A REVOLUTION TOO SOON: WOMAN SUFFRAGISTS AND THE "LIVING CONSTITUTION"

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From 1869 to 1875, activists associated with the National Woman Suffrage Association, including Susan B. Anthony and Elizabeth Cady Stanton, argued that the United States Constitution guaranteed women's right to vote. Adam Winkler argues that this movement—which the suffragists termed the "New Departure"—rested on an innovative theory of constitutional interpretation that would become the dominant mode of constitutional construction in the twentieth century. Now recognizable as "living constitutionalism," the suffragists' approach to constitutional interpretation was harshly critical of originalism—the dominant mode of nineteenth-century interpretation—and proposed to construe textual language to keep up with changing societal needs. This Article analyzes the intellectual currents that made plausible the suffragists' embrace of an evolutionary interpretive methodology, traces the development of the suffragists' approach as they fought for the franchise in Congress and in the courts, and reveals how radical suffragists encountered the obstacles of originalism at every turn. Correcting the error of constitutional historians who assert that living constitutionalism first emerged in the Progressive Era, this Article stakes a claim for recognizing woman suffragists as important innovators at the forefront of modern constitutional thought.

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INTRODUCTION

Around the turn of the twentieth century, constitutional argument shifted away from the traditional mode of originalism—in which constitutional disputes are settled by reference to the intent of the Framers—to an evolving, progressive "living constitutionalism"—in which constitutional provisions are unmoored from their originalist grounding and interpreted to meet present societal needs.[1] Legal historians credit Progressive Era thinkers such as Oliver Wendell Holmes Jr., Christopher Tiedeman, Louis D. Brandeis, and Woodrow Wilson for making the "earliest efforts" to adopt a changing, evolving Consititution.[2] Overlooked in these accounts is an earlier sustained effort to promote adoption of an evolutionary constitutional interpretive methodology. In the early 1870s a cadre of woman suffragists, including Elizabeth Cady Stanton, Susan B. Anthony, and other members of the National Woman Suffrage Association (NWSA) put forward a version of living constitutionalism when they mounted legal challenges to their continued disenfranchisement following the ratification of the Reconstruction Amendments to the U.S. Constitution.

This Article argues that these woman suffragists, though unsuccessful in achieving their goal of enfranchisement through constitutional interpretation, used living constitutionalism long before the Progressive Era and helped to shape the evolutionary constitutional

[1] Originalism and living constitutionalism are certainly not the exclusive modes of constitutional interpretation. Among the other popular ways of reading the Constitution are textualism, structuralism, and natural rights arguments. See infra notes 19-21 and accompanying text. According to the standard historical accounts of American constitutional development, however, the most important change in interpretive methodology was the shift from the nineteenth century's predominant emphasis on originalism to the twentieth century's use of living constitutionalism. See, e.g., Howard Gillman, The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building, 11 Stud. Am. Pol. Dev. 191 (1997) (describing "shift away from originalism" and toward living constitutionalism); Morton J. Horwitz, Transformation of Constitutional Law, in 6 Encyclopedia of the American Constitution 2712-14 (Leonard W. Levy et al. eds., 2d ed. 2000) (same).

[2] See, e.g., Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory 77-89 (1992) (discussing Holmes, Tiedeman, and Thomas Cooley); Gillman, supra note 1, at 215-20 (discussing Wilson, Tiedeman, and Holmes); Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 51-54 (discussing Wilson and Brandeis).

method that became dominant in the twentieth century. This Article analyzes in detail how suffragists argued that the text of the Constitution should be construed to keep up with the cultural and legal changes in the status of women,[3] and shows how they mixed this evolutionary method with a forceful critique of originalism.[4] This Article shows how the suffragists first attempted to persuade Congress to pass legislation protecting woman suffrage,[5] but finding no success there, turned to the courts.[6] It also analyzes how suffragists used litigation to transform their evolutionary approach to the Constitution into a model of judicial reasoning.[7] The pattern—critiquing originalism, insisting that the interpretation of the constitutional text evolve to meet changed conditions in society, and pursuing reform through litigation strategies that made evolution central to judicial reasoning—has come to define modern living constitutionalism.

Recognizing the constitutional innovations of the "New Departure"—the name given by the suffragists to their novel interpretive move[8]—is important in order to correct the deficiencies in standard accounts of both constitutional development and the New Departure. Historians, lawyers, and political scientists have yet to recognize the New Departure activists as early players in one of the most significant transformations in American judicial practice—the move from originalism to living constitutionalism. This Article suggests the incompleteness of timelines tracing the emergence of living constitutionalism only back to the Progressive Era. More than twenty-five years earlier, suffragists condemned originalism and adopted living constitutionalism as the core strategy of a nationwide, high-profile reform effort that they fought in both houses of Congress, the Supreme Court, and numerous federal trial courts.[9]

Scholars who have focused on the New Departure have not noticed the revolutionary promise of its constitutional argument. This Article counters the suggestion that the New Departure's arguments were "radical . . . only because . . . women dared to ask for the basic individual right that white males already possessed."[10] The suffragists' claims were more than just requests to extend men's rights to women; they were a radically different way of understanding constitutional in-

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3 Infra Part II.A.

4 Infra Part II.C.

5 Infra Part II.A.

6 Infra Part II.B.

7 Id.

8 Ellen Carol DuBois, Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878, 74 J. Am. Hist. 836, 853 (1987).

9 See infra Part II.

10 Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 174 (1991).

terpretation, opposed to reasoning by original intent and seeking to update the principles of the text to societal and legal changes in the status of women. The New Departure was even more innovative than scholars of the women's movement have recognized.

Another significant reason for focusing on the constitutional argument undergirding the New Departure is that it suggests an unrecognized measure of women's influence and creativity in constitutional thought. Women remain undervalued as constitutional thinkers, and it has been noted that women and their cases have been kept out of the constitutional canon.[11] In the New Departure, we have evidence of women creating and using living constitutionalism arguments that previously had been exclusively associated with men. The time has come for women to share some of the credit for devising an innovative and, in the long run, remarkably successful mode of constitutional practice.

To assert that the suffragists were innovative constitutional thinkers is not to claim that they created living constitutionalism from whole cloth. As this Article shows, the suffragists benefited from their intellectual forebears, such as abolitionists, and from emerging currents in mid-nineteenth-century legal thought. The suffragists built on these influences to craft a distinctive interpretive strategy, mixing a critique of originalism—the dominant mode of nineteenth-century interpretive practice—with an explicit demand to interpret the Constitution to meet current societal conditions.

This Article proceeds as follows: Part I introduces originalism as the traditional mode of nineteenth-century constitutional interpretation and describes how legal historians have portrayed the shift from originalism to evolutionary interpretive method. This Part then explains how institutional and cultural developments around the time of the Civil War provided the background elements that influenced the suffragists' innovative approach to constitutional interpretation. Part II analyzes the New Departure, showing how the living Constitution argument was constructed over the course of several years by a variety of activists in both political and legal contexts. This Part discusses the strategy of the New Departure activists, their strategic shifts, and the movement's most significant moments. This Part also shows that traditional originalist reasoning was continually reasserted to defeat the suffragists' challenge. The concluding Part offers some brief thoughts as to why the suffragists failed, in the short term, to rework constitutional interpretive method, and as to the possible influence of

[11] E.g. Karin Mika, Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence, 9 Hastings Women's L.J. 273, 273-74 (1998).

the suffragists on the Progressive Era legal thinkers usually credited with creating evolutionary constitutionalism.

One caveat must be stated before delving into the nuances of the suffragists' approach to constitutional interpretation. Because this Article shows how the suffragists challenged originalism and links their arguments to later debates over the validity of this method of interpretation, at times the discussion may appear to take a normative stand in favor of living constitutionalism. I mean to take no position on whether originalism or living constitutionalism is the better method of constitutional interpretation; my purpose is not to defend or advance the suffragists' constitutional vision, but to describe and explain it.[12] This Article does, however, make clear that the suffragists took a normative position, forcefully challenging originalist reasoning while promoting an evolutionary method of interpretation now recognizable as living constitutionalism.

I
ORIGINALISM AND THE INTELLECTUAL CURRENTS UNDERLYING STATIC CONSTITUTIONALISM

A. Originalism and the Turn to Evolutionary Constitutionalism in Historical Scholarship

For most of the nineteenth century, constitutional interpretation was discerned by the notion that the meaning of textual provisions

[12] Another pitfall that confronts any author analyzing the suffragists is hagiography, as one is liable to consecrate those who fought for values now held as basic and fundamental. Thus, it is worth pointing out that many of the NWSA activists discussed here were perfectly willing to voice racist and nativist arguments in their effort to achieve the vote. E.g., Elizabeth Cady Stanton, Gerrit Smith on Petitions, The Revolution, Jan. 14, 1869, at 24-25 (1869), reprinted in The Elizabeth Cady Stanton and Susan B. Anthony Reader: Correspondence, Writings and Speeches 120 (Ellen Carol DuBois ed., 1981) [hereinafter Stanton-Anthony Reader] (noting that enfranchising blacks without enfranchising women would allow that "every type and shade of degraded, ignorant manhood should be enfranchised, before even the higher classes of womanhood should be admitted to the polls"); see also Ellen Carol DuBois, Introduction, Part Two: 1861-1873, Stanton-Anthony Reader, supra, at 88, 92 (reporting that "Anthony and particularly Stanton reacted to the conflict between black and woman suffrage in a racist fashion"). Perhaps this attitude was the result of the activists' middle-class background, or was a strategic choice. But if the suffragists' racism and nativism was a strategic choice to make women's voting rights more palatable to lawmakers, it may have backfired by poisoning their cause. As one contemporary observed:

> 'I do not blame any naturalized citizen for opposing Woman Suffrage if he finds it habitually urged on the ground that it will help to neutralize the foreign-born vote.... For the sake of winning support in one direction, we forfeit support in another, besides leaving our fundamental principle to be obscured and ignored.'

Linda K. Kerber, No Constitutional Right to be Ladies 109 (1998) (quoting Thomas Wentworth Higginson).

should be determined by reference to the original intentions of those who framed and ratified the document.[13] The meaning of the Constitution did not change, as jurist Joseph Story wrote in his famous *Commentaries on the Constitution of the United States*: The Constitution "is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever."[14] This constancy was achieved by referencing the intent of the constitutional Framers to resolve controversies. Reflecting on the standard practice, midcentury thinkers believed that the distinctive feature of American constitutionalism was that it was nondevelopmental. In *On Civil Liberty and Self-Government*, published in 1853, Francis Lieber described the Constitution as "the positive enactment of the whole at one time, and by distinct authority."[15] John Norton Pomeroy, dean of the New York University School of Law, wrote, in 1868, in his widely influential *An Introduction to the Constitutional Law of the United States* that "this Constitution is fixed."[16] Distinguishing the English Constitution, which had "grown up by a historical development" and for which "the historical element must enter largely into its discussion," Pomeroy insisted that the American Constitution was "peculiar" because "it has nothing of tradition."[17] Describing this "firmly entrenched . . . originalist approach," twentieth-century legal historian Morton Horwitz explains that "[f]or the first hundred years, American constitutional interpretation firmly adhered to . . . a Newtonian conception of the Constitution" in which "[c]onstitutional concepts and principles were static and unchanging, akin to timeless scientific truths."[18] Other methods

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[13] See, e.g., Kahn, supra note 2, at 32-64 (concluding that originalism reigned in nineteenth-century constitutional argument); Howard Gillman, Living Constitution, in 4 Encyclopedia of the American Constitution, supra note 1, at 1632-34 (analyzing shift from nineteenth-century originalism to living constitutionalism); Horwitz, supra note 2, at 44-51 (tracing doctrine's historical antecedents to Founders' "static originalism," and claiming this to be "dominant interpretative paradigm for most of American constitutional history"); see generally Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law (rev. ed. 1994) (arguing that standard judicial practice in nineteenth century was originalist-inspired interpretivism).

[14] Joseph Story, Commentaries on the Constitution of the United States 145 (Boston, Hilliard, Grey 1833).

[15] Francis Lieber, On Civil Liberty and Self-Government 179 n.* (Philadelphia, Lippincott, Grambo 1853).

[16] John Norton Pomeroy, An Introduction to the Constitutional Law of the United States §14, at 10 (Boston, Houghton, Osgood & Co. 4th ed. 1879).

[17] Id. at 11.

[18] Horwitz, supra note 1, at 2712.

of constitutional interpretation—textualism,[19] structuralism,[20] and arguments from natural rights[21]—were also used on occasion by nineteenth-century jurists, but originalism dominated constitutional thought and practice.[22]

Nineteenth-century originalism was reflected prominently in Chief Justice Roger B. Taney's opinion in *Dred Scott v. Sandford*,[23] already infamous by the time of the Civil War. Rejecting the claim that a free black person was a citizen of the United States, Taney relied on both originalism and a static conception of judicial power established and instituted by the Framers:

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19 Textualism is the interpretative methodology that demands that judges rely primarily on the precise language of the Constitution in resolving controversies. Research indicates that this was the most prevalent theory of constitutional interpretation among the nation's Founders. Leonard W. Levy, Original Intent and the Framers' Constitution 2 (1988) (concluding that original intent "did not greatly matter [to the Framers;] [w]hat mattered to them was the text of the Constitution"). Supreme Court Justice Owen Roberts famously articulated a vision of this theory in his opinion for the Court in United States v. Butler, 297 U.S. 1, 62 (1936):

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

20 Structuralism emphasizes construing the various provisions of the Constitution so that they "fit," or remain consistent with the organic whole of the text. Although the term "structuralism" is of twentieth-century origin, this mode of constitutional interpretation stretches back to the Founding. Walter F. Murphy et al., American Constitutional Interpretation 292-94, 320-21 (1986) ("In American constitution making[,] overt use of structuralism began with the Philadelphia Convention, if not earlier."). Charles L. Black Jr.'s *Structure and Relationship in Constitutional Law* (1969) remains the best work on structuralist interpretative practice.

21 Natural-rights theorists view the Constitution as the embodiment of transcendent values, such as self-government and equality, that each person is inherently worthy of enjoying. Textual constructions that inhibit the enjoyment of those rights emanating from one's natural personhood are disfavored, even in the absence of textual ambiguity. See generally Leo Strauss, Natural Right and History (1953) (arguing that laws and institutions cannot transcend certain natural rights). The Declaration of Independence speaks to natural rights in its reference to the "self-evident" truth that "all men are created equal . . . endowed, by their Creator, with certain unalienable rights." The Declaration of Independence para. 2 (U.S. 1776).

22 Originalism describes the prevalent mode of judicial reasoning in nineteenth-century constitutional cases, but that is not to say that jurists always made rigorous efforts to ascertain the subjective intentions of the Framers. In fact, what one often finds in early- to mid-nineteenth-century opinions are invocations of original intent without any historical evidence, citation, or even substantive discussion of the Framers' views. See, e.g., Mills v. County of St. Clair, 49 U.S. (8 How.) 569, 584-85 (noting intent of Framers towards federal power over municipal elections in brief sentence without elaboration). Original intent may be seen primarily as a method of justification, not of interpretation. I am grateful to Ed Balleisen for this insight.

23 60 U.S. (19 How.) 393 (1857).

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[24]

Taney's recourse to the original intent of the Framers was coupled with a mechanical conception of the political order: The Framers set up various institutions and defined their relative powers, creating a regime of rights from which the judiciary was not free to stray. Once instituted, the regime could be changed only through formal procedures for textual amendment, themselves a product of the Framers and binding on future generations.

Historical accounts of constitutional development contend that a new form of constitutional practice began to emerge at the tail end of the nineteenth, or the early twentieth, century.[25] Originalism was challenged by a more dynamic, evolutionary approach to constitutional interpretation, one that called for textual provisions to be read in light of society's changing needs and conditions rather than solely the Framers' intent. This new interpretive methodology has been termed "living constitutionalism."[26] Based on the idea that society changes and evolves, living constitutionalism requires that constitutional controversies, in the words of Justice Oliver Wendell Holmes Jr., "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[27]

Living constitutionalism, according to the classic definition, is the idea that "in a dynamic society" the Constitution

> must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy.... A constitutional provision can maintain its integrity only by moving

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[24] Id. at 405.

[25] See, e.g., Gillman, supra note 13; Horwitz, supra note 1, at 2712-14; Horwitz, supra note 2, at 51-57. Another rich source is Herman Belz, A Living Constitution or Fundamental Law?: American Constitutionalism in Historical Perspective 41-75 (1998).

[26] The term is often traced to Benjamin N. Cardozo, whose *The Nature of the Judicial Process* popularized the notion of the evolving Constitution. Cardozo famously explained that the "content of constitutional immunities is not constant, but varies from age to age." Benjamin N. Cardozo, The Nature of the Judicial Process 82-83 (1921).

[27] Missouri v. Holland, 252 U.S. 416, 433 (1920).

> in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change.[28]

Under this theory of constitutional interpretation, fidelity to original constitutional principles means that their scope of application must evolve with the underlying changes in society.[29]

Living constitutionalism therefore is respectful of the past—in the sense of attempting to be true to the basic principles embodied in our constitutional text—but inherently critical of reasoning by original intent. In the words of Justice William J. Brennan Jr., perhaps the most influential proponent of living constitutionalism in the late twentieth century, "[i]t is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."[30] Rather, advocates of living constitutionalism believe, in one commentator's description, that "the judiciary must interpret the text to promote human dignity in light of society's changing values and needs,"[31] and "should not be cabined by too literal a quest for the Framers' intent."[32]

The standard historical account of the change in interpretive practice from originalism to living constitutionalism credits Progressive Era reformers around the turn of the twentieth century for undertaking the "earliest efforts to develop a theory of an historically changing constitution."[33] According to Horwitz, it was "only after *Lochner* [was decided in 1905] that a progressive view of the Constitution began to emerge."[34] Horwitz claims that the "first progressive thinkers to elaborate a theory of a changing constitution" were Woodrow Wilson and Louis D. Brandeis in the early decades of the twentieth century. Both were propelled, he argues, by Darwinist evo-

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[28] Charles A. Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 735-36 (1963).

[29] For example, although the ratifiers of the Fourteenth Amendment may not have thought that the guarantee of "equal protection of the laws" meant that racially segregated public schools were unconstitutional, by the 1950s, the evolving ideal of equality and the pressing societal need to elevate African Americans to full citizenship required school desegregation on the basis of that constitutional principle. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954). In light of changed conditions in America, the principle of "equal protection of the laws" could be achieved only by applying it to areas perhaps never imagined by the ratifiers of the Fourteenth Amendment.

[30] William J. Brennan Jr., The Constitution of the United States: Contemporary Ratification, in Alpheus Thomas Mason & Donald Grier Stephenson Jr., American Constitutional Law: Introductory Essays and Selected Cases 607, 609 (8th ed. 1987).

[31] Arlin M. Adams, Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution," 139 U. Pa. L. Rev. 1319, 1319 (1991) (citing Brennan, supra note 30).

[32] Id. (citing Sch. Dist. of Abington Township v. Schnepp, 37 U.S. 203, 237 (1963) (Brennan, J., concurring)).

[33] Horwitz, supra note 2, at 51.

