gendered social norms and systems, and sought formal equality for women. The WCTU, however, brought with it a significant increase in numbers of supporters, greater visibility, and more financial backing.<sup>103</sup> Eventually, the National and American suffrage organizations merged into one, becoming the National American Woman's Suffrage Association (NAWSA) in 1890.<sup>104</sup> Yet, even as this broader consensus among women expanded the suffrage movement, it contracted the feminist promise of the movement for broader equal rights.<sup>105</sup> The vote became the only ground of consensus among the diverse range of women, coalescing at the lowest common denominator of the vote, silencing other important demands from Seneca Falls.<sup>106</sup>

### III. STATE STRATEGIES: KEEPING THE EMBERS BURNING

The women's suffrage movement renewed its focus on state-by-state efforts, forced back to that strategy by the Supreme Court's decision in *Minor* and the leadership of the American suffrage organization. "[The] state-by-state effort spun the main thread of suffrage activity," and the galvanizing refrain had been to "[w]in more States to

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citizenship because of "an apprehension of a destructive faculty in State governments" and to place the states under the "oversight and restraining and enforcing hand of Congress").

101. DuBOIS, *supra* note 5, at 106–12; Carolyn DeSwarte Gifford, *Frances Willard and the Woman's Christian Temperance Union's Conversion to Woman Suffrage*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 117. See generally RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873–1900* (1990).

102. DuBOIS, *supra* note 5, at 109–10.

103. *Id.* at 106–07.

104. TETRAULT, *supra* note 10, at 159–60.

105. Thomas, *supra* note 21 (manuscript at 12).

106. *Id.*

full woman suffrage.”<sup>107</sup> This state approach, however, would prove to be a slow, glacial process with little to show for it after forty years.

One of the “most ambitious and consequential of these state-level” campaigns was Kansas in 1867.<sup>108</sup> The American Equal Rights Association, a group of both Black and white feminist-abolitionists seeking universal suffrage rights for all, optimistically targeted the new territory.<sup>109</sup> Elizabeth Cady Stanton and Susan B. Anthony campaigned on the ground across the state.<sup>110</sup> Despite the supposed unified interests, the suffrage question was split into two constitutional provisions in Kansas—one for Black suffrage and one for women’s suffrage.<sup>111</sup> The reformers thus found themselves working against each other. Both failed.<sup>112</sup>

Animosities over the campaign and finances began the split between Stanton and Anthony and the abolitionists.<sup>113</sup> It led Stanton and Anthony to seek their own voice and leadership apart from the abolitionists, culminating in their own national suffrage organization and newspaper, *The Revolution*.<sup>114</sup> Indeed, they shocked their reformer colleagues by financing their paper through George Train, a wealthy promoter and showman, known for his vocal racism.<sup>115</sup> Stanton replied only that she would “accept aid from the devil himself” in order to use her own standards and vehicle for the women’s rights cause.<sup>116</sup> *The Revolution* survived for only three years, done in by limited finances once Train was arrested and deported to Ireland.

Women’s suffrage activism then entered a period of several decades that historians have labelled “the doldrums.”<sup>117</sup> Energy, efforts, and public appeal of suffrage waned as the marathon work of activism produced little results. New suffrage leaders like NAWSA’s president

107. CATT & SHULER, *supra* note 94, at 216.

108. DUBOIS, *supra* note 5, at 61–69.

109. *Id.* at 61; TETRAULT, *supra* note 10, at 19–20.

110. DUBOIS, *supra* note 5, at 66.

111. DUBOIS, *supra* note 42, at 77–102.

112. DUBOIS, *supra* note 5, at 68.

113. DUBOIS, *supra* note 42, at 99–100.

114. *Id.* at 103.

115. DUBOIS, *supra* note 5, at 66–67. Train was “America’s Champion Crank” who made and lost fortunes in shipping and streetcars. He lived an eccentric, sensational life and dabbled in presidential politics. Just a year into *The Revolution*, he was extradited to Ireland and sentenced for aiding the Irish rebels. GRIFFITH, *supra* note 34, at 129–30, 133.

116. GRIFFITH, *supra* note 34, at 131.

117. Marjorie Spruill Wheeler, *A Short History of the Woman Suffrage Movement in America*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 1, 14.

Carrie Chapman Catt and Harriot Stanton Blatch (Elizabeth Cady Stanton's daughter) worked to reinvigorate and rebuild suffrage membership and image.<sup>118</sup> They recruited society women, college women, working-class factory women, progressives and socialists—all in efforts to rebuild their movement and expand their constituencies.<sup>119</sup>

By 1900, after thirty years of organized effort, only four states had passed full suffrage for women: Wyoming (1869), Utah (1870), Colorado (1893), and Idaho (1896).<sup>120</sup> But the tide began to turn faster after 1910. From 1910 to 1912, six more states gained full suffrage, raising the total to ten states.<sup>121</sup> This so-called success in the West in the newer states of the western territory has been attributed to these states' more progressive pioneering spirit and the openness of their less-entrenched political parties.<sup>122</sup> Other factors contributing to success in the West were the better mobilization of the women's suffrage movements and the social blur between the public and private spheres on the frontier where women were more likely to be active as homesteaders and in higher education.<sup>123</sup>

More generally, women's suffragists had better success in securing partial suffrage for municipal or school board elections. Kentucky was one of the first states to pass school board suffrage, passing it in

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118. *Id.* at 14–15.

119. *Id.* at 14–16; Ellen Carol DuBois, *Working Women, Class Relations, and Suffrage Militance: Harriot Stanton Blatch and the New York Woman Suffrage Movement, 1894–1909*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT*, *supra* note 15, at 221, 223–27.

120. Wheeler, *supra* note 117, at 9, 11; Beverly Beeton, *How the West Was Won for Woman Suffrage*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT*, *supra* note 15, at 99, 100. The Wyoming Territory passed women's suffrage in 1869 and passed it again in 1890 when it became a state. Utah passed women's suffrage in 1870, but women were stripped of their right to vote by federal anti-polygamy laws of the Edmunds-Tucker Act aimed against the Mormon territory's polygamist practices until Utah entered the union as a non-polygamist state. See Wheeler, *supra* note 117, at 11.

121. The next states to grant women full suffrage were Washington (1910), California (1911), Oregon (1912), Kansas (1912), and Arizona (1912). See Wheeler, *supra* note 117, at 11.

