A "NEW" NEW DEPARTURE

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ABSTRACT

In the wake of enactment of the Fourteenth and Fifteenth Amendments, women's rights activists embarked on an exercise in popular constitutionalism known as "the New Departure." Frustrated by the failure of Congress to include women in the Reconstruction Amendments, suffragists turned to a strategy based, in part, upon republican theory. They argued that women had an inherent right to vote grounded in natural law and in their status as citizens of the United States under the Fourteenth Amendment. They operationalized that theory by engaging in mass-voting events and were prosecuted for illegal voting. These activist efforts came to an end in 1875 when the U.S. Supreme Court rejected that theory in Minor v. Happersett. This paper situates the New Departure at the beginning of a historical continuum that includes two subsequent periods in feminist legal history—the Progressive Era and the period which began in the wake of the Court's decision in Dobbs v. Jackson Women's Health. It explores how women's rights activists in each of these three periods have rejected originalism as an interpretive methodology that, by its very terms, has a subordinating effect on women's constitutional status. Such activists have proposed alternative interpretive methods which centered women and their legal, economic, and social status. Feminist constitutional advocacy in the post-Dobbs period continues in this tradition by resisting the dominant interpretive method and arguing for a "new" New Departure toward interpretive methods which elevate rather than subordinate women's constitutional status. Exploring feminist constitutional strategies across time illuminates a history and tradition that may have a generative effect for current efforts to restore the right to abortion and establish a broader reproductive justice.

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INTRODUCTION

The United States Supreme Court's decision in *Minor v. Happersett* marked the end of a brief but remarkable period in American history.[1] In the wake of enactment of the Fourteenth and Fifteenth Amendments to the United States Constitution, women's rights activists embarked on an exercise in popular constitutionalism known as "the New Departure." Frustrated by the failure of Congress to include women in the Reconstruction Amendments, suffragists turned to a strategy grounded in the theory that women had an inherent or natural right to suffrage as citizens of the United States. Suffragists operationalized this constitutional theory by simply registering and voting. Their efforts were met with prosecution for illegal voting and voter fraud, and Susan B. Anthony's trial on such charges garnered national attention in 1873.

These activist efforts came to an end with the Supreme Court's decision in *Minor*. Missouri suffragist Virginia Minor, represented by her husband Francis Minor, brought suit against St. Louis elections registrar, Reese Happersett, for his refusal to register Virginia. The Minors appealed an adverse decision of the circuit court to the Missouri Supreme Court, and then to the U.S. Supreme Court. In 1875, a unanimous Court rejected the theory that a woman's right to vote was an attribute of national citizenship. It affirmed the state court decision below, ending the period known as the New Departure and shifting the movement's focus to a federal suffrage amendment.

This paper situates the current constitutional period, which began in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* in June 2022, on a historical continuum that begins one hundred fifty years ago with the New Departure.[2] It highlights three distinct periods where women's rights activists played significant roles as constitutional actors: the New Departure, the Progressive Era, and the post-*Dobbs* period. Making connections among modes of constitutional interpretation deployed by women's rights activists in each of these periods

1. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).
2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

may have a generative effect for current efforts to restore the right to abortion, first recognized by the Court in *Roe v Wade*.[3] Exploring how traditional interpretive methods like formalism or originalism have historically tended to constrain women's status in our constitutional order may also help feminists move beyond *Roe*, toward a broader reproductive justice.

The similarities among these three periods in the nineteenth, twentieth, and twenty-first centuries include elevating or restoring women to full citizenship. In each period, activists have grappled with interpretations of the Fourteenth Amendment. And they have had to navigate a separate sexual spheres conception of the social order, exemplified by Justice Bradley in his 1873 concurrence in *Bradwell v. State*.[4] In each constitutional period, activists also navigated issues of federalism and whether a woman's right to self-determination—political, economic, or reproductive—should be a state legislative determination.[5] Finally, New Departure activists argued for a new kind of constitutional reasoning that took into account the changed social, economic, and legal status of women in post-Civil War America. They pushed against the formalism or originalism deployed by the Supreme Court in reasoning about the constitutional status of women. In the Progressive Era, social feminists continued this critique of formalism, arguing in favor of a new form of interpretive method—one that took into account empirical evidence of the social, economic, and legal conditions of women. And in the current post-*Dobbs* period, feminist advocates have engaged in similar arguments against originalism as an interpretive method.[6] If we situate that move in a broader continuum which begins with the New Departure, it demonstrates that today's feminist scholars and activists may not prevail in the short-term, but they may win a longer constitutional game.

This paper proceeds in three parts. Part I describes the Supreme Court's decision in *Dobbs* and the consequent search for a constitutional path forward. It then reviews a similar search in the nineteenth century by women's rights activists in the wake of the Reconstruction Amendments. Those activists understood securing suffrage to be a significant constitutional move in eliminating what Elizabeth Cady Stanton described

3. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 302.

4. Bradwell v. State, 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring); *see infra* notes 71, 98 and accompanying text (discussing *Bradwell* and *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

5. *See* ELLEN CAROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS 108 (1998) (citing 3 HISTORY OF WOMAN SUFFRAGE: 1876–1885 at 80–92 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Josyln Gage eds., 1886).

6. See *infra* note 155 for a description of the different versions of originalism at issue in the different periods and challenges to assertions that the *Minor* Court or the *Dobbs* Court were actually using originalism at all.

as "an oligarchy of males."[7] They advocated for an "evolutionary" interpretation of the Constitution's meaning in the wake of the Fourteenth Amendment's ratification.[8] The Supreme Court's decisions in *Bradwell v. State* and *Minor v. Happersett* in the mid-nineteenth century were a rejection of such a "living constitutionalism" which would have taken into account women's evolving political, economic, and social status. Part II highlights a second period on the historical continuum of women activists in the Progressive Era continuing to advocate for a living constitutionalism decades after the end of the New Departure. Their "sociological jurisprudence" was an interpretive method which took into account empirical evidence around the social, legal, and economic conditions of women. That method prevailed in *Muller v. Oregon* in the early twentieth century.[9] Part III highlights a third period on the continuum in the twenty-first century, today's post-*Dobbs* period where scholars and activists are once again having to contend with a resurgence of the subordinating interpretive method of originalism. This Part argues that, in doing so, they are continuing in a feminist tradition of advocating for a constitutionalism which takes into account the lived experiences of women and the impact that the choice of interpretive methods may have on women's constitutional status.

Viewing these constitutional periods on a continuum demonstrates how interpretive methods have been used to limit the scope of women's citizenship and reify subordinating legal regimes like coverture. It also foregrounds the significant contributions of American women to the development of interpretive methods which center women's lived experiences and their evolving status in our constitutional order. Those contributions during the New Departure took decades to come to fruition. In the Progressive Era, interpretive methods did shift to modalities which took into account women's lived experiences. Yet, we find ourselves in the post-*Dobbs* period with a resurgence in interpretive methods like originalism which ignore the substantial history of women as constitutional actors and their status as full citizens. The most hopeful view is that

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7. Elizabeth Cady Stanton, Self-Government the Best Form For Self-Development (March 5, 1884), *in* NAT'L WOMAN SUFFRAGE ASS'N, REPORT OF THE SIXTEENTH ANNUAL WASHINGTON CONVENTION, MARCH 4TH, 5TH, 6TH, 7TH, 1884, WITH REPORTS OF THE FORTY-EIGHTH CONGRESS 66 (Elizabeth Cady Stanton & Susan B. Anthony eds., 1884), https://tile.loc.gov/storage-services/service/rbc/rbnawsa/n8341/n8341.pdf [https://perma.cc/89T9-BA9L] ("The disfranchisement of one-half the people . . . mak[es] our government an oligarchy of males, instead of a republic of the people . . . .").

8. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution*,*"* 76 N.Y.U. L. REV. 1456, 1460 (2001) ("[T]he suffragists took a normative position, forcefully challenging originalist reasoning while promoting an evolutionary method of interpretation now recognizable as living constitutionalism.").

9. Muller v. Oregon, 208 U.S. 412 (1908).

interpretive cycles ebb and flow. Feminist constitutional advocacy in the post-*Dobbs* period is once again having to resist the dominant interpretive method and to push for a "new" New Departure toward a shift to interpretive methods which elevate rather than subordinate women's constitutional status.

I. THE NEW DEPARTURE

In June 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,[10] striking down a previously recognized constitutional right for the first time in the Court's history.[11] That constitutional right—the right to abortion—had been established fifty years before in *Roe v. Wade*[12] and subsequently reaffirmed in *Planned Parenthood v. Casey*.[13] In the wake of *Dobbs*, feminist legal scholars have been searching for constitutional paths forward. This effort is reminiscent of woman suffragists' efforts during the New Departure to find such a path forward in the wake of the ratification of the Reconstruction Amendments.

Deploying a purportedly originalist interpretive method, in conjunction with a "history and tradition" test, the *Dobbs* majority explicitly rejected the theory that the right to abortion was grounded in the due process clause of the Fourteenth Amendment.[14] It also rejected the argument that the equal protection clause of the Fourteenth Amendment required the Court to recognize the right to abortion.[15] And it hypothesized that such a right would

10. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

11. *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CTR. FOR REPROD. RTS. (June 24, 2022), https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/ [https://perma.cc/T23V-LTUW].

12. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 302.

13. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

14. *Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' The right to abortion does not fall within this category." (citation omitted)).

15. *Id.* at 236–37 ("We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.' And as the Court has stated, the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health

not be sustained as a matter of national citizenship under the Privileges or Immunities Clause, were that claim to be made.[16] The majority concluded that abortion was essentially a matter of states' rights and that it was:

> time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." . . .
>
> . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[17]

Contemporary feminist scholars and advocates disagree. They argue that the Fourteenth Amendment is, in fact, a primary constitutional source of a woman's right to reproductive liberty.[18] The Fourteenth Amendment was also the constitutional foundation of nineteenth-century efforts to expand the scope of women's citizenship. In the wake of the Civil War, women's rights activists had lobbied Congress for universal suffrage through the American Equal Rights Association.[19] Not only did they fail in that effort, but many subsequently felt betrayed when the final text of the Fourteenth Amendment included the word "male" in the Constitution for the first time.[20] As a result, activists like Elizabeth Cady Stanton and Susan B. Anthony formed the National Woman Suffrage Association (NWSA) which developed a constitutional strategy for moving forward.[21] That strategy was

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and safety measures." (alteration in original) (footnote omitted) (citation omitted) (first quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974); and then quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993))).

16. *Id.* at 240 n.22.

17. *Id.* at 232, 256 (citation omitted).

18. *See, e.g.*, Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents at 5, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4340072 ("The right to make decisions about whether to end a pregnancy is grounded in both the Due Process and Equal Protection Clauses [of the Fourteenth Amendment].").

19. *See* DUBOIS, *supra* note 5, at 92 ("[T]hey organized the American Equal Rights Association with the goal of incorporating black suffrage and woman suffrage into the overarching demand for universal suffrage.").

20. Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2634 (2021) ("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. Stanton felt so betrayed by her former colleagues that she left the abolition movement, and she and [Susan B.] Anthony formed their own National Woman Suffrage Association (National Association) in May 1869." (footnote omitted)).

