

DUQUESNE LAW REVIEW



A CENTURY SINCE SUFFRAGE: HOW DID WE GET HERE? WHERE WILL WE GO? HOW WILL WE GET THERE?

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Rona Kaufman

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THE DESTABILIZING EFFECTS OF CONSTITUTIONAL
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PROTECTING WOMEN’S RIGHTS BY KEEPING
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Emily Peffer

Duquesne Law Review

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Foreword: A Century Since Suffrage: How Did We Get Here? Where Will We Go? How Will We Get There?

Rona Kaufman*

“Until we are all free, we are none of us free.”¹

One hundred years have passed since (white) women attained the right to vote.² In the century since the Nineteenth Amendment was ratified, American women have transitioned from an existence as mere objects of history to becoming active subjects of history. In 2019 and 2020, many programs and conferences were organized to celebrate the achievements of America’s women and commemorate the 100th anniversary of women’s suffrage. The Section on Women in Legal Education³ hosted a program at the January 2020

* Rona Kaufman, Associate Professor of Law, Duquesne University School of Law. I thank the Executive Committee and members of the Women in Legal Education Section of the American Association of Law Schools for planning our January 2020 main program: *A Century Since Suffrage: How Did We Get Here? Where Will We Go? How Will We Get There?* I thank the professors who gave their time and energy to review all proposals for the conference. I thank the professors who submitted proposals for the conference and those who were selected for making our panel presentations interesting and for spurring an inspiring conversation among those in the audience. I thank Danielle Mrdjenovich and Julia Siracuse, Editors of the Duquesne Law Review, and Jan Levine, Faculty Advisor of the Duquesne Law Review, for inviting the WILE to publish the articles from our conference in this Symposium Issue and for their patience and grace throughout the process. I thank Alyssa Henderson and Jarek Sulak for their research assistance. And, I thank my daughter, Naomi Kitchen, for inspiring me to continue to fight for women’s equality and to remember that until all women are free, no woman is truly free.

1. Emma Lazarus, *A Quote from Epistle to the Hebrews*, THE AM. HEBREW (1883) (transcript available at <https://jwa.org/media/quote-from-epistle-to-hebrews>).

2. U.S. CONST. amend. XIX; Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006). The Nineteenth Amendment promises that no woman will be disenfranchised from the vote on the basis of her sex. U.S. CONST. amend. XIX. As Nan Hunter notes, “the organizations, strategies, and concepts of law discussed throughout were pervasively racialized. Foundationally, the Nineteenth Amendment itself had little impact on Black women in southern states who were disenfranchised by Jim Crow laws in 1920 and remained so for many years thereafter. Their inability to benefit from the Amendment was well known at the time.” Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 DUQ. L. REV. 125, 127–28 n.2 (2021) (citation omitted).

3. See generally Karen Syma Czapanskiy, *1992: A Year of Women, Bravery, and Growth*, 80 UMKC L. REV. 751 (2012); Ruth Bader Ginsburg, *Presentation of AALS Section on Women in Legal Education Ruth Bader Ginsburg Lifetime Achievement Award*, 104 CALIF. L. REV. 575 (2016); Ruth Bader Ginsburg, *In the Beginning . . .*, 80 UMKC L. REV. 663 (2012); Marilyn J. Ireland, *Women’s Entry into the Law Teaching Profession: Cracking the Door Open*, 80

American Association of Law Schools (AALS) Annual Meeting titled, *A Century Since Suffrage: How Did We Get Here? Where Will We Go? How Will We Get There?*⁴ Professors from law schools across the country submitted their proposals. A committee comprised of women in legal education reviewed the professors' proposals and selected those who would be invited to present their papers, published in this Symposium Issue of the *Duquesne Law Review*. The following distinguished women law professors were selected:

- Nan Hunter, Scott K. Ginsburg Professor of Law, Georgetown University Law Center;
- Lolita Buckner-Inniss, Senior Associate Dean for Academic Affairs, University Distinguished Professor, Robert G. Storey Distinguished Faculty Fellow, and Professor of Law, SMU Dedman School of Law;
- Leslie Gielow Jacobs, Justice Anthony M. Kennedy Professor of Law & Director of the McGeorge Capital Center for Law & Policy at the University of the Pacific, McGeorge School of Law;
- Diane Klein, University of La Verne College of Law; and
- Danaya Wright, University of Florida Levin College of Law, Clarence J. TeSelle Endowed Professor of Law.