122. REBECCA J. MEAD, *HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN STATES, 1868–1914*, at 1 (2004); Beeton, *supra* note 120, at 100; Holly J. McCammon & Karen E. Campbell, *Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866–1919*, 15 *GENDER & SOC'Y* 55, 59–66 (2001); Susan Schulten, *The Crooked Path to Women's Suffrage*, *N.Y. TIMES* (June 4, 2019), <https://www.nytimes.com/2019/06/04/opinion/the-crooked-path-to-womens-suffrage.html> [<https://perma.cc/Z56H-YR22>].

123. MEAD, *supra* note 122, at 1125; McCammon & Campbell, *supra* note 122, at 64–66.

1838.<sup>124</sup> School suffrage proved to a somewhat successful strategy nationwide as seventeen other states passed school suffrage.<sup>125</sup> There was social acceptance of the idea of women as well-suited to issues about children and school, although this proved counterproductive to demands for full suffrage. Kansas was also one of the first states to adopt municipal suffrage in 1887, allowing women to vote in the limited context of city elections.<sup>126</sup> However, a decision of the Michigan Supreme Court striking down its municipal suffrage law, finding no authority for the legislature to create a new class of voters, stymied municipal suffrage for many years.<sup>127</sup> Illinois proved the turning point in 1913 when its municipal suffrage law was upheld as constitutional by its highest court.<sup>128</sup> Ohio's municipal suffrage law was similarly upheld as constitutional by the Ohio Supreme Court a few years later.<sup>129</sup>

Building on this limited success in partial suffrage, advocates began to invest in a new strategy of presidential suffrage.<sup>130</sup> Presidential suffrage was initially the idea of Henry Blackwell, seeking to grant women the right to vote for presidential electors, and thus president, and thought initially to be less subject to referendum or legislative overruling.<sup>131</sup> Illinois was the first state to pass presidential suffrage

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124. See KRADITOR, *supra* note 5, at 4.

125. The states were Kentucky (1838), Kansas (1861), Michigan (1875), Minnesota (1875), and thirteen more by 1890. See *id.*; State *ex rel.* Mills v. Bd. of Elections, 6 Ohio Cir. Dec. 36 (Ct. App. 1895), *aff'd without decision*, 47 N.E. 1114 (Ohio 1896) (upholding school board suffrage).

126. CATT & SHULER, *supra* note 94, at 180.

127. *Id.*; Coffin v. Bd. of Election Comm'rs, 56 N.W. 567, 569 (Mich. 1893).

128. Scown v. Czarnecki, 106 N.E. 276, 277, 302 (Ill. 1914); CATT & SHULER, *supra* note 94, at 180–82.

129. State *ex rel.* Taylor v. French, 117 N.E. 173, 177 (Ohio 1917).

130. CATT & SHULER, *supra* note 94, at 183.

131. DUBOIS, *supra* note 5, at 185–89. “Presidential suffrage” meant the right to vote for members of the Electoral College in each state, as set forth in Article II, section 1 of the federal Constitution authorizing the state legislature to determine the manner of appointing presidential electors. 4 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 209 (Ann D. Gordon ed., 2006); see CATT & SHULER, *supra* note 93, at 180 (noting that Rhode Island was the first state to propose women's presidential suffrage in 1892). Women's suffrage leaders also made an argument for federal suffrage, the right to vote in all federal elections including for members of Congress, based on Article I, sections 2 and 4 of the Constitution. Gordon, *supra* note 9, at 97–99. Suffragists utilized “all methods of trying to break men's monopoly of political power.” *Id.*

in 1913, and five more states passed it in 1917, including North Dakota, Nebraska, Rhode Island, Indiana, and Ohio.<sup>132</sup> A referendum in Ohio, however, showed the weakness of this strategy.<sup>133</sup> There opponents challenged the passage of presidential suffrage, fueled by the deep pockets of anti-prohibition liquor interests. Florence Allen, later the first woman federal appellate judge and a key drafter of the presidential suffrage provision in Ohio, fought the referendum in court by challenging the many fraudulent signatures on the referendum ballots county by county.<sup>134</sup> But this effort was not enough, and the referendum went forward and overturned women's presidential suffrage by a majority of the male voters.

There was strong philosophical and financial opposition to women's suffrage. The primary funding and organization for the "antis" opposed to women's suffrage came from the liquor industry.<sup>135</sup>

Liquor manufacturers, businesses, and consumers feared that moralistic women, particularly women temperance voters, would pass national prohibition. However, Prohibition was enacted by men; the Eighteenth Amendment was adopted before women nationally gained the right to vote, passing Congress in 1917 and ratified by the states in 1919.<sup>136</sup> Others strongly opposed women's suffrage for the threat to marital harmony, believing it would disrupt the household, women's maternal role, and social gender norms.<sup>137</sup> And yet other vocal "antis" opposed women's suffrage because they believed it would trigger more progressive legislation like child labor laws, that women were too emotional or intellectually inferior to participate in such affairs, or because they believed that women could better direct their influence through public service work.<sup>138</sup>

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132. Illinois (1913), North Dakota (1917), Nebraska (1917), Rhode Island (1917), Indiana (1917), Ohio (1917). *Appendix One*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 375–77.

133. CATT & SHULER, *supra* note 94, at 193–94.

134. Tracy A. Thomas, *The Jurisprudence of the First Woman Judge, Florence Allen: Challenging the Myth of Women Judging Differently*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. (forthcoming 2021) (manuscript at 1, 15), <https://ssrn.com/abstract=3641736>.

135. CATT & SHULER, *supra* note 94, at 125.

136. Hamlin, *supra* note 8, at 107; Mark Lawrence Schrad, *Why Do We Blame Women for Prohibition?*, POLITICO MAG. (Jan. 13, 2019), <https://www.politico.com/magazine/story/2019/01/13/prohibition-women-blame-history-223972> [<https://perma.cc/9THN-A2L5>].