[34] Id. at 43.

lutionary thought and pragmatist political theory.[35] Historian Herman Belz notes that Progressive thinkers such as James Bryce, J. Franklin Jameson, George Ticknor Curtis, and Simon Stern were leaders in the movement towards a less formalist, static constitution.[36] Political scientist Howard Gillman and legal scholar Paul Kahn trace the emergence of evolutionary constitutional method back to the final two decades of the nineteenth century and Progressive Era reformers such as Holmes and Christopher Tiedeman.[37] Both Gillman and Kahn note a lone proponent of evolutionary constitutionalism prior to the late nineteenth century: Unionist lawyer Sidney George Fisher, whose 1862 book, *The Trial of the Constitution,*[38] defended Lincoln's assumption of wartime powers and disregard of the constitutional guarantees of free speech and habeas corpus.[39]

Omitted from all these discussions are the woman suffragists of the early 1870s who articulated, promoted, and pursued through active litigation an evolutionary method of constitutional interpretation. Although Holmes famously declared in 1881 that the common law must adapt to "the felt necessities of the time,"[40] more than ten years earlier suffragists from New York to California were making the same argument with regard to the Constitution in trials that were widely publicized and much debated. This effort ended in 1874, when the U.S. Supreme Court refused to adopt an evolutionary interpretive method and ruled, in *Minor v. Happersett*,[41] that the Constitution did not protect women's right to vote.[42] The decision was unanimous, a sign that the suffragists' argument was still too radical for its time.

One reason that historical discussions of living constitutionalism may have missed the suffragists' example could be the *Minor* case itself. In constitutional textbooks and treatises, the suffragists' attempt

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35 Id. at 51-54.

36 Belz, supra note 25, at 48-50.

37 Kahn, supra note 2, at 77-89 (analyzing legal theories of Holmes and Tiedeman as they relate to constitutional construction); Gillman, supra note 1, at 217-20 (same).

38 Sidney George Fisher, The Trial of the Constitution (Negro Universities Press 1969) (1862).

39 See Gillman, supra note 1, at 214-15 (noting need for constitutional interpretation that presumes permanent union); Kahn, supra note 2, at 70-71. Kahn also credits Thomas Cooley's 1868 *Constitutional Limitations* with putting forward an evolutionary model of constitutional construction. Id. In fact, while Cooley accepted evolutionary law in the realm of the common law, he explicitly rejected it in the context of constitutional law. Thomas M. Cooley, A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 54-55 (Boston, Little, Brown 1868); see also Stephen A. Siegel, Historism in Late Nineteenth-Century Constitutional Thought, 1990 Wis. L. Rev. 1431, 1506-08 & 1506 n.452.

40 Oliver Wendell Holmes Jr., The Common Law 1 (Boston, Little, Brown 1881).

41 88 U.S. (21 Wall.) 162 (1874).

42 Id.

to win the franchise through the courts is recognized, and naturally the Supreme Court's decision in *Minor* is prominently featured.[43] Yet Virginia Minor's argument before the Supreme Court represents one of the least "evolutionary" interpretations of the Constitution put forward by the New Departure suffragists. Although Virginia Minor was an important suffragist figure who ignited the New Departure's turn toward the courts for reform and inspired the move toward living constitutionalism arguments, by the time her case came before the Supreme Court, she had forsaken most of the suffragists' evolutionary method. After four years of attempting to persuade first Congress, and then the courts, to adopt a dynamic method of constitutional interpretation, only to be met time and time again with originalism, Minor's legal team retrenched and attempted a more traditional tack.[44] Thus, her Supreme Court arguments omitted many of the evolutionary aspects of the New Departure in favor of an originalist argument for woman suffrage.

The focus on the *Minor* case has distracted legal scholars—the most naturally inclined to study a theory of constitutional hermeneutics—from the earlier, more evolutionary claims advanced by the New Departure activists and theorists. As this Article shows, the high point of the suffragists' living constitutionalism was not *Minor*, but the earlier criminal trial of Susan B. Anthony for voting illegally.[45] Anthony's attorneys presented to the court the most complete and forceful living constitutionalism argument of the period. Once the court rejected Anthony's arguments, suffragists such as Minor began to step back from the evolutionary interpretive method. Thus the Anthony trial illustrates the suffragists' constitutional innovations more fully than the *Minor* case.

B. The Institutional and Cultural Context of the Suffragists' Constitutional Method

Before examining the ways in which woman suffragists articulated and defended evolutionary constitutionalism, it is important to consider the intellectual and cultural developments that provided a context and framework for this dynamic interpretive model. New

[43] See, e.g., Daniel A. Farber et al., Constitutional Law: Themes for the Constitution's Third Century 308-09 (2d ed. 1998); Geoffrey R. Stone et al., Constitutional Law 677 (2d ed. 1991); Laurence H. Tribe, American Constitutional Law 1559 (2d ed. 1988). A notable exception is Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 265-68 (4th ed. 2000) (detailing New Departure argument and prosecution of Susan B. Anthony).

[44] See infra Section II.E.

[45] United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459). See infra Section II.D.

methods of constitutional interpretation do not just appear; they grow out of soil that has been enriched by developments in the institutional and social environment.

Evolutionary models of general cultural transformation were rapidly becoming popular around the time of the Civil War. Darwin's *On the Origin of Species*, published in 1859, was preceded by the notable evolutionary theories of society and culture put forward by Herbert Spencer and, before him, Auguste Comte.[46] In the domain of law, dynamism and adaptation were being legitimated by intellectual trends concerning the common law. Once viewed as static and timeless, the common law was coming to be seen as "perpetually fluctuating,"[47] responsive to the "varying tempers of ages and nations."[48] While some legal theorists, such as Sir Matthew Hale, had long challenged the supposed immutability of the common law,[49] American lawyers were not persuaded of the common law's dynamism until pushed by the demands of rapid economic growth in the midst of the nineteenth century. According to legal historian William Nelson, "the urge for economic development infected the legal profession. Judges began to think that law should be 'a practical system, adapted to the condition and business of society' and 'suit[ed to] the local condition and . . . exigencies of every people.'"[50] Judges modified old rules of property, contract, and tort that were believed to impede expansive economic growth.[51]

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[46] Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 Tex. L. Rev. 645, 664-66 (1985) (exploring how social thought in mid-nineteenth century promoted evolutionary thinking about law). See generally Auguste Comte, The Positive Philosophy (Harriet Martineau trans., C. Blanchard ed., AMS Press 1974) (1855) (articulating evolutionary theory of cultural development); Herbert Spencer, Social Statics (Robert Schalkenback Foundation 1970) (1851) (arguing that humans adapted to their environment in process of perfecting character).

[47] Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 14 (New York, John S. Voorhies 1857).

[48] Review, Portico, Jan. 1817, at 192, 193 (reviewing David Hoffman, A Course of Legal Study (Coale & Maxwell 1817)).

[49] See generally Sir Matthew Hale, The History of the Common Law of England (Charles M. Grey ed., University of Chicago Press 1971) (1713) (exploring how common law evolves with society).

[50] William E. Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 521 (1974) (quoting Steele v. Curle, 34 Ky. (4 Dana) 381, 390 (1836) and Allison v. McCune, 15 Ohio 726, 730 (1846)).

[51] Nelson, supra note 50, at 521-24. Change was not wholesale but incremental, and in some areas, such as the law of master and servant, there was more stability than change. Karen Orren argues that nineteenth-century American labor relations held firm to their feudal roots and that "the old common-law rules of labor governance had been left standing." Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States 15-16 (1991).

The example of the common law did not translate automatically to constitutional law. The latter was distinct precisely because one purpose of a written constitution was to preserve prior commitments in the face of political vicissitudes.[52] But thought about the common law indicated a legal environment growing accustomed to judicially directed legal change.

In the wake of the Civil War's devastation, a new generation of Americans was hopeful about the prospects of change. After historian John Lothrop Motley met Holmes in 1867, he remarked that Holmes was "one of the fellows who have got to prove to the world that America means Radicalism—that America came out of chaos in order to uproot, not to conserve the dead and polished productions of former ages."[53] Henry Adams, destined, like Holmes, to become an exemplar of his generation, wrote in 1865: "We want a national set of young men like ourselves or better, to start new influences not only in politics, but in literature, in law, in society, and throughout the whole social organism of the country—a national school of our own generation."[54] In this environment of change and idealism, the postwar suffragists intensified their campaign to win women the right to vote.

The suffragists' dynamic constitutionalism built on the practices of their prewar allies in the abolitionist movement. Abolitionists had vigorously attacked the reigning doctrines and dogma of nineteenth-century constitutional law, relying on principles of higher or natural law instead of original intent.[55] The Constitution, with its acceptance of slavery in the Three-Fifths Clause,[56] was properly understood as a bulwark against emancipatory reform, and antislavery activists, such as religious perfectionist William Lloyd Garrison,[57] condemned the document as a "covenant with death and an agreement with hell."[58] Other abolitionists, notably Frederick Douglass and Alvan Stewart, attempted to reconstruct the Constitution as an antislavery document

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52 See, e.g., Cooley, supra note 39, at 54-55.

53 Motley to Holmes, Mar. 12, 1867, in 2 The Correspondence of John Lothrop Motley 255 (George W. Curtis ed., New York, Harper & Brothers 1889) (letter to Oliver Wendell Holmes Sr.).

54 Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America 46 (1977) (quoting Adams and detailing "euphoria" of postwar optimism).

55 On the contours of antislavery constitutionalism, see generally William M. Wiecek, The Sources of Antislavery Constitutionalism in America 1760-1848 (1977); Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1358-64 (1995).

56 U.S. Const. art. I, § 2, cl. 3.

57 Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery (1998) is an exhaustive revisionist account of Garrison, his moral absolutism, and his influence on the nineteenth-century antislavery struggle.

58 William M. Wiecek, Abolitionist Constitutional Theory, in 1 Encyclopedia of the American Constitution, supra note 1, at 3 (quoting Garrisonian opinion of Constitution).

imbued with deep, natural-law principles of equality and individual liberty.[59] Stewart, like the New Departure suffragists, even pursued his radical vision of the Constitution through litigation, attempting to achieve emancipation through interpretation rather than amendment.[60] Yet antislavery rhetorical attacks on the Constitution did not purport to propose an evolutionary method of constitutional interpretation, and we should be careful to distinguish the abolitionists from the suffragists. The former sought to bring timeless principles of natural law to bear on a Constitution deformed from its inception by its compromise on slavery.[61] The Constitution did not need to be reinterpreted because society had evolved; it needed to be reinterpreted because the Founders had robbed blacks of equal citizenship in the first place. Abolitionists were not living constitutionalists even though they sought, like the later suffragists, a revolution in the constitutional order.

Abolitionist constitutional agitation provided an example for New Departure suffragists because it actively sought constitutional reform in the courts and because it succeeded in calling into question the value and wisdom of continuing to abide strictly by the intent of the Framers. Most of the woman suffragists who put forward an evolutionary interpretive methodology during Reconstruction had participated actively in the abolition movement.[62] The suffragists' move beyond a jurisprudence of original intent was in part an outgrowth of their abolitionist experience.

Moreover, agitation for women's rights had long relied on a critical approach to history. To the extent that women political thinkers and activist reformers sought to elevate women from their traditional subordination, suspicion of ancient rules was built into the ideology of the movement.[63] Early modern feminists, such as Mary Astell in *Some Reflections Upon Marriage*, couched their reforms in the language of restoration seeking to vindicate divine intentions over the

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[59] On Douglass, see William S. McFeely, Frederick Douglass 169 (1991); on Stewart, see Daniel R. Ernst, Legal Positivism, Radical Litigation, and the New Jersey Slave Case of 1845, 4 Law & Hist. Rev. 337, 346-48 (1986).

[60] Ernst, supra note 59, at 344-45.

[61] Lobel, supra note 55, at 1361. See also Bret Boyce, Originalism and the Fourteenth Amendment, 33 Wake Forest L. Rev. 909, 964-65 (1998) (noting abolitionists' natural-law approach to constitutionalism).

[62] "The first generation of feminists were active and dedicated abolitionists," including Anthony and Stanton. Kate Millet, Sexual Politics 80 (1970); see also Eleanor Flexner, Century of Struggle: The Woman's Rights Movement in the United States 41 (1970) (discussing ties between abolitionists and woman suffragists).

[63] As Elizabeth Cady Stanton put it: "It is a settled maxim with me that the existing public sentiment on any subject is wrong." Sara M. Evans, Born for Liberty: A History of Women in America 124 (1989).

corrupted practices of men.[64] In contrast, antebellum women vigorously criticized tradition and slavish adherence to custom. Harriet Taylor Mill, among the most articulate and influential antitraditionalists, argued in her 1851 essay, "Enfranchisement of Women," that "custom" was the primary stumbling block to the full extension of political and civil rights to women.[65] Past practices were to be examined critically in order to discover their assumptions and consequences, not glorified to immunize them from the demands of reason: "That an institution or practice is customary is no presumption of its goodness."[66] Rights must keep up with larger societal developments; as politics was no longer a violent, aggressive, and dangerous realm unfit for women, women should be accorded the franchise.[67]

In the wake of the Civil War, the once-stable constitutional order was left chaotic, unsettled, and negotiable—and thus potentially open to novel interpretive methodologies. The war itself called into question traditional norms that formed the foundations of the American Constitution, such as state sovereignty and limited federal power. The Union's conduct of the war also challenged the stability of accepted constitutional principles. Justified by the exigencies of the rebellion, the Lincoln administration disregarded core civil liberties, such as freedom of speech (as in the notorious case of Clement Vallandigham),[68] the guarantee of habeas corpus,[69] and controversially imposed martial law upon civilians.[70] After the war ended, federal troops occupied the Southern states, governing through discretionary powers and military tribunals for civilian legal infractions never contemplated by the Constitution but, again, justified by the situation.[71] The term "reconstruction" was apt; the old system lay in ruins.

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[64] See generally Mary Astell, Some Reflections Upon Marriage, reprinted in The First English Feminist 89 (Bridget Hill ed., 1986) (1706).

[65] Harriet Taylor Mill, Enfranchisement of Women, in The Complete Works of Harriet Taylor Mill 51, 55 (Jo Ellen Jacobs ed., 1998) (1851).

[66] Id. at 56.

[67] Id. at 61-62.

[68] See generally Michael Kent Curtis, Lincoln, Vallandigham, and Anti-War Speech in the Civil War, 7 Wm. & Mary Bill Rts. J. 105 (1998) (discussing arrest and military trial of prominent Democratic politician Vallandigham in 1863 for giving antiwar speech); The Trial of Hon. Clement L. Vallandigham by a Military Commission (Cincinnati, Rickey & Carroll 1863).

[69] See generally Mark E. Neely Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (1991) (analyzing sympathetically Lincoln administration's wartime denial of habeas corpus).

[70] Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (declaring Lincoln's use of martial law unconstitutional where civil courts still operated).

[71] See generally Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (1973) (analyzing impact of Civil War and

The Civil War also led to a series of constitutional amendments that seemed at the time to promise a radical shift in the nature of federalism and in the rights accorded to citizens. The Thirteenth Amendment prohibited slavery, reversing the original design.[72] The Fourteenth Amendment strengthened the national government at the expense of traditional states' rights and guaranteed the equal enjoyment of the privileges and immunities of national citizenship.[73] The Fifteenth Amendment inhibited the long-standing state power over enfranchisement by guaranteeing blacks the right to vote.[74] Not only was the substance of these changes amenable to the ends of the suffragists, who sought expanded rights of citizenship—such as the vote—and the protection of these rights from state encroachment by federal mandate, but the fact of radical constitutional change in pursuit of higher law only could have emboldened them in their own effort to legitimate adaptation and development of the Constitution. The very idea that the Framers' intentions should control the political system fit uncomfortably, at best, with the profoundly changed constitutional order that emerged from the war.

The outbreak of the Civil War had led at least one prominent Republican not aligned with the suffragist movement to stake a claim for an evolving Constitution. Sidney George Fisher, a Philadelphia lawyer and vigorous Unionist, published *The Trial of the Constitution* in 1862, arguing that a "fixed, unchangeable government, for a changeable, advancing people, is impossible."[75] The law of government, like the common law, should rest not on the original intent of mythical Framers, but on what Fisher termed "custom." Custom, according to Fisher, was the "perfection of reason" in light of "the demands which are made by time."[76] Reason, not original design, should shape the contours of the constitutional order. "The Constitution belongs to the people," Fisher exclaimed, "to the people of 1862, not to those of 1787."[77]

Fisher, however, did not argue for an interpretive methodology to be adopted by the courts. In fact, Fisher directed the force of his argument *against* judicial power, believing that by the end of the 1850s the courts had proven to be bastions of conservatism and reaction.[78] For

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Reconstruction on Constitution as well as influence of Constitution on Civil War and Reconstruction).

72 U.S. Const. amend. XIII.

73 U.S. Const. amend. XIV.

74 U.S. Const. amend. XV.

75 Fisher, supra note 38, at 39.

76 Id. at 18.

77 Id. at 96.

78 Id. at 51-52.

Fisher, the way to assure an evolving Constitution was to limit conservative institutions such as the judiciary and to govern the United States like England, with a strong Parliament.[79] Since it is not bound by a written constitution, the elected Parliament is able to reflect current democratic demands, ensuring that "the organic law is thus pliable and responsive to the wishes of the people."[80]

In imagining reduced judicial power, Fisher was not so much a proponent of living constitutionalism, which is primarily a form of judicial reasoning, as he was a very early supporter of constitutional "dialogue"—the trend among modern theorists to emphasize how constitutional law is shaped by nonjudicial actors, such as Congress, the Executive Branch, and the states.[81] Nevertheless, Fisher's call for a changing Constitution, even if achieved through the elected branches, suggests that at least some in the legal community were beginning to accept dynamism in constitutional law,[82] where static originalism still reigned.

The suffragists' turn toward an evolutionary constitutional method was largely dictated by their limited strategic choices. They

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79 Id. at 62-64. According to Fisher, "Parliament was omnipotent." Id. at 41.

80 Id. at 30.

81 There is an extensive literature from the 1980s and 1990s on dialogic constitutional lawmaking. Among the most notable works are Bruce Ackerman, 1 We the People: Foundations (1993) (claiming that people institute new constitutional orders in unusual moments of "higher lawmaking") [hereinafter Ackerman, Foundations]; Bruce Ackerman, 2 We the People: Transformations (1998) (same) [hereinafter Ackerman, Transformations]; Robert A. Burt, The Constitution in Conflict (1992) (arguing that legislation such as Civil Rights Acts and Voting Rights Act contribute to constitutional doctrine); Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (1988) (detailing everyday practice of multibranch influences on constitutional law); Cass R. Sunstein, The Partial Constitution (1993) (proposing that contemporary constitutional debate is incomplete in part because it overemphasizes role of judiciary and marginalizes nonjudicial inputs); Mark Tushnet, Taking the Constitution Away from the Courts (1999) (defending non-court-centered understanding of Constitution and its meaning); Keith Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999) (using case studies of major political controversies to show how nonjudicial actors shape meaning of constitutional rules).

82 In 1847, an anonymous essayist in the popular *American Review* also noticed the ways in which the constitutional order was evolving as a matter of practice, a situation the essayist harshly condemned. See The Constitution: Written and Unwritten, 6 Am. Rev. 1 (1847). The essayist specifically considered how Presidents, such as Jefferson and Polk, aggrandized executive power in asserting novel war authority and discretion over conquered or purchased territories. In light of popular indifference to these power grabs, he concluded that we Americans

> deceive ourselves egregiously if we suppose that, because we began with a written instrument, we are therefore secure against any changes in its features or provisions, except such as may be made according to the forms prescribed in the terms of the written instrument itself, and plainly written down, like the rest, as part of it.

Id. at 2.

had few viable options for winning the vote. In the pursuit of constitutional recognition of their voting rights, the suffragists already had failed to win inclusion in the franchise-protective amendments passed by Congress during early Reconstruction. No approach to constitutional interpretation based on original intent held any hope of victory; it was clear to all that women's right to vote was purposefully omitted from the guarantees of the Fourteenth Amendment.[83] Nor were competing interpretive theories, such as the natural-rights arguments preferred by the prewar abolitionists, likely to succeed where in the past they had failed.[84] Suffragists turned to living constitutionalism because it built upon the emerging recognition of dynamism in the law and because they had few other choices. Pressing needs inspire innovation.