21. *See* DUBOIS, *supra* note 5, at 116, 134 n.5 (describing the split between NWSA and the American Woman Suffrage Association (AWSA) founded by Lucy Stone, Frances Ellen Watkins Harper, and others, that continued to support the Fifteenth Amendment). NWSA is most associated with

grounded in the theory that suffrage was inherent in citizenship. Thus, the Fourteenth Amendment's provision making "[a]ll persons born or naturalized in the United States"[22] citizens should be understood as an implicit affirmation that women had a right to vote which could not be abrogated by the states.

NWSA members argued that the most important right in terms of full and equal citizenship—the right to vote—was deserving of "the honor of national protection."[23] They viewed suffrage as central to self-governance and self-determination. Elizabeth Cady Stanton characterized the right to self-govern as a natural right that preceded constitutions, and she connected the ballot to republicanism.[24] In her Congressional testimony, she argued that "the right of Suffrage in a republic means self-government . . . . The ballot is the scepter of power in the hand of every citizen."[25]

The prevailing model of citizenship in the mid-nineteenth century separated civil, political, and social rights.[26] Thus, the theory was that women could be citizens without being afforded political rights. While this may seem unusual to contemporary Americans, it was a common understanding of citizenship during Reconstruction.[27] To suffragists—who had supported the male Radical Republicans in their push for the Thirteenth and Fourteenth Amendments—the separation of civil and political rights in terms of citizenship was deeply problematic. As noted above, voting secured the self-government essential to self-determination, which women's rights activists argued required both political and civil rights,

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support of a federal woman suffrage amendment and AWSA with a state-by-state approach. But DuBois notes that their positions had been the opposite in the early days of the split, and that "[t]he constitutional issues raised by the New Departure became, like virtually every other political issue, an element in the American/National split." *Id.* at 134 n.5. Note that Stanton and Anthony's rhetoric took a decidedly racist turn at this point in the woman suffrage movement that continued through ratification of the Nineteenth Amendment in 1920. *See* LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 6 (2015) ("Particularly in their 1868 newspaper campaign against the Fifteenth Amendment, which implicitly permitted discriminating against voters on the basis of sex, the two activists wielded racist arguments . . . .").

22. U.S. CONST. amend. XIV, § 1.

23. *See* Mary Ann Shadd Cary, Speech to Judiciary Committee re: The Rights of Women (Jan. 1872) (transcript available in Recovering Democracy Archives, University of Maryland), https://recoveringdemocracyarchives.umd.edu/rda-speech/?ID=2309 [https://perma.cc/AK8Z-8SXD] (testimony of Black abolitionist and suffragist, Mary Ann Shadd Cary, submitted to the House Judiciary Committee in 1872).

24. *See* Elizabeth Cady Stanton, Suffrage: A Natural Right (Feb. 1, 1894), *in* THE OPEN COURT (1894), https://www.loc.gov/item/mss412100117 [https://perma.cc/S2FM-2APQ].

25. Stanton, *supra* note 7, at 64.

26. Jack M. Balkin, Plessy, Brown*, and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1699 (2005) (citing Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) ("[D]istinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision.")).

27. *Id.*

including reproductive self-determination in the form of "voluntary motherhood."[28] One of their foundational constitutional arguments during the New Departure was that women's fundamental rights should be protected by the federal Constitution and the national government from infringement by the states as a matter of federalism.[29] And in the wake of the Civil War, suffrage and its connection to republican government "began to play a more central role in the movement."[30]

As participants in the abolition movement, women's rights activists had embraced demands for universal suffrage which would enfranchise all adult citizens regardless of race or sex. When the Civil War ended, they began to testify for suffrage before various Congressional Committees. Steeped in ideas around universal suffrage and republicanism as a result of their abolition work, their arguments were grounded in the consent of the governed. For example, Stanton emphasized that self-government was central to republican theory and that, in turn, meant that citizens were able to choose their representatives. Thus, the ballot was the measure of "the true political status of the people in a republic."[31]

Their arguments included a focus on taxation without representation as well. Suffragist and abolitionist Mary Ann Shadd Cary argued that women were "[t]axed, and governed in other respects, without their consent, [and so] they respectfully demand[ed], . . . that they may be invested with the right to vote as do men, [so] that thus as in all Republics indeed, they may in future, be governed by their own consent."[32]

It was in this intellectual context that suffragists developed the two-pronged constitutional theory which was the underpinning of the New Departure. Its first pillar was Stanton's argument that suffrage was a natural right held by the people prior to the Constitution and it could therefore not be abrogated by states. The second pillar was proposed by Francis and

28. *See* Reva B. Siegel, Essay, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 463–64 (2020) ("In the 1870s, suffragists regularly asserted claims for . . . voluntary motherhood . . . . [which they viewed as] the right 'to decide when she shall become a mother, how often & under what circumstances . . . .'" (footnotes omitted)).

29. The nineteenth-century women's rights movement was initially focused on dismantling the legal regime of coverture and suffrage was considered a radical demand. Its inclusion in the demands made by those who gathered at Seneca Falls in 1848 was controversial. *See* TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 8 (2016). Note that while Seneca Falls is generally identified as the beginning of the nineteenth-century women's rights movement, some scholars date the movement to earlier historical points. *See, e.g.*, LESLIE BUTLER, CONSISTENT DEMOCRACY: THE "WOMAN QUESTION" AND SELF-GOVERNMENT IN NINETEENTH-CENTURY AMERICA 14 (2023) (dating the first published query about expanding the rights of women to an 1838 article titled "The Woman Question" by Samuel Osgood in the *Western Messenger*, a "reformist Unitarian journal" of the time).

30. *See* Paula A. Monopoli, *The Nineteenth Amendment and* Dobbs, 15 CONLAWNOW 227, 237 (2024).

31. Stanton, *supra* note 7, at 62.

32. Shadd Cary, *supra* note 23.

Virginia Minor and it built upon the recently ratified Fourteenth Amendment. That amendment defined citizenship and thus—the Minors argued—implicitly extended suffrage to all who met that definition. Citizenship was both a source of that right and a trigger for national protection of the right. The two strands of argument would require the Supreme Court to adopt a new interpretive method, one that included consideration of the changed social, economic, and legal status of women since the original Constitution had been ratified.

Although the enactment of the Fourteenth Amendment "created what looked like a strategic dead end for woman suffrage," the Minors argued that the Fourteenth Amendment, read together with the protection of voting rights by the national government pursuant to the then-pending Fifteenth Amendment, should be understood to make voting a matter of national citizenship.[33] They read the preamble to the Constitution to establish the principle that "popular sovereignty preceded and underlay constitutional authority."[34] The Constitution itself established federal supremacy and, read in light of Supreme Court precedent like *Corfield v. Coryell*[35] which had interpreted the scope of the original privileges and immunities clause, these various provisions and amendments as a whole should be understood to make suffrage a matter of national citizenship.[36]

The Minors first published their theory in the NWSA journal *The Revolution* in October 1869. It became the foundation for a campaign of civil disobedience characterized by mass-voting events.[37] Even before their letter appeared in 1869, women had begun to try to vote.[38] For example, two hundred women in Vineland, New Jersey in 1868 went to the polls in an effort to have their ballots counted.[39] Historians have argued that such events were evidence "that the New Departure grew out of a genuinely popular political faith."[40] And Elizabeth Cady Stanton turned from her efforts to enact universal suffrage by Congressional action to focus on this novel constitutional argument.[41]

33. DUBOIS, *supra* note 5, at 98.
34. *Id.*
35. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
36. DUBOIS, *supra* note 5, at 98–99.
37. *Id.* at 119.
38. *Id.* ("[T]he first examples of women's direct action voting occurred in 1868 and 1869, before the Minors made their formal constitutional argument . . . .").
39. *Id.*
40. *Id.*
41. *See* Ann D. Gordon, *Many Pathways to Suffrage, Other Than the 19th Amendment*, 11 CONLAWNOW 91, 95–96 (2020) (noting Stanton's support for Congressional legislation introduced as H.R.J. Res. 15, 41st Cong. (1869), that would have provided an affirmative right to vote).

The New Departure activism took place in multiple venues, including in Congress, in the courts, and in polling precincts.[42] Suffragists made natural rights and constitutional arguments to Congressional committees in seeking legislative declarations of woman suffrage.[43] They tried to register to vote and to actually vote, despite state laws that made them ineligible, in order to generate test cases in state and federal courts.[44] Two of the most prominent efforts in Congress included an effort to have Congress pass declaratory legislation affirming woman suffrage during which Victoria Woodhull and Elizabeth Cady Stanton gave Congressional testimony.[45] Those efforts also included a movement to enact suffrage in the District of Columbia—an effort for which Stanton and Mary Ann Shadd Cary both submitted testimony.[46]

In the wake of Woodhull's testimony, the House Judiciary Committee issued a significant report on the constitutionality of woman suffrage in 1871.[47] The Majority and Minority views of the Committee encapsulated the disparate views of the time, reflecting two very different understandings of constitutional interpretation. The Majority's view rejected the idea that the Constitution protected woman suffrage from being denied or abridged by the states. The author of the Majority view was Representative John Bingham, a primary architect of Section One of the Fourteenth Amendment.[48] This view reflected a narrow, separate sexual spheres view of women in the constitutional order.[49] States could define the scope of women's citizenship differently from that of men and the new

42. *See supra* notes 38–41 and accompanying text.

43. *See infra* notes 45–51 and accompanying text.

44. *See infra* notes 52–61 and accompanying text.

45. *See* Victoria C. Woodhull, The Memorial of Victoria C. Woodhull, to the Honorable the Senate and House of Representatives of the United States in Congress Assembled, Respectfully Showeth [Regarding Women Voting] (Dec. 19, 1870) (transcript available in the Library of Congress), https://tile.loc.gov/storage-services/service/rbc/rbpe/rbpe12/rbpe128/12800900/12800900.pdf [https://perma.cc/RK7V-2LQQ]; Victoria C. Woodhull, Address to the Judiciary Committee of the U.S. House of Representatives (Jan. 11, 1871) (transcript available in the Archives of Women's Political Communication, Iowa State University), https://awpc.cattcenter.iastate.edu/2020/12/15/address-to-the-judiciary-committee-of-the-u-s-house-of-representatives-jan-11-1871/ [https://perma.cc/WP9FFHW7]; *see also* Winkler, *supra* note 8, at 1483 ("[Elizabeth Cady] Stanton's appearance before the Senate Committee on the District of Columbia was the first attempt to bring evolutionary constitutionalism into a government forum.").

46. *See* Shadd Cary, *supra* note 23.

47. H.R. REP. NO. 41-22, pt. 1 (1871).

48. *12.5 Primary Source: John Bingham, One Country, One Constitution, One People (1866)*, NAT'L CONST. CTR., https://constitutioncenter.org/education/classroom-resource-library/classroom/12.5-primary-source-john-bingham-one-country-one-constitution-one-people-1866 [https://perma.cc/UC5W-DWZW].

49. *See* DUBOIS, *supra* note 5, at 32 ("Adult women remained almost entirely within the private sphere, defined politically, economically, and socially by their familial roles. Thus, the public sphere became man's arena; the private, woman's. This gave the public/private distinction a clearly sexual character. This phenomenon [is] canonized as the nineteenth-century doctrine of sexual spheres . . . .").

Reconstruction Amendments provided no national protection from such disparate treatment. It remained a matter of states' rights.