137. Siegel, *supra* note 1, at 978–81.

138. KRADITOR, *supra* note 5, at 14–28; Wheeler, *supra* note 117, at 15; Manuela Thurner, "Better Citizens Without the Ballot": American Anti-Suffrage Women and Their

By 1916, NAWSA returned to the federal constitutional amendment campaign. Officially, its leader, Carrie Chapman Catt, had adopted the “Winning Plan,” consolidating organizational power and pursuing a concurrent strategy of both federal amendment and partial state suffrage.<sup>139</sup> She accelerated federal lobbying efforts, and directed state suffrage efforts to only those states where success was likely.<sup>140</sup> This dilution of effort, however, from fighting the suffrage battle on too many fronts, was challenged by the younger generation of suffragists. These women, led by Harriot Stanton Blatch and Alice Paul, demanded an intensification of concentrated effort on the federal amendment, and an end to the decades-long doldrums in which women’s suffrage languished.<sup>141</sup> Paul renamed the federal proposal the “Susan B. Anthony Amendment” to pay tribute to its history while refocusing efforts on a federal campaign.<sup>142</sup>

#### IV. PUSHING THROUGH THE FIRE OF OPPOSITION

Alice Paul led a NAWSA committee, the Congressional Union, in its more militant efforts to generate public and political support for a federal woman’s suffrage amendment.<sup>143</sup> When the older generation of suffragists represented by the old guard of Catt became embarrassed by these efforts, Paul broke off from the main women’s suffrage organization and formed her own National Woman’s Party (NWP).<sup>144</sup> Paul adopted tactics of publicity, parades, and protests, learned from the English militant suffrage women led by Emmeline Pankhurst.<sup>145</sup> One of the most well-known efforts was a parade in New York City, led by lawyer Inez Milholland on a white horse and followed by contingents of women dressed in white, the color of moral right, with yellow

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*Rationale During the Progressive Era*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 203, 204–05.

139. Wheeler, *supra* note 117, at 17; Robert Booth Fowler, *Carrie Chapman Catt, Strategist*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 295, 303–04.

140. Wheeler, *supra* note 117, at 17.

141. *Id.* at 16; DuBois, *supra* note 119, at 237.

142. J.D. ZAHNISER & AMELIA R. FRY, ALICE PAUL: CLAIMING POWER 215 (2014); Lynda Dodd, *Sisterhood of Struggle: Leadership and Strategy in the Campaign for the Nineteenth Amendment*, in FEMINIST LEGAL HISTORY 189, 194 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011).

143. Linda G. Ford, *Alice Paul and the Triumph of Militancy*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, *supra* note 15, at 277, 284. *See generally* ZAHNISER & FRY, *supra* note 142.

144. Dodd, *supra* note 142, at 189. *See generally* BERNADETTE CAHILL, ALICE PAUL, THE NATIONAL WOMAN’S PARTY AND THE VOTE (2015).

145. Ford, *supra* note 143, at 284; Dodd, *supra* note 142, at 189.

sashes and roses for sisterhood and light, and purple connoting royalty and respect.<sup>146</sup> Paul, however, pandering to racism, segregated Black women to the back of the parade.<sup>147</sup> Leader Ida B. Wells-Barnett refused to be so discounted, and deliberately moved up her position once the parade began.<sup>148</sup> The parades generated publicity, but also protest, as bystanders verbally and physically attacked the women.<sup>149</sup>

Paul further expanded her efforts into pickets of the White House.<sup>150</sup> She objected to President Woodrow Wilson's refusal to support women's suffrage and lead his Democratic party to support the federal amendment. Now-familiar images of a small contingent of women picketing the president antagonized Wilson and anti-suffragists. Many, including NAWSA leaders, were outraged at the theatrics, and the blatant opposition to the president during the national crisis of World War I. Seeking to end these embarrassing pickets, authorities repeatedly arrested the women. The women's mistreatment in the D.C. jails, where they were kept in solitary isolation, went on hunger strikes, force fed in inhumane ways, and denied outside communication, finally reached public light.<sup>151</sup> The public outrage was immediate and began to shift the political support in favor of women's suffrage. A global flu pandemic, however, in 1918 ordered people to stay at home and thus limited "suffragists' ability to gather for rallies and to lobby Congress."<sup>152</sup>

Wilson finally shifted his historical stance against women's suffrage. In a speech to Congress, he attributed this to women's patriotic

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146. Ford, *supra* note 143, at 281–82; ZAHNISER & FRY, *supra* note 142, at 137, 145.

147. Ford, *supra* note 143, at 140–42, 144.

148. Wanda A. Hendricks, *Ida B. Wells-Barnett and the Alpha Suffrage Club of Chicago*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT*, *supra* note 15, at 263, 268–69.

149. See DUBOIS, *supra* note 5, at 193 (explaining how bystanders harassed and grabbed the women at the parade); ZAHNISER & FRY, *supra* note 142, at 146–48 (describing how the police did little to stop the "horrible howling mob" of men who "shoved, jostled, pushed, hooted, jeered" at the women marchers, and broke into the march line to trip or slap the women).

150. Ford, *supra* note 143, at 284; Dodd, *supra* note 142, at 191.

151. Ford, *supra* note 143, at 286–88. The women's ordeal is the subject of a book and a major motion picture. DORIS STEVENS, *JAILED FOR FREEDOM* (1920); *IRON JAWED ANGELS* (HBO Films 2004).

152. MONOPOLI, *supra* note 4, at ix; Alisha Haridasani Gupta, *How the Spanish Flu Almost Upended Women's Suffrage*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/spanish-flu-womens-suffrage-coronavirus.html> [https://perma.cc/WW6M-SJJP].

support and important contributions during the time of war.<sup>153</sup> Behind the scenes, the longstanding lobbying efforts of NAWSA congressional liaisons Maud Wood Park and Helen Hamilton Gardener seemed to finally pay off.<sup>154</sup> Democrats had opposed women's suffrage in part because they were a party of southern states, where segregation and Jim Crow were still the norm and a new constitutional amendment threatened to resurrect enforcement of constitutional prohibitions against race discrimination.<sup>155</sup> Wilson, a segregationist, was attuned to these motives.

Leading white suffragists, too, had played into these racist politics that delayed passage of the Nineteenth Amendment.<sup>156</sup> After Reconstruction, the women's suffrage movement not only "veered away from its historic connection to black rights," but affirmatively engaged in racist politics.<sup>157</sup> Suffragists recognized that federal constitutional suffrage could not be won without the support of southern white politicians, and they adopted campaigns to cultivate white suffrage support in the South at the expense of racial equality.<sup>158</sup> Orchestrated by Henry Blackwell and Laura Clay, of Kentucky, the "southern strategy" adopted in the 1890s argued for a literacy qualification for voting that would effectively authorize white women's vote, while continuing to exclude most Black people as desired by the southern state governments.<sup>159</sup> This strategy fit within the existing states' rights politics of the times, but it backfired as it alienated many suffrage women and

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153. President Woodrow Wilson, *Equal Suffrage: Address of the President of the United States, Delivered in the Senate of the United States 2-3* (Sept. 30, 1918), <https://www.senate.gov/artandhistory/history/resources/pdf/WilsonSpeech1918.pdf> [<https://perma.cc/3BBZ-Q9FY>]; see TINA CASSIDY, *MR. PRESIDENT, HOW LONG MUST WE WAIT?: ALICE PAUL, WOODROW WILSON, AND THE FIGHT FOR THE RIGHT TO VOTE* 215 (2019).