II
THE NATIONAL WOMAN SUFFRAGE ASSOCIATION AND THE DEVELOPMENT OF SUFFRAGIST LIVING CONSTITUTIONALISM

A. A Minor Suggestion

The living constitutionalism of the New Departure was built up gradually, not born of a moment, and was shaped in the crucible of suffragist activism. A foundation was laid in 1869 by Francis and Virginia Minor, a husband-and-wife team of creative Missouri reformers who first saw that the textual ambiguities of the Fourteenth Amendment opened the door for a construction of the text according to which women's right to vote was already secured. Appearing before a Senate Committee shortly thereafter, Elizabeth Cady Stanton—who, together with Susan B. Anthony, led the New Departure movement—adopted the Minors' reading of the Fourteenth Amendment and sought to justify it by pointing to the evolutionary nature of democratic values in American law. Stanton's emphasis on evolution would be taken up, in turn, by suffragist Victoria Woodhull and Con-

[83] See Earl M. Maltz, The Constitution and Nonracial Discrimination: Alienage, Sex and the Framers' Ideal of Equality, 7 Const. Comment. 251, 266-80 (1990) (detailing opposition to woman suffrage among Fourteenth Amendment's framers); Ward Farnsworth, Women Under Reconstruction: The Congressional Understanding, 94 Nw. U. L. Rev. 1229, 1260-73 (2000) (same). Farnsworth's excellent and thorough study of the legislative history of the Reconstruction Amendments illustrates that the prevailing view in Congress was that the provisions did not disturb the states' imposition of legal disabilities on women. With regard to the right to vote, women were thought to be adequately represented by their husbands (if married) and fathers (if single); that was, at least, the explicit justification. See id. at 1236-40.

[84] See supra note 21.

gressman Albert Gallatin Riddle in defense of an 1872 memorial[85] to Congress seeking legislation recognizing women's voting rights; they would refocus Stanton's evolutionary dynamic to highlight changes in the legal and social status of women. Eschewing ahistoricism, each of these activists promoted their preferred reading of the Constitution as faithful to underlying patterns of development in the law. They would find, however, originalism being reasserted, even by supposed allies in the Republican Party, to defeat claims for woman suffrage.

From the 1820s to the Civil War, woman suffragists and abolitionists worked together for common goals, including the extension of the right to vote to the great disenfranchised classes: slaves and women.[86] At the end of the Civil War, with the North galvanized by the spirit of universal rights, the suffragists pinned their hopes for enfranchisement on the movement, supported by the Republican Party, to extend the right to vote to blacks as part of Reconstruction. As Elizabeth Cady Stanton put it, the suffragists intended "to avail ourselves of the strong arm and the blue uniform of the black soldier to walk in by his side."[87]

Yet the suffragists soon discovered that many of their antebellum Republican allies supported adoption of the Fourteenth and Fifteenth Amendments. The Fourteenth Amendment, although not explicitly guaranteeing the franchise to anyone, for the first time introduced the word "male" into the Constitution; Section 2 provided that a state's denial of the suffrage to "male inhabitants" would occasion reduced representation in Congress.[88] The obvious implication was that states could deny women inhabitants the vote without penalty. For woman suffragists, the Fifteenth Amendment was problematic for what it lacked; its extension of the right to vote to former slaves did not reach women, black or white.[89]

Some women's rights activists, such as Lucy Stone and Henry Blackwell, supported these amendments, disappointed in their limitations but hopeful that women's day would come soon.[90] Others, such as Stanton and Susan B. Anthony, refused to support the amend-

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[85] "A written statement of facts presented to a legislative or executive as a petition." Black's Law Dictionary 998 (7th ed. 1999).

[86] See Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869, at 31-39, 50-52, 59-61 (1978).

[87] Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 177 (2000).

[88] U.S. Const. amend. XIV, § 2.

[89] U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.")

[90] DuBois, supra note 86, at 58-62, 163.

ments, contributing to a growing rift in the women's rights movement.[91] Stanton and Anthony splintered off from Stone and the more moderate suffragists of the American Woman Suffrage Association (AWSA) and formed the NWSA to pursue their more radical demands for immediate woman suffrage.[92]

More than strategic disagreement divided the rival suffrage organizations. As Rogers Smith describes, the NWSA "advocated far more broad-ranging reforms, encompassing changes in religious as well as political and legal doctrines and challenges to a range of marital, familial, and workplace arrangements."[93] The NWSA sought "fundamental restructuring" of institutions and traditions, rather than incremental improvements, in order to "realize meaningful gender equality in many areas of life."[94]

Despite the NWSA's opposition, the Fourteenth Amendment was ratified in July 1868.[95] A year and a half later, the Fifteenth Amendment was also ratified.[96]

Throughout most of 1869, while the proposed Fifteenth Amendment was being considered by the states, the NWSA agitated for a Sixteenth Amendment explicitly guaranteeing female suffrage. According to Stanton, they had "a definite, constructive rallying point" in fighting for "an amendment wholly of [their] own."[97] Nothing short of a constitutional amendment, similar to that protecting black males, they thought, would elevate woman from her subservience and bestow upon her an enforceable right to vote.[98] This was the core of their immediate reform agenda.

The NWSA's focus on a Sixteenth Amendment as the vehicle for enfranchisement changed in October 1869, sparked by the opening address of the Woman Suffrage Convention held in St. Louis. The speaker was Virginia Minor, a local women's rights activist who, with

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91 Flexner, supra note 62, at 145.

92 DuBois, supra note 86, at 164. On the suffrage movement around the Civil War, see generally Israel Kugler, From Ladies to Women: The Organized Struggle for Woman's Rights in the Reconstruction Era (1987).

93 Rogers Smith, Civic Ideals 315 (1997). One enduring example of the multifront radicalism of the NWSA activists is Stanton's compilation of feminist responses to the Bible. See Elizabeth Cady Stanton, The Woman's Bible (Prometheus Books 1999) (1898).

94 Smith, supra note 93, at 315.

95 William E. Nelson, Fourteenth Amendment, in 3 Encyclopedia of the American Constitution, supra note 1, at 1084, 1085.

96 William Gillette, Fifteenth Amendment, in 3 Encyclopedia of the American Constitution, supra note 1, at 1039, 1040-41.

97 Elizabeth Cady Stanton to Lucretia Mott (Jan. 21, 1869), in 2 Elizabeth Cady Stanton as Revealed in Her Letters, Diary, and Reminiscences 121-22 (Theodore Stanton & Harriet Stanton Blatch eds., 1922) [hereinafter Letters of Elizabeth Cady Stanton].

98 See Ross Evans Paulson, Liberty, Equality, and Justice: Civil Rights, Women's Rights, and the Regulation of Business 1865-1932, at 47 (1997).

her husband Francis (a prominent local attorney) devised an ingenious argument for woman suffrage.[99] Minor boldly stated that the Constitution as it was *already* guaranteed women the right to vote. The Constitution, she contended, "gives me every right and privilege to which every other citizen is entitled."[100] Women were "universally conceded" to be citizens, she went on, and thus as citizens were entitled under Section 1 of the Fourteenth Amendment to all the "privileges and immunities" of citizenship.[101] The right to vote was the ultimate privilege and immunity of a citizen in the United States, and therefore must be guaranteed by the Fourteenth Amendment.[102] After describing how she was "jeeringly asked, 'If the Constitution gives you this right, why don't you take it?,'" she declared the time had come to do exactly that.[103] "Failing before the Legislatures, we must then turn to the Supreme Court of our land and ask it to decide what are our rights as citizens."[104]

Minor's argument was not living constitutionalism but textualism. That is, Minor did not argue that the Constitution embodied certain principles that must keep up or evolve with underlying changes in society. She was arguing instead that a strict textual reading of the Constitution specified federal protection of all the privileges and immunities of citizenship. She asserted that women's right to vote was one such privilege, and thus women already possessed the franchise. But there was no hint that her reading was based on changed societal conditions. Not until later did the NWSA activists add evolutionary dimensions to Minor's suggested reading of the Fourteenth Amendment.

Virginia Minor's speech had an immediate impact on the crowd. She directly challenged three basic assumptions of the organized suffragist movement: first, that the Constitution needed to be amended to provide woman suffrage; second, that the Fourteenth Amendment, with its protection of only male electors, was a hurdle to be overcome; and third, that the suffragists should be agitating for congressional ac-

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99 Ida Husted Harper, 1 Life and Work of Susan B. Anthony 331 (Indianapolis, The Hollenbeck Press 1898).

100 2 The History of Woman Suffrage 409 (Elizabeth Cady Stanton et al. eds., New York, Fowler & Wells 1882) (quoting Minor speech). See also Ellen Carol DuBois, Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s, in Visible Women: New Essays on American Activism 19-40 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993) (noting formative role of Virginia and Francis Minor in New Departure argument).

101 The History of Woman Suffrage, supra note 100, at 409 (quoting Minor speech).

102 Id. at 409-10.

103 Id. at 410.

104 Id.

tion, rather than judicial vindication of their claim. NWSA leaders instantly recognized the potential of Minor's innovative argument, and "from this hour"[105] adopted it as the organization's official position.

Minor's speech was soon published in *The Revolution*, Anthony and Stanton's weekly journal financed by the controversial racist Democrat George Francis Train.[106] Not only did the journal reprint the address, but ten thousand extra copies were made and sent to influential people across the country, including every member of Congress.[107] This was part of a strategy designed to make the New Departure the central focus of public debate on woman suffrage, especially in the upcoming 1870 elections. As Virginia Minor's activist husband, Francis Minor, explained, the goal was that "[e]very newspaper in the land would tell the story, every fireside would hear the news. The question would be thoroughly discussed by thousands, who [had] give[n] it no thought . . . [leading to a] popular verdict."[108]

Although Virginia Minor had argued for a judicial resolution, as Francis Minor's statement suggests, the NWSA at first oriented its effort toward a campaign to convince the American people and create political pressure on elected officials. Throughout 1870 and 1871, the NWSA focused on a legislative strategy of agitating for congressional action, though now in support of Minor's Fourteenth Amendment interpretation instead of a constitutional amendment.[109]

There were a number of reasons for suffragists to take their battle to Congress instead of the courts. The federal courts had not supported the antislavery arguments favored by antebellum activists,[110] and were beginning to show signs of a stubborn reaction to the Republican program of Reconstruction.[111] In Congress, the Republicans held a two-thirds majority in both houses. The Republican party "was the most important mainstream progressive political movement of the

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105 Id. at 411.

106 Flexner, supra note 62, at 150.

107 The History of Woman Suffrage, supra note 100, at 411.

108 Id. at 408.

109 Cf. Harper, supra note 99, at 346 (reporting fellow women's rights activist Myra Bradwell's agreement with Anthony "that the great battle-ground in the first instance should be in Congress").

110 See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (denying citizenship to slave who lived in free territory).

111 Two examples of the Court's hostility were Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), which voided Reconstruction's prescribed use of military courts to try civilians when civil courts were still in operation, and Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), which overturned reconstructed Missouri's constitutional requirement of loyalty oath for lawyers, ministers, and other officials.

era," and many members remained committed to feminist goals.[112] By 1872, the Republican Party platform would become the first of any major party to call for careful consideration of the claims of women to equal rights[113]—even though it was more of a "splinter" than a "plank" in the platform.[114] Republican President Ulysses Grant, though no advocate of women's rights, had appointed several women postmasters and was thought to be somewhat sympathetic.[115]

Republican majorities were certainly no guarantee of success, as the woman suffragists had disappointingly discovered even by 1869. Not only did Republican support wither in the face of charges of "political necessity" and "the Negro's hour" when considering the Reconstruction Amendments, but Republican defections cost women promising opportunities to win the franchise in the states.[116] Perhaps no incident was more painful than the Kansas Referendum of 1867. Large Republican majorities in the state legislature submitted to voters two constitutional amendments: one calling for black male enfranchisement, and one calling for female enfranchisement, the latter the first referendum of its kind.[117] Of twenty newspapers in the state, fourteen advocated passage of the woman suffrage amendment,[118] breeding optimism among activists such as Stanton, who enthused that "the youngest civilization in the world was about to establish a government based on the divine idea—the equality of mankind."[119] Traditional Republican allies, however, abandoned the woman suffragists by failing to voice their support, and both measures were defeated. Just as the suffragists blamed Republicans for the loss, Republican men criticized feminists for having "killed Negro suffrage."[120]

Although some women came to "despise the Republican party" for failing to support women's rights, the Democrats were politically

112 Maltz, supra note 83, at 266.

113 Harper, supra note 99, at 418; The History of Woman Suffrage, supra note 100, at 546.

114 Elizabeth Cady Stanton to Susan B. Anthony, June 30, 1873, in Letters of Elizabeth Cady Stanton, supra note 97, at 143-44. In a particularly memorable description of the plank, Carrie Chapman Catt and Nettie Rogers Shuler wrote that it "deserves to go down in song and story as the ablest effort to say something and give nothing that was ever indulged in." Carrie Chapman Catt & Nettie Rogers Shuler, Woman Suffrage and Politics 90-91 (1923).

On the lukewarm support of women's rights among that year's Republicans, see Evans, supra note 63, at 124.

115 Harper, supra note 99, at 418.

116 See infra notes 117-20 and accompanying text.

117 Catt & Shuler, supra note 114, at 54.

118 Id. at 55.

119 Id. at 54.

120 Id. at 56.

enfeebled and, as the party of slavery, hardly likely to help progressive women.[121] Nevertheless, some suffragists announced their intent to support any party that promoted woman suffrage, and Anthony even attempted to convince the Democrats to add a plank to their platform advocating enfranchisement of white women, only to be jeeringly turned away.[122] Facing barriers in every direction, at least some glimmer of hope was seen in the Republican party in Congress. National legislation enfranchising women was proposed in the Senate by S.C. Pomeroy, a Kansas Republican, and in the House by George W. Julian, an Indiana Republican, during the winter of 1868-1869.[123] In Wyoming Territory in 1869, a Republican territorial governor signed the first law in the country allowing women to vote,[124] since New Jersey ended its phase of female enfranchisement in 1807.[125] In 1870, the Wyoming experiment would be extended to Utah Territory, somewhat more controversially on account of the territory's Mormonism.[126] Perhaps with a renewed effort, the NWSA still could build a coalition of Republican support to enact federal laws based on the New Departure argument, recognizing women's right to vote as part of the "privileges and immunities of citizenship" guaranteed by the Fourteenth Amendment.

The first use of Minor's suggestion in an official government forum came a few months after the St. Louis convention, when Stanton appeared in January 1870 before the Senate Committee on the District of Columbia, which was considering a petition to extend suffrage to women in the District.[127] During her address to the Senate committee, Stanton supplemented Minor's suggested reading of the Fourteenth Amendment by arguing for a living, or evolutionary, understanding of society. Because of changes in the political and cultural environment, Stanton argued that a new reading of the Constitution to guarantee women's right to vote was necessary. With her address to this congressional committee, Stanton placed herself on the

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121 Harper, supra note 99, at 382.

122 Id. at 305-06.

123 Flexner, supra note 62, at 149.

124 Beverly Beeton, Women Vote in the West: The Woman Suffrage Movement 1869-1896, at 157 (1986).

125 See Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874) ("[T]he right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey.").

126 For a thorough and insightful analysis of the Utah woman suffrage controversy that pushed even women's rights leaders to criticize the experiment, see Sarah Barringer Gordon, "The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America, 83 J. Am. Hist. 815 (1996).

127 The History of Woman Suffrage, supra note 100, at 411 (noting Stanton's appearance before Congressional Committee on the District of Columbia).

cutting edge of living constitutionalism. She eventually proved to be its most important innovator.

Movement organizers pursued the petition on extending the franchise to women in the District to avoid any opposition argument centered on states' rights. Because Congress exercised legislative authority over the District, there could be no claim of interference with the traditional authority of the states to regulate the franchise.[128] The District also had been a testing ground for voting rights a few years earlier when, overriding President Andrew Johnson's veto, Congress instituted black suffrage there in 1866.[129]

Because Stanton was President of the Woman Suffrage Convention of that year, her appearance was widely anticipated and well attended.[130] Senator Charles Sumner of Massachusetts reported that in his twenty years in Congress, he had never before seen so many senators, representatives, and interested spectators present at a congressional committee meeting.[131] Stanton echoed the core interpretive move suggested by Minor: Voting is a privilege of citizenship that cannot be infringed on account of the Fourteenth Amendment's Privileges and Immunities Clause. But Stanton added several new dimensions to the argument that evoked evolution and the changing nature of the fundamental law of the land.

First, Stanton tied this novel interpretation of the Fourteenth Amendment to dynamic developments in the law. Minor's reading of the Privileges and Immunities Clause was justified, according to Stanton, by the evolutionary nature of democracy and the common law. Describing the fundamental law as "organic," Stanton argued that there was a pattern of growth and expansion of individual rights: "As history shows . . . each step in civilization has been a steady approximation to our democratic theory, securing larger liberties to the people . . . ."[132] Affirming women's right to vote was another inevitable step in this natural evolution. After the war, core ideas in American democratic thought, such as rule by the people, were developing—not changing so much as growing to encompass a wider spectrum of people than originally included in the Framers' vision.[133] Suffrage, for instance, once extended only to propertied white men,

128 See Maltz, supra note 83, at 277 (noting special status of Congress's control over District of Columbia, and how that bred efforts to use District as testing ground for enfranchisement legislation).

129 Keller, supra note 54, at 99.

130 Harper, supra note 99, at 338-39. Several other women also testified, including Susan B. Anthony. Id.

131 The History of Woman Suffrage, supra note 100, at 416.

132 Id. at 411.

133 Id. at 411-12.

but over the course of several decades it expanded to universal white male suffrage, and now black men, too, were enfranchised. This pattern of growth recognized by Stanton meant that the fundamental principles of American democracy were evolving. This key move—the first claim by New Departure activists for a living constitutionalism—would come to undergird American constitutional jurisprudence in the twentieth century.

Second, Stanton foreshadowed twentieth-century living constitutionalism by supporting her novel argument through references to general principles underlying a variety of constitutional provisions.[134] In addition to the Privileges and Immunities Clause, otherwise disparate constitutional provisions gave additional support to the notion that woman suffrage was already secured. The Guarantee Clause[135] ensures a "republican form of government," she noted, asking how "can that form of government be republican, when one-half the people are forever deprived of all participation in its affairs?"[136] The broad principle of a republican government required that women be citizens with equal public standing. Female disenfranchisement also violated Article I, Section 9,[137] because it was a "bill of attainder of the most odious character";[138] women were being punished for their immutable status. According to Stanton, the citizen's right to vote took shape in the intersection of several constitutional provisions without a separate amendment explicitly establishing woman suffrage.

Third, Stanton shored up her constitutional reading with analogies to recent Supreme Court cases interpreting the Constitution, once again introducing what would become commonplace in living constitutionalism. "It has just been decided," she explained referring to a decision of the U.S. Supreme Court, that "a foreign born woman" is "naturalized" upon marriage to a native.[139] Because native-born women did not need to be naturalized, they must already be citizens,[140] guaranteed all the privileges and immunities of that citizenship. Stanton's use of this particular argument was strategic, aimed at

134 This pattern of argument would profoundly shape the living constitutionalism of the twentieth century, especially in the development of the right of privacy, which the Warren Court found to emanate from the penumbras of multiple constitutional provisions. E.g., Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

135 U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

136 The History of Woman Suffrage, supra note 100, at 412.

137 U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

138 The History of Woman Suffrage, supra note 100, at 412.

139 Id.

140 Id.

the argument that women were not really citizens. Although it was unlikely that women's citizenship would be denied by opponents in light of the devastation wrought by the Supreme Court's similar claim regarding blacks in *Dred Scott*, Stanton could take no chances. Women's status had long been unequal, their position in society marginalized, and their civil and political rights questionable if extant at all. If women were not considered full citizens, then the privileges and immunities argument could not succeed; only the privileges and immunities of citizens were guaranteed by the amendment. Stanton's use of recent Supreme Court precedent might have also helped her cause by invoking the decision of a conservative institution to buttress women's claims to the rights of citizenship.