UMKC L. Rev. 695 (2012); Linda Jellum & Nancy Levit, *Reflections of Women in Legal Education: Stories from Four Decades of Section Chairs*, 80 UMKC L. REV. 659 (2012); Rona Kaufman, *Ruth Bader Ginsburg Lifetime Achievement Award Remarks*, 21 GEO. J. GENDER & L. 541 (2020); Elizabeth Nowicki, *An Unexpected Chair*, 80 UMKC L. REV. 813 (2012); Judith Resnik, *Hearing Women*, 65 S. CAL. L. REV. 1333 (1992). The Women in Legal Education Section of the AALS was established in 1973, at a time when the number of women in legal education remained small and when their voices were marginalized. Today, the Women in Legal Education Section is the largest affinity group of the AALS. It has a distinguished history of engaging in important conversations surrounding equality and women's role in legal education. Past chairs of the section include some of the most esteemed women of the legal profession. In 2014, the Section established the Ruth Bader Ginsburg Lifetime Achievement Award to recognize women who have had distinguished careers of teaching, service, and scholarship for at least twenty years and who have impacted women, the legal community, the academy, and the issues that affect women through mentoring, writing, speaking, activism, and by providing opportunities to others. Ruth Bader Ginsburg was the first awardee. Thereafter, the award has been bestowed upon Catherine MacKinnon, Herma Hill Kay, Marina Angel, Martha Albertson Fineman, Tamar Frankel, Robin West, and Kimberlé Crenshaw.

4. *Annual Meeting 2020*, AALS, <https://am.aals.org/past/am20/> (last visited Feb. 12, 2021).

Their presentations each examined specific aspects of the so-far-100-year-old movement for women's equality. They provided diverse perspectives on the movement for women's equality including: arguments against state rescission of the Equal Rights Amendment,⁵ an analysis of the degree to which white women's *becoming* was in furtherance of the oppression of Black women,⁶ exploration of how infringements on women's rights are justified under the guise of protection of religious liberty,⁷ and an analysis of the history of women's fight for political, economic, and reproductive equality.⁸ I served as Chair of the Women in Legal Education Section in 2020 and had the privilege of moderating this extraordinary panel of presenters. I am now once again privileged to introduce their important work, published in this Symposium Issue.

It seems appropriate to introduce this Symposium Issue by recalling the lived experiences of women, or more often the experiences not lived by women, just a century ago. In 1920 no women served in Congress,⁹ no women were state governors,¹⁰ no women were appointed members of a presidential cabinet,¹¹ no women held leadership positions in corporate America.¹² In 1920, few women

5. See Danaya C. Wright, "An Atrocious Way to Run a Constitution": *The Destabilizing Effects of Constitutional Amendment Rescissions*, 59 DUQ. L. REV. 12 (2021).

6. See Diane Klein, *Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture*, 59 DUQ. L. REV. 106 (2021).

7. See Leslie Gielow Jacobs, *Protecting Women's Rights by Keeping Religious Liberty in Its Lane*, 59 DUQ. L. REV. 54 (2021).

8. See Hunter, *supra* note 2, at 128 n.3.

9. *History of Women in the U.S. Congress*, CTR. FOR AM. WOMEN & POL., <https://cawp.rutgers.edu/history-women-us-congress> (last visited Mar. 8, 2021).

10. *History of Women Governors*, CTR. FOR AM. WOMEN & POL., <https://cawp.rutgers.edu/history-women-governors#:~:text=%20%20%20%20Name%20%28Party-State%29%20%20,succeeded%20g%20...%20%2027%20more%20rows%20> (last visited Mar. 8, 2021).

11. Compare Robert McNamara, *Frances Perkins: The First Woman to Serve in a Presidential Cabinet*, THOUGHTCO., <https://www.thoughtco.com/frances-perkins-biography-4171543> (Sept. 17, 2019) (noting that in 1933, Frances Perkins was the first woman to be appointed to a cabinet position as Secretary of Labor), with Deena Zaru, *Biden Cabinet Picks Feature Record Number of Women and Women of Color*, ABC NEWS (Jan. 23, 2021, 1:47 PM), <https://abcnews.go.com/Politics/biden-cabinet-picks-feature-record-number-women-women/story?id=75380370> (highlighting that there are currently twelve women nominated for Cabinet level positions).

12. Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 506–15 (2006); see also Susan Caminiti & Jennifer Reese, *America's Most Successful Businesswoman*, FORTUNE MAG. (June 15, 1992), https://archive.fortune.com/magazines/fortune/fortune_archive/1992/06/15/76533/index.htm (detailing Linda Joy Wachner's rise to CEO of a Fortune 500 company and her adeptness as a leader).

were lawyers,¹³ doctors,¹⁴ or professionals of any sort.¹⁵ In 1920, no woman served on the Supreme Court¹⁶ or any other federal court in the country.¹⁷ In 1920, no law school or medical school was led by a woman.¹⁸ In 1920, women, including those who worked for pay, controlled a miniscule percentage of America's overall wealth.¹⁹ Neither did women gain acclaim in the arts.²⁰ It is no wonder that in 1920 women were virtually absent from public life, for at the time, women rarely had any autonomy or legal personhood.²¹

13. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 3–4 (2009). In 1920, eighty-four women were law students at the top twelve law schools; upon graduation, they were unable to secure jobs as lawyers due to then-lawful sex discrimination. *Id.*; *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding Illinois's refusal to allow a woman to practice law on the basis of her role according to the law of the creator over a constitutional challenge); *see also* Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859 (2005) (providing an in-depth discussion of the history of women in law).

14. Carolyn M. Moehling et al., *Shut Down and Shut Out: Women Physicians in the Era of Medical Education Reform* (Apr. 2019), <https://ostromworkshop.indiana.edu/pdf/piep2019/moehling-niemesh-thomasson.pdf> (noting that in 1920, women comprised 10% of doctors in Boston and 8% of doctors in Minneapolis).

15. Women's Bureau, *History: An Overview 1920–2020*, U.S. DEPT OF LABOR, <https://www.dol.gov/agencies/wb/about/history> (last visited Mar. 8, 2021). During World War I, the number of women in industry increased greatly and the range of occupations open to them was extended, even though they remained concentrated in occupations such as domestic and personal service, clerical occupations, and factory work. *Id.* In 1920, women were about twenty percent of all persons in the labor force. *Id.*; *see also* Schipani et al., *supra* note 12, at 506–15.

16. Linda Greenhouse, *Sandra Day O'Connor: A Different Kind of Justice*, N.Y. TIMES (Oct. 9, 1981), <https://www.nytimes.com/1981/10/09/us/sandra-day-o-connor-a-different-kind-of-justice.html>. In 1981, Sandra Day O'Connor was the first woman appointed to the Supreme Court. *Id.*

17. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 487 (2004).

18. Herma Hill Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?*, 14 YALE J.L. & FEMINISM 219, 221–22 (2002). The first woman to become Dean of an ABA-approved law school was Miriam Theresa Rooney. *Id.* at 240. In 1919, Barbara Armstrong became the first woman law professor when she was hired to teach at Berkley's Law School. Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8 (1991). It was not until 1951 that the first African-American woman law professor, Sybil Marie Jones Dedmond, was hired. *Id.* at 9. Margaret Hope Bacon, *Ann Preston—Pioneer Woman Doctor*, WOMEN IN MED. MAG., <http://www.womeninmedicinejournal.com/profile-of-women-in-medicine/ann-preston-pioneer-woman-doctor> (Dec. 11, 2016, 10:39 PM). In 1866, Ann Preston became the first female dean of a medical school. *Id.*

19. *See generally* Claudia Goldin, *The Changing Economic Role of Women: A Quantitative Approach*, 13 J. INTERDISC. HIST. 707 (1983).

20. *Expatriates*, in INTIMATE CIRCLES: AMERICAN WOMEN IN THE ARTS (2003) (available at <http://brbl-archive.library.yale.edu/exhibitions/awia/esexpat.html>). There were women who rose to a level of fame in the arts but had to leave America to be liberated. Gertrude Stein was the most prominent of these expatriates. *Id.*

21. Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL'Y 45, 48–49 (2012).