154. See Wheeler, *supra* note 117, at 17; KIMBERLY A. HAMLIN, *FREE THINKER: THE EXTRAORDINARY LIFE OF HELEN HAMILTON GARDENER* 237, 254 (2020).

155. See DUBOIS, *supra* note 5, at 151-52.

156. *Id.* at 151.

157. *Id.*

158. *Id.*

159. *Id.* at 151-54 ("Blackwell was as much an abolitionist as any other suffragist of his generation. However, his relentless political pragmatism led him to urge southern states still fighting Reconstruction to recognize that 'four millions of Southern white women will counterbalance your four millions of negro men and women, and thus the political supremacy of your white race will remain unchanged.'"); DUDDEN, *supra* note 37, at 92-93, 232 (detailing Blackwell's 1867 essay, *What the South Can Do: How the Southern States Can Make Themselves Masters of the Situation*, directed to the "legislatures of the southern states" arguing they could "safely" accept Black suffrage if they also enacted women's suffrage which would maintain white control); KRADITOR, *supra* note 5, at 163-73.

race reformers and ultimately proved unsuccessful.<sup>160</sup> Into the late 1910s, “the main impediment to Congressional passage of the Nineteenth Amendment was not sex but race—Congressional representatives from all regions and both parties feared the growth of the black electorate.”<sup>161</sup>

By the time of Wilson’s belated endorsement for suffrage, midterm elections had put the Republican Party in power, and Republicans endorsed women’s suffrage, as did the Progressive Party of former president Theodore Roosevelt. With this broad partisan support, the federal woman’s suffrage amendment moved quickly through Congress. It passed the House in May 1919 and passed the Senate in June 1919.<sup>162</sup> Many states quickly ratified the amendment within a week of its passage.<sup>163</sup>

That momentum slowed, however, and by August 1920 the count was close and came down to one state, Tennessee.<sup>164</sup> National supporters and opponents of women’s suffrage converged on Nashville, wearing yellow roses of support and red roses in opposition.<sup>165</sup> The vote appeared to depend on one man, a young bachelor, Harry Burn, who wore a red rose of opposition, although he personally favored suffrage but his constituents did not.<sup>166</sup> The story goes that he received a note from his mother just as he was to cast his vote in which she told him, “Hurrah and vote for suffrage and don’t keep them in doubt. . . . Don’t forget to be a good boy and help Mrs. Catt.”<sup>167</sup> Burn switched his vote, as did another legislator, and women’s suffrage

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160. Wheeler, *supra* note 117, at 12–13.

161. Hamlin, *supra* note 8, at 104.

162. H.R.J. Res. 1, 66th Cong. (1919); *see also* 58 CONG. REC. 635 (1919) (recording passage of House Joint Resolution 1 in the Senate on June 4, 1919, by a vote of fifty-six to twenty-five); *id.* at 93–94 (recording passage of House Joint Resolution 1 in the House on May 21, 1919, by a vote of 304 to 90).

163. Kolbert, *supra* note 2, at 537 n.173 (“Notably, state legislatures also moved with incredible speed to ratify the Nineteenth Amendment.”); CATT & SHULER, *supra* note 94, at 334–51 (detailing how many states had to call special legislative sessions because state assemblies were out of session); *see also State-by-State Race to Ratification of the 19th Amendment*, NAT’L PARK SERV., <https://www.nps.gov/subjects/womenshistory/womens-suffrage-timeline.htm> [<https://perma.cc/CF6B-LLGX>].

164. WEISS, *supra* note 15, at 1.

165. *Id.* at 198.

166. *Id.* at 169, 305.

167. *Id.* at 305–06. Burn’s widowed mother, Phoebe Ensminger Burn, “was a sharp-witted, college-educated woman who read several newspapers every day and kept abreast of current events.” *Id.* at 313.

passed by the required number of two-thirds of the states.<sup>168</sup> Tennessee tried to rescind its ratification, but efforts failed and one week later on August 26, 1920, the Nineteenth Amendment became law.<sup>169</sup>

#### V. RISING FROM THE ASHES AFTER THE NINETEENTH AMENDMENT

Ratification, however, was not the end of the story. Challenges were brought to the validity of the Nineteenth Amendment within the year. In *Leser v. Garnett*, the Supreme Court rejected states' rights claims that the constitutional amendment was unconstitutionally enacted.<sup>170</sup> In *Fairchild v. Hughes*, the Court again rejected an attempt of a private citizen to challenge the constitutionality of the amendment and its pending enforcement legislation.<sup>171</sup> And previously in *Hawke v. Smith*, the Court had rejected a claim that state law could mandate that constitutional amendments like the Eighteenth Amendment be ratified by public referendum in contradiction to Article V of the U.S. Constitution, a case with immediate application to the then-pending Nineteenth Amendment.<sup>172</sup> In all of these cases, the Court quickly dismissed challenges and upheld the new women's suffrage amendment.

The Nineteenth Amendment, however, did not in fact enfranchise all women or guarantee the right to vote.<sup>173</sup> Many women remained excluded by their race.<sup>174</sup> Black women were denied the right to vote by racist Jim Crow laws like poll taxes, grandfather clauses, and literacy tests that would persist until the Voting Rights Act of 1965.<sup>175</sup> Native American women could not vote because they were not deemed to be citizens of the United States until the 1924 Indian Citizenship Act.<sup>176</sup> Asian American women were denied the right to vote until the

168. *Id.* at 306–07.

169. *Id.* at 310–20.

170. 258 U.S. 130 (1922); see MONOPOLI, *supra* note 4, at 36–40; Siegel, *supra* note 1, at 1005–06.

171. 258 U.S. 126 (1922); see also MONOPOLI, *supra* note 4, at 51.

172. 253 U.S. 221 (1920).

173. See MONOPOLI, *supra* note 4, at 1–2; CATHLEEN D. CAHILL, RECASTING THE VOTE: HOW WOMEN OF COLOR TRANSFORMED THE SUFFRAGE MOVEMENT 7 (2020) (“The amendment . . . simply stated that sex could no longer be used as a reason for denying them the franchise.”).

174. See MONOPOLI, *supra* note 4, at 1–2, 45; CAHILL, *supra* note 173, at 7; MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 175, 190 (2020).