The invocation of a recent Supreme Court decision also served to enhance the credibility of Stanton's broader claim for an evolutionary constitutionalism. If the law is to keep up with societal changes, Supreme Court precedent is a vital pathway to understanding change and its legal embodiments.[141] Precedent, moreover, helps to illuminate otherwise vague textual commands. Stanton, by using a recent Supreme Court decision that implied women's citizenship, illuminated both current public values and the meaning of citizenship as understood in constitutional doctrine.

Why did Stanton pursue this line of argument rather than originalism, the traditional mode of legal reasoning prevalent at the time? Originalism surely would have failed to convince her audience of congressmen who were themselves the framers of the Fourteenth Amendment's Privileges and Immunities Clause. Most were in their current seats when the amendment was ratified only eighteen months before, and knew that their intent was to protect blacks, not women. Moreover, these legislators must not have viewed the Privileges and Immunities Clause as complete protection for the right to vote, even for blacks. If they had, then the Fifteenth Amendment's protection of black enfranchisement would have been redundant. These very sentiments not only explain Stanton's failure to persuade the committee to enfranchise women in the District of Columbia but also proved to be the jagged reef upon which the New Departure itself would founder.

141 Proponents of living constitutionalism contend that precedent is as important as the text to the practice of constitutional interpretation; the body of legal doctrine emerging from judicial decisions provides a more reliable method of ascertaining public values than reference to ambiguous textual provisions standing alone. See, e.g., George Ticknor Curtis, 1 Constitutional History of the United States at iv (1903) (defining constitutional law as text plus authoritative constructions of those charged with interpreting text). For modern proponents, see, e.g., Boyce, supra note 61, at 914; Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 6 (1998); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 898 (1996).

An evolutionary constitutional understanding was likely to fail if it relied upon the "evolution" of only the Fourteenth Amendment, which had been ratified too recently to have its underlying meaning change in any significant way. Stanton and later New Departure suffragists instead relied on the evolution of the entire Constitution from 1789 up to the 1870s. Several of the Constitution's original principles, such as the guarantee of republican government and the ban on bills of attainder, were now offended by the disenfranchisement of women, no matter what the original intent, design, or scope of application of these constitutional promises. Because of changes in social conditions, and in the ideas of democracy, these original principles supported a novel, broad reading of the text. Foremost among the original principles that had evolved was the concept of the "privileges and immunities" of citizenship—which was a promise guaranteed in the original text under Article IV, section 2.[142] Whatever the limits of its original meaning, the rise of women to a place of full citizenship meant that they must be extended all of the rights history had attached to the terms "privileges and immunities" of citizenship.

Because the Fourteenth Amendment guaranteed federal protection of the privileges and immunities of citizenship, it was the textual hook on which the suffragists hung their claim for suffrage. Their argument was thus relying on the Fourteenth Amendment and the idea of evolution, but it did not contend that the Fourteenth Amendment had somehow changed since its ratification a few years earlier. What had changed was the meaning of the privileges and immunities of citizenship since the time of the Founders. In addition, underlying changes in society—such as the development of women's rights—pushed for a broader scope of application for these more ancient, established yet evolving constitutional principles.

Stanton's appearance before the Senate Committee on the District of Columbia was the first attempt to bring evolutionary constitutionalism into a government forum. Her speech introduced significant, durable elements of living constitutionalism into juridical debate. She argued for a developmental, organic approach to constitutional interpretation that keeps up with social change. She also used general principles emanating from disparate textual provisions to support her evolutionary reading. She relied on precedent to shed light on changed public values and constitutional meanings.

In the winter of 1870, a stranger to the organized women's movement, Victoria C. Woodhull, would take up the New Departure argument and, with modifications of her own, bring publicity and energy to

142 U.S. Const. art. 4, § 2, cl. 1.

the movement. Woodhull had gained notoriety as the first woman to run a successful brokerage house on Wall Street and for managing the newspaper *Woodhull & Claflin's Weekly*, which was associated with controversial opinions such as socialism and free love.[143] On December 21, 1870, Woodhull brought a memorial requesting Congress to enfranchise women by passing a law that Senator John Spafford Harris, Republican from Louisiana, and Representative George W. Julian, the sponsor of earlier suffrage legislation, had introduced.[144] Although she did not consult with suffrage leaders,[145] and indeed had met Anthony only once before for a brief interview in Anthony and Stanton's paper, *The Revolution*,[146] Woodhull was close with Massachusetts Republican Congressman Benjamin Butler. A suffrage supporter, Butler arranged for Woodhull to appear before the joint committee and, some said, was the true author of her presentation.[147]

Woodhull's memorial sought the passage of a declaratory act of Congress providing that no state could deny women the franchise.[148] Upon arriving at the capitol only days before the third annual convention of the NWSA was scheduled to begin in Washington, suffrage leaders opened the local papers to discover that Woodhull would defend her memorial before a joint session of the Senate and House Judiciary Committees the very morning their convention was to begin.[149] Some NWSA leaders wanted to attend the joint session as a show of support for female enfranchisement, while others, such as Isabella Hooker, thought it more important to begin their own convention, especially in light of Woodhull's controversial background.[150] Senator Pomeroy, a proven ally, strongly urged the women to go to Capitol Hill: "This is not politics. Men could never work in a political party if they stopped to investigate each member's antecedents and associates. If you are going into a fight, you must accept every help

143 Flexner, supra note 62, at 153; Women's Rights in the United States: A Documentary History 146 (Winston E. Langley & Vivian C. Fox eds., 1994).

144 On the earlier suffrage legislation, see supra note 123 and accompanying text. On the bill addressed by Woodhull's memorial, see Harper, supra note 99, at 375.

145 Id.

146 Barbara Goldsmith, Other Powers: The Age of Suffrage, Spiritualism, and the Scandalous Victoria Woodhull 248 (1998).

147 Id. at 248. Woodhull claimed that the words came to her in a trance one afternoon in November 1870. Id. On the relationship between Woodhull and Butler, see Mary Gabriel, Notorious Victoria: The Life of Victoria Woodhull, Uncensored 68-70 (1998).

148 Victoria C. Woodhull, Testimony Before the Judiciary Committees of the Senate and House of Representatives of the Congress of the United States, January 2, 1871, in The Victoria Woodhull Reader 40b-40f (Madeleine B. Stern ed., 1974) [hereinafter Woodhull Reader].

149 Harper, supra note 99, at 375; Woodhull Reader, supra note 148, at 40b.

150 Harper, supra note 99, at 375.

that offers."[151] The NWSA postponed its convention commencement until later that afternoon, and Anthony, Hooker, Paulina Wright Davis, and other suffragists gathered to hear Woodhull's presentation.[152]

In a confident voice filled with "fire and freedom,"[153] Woodhull repeated Stanton's emphasis on change and evolution, although now Woodhull placed the focus on the development and growth of women's legal and social status to justify a new reading of the Constitution. She insisted that women's place in society had changed, and with it, the Constitution:

> Those who look upon woman's status by the dim light of the common law, which unfolded itself under the feudal and military institutions that establish right upon physical power, can not find any analogy in the status of the woman citizen of this country, *where the broad sunshine of our Constitution has enfranchised all.*[154]

Construing the Constitution to provide for woman suffrage was necessary, according to Woodhull, to keep abreast of societal changes in the "march onward and upward" of the "American nation":

> As the world has advanced in civilization and culture; as mind has risen in its dominion over matter; as the principle of justice and moral right has gained sway . . . so have the rights of women become more fully recognized, and that recognition is the result of the development of the minds of men . . . .[155]

Woodhull went beyond arguing merely that society was evolving. She claimed that the very substance of those changes provided the basis for the extension of the franchise to women. Women, she argued, were now "free to own and to control property" and "are held responsible in their own proper persons . . . in and out of court."[156] By mentioning the specific improvements in women's legal standing and property rights, Woodhull showed that the law recognized that women were no longer considered dainty incompetents in constant need of men's protection. But the suggestion went much deeper. By gaining legal standing, women were now recognized to be responsible

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151 Id.

152 Id. There is some question about the size of Woodhull's audience. Compare Gabriel, supra note 147, at 73 (quoting report by Press of Philadelphia that room was "sparsely filled"), with Kugler, supra note 92, at 90 (claiming that room was "packed with women"), and Doris Weatherford, A History of the American Suffragist Movement 120 (1998) ("[T]here was not even standing room available in the chambers of the House Judiciary Committee.").

153 Goldsmith, supra note 146, at 250 (quoting woman present at speech).

154 Woodhull, supra note 148, at 40b.

155 Id. at 40d-40e.

156 Id. at 40d. Woodhull was referring to mid-nineteenth century recognition of limited property and inheritance rights for women. See infra note 241 and accompanying text.

and accountable before the law. And the right of property was the touchstone of independence and security in American political thought.[157] With legal standing and property rights, women possessed the independent free will that the right to vote demanded.

Both Woodhull and Stanton looked to the emerging legal rights of women to ground their claims for a novel constitutional interpretation. In doing so, they avoided what twentieth-century critics of living constitutionalism consider its primary weakness: its potential for ahistoricism.[158] If the Constitution evolves outside of formal amendment, critics contend, judges may be emboldened to make up whatever doctrine they see fit without any historical basis. In fact, however, living constitutionalism, dating back to the woman suffragists, takes seriously the notion of "evolution," seeking to formalize and extend an extant pattern of growth and development. Woodhull and Stanton firmly grounded their arguments in the patterns of historical change. Their use of history was radically different from that of constitutional originalists, who studied history to determine the intent of the Fram-

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157 The link between property ownership and suffrage was hardly unique to the United States—the American philosophy borrowed directly from British practice. See Kerber, supra note 12, at 94-95 ("[S]tates brought into the republic the traditional English link between property holding and voting, grounded in the belief that . . . some were 'too poor to have a will of their own.'"); Robert J. Steinfeld, Property and Suffrage in the Early American Republic, 41 Stan. L. Rev. 335, 339-48 (1989) (discussing political significance of property in America and Britain during colonial times); Sean Wilentz, Property and Power: Suffrage Reform in the United States, 1787-1860, in Voting and the Spirit of American Democracy 34 (Donald W. Rogers ed., 1990) ("[A]ll sides in the American suffrage debates drew on ideas received from the Old World."). For example, Blackstone explicitly tied the franchise to property holding as a method of insuring that voters would be independent and of free will:

> The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

1 William Blackstone, Commentaries, *171-72.

158 Friedman and Smith criticize proponents of living constitutionalism for trying to "flee history" by subscribing to supposed "timeless" principles that are, in fact, entirely contingent. Friedman & Smith, supra note 141, at 51-54.

ers. The suffragists' embrace of history instead emphasized post-Founding developments in the status of women and in society.

Woodhull's presentation before the congressional committee differed from Minor's suggestion and Stanton's congressional testimony in that her constitutional interpretation did not rest on the Privileges and Immunities Clause of the Fourteenth Amendment. Instead, Woodhull hung her argument on the textual hook of the Fifteenth Amendment.[159] "The right to vote can not be denied on account of race," she said. "Women, white and black, belong to races," and "[a]ll people included in the term race have the right to vote."[160] As women were members of racial groups, the Fifteenth Amendment prohibited their disenfranchisement.

Woodhull's use of the Fifteenth Amendment was hardly convincing and did little to help the suffragists. In fact, it was plainly a bad argument, more sophomoric than sophisticated. Simply because women were members of racial groups did not mean that their disenfranchisement was *on account of* race; if it was, then virtually anyone, including minor children, the insane, or convicted criminals could claim to be unconstitutionally disenfranchised, for they too were members of racial groups.[161]

In an effort to shore up Woodhull's argument, Republican Congressman Albert Gallatin Riddle of Ohio addressed the House Judiciary Committee in support of her memorial later the same day.[162] Although Riddle's defense was not grounded in evolutionary constitutionalism—he made a formalistic argument heavily reliant upon literalism, not evolution—Riddle sought to frame the conditions of women in Fifteenth Amendment terms to salvage the earlier presentation.

First, he argued that the Fifteenth Amendment did not *grant* the franchise to anyone, but rather recognized a preexisting right to vote. Citing the language of the amendment—"The right of citizens to vote shall not be denied"—Riddle contended that this "does not confer suffrage; it recognizes a right already conferred, and says that it shall

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159 U.S. Const. amend. XV.

160 The History of Woman Suffrage, supra note 100, at 445 (quoting Woodhull's speech to committee).

161 On the legacy of disenfranchisement of these groups, see Keyssar, supra note 87, at 277-79 (describing disenfranchisement of underage citizens); Joel E. Smith, Voting Rights of Persons Mentally Incapacitated, 80 A.L.R. 3d 1116 (1977) (detailing denial of suffrage to those suffering from mental disabilities); Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 Harv. L. Rev. 1300 (1989) (noting exclusion of felons and ex-felons from voting rights).

162 The History of Woman Suffrage, supra note 100, at 448 (quoting speech given by Riddle in support of Woodhull Memorial).

not be denied or abridged."[163] Citizens, by the nature of their status, have the right to vote, and had it prior to the passage of the Fifteenth Amendment. According to Riddle, even earlier case law recognized that citizens had the franchise as a privilege of citizenship. For support, he relied on an 1823 circuit court decision, *Corfield v. Coryell*,[164] in which Supreme Court Justice Bushrod Washington—nephew of George—wrote that the enjoyment of the elective franchise belonged to all citizens of a free government.[165] All the Fifteenth Amendment did, according to Riddle, was constitutionalize and clarify the prohibition on its denial or abridgment on account of race.

Riddle's second use of the Fifteenth Amendment considered how it prohibited denial of the franchise to "persons who have suffered from previous conditions of servitude." "[W]hat is really the legal status of marriage, so far as the condition of the wife is concerned?" Riddle inquired.[166] Quickly answering his own question, Riddle responded that it was a condition "of servitude."[167] By "the language of the law," the woman is given to the man, "not the man to her, nor the two mutually to each other. They become one; and that one is the husband—such as he is."[168] By denying women the right to vote, the states were enforcing a badge of servitude contrary to the Constitution.

Riddle's argument about women being in a state of servitude akin to that of the former slaves of the South may sound odd to modern ears, but at the time it fit into the pattern of women's rights activists' claims about marriage. Under the common law, the doctrine of coverture meant that a married woman's legal existence was submerged under her husband's identity; he held title to her property, was often held responsible for her actions (even criminal ones), and exercised sovereignty over her.[169] Women's rights activists decried this state of affairs as a form of slavery, with women as a form of chattel.[170] "Ac-

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163 Id. at 454.

164 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (No. 3230) (upholding New Jersey statute prohibiting nonresidents from gathering oysters in state waters and rejecting plaintiff's argument that statute violated Privileges and Immunities Clause of Constitution).

165 Id. at 551.

166 The History of Woman Suffrage, supra note 100, at 455-56.

167 Id.

168 Id.

169 1 William Blackstone, Commentaries *442 ("[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .").

170 Women's rights activists were fond of quoting Shakespeare's *The Taming of the Shrew* for its depiction of the relationship between man and wife:

cording to man's idea, as set forth in his creeds and codes," wrote Stanton, "marriage is a condition of slavery."[171]

The NWSA did not see the shortcomings in Woodhull's argument, and movement leaders quickly placed her at the forefront of their effort. Woodhull was invited to repeat her speech to the NWSA convention audience, and the convention passed a resolution calling for her memorial to be passed.[172] To many, Woodhull was a "heroine" of women's rights;[173] Stanton wrote that she "fully agree[d]" with Woodhull's argument and described Woodhull as "the leader of the woman suffrage movement . . . . And those of us who were convinced by her unanswerable arguments that her positions were sound, had no choice but to follow."[174] Moreover, by the close of the NWSA convention, suffragists were overwhelmed by optimism and believed that the battle was almost won.[175] A dozen Congressmen's wives publicly endorsed Woodhull's memorial and even President Grant's sister announced her support and the First Lady's.[176] Alas, disappointment was again around the corner.

The House Committee on the Judiciary firmly rejected the Woodhull Memorial on originalist grounds.[177] Ohio Representative John A. Bingham, a stalwart antislavery Republican who originally favored an expansive Fourteenth Amendment,[178] wrote the majority report, which primarily relied on originalism and states' rights. Although it found that the Constitution affirmed women's status as citizens, Bingham's report portrayed the Constitution as having a fixed and permanent meaning that was to be interpreted through an originalist methodology. The rights guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment were only those "embraced in the original text of the Constitution," which did not in-

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I will be master of what is mine own.
She is my goods, my chattels, she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my any thing.

William Shakespeare, The Taming of the Shrew act 3, sc. 2.; Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation 176 (1998).

171 Stanley, supra note 170.

172 Harper, supra note 99, at 375-78.

173 See Kugler, supra note 92, at 100 ("Mrs. Woodhull now became a heroine of the National Woman Suffrage Association.").

174 Id. at 100-01.

175 Harper, supra note 99, at 381.

176 Id.

177 H.R. Rep. No. 41-22, at 1-4 (1871) (reporting decision of Committee on Judiciary on Woodhull Memorial).

178 See Paul Finkelman, John A. Bingham, in 1 Encyclopedia of the American Constitution, supra note 1, at 180-81.

clude suffrage.[179] "[T]he intention of the clause" was merely to ensure a "general citizenship," not to secure new rights from the states.[180] The power to grant political rights, such as the franchise, belonged to the several states and was beyond the power of the federal government. The Fourteenth Amendment "did not change or modify the relations of citizens of the State and Nation as they existed under the original Constitution."[181]

Ironically, the same Republican legislators who gave scant attention to constitutional formalities in adopting the Reconstruction Amendments,[182] carrying out Reconstruction,[183] and impeaching President Johnson,[184] now claimed constitutional powerlessness in the face of states' rights. "In the opinion of the Committee, such declaratory act is not authorized by the Constitution nor within the legislative power of Congress."[185] To gain the franchise, Bingham's report concluded, women would have to seek reform in the individual states.[186]

Woodhull's interpretation of the Fifteenth Amendment was not as successful as it was notable. A few days after her testimony, Sumner reported to Isabella Beecher Hooker that twenty senators were asked at a dinner party to refute Woodhull's arguments, but none could.[187] A favorable minority report written by Representatives Benjamin Butler of Massachusetts and William Loughridge of Iowa was distributed to twenty thousand influential people, and the memorial itself was set in electrotype and mailed—free of charge thanks to Butler's franking privileges—across the country.[188] The novel constitutional argument was receiving attention as Francis

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179 H.R. Rep. No. 41-22, at 1.

180 Id. at 2.

181 Id. at 1.

182 See Ackerman, Foundations, supra note 81, at 44-46 (describing Republican deviations from, and challenges to, text's system for constitutional revision in effort to obtain ratification of Reconstruction Amendments).

183 For example, the Republicans imposed martial law upon the South, despite the continued operation of civil legal institutions. See, e.g., Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 149 (1988).

184 For classic statements of condemnation of the Republicans' impeachment of Johnson because it was politically, not constitutionally, motivated, see generally David Miller DeWitt, The Impeachment and Trial of Andrew Johnson, Seventeenth President of the United States: A History (1903); Eric L. McKitrick, Andrew Johnson and Reconstruction (1960). A more favorable view of Congress's motives behind the Johnson impeachment can be found in Michael Les Benedict, The Impeachment and Trial of Andrew Johnson (1973).

185 H.R. Rep. 41-22, at 4.

186 Id. ("[A]s public opinion creates constitutions and governments in the several States, it is not to be doubted that whenever, in any State, the people are of opinion that [woman suffrage] is advisable, it will be made.").