Women had neither the right to control their bodies,²² nor their destiny.²³ Women were rarely the main characters in the stories of their lives. Rather, theirs were the lives of the supporting character, centered around serving parents, husband, children, and home.²⁴ Though women worked, the great bulk of their work was unpaid.²⁵ Even when they engaged in paid labor, law and social norms often continued to prevent women from achieving autonomy commensurate with that exercised by men.²⁶

The struggle for women's equality was long and arduous. Professor Leslie Gielow Jacobs, in her article *Protecting Women's Rights by Keeping Religious Liberty in Its Lane*, notes that "[i]t took a century after the Equal Protection Clause became a part of the Constitution, and fifty years after women got the right to vote, for the Court to interpret it to require equal treatment of men and women."²⁷ As Professor Jacobs's legal analysis demonstrates, women's equality continues to face an uphill battle in the courts.

22. Maria T. Vullo, *People v. Sanger and the Birth of Family Planning Clinics in America*, 9 JUD. NOTICE 43, 43–44 (2013).

23. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002).

24. See *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973); Siegel, *supra* note 23, at 979.

25. Jonathan Gershuny & Teresa Attracta Harms, *Housework Now Takes Much Less Time: 85 Years of US Rural Women's Time Use*, 95 SOC. FORCES 503, 504 (2016).

26. See Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 126–27 (2012). For well into the twentieth century, the law made clear that men had far more legal rights in a marriage than women:

In 1966, the United States Supreme Court put a modern gloss on William Blackstone's conventional phrasing of the doctrine of coverture saying that, a '[h]usband and wife are one—and that one is the husband.' In fact, the Supreme Court did not give 'constitutional impetus' to eliminating male control over marital property until 1981, when it decided *Kirchberg v. Feenstra*.

Kelly Fasbinder, *International Women's Human Rights: United States Stalling Progress from CEDAW into CIL*, 61 WAYNE L. REV. 691, 706 (2016) (alteration in original). Indeed, men maintained absurd amounts of control of their wives' property and earnings, denying women their deserved full autonomy:

For centuries the common law of coverture gave husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names. During the nineteenth century, however, statutes enacted in the United States and England gave wives the capacity to enter into legal transactions and granted them rights in their property and earnings. Yet the married women's property acts and earnings statutes did not fully emancipate wives from the common law of marital status.

Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2127 (1994). Nor did women find respite in social norms, as "norms sometimes come closer to defining economic rights because they implicitly recognize actual enforcement costs (Posner 1997), and many scholars (for example, Becker 1991; Cheung 1972; Ellickson 1991; Posner 1997) have noted the importance of culture and custom in defining rights." Rick Geddes et al., *Human Capital Accumulation and the Expansion of Women's Economic Rights*, 55 J.L. & ECON. 839, 841 n.7 (2012).

27. Jacobs, *supra* note 7, at 60.

Today, in addition to many other legal arguments, protection of religious liberty is increasingly being used to justify deprivations of women's rights.²⁸

Despite continuing challenges to women's equality, today, twenty-four women are United States Senators and 118 women are members of the House of Representatives.²⁹ Nine states and Puerto Rico are led by Women governors.³⁰ Forty-one Fortune 500 Companies are led by woman CEOs.³¹ Women deans lead thirty-five percent of law schools.³² Women graduate from college, master's programs, medical schools, law schools, and PhD programs at rates equal to or higher than those of men.³³ These achievements are not limited to white women. Despite facing obstacles and challenges well above and beyond those faced by white women,³⁴ Black women, Native American women, and other women of color are also accomplishing feats that a century ago were inconceivable in thought and impossible in practice.³⁵ The election of Kamala Harris as the first woman Vice President of the United States³⁶ and the nomination of Deb Haaland as the first Native American woman to be appointed

28. *Id.* at 69.

29. *History of Women in the U.S. Congress*, *supra* note 9.

30. *History of Women Governors*, *supra* note 10.

31. Jill Griffin, *Women Are Advancing to Fortune 500 CEO's: 5 Proven Ways to Join Them*, FORBES (Jan. 7, 2021, 3:02 PM), <https://www.forbes.com/sites/jillgriffin/2021/01/07/women-are-advancing-to-fortune-500-ceos-5-proven-ways-to-join-them/>.

32. Karen Sloan, *More Minority Women Ascend to Law Dean Jobs*, THE NAT'L L.J. (Jan. 10, 2019, 4:39 PM), <https://www.law.com/nationallawjournal/2019/01/10/more-minority-women-ascend-to-law-dean-jobs/?slreturn=20210023141143>. For a discussion concerning how women deans led law schools, see Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?*, *supra* note 18. Our own Duquesne University School of Law is currently being led by its second woman dean, April Mara Barton.