175. JONES, *supra* note 174; TERBORG-PENN, *supra* note 44, at 1–2.

176. MONOPOLI, *supra* note 4, at 155–56 n.5; see Cathleen Cahill & Sarah Deer, *In 1920, Native Women Sought the Vote: Here's What's Next*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/07/31/style/19th-amendment-native-womens>

Chinese Exclusion Repeal Act in 1943 and the passage of the Immigration and Naturalization Act of 1952.<sup>177</sup>

Congress also failed to pass enforcement legislation for the Nineteenth Amendment, as it had done for the Fourteenth and Fifteenth Amendments, thus omitting a legal vehicle by which to protect and define the contours of the constitutional right.<sup>178</sup> Federal enforcement legislation for the Nineteenth Amendment introduced into Congress “raised the specter of a Second Reconstruction among white southerners,” who strongly opposed enforcement legislation as much as they had opposed the enforcement clause of the suffrage amendment itself.<sup>179</sup> Therefore, state courts were mostly left to do the interpretation, even as they were motivated by principles of limited federal power.<sup>180</sup> Despite this, some courts “in the immediate aftermath of ratification understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law.”<sup>181</sup> For example, a few courts read the Nineteenth Amendment as “embodying a sex equality norm that had implications for constitutional questions other than voting,” such as criminal liability, marital domicile, and contract.<sup>182</sup>

However, most courts did not read the Nineteenth Amendment to apply more broadly to women’s political citizenship.<sup>183</sup> Many state courts did not find that voting was “coextensive” with jury or public service “[p]erhaps fearing the broad social change the Nineteenth Amendment might signal in the role of women, or its political impact

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-suffrage.html [https://perma.cc/ZNM5-MHL6] (noting that while U.S. citizenship was extended to Native Americans in 1924, many states still enacted policies intent on disenfranchising the Native population).

177. MONOPOLI, *supra* note 4, at 155–56 n.5.

178. *See id.* at 43–67 (analyzing Congress’s failure to enact enforcement legislation, forcing state courts to interpret the Nineteenth Amendment’s scope); Kolbert, *supra* note 2, at 510–28 (exploring modern restrictions to the Nineteenth Amendment to emphasize the need for enforcement legislation).

179. MONOPOLI, *supra* note 4, at 8.

180. *See id.* at 43–67.

181. Siegel, *supra* note 1, at 1018.

182. *Id.* at 1012–18 (citing *United States v. Hinson*, 3 F.2d 200, 200 (S.D. Fla. 1925) (criminal liability); then citing *McCormick v. United States*, T.D. 43804, 57 Treas. Dec. Int. Rev. 117, 125–26 (1930) (Cline, J., concurring) (marital domicile for taxation); then citing *Hollander v. Abrams*, 132 A. 224, 229 (N.J. Ch. 1926); and then citing *Commonwealth v. Rutherford*, 169 S.E. 909, 913 (Va. 1933) (marital domicile for taxation)).

183. *See* MONOPOLI, *supra* note 4, at 4.

on state sovereignty.”<sup>184</sup> It would not be until 1975 that sex-based barriers to women’s right to serve as jurors would be declared unconstitutional by the Supreme Court.<sup>185</sup> Before the amendment’s passage, women had challenged their limitation of these political rights, such as the denial of the right to licensure as a public notary.<sup>186</sup> After adoption of the Nineteenth Amendment, placing women in public office was one of the first goals of women activists.<sup>187</sup>

Florence Allen, suffrage activist and lawyer, ran for judicial office immediately after ratification of the Nineteenth Amendment.<sup>188</sup> She ran as an independent candidate, missing the primaries and without endorsement of either political party, but buoyed by the bipartisan support and campaigning of the women’s suffrage network.<sup>189</sup> Allen became the first woman judge of a general trial court, serving on the Cuyahoga Court of Common Pleas in Cleveland, Ohio, from 1921 to 1922.<sup>190</sup> She was subsequently elected to the Ohio Supreme Court for two terms, was the first woman appointed to a federal appellate court, being nominated to the U.S. Court of Appeals for the Sixth Circuit in 1934, and was the first woman repeatedly shortlisted for the U.S. Supreme Court.<sup>191</sup>

The advent of the Nineteenth Amendment also failed to force legislators to be responsive to the female electorate. Initially, in the first year after passage, Congress turned its attention to several issues raised by the women’s lobby. Women’s organizations formed a loose

184. *Id.*; see, e.g., *People ex rel. Murray v. Holmes*, 173 N.E. 145, 147 (Ill. 1930) (stating that “[t]he Nineteenth Amendment has nothing to do with the qualification for service as jurors” as that is “an issue for the state, not federal, government”). See generally HOLLY J. MCCAMMON, *THE U.S. WOMEN’S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT* (2014).

185. *Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975); see also *Hoyt v. Florida*, 368 U.S. 57, 59–65 (1961) (upholding Florida’s statute that automatically exempted women from juries); LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES 3* (1998).

186. See Elizabeth D. Katz, “A Woman Stumps Her State”: *Nellie G. Robinson and Women’s Right To Hold Public Office in Ohio*, 53 AKRON L. REV. 313, 314–15 (2019) (noting women’s demand to hold public office as “emblematic of a sustained yet largely overlooked component of the women’s movement”); Elizabeth D. Katz, *Women’s Suffrage and the Legal Right To Hold Office* (unpublished manuscript) (on file with author).

187. See Katz, “A Woman Stumps Her State,” *supra* note 186, at 315 (noting that one longstanding goal of the women’s suffrage movement was access to public office).

188. JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN* 53–55 (1984); Thomas, *supra* note 134 (manuscript at 16).

189. Thomas, *supra* note 134 (manuscript at 16–17).

190. *Id.* (manuscript at 17).

191. RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 22 (2020).

affiliation in the Women's Joint Congressional Committee to bring consensus issues of women's right to Congress.<sup>192</sup> Built around the suffrage consensus on maternalism, the Joint Committee expanded the issues debated in Congress to include matters of marriage, motherhood, and children.<sup>193</sup> It succeeded in securing passage of the Cable Act, which reinstated national citizenship to American women expatriated when they married non-American men.<sup>194</sup> The committee also achieved success in passing the Sheppard-Towner Act, which designated federal money for maternal and child health care and remedying high infant and maternal mortality rates.<sup>195</sup> And they were able to move forward the constitutional amendment against child labor.<sup>196</sup> Congress however quickly learned that women themselves were not unified on the issues. Women did not vote as a bloc, and women voters did not hold uniform views, but rather represented the usual spectrum of diverse views seen in men.<sup>197</sup> Accordingly, legislators abandoned their efforts to court women voters through women-centered legislation.<sup>198</sup>

The impact of the Nineteenth Amendment was also limited by women suffrage activists themselves. After accomplishing their vote

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192. JAN DOOLITTLE WILSON, *THE WOMEN'S JOINT CONGRESSIONAL COMMITTEE AND THE POLITICS OF MATERNALISM, 1920-30*, at 19 (2007).