187 Goldsmith, supra note 146, at 251.

188 Id.

Minor had hoped, but the NWSA strategy of appealing to Congress for the franchise was stymied by the legislature's commitment to originalism and states' rights.

B. A Change in Direction

By mid-1871, it was becoming clear that the NWSA's legislative strategy was failing. Congress's rejection of the elective franchise in the District of Columbia and of the Woodhull Memorial signaled the end of any hope of a broad bill guaranteeing women's right to vote in all the states. Obtaining a constitutional amendment had become even less likely, in part because the New Departure's argument itself gave opponents another reason to vote against one by claiming that the right already existed. Even potential allies, like the radical Sumner, were growing tired of the pitched partisan battles over Reconstruction and now lacked the political will to press for a Sixteenth Amendment. "I will never vote for a XVI. Amendment," Sumner wrote to Anthony.[189] Justifying his stance by claiming allegiance to the New Departure argument, Sumner continued, "There is not a doubt but women have the constitutional right to vote."[190] The suffragists' own constitutional claim was used as an excuse by legislators to avoid fighting another contentious battle for expansion of the franchise.

Having failed with an exclusively legislative strategy, suffragists picked up on the one element of Minor's suggestion they had ignored, turning to the courts.[191] At the 1872 NWSA convention, Stanton "an-

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189 The History of Woman Suffrage, supra note 100, at 635 (quoting 1873 speech by Anthony where she recounts 1871 conversation with Sumner).

190 Id.

191 Other suffragists sympathetic with the New Departure turned to another form of civil disobedience in their struggle for the franchise by refusing to pay taxes. The most notable pair of tax resisters was the Smith sisters—Julia and Abby, both unmarried—of Glastonbury, Connecticut. See Carolyn C. Jones, Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s, 1994 U. Ill. L. Rev. 265, 269. In the spring of 1873, during the NWSA's effort to "take" the vote by demanding that local officials allow women to register and vote, the Smith sisters marched to the Glastonbury registrar and insisted they be added to the voter rolls. Kerber, supra note 12, at 87. Although the registrars agreed, apparently their promise went unfulfilled, and when the local tax assessor raised the taxes on their property by two hundred dollars the sisters refused to pay. Id. at 88. Echoing the rallying cry of the American revolutionaries—"no taxation without representation"—the sisters held out until 1879. See id. at 89-90, 111.

The Smith sisters were hardly the first woman suffragists to link voting rights to tax obligations. The Declaration of Sentiments adopted at the Seneca Falls Convention of 1848 demanded that women be enfranchised and complained: "After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it." Kerber, supra note 12, at 97-98. Several suffragists in the 1850s, including Lucy Stone and Mary L. Harrington, refused to pay taxes in the absence of a right to vote. See id. at 97.

nounced a change of tactics,"[192] prompting women's rights activists to move their battle from the legislative to the judicial branch: "Instead of petitioning Congress for our rights we propose to settle the question before the courts. . . . We have reasoned for twenty-five years, and now we propose to take our rights under the Constitution as it is."[193] The path to the courts was through civil disobedience. Firm in the conviction that the vote was a privilege of citizenship already rightfully theirs, women would go to the polls and demand ballots.[194] If turned away, they would file suit in court to compel registrars to permit them to vote.[195] As Isabella Beecher Hooker, another leader of the NWSA, agreed:

> "Women should attempt to qualify and attempt to vote in every state election. . . . This action not only serves the purpose of agitation of the whole question of suffrage, but it puts upon men, our brothers, the onus of refusing the votes of their fellow citizens, and compels them to show just cause for such proceeding."[196]

Albert Riddle explained before the House Judiciary Committee, "We do not need any XVI. Amendment. We need only intelligent, firm, decisive, and deciding—reasonably brave courts, and to have a question made and brought to their adjudication. I propose to offer . . . two or three . . . ladies for registration, two or three months hence, when the time comes."[197] From then on, the NWSA would concentrate on a second line of attack, targeting the courts. The suffragists would find, however, that once again originalism would be asserted to defeat their claims.

The groundwork for a judicial resolution was being created through suffragist agitation from coast to coast. In the elections of 1870, 1871, and 1872, women began to demand that election officials allow them to register and to vote.[198] Marilla Ricker of New Hampshire, a young widow and the owner of a substantial amount of property, was inspired by the New Departure and became the first woman of the era to successfully register to vote in March 1870; on Election Day, however, her ballot voting the straight Republican ticket was re-

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192 Kugler, supra note 92, at 101.

193 The History of Woman Suffrage, supra note 100, at 495-96 (quoting opening remarks of Stanton to fourth NWSA convention in Washington, D.C.).

194 See infra notes 198-210 and accompanying text.

195 See infra notes 210-19 and accompanying text.

196 The History of Woman Suffrage, supra note 100, at 496 (quoting report of Hooker to fourth NWSA convention).

197 The History of Woman Suffrage, supra note 100, at 456-57 (quoting speech before House Judiciary Committee in support of Woodhull Memorial).

198 DuBois, supra note 100, at 23, 25, 36 n.12.

fused.[199] She contemplated a lawsuit, but Republican friends convinced her to acquiesce, insisting that her effort would do more harm than good.[200] To placate women's demands to participate, polling places in southern New Jersey and Hyde Park, Massachusetts allowed women to cast their ballots, although apparently the ballots were deposited in a separate box and, ultimately, not counted.[201]

In March 1871, Ricker's name appeared on the ward registry, and she was allowed to vote without incident.[202] She thereby became the first woman to vote as part of the New Departure strategy of taking the franchise. On April 3, 1871, Nannette B. Gardner was allowed to vote in Detroit because she was a widow; her friend Catherine A.F. Stebbins, who was married, accompanied her but was turned away.[203] Others soon followed, although with even less success. On April 20, Sara Andrews Spencer and Sarah E. Webster, along with seventy other women, marched to the polls in the District of Columbia, but their ballots were refused for failure to register in advance.[204] In Santa Cruz, California, Ellen Rand Van Valkenburg unsuccessfully attempted to register, as did her sister-in-law, Catharine Van Valkenburg Waite, in Illinois.[205] Carrie S. Burnham attempted to vote in Philadelphia.[206] In New York City, Woodhull and her sister Tennessee Claflin were turned away.[207] The 1872 elections brought still more suffragists to the polls in New York, Connecticut, and Michigan.[208] Sojourner Truth even attempted to vote, insisting on her right as a propertyholder and a taxpayer, but was refused.[209] Overall, 150 women attempted to vote in ten states and the District of Columbia during 1871 and 1872.[210]

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199 The History of Woman Suffrage, supra note 100, at 586; Weatherford, supra note 152, at 114 (1998). There is some evidence of women attempting to vote as early as 1868, prior to the first articulation of the New Departure argument. See DuBois, supra note 100, at 23-24 (describing grassroots direct-action voting by women in 1868 and 1869). According to Weatherford, 172 women voted in Vineland, New Jersey, in November 1868; four of the women were black. Weatherford, supra note 152, at 112.

200 Id. at 586.

201 Flexner, supra note 62, at 164-65.

202 The History of Woman Suffrage, supra note 100, at 586-87.

203 Id. at 587; Weatherford, supra note 152, at 114; DuBois, supra note 100, at 25.

204 The History of Woman Suffrage, supra note 100, at 587; Weatherford, supra note 152, at 115. They were not registered in advance because their previous attempt at registering had been unsuccessful. Id.

205 The History of Woman Suffrage, supra note 100, at 600-01.

206 Id.

207 Johanna Johnston, Mrs. Satan: The Incredible Saga of Victoria C. Woodhull 123 (1967).

208 Weatherford, supra note 152, at 115.

209 Id.

210 Flexner, supra note 62, at 165.

Several of these women brought actions in mandamus against the election registrars to force the opening of the polls, asserting the protections of both the Fourteenth Amendment and the Enforcement Act of 1870,[211] a federal law designed to provide judicial recourse for blacks denied the vote in the South.[212] Often, the suits were thrown out of court on demurrer—a procedural device for ending meritless legal claims—without the opportunity for trial.[213] When judges did issue written opinions, the reasoning mirrored the legislative response, portraying the Constitution's meaning as permanent and fixed and interpreting its text according to original intent.

Chief Justice William T. Wallace's[214] opinion for the California Supreme Court in Van Valkenburg's case was typical.[215] "Undoubtedly" women were U.S. citizens, he wrote, but the "history and aim of the Fourteenth Amendment" was "well known"—to secure the citizenship of "persons of African descent, who had been held in slavery in this country."[216] "This is recent history," the court continued, "familiar to all."[217] "The words 'privileges and immunities' had [by 1791] acquired a distinctive meaning and a well-known signification," and "had never been supposed to include the right to the exercise of the elective franchise."[218] A formalist reading of the Fourteenth Amendment confirmed the court's conclusion. Because Section 2 implicitly allows men to be disenfranchised[219]—although at the cost of reduced federal representation—"it is inconceivable" that the Privileges and Immunities Clause of Section 1 "had just forbidden" denial of the franchise to citizens.[220]

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211 Ch. 114, 16 Stat. 140.

212 DuBois, supra note 100, at 25-26 (reporting suits by Van Valkenburg and others); see also Sandra F. VanBurkleo, "Belonging to the World": Women's Rights and American Constitutional Culture 154 (2001) (same).

213 See, e.g., Minor v. Happersett, 88 U.S. (21 Wall.) 162, 164 (1874) (stating that suffrage was not one of necessary privileges conferred on U.S. citizens by Constitution).

214 On Wallace and his background, see Arnold Roth, The California Supreme Court, 1860-1879: A Legal History 27-28 (1973) (unpublished Ph.D. dissertation, University of Southern California) (on file with University of Southern California library).

215 Van Valkenburg v. Brown, 43 Cal. 43 (1872).

216 Id. at 46-47.

217 Id. at 47.

218 Id. at 48, 50.

219 U.S. Const. amend. XIV, § 2 ("But when the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . the bases of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.")

220 *Van Valkenburg,* 43 Cal. at 53. By the same formalist logic, a law imposing imprisonment for theft could not be construed as protecting a right to property because it allows the theft to occur in the first place and provides only ex post punishment. The objection might be made that the analogy of Section 2 to a criminal prohibition on theft is inappropriate, based on the idea that the Fourteenth Amendment was not meant to prohibit disen-

Despite the initial judicial hostility, suffrage activists still held out hope that the courts eventually would adopt a broad, evolutionary interpretation of privileges and immunities, and read the Fourteenth Amendment to enfranchise women. This hope was encouraged by an opinion of Supreme Court Justice Joseph Bradley in a circuit court case, *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*[221] Bradley, as Riddle remarked in his address to the Judiciary Committee, was "not preeminently in favor of what is called woman's rights," yet the Justice had offered support for what Riddle took to be an unusually broad interpretation of the Fourteenth Amendment.[222] "It is possible," Bradley wrote,

> that those who framed the article were not themselves aware of the farreaching character of its terms. They may have had in mind but one particular phase of social and political wrong, which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of . . . it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.[223]

Here, Bradley appeared to support a constitutional construction that identified the underlying principles of the amendment, even if it meant moving beyond the original intent of its framers. And the constitutional provision so construed was the same Privileges and Immunities Clause that suffragists were relying on to guarantee women the right to vote. Yet, as the suffragists would soon discover, Bradley was far from hospitable to any broad reading of the Constitution that

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franchisement, while punishment for theft is clearly intended to prohibit theft. Under this reading of the Fourteenth Amendment, Section 2 operates more like a contractual rule of efficient breach: The states could disenfranchise white males if the states valued disenfranchisement more than the loss in federal representation. No statements of proponents of the Fourteenth Amendment advancing such a reading have been uncovered. The Framers of the Fourteenth Amendment sought to prohibit male disenfranchisement by the Fourteenth Amendment, and then the Fifteenth, but adopted the penalty provisions of Section 2 to provide a means of future enforcement without having to undertake another Civil War. In this sense, the contractual understanding of the Fourteenth Amendment is not totally misguided, but the relevant contract is a consent decree that provides means of enforcement in the event of breach rather than a business agreement subject to efficient breach.

221 15 F. Cas. 649 (C.C.D.La. 1870) (No. 8408). On appeal, this controversy would appear in the Supreme Court as one of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

222 The History of Woman Suffrage, supra note 100, at 457 (quoting Riddle's speech to House Judiciary Committee).

223 *Live-Stock Dealers' & Butchers' Ass'n*, 15 F. Cas. at 652.

would extend to woman suffrage. His sympathies were little more than a mirage.

Riddle used Justice Bradley's statements in the trial of Sara Spencer and Sarah Webster, two District of Columbia women who attempted to vote in April 1871.[224] Riddle, along with attorney Francis Miller, represented the women in their October 1871 suit to force the Board of Inspectors to allow the women to vote, arguing to the court that the Constitution should be read broadly to encompass woman suffrage. Like their predecessors in the legislative arena, Riddle and Miller added new dimensions to the interpretive methodology that would eventually become standard features of living constitutionalism.

Riddle and Miller first attempted to frame their evolving interpretation in historically grounded terms as a return to ancient and established principles. This was a response to the hostility previously encountered in the legislative and the judicial reaction to the explicitly evolutionary elements of the New Departure. Riddle and Miller argued that women's right to vote was an already-established rule of the common law from which American law had strayed. Construing the Constitution to protect woman suffrage was not revolutionary, but essential to maintain earlier settled law. Their "new" interpretations were not creative, but restorative: "[B]y the old common law of our English ancestors, the old storehouse of our rights and liberties, . . . woman always possessed this right of suffrage."[225] Relying on English cases to show that the suffrage in England turned not on sex but on freehold property, Riddle and Miller argued that it was "broad and clear that the right of woman to the elective franchise was one of the best acknowledged and clearest of common law rights."[226] Their reading of the Privileges and Immunities Clause "but restores her to her old common law right in the persons of her American daughters."[227] Their preferred doctrine was new, but the principle they sought to support was ancient and firmly established. Again, the suffragists did not try to evade history, but found in it a usable past that might further the cause of suffrage.[228]

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224 The History of Woman Suffrage, supra note 100, at 587.

225 Id. at 589.

226 Id. at 593.

227 Id.

228 Efforts to utilize history to create a "useable past" have been defended by modern proponents of evolutionary constitutionalism. See, e.g., Cass R. Sunstein, The Idea of a Useable Past, 95 Colum. L. Rev. 601, 601-05 (1995) (arguing that search for "useable past . . . [i.e.,] the goal of finding elements in history that can be brought fruitfully to bear on current problems" is defining and proper feature of constitutional lawyer's role).

In addition to presenting their reading of the Constitution as restorative, Riddle and Miller also explicitly defended interpretive departures from the constitutional text. The Constitution, they claimed, is not just what the literal words of the document provide: "[W]hoever looks to the written text will not find the whole of the Constitution."[229] Rather, understanding the meaning of constitutional terms, such as "citizenship," required looking also to what they termed the "unwritten Constitution."[230] According to unwritten constitutional practice, citizenship meant solely the right to vote and to hold office, for these were the only rights denied to noncitizen resident aliens.[231] Aliens already enjoyed the right to domicile, hold property, and appear in court; therefore, the "sum total" of citizenship by naturalization for resident aliens was the two political rights of voting and officeholding.[232] If women were citizens—and no one was still disputing that—then they necessarily held the right to vote and to hold office.

Riddle and Miller's rhetorical invocation of an "unwritten Constitution" and of ancient common-law rights pushed constitutional interpretation firmly away from formalistic literalism and originalism. Women's claims could not be defeated merely by looking at the words in the text or the intent of the Framers, but assessed for their fit with historical practices and principles that emerged perhaps in spite of original intention or textual commands.

Modern defenders of originalism, such as Raoul Berger, believe it is mandated by the written nature of the Constitution.[233] According to this scholarship, the construction of any written law should be, axiomatically, a search for the original intention of those who framed and adopted it. Riddle and Miller argued that one who ignores constitutional practices fails to see the whole meaning of the Constitution on the ground, in lived experience. A half-century later, legal realists such as Karl Llewellyn would decry the superficiality of originalist in-

229 The History of Woman Suffrage, supra note 100, at 593 (quoting Riddle and Miller's brief for female plaintiffs suing District of Columbia Board of Inspectors for refusing their votes and registrations).

230 Id.

231 Id. at 593-94.

232 Id.

233 See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 401-09 (2d ed. 1997) (defending originalism that looks to intent of Framers participating in Constitutional Convention).

terpretation abstracted from postenactment practices and institutional development.[234]

Despite its new twists—emphasizing suffrage as restorative and part of the "unwritten Constitution"—Riddle and Miller's argument met the same fate as that of previous activists. Chief Justice David K. Cartter, the prominent Republican who presided over the trial,[235] called their argument "ingenious" but, pushed by his commitment to originalism, rejected its historical claims: "In all periods, and in all countries, it may be safely assumed that no privilege has been held to be more exclusively within the control of the conventional power than the privilege of voting."[236] Here that conventional power was the state governments, which had long regulated the franchise. Unlike other originalist judges, Cartter did recognize that present needs and circumstances, which he termed "current history," might affect constitutional interpretation. Yet his approach did not work in favor of women. Recent extensions of the vote had led to "political profligacy and violence verging upon anarchy,"[237] Cartter claimed. "The fact that the practical working of the assumed right would be destructive of civilization is decisive that the right does not exist."[238] The current venal, corrupt, and violent state of the electoral system was an additional reason to keep women away from the ballot box.

C. The Suffragists' Counterattack

From 1872-1873, the fight continued on both the legislative and judicial fronts, and the activists' interpretive methodology continued to evolve. In speeches, NWSA activists continued to emphasize the significance of underlying changes in society and in women's status to support their claim for enfranchisement. Having been confronted with originalist readings of the Constitution by opponents, suffragists mounted a new attack on that traditionally preferred interpretive method. They also condemned the notion of "states' rights" vis-à-vis

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234 See generally Karl N. Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934) (arguing that institutional and societal developments mean that working Constitution is forced to move away from Framers' original vision).

235 Prior to becoming Chief Justice of the Supreme Court of the District of Columbia, Cartter had been an active Republican and in 1860 was responsible for delivering Ohio's support for the nomination of Abraham Lincoln over Salmon Chase in the Republican Party convention. Richard L. Aynes, The Antislavery and Abolitionist Background of John A. Bingham, 37 Cath. U. L. Rev. 881, 924 n.346 (1988).

236 The History of Woman Suffrage, supra note 100, at 598 (quoting Justice Cartter's opinion).

237 Id.

238 Id. at 599.

the federal government's authority, pushed by their opponents' view that suffrage was exclusively an issue reserved for the states.

In separate speeches, Stanton and suffragist Matilda Joslyn Gage responded to opponents' reliance upon originalism and states' rights to defeat the New Departure. Stanton's critique of originalism in particular was a withering, explicit attack on the dominant mode of constitutional interpretation. Her speech also further secured her place as an innovator in living constitutionalism's interpretive method and foreshadowed modern critiques of originalism.

In January 1872, Stanton appeared before the Senate Judiciary Committee in support of another petition requesting Congress to pass legislation declaring voting to be a privilege of national citizenship. While echoing the standard New Departure line of argument—women were citizens whose privileges and immunities, including the right to vote, were secured from state encroachment by the Fourteenth Amendment—Stanton, more than any other before her, called attention to the recent evolution in the status of women and condemned originalism.

As evidence of evolving female citizenship in practice, Stanton noted that women now "pre-empt land," "register ships," "obtain passports," "pay the penalty of their own crimes," and "pay taxes.... In some states, even married women can make contracts, sue and be sued, and do business in their own names."[239] Taking the opposite tack from Albert Riddle's testimony in support of the Woodhull Memorial, Stanton argued that "the old Blackstone idea that husband and wife are one, and that one the husband"[240] had been overwhelmed by legal developments, specifically laws securing married women the right to inherit property in their own names.[241] These changes in law and practice were coupled with the evolution of

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239 Id. at 507.