The Minority view was authored by Representatives William Loughridge and Benjamin Franklin Butler.[50] Their lengthy dissent lays out the constitutional argument that women not only had the right to suffrage, but the federal government had the authority to protect that right from being abridged by the states. Their minority report reveals that a robust view of women's rights grounded in natural rights and constitutional law existed in Congress during debates around the Reconstruction Amendments. It demonstrates that there was a small but important counter to the thinner, separate spheres view of women's role in the constitutional order embraced by a majority of Congress and subsequently endorsed by the Supreme Court in *Bradwell* and *Minor*.

One of the most interesting aspects about the Majority report is the juxtaposition of Bingham's views on women's constitutional status with his view of the status of men—the latter grounded in a conception of a citizenship that included both political and civil rights. His understanding of the Fifteenth Amendment was that it ensured political rights for formerly enslaved men, extending national protection to those rights. But he saw no similar right in women—presumably Black or White.

What may be most remarkable to us today is not the Bingham/Bradley separate spheres view but the Loughbridge/Butler view. It demonstrates that there were powerful men—albeit a minority—who were significant political actors on the national stage who made capacious constitutional arguments around women having the right to vote as a matter of natural rights and constitutional law. The existence of that view is rarely, if ever, acknowledged in contemporary discussions of Reconstruction.[51]

The New Departure's emphasis on popular constitutionalism and civil disobedience in registering and voting despite resistance was amplified by

> [t]he passage of the Enforcement Act to strengthen the Fifteenth Amendment in May 1870 [which] seems to have encouraged many more women—in California, New Hampshire, Michigan, and elsewhere—to regard the right to vote as already theirs. That year

50. H.R. REP. NO. 41-22, pt. 2 (1871).

51. While some scholars have discussed the Butler/Loughridge dissent, they have concluded that while some Radical Republicans in Congress during this period believed that the Fourteenth Amendment was meant to include political rights, even they would have taken the position that those rights were not intended to extend to women. *See* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1263–64 (2000). For a recent and extensive discussion of the Loughridge dissent, see Gerard N. Magliocca, Essay, *"Right in Theory, Wrong in Practice": Women's Suffrage and the Reconstruction Amendments*, J. AM. CONST. HIST. (forthcoming 2025).

> black women went to the polls in South Carolina, encouraged to do so by federal government agents.[52]

This movement, with its tactical use of civil disobedience including voting and withholding taxes,[53] resulted in the criminal trials of women like Susan B. Anthony for illegal voting in Rochester, New York,[54] as well as lawsuits by women like Sara Spencer and Sarah Webster in the District of Columbia[55] and Virginia Minor in St. Louis, Missouri.[56] Anthony was convicted, and Spencer, Webster, and Minor's constitutional arguments did not prevail. But much as these suffragists developed their arguments by petitioning Congress to pass declaratory acts protecting woman suffrage, they used litigation to develop them as well.

Sara Spencer and Sarah Webster's petition in the courts of the District in 1871 was centered on the idea of suffrage as both a natural and a constitutional right.[57] Their lawyers, Francis Miller and Albert Riddle made these arguments to Congressional committees and in the Supreme Court of the District of Columbia.[58] They reiterated the arguments that suffrage was an inherent right of citizenship and that women had clearly been declared citizens by Section One of the Fourteenth Amendment.[59] In so doing, they were in essence arguing for an alternate constitutional interpretation of that amendment. But the District of Columbia Supreme Court rejected their interpretive approach, citing concerns about the potentially expansive effect it would have and the "political profligacy and violence verging upon anarchy" that the recent expansion of the right to vote to Black men had produced.[60] The court also noted confusion about Spencer and Webster's interpretive approach:

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52. DUBOIS, *supra* note 5, at 99–100.

53. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 147 (rev. ed. 2009) (describing the tax protest of suffragist sisters, Abby Hadassah Smith and Julia Evelina Smith in 1869).

54. AN ACCOUNT OF THE PROCEEDINGS ON THE TRIAL OF SUSAN B. ANTHONY ON THE CHARGE OF ILLEGAL VOTING AT THE PRESIDENTIAL ELECTION IN NOV., 1872, AND ON THE TRIAL OF BEVERLY W. JONES, EDWIN T. MARSH AND WILLIAM B. HALL, THE INSPECTORS OF ELECTIONS BY WHOM HER VOTE WAS RECEIVED (1874), https://www.loc.gov/item/97187514 [https://perma.cc/KGQ2-Y6NX].

55. J.O. CLEPHANE, SUFFRAGE CONFERRED BY THE FOURTEENTH AMENDMENT. WOMAN'S SUFFRAGE IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, IN GENERAL TERM, OCTOBER, 1871. SARA J. SPENCER VS. THE BOARD OF REGISTRATION, AND SARAH E. WEBSTER VS. THE JUDGES OF ELECTION. ARGUMENT OF THE COUNSEL FOR THE PLAINTIFFS. WITH THE OPINIONS OF THE COURT (1871), https://www.loc.gov/item/39023154 [https://perma.cc/L94K-KJFA].

56. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

57. CLEPHANE, *supra* note 55, §§ I, III.

58. FRANCIS MILLER, ARGUMENT BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES UPON THE PETITION OF 600 CITIZENS ASKING FOR THE ENFRANCHISEMENT OF THE WOMEN OF THE DISTRICT OF COLUMBIA (1874), https://www.loc.gov/item/07033363/ [https://perma.cc/9P7K-ZHXT].

59. CLEPHANE, *supra* note 55, §§ I, III.

60. KEYSSAR, *supra* note 53, at 146.

> We do not understand that it is even insisted in argument that authority for the exercise of the franchise is to be derived from law. The position taken is, that the plaintiffs have a right to vote, independent of the law; even in defiance of the terms of the law. The claim, as we understand it, is, that they have an inherent right, resting in nature, and guaranteed by the Constitution in such wise that it may not be defeated by legislation.[61]

In each of these venues, New Departure activists wove various strands of argument together. They "built on these influences to craft a distinctive interpretive strategy, mixing a critique of originalism . . . with an explicit demand to interpret the Constitution to meet current societal conditions."[62] The Minors' argument has been described as textualist in that they asserted that the text of the Fourteenth Amendment should be read to protect suffrage as a right of national citizenship for all citizens, including women.[63] Elizabeth Cady Stanton and fellow NWSA suffragists added an evolutionary dimension to the Minors' textualist argument.[64] Stanton's 1872 testimony to the Senate Judiciary Committee illustrated this idea that the legal status of women had evolved since the Founding and their elevated status should be considered in interpreting the Fourteenth Amendment. Stanton asserted that everyone agreed "all persons" in Section One of the Fourteenth Amendment included both men and women as citizens. She went on to argue that:

> Women pre-empt land; women register ships; women obtain passports; . . . women pay taxes . . . . In some States, even married women can make contracts, sue and be sued, and do business in their own names; in fact, the old Blackstone idea that husband and wife are one, and that one the husband, received its death blow twenty years ago, when the States of New York and Massachusetts passed their first laws securing to married women the property they inherited in their own right.[65]

Adam Winkler has argued that New Departure suffragists laid the foundation for "the emergence of evolutionary constitutionalism as the dominant form of [American] constitutional interpretation."[66] They introduced "[m]any of the elements currently associated with the notion of

61. CLEPHANE, *supra* note 55, at 69.
62. Winkler, *supra* note 8, at 1459.
63. *Id.* at 1476.
64. *Id.*
65. Elizabeth Cady Stanton, Speech by Mrs. Stanton to Gentlemen of the Judiciary Committee (Jan. 10, 1872), *in* 2 HISTORY OF WOMAN SUFFRAGE: 1861–1876, at 506, 507 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881).
66. Winkler, *supra* note 8, at 1523.

a living Constitution."[67] Winkler includes among these elements a critique of originalism, a consideration of social changes in women's status and capacities, and reading constitutional text with "reference to [its] deeply embedded principles, rather than its literal wording or traditional application."[68] I would extend Winkler's argument that these suffragists laid the foundation for an evolutionary constitutionalism even further. This constitutional move also reflected a nascent feminist or gender constitutionalism. New Departure suffragists were effectively proposing a mode of constitutional reasoning which considered the impact on women of one interpretation over another when they argued for such reasoning to take into account social, economic, and legal changes in women's status.[69]

The Supreme Court's 1875 decision in *Minor v. Happersett* marks the end of the New Departure and a pivot toward enactment of a federal suffrage amendment. However, some scholars have noted that the Supreme Court's earlier decisions in *Bradwell v. State* and *The Slaughter-House Cases* (decided the same day in 1873) could be characterized as the beginning of the end of the New Departure.[70] The reasoning about the Fourteenth Amendment in those cases was echoed by the *Minor* Court as it reasoned around whether voting was an attribute of national citizenship.[71] In *Slaughter-House*, the Court held constitutional a Louisiana statute creating a monopoly in the occupation of butchering livestock.[72] Local butchers had argued that the newly enacted Thirteenth and Fourteenth Amendments precluded the State from burdening their right to engage in their profession

67. *Id.*

68. *Id.*; *see also id.* at 1515 (arguing that by the time the Supreme Court decided *Minor v. Happersett* in 1875, the Minors' theory did not include this evolutionary dimension and was purely textual, suggesting the Minors "presented to the Supreme Court a watered-down version of the evolutionary, living Constitution argument articulated by the New Departure activists" and giving credit to NWSA leaders like Stanton and Anthony for the evolutionary or dynamic element in "constitutional interpretation designed to keep the principles of the text current with present societal conditions and needs").

69. *See infra* notes 143–47 and accompanying text for a discussion of feminist constitutionalism.

70. *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFF. U. L. REV. 27, 44 (2005) ("Together, *Slaughter-House* and *Bradwell* strongly signaled that the New Departure had few friends on the federal bench."); *see also* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1371 (1995) ("The Bradwell and Slaughter-House cases were devastating blows to the New Departure's interpretation of the Fourteenth Amendment.").

71. *See* DUBOIS, *supra* note 5, at 104 ("Meanwhile, following the lead of the 1871 Bingham report of the House Judiciary Committee, Republican judges began to rule against cases brought by New Departure suffragists. . . . The next stage in the judicial history of the New Departure was *Bradwell v. State* in which Myra Bradwell challenged the Illinois Bar's refusal to admit her to practice before it."). Note that *Bradwell* and *Slaughter-House*, decided on the same day, rejected a broad interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment. Slaughter-House, 83 U.S. (16 Wall.) 36, 79–80 (1873); Bradwell v. State, 83 U.S. at 139. That same narrow interpretation was the foundation for the *Minor* Court's holding that voting was not a privilege of national citizenship under the Fourteenth Amendment. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177–178 (1875).