193. See generally *id.* (examining the Joint Committee's political campaigns over time).

194. See KERBER, *supra* note 185, at 42; Felice Batlan, "She Was Surprised and Furious": *Expatriation, Suffrage, Immigration, and the Fragility of Women's Citizenship, 1907-1940*, 15 STAN. J.C.R. & C.L. 315, 324-25 (2020) (noting that the Act provides that a woman's citizenship will not be dictated by her husband's citizenship). *But see* Leti Volpp, *Expatriation by Marriage: The Case of Asian American Women*, in FEMINIST LEGAL HISTORY 68, 72-75 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011) (finding that the Act "continued to take away U.S. citizenship for women who married a particular subset of noncitizen men").

195. See WILSON, *supra* note 194, at 50; Susan L. Waysdorf, *Fighting for Their Lives: Women, Poverty, and the Historical Role of United States Law in Shaping Access to Women's Health Care*, 84 KY. L.J. 745, 771-91 (1995-1996) (discussing the Sheppard-Towner Act as the "pioneer legislation for women's health"); J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776, 778 (1968) (noting the Women's Joint Congressional Committee's vigorous lobbying and contribution to the passage of the Sheppard-Towner Act).

196. WILSON, *supra* note 194, at 66-89 (describing the Women's Joint Congressional Committee's crusade for the Child Labor Amendment).

197. J. KEVIN CORDER & CHRISTINA WOLBRECHT, *COUNTING WOMEN'S BALLOTS: FEMALE VOTERS FROM SUFFRAGE THROUGH THE NEW DEAL* 51 (2016).

198. See *id.* ("[A]s it became clear that women's organizations would not emerge as an effective force for counter-mobilization, policy concessions dried up.").

objective, the suffrage organizations disbanded, splintering into numerous organizations with different and often competing goals.<sup>199</sup> The core group from NAWSA established the League of Women Voters, adopting a neutral, bipartisan goal to enroll and educate voters about the voting process and the issues.<sup>200</sup> Social feminists affiliated with the labor movement, like Florence Kelley of the National Consumers League, focused their efforts on working women, seeking legal reforms for worker protection laws like maximum hours and minimum wages.<sup>201</sup> Early success of this movement in the 1908 case of *Muller v. Oregon* based legal advocacy on women's need for protection due to their weakness—lesser physical stamina caused by smaller size, menstruation, and pregnancy, and their social disability caused by family and housekeeping demands.<sup>202</sup> Meanwhile, Alice Paul's National Woman's Party turned to advocacy of a new federal equal rights amendment.<sup>203</sup> And progressive feminists expanded their social agenda broadly to include activism for birth control, economic rights of profession, global peace, and socialism.<sup>204</sup>

Black women like Mary Church Terrell and Hallie Quinn Brown formed organizations to challenge the continued race-based impediments to women voting, as well as issues of lynching and Jim Crow laws.<sup>205</sup> The NWP, League, and labor women rejected overtures to work in partnership with Black women like Terrell, Brown, and Ida B. Wells-Barnett to remove racial barriers to women's voting, because,

199. See *id.* (noting that once the vote was achieved, female activists were “split sharply on a number of issues”).

200. Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the Next Logical Step*, in 100 YEARS OF THE NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN'S POLITICAL ACTIVISM 227, 231 (Holly J. McCammon & Lee Ann Banaszak eds., 2018); MONOPOLI, *supra* note 4, at 3.

201. MONOPOLI, *supra* note 4, at 25; Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 239 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

202. 208 U.S. 412, 421–22 (1908); see NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS 2* (1996) (showing how social feminists' success in *Muller* was built on women's weakness and need for protection); NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s–1990s*, at 64–68 (2015) [hereinafter WOLOCH, *A CLASS BY HERSELF*] (reviewing the arguments of the Brandeis brief in defense of the state in *Muller v. Oregon*, focusing on statistical studies of the physical differences between men and women); see also Batlan, *supra* note 203, at 239 (crediting Florence Kelley in the creation and outcome of the Brandeis brief).

203. Boisseau & Thomas, *supra* note 200, at 239.

204. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 44–49 (1987) (tracing the agenda of feminism in the early 1900s); Thomas, *supra* note 21 (defining the period of progressive legal feminism and its agenda).

205. DUBOIS, *supra* note 5, at 289–90; JONES, *supra* note 174, at 175.

Paul said, disenfranchisement of Black women was “a race, not a sex, matter and of no interest” to their women’s organizations.<sup>206</sup> Thus, soon after ratification of the Nineteenth Amendment, “it looked as though Hallie Quinn Brown and the women of the National Association of Colored Women (NACW) had been left alone to drive the next phase of the fight for women’s votes.”<sup>207</sup>

Equality feminists instead focused their work on the singular goal of an equal rights amendment.<sup>208</sup> Led by Alice Paul, they first proposed an equal rights amendment in 1921, just one year after the Nineteenth Amendment, seeking a blanket amendment that would address all of the many sex-based legal denials of right.<sup>209</sup> The idea had previously circulated among a radical progressive feminist group, the Feminist Alliance, in New York City in 1914.<sup>210</sup> A committee of thirteen women attorneys working with Paul identified over three hundred state laws denying women equal rights, including laws regarding marital property, child custody, jury duty, employment, and education.<sup>211</sup>

Harkening back to Seneca Falls, these proposals appreciated the breadth of civil rights denied to women in all institutions of state, family, and the market. The idea of the Equal Rights Amendment (ERA) was that one blanket constitutional amendment could resolve all of these questions, rather than taking up each issue separately, as the Nineteenth Amendment had done for the vote. Social feminists and labor activists, however, opposed the ERA, fearful that legal arguments

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206. *Id.* at 289; *see also* MONOPOLI, *supra* note 4, at 9 (noting that women suffragist organizations “failed to respond to the post-ratification requests of African-American suffragists”); JONES, *supra* note 174, at 179 (tracing Black women’s role in the suffragist movement and examining how they were “written out” of the Nineteenth Amendment revolution); CAHILL, *supra* note 173, at 218–19; Liette Gidlow, *More Than Double: African American Women and the Rise of a “Women’s Vote,”* 32 J. WOMEN’S HIST. 52, 58 (2020) (“Faced with disenfranchisement in the early elections after ratification, southern Black women reached out to white former suffragists to no avail.”).