240 Id.

241 Id. In the late 1830s and 1840s, married women's property acts were passed in several states. These acts recognized women's right to control property they brought into marriage and to control the profits and rents stemming from that property. See Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York 27-29 (1982) (listing passage of married women's property acts in several states); Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1398 (1983) (noting multiple waves of legislation in mid-nineteenth century); Joseph A. Ranney, Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin, 6 Wm. & Mary J. Women & L. 493, 506-16 (2000) (examining married women's property acts and related laws in Virginia, New York, and Wisconsin). See generally Carole Shammas, Re-Assessing the Married Women's Property Acts, 6 J. Women's Hist. 9 (1994). In 1839, Mississippi became the first state to adopt a married women's property law. See Megan Benson, Fisher v. Allen: The Southern Origins of the Married Women's Property Acts, 1998 J. S. Legal Hist. 97, 98.

women—an evolution that cried out for a new reading of the Constitution:

> [W]ith the wonderful progress in art, science, education, morals, religion, and government we have witnessed in the last century, woman has not been standing still, but has been gradually advancing to an equal place with the man by her side, and stands to-day his peer in the world of thought.[242]

Stanton did not merely restate earlier advocates' recognition of the evolution of women and their legal status; she added a stinging condemnation of the dominant method of constitutional interpretation, originalism, which was proving to be the primary stumbling block for suffrage reform:

> Though the world has been steadily advancing in political science, and step by step recognizing the rights of new classes, yet we stand to-day 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 be always governed by dead men.[243]

Interpreting the Constitution solely with regard to the intent of "dead men" was a fraudulent method of constitutional interpretation; when people speak of "the 'intention' of the framers," she insisted, they "talk of what they can not know or understand."[244]

Stanton's characterization of original intentions as unknowable or incomprehensible was an early realization of what are now recognized as the considerable practical impediments to originalist jurisprudence.[245] The Framers were not a single coherent group unified in purpose and thought. They were a diverse group of men, from different states, having distinct ideologies and political goals. They agreed upon the language of the Constitution, not because it met all of their combined objectives, but because it represented a workable compromise that balanced power and inhibited dominance of the new nation by any one region. Evidence suggests that many of the Framers thought the Constitution should not be construed with regard to their intentions.[246] Moreover, to whom does the originalist owe allegiance?

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242 The History of Woman Suffrage, supra note 100, at 510.

243 Id.

244 Id. at 511.

245 For various views on the problems and promise of originalist jurisprudence, see generally Interpreting the Constitution: The Debate Over Original Intent (Jack N. Rakove ed., 1990).

246 See Levy, supra note 19, at 2-29 (1988) (showing Framers' aversion to originalism); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 709 (arguing that Framers intended for unwritten natural rights to be enforced); H. Jefferson

The drafters of the text of the Constitution? The men who approved it at the Constitutional Convention?[247] The people of the several states who voted to ratify the new charter?[248] If this definitional issue were resolved, there would remain the problem of an incomplete historical record; even by the mid-nineteenth century, jurists such as Justice Joseph Story had remarked upon the practical impediments to discerning original intent posed by the murky and partial records of the constitutional and ratifying conventions.[249]

By criticizing governance by "dead men," Stanton also called into question the democratic pedigree of originalism. Proponents of originalism justify the practice as democracy-enhancing because it limits the discretion of unelected, unaccountable judges and forces them to decide cases according to the will of the people who enacted the constitutional provision.[250] Stanton's critique of originalism reveals the fissures in this justification. If today's popular majorities are prohibited from enacting necessary reforms by the laws of dead men, then we have not enhanced democracy but merely privileged majorities of yesteryear over majorities of today. By her caustic reference to dead "men," Stanton also pointed to the fact that yesteryear's majorities were not necessarily democratically legitimate ones; the Framers were an elite lot that did not truly represent women, blacks, or unpropertied men. If the "majority" behind the Constitution was not democratically legitimate under contemporary standards, then originalist jurisprudence is less justifiable as a means of preserving democracy. Modern critics of originalism, such as Michael Dorf and Michael Klarman, focus on these same fissures in criticizing the democratic pedigree of originalism.[251]

Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 902-04 (1985) (finding that Framers intended Constitution to be construed according to norms of statutory interpretation, unassisted by their speeches and statements).

247 See Berger, supra note 233, at 401-07 (arguing that Framers expected effectuation of their intent).

248 See Robert Bork, The Tempting of America: The Political Seduction of the Law 144 (1989) (arguing for originalism based on "public understanding" of American people extant at ratification); Michael W. McConnell, The Role of Democratic Politics in Transforming Moral Convictions Into Law, 98 Yale L.J. 1501, 1525 (1989) (same).

249 See Story, supra note 14, §§ 406-407 (emphasizing range of objections to, and interpretations of, Constitution during state conventions). For a modern statement of the futility of attempting to discern a reliable original intent, see Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 219 (1980).

250 See Boyce, supra note 61, at 925-28.

251 See Michael C. Dorf, A Nonoriginalist Perspective on the Lessons of History, 19 Harv. J.L. & Pub. Pol'y 351, 353 (1995) ("[W]hy should a modern majority be any more willing to cede power to long-dead generations of Americans than to unelected judges?"); Michael J. Klarman, Antifidelity, 70 S. Cal. L. Rev. 381, 382 (1997) (describing "dead-hand problem" of originalism).

Stanton's radical rejection of originalist interpretation was met with congressional inaction. Meanwhile, the suffragists continued to respond forcefully to the hurdles preventing reform. At the fifth annual Washington, D.C. convention of the NWSA in January 1873, Matilda Joslyn Gage condemned the vision of states' rights upon which both congressional and judicial opponents to suffrage relied.[252] She also spoke at length about change, development, and evolution of the constitutional structure and of women in society. Such changes, she claimed, mandated female enfranchisement.

Gage's address sought to defuse the states' rights argument by relying on an evolutionary understanding of law and society. States' rights was no longer a viable argument, according to Gage, due to changes in the constitutional structure. Foremost among these was the change in federalism brought about by the Civil War, which transformed the country from a federation of sovereign states to a national republic in which the federal government was primary.[253] Yet, she pointed out, suffrage opponents fell back on the claim that regulation of the franchise was a firmly embedded states' right. "'State rights,'" Gage stated, responding to the opponents' arguments, "has from the very commencement of this Government been the rock on which the ship of the nation has many times nearly foundered, and from which it is to-day in great danger."[254] Gage asked the "question of the hour": Is "the United States a Nation with full and complete National powers, or is it a mere thread upon which States are strung as are the beads upon a necklace?"[255]

Gage took her lead from the emerging nationalism of post-Civil War America. Lincoln's understanding of America, as described in his First Inaugural and Gettysburg addresses, was that we were more than a league of sovereign states bound only by a compact.[256] We had become one people, with a common heritage and a singleness of identity.[257] This nationalism came at the expense of states' rights; in 1867, Sumner explained that "the states will exercise a minute jurisdiction required for the convenience of all; the Nation will exercise that other

252 See The History of Woman Suffrage, supra note 100, at 523-33 (quoting text of speech).

253 Id. at 528-29.

254 Id. at 523.

255 Id. at 523-24.

256 See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 Collected Works of Abraham Lincoln 262, 264-71 (Roy P. Basler ed., 1953); see also Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in 7 Collected Works of Abraham Lincoln, supra, at 22, 23.

257 See Garry Wills, Lincoln at Gettysburg: The Words That Remade America 129-33, 145-47 (1992).

paramount jurisdiction required for the protection of all."[258] In debate over the proposed Fifteenth Amendment, Republicans such as Oliver Morton denounced the idea that Americans belonged to several "independent and sovereign tribes" such as the "Delawares"—"we are one people . . . we are one nation."[259] The strengthening federal power was manifest in the spurt of growth of national bureaucracies, including the Department of Agriculture, the Commissioner of Immigration, the Bureau of Education, the Weather Bureau, and the Department of Justice.[260] According to historian Morton Keller, "the mood of the postwar polity" was that a new nationalism had been born out of the horrors of war; "[t]he Union victory settled once and for all the nation's supremacy over its parts."[261] For suffragists, however, states' rights continued to prevent reform. Women's equality marked one boundary of the new nationalism.

Thoughtfully reflecting on the struggle between states' rights and nationalism, Gage argued that the former had frustrated the achievement of liberty and justice since the founding of the nation. More recently, the theory of states' rights "precipitated upon us our civil war."[262] Despite this "sad experience,"[263] opponents of woman suffrage continued to insist that the states were the proper authorities to define the right to vote. Gage's response took note of recent developments in the law: "If control of the franchise is the right of each State as sovereign, then the National Law of 1870 [the Enforcement Act] . . . was an unauthorized interference of the United States in a matter belonging solely to the respective States."[264]

The Reconstruction Amendments, she claimed, "strengthened the National power."[265] Centralized power, because of the Union's victory, was now preeminent: "The time has passed when men can take their choice between 'State sovereignty' and 'centralized power.'"[266] In an environment of such radical structural change, the old models of government and federated powers no longer fit.

Gage also noted an additional development that revealed the federal government's interest in and authority over the right to vote: the pending criminal prosecution by the federal government of Susan B.

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258 Charles Sumner, Are We a Nation: Address to the Young Men's Republican Union, . . . Nov. 19, 1867, quoted in Keller, supra note 54, at 55-56.

259 Keller, supra note 54, at 69.

260 Id. at 101.

261 Id. at 39-40.

262 The History of Woman Suffrage, supra note 100, at 528.

263 Id.

264 Id. at 530.

265 Id. at 532.

266 Id. at 530.

Anthony for illegally voting in Rochester, New York, in November 1872.[267] Anthony's prosecution would become the incitement to widespread public debate over woman suffrage that Francis Minor had sought three years earlier. It would also prove to be the central testing ground for the New Departure argument in the courts and the culmination of the emerging evolutionary constitutionalism of the suffragists. But even before the Anthony trial was under way, Stanton and Gage had leveled a withering critique of originalism and states' rights, two barriers that stood between women and the franchise.

In advance of the Anthony trial, the Supreme Court handed down two decisions on the same day in December 1872 that severely diminished whatever small chance of success Anthony and the suffragists had for a judicial vindication of the New Departure.

The first was *Bradwell v. Illinois*,[268] in which women's rights activist and *Chicago Legal Times* editor Myra Bradwell challenged Illinois's refusal to admit her to the bar to practice law on account of her sex. From the start, *Bradwell* was an inauspicious case for the suffragists. On the one hand, Bradwell's attorney, Republican Senator Matthew Hale Carpenter, premised his argument on a broad reading of the Privileges and Immunities Clause of the Fourteenth Amendment, which he claimed protected the right to practice law as a privilege of national citizenship.[269] On the other hand, Carpenter unnecessarily argued that the right to vote was not such a privilege, and was thus distinct from the practice of law in the eyes of the Constitution.[270] The Supreme Court ruled against Bradwell and held that the right to practice one's trade was not protected by the Privileges and Immunities Clause; indeed, it had no relation to citizenship at all.[271]

Particularly disappointing to woman suffragists was the concurrence of Justice Bradley, whose opinion in *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*[272] they had interpreted to suggest a potentially broad, pro-

267 See United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459); see also infra Part II.D.

268 83 U.S. (16 Wall.) 130 (1872).

269 Id. at 134.

270 DuBois, supra note 100, at 30. Carpenter's position on woman suffrage came as no surprise to activists; he had authored the Senate Report rejecting a suffrage memorial presented by Stanton and Anthony in 1872. See S. Rep. No. 21, at 1 (1872). Why Bradwell, a suffrage advocate, allowed Carpenter to take this position remains a mystery.

271 *Bradwell*, 83 U.S. at 139.

272 15 F. Cas. 649 (C.C.D.La. 1870) (No. 8408).

gressive construction of the Fourteenth Amendment.[273] Instead, Bradley articulated cultural stereotypes of women's role in society:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[274]

In the second opinion of the day, the *Slaughter-House Cases*,[275] a narrow majority of the Court reversed Justice Bradley's decision in the *Live-Stock Dealers' & Butchers' Ass'n* case, rejecting a claim by Louisiana butchers that a state-granted monopoly on slaughtering in New Orleans violated the Privileges and Immunities Clause.[276] The butchers claimed the monopoly deprived them of the right to pursue their vocation, which they claimed, as Bradwell did, to be a privilege of citizenship.[277] In a lengthy discussion, the majority relied on originalist reasoning to reject the butchers' claim. Examining the "history" of the Reconstruction Amendments, the majority found in them "one pervading purpose[:] . . . the freedom of the slave race," not of others.[278] To the extent that the Privileges and Immunities Clause provided protection to classes of individuals beyond blacks, the Court ruled that it was confined to a narrow sphere of rights traditionally associated with national citizenship, such as habeas corpus, access to navigable waters, and the ability to move from one state to another.[279] Other rights, such as the right to pursue one's vocation, were traditionally the province of state law, and the Reconstruction Amendments were not intended, according to the Court, to "radically change[ ]" the relationship between the federal and state governments.[280] The states retained their traditional authority to regulate labor and employment. Thus the Court firmly rejected both Gage's notion of a new nationalism and the broad reading of the Privileges and Immunities Clause supported by Minor, Stanton, and other NWSA activists. It was in this setting of crimped judicial recognition of the changes brought about by the Civil War that Anthony's trial got under way.

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273 See supra notes 223-34 and accompanying text.

274 *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

275 83 U.S. (16 Wall.) 36 (1872).

276 Id.

277 Id. at 60.

278 Id. at 71.

279 Id. at 79-80.

280 Id. at 78.

D. United States v. Susan B. Anthony

Having found frustration trying to convince Republicans in Congress and to persuade judges to adopt their evolutionary way of constitutional construction, the suffragists hoped that a "popular verdict"[281] might be had from a jury of ordinary citizens in Anthony's criminal trial for voting illegally. Anthony's lawyers put together the earlier strands of the New Departure argument and made the most complete, full-bodied articulation of living constitutionalism to date. Originalism would once again defeat their hope.

On November 1, 1872, while "reading her morning paper," the *Rochester Democrat & Chronicle,* Anthony noticed an editorial urging readers to register to vote.[282] She and her sister immediately marched down to the Board of Registry, housed in a local barber's shop,[283] and demanded that the three inspectors—two Republicans and one Democrat—permit the women to register.[284] The inspectors' initial refusal was met with an aggressive verbal assault by Anthony, who launched into a thorough argument as to why the Constitution guaranteed woman suffrage.[285] Unable to defend their position against Anthony, and under the strong advice of the United States Supervisor present that day, the young inspectors allowed Anthony to register.[286] The evening newspapers covered the story extensively, and within days, fifty Rochester women had registered, fourteen in Anthony's ward alone.[287] On November 5, Election Day, Anthony and six other women went to the polls early to avoid causing a stir; Anthony reported that she voted the straight Republican ticket headed by Grant for President.[288] Anthony's voting garnered extensive media attention; there was "scarcely a newspaper in the United States which did not contain from one to a dozen editorial comments" about it.[289] Perhaps because of this publicity, the Grant Administration, having won reelection, informed Anthony three weeks later, on Thanksgiving Day, that it was bringing criminal charges against her.[290] Her crime? Fraudulent voting in violation of the Civil Rights Act of 1870, a federal law passed to prevent the Ku Klux Klan and other southern

281 See remarks of Francis Minor, text accompanying supra note 105-105.
282 The History of Woman Suffrage, supra note 100, at 627.
283 Harper, supra note 99, at 423.
284 The History of Woman Suffrage, supra note 100, at 627.
285 Id.
286 Id.
287 Id. at 628.
288 Id.; Goldsmith, supra note 146, at 345.
289 Harper, supra note 99, at 424.
290 The History of Woman Suffrage, supra note 100, at 628.

whites from casting multiple ballots to dilute the effect of freedmen's votes.[291]

The prosecution was hardly a surprise to Anthony; rather, it was an expected response that would give the NWSA a high-profile forum for its constitutional argument. Indeed, to ensure that nothing prevented this, on Election Day Anthony had promised to indemnify the election inspectors who allowed her to vote if they, too, were targeted for prosecution.[292]

Anthony's bail was set at one thousand dollars, but she announced that she would not pay and that she was willing to be imprisoned for the cause.[293] Without Anthony's permission, her attorney, former appellate judge Henry R. Selden, went ahead and posted bond, costing Anthony, whose case could only be appealed to the Supreme Court on a petition for habeas corpus, her chance to reach the High Court.[294] Selden explained that he "could not see a lady [he] respected put in jail."[295] Livid, Anthony stormed into the courtroom to reclaim the bond, but to no avail.[296] She would not have her case heard by the Supreme Court.

Although *Bradwell* and *Slaughter-House* signaled the hostility of judges toward women's rights and to an expansive reading of the Privileges and Immunities Clause, Anthony continued to believe that vindication would come, if it came at all, through the courts. Only now it was not the judges who needed to be persuaded; it was the jurors who would decide her case and others like it. The right to vote might still be won if popular pressures forced the judicial hand through jury verdicts acquitting the suffragists. Although she did not speak in terms of "nullification," Anthony was surely aware of the antebellum abolitionists' advocacy of juries' refusing to return escaped slaves to their masters, despite laws requiring the contrary.[297] If jurors believed that

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291 16 Stat. 144 (1870); see also VanBurkleo, supra note 212, at 154.

292 Flexner, supra note 62, at 166.

293 Harper, supra note 99, at 432; VanBurkleo, supra note 212, at 159.

294 Harper, supra note 99, at 432.

295 Id. at 433.

296 Id.

297 See Jeffrey Abramson, We, the Jury 80-82 (1994) (detailing famous nullification verdict of Northern jury sitting on Fugitive Slave Act prosecution). Abolitionist Lysander Spooner was perhaps the leading proponent of jury nullification of fugitive slave prosecutions in the antebellum era. His 1852 essay, "Trial by Jury," insisted that juries, as representatives of the democratic polis, had the inherent right to determine whether the law applied to indicted defendants. Lysander Spooner, An Essay on the Trial by Jury, reprinted in 2 The Collected Works of Lysander Spooner 6-10 (Charles Shirely ed., 1971). For an excellent overview of Spooner and his constitutional thought, see generally Randy E. Barnett, Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation, 28 Pac. L.J. 977 (1997).

disenfranchisement was unconstitutional, the suffragists could still achieve some vindication through nullifying verdicts that revealed favorable popular sentiment.

In pursuit of this strategy, Anthony enlisted Matilda Gage in a speaking tour to reach every potential juror.[298] During the winter of 1872-73, Anthony and Gage spoke in each of the twenty-nine post office districts in Monroe County, from which the Rochester jurors were to be chosen.[299] Fearing a jury biased by the speeches, the federal prosecutor, District Attorney Richard Crowley, requested and received the removal of Anthony's trial to neighboring Ontario County.[300] Anthony and Gage traveled there and over the course of three weeks lectured in each of that county's thirty-seven districts.[301] In district after district, they defended the New Departure's interpretation of the Constitution.[302] If anything, Anthony became more certain of the validity of the New Departure's argument, and, in March 1873, undeterred by the pending criminal charges against her, she voted again in the Rochester municipal elections.[303]

On June 17, 1873, the trial of *United States v. Anthony*[304] began in Canandaigua, New York, with newly appointed United States Supreme Court Justice Ward Hunt presiding. Described, perhaps exaggeratedly, as a "small-brained, pale-faced, prim-looking man,"[305] Hunt had been one of the founders of the Republican Party in the 1850s and had just been appointed to the Supreme Court by Grant.[306] This was Hunt's first criminal trial,[307] as evidenced by his careless rulings that would undermine the legitimacy of Anthony's eventual conviction in the public mind and raise the ire of newspaper editors who otherwise opposed woman suffrage.[308] While it remains unclear how Hunt came to preside over Anthony's criminal trial, some have sus-

298 Flexner, supra note 62, at 166.

299 Id.

300 Id.

301 Id.

302 The History of Woman Suffrage, supra note 100, at 630-46 (quoting sample text of speech given by Anthony at post office).