72. *Slaughter-House*, 83 U.S. at 83.

in locations other than the centralized facility set up by the legislation.[73] Among other provisions, the butchers argued that the right to engage in their occupation or profession was a privilege of national citizenship protected by the Privileges or Immunities clause of the Fourteenth Amendment.[74] The Court rejected that argument and concluded that the right to regulate the activity arose from the state's police power, the right to engage in the activity was not a right of national citizenship, and that the newly enacted Amendment was not meant to so profoundly alter the relationship between the states and the federal government.[75]

Bradwell v. State was handed down by the Court the same day as *Slaughter-House*. In that case, Myra Bradwell challenged a decision by the Illinois Supreme Court to deny her a license to practice law solely because of her sex.[76] The *Bradwell* Court held that the right of admission to practice law in a state was not a privilege of national citizenship, was thus not protected by the newly enacted Fourteenth Amendment, and that it was a matter for the state.[77] The Court referred back to its decision in *Slaughter-House* and noted that its reasoning in that case "render[ed] elaborate argument in the present case unnecessary."[78] Justice Bradley concurred in the Court's judgment in *Bradwell*, even though he had vehemently dissented from that same reasoning in *Slaughter-House* when it came to the male butchers' right to practice their occupation, arguing that "among [the rights of national citizenship] none is more essential and fundamental than the right to follow such profession or employment as each one may choose."[79] Although Bradley was in the minority in *Slaughter-House* in supporting an expansive interpretation of the Fourteenth Amendment, he took pains in *Bradwell* to explicitly note that such an interpretation did not apply to women seeking the right to practice their profession.[80] In his concurrence in *Bradwell*, Bradley used a separate sexual spheres framework to justify his argument that the Privileges or Immunities clause should not be read broadly when it came to Myra Bradwell's right to practice law.[81] Bradley

73. *Id.* at 57.
74. *Id.* at 58.
75. *Id.* at 80.
76. *Bradwell*, 83 U.S. at 137–38.
77. *Id.* at 139.
78. *Id.*
79. *Slaughter-House*, 83 U.S. at 119 (Bradley, J., dissenting).
80. *Bradwell*, 83 U.S. at 142 (Bradley, J., concurring) ("But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position.").
81. *Id.* at 141 (Bradley, J., concurring) ("It certainly cannot be affirmed, as an [sic] historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex.

described women as a separate category of citizens—apart from men. He used this distinction to justify his position that, unlike the male butchers in *Slaughter-House*, women had no similar constitutional right to an occupation under the Privileges or Immunities clause of the Fourteenth Amendment.[82] Taken together, *Slaughter-House* and *Bradwell* signaled the Supreme Court's resistance to expansive constitutional interpretations of the Fourteenth Amendment, especially as they applied to women who had been relying in large part on the Privileges or Immunities Clause of the Fourteenth Amendment in their New Departure argument for woman suffrage. The two cases foreshadowed the failure of the New Departure's interpretive methods to gain traction at the Supreme Court and *Minor v. Happersett* marked the end of such efforts.

On October 15, 1872, Virginia Minor appeared before the Registrar of the thirteenth election district of the city and county of St. Louis, Missouri. She "respectfully applied to him to be registered as a lawful voter," but the Registrar refused to register her.[83] He "stated to [Minor] that she was not entitled to be registered, or to vote, because she was not a 'male' citizen, but a woman" and that the Missouri Constitution provided that only "male citizens" of the United States were permitted to vote.[84] As noted above, she sought relief against St. Louis elections registrar, Reese Happersett, for his refusal to register her. With her husband Francis representing her, Virginia appealed an adverse decision of the circuit court to the Missouri Supreme Court, and then to the U.S. Supreme Court.[85] Virginia and Francis Minor "argued in good Radical Reconstruction fashion that national citizenship had finally been established as supreme by the first section of the Fourteenth Amendment . . . . [and that] 'all persons born or naturalized in the United States' were equally entitled to the privileges and protections of national citizenship."[86] The Minors concluded that voting was thus "one of the basic privileges and immunities of national citizenship."[87]

The *Minor* Court conceded that women were citizens under the Fourteenth Amendment and were citizens even before its ratification.[88] Yet, the Court reasoned that the Fourteenth Amendment did not add to the

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On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.").

82. *Id.* (Bradley, J., concurring).

83. Brief for Plaintiff in Error, Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), *reprinted in* 7 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 212, 213 (Philip B. Kurland & Gerhard Casper eds., 1975).

84. *Id.*

85. Minor v. Happersett, 53 Mo. 58 (1873), *aff'd*, 88 U.S. (21 Wall.) 162 (1875).

86. DUBOIS, *supra* note 5, at 118.

87. *Id.*

88. *Minor*, 88 U.S. at 165 ("There is no doubt that women may be citizens.").

privileges of national citizenship.[89] Thus, it felt compelled to look back to the Founding to determine if voting had been deemed coextensive with citizenship at that time. The Court concluded that it had not.[90] It then reasoned that there would have been no need for a Fifteenth Amendment which explicitly protected voting eligibility if the Fourteenth had been intended to include suffrage as a privilege of national citizenship.[91] The *Minor* Court engaged in textualist and structural methods as it reviewed what it called "the proof found upon the inside of the Constitution."[92] It then turned to what it called "[t]hat upon the outside" which it found "equally effective."[93]

The Court went on to use a retrospectively historical approach in reviewing whether any state had allowed women to vote at the Founding or whether any newly admitted state had allowed women to vote at the time of its admission.[94] It concluded that none had done so, except New Jersey which moved quickly to end the practice by 1807.[95] In so doing, the Court rejected any argument that such a right to confer suffrage existed anywhere other than in the states.[96] And it explicitly refused to consider any "outside proof" of the changed legal and social status of women since the Founding in a way that would demonstrate any kind of living constitutionalism, stating that

> "[n]o argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold."[97]

The *Minor* Court was selective in its choice of interpretive methods—textualist, structural, and retrospectively historical—some might characterize it as "originalist" since it claimed to be divining the intention of the Founders as to what constituted privilege and immunities.[98] It failed

89. *Id.* at 171.
90. *Id.* at 173.
91. *Id.* at 175.
92. *Id.* at 176.
93. *Id.*
94. *Id.* at 172–73.
95. *Id.* at 176–77.
96. *Id.*
97. *Id.* at 178.
98. See Balkin, *supra* note 70, at 55–56, for a discussion of whether *Slaughter-House* and *Bradwell* could fairly be characterized as originalist. If not, then the same conclusion applies to *Minor*, which echoes their narrow view of the Fourteenth Amendment. For a discussion of the evolution of contemporary originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("[O]riginalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers. Now [they] seek the original meaning of the text." (emphasis in original)).

to consider the historical record from the Founding forward to the ratification of the Fourteenth Amendment as that record related to women's changed social and economic status. Nor did it much consider the more capacious scope the amendment's Framers may actually have intended.

In relegating woman suffrage to the state legislatures, the *Minor* Court implicitly ratified the separate spheres rationale upon which women had presumably always been excluded from voting by the states. The *Slaughter-House* Court had taken a narrow view of which rights qualified for national protection and *Bradwell* embraced that reasoning to effectively deny a woman the right to practice law. Justice Bradley's concurrence in *Bradwell* lays out a rationale based explicitly on separate spheres reasoning.[99] The *Minor* Court's refusal to extend to suffrage the status of a right of national citizenship was in keeping with a separate spheres view. At the heart of such a view was the belief that profound changes in women's social, legal, and economic status were threatening to the family and the social order.[100] Therefore, any legislative reform that might engender such changes should be matters for state legislatures where those all-male institutions could more closely regulate them. The *Dobbs* Court's decision to take a previously recognized constitutional right and send it back to the states echoes that separate spheres view that the scope of women's rights in particular should stay "local." Like the *Minor* Court, the *Dobbs* Court once again used federalism to reify women's subordinated citizenship status.[101]

With a unanimous decision rejecting the theory that a woman's right to vote was an attribute of national citizenship and affirming the state court decision below, the *Minor* Court effectively ended the period known as the New Departure in 1875. In the wake of the Court's decision, NWSA members turned to supporting legislation for a federal suffrage amendment in 1876—legislation that eventually became the Nineteenth Amendment forty-four years later.[102]

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99. *See supra* notes 79–82 and accompanying text.

100. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 987 (2002) ("The claim that women were individual citizens with interests and agency independent of men was a challenge to male authority and to historic understandings of the marriage relationship, as both sides of the debate deeply appreciated.").

101. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

102. *See* Gordon, *supra* note 41, at 95–96 (noting that Elizabeth Cady Stanton had been instrumental in the introduction of an earlier version of a potential Sixteenth Amendment in 1869). That legislation neither tracked the language of the Fifteenth Amendment nor did it move forward. *See* Thomas, *supra* note 20, at 2624 ("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

II. THE PROGRESSIVE ERA

New Departure activists like Elizabeth Cady Stanton understood that in order for their arguments to succeed in Congress or in the Supreme Court, those institutions would have to be persuaded to embrace a new form of reasoning around constitutional provisions—especially after the word "male" was inserted into Section Two of the newly ratified Fourteenth Amendment. In her 1872 testimony before the Senate Judiciary Committee, Stanton engaged in a "stinging condemnation of the dominant method of constitutional interpretation" of that era, which some scholars have characterized as originalism:

> Though the world has been steadily advancing in political science, and step by step in recognizing the rights of new classes, yet we stand today talking of precedents, authorities, laws, and constitutions, as if each generation were not better able to judge of its wants than the one that preceded it. If we are to be governed in all things by the men of the eighteenth century, and the twentieth by the nineteenth, and so on, the world will always be governed by dead men.[103]

Thus, despite the Supreme Court's adverse decision in *Minor v. Happersett*, the New Departure's most significant contribution may have been its rejection of traditional modes of interpretation and its laying the foundation for a new form of constitutional reasoning.[104] As noted above, scholars have argued that New Departure arguments paved the way for a shift from originalism to the living constitutionalism which emerged decades later, in the early twentieth century. It was yet another prominent woman suffragist, Florence Kelley, who eventually played a central role in the Supreme Court's adoption of a living constitutionalism.[105] Kelley was

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whatever founded on sex.'" (citation omitted)); *see also* Kimberly A. Hamlin, *The Nineteenth Amendment: The Fourth Reconstruction Amendment?*, 11 CONLAWNOW 103, 104 (2020).

103. Stanton, *supra* note 65, at 510; THOMAS, *supra* note 29, at 70 (citing Stanton, *supra* note 65, at 510).

104. Winkler, *supra* note 8, at 1458–59. Note that Winkler characterizes the Supreme Court's approach as originalism. However, Jack Balkin takes issue with that characterization, arguing that *Slaughter-House* and *Bradwell* did not adhere at all to the original intent of the Framers:

> If the suffragist argument seems rather strained from the standpoint of original understandings, it is nothing compared to what Justice Miller did in Slaughter-House. Indeed, Justice Miller not only got away with an argument that defied the framers' original purposes and ripped the heart out of the constitutional text, but he managed to do so only four years after the Amendment's ratification!

Balkin, *supra* note 70, at 55.

105. Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, *in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS 239 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

instrumental in the prevailing arguments in *Muller v. Oregon* in 1908.[106] The iconic brief in that case put a multitude of empirical facts before the Supreme Court in an effort to shift its interpretive method to a more evolutionary model, one which took into account social and economic conditions of women in the real world.[107] Although it is notable that in *Muller*, Kelley and the social feminists were arguing that the asserted constitutional right to contract was not absolute and the states had the authority to regulate the employer-employee relationship.[108]

Felice Batlan has demonstrated the significant role played by Kelley in the movement by legal progressives to introduce a new form of jurisprudence, replacing formalism with legal realism and attacking the conservative Supreme Court's use of substantive due process to protect elite economic interests.[109] She argues that the women reformers of the late nineteenth and early twentieth century "had come to realize that custom, the common law, and courts had consistently thwarted women's rights. . . . [And b]y the turn of the century, elite women reformers had few illusions about courts, the common law, and custom."[110] Kelley was a lawyer and social scientist who worked with Jane Addams at Hull House in Chicago.[111] There they "participated in the development and lived experience of pragmatism" and engaged with legal realists like Roscoe Pound.[112] Batlan argues that "[i]t is difficult not to see that Kelley provided much of the groundwork for what Pound would much later call sociological jurisprudence."[113]

That groundwork included *Ritchie v. People*,[114] which raised the issue of the constitutionality of a state maximum hours law for women in 1894.[115] Trained as a lawyer and holding the position of Chief Factory Inspector for the State of Illinois, Kelley "tied together law on the books with law in action" writing the state's brief defending the statute.[116] The *Ritchie* brief "cited a wide variety of experts regarding the health effects of long hours

106. Muller v. Oregon, 208 U.S. 412 (1908).

107. Batlan, *supra* note 105, at 248.

108. Muller, 208 U.S. at 419 (noting the Brandeis brief in favor of the State of Oregon).

109. Felice Batlan, Florence Kelley and the Battle Against Laissez-Faire Constitutionalism at *13 (Dec. 1, 2010) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721725 [https://perma.cc/SK6R-4JJD] ("To acknowledge that some women must be recognized as crucial legal actors who were at the very center of Constitutional litigation and the creation of new understandings of the meaning of substantive due process, challenges us to ask ourselves whom we imagine to be our historical actors and whom we are excluding.").