207. JONES, *supra* note 174, at 175.

208. Boisseau & Thomas, *supra* note 200, at 229; MONOPOLI, *supra* note 4, at 10.

209. Boisseau & Thomas, *supra* note 200, at 229.

210. COTT, *supra* note 204, at 81.

211. Boisseau & Thomas, *supra* note 200, at 232. The lawyers’ committee was led by Burnita Shelton Matthews, who in 1949 would become the first woman judge on a federal district court, appointed to the United States District Court for the District of Columbia. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. TIMES (Apr. 28, 1988), <https://www.nytimes.com/1988/04/28/obituaries/burnita-s-matthews-dies-at-93-first-woman-on-us-trial-courts.html> [<https://perma.cc/YN3B-NTP6>].

of equality would undermine and reverse their efforts to protect women workers on grounds of gender difference.<sup>212</sup>

This animosity between labor feminists and equality feminists as to the meaning of gender equality played out in the U.S. Supreme Court as it initially considered the meaning of the Nineteenth Amendment. In *Adkins v. Children's Hospital*, the Court overturned a minimum wage law for women, holding that women were equal with men in employment and thus could not be treated differently.<sup>213</sup> This was a rejection of the Court's prior holding in *Muller v. Oregon* that woman was biologically and socially different from man, and thus "properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men."<sup>214</sup> The reversal in the *Adkins* opinion was written by the newly-appointed Justice George Sutherland, a prominent conservative who had counseled Alice Paul on suffrage and an equal rights amendment and gained attention as one of the "four horsemen" of Justices who aggressively struck down progressive Depression-era legislation.<sup>215</sup> Paul had input into the briefing for the case, advancing the position of women's formal equality with men.<sup>216</sup> The *Adkins* opinion, however, went beyond this formal equality conclusion, instead recognizing the Nineteenth Amendment as a structural reversal of women's common law disabilities and discrimination.<sup>217</sup> It held that women were emancipated from the old doctrine of "the ancient inequality of the sexes" and the need for special protection or restraint.<sup>218</sup> The Court stated:

In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to

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212. WOLOCH, A CLASS BY HERSELF, *supra* note 202, at 122; Boisseau & Thomas, *supra* note 200, at 234.

213. 261 U.S. 525 (1923); *see also* WOLOCH, A CLASS BY HERSELF, *supra* note 202, at 112–15; Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 221 (1991) (discussing Justice Sutherland's majority opinion in *Adkins*).

214. 208 U.S. 412, 422 (1908).

215. *See* WOLOCH, A CLASS BY HERSELF, *supra* note 202, at 116; Boisseau & Thomas, *supra* note 200, at 235–36; Zimmerman, *supra* note 213, at 211–13, 219; David E. Bernstein, *The Feminist "Horseman,"* 10 GREEN BAG 2D 379, 379 (2007).

216. Zimmerman, *supra* note 213, at 220–21.

217. *See* Boisseau & Thomas, *supra* note 200, at 235–36; Siegel, *supra* note 1, at 1012.

218. *Adkins v. Child.'s Hosp.*, 261 U.S. 525, 553 (1923).

say that these differences have now come almost, if not quite, to the vanishing point.<sup>219</sup>

The Court thus recognized that the Nineteenth Amendment encapsulated broad citizenship rights for women invalidating the common-law system of coverture designating women legally disabled and unrecognized.<sup>220</sup> But as to the specific ruling in *Adkins* regarding women-protective laws, the Court vacillated over the next fifteen years, upholding some and invalidating others, until it overturned *Adkins* without ever revisiting the question of the Nineteenth Amendment issue.<sup>221</sup>

Fast forwarding fifty years, formal gender equality thinking came to dominate the Supreme Court's jurisprudence. Leading thinkers like Justice Ruth Bader Ginsberg and Black lawyer and activist Pauli Murray crated an equal protection jurisprudence analogizing to race-based judicial inquiry that scrutinized formal government action that discriminated against women or men based on gender stereotype.<sup>222</sup> This legal strategy was ultimately successful, as the Supreme Court beginning in 1971 interpreted the equal protection clause to include gender discrimination.<sup>223</sup> But the "ahistorical" assumptions that gave rise to this race-gender analogy limited the legitimacy and accuracy of the subsequent sex discrimination doctrine, treating gender discrimination as the orphaned sister of Reconstruction without its own meaningful history.<sup>224</sup>

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219. *Id.*

220. See Siegel, *supra* note 1, at 1015; MONOPOLI, *supra* note 4, at 5–6, 111; Boisseau & Thomas, *supra* note 200, at 235–36.

221. Compare *Radice v. New York*, 264 U.S. 292 (1923) (upholding restrictions on women's night work), with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum wage law for women and minors), and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overturning *Adkins* and upholding minimum wage law for women). In *West Coast Hotel*, the Court upheld gendered laws for women because of "the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances." 300 U.S. at 398. Congress ultimately answered the gender question by extending workplace protections to all workers in the Fair Labor Standards Act of 1938 (FLSA). See *United States v. Darby*, 312 U.S. 100, 122–23 (1941) (upholding FLSA).

222. See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 14–20, 63–64 (2011); Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 3, 5 (2021); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 784 (2004). See generally ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY 342–45 (2017).

223. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 679 (1973); *Craig v. Boren*, 429 U.S. 190, 192 (1976).

224. Siegel, *supra* note 1, at 966, 1022.

Thus, the Nineteenth Amendment has been legally confined to its narrow voting topic. Under this “thin” construction of the amendment, it is read most literally, as not granting a “right” to vote, but “simply prohibiting the states or the federal government from using sex as a criterion for voter eligibility.”<sup>225</sup> It does not provide a guarantee of women’s voting that might reach interrelated barriers such as race. It does not necessarily reach related political rights of jury service or political office. Nor does it reach other public rights such as employment or education. This thin construction resulted from the advocates’ abandonment of the amendment shortly after its adoption, the failure to pass enforcing legislation, and from the narrowed constructions given the amendment by state courts.<sup>226</sup>

Yet even under this narrow, literal construction, the Nineteenth Amendment has not been applied to clear cases of gender barriers to voting. In 1937, the Supreme Court upheld a gendered poll tax exempting women in *Breedlove v. Suttles*.<sup>227</sup> A white man challenged the Georgia poll tax, intended like most poll taxes to exclude Black voters, as violative of the Nineteenth Amendment because it exempted women who did not register to vote.<sup>228</sup> The Court upheld the statute on gendered grounds, justifying the exemption “[i]n view of burdens necessarily borne by them for the preservation of the race” and because “[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him.”<sup>229</sup> “The issue of gender discrimination in *Breedlove* was left intact.”<sup>230</sup>

In 1977, women challenged an Ohio state practice of automatically cancelling a woman voter’s registration at marriage.<sup>231</sup> The assumption was that a married woman changed her name, thus invalidating her prior registration in order to prevent voter fraud of double voting.<sup>232</sup> In striking down the practice in *Ball v. Brown*, the district court articulated contradictory conclusions as to the legal import of the Nineteenth Amendment.<sup>233</sup> It rejected broader jurisdiction and

225. MONOPOLI, *supra* note 4, at 2.

226. *Id.* at 1–3.