303 See Harper, supra note 99, at 434.

304 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

305 The History of Woman Suffrage, supra note 100, at 647.

306 Stanley I. Kutler, Ward Hunt, in 2 The Justices of the United States Supreme Court: Their Lives and Major Opinions 601 (Leon Friedman & Fred L. Israel eds., 1997).

307 Harper, supra note 99, at 441.

308 See Hoff, supra note 10, at 157-60, 169 (describing criticism of Justice Hunt's reasoning). "[S]carcely a newspaper in the country sustained Justice Hunt's action." Harper, supra note 99, at 441. On the criticism of Hunt by even newspapers opposed to women's rights, see id. at 441-42.

pected that the Grant Administration orchestrated the assignment to ensure Anthony's defeat.[309]

Selden, as lead counsel, made most of Anthony's defense presentation to the packed courtroom, where spectators included former President Millard Fillmore.[310] His argument, worked out with Anthony prior to trial, consolidated the various strands of the New Departure argument into the most coherent, focused constitutional claim yet made for woman suffrage. Anthony herself would not be allowed to speak during the trial. As a woman, she was declared by Hunt to be incompetent to testify on her own behalf.[311]

After setting forth the suffragists' reading of the Fourteenth Amendment, Selden insisted that present societal conditions and needs warranted recognition of women's right to vote. Even if female disenfranchisement may have been sensible at one time, circumstances had since changed. The present "condition of women" made extending suffrage both reasonable and necessary.

The first reason women required the vote was that the men who were theoretically women's virtual representatives or "self-constituted protectors" had proven themselves incapable.[312] Offering "some examples from my own professional experience," Selden recounted numerous instances of women being abandoned or slandered by men.[313] To respond to such present evils, Selden argued, the law must evolve; not necessarily to adopt new commitments but to embrace new doctrinal rules to meet older, long-standing commitments, such as protecting women.

Selden then enhanced his argument by pointing to the law's recent evolution, citing the New York Married Women's Property Law of 1848[314] and the New York 1860 child custody reform[315] in describing the "great changes" with regard to women's legal status over "the last twenty-five years":

> The property, real and personal, which a woman possesses before marriage, and such as may be given to her during couverture, remains her own, and is free from the control of her husband. If a married woman is slandered she can prosecute the slanderer in her

309 DuBois, supra note 100, at 31-32.

310 Catt & Shuler, supra note 114, at 102.

311 The History of Woman Suffrage, supra note 100, at 653; Hoff, supra note 10, at 157 (noting Hunt's refusal to allow Anthony to testify); Sandra Day O'Connor, The History of the Women's Suffrage Movement, 49 Vand. L. Rev. 657, 662 (1996) (same).

312 The History of Woman Suffrage, supra note 100, at 657.

313 Id. at 657-58.

314 See 1848 N.Y. Laws 307.

315 See 1860 N.Y. Laws 157. On the scope of the 1860 reform, and the role of women advocates in achieving it, see Basch, supra note 241, at 188-99.

> own name, and recover to her own use damages for the injury. The mother now has an equal claim with the father to the custody of their minor children . . . .[316]

Thanks to activists such as Anthony, "a thousand years" of "absurdities and cruelties . . . imbedded in the common law" recently had been removed.[317] Nevertheless, in light of continuing legal disabilities, "much more remains to be done by women"; in this, the "elective franchise" was essential to achieve "valuable reforms."[318] Women

> are still subject to taxation upon their property, without any voice as to the levying or destination of the tax; are still subject to laws made by men, which subject them to fine and imprisonment for the same acts which men do with honor and reward—and when brought to trial no woman is allowed a place on the bench or in the jury box, or a voice in her behalf at the bar. They are bound to suffer the penalty of such laws, made and administered by men, and to be silent under the infliction.[319]

Not only would these disabilities be eliminated by woman suffrage, Selden argued, so too would a host of societal dilemmas faced by post-Civil War society, from insufficient charitable work to the growing problem of prostitution: "Schools, alms-houses, hospitals, drinking saloons, and those worse dens which are destroying the morals and constitutions of so many of the young of both sexes, will feel [women's] influence to an extent now little dreamed of."[320]

Selden's contentions about the political impact of woman voters worked on two levels. First, it was a policy argument that pointed to the beneficial consequences that would accrue to society from enfranchising women. Implicit in this policy argument was the notion that women would exercise the franchise differently than men did. They would not be just another class of voters, but voters with particular points of view and political preferences—oriented toward caregiving and support of others—arising from the traditional feminine roles of mother and wife.

Second, Selden also was illustrating the quintessential living constitution emphasis on present needs warranting new legal doctrines. In the late 1860s and early 1870s, public health, temperance, and vice control emerged as primary areas of political concern.[321] Enfranchising women would help to solve some of the public health and social

316 The History of Woman Suffrage, supra note 100, at 659.

317 Id.

318 Id.

319 Id.

320 Id.

321 See Keller, supra note 54, at 122-36 (describing postwar "quest for a good society").

reform issues that were becoming increasingly salient in the postwar polity. Playing upon those current needs, Selden argued that enfranchising women would further necessary reforms.

Selden recognized that a substantial barrier to the New Departure's argument was originalist legal reasoning. Not only was it the prevailing modus operandi of the judiciary, but the specific intent of the Republican framers of the Reconstruction Amendments had been to exclude women from the franchise. Building on Stanton before him, Selden declared the search for original intent misguided, especially insofar as it required ascertaining the will of those who drafted the text: "It may be conceded that the persons who prepared [the Fourteenth Amendment] supposed that . . . States would still be authorized . . . to deny to the citizens the privilege of voting."[322] Yet "their mistake" need not bind present adjudication.[323]

To buttress his point, Selden, like Stanton before him, recognized what modern critics of originalism describe as its definitional or identity dilemma: Whom do we mean by the "Framers," whose intent is supposed to govern?[324] According to Selden, "those who prepare constitutions are never those who adopt them, and consequently the views of those who frame them have little or no bearing upon their interpretation."[325] Privileging the intent of those who drafted and negotiated the Constitution risks ignoring the true sovereign behind the document: we, the people. According to Selden, the intent of the framers of the Fourteenth Amendment was "wholly immaterial" in light of the public's role in constitutional formation and amendment.[326]

Even if one were determined to look to the people who ratified the Constitution in the several states, Selden contended, "it is never possible to arrive at the intention of the people in adopting constitu-

322 The History of Woman Suffrage, supra note 100, at 667.

323 Id.

324 Modern sources have recognized the definitional dilemma. See William J. Brennan Jr., The Constitution of the United States: Contemporary Ratification, in Interpreting the Constitution: The Debate Over Original Intent 25 (Jack N. Rakove ed., 1990) ("[I]t is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?"); Charles A. Lofgren, The Original Understanding of Original Intent?, in Interpreting the Constitution, supra (describing two definitional dilemmas: first, whether "framer intent" or "ratifier intent" qualifies as "original intent"; and second, who is "framer" or "ratifier"); Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 375 n.130 (1981) ("Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.").

325 The History of Woman Suffrage, supra note 100, at 667.

326 Id. at 668.

tions."[327] Modern critics of originalism highlight this difficulty by noting the incomplete historical record of the ratification debates and recognizing the impossibility of assessing why various people supported the constitutional compromise.[328] The only indication of the popular will behind the Constitution, Selden claimed, was "the language used."[329] Here, the language was a broad guarantee of protection for the privileges and immunities of citizenship from state denial; language the citizenry "must be presumed to have known" would incorporate "the right to exercise the elective franchise."[330]

To secure this anti-originalist interpretive methodology, Selden attempted to show that evolving constitutionalism enjoyed a distinguished pedigree:

> It is not a new thing for constitutional and legislative acts to have an effect beyond the anticipation of those who framed them. It is undoubtedly true, that in exacting *Magna Charta* from King John, the Barons of England provided better securities for the rights of the common people than they were aware at the time . . . ."[331]

Even the Framers of the original American Constitution, according to a popular phrase, "'builded better than they knew.'"[332] The fundamental law regularly acquires legal meaning beyond the original intent of those who framed it, its underlying principles applying to an ever widening circle of subjects.

Whatever Selden's persuasive power, the jury was not given the opportunity to vote on the Anthony charge. Justice Hunt ruled that since there were no factual issues in dispute the only question was one of law, properly addressed to judge, not jury.[333] Taking out a statement he had written prior to the trial—prior to any argument whatsoever in his court—Hunt announced to the audience that Anthony had no right to vote and therefore was guilty, by directed verdict, of illegal voting.[334] Selden, his co-counsel, and Anthony herself rose to protest

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327 Id.

328 See, e.g., Boyce, supra note 61, at 946-50.

329 The History of Woman Suffrage, supra note 100, at 668.

330 Id. at 667.

331 Id. at 668.

332 Id.

333 See United States v. Anthony, 24 F. Cas. 829, 832-33 (C.C.N.D.N.Y. 1873) (No. 14,459).

334 See DuBois, supra note 100, at 31-32. It has been suggested that Hunt's directed verdict was the result of a coordinated, prearranged decision by the highest levels of the Republican Party to prevent Anthony from winning her case. Id.

this apparent violation of due process; it was unheard of to direct a guilty verdict in a criminal trial.[335]

Hunt held firm, ruling strictly according to traditional originalist reasoning. Examining how the Reconstruction Amendments "were designed" and what the Privileges and Immunities Clause "intended," he determined that the right to vote was not a right attached to national citizenship.[336] Citing both the *Slaughter-House Cases* and *Bradwell*, Hunt held that, like the practice of law, the franchise arose from *state* citizenship, and nothing in the Fourteenth Amendment changed that.[337] He further supported his argument by literalist formalism: Under Section 2, states were at liberty to disenfranchise male voters at the cost of reduced representation in Congress. "The regulation of the suffrage is thereby conceded to the States as a State's right,"[338] a statement whose firmness was ironic in light of its being made by a *federal* judge in a *federal* court in a *federal* prosecution for violation of a *federal* law on voting in *federal* elections. Hunt did not offer any recognition of the law's evolution or of the pressing conditions of society that uniquely burdened women, nor did he respond to the critique of originalism. His was refutation by disregard.

The next day, as he was about to pronounce his sentence, Hunt asked the defendant if she had anything to say.[339] Anthony stood and characteristically launched into a broad attack on women's subjugation in general and her trial proceedings in particular, which she condemned as trampling on "every vital principle of our government. My natural rights, my civil rights, my political rights, are all alike ignored."[340] Hunt tried five times to quiet Anthony, with little success.[341] Finally, when she finished, he announced her sentence: "a fine of one hundred dollars and the costs of prosecution."[342] Anthony replied in open court, "I shall never pay a dollar of your unjust penalty."[343] Hunt, apparently trying to avoid making Anthony a martyr, refused to give her jail time and, even in the face of her vow not to pay, declined to commit her pending payment of the fine.[344]

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335 Twenty years later, the Supreme Court held that in a criminal trial "it is not competent for the court . . . to instruct the jury peremptorily to find the accused guilty of the offense charged . . . ." Sparf v. United States, 156 U.S. 51, 105 (1895).

336 *Anthony*, 24 F. Cas. at 829-30.

337 Id. at 830-31.

338 Id. at 830.

339 Flexner, supra note 62, at 167.

340 The History of Woman Suffrage, supra note 100, at 687.

341 Id. at 687-88.

342 Id. at 689.

343 Id.

344 Id.

Anthony, though free, had no misconceptions about the magnitude of her loss, nor of its implications for others. Presciently, she warned that states would be emboldened by her defeat to devise ever more cunning ways of denying the right to vote of other groups in society.[345] The ensuing years would indeed witness a dramatic retrenchment in voting rights: the rapid disenfranchisement of southern blacks in the mid-1870s[346] was followed by the scaling back of the ability of the illiterate, the poor, and immigrants to vote.[347]

Hunt's unwillingness to imprison Anthony kept her from using the writ of habeas corpus to appeal her case to another court under extant rules of criminal procedure.[348] But though she was denied the opportunity to be heard again, Anthony and her counsel did register some small successes. At least one juror, interviewed after being dismissed, stated that he was prepared to acquit Anthony. "The verdict of guilty would not have been mine, could I have spoken, nor should I have been alone," said the man. "There were others who thought as I did, but we could not speak."[349] In addition to convincing at least some of the jurors, Anthony's legal team was successful in bringing more public attention to the suffragist movement and its constitutional philosophy. Selden's argument at trial was "published in all the leading papers" and "arrested the attention of legal minds as no popular discussions had done before."[350]

E. The Return of Virginia Minor—and Her Retreat

Halfway across the country, in Missouri, a less-publicized case challenging woman disenfranchisement was winding its way through the courts. In October 1872, Virginia Minor, the mother of the New Departure argument, attempted to register to vote in St. Louis.[351] Af-

345 See Hoff, supra note 10, at 175 (describing Anthony's pretrial prediction that if court established during her case that United States citizenship did not carry with it right to vote, other classes of citizens soon would be denied suffrage).

346 Within three years of Anthony's conviction, the Supreme Court cut the heart out of the Reconstruction Congress's legislation designed to protect blacks' right to vote. See United States v. Cruikshank, 92 U.S. 542 (1875) (invalidating federal prosecution of white defendants who attacked assemblage of blacks, on ground that no federal right was infringed); United States v. Reese, 92 U.S. 214 (1875) (voiding federal law protecting blacks' right to vote because not limited to discrimination on basis of race). See also Keyssar, supra note 87, at 53-67.

347 See Keyssar, supra note 87, at 53-67.

348 Mildred Adams, The Right to Be People 68 (1967); Rayne L. Hammond, Trial and Tribulation: The Story of United States v. Anthony, 48 Buff. L. Rev. 981, 1008 n.108 (2000).

349 The History of Woman Suffrage, supra note 100, at 689.

350 Id. at 691.

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

ter being turned away by the registrar, Minor sued in state court under the Enforcement Act for violation of her federal constitutional rights, only to have her complaint dismissed on demurrer.[352] Vigorously pursuing her appeal, Minor was able to garner what Anthony, because of Justice Hunt's procedural manipulation, could not: She appeared before the Supreme Court in May 1873 through a writ of error.[353] It would take almost two years for the Justices to hand down their decision, but in March 1875 a unanimous Court rejected her claim that the right to vote was guaranteed by the Fourteenth Amendment.[354]

Although it probably mattered little to the eventual outcome of her case (since none before her had been successful), Minor and her attorneys, including her husband Francis, presented to the Supreme Court a watered-down version of the evolutionary, living Constitution argument articulated by New Departure activists. In part, this is not surprising; Minor's original suggestion on how to read the Privileges and Immunities Clause of the Fourteenth Amendment relied primarily on textualism, not living constitutionalism.[355] It was only subsequent to Minor's St. Louis speech that NWSA activists such as Stanton and Anthony proposed a dynamic model of constitutional interpretation designed to keep the principles of the text current with present societal conditions and needs.[356] Moreover, by the time of Minor's Supreme Court argument, the broad, evolutionary interpretative approach had been handily rejected by several judges—many of them Republicans—in earlier New Departure cases. Minor, her husband, and her other attorneys knew their chances for victory were minimal and possibly even less than that if an innovative theory of constitutional interpretation were essential to their claims.[357]

Minor's legal team maintained the core argument that the Fourteenth Amendment recognized women's status as national citizens and that the Privileges and Immunities Clause guaranteed the right to vote. However, they avoided any direct challenge to original intent-based reasoning and pushed an evolutionary view of the law to the periphery. Instead, accepting originalism, they attempted to portray the intent of the Framers as protecting woman suffrage:

> [A]t that very time [of the framing], and for nearly twenty years afterward, women did vote, unquestioned and undisputed, in one of

352 Id. at 164.

353 VanBurkleo, supra note 212, at 160.

354 *Minor*, 88 U.S. at 162-63.

355 See supra Part II.A.

356 See supra Parts II.A & II.D.

357 See Lobel, supra note 55, at 1371 ("By 1874, the Minors must have sensed that defeat was inevitable."); Hoff, supra note 10, at 171 (same).

> the States (New Jersey). The men who framed the Constitution were then living—some of them in this very State; yet we hear no mention of its being unconstitutional, no objection made to it whatever . . . . This fact is worth a thousand theories.[358]

Whereas other New Departure activists cited postconstitutional ratification practices to demonstrate the law's evolution, the Minors used the example of women's voting rights in New Jersey after the Revolution as evidence of the Framers' original intent.

Yet this argument strengthened the hand of those opposed on federalism grounds to extending women's rights. That New Jersey, and New Jersey alone, had allowed women to vote signified that the states had the ultimate power to dictate who could vote.[359] And there had been no constitutional objection to New Jersey's decision to disenfranchise women in 1807, when most of the Framers were still living.[360] On a more subtle level, this originalist argument undermined the essence of the New Departure argument, which was that the Reconstruction Amendments fundamentally transformed the nature of citizenship and the federal-state balance of authority over the privileges and immunities of citizenship. By dropping the critique of originalism, the Minor team did little to help its cause. In fact, Missouri considered Minor's argument so weak and tenuous that it declined to submit an opposing brief to the Supreme Court.[361]

Of course, there is little reason to suspect that the Court would have ruled in Minor's favor even had she advanced a strong version of evolutionary interpretive methodology. No matter how they framed their argument, New Departure activists from Stanton and Woodhull to Van Valkenburg and Anthony universally failed in forums both political and judicial, halted time after time by the traditional originalist reasoning of the era. Minor likely would not have been an exception, as indicated by the originalist-based rejection of her claim by the Supreme Court.

Chief Justice Morrison Waite, writing for the Court, expounded at length about the original intent of the Framers. Once the undeniable conclusion that women were U.S. citizens was accepted, the question was whether the suffrage was among the privileges and immunities of citizenship "as they existed at the time [the Constitution] was adopted."[362] His ruling that "the framers" had not "in-

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358 The History of Woman Suffrage, supra note 100, at 722 (quoting Minor's argument to Supreme Court).

359 *Minor*, 88 U.S. at 172-73.

360 Id. at 177.

361 Hoff, supra note 10, at 171.

362 *Minor*, 88 U.S. at 171.

tended to make all citizens of the United States voters" was supported by an exemplary formalistic reading of various constitutional provisions.[363] If the suffrage was a privilege of citizenship, then the command of Article IV, Section 2, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States"—the original Privileges and Immunities Clause—would mean that "the citizens of each State" must be allowed to "vote in any State," presumably in any election.[364] And although the original Constitution banned bills of attainder and guaranteed a "republican form of government," the acceptance of female disenfranchisement by the Framers indicated that the disenfranchisement of women did not offend these provisions.[365]

Waite also dismissed the idea that the rights of citizenship were changed by the Reconstruction Amendments. Affirming the reasoning of *Bradwell* and *Slaughter-House*, Waite declared that the Fourteenth Amendment "did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[366] Apparently, the Union's victory in the Civil War and the Radical Republicans' efforts in the war's wake had done little but affirm ancient, previously recognized rights. With egregious disregard of the Fifteenth Amendment (an ignorance that would prove ominous for blacks in ensuing years), Waite declared boldly that "the Constitution of the United States does not confer the right of suffrage upon any one."[367]

Yet it was surely not doctrinal consistency that led to the outcome in *Minor*. The Court affirmed that women were indeed citizens, yet in *Slaughter-House* the Court had insisted that "[t]he negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union."[368] And in the years following *Minor*, the Court would hold explicitly that "electors for members of Congress[, a federal office, do not] owe their right to vote to the State law in any sense," and that the Constitution "operate[s] as the immediate source of a right to vote."[369] It was women for whom citizenship meant no right to vote.