110. Batlan, *supra* note 105, at 240–41.

111. *Id.* at 242.

112. *Id.*

113. *Id.* at 244.

114. 40 N.E. 454 (Ill. 1895).

115. Batlan, *supra* note 105, at 245.

116. *Id.* at 244.

on women" and "the *Ritchie* brief was already experimenting with the use of medical and sociological data."[117] It would become the template for the brief in *Muller v. Oregon* fourteen years later.[118] When the *Ritchie* Court found the statute unconstitutional, Kelley criticized its members for failing to understand the changes wrought by industrialization, writing that "[t]he judicial mind has not kept pace with the strides of industrial development."[119] It would take more time "to rescue the Fourteenth Amendment to the Constitution of the United States from the perverted application upon which this decision rests."[120]

By 1908, Kelley was leading the National Consumers League in New York City where she "planned and oversaw the development of the legal briefs drafted by her female assistants at the NCL [including Josephine Goldmark] and recruited prominent male attorneys to serve as legal figureheads in these cases."[121] She and Goldmark recruited Goldmark's brother-in-law, prominent Boston attorney Louis Brandeis, to take a case defending against another legal challenge to a piece of protective labor legislation.[122] The brief in that case, *Muller v. Oregon*, incorporated extensive empirical evidence about the working conditions of women in factories.[123] The brief became known as the "Brandeis Brief" even though it was written predominantly by Josephine Goldmark.[124] The Court's embrace of that form of argument is often hailed as the moment that the tradition of formalism began to give way to legal realism in American jurisprudence.[125]

The *Muller* Court held the state statute at issue constitutional and found the source of the state's authority to regulate the employer-employee relationship in its police power.[126] It was explicit in its reasoning: "Differentiated by these matters from the other sex, [woman] is 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 and could

117. *Id.* at 245.
118. *Id.*
119. *Id.*
120. *Id.* (quoting THIRD ANNUAL REPORT OF THE FACTORY INSPECTORS OF ILLINOIS FOR THE YEAR ENDING DECEMBER 15, 1895, at 7 (1896)).
121. *Id.* at 246 (internal quotation marks and citation omitted).
122. *Id.* at 248.
123. *Id.*
124. *Id.* ("Yet there is good reason to believe that Goldmark wrote the entire brief with very little input from Brandeis." (citation omitted)).
125. Michael Rustad, *Karl Llewellyn's Sociological Vision of Case Law—The Case Law System in America by Karl N. Llewellyn*, 25 SUFF. U. L. REV. 135, 148 (1991) (book review) ("An examination of the Brandeis brief yields yet another integral structural support in the theoretical bridge from the formalist to the realist paradigm.").
126. Muller v. Oregon, 208 U.S. 412, 423 (1908).

not be sustained."[127] The import of the Court's decision was that the concept of "liberty of contract" under the Due Process Clause of the Fourteenth Amendment did not prohibit a state from regulating labor conditions when it came to women. In upholding the constitutionality of a state statute that treated men and women differently, the Court asserted that its holding "rests in the inherent difference between the two sexes, and in the different functions in life which they perform."[128] Kelley had prevailed in her quest to have courts embrace a form of interpretive reasoning which took into account facts that caused those courts to be "enlightened and instructed concerning conditions as they exist."[129] This statement is aligned with the description of a feminist constitutionalism as an approach that "avoids the need to develop a comprehensive theory but rather concentrates on practice and facts, in the tradition of feminist thinking."[130]

In the wake of *Muller*, states across the country enacted both maximum hours laws and minimum wage laws, and in 1917 the Court let stand an Oregon decision upholding that state's minimum wage law.[131] While a minimum wage law for women was later rejected in *Adkins v. Children's Hospital of D.C.*, *Muller*'s woman-centered reasoning was once again deployed by the Court in *West Coast Hotel Co. v. Parish* in 1937.[132] This history demonstrates that the living and nascent feminist constitutionalism introduced by New Departure activists, which considered women's social, legal, and economic conditions, arguably prevailed in the mid-twentieth

127. *Id.* at 422. Note that there was a distinct split between social feminists like Florence Kelley and neutrality feminists like Alice Paul in terms of whether protective labor legislation for women, which relied on a kind of separate spheres reasoning, was actually helpful or harmful to women's equality. Social feminists were concerned with substantive equality while neutrality feminists were concerned with formal equality. The *Muller* Court used a version of separate spheres reasoning since it was making distinctions grounded in physical difference and women's role in social reproduction. Yet, social feminists would have argued that the distinctions were not being used to refuse women political rights and that the *Muller* decision yielded a significant improvement in poor women's working conditions. In other words, any cost in terms of formal equality was worth the benefit in substantive equality. On the other hand, Alice Paul and other neutrality feminists took the position that protective labor legislation like that at issue in *Muller*, which relied for its constitutional validity on separate spheres reasoning grounded in women's physical difference and motherhood responsibilities, risked reifying women's subordinate status. They predicted that such legislation would actually have adverse consequences for women's equality when employers refused to hire them because of limits on their working hours or having to pay them a minimum wage. *See* PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 127–44 (2020).

128. *Muller*, 208 U.S. at 423.

129. Batlan, *supra* note 105, at 247 (internal quotation marks omitted) (quoting FLORENCE KELLEY, SOME ETHICAL GAINS THROUGH LEGISLATION 254 (1905).

130. Daphne Barak-Erez, *Her-meneutics: Feminism and Interpretation*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 85, 97 (Beverley Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012) (citing Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849 (1990)).

131. Stettler v. O'Hara, 243 U.S. 629 (1917) (per curiam).

132. Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

century. The Court's willingness to consider real-world social and economic conditions is evident from the *Muller* Court's acknowledgement that:

> Constitutional questions, it is true, are not settled by even a consensus of present public opinion . . . . At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.[133]

Such an approach did not guarantee women's equal status in the constitutional order, and some argued it tended to yield outcomes that diminished it.[134] Separate spheres reasoning had previously been used to restrict women's rights and it could be a double-edged sword.[135] However, the *Muller* Court's interpretive approach did at least take into consideration women's actual working conditions, differential caregiving burdens, and continuing lack of social, legal, and economic equality as compared to their male co-workers.[136]

In addition to her role in bringing a living constitutionalism to fruition, Florence Kelley was also instrumental in developing an affirmative or social rights constitutionalism. In her 1905 book, *Some Ethical Gains Through Legislation,* she argued that the Constitution should be read to impose duties on the state itself.[137] Such duties included protecting the health of its citizens.[138] This kind of positive rights reading is very much aligned with a feminist constitutionalism as today's scholars have defined such an interpretive method.[139] As Daphne Barak-Erez explains, "[d]enying constitutional status to social rights has a disproportionate effect on women, who are in general poorer (alongside other disadvantaged groups) and carry the burden of caring for their dependent relatives."[140]

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133. *Muller*, 208 U.S. at 420–21.

134. *See* MONOPOLI, *supra* note 127, at 140 ("This 'substantive' view of equality was seen as dangerous by middle- and upper-class women . . . . In their view, the inability to compete on the same terms as men . . was deeply problematic and ensured continued inequality. This was especially true, when . . . justified on the basis of women's fragile physical nature.").

135. *See* discussion *supra* note 127. Note that Florence Kelley, other social feminists, and legal progressives went on to oppose the Equal Rights Amendment authored by Alice Paul, Crystal Eastman, and other NWP allies and introduced into Congress in 1923. Their opposition stemmed from the continuing concern that a "neutrality" or "formal" approach to equality failed to recognize the substantial inequality that actually existed between men and women. They feared a conservative Supreme Court would use the amendment to strike down protective labor and similar legislation meant to "level the playing field" for women. *See* MONOPOLI, *supra* note 127, at 132–33.

136. *Muller*, 208 U.S. at 422–23.

137. Batlan, *supra* note 105, at 246–47. *See generally* KELLY, *supra* note 129.

138. Batlan, *supra* note 105, at 246–47

139. Barak-Erez, *supra* note 130, at 95 (citing Bartlett, *supra* note 130, at 837–49).

140. *Id.* at 96 (citations omitted).

III. AFTER DOBBS

New Departure activists like Elizabeth Cady Stanton advocated for an evolutionary or dynamic model of constitutional interpretation which considered changes in women's social, legal, and economic status. Social feminists like Florence Kelley continued that approach by introducing empirical evidence of such status for consideration by the Court, a strategy that finally got traction with the *Muller* Court.[141] And today's feminist scholars and advocates are making similar arguments for courts to take into account the lived experiences of women in order to restore a constitutional right to reproductive liberty. When viewed on a continuum, these three periods demonstrate a lengthy history of women as significant constitutional actors who recognized that the Court's choice of interpretive methods was outcome-determinative and often reified women's subordination. In response, they developed methods that incorporated the gendered dimensions of constitutional reasoning. In each period, activists made arguments grounded in alternative readings of the Fourteenth Amendment. Such readings arguably reflected not only an early living constitutionalism but one that contained the seeds of a feminist or gender constitutionalism.[142] Situating today's arguments at the end of such a continuum demonstrates their lineage and places those arguments in a tradition of woman-centered interpretive theory.

Feminist constitutionalism has been described as "the project of rethinking constitutional law in a manner that addresses and reflects feminist thought and experience."[143] It includes a broad inquiry into "the *relationship between* constitutional law and feminism by *examining, challenging, and redefining the very idea* of constitutionalism from a feminist perspective."[144] Within its scope, it includes the intersection of feminism and constitution-making, judging, democracy and political

141. *Muller,* 208 U.S. at 419 ("In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.").

142. Feminist constitutionalism aims to interpret constitutions in a way that does the least harm to women and that most enhances their status as full citizens in the constitutional order. *See* Barak-Erez, *supra* note 130, at 95. Note that I use "women" in this paper in an inclusive way to include all those who identify as women. Feminist constitutionalism has recently produced a new theoretical iteration which builds on its foundation. Ruth Rubio-Marin has developed what she calls "gender constitutionalism," a theory that "deposes constitutionalism's most sacred artifact—the distinction between what falls under constitutionalism's mandate and what does not, which is to say, the domain of constitutional law. Constitutionalists revere this distinction as the gender-neutral public/private divide; feminists critique it as gendered separate spheres." Bev Baines, *Foreword* to RUTH RUBIO-MARIN, GLOBAL GENDER CONSTITUTIONALISM AND WOMEN'S CITIZENSHIP: A STRUGGLE FOR TRANSFORMATIVE INCLUSION, at xiii (2022).

143. Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, *Introduction: The Idea and Practice of Feminist Constitutionalism*, *in* FEMINIST CONSTITUTIONALISM, *supra* note 130, at 1.

144. *Id.* (emphasis in original).

participation, reproductive rights, multiculturalism, and religious pluralism.[145] One dimension of feminist constitutionalism is its interpretive application. Much like nineteenth-century and twentieth-century suffragists introduced a nascent living constitutionalism to American jurisprudence, today's feminist scholars and advocates have questioned the current Court's purported use of originalism as an interpretive method, identifying its embedded masculine norms, and arguing for a more holistic and woman-centered interpretive methodology.[146] This methodology bridges jurisprudential distinctions between the public and private spheres. It eschews liberty-limiting definitions of fundamental rights, exemplified by the current Supreme Court's reproductive jurisprudence. Rather, it embraces capacious and universal definitions of such rights that expand equality.[147]

There are many feminisms, but scholars have argued that a feminist or gender constitutionalism can bridge divides among them.[148] It contextualizes the interpretive process, minimizing generalizations about women as a legal and social category, and supplies an intersectional analysis of the disparate impact and burdens on marginalized women. As noted above, such contextualizing "avoids the need to develop a comprehensive theory but rather concentrates on practice and facts, in the tradition of feminist thinking."[149] This approach, in turn, offers the promise that rather than simply restoring *Roe*, it could establish a broader reproductive justice that encompasses positive or "social" rights. "Asking the woman question also opens additional possibilities for thinking about the status of social rights in the constitutional regime."[150] For example, such reasoning could provide a foundation for going beyond restoring a narrow right to abortion and recognizing a broader right to state funding of reproductive care.[151] This interpretive move, in turn, would enhance access to health care and reduce

145. *Id.* at 4.

146. *See, e.g.*, Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563 (2024); Melissa Murray, Address, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023).

147. *See, e.g.*, Brief *Amici Curiae* for Organizations Dedicated to the Fight for Reproductive Justice—Mississippi in Action, *et al.*—In Support of Respondents at 3, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4340175 [hereinafter *Dobbs Amicus Brief*] ("The fundamental right to liberty is a bedrock of American law. This Court has long recognized that reproductive autonomy lies at the heart of liberty, giving everyone to [sic] right to make certain choices about their own bodies—including, for every childbearing person, the choice to have children or obtain an abortion. This Court's precedents, as well as well-established international norms, make clear that liberty without the right to make this choice is not liberty at all.").

148. Barak-Erez, *supra* note 130, at 97 (citing Bartlett, *supra* note 130, at 849).

149. *Id.*

150. *Id.* at 96.

151. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that state and federal governments had no duty to make public funding available to pregnant people who could not otherwise afford to exercise their (then) constitutional right to abortion).

maternal mortality rates, the burden of which falls disproportionately on women of color.[152]

Like women's rights activists during the New Departure and social feminists during the Progressive Era, feminist scholars and activists in today's post-*Dobbs* period are engaged in critiques of the current Supreme Court's purported use of originalism.[153] In so doing, they are arguing for interpretive methods that embody the type of living constitutionalism for which New Departure activists and the Progressive Era's social feminists laid the groundwork. As noted above, that method became a dominant mode of interpretation in the early twentieth century but fell into disfavor as the Court's membership shifted. The result has been a movement back to originalism as the preferred method for the majority of the Court's conservatives.[154] This shift has deeply gendered dimensions and implications. For example, Melissa Murray has argued that the current Supreme Court era can be characterized by an inconsistent application of originalism in a variety of cases beyond *Dobbs*.[155] She posits that the Roberts Court's actual interpretive methodology is one replete with underlying masculine norms:

> The neglect of . . . other decisions [like *Bruen* and *Bremerton School District*] is unfortunate because, when viewed in tandem with *Dobbs*, these other decisions suggest the Roberts Court's commitment to an ascendant "jurisprudence of masculinity" that prioritizes, both explicitly and implicitly, men's rights, even as it diminishes and constrains women's rights.[156]

In other words, the Roberts Court's approach seeks an interpretation of the text using a history and tradition that does the least harm to *men* and maximizes *their* status in the constitutional order. Such an interpretive

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152. *See Dobbs Amicus Brief*, *supra* note 147, at 29-39 (discussing the impact of overturning *Roe* on marginalized women).

153. *See* Siegel, *supra* note 146; Murray*, supra* note 146.

154. This shift from formalism to legal realism was reflected in a shift in modes of reasoning or interpretive methods. In this transition, invocations of natural law sharply diminished with the ascendency of arguments built on positive law. *See* Conor Casey, *Reflections on* The Natural Law Moment in Constitutional Theory, 48 HARV. J.L. & PUB. POL'Y 329, 333 (2025) ("In the late nineteenth and early twentieth centuries . . . . [due to] an increase in ethical and religious skepticism, the rise of liberalism, and a greater appetite for grounding socio-political argument on empirical and scientific methodology—*explicit* reliance on natural law reasoning became increasingly regarded as a 'suspect element in professional legal discourse.' . . . [E]xplicit invocation of its precepts by lawyers went from being 'almost universally accepted in the legal system in 1870,' to 'almost completely gone by the early 20th century.'" (footnotes and citations omitted)).

155. Murray, *supra* note 146, at 800. The "originalism" of the *Slaughter-House*, *Bradwell*, and *Minor* Courts arguably looked to the intent of the Framers in drafting constitutional provisions. The originalism of the current Supreme Court purportedly looks to the original public meaning of textual provisions.

156. *Id.* at 799.

exercise is often a zero-sum game in that maximizing masculine norms often requires diminishing feminine ones. So how might today's activists continue to develop a feminist or gender constitutionalism to counter this trend, much as New Departure activists laid the original groundwork for such an approach?

The *Dobbs* Court's discourse around liberty illustrates how modes of interpretation matter when defining fundamental constitutional rights. The majority framed its inquiry into whether there was an unenumerated constitutional right to abortion within a larger constitutional liberty interest as follows:

> [G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[157]

Deploying purportedly originalist interpretive methods, in conjunction with a truncated version of history, the *Dobbs* Court exhibits a profoundly masculine view of liberty. It is particularly revealing that prostitution is one of the examples the majority uses to highlight the "parade of horribles" that a more capacious understanding of liberty might unleash. It is notable that the majority reaches for this highly gendered illustration of its concerns about what a broader understanding of liberty might yield.[158]

By situating *Dobbs* in a continuum that begins with the New Departure, we can more clearly see the significant contributions of women activists to American constitutional interpretation, despite their erasure in our constitutional memory.[159] Originalism was used during the New Departure

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157. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022). The *Dobbs* majority further explains that its reasoning is correct whether it is deployed to interpret the Due Process or the Privileges or Immunities Clause of the Fourteenth Amendment. In his concurrence, Justice Thomas concludes that "even if the [Privileges or Immunities] Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach." *Id.* at 333 (Thomas, J., concurring). For a contrary position, see Tori A. Shaw, Turning the Tables on Originalism: How Reinvigorating the Purpose and Plain Meaning of the Privileges or Immunities Clause Can Restore Reproductive Freedom (May 2, 2023) (unpublished manuscript) (on file with the University of Maryland Digital Commons/WLE papers, No. 33), https://digitalcommons.law.umaryland.edu/wle_papers/33 [https://perma.cc/JWK8-XZGV].

158. *Dobbs*, 597 U.S. at 257 ("These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history." (citations omitted)).

159. Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 46–47 (2022) (explaining how New Departure suffragists as historical actors have been erased from our constitutional memory).

as a tool to slow the erosion of the subordinating legal regime of coverture and the movement to elevate women to full citizenship. The constitutional path available to New Departure activists in the wake of the Reconstruction Amendments, which arguably set those goals back decades, therefore had to include a reimagining of constitutional interpretation. Elizabeth Cady Stanton argued that "[i]t is not safe to leave the 'intentions' of the Pilgrim fathers . . . wholly to masculine interpretation, for by Bible and Constitution alike, women have thus far been declared the subjects, the slaves of men."[160] Social feminists in the Progressive Era continued to push new modes of interpretation that would yield substantive equality for women. Their efforts helped usher in the kind of living constitutionalism first advocated for by New Departure activists. Yet, in the current post-*Dobbs* era, originalism is once again ascendent as an interpretive method. It is posited as a neutral interpretive method which limits judicial discretion in reasoning around constitutional rights.[161] However, it continues to be used to slow or reverse women's progress toward equality, most recently the autonomy that a constitutionally protected reproductive liberty has engendered since *Roe* was decided in 1973. Thus, interpretive methods continue to be an institutional tool to "re-subordinate" women and erode their status in our constitutional order.

In her recent article, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, Melissa Murray offers us an example of what such a feminist or gender constitutionalism requires. In her trenchant analysis of the gendered nature of the Roberts Court's jurisprudence, she incorporates the type of "gender-aware" perspective required by such a constitutionalism. Murray points out the ways in which the Court's jurisprudence in *Dobbs*, *New York State Rifle & Pistol Association, Inc. v. Bruen*,[162] and *Kennedy v. Bremerton School District*[163] "suggests the Court's solicitude for certain constitutional rights over others," including free exercise of religion, speech, and guns.[164] She argues that these rights are "coded" male and that the Court "prioritizes the exercise of constitutional rights by *men* . . . [which] suggests an emerging jurisprudence of masculinity."[165]

160. Stanton, *supra* note 65, at 512.

161. *See* Siegel, *supra* note 146, at 582 (arguing that despite its claims, originalism does not, in fact, constrain judicial discretion).

162. 597 U.S. 1 (2022).

163. 597 U.S. 507 (2022).

164. Murray, *supra* note 146, at 804.

165. *Id.*; *see also id.* at 842 n.209 (explaining that in addition to rights being generally associated with the masculine or the feminine, by "coded male" Murray is also referring to the concept that certain justifications for protecting rights like property rights have historically been based on premises like possession and labor that do not apply to women or people of color; that contract law's male orientation

Murray explains that rights associated with and predominantly exercised by women, like privacy and the right to abortion that flowed from it, are coded female. And that, while it prioritized and expanded constitutional protection for "male" rights (which are ostensibly gender neutral) in *Bruen* and *Bremerton*, the *Dobbs* Court relegated "female" rights to majoritarian rule by sending regulatory decisions about their scope back to state legislatures.[166] Murray goes on to look at what she calls the contours of the jurisprudence of masculinity and how it alters the public-private divide in ways that benefit men and disadvantage women.[167] She observes that the *Bremerton* Court concludes that even though the football coach/plaintiff is engaged in prayer on school property, he is somehow enveloped within the private sphere—outside regulation by the state. Murray offers this as an example of the Court's gendered reasoning. "On this account, the fact that an individual is engaged in prayer transforms space, regardless of its public ownership, into something akin to a church . . . ."[168] The *Bruen* Court's reasoning that "there *is* no boundary separating the home from the private sphere" when it comes to one's right to bear arms is a similar example.[169]

Murray argues that the effect of this reasoning "goes beyond merely expanding men's privacy and rendering women's intimate lives subject to regulation . . . . [The three cases represent] a recharacterization of the rights themselves."[170] She observes that gun rights, speech rights, and religious freedom protections "are recast as protections for . . . men's bodily autonomy."[171] And while the Court is protecting men's bodies, "[it demonstrates] no such . . . solicitude for the rights of women and pregnant persons."[172] Without the constitutional protections of *Roe* and *Casey*, "the pregnant body is even more obviously an object of public interest, properly subject to state regulation."[173] Murray concludes with an analysis of how the Court casts the state as an antagonist when it comes to male rights, but "[i]n *Dobbs* . . . the Court is not skeptical of the state at all. Indeed, the state

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is clear in its abstraction, rationality, and objectivity; and that the legacy of coverture may explain the gendered nature of both of these fields of law).