227. 302 U.S. 277, 279–80 (1937); *see also* MONOPOLI, *supra* note 4, at 85–86.

228. *Breedlove*, 302 U.S. at 279–80; *see* Hasen & Litman, *supra* note 17, at 34–37 (discussing case).

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

230. Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women’s Poll Tax Repeal Movement After the Nineteenth Amendment*, 73 NOTRE DAME L. REV. 839, 887 (1998).

231. *Ball v. Brown*, 450 F. Supp. 4, 9–10 (N.D. Ohio 1977).

232. *Id.*

233. *Id.* at 7–8. *Contra* *People ex rel. Rago v. Lipsky*, 63 N.E.2d 642 (Ill. App. 1945)

class action status for the Nineteenth Amendment claim, yet also held that it was incorporated into the Fourteenth Amendment's equal protection clause.<sup>234</sup>

More recently, in 2020, a Florida district court upheld a pay-to-vote law against constitutional challenge on many grounds, including the Nineteenth Amendment. In considering the felon voter disenfranchisement law, the federal courts further limited the legal scope of the Nineteenth Amendment.<sup>235</sup> Plaintiffs in *Jones v. DeSantis* challenged a state law requiring former felons to pay all of their outstanding fines before being eligible to vote, even if they showed they could not due to poverty.<sup>236</sup> In addition to claims under the poll tax amendment and the Fifteenth Amendment, plaintiffs alleged that the law had a disparate impact on women due to gender discrimination in employment and education and disproportionate family caregiving responsibilities, all making it harder for them to earn money to pay off the fines.<sup>237</sup> In considering the Nineteenth Amendment claim, the federal appellate court restricted the amendment by adopting a "but-for-causation" test limiting the scope of the amendment even in voting cases.<sup>238</sup> "The . . . Nineteenth Amendment [is] best understood to forbid any voter qualification that makes . . . sex a but-for cause of the denial of the right to vote" meaning only, according to the court, that sex cannot be a qualification for voting.<sup>239</sup> The federal district court had also limited the legal test for the Nineteenth Amendment by imposing a heightened legal standard of discriminatory purpose or intent due to gender, which it did not find present in the law targeted at felons generally.<sup>240</sup> After tightening the legal standards, the trial court then held that the real concern was that "the pay-to-vote requirement overall has a disparate impact on men, not women" because there are more men than women who are felons and thus governed by the law.<sup>241</sup>

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(upholding cancellation of voting registration upon marriage for women, and not mentioning the Nineteenth Amendment).

234. *Ball*, 450 F. Supp. at 8 ("To the extent that the nineteenth amendment provides a further guarantee of the right to vote, that guarantee is encompassed within the fourteenth amendment guarantee of equal protection under laws prohibiting state action which invidiously encroaches upon the right to vote.").

235. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla.) (invalidating law on other constitutional grounds), *rev'd sub nom. Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

236. *Id.* at 1203.

237. *Id.* at 1239–40.

238. *Jones*, 975 F.3d at 1042.

239. *Id.*

240. *Jones*, 462 F. Supp. 3d at 1240.

241. *Id.*

Reading the Nineteenth Amendment this way, using an increasingly thin construction, reinforces the assumption that the Nineteenth Amendment is not legally meaningful. Legal scholars, however, argue for a more robust, “thick” construction of the Nineteenth Amendment that would extend the constitutional law more broadly to rights of gender equality.<sup>242</sup> This thick construction would recognize the Nineteenth Amendment as a complete restructuring of the common law of coverture, which would then recognize a right to systemic, gender equality in all aspects of the civil law. Some scholars support this robust construction by a synthetic reading of the Nineteenth and the Fourteenth Amendments, incorporating the Nineteenth through the equal protection clause.<sup>243</sup> Others argue for a historical, contextual interpretation of the Nineteenth, which would recognize the broad origins of its meaning in the context of Seneca Falls, the Reconstructed Constitution, and contemporaneous judicial interpretation in *Adkins*.<sup>244</sup> Read this way, the Nineteenth Amendment would be far from irrelevant.

#### CONCLUSION

Our collective memory and interpretation of the Nineteenth Amendment remains blurred, to the detriment of women and their longstanding demands for equality. At the Women’s Rights National Historical Park, located in Seneca Falls, a small museum attempts to trace the entirety of the movement for women’s rights in a handful of rooms.<sup>245</sup> A granite waterfall outside the museum streams water over the engraved words of Stanton’s *Declaration of Sentiments*.<sup>246</sup> The museum is much smaller than the movement or its import demand. For the vote was only part of the story, part of the larger movement for what women demanded of their equality, opportunity, and freedom.

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242. See Siegel, *supra* note 1, at 1022; MONOPOLI, *supra* note 4, at 2–3, 7–8; Hasen & Litman, *supra* note 17; Siegel, *Why the Nineteenth Amendment Matters Today*, *supra* note 17; Hodes, *supra* note 20, at 26.

243. Siegel, *supra* note 1, at 1022; Hasen & Litman, *supra* note 17, at 39; Siegel, *Why the Nineteenth Amendment Matters Today*, *supra* note 17, at 266.

244. Siegel, *supra* note 1, at 965–68; MONOPOLI, *supra* note 4, at 141–42; Hodes, *supra* note 20, at 26 (stating that the Nineteenth Amendment can be interpreted as an “emancipation proclamation which extends the guarantees of all three Civil War Amendments to all women”).

245. *Declaration Park and Waterwall*, NAT’L PARK SERV., <https://www.nps.gov/woori/learn/historyculture/declaration-park-and-waterwall.htm> [https://perma.cc/YTQ8-854Z].

246. *Id.*