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363 Id. at 173.

364 Id. at 174.

365 Id. at 175-76.

366 Id. at 171.

367 Id. at 178.

368 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872).

369 Ex Parte Yarbrough, 110 U.S. 651, 663, 665 (1884) (holding that, while Fifteenth Amendment "gives no affirmative right to . . . vote[,]" it does, "under some circumstances . . . operate as the immediate source of a right to vote").

In his closing paragraphs, Waite rejected any notion of a living Constitution, one that evolved through judicial construction to respond to present conditions: "If the law is wrong, it ought to be changed; but the power for that is not with us. . . . No argument as to woman's need of suffrage can be considered."[370] Affirming the formalist reasoning of the day, he described the "duty" of the Court as being to limit itself to "act upon [women's] rights as they exist."[371] Yet even before the Supreme Court ruled in Minor's case, the opening battle between evolutionary interpretive method and originalist formalism had been fought, and won by the forces of tradition.

CONCLUSION

The story of the New Departure in the 1870s raises two questions: Why did the suffragists lose, and what influence did they have on the Progressive Era legal thinkers who instituted evolutionary constitutionalism as a mainstream constitutional doctrine? Neither of these questions can be answered authoritatively, and my intent in this Conclusion is only to speculate on the causes of the suffragists' failure and on their lasting influence on constitutional practice.

The conservatism of post-Civil War judges likely contributed to the suffragists' inability to convince courts to accept evolutionary constitutionalism. The Supreme Court emerged from the war in disrepute; its prewar fugitive slave jurisprudence, exemplified by *Dred Scott*, was seen as one cause of the insurrection. The Taney Court was castigated for deciding prewar cases on the basis of "political principles"[372] rather than rules of law, the result of having been appointed to the bench for reasons more partisan than juridical. Similar public scorn extended to the entire judiciary.[373] Their postwar successors were known for rejecting novel assertions of Congressional authority, including overturning several acts of the Reconstruction Congress.[374] In this environment, judges were not likely to adopt a novel interpretive method to justify a reading of the Constitution that, by recognizing women's right to vote, construed the text in a progressive way never before imagined by the mainstream legal community. Women

370 *Minor*, 88 U.S. at 178.

371 Id.

372 Roger Brooke Taney, 15 Atlantic Monthly 151, 153 (1865), quoted in Nelson, supra note 50, at 549.

373 See Nelson, supra note 50, at 549-50 (analyzing bases of public's low estimation of courts in 1860s and 1870s).

374 See, e.g., United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870) (invalidating federal statute prohibiting sale of illuminating petroleum on commerce clause grounds); Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866) (voiding loyalty oaths for lawyers practicing in federal courts).

were hardly alone in their frustration with the conservative courts; by the mid-1870s, in cases such as *United States v. Cruikshank*[375] and *United States v. Reese*,[376] the Supreme Court consolidated its opposition to federal reform laws designed to help blacks in furtherance of Reconstruction. As in the woman suffrage cases, the judges turned a blind eye to the social reality of discrimination and inequality.

On the legislative front, the Republican refusal to enact laws enfranchising women was part of a larger pattern of disassociation from the promises of the Reconstruction Amendments.[377] The Republicans were weary from two decades of fierce battles with Democrats over the constitutional issues of slavery and Reconstruction; moreover, the spoils of Republican victory were few. The coalition of Union Republicans—consisting of conservative and moderate Republicans, Radicals, and War Democrats—which was held together by Lincoln and the goal of preserving the Union quickly came unglued after the war, and by the 1872 election, the factions were openly at war.[378] The Republican Party faced a dramatic split that year as Liberal Republicans defected to run their own presidential ticket, headed by Horace Greeley, the *New York Tribune* editor who promised "local self-government" as a compromise with the South.[379] The fight over broad principles not only split the nation; it also weakened the young Republican Party and threatened to loosen its tenuous grasp on political power.

The euphoric promise of new principles and a new nationalism that characterized the late 1860s faded rapidly in the early 1870s. In part this was due to the political environment faced by Republicans: The populace still believed in the ancient prejudices and hierarchies of white over black, local over national, man over woman. The desire for new institutions and commitments described by Henry Adams in 1865 came to be seen as socially chaotic in the wake of upheavals, both foreign and domestic. Events such as the Paris Commune of 1871,[380] labor unrest and the Panic of 1873,[381] the publicized corrup-

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375 92 U.S. 542 (1875) (invalidating federal prosecution of white defendants who attacked assemblage of blacks, on ground that no federal right was infringed).

376 92 U.S. 214 (1875) (voiding federal law protecting blacks' right to vote because it was not limited to discrimination on basis of race).

377 DuBois, supra note 100, at 32.

378 Foner, supra note 183, at 499-501.

379 Id. at 501-10.

380 See generally Robert Tombs, The Paris Commune: 1871, at 1-12 (1999) (describing life during Paris Commune, two-month period in spring of 1871, in which dissident units of citizen militia gained control of city in hopes that "the free city of Paris would begin a new era as a democratic and social republic").

381 See Encyclopedia of American History 300 (Richard B. Morris ed., 1982) (describing Panic of 1873, when financier Jay Cooke's investment bank collapsed and caused market

tion of the Grant administration,[382] and other prominent scandals[383] all "reinforced the notion that restoration, not change, should be the primary purpose of social policy."[384]

Woman suffrage was also stymied because its achievement was dependent at every turn upon Congressmen, lawyers, and judges—all men, who proved over the course of the next half-century to be tenacious in their resistance to granting the vote to women. As feminist political theorist Carole Pateman observes, "[t]he franchise appeared to pose a radical challenge and threat not just to the state but to the powers and privileges of men as a sex."[385] Just as black enfranchisement had paved the way for subsequent demands for full black equality in the enjoyment of public accommodations, education, and civil standing, so men feared woman suffrage would be the beginning of true equal citizenship for women.[386] Deep-seated assumptions of

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collapse and widespread bank failure); Morton J. Horwitz, The Transformation of American Law, 1870-1960, at 65 (1992) (same).

382 See Margaret Susan Thompson, The "Spider Web": Congress and Lobbying in the Age of Grant 33-43 (1985) (detailing public scandals of Grant administration and resulting crisis of confidence in government).

383 None was more notable than the Beecher-Tilton scandal, in which the country's foremost preacher, Henry Beecher, was accused of adultery and seduction of another man's wife. See generally The Beecher Trial: A Review of the Evidence (New York, no publisher 1875) (collecting reports on trial from the *New York Times*). The scandal was particularly injurious to the New Departure, and has been said to have "set the women's movement back by at least a decade." Weatherford, supra note 152, at 121, 123. Beecher had longstanding ties to the women's rights movement and had even served as President of the American Woman Suffrage Association. Flexner, supra note 62, at 154.

The scandal also became associated with Victoria Woodhull, whose newspaper, *Woodhull & Clafin's Weekly*, broke the story of Beecher's affair. Weatherford, supra note 152, at 121. Apparently, Woodhull hoped to reveal male hypocrisy over sexual behavior—hypocrisy that had helped bring about her besmirched reputation for radical free lovism. See id. (noting Woodhull's motives for breaking story of Beecher's affair). All Woodhull achieved by her publication of the story was condemnation and a criminal prosecution for sending obscenity through the mail. Kugler, supra note 92, at 91. Although Beecher would not be found liable in his own trial, the Beecher-Tilton Scandal tarred the suffrage movement with free lovism. See id.

Although Woodhull has defenders who insist that her association with the suffragists did not set back the woman's rights movement, it is hard to imagine how it could not have done so. See Flexner, supra note 62, at 154. Former allies were quick to denounce Woodhull: The *New York Tribune*, for example, condemned the free love and radicalism of Woodhull and editorialized that the NWSA, having embraced her, was therefore supportive of all of Woodhull's notorious views on social questions. Harper, supra note 99, at 383.

384 Keller, supra note 54, at 127.

385 Carole Pateman, Three Questions About Womanhood Suffrage, in Suffrage and Beyond 335 (C. Daley & M. Nolan eds. 1994).

386 "Viewed symbolically as a goal, a sign of women's independent status, it was *culturally* a radical rejection of the society's cultural stereotype of female dependence . . . ." Paulson, supra note 98, at 47; see also Keller, supra note 54, at 142-46 (discussing Reconstruction Era demands for equal citizenship for blacks).

male superiority and patriarchy were threatened by woman suffrage and other demands for equality,[387] the threat reaching even to issues of male sexuality.[388] The NWSA activists behind the New Departure pressed for far more radical change than female enfranchisement, considering it only the beginning of a fundamental restructuring of society to equalize the status of women.[389] The pursuit of the right to vote threatened to break down the separate spheres that tradition required men and women to occupy. As Republican Senator Lot M. Morrill of Maine argued during debate over the Fourteenth Amendment, the vote for women

> associates the wife and mother with policies of state, with public affairs, with making, interpreting, and executing the laws, with police and war, and necessarily disseverates her from purely domestic affairs, peculiar care for and duties of the family; and, worst of all, assigns her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood.[390]

Perhaps most worrisome to men was the threat women's rights posed to the institution of marriage. Activists had never hesitated to claim that the ultimate objective of their quest was to gain full equality, which inevitably meant marital reform. It was the contours of this relationship in an age of coverture that kept women subordinate in their daily lives. Yet, as some women's rights sympathizers recognized in the mid-nineteenth century, the discussion of marriage "'has damaged the cause greatly in public estimation.'"[391] Suffrage was the mouth of a river up which few men of the middle nineteenth century were interested in venturing.

When suffragists threatened, as Stanton did, to "revolutionize" the family, it ignited the fears of many women too.[392] Women's opposition to enfranchisement was embodied by Catherine Beecher—sister of the New York preacher—who fought for an antisuffrage memo-

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387 See DuBois, supra note 86, at 46-47.

388 See Pateman, supra note 385, at 338-39.

389 See Smith, supra note 93, at 315. For example, Anthony made clear her opinion of the vastness of the revolution women sought at the 1874 NWSA annual convention. The goal was to "'open to [women] all colleges of learning; secure to them the right to sit on juries; to sue and be sued; to practice in all our courts on the same terms with colored men; to be tried by a jury of their peers; to be admitted to theaters and hotels alone; to walk the streets by night and by day . . . ; [and] to secure equal place and pay in this world of work.'" VanBurkleo, supra note 212, at 155.

390 Cong. Globe, 39th Cong., 2d Sess. 40 (1866).

391 Stanley, supra note 170, at 178 (quoting letter written by one such sympathizer).

392 See VanBurkleo, supra note 212, at 152. "[W]oman's chief discontent," admitted the *Revolution*, "is not with her political but with her social, and particularly with her marital bondage." Kugler, supra note 92, at 89.

rial.[393] Echoing the views of many religious women, Beecher and the women antisuffragists insisted that Holy Scripture dictated for women a sphere "apart from public life," and that women's nature rendered them unfit for politics.[394] Woman suffrage would introduce an "element of discord in the existing marriage relation[ship], . . . and [would] increase the already alarming prevalence of divorce."[395] The breadth and scope of the NWSA's agenda was too much for even many progressive women—such as those in Lucy Stone's AWSA—to support; it was clearly beyond conservative women and men.[396] Even extending the basic right to vote to women was too radical for some, and Anthony herself concluded as late as 1880 that most women opposed enfranchisement.[397]

Perhaps the suffragists' own strategy contributed to their defeat. The suffragists pursued their evolutionary claims about the Constitution too soon after the Reconstruction Amendments' adoption, when the more modest intentions of the ratifiers were still clear in the minds of all public men. At every turn, their claims about the meaning and principle of the words in these amendments were easily brushed aside by politicians and judges asserting that protection of blacks was the amendments' sole objective. Even though suffragists attempted to craft their narrative as one of evolution in the constitutional order since the Founding, not merely of evolution since the ratification of the Fourteenth Amendment, they consistently were misconstrued to be arguing only for an evolutionary reading of the Fourteenth Amendment itself. Since the Fourteenth Amendment had been enacted only recently, this view of the suffragists' argument was a death knell to their claims.[398]

The timing and internal inconsistencies within their strategy also cast the suffragists' effort as overtly political. They failed to gain inclusion in the Reconstruction Amendments, so they fought against their passage. Once the amendments were passed, they sought declaratory laws from Congress arguing that the Fourteenth Amendment guaranteed them the vote—even though those same women had

393 See Thomas J. Jablonsky, The Home, Heaven, and Mother Party: Female Anti-Suffragists in the United States, 1868-1920, at 3 (1994).

394 Id.

395 Id.

396 See Kugler, supra note 92, at 87-89.

397 See Gordon, supra note 126, at 825 (citing arguments Anthony delivered before Senate in 1880).

398 For a modern statement of the need for sufficient time to pass before an evolutionary argument about constitutional meaning becomes credible, see Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 Geo. L.J. 1765, 1816-22 (1997).

fought against ratification. Once that effort failed, they went to the courts with the claim that they did not need the very declaratory laws they earlier asserted were necessary. Their strategy, born of desperation apparent to all, coupled with the improbability of success, led even some sympathetic reformers to condemn the New Departure; for example, the *Nation,* at the time a centrist Republican journal that supported the cause of woman suffrage,[399] editorialized that the *Minor* case was a distraction from the Supreme Court's ability to focus on "really important cases."[400]

Later agitators for reform who took up living constitutionalism avoided the overreaching of the New Departure suffragists, who went immediately for the ultimate goal of full female enfranchisement. Civil rights and abortion rights advocates after the New Deal would seek to achieve their goals through piecemeal efforts, building up small legal victories to establish precedents that would ultimately create a firmer foundation for their larger objectives.[401] This more careful form of living constitutionalism proved more effective.

Even though they were unsuccessful, the woman suffragists did lay foundations of a different sort: those for the emergence of evolutionary constitutionalism as the dominant form of constitutional interpretation. Many of the elements currently associated with the notion of a living Constitution were introduced and widely publicized by the suffragists. They articulated a profound critique of originalism, the reigning mode of legal reasoning, and sought to update the law to meet the present needs and recent developments in the understanding of women's capacities. They proposed to construe the textual provisions of the Constitution by reference to the text's deeply embedded principles, rather than its literal wording or traditional application. They centered their argument on the principles announced in the Fourteenth Amendment, the textual basis that would later become the central focus of evolutionary claims about constitutional meaning. They did not portray their efforts as bold and innovative—doing so has proven ineffective to this day in constitutional interpretation—but instead presented their arguments as restorative of the commitments of American democracy and mandated by the demands of reason.

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399 Maltz, supra note 83, at 267.

400 The Week, Nation, Oct. 14, 1875, at 238.

401 See generally David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (1994) (discussing litigants' pursuit of legal recognition of right of privacy); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 (1994) (discussing piecemeal strategy used to gain guarantees for civil rights).

Each of these core tenets of living constitutionalism was introduced into the courts by the suffragists.

It is difficult to discern the influence of the suffragists on the Progressive Era legal thinkers traditionally credited with evolutionary constitutionalism. One thing is certain: Progressives employed similar interpretive styles.[402] But beyond that, we are left to speculate whether the woman suffragists directly influenced later constitutional thinkers. Progressive Era legal scholars such as Christopher Tiedeman and Oliver Wendell Holmes Jr., neither cited nor invoked the suffragists. This in itself is unsurprising and tells us little of the genealogy of their interpretive style. A nineteenth-century man would fear to be seen as being intellectually influenced by women. Moreover, association with the suffragists was association with a losing effort; the *Anthony* and *Minor* cases marked a dramatic failure for the New Departure's constitutional innovations, and women in the Progressive Era still remained without the vote. Nevertheless, a circumstantial case can be made for the suffragists' potential influence on Progressives. My limited purpose here is not to prove that the Progressives were influenced by the suffragists, but to point out some clues that suggest a potential connection that might be a promising area for further historical research.

During the early 1870s, the New Departure argument was disseminated widely as part of the suffragists' media campaign to bring the suffrage question to the forefront of political debate. Progressive thinkers such as Holmes and Tiedeman were in their formative years as lawyers during this time and must have been aware of the suffragists' constitutional argument. From 1871 to 1873, for example, Holmes was the young editor of the leading law journal of its day, the *American Law Review*, and thus was at least exposed to the suffragists' controversial argument. During his editorship, the *Review* covered developments in the legal status of women from a sympathetic vantage point; in 1871 an anonymous article entitled "Married Women" condemned statements of women's divinely ordained inferiority as "balderdash"[403] and of female inequality as "the last vestige of slavery":

> Upon [women's] subjection it has been thought rests the basis of society; disturb that, and society crumbles into ruins. By the married women's property acts, the first blow has been struck. The cheek of the idol has fallen to the ground; the thunder is silent, and

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402 See supra notes 13-39 and accompanying text.

403 Married Women, 6 Am. L. Rev. 57, 61 (1871).

> the earth preserves its accustomed tranquillity. The huge idol will sooner or later be broken to pieces.[404]

In a recurring section entitled "Summary of Events," the *Review* during Holmes's editorship took regular notice of New Departure cases, including decisions in Virginia Minor's and Sara Spencer's cases;[405] and of controversies over the admission of women to the bar.[406] The coincidence of the woman suffragists' innovative constitutional claims with the early careers of progressive legal scholars such as Holmes at least suggests the potential for influence. The similarities between suffragist and Progressive Era evolutionary interpretive method, coupled with the widely publicized character of the New Departure campaign, suggest that turn-of-the-century legal thinkers took their cue, though perhaps unknowingly, from the suffragists.

After the Anthony trial and the Supreme Court's unanimous decision in *Minor*, the suffragists of the NWSA gave up on the New Departure and its radical interpretive methodology, and refocused on a strategy of constitutional amendment. But before changing tack, acting together and in cumulative fashion, suffragists such as Virginia Minor, Elizabeth Cady Stanton, Victoria Woodhull, Albert Riddle, Francis Miller, Matilda J. Gage, Henry Selden, and Susan B. Anthony had created a novel constitutional methodology, layer by layer, step by step. Each built upon the insights of the others, and through their activism they bridged the gap between theory and practice.

Although suffragists eventually abandoned the effort, this is not to say that their innovations ceased. While tirelessly pursuing a federal constitutional amendment enfranchising women, they also sought reform through state referenda, waging seventeen campaigns between 1867 and 1910 to put woman suffrage to a popular vote of the citizenry.[407] In doing so, they foreshadowed the rise of the initiative process, which was not widely instituted until the early decades of the twentieth century as part of a pattern of Progressive Era electoral reform.[408] And at the turn of the twentieth century, suffragists responded to the increasingly urban, commercial, capitalist-driven economy by incorporating modern methods of advertising, publicity,

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404 Id. at 73.

405 See Selected Digest of State Reports, 10 Am. L. Rev. 302, 307 (1875) (discussing Minor case); Summary of Events, 6 Am. L. Rev. 365, 366 (1872) (discussing Spencer case).

406 See Summary of Events, 7 Am. L. Rev. 732, 746 (1873) (discussing Bradwell case); Summary of Events, 7 Am. L. Rev. 348, 357 (1872) (discussing Maine's admission of women to bar); id. at 384 (discussing Utah's admission of women to bar).

407 Flexner, supra note 62, at 175.

408 See Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 50-59 (1989) (outlining adoption of initiative process and other popular lawmaking devices in early twentieth century).

mass merchandising, and mass entertainment into their political struggle, selling suffrage as if it were a commodity.[409] Once again, woman's rights activists were innovators, ahead of the curve in their pursuit of suffrage and equality.

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[409] See generally Margaret Finnegan, Selling Suffrage: Consumer Culture and Votes for Women (1999).