166. *Id.* at 825–26 ("To be clear, men, who dominate every branch of government and are overrepresented in the ranks of corporate America and industry, are in no danger of becoming a minority group. But that is how the Roberts Court and its jurisprudence of masculine grievance understands them—as beleaguered and besieged. By contrast, the women who wish to secure and exercise their rights to make decisions about their bodies find no quarter with this Court. Instead, they are told to vindicate their interests through the political process." (footnotes omitted)).

167. *Id.* at 829 ("The Roberts Court's ascendant jurisprudence of masculinity turns this traditional configuration of the public and private on its ear.").

168. *Id.*

169. *Id.* at 830.

170. *Id.* at 831.

171. *Id.*

172. *Id.* at 833.

173. *Id.*

is a much-welcomed ally in the project of regulating pregnant bodies and reinforcing gender hierarchies."[174]

Murray's approach rejects the idea that the Roberts Court is using neutral principles in its interpretive process.[175] And she notes that "[i]t is hardly surprising that an interpretive method that prioritizes the Founding and the Founders' intent yields gendered outcomes. Indeed, gendered outcomes and hierarchies seem to follow ineluctably from the methodology that the Court is using . . . ."[176] And I would agree. An interpretive method—be it originalism or a living constitutionalism—that ignores the gendered dimensions and implications of its reasoning will fail to yield an interpretation of constitutional provisions that does the least harm to women and most elevates their status in the constitutional order.[177] An explicitly feminist or gender constitutionalism would contextualize the interpretive process, minimizing generalizations about women as a legal and social category and providing an intersectional analysis of the disparate impact and burdens on marginalized women. It would ask the "woman question" and take into account the real-world impact on women's social, legal, and economic status.[178] Murray's trenchant analysis leaves us with the bleak landscape of "demosprudence" where women and their rights have been left to majoritarian rule in a distorted democratic process brought on, in many cases, by the Roberts Court.[179] Murray concludes by asking whether the Roberts Court "will see fit to continue the work of refashioning the constitutional order in men's image."[180]

So why might this bleak constitutional period be a productive time to further develop a feminist or gender constitutionalism which would yield a constitutional order that centers women as much as it does men? Much like the Supreme Court was discredited after the Civil War and had lost substantial legitimacy prior to the New Departure, the current post-*Dobbs* Court has been deeply discredited and has suffered diminished legitimacy as a result.[181] And despite the electorate's move toward the right in the 2024

174. *Id.* at 837.

175. *Id.* at 843.

176. *Id.* at 845.

177. *See* Siegel, *supra* note 146, at 568 ("[C]rucially, not all living constitutionalism is the same. I identify several ways in which the Justices who present appeal to the past as claims of judicial constraint engage in *anti-democratic* forms of living constitutionalism. To mention only one here: History-and-tradition decisions in which judges deny they are engaged in normative reasoning and tie changes in the law to facts about the past, claiming constraint as they reason from value, lack transparency. Normative reasoning in this form can mislead the public and inhibit democratic oversight.").

178. *See* Barak-Erez, *supra* note 130, at 95.

179. Murray, *supra* note 146, at 858–63.

180. *Id.* at 864.

181. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/NZ33-79ZZ].

elections, Americans pushed back on abortion restrictions, with seven of ten referenda and ballot initiatives to prevent such restrictions passing by substantial margins.[182] So as a contextual matter, there may be an opportunity to continue to develop interpretive methods that take into account women's lived experiences in both the public and private sphere. Such efforts are already being seen in lower courts, where judges may be emboldened to adopt such interpretative methods in light of the loss of the Supreme Court's legitimacy. Those courts have adopted more capacious and woman-centered understandings of constitutional rights like liberty.[183] The *Dobbs* dissenters themselves invoke the period around 1868 and the suffragist history and struggles of that time. And they reiterate that under the common law abortion was not widely criminalized:

> Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal

182. *Abortion on the Ballot 2024: Voters in Seven States Approve Constitutional Amendments to Protect Abortion Rights*, CTR. FOR REPROD. RTS. (Nov. 6, 2024), https://reproductiverights.org/abortion-ballot-results-2024/ [https://perma.cc/8ED2-JXE7].

183. *See e.g.*, SisterSong Women of Color Reprod. Just. Collective v. State, No. 2022CV367796, at *10 n.16 (Ga. Super. Ct. Sept. 30, 2024), https://assets.aclu.org/live/uploads/2022/07/Order-enjoining-GA-six-week-ban-9.30.24.pdf [https://perma.cc/3E52-SGBY], *stayed*, No. S25M0216 (Ga. Oct. 7, 2024), https://www.aclu.org/documents/stay-order-in-state-of-georgia-v-sistersong-women-of-color-reproductive-justice-collective-et-al [https://perma.cc/Y8TW-DUKL], *and vacated*, No. S25A0300 (Ga. Feb. 20, 2025), https://statecourtreport.org/sites/default/files/2025-02/supreme_ court_ of_georgia-order.pdf [https://perma.cc/TWX2-GT4Y]. The trial court's decision reflected an explicitly feminist or gendered mode of constitutional reasoning and rejected an interpretive method that required reference to the meaning of a constitutional provision at a time when women were less than full citizens:

> Originalists and textualists insist that courts rely on the provision's "original public meaning," that is, the meaning the provision had at the time of the Constitution's ratification. . . . Given the presumption of continuity afforded to unchanged provisions of subsequent constitutions, adherents of textualism look to the "original public meaning" of liberty back in 1861. The obvious problem with this interpretive approach . . . is that the Plaintiffs whose rights are at issue in this litigation had no (or very limited) rights when the constitutional provision was adopted. "Liberty" for white women in Georgia in 1861 did not encompass the right to vote (and thus to ratify the State's new constitution). And of course liberty did not exist at all for Black women in Georgia in 1861. Thus, any rooting around for original public meaning from that era would yield a myopic white male perspective on an issue of greatest salience to women, including women of color; certainly that is not what constitutional interpretation of any legitimate stripe ought to do.

Id. (citations omitted) (citing Order on Defendant's Motion for Summary Judgment, Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-01608, at *13–14 (N.D. Dist. Ct. Sept. 12, 2024) ("[T]his Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that 'individuals' did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests.")).

> law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions.[184]

As I have argued, "[t]he centrality of bodily autonomy to the definition of liberty before, during, and after the Civil War should be just as relevant to the Supreme Court's reasoning around a constitutional right to reproductive liberty as nineteenth-century statutes prohibiting abortion"[185] in light of the fact that "[t]he emphasis on freedom or enslavement of the body, and the issues that sprang from that focus, were feminists' contribution to nineteenth-century American liberalism . . . ."[186] This is particularly true because the *Dobbs* majority "opens the door" to the history of woman suffrage when it explains that its relegating the regulation of abortion back to the states is, in part, justified by women having the right to vote.[187] In so doing, the Court invoked by implication the Nineteenth Amendment and its proponents' understanding of the amendment's meaning. However, the *Dobbs* majority failed to take that history into account when reasoning to its conclusion that there was no constitutional right to abortion. Especially when courts use interpretive methods that implicate the rights of women and other pregnant people in a much more significant way than men, those methods should take into account their lived experiences. For example, a recent Pennsylvania Supreme Court decision highlighted the nexus between bodily integrity or self-ownership and the right of equal citizens to self-determination when a plurality of the court noted "[w]hether or not to give birth is likely the most personal and consequential decision imaginable in the human experience. Any self-determination is dependent on the right to make that decision."[188]

I have also argued that "courts should read the Constitution capaciously in a way that links voting to self-government, and self-government to self-determination," unlike the *Dobbs* majority, whose opinion

> has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority

184. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 371 (2022) (Breyer, J., dissenting) (footnotes omitted).

185. MONOPOLI, *supra* note 30, at 240. See also THOMAS, *supra* note 29, at 177, describing the American Medical Association's anti-competitive motives for supporting statutes that criminalized abortion, a history that the *Dobbs* majority failed to acknowledge.

186. *See* Elizabeth B. Clark, *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905, 905 (1989).

187. *See Dobbs*, 597 U.S. at 289 ("Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.").

188. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 906 (Pa. 2024) (plurality opinion).

> approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command.[189]

This nexus among suffrage, self-government, bodily autonomy, and liberty was central to the nineteenth-century women's rights movement. It should inform the Court's interpretive methods today.

Feminists have long struggled over different definitions of equality. Should law be neutral and reflect a formal equality or should it recognize difference and render substantive equality?[190] Embedded in those debates is the fact that, historically, only women were associated with pregnancy.[191] The challenge posed by *Dobbs* is to persuade courts to recognize that the very definition of liberty as it is protected by American common law, statutes, and the Constitution has to be one capacious enough to reflect sex-based differences like pregnancy. Until we have a Supreme Court that moves away from what it claims is formal equality or neutrality as its interpretive benchmark, we will have to develop this more capacious definition of liberty in state and lower federal courts.[192]

The *Dobbs* dissenters reference *Bradwell*, with its reasoning in Justice Bradley's concurrence that it would not be unconstitutional to define women's civil rights in a more limited way than men's civil rights.[193] In *Dobbs*, the majority is not as explicit as it was in the nineteenth century about the separate spheres social order and its connection to whether or not the right to a profession or suffrage were rights of national citizenship. But the majority interprets liberty in such a limited way that it is once again constitutional to allow individual states to afford some American women fewer civil rights than men based solely on sex. In failing to adopt a capacious and universal definition of liberty, the *Dobbs* majority is

189. MONOPOLI, *supra* note 240 (citing *Dobbs*, 597 U.S. at 387 (Breyer, J., dissenting)).

190. *See* MONOPOLI, *supra* note 127, at 127–44.

191. Today we have expanded that possibility to include those who identify as nonbinary or as male and are thus pregnant people. Yet, the status predominantly affects those who identify as women and remains identified with the feminine as a matter of societal gender schemas.

192. *See infra* note 195 and accompanying text.

193. *Dobbs*, 597 U.S. at 373 (Breyer, J., dissenting) ("'There was a time,' *Casey* explained, when the Constitution did not protect 'men and women alike.' But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was 'no longer consistent with our understanding' of the Constitution. Now, '[t]he Constitution protects all individuals, male or female,' from 'the abuse of governmental power' or 'unjustified state interference.'" (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896–98 (1992) (citing Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873)))).

implicitly grounding its reasoning in a separate sexual spheres framework as applied to women's citizenship. The only form of liberty that will be recognized as a matter of national citizenship is a liberty limited to one built around the male body. The risks to life and liberty that the male body faces as a corporeal matter are the only kind that trigger a natural right to self-protection that the majority will recognize as constitutionally protected. But, of course, biologically male bodies do not bear the life-threatening and liberty-limiting risks that result from pregnancy.

While it may not be clear to us today, the idea of extending suffrage to women implicated a similar challenge for the *Minor* Court in the nineteenth century. Women were viewed as lacking in the same kind of reasoning ability as men. And suffrage was grounded in self-government, which was based on the ability of men to reason. Thus, embracing Virginia Minor's interpretation of the Fourteenth Amendment that suffrage was a right of national citizenship would have forced the *Minor* Court to embrace a more capacious understanding of who was entitled to self-govern and a broader view of who had the reasoning capacity it took to engage in self-governance. The Court was not willing to interpret that amendment in a way that made women part of the political community. Such a decision might have been perceived as endorsing a view that was not in keeping with the "natural order." The Court preferred to leave that very political decision to the states. In a similar vein, the *Dobbs* majority chooses that same constitutional path—state legislatures—to deal with sex-based differences in defining fundamental rights like liberty. Implicit in *Dobbs*, much like in *Minor,* is the idea that there are phenomena that are "unnatural," i.e., women exercising political power through suffrage in *Minor* and women choosing to end a pregnancy in *Dobbs.* In the Court's view, such "unnaturalness" undermines the argument that suffrage and abortion are natural or fundamental rights of national citizens that precede the Constitution and must be afforded its protection. Thus, the separate sexual spheres framework continues to influence the Court's reasoning and decision-making today in a way that limits rather than expands women's constitutional rights.

Feminist activists and scholars should continue to argue for interpretive methods which incorporate a universal definition of liberty that includes both the masculine and the feminine. Admittedly, focusing on sex-based differences like pregnancy in an effort to *expand* rather than *limit* rights has its risks. However, there is a substantive difference between using a separate spheres analysis to *constrain* women's rights and using a universal rights analysis to *expand* them. There is indeed a fine line and navigating that line is difficult. However, pregnancy is a unique attribute and the failure to address how it fits into constitutional reasoning ensures that decisions like

Dobbs which use a false neutrality that has liberty-limiting effects for women poses its own risks.[194] Much like New Departure activists and Progressive Era social feminists made constitutional arguments that took into account women's *actual* legal, economic, and social status, today's feminist activists and scholars are making constitutional arguments around pregnancy that take into account its life-altering reality and its disparate impact on women of color. In doing so, they are speaking to a broader audience and offering arguments for lower courts to use in reasoning around a more capacious liberty interest.[195] As a matter of feminist or gender constitutionalism, they are shoring up the argument that the *Dobbs* dissent makes, which connects reproductive self-determination and citizenship in the state:

> Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. That expectation helps define a woman as an "equal citizen[]," with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government.[196]

In making these arguments, today's scholars and advocates can borrow from the New Departure arguments around the inherent rights of citizens

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194. For an insightful analysis of the risks involved in adopting what Mary Ziegler calls gender-role feminism, see Mary Ziegler, *The Bonds that Tie: The Politics of Motherhood and the Future of Abortion Rights*, 21 TEX. J. WOMEN & L. 47 (2011). And for a recent article analyzing the gendered dimensions of the Roberts Court's definition of liberty, see Laura Portuondo, *Gendered Liberty*, GEO. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4755198 [https://perma.cc/K9UJ-JQWD].

195. Feminist legal scholarship has already had an impact on judicial discourse both in the *Dobbs* dissent and in subsequent state court decisions. *See, e.g.*, *Dobbs*, 597 U.S. at 394 (Breyer, J., dissenting) ("Finally, the majority's ruling today invites a host of questions about interstate conflicts." (citing David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023))); *see also* Monopoli, *supra* note 30, at 249 n.80 ("For a recent example of the significant impact that feminist legal scholarship can have in the wake of *Dobbs*, *see* Planned Parenthood Ass'n of Utah v. State, [554] P.3d [998] (Utah [2024]) in which the Utah Supreme Court upheld a preliminary injunction of the state's abortion ban. Three of the five justices on the Court are women, all of whom joined the majority in the Court's 4-1 decision. The majority cited the work of [legal scholars] Tracy Thomas and Reva Siegel in reasoning about Utah's history of abortion regulation . . . ."); SisterSong Women of Color Reprod. Just. Collective v. State, No. 2022CV367796, at *15 n.21 (Ga. Super. Ct. Sept. 30, 2024), https://assets.aclu.org/live/uploads/2022/07/Order-enjoining-GA-six-week-ban-9.30.24.pdf [https://perma.cc/3E52-SGBY], *stayed*, No. S25M0216 (Ga. Oct. 7, 2024), https://www.aclu.org/documents/stay-order-in-state-of-georgia-v-sistersong-women-of-color-reproductive-justice-collective-et-al [https://perma.cc/Y8TW-DUKL], *and vacated*, No. S25A0300 (Ga. Feb. 20, 2025), https://statecourtreport.org/sites/default/files/2025-02/supreme_court_of_georgia-order.pdf [https://perma.cc/TWX2-GT4Y] (discussing legal scholar Michele Goodwin's article, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191 (2022)).

196. *Dobbs*, 597 U.S. at 408–09 (Breyer, J., dissenting) (alteration in original) (citations omitted).

which precede constitutions and thus cannot be abrogated by the state. Elizabeth Cady Stanton argued that suffrage, and by extension liberty, were natural rights, grounded in the concept that the state could not deny a citizen the right to self-defense:

> Not impressed by any social compact that had made so few provisions for women, [Stanton] declared that, in compacting for the establishment of government and mutual protection, no one gave up a "natural right to protect themselves and their property by laws of their own making, they simply substituted the ballot for the bow and arrow."[197]

The argument that liberty is an inherent right, grounded in self-protection or self-defense, aligns with the realities of pregnancy for many women and other pregnant people.

CONCLUSION

One can read the history of the New Departure as evidence that the Supreme Court has always used interpretive methods to reify women's political, social, and economic subordination. The New Departure was a period during which the legal regime of coverture was slowly eroding. The *Bradwell* and *Minor* Courts' use of interpretive methods grounded in formalism or originalism was a means to an end, i.e., a way of slowing such erosion. The *Minor* Court's holding that suffrage was not a matter of national citizenship deprived women of the most efficient means of achieving political power and slowed progress toward that goal. And Justice Bradley's concurrence in *Bradwell* deployed separate sexual spheres reasoning to justify a more limited scope of economic opportunity for women. These types of constitutional moves effectively shored up the eroding legal regime of coverture as a matter of social design. Similarly, the *Dobbs* Court's purported use of originalism to define liberty in ways that protect men but not women echoes the New Departure Court's use of interpretive methodology to re-subordinate women.

In the current post-*Dobbs* period, especially in the wake of the 2024 election, feminist scholars and activists are also facing a very steep constitutional path. Much like New Departure suffragists pushed back on "intent" originalism and Progressive Era social feminists pushed back on formalism in service to economic elites, today's scholars and activists have pushed back on "public meaning" originalism as the appropriate way to read the Due Process Clause of the Fourteenth Amendment. They have argued

197. Clark, *supra* note 186, at 917–18 (first citing Stanton, *supra* note 24, at 2–3; and then citing Stanton, *supra* note 7, at 64).

for a broad interpretation that links bodily autonomy to citizenship. Like earlier women's rights activists, they have foregrounded citizenship as a source of substantive rights.[198] Today's scholars and advocates are centering women and other pregnant people in their interpretive method.[199]

Evaluating connections among the New Departure activists' introduction of a new interpretive method, similar constitutional moves by Progressive Era social feminists, and the work of today's feminist scholars and advocates can elevate our recognition of "women's influence and creativity in constitutional thought" because "[w]omen remain undervalued as constitutional thinkers."[200] In an era when "history and tradition" and "original public meaning" are the benchmarks for recognizing constitutional rights, it is even more important to remind the Court that women have been making interpretive arguments around significant constitutional provisions like the Fourteenth Amendment for one hundred fifty years. *That* history and tradition should inform how those provisions are understood today. In his examination of the New Departure, Jack Balkin reminds us that without political power, such efforts to alter interpretive methods are not likely to gain traction.[201] But one lesson to take from the New Departure and the Progressive Era is that laying the seeds of such methods in lower courts and in Congress ensures that when the political landscape shifts, judicial and political decisionmakers have existing arguments on which to build.

This paper embraces the proposition that "no theory of constitutional citizenship is purely a matter of logic. It is always in conversation with changes in politics," and rights are essentially political compromises.[202] *Roe* was just such a compromise. Most Americans support reproductive freedom, including abortion, and a significant number feel betrayed by its being overturned in *Dobbs*.[203] That betrayal can be seen in the post-*Dobbs* public opinion about the Court, which demonstrates that a majority of Americans support judicial reforms like age and term limits on justices.[204] The *Dobbs* Court upended a political compromise that had existed for fifty years. The New Departure idea that a truly republican government must

198. For an analysis of citizenship as a source of substantive rights, see generally Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015 (2008).

199. *See, e.g.*, Murray, *supra* note 146, at 855–57.

200. Winkler, *supra* note 8, at 1459; *see also* Siegel, *supra* note 159, at 23; Batlan, *supra* note 109.

201. Balkin, *supra* note 70, at 65.

202. Balkin, *supra* note 26, at 1704.

203. PEW RSCH. CTR., BROAD PUBLIC SUPPORT FOR LEGAL ABORTION PERSISTS 2 YEARS AFTER DOBBS (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/05/PP_2024.5.13_abortion_REPORT.pdf [https://perma.cc/264W-64M4-2YPG].

204. PEW RSCH. CTR., AMERICANS' DISMAL VIEWS OF THE NATION'S POLITICS § 10 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf [https://perma.cc/N3Y3-CCDH]; *see also* Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html [https://perma.cc/Q9QW-26HN].

provide a mechanism for the consent of the governed to be heard was bold, and it ultimately failed to persuade the Supreme Court. Yet it resonates today as we live once again in a constitutional order in which that same Court permits women's liberty to be defined differently and more narrowly than men's liberty.

Catharine MacKinnon has described constitutions as "artifacts of a particular male legal intervention" and has observed that "dominant men have largely interpreted constitutions, and have overwhelmingly confined debates they deem authoritative on them, to terms they set."[205] And Elizabeth Cady Stanton's words on the state of constitutional interpretation in her own era still resonate:

> "A century of discussion has not yet made the constitution understood[.]" . . . "It has no settled interpretation. Being a series of compromises, it can be expounded in favor of many directly opposite principles. . . . "[T]he numerous demands by the people for national protection in many rights not specified by the constitution, prove that the people have outgrown the compact that satisfied the fathers."[206]

One might characterize the Court's reasoning in *Dobbs* as a reprise of just such an interpretation of the compact that may have satisfied the fathers but no longer satisfies the mothers. Remembering the evolutionary reasoning proposed by New Departure activists is valuable. It demonstrates that there is a long history and tradition of interpretive constitutional reasoning which rejects formalist or originalist methods and takes into account the facts around women's lived experiences and their actual legal, social, and economic status.[207] That history and tradition should have a bearing on how our Constitution is read today.

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205. Catharine A. MacKinnon, *Foreword* to FEMINIST CONSTITUTIONALISM, *supra* note 130, at ix.

206. *See* DUBOIS, *supra* note 5, at 108 (quoting 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 5, at 87–88.

207. The *Dobbs* dissenters noted the majority's choice of interpretive method fails to take into account its impact on women. "Today the majority refuses to face the facts. 'The most striking feature of the [majority] is the absence of any serious discussion' of how its ruling will affect women." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 405 (2022) (Breyer, J., dissenting) (alteration in original).