33. *Degrees Conferred by Race and Sex*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=72> (last visited Jan. 24, 2021).

Across all racial/ethnic groups, female students earned the majority of certificates, associate's degrees, and bachelor's degrees. For example, the shares of bachelor's degrees earned by female students were 64 percent for Black students, 61 percent for American Indian/Alaska Native students, 60 percent for Hispanic students, 59 percent for students of [t]wo or more races, 56 percent for White students, and 54 percent for Asian/Pacific Islander students.

Id.

34. Hunter, *supra* note 2, at 130 n.9 (citing SUZANNE M. MARILLEY, *WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES, 1820–1920*, at 178 (1996)).

35. See, e.g., Sloan, *supra* note 32; see also *History of Women of Color in U.S. Politics*, CTR. AM. WOMEN & POL., <https://cawp.rutgers.edu/history-women-color-us-politics> (last visited Mar. 8, 2021).

36. Lisa Lerer & Sydney Ember, *Kamala Harris Makes History as First Woman and Woman of Color as Vice President*, N.Y. TIMES, <https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html> (Jan. 20, 2021).

to a cabinet-level position,³⁷ while not suggestive that we live in a post-racial America,³⁸ are visible reminders that women of color are breaking through one glass ceiling after another as never before.³⁹ Today, nineteen law schools have minority women as their deans.⁴⁰ Twenty-six Black women will serve in the 117th Congress.⁴¹ President Biden's cabinet will include more women of color than any before.⁴²

Still, until recently, the struggles faced by women of color—both those distinct from and those shared with white women—were rarely focused upon, often even in feminist circles.⁴³ Worse, some feminist gains were in furtherance of other women's continuing oppression. White women's early property rights were acquired and used for the specific purpose of perpetuating the enslavement of Black women. Professor Diane Klein, in her article, *Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture*, confronts these ugly truths.⁴⁴ Professor Klein explores the inextricable link between the liberation of white women and the enslavement of Black women.⁴⁵ While recognizing that white women lacked many freedoms themselves and that their fight for equality

37. Juliet Eilperin et al., *With Historic Picks, Biden Puts Environmental Justice Front and Center*, WASH. POST (Dec. 17, 2020, 7:28 PM), <https://www.washingtonpost.com/climate-environment/2020/12/17/deb-haaland-interior-secretary-biden/>.

38. See Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659 (2010) (arguing that the United States did not become post-racial by the election of President Obama).

39. See, e.g., Marco della Cava, *'Work Harder Than Everyone': Kamala Harris' Background Resonates with Other Women of Color Making History*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2020/08/22/kamala-harris-background-resonates-trailblazing-women-color/3387348001/> (Aug. 23, 2020, 2:01 PM).

40. Ayanna Alexander, *Black Women Law Deans to Be Honored for Antiracism Efforts*, BLOOMBERG L. (Nov. 13, 2020, 12:14 PM), <https://news.bloomberglaw.com/social-justice/black-women-law-deans-to-be-honored-for-antiracism-efforts>.

41. *By the Numbers: Black Women in the 117th Congress*, CTR. AM. WOMEN & POL., https://cawp.rutgers.edu/sites/default/files/resources/higher_heights_black_women_in_congress_fact_sheet_12.30.pdf (last visited Jan. 29, 2021).

42. See Zaru, *supra* note 11. There are eight women of color nominated for cabinet level positions in the Biden administration. *Id.*

43. Hunter, *supra* note 2, at 130. While it is true that women of color were often excluded from feminist circles, it is simultaneously true that many of the women who fought and continue to fight for women's equality have also fought and continue to fight for racial equality. Gloria Steinem, a feminist icon since the civil-rights movement, remains deeply committed to fighting for sex equality in full—for all women, regardless of race and with due concern and awareness about the racialized sexism and sexualized racism that women of color face. Her relationships with fellow feminists, Flo Kennedy and Wilma Mankiller, are an example of how the feminist movement can be inclusive of women of all races, colors, creeds, and religions. See GLORIA STEINEM, *MY LIFE ON THE ROAD* (2015). Well before Gloria Steinem was making headlines, other feminists were fighting for the rights of both women and Blacks. Sarah Grimke is one of the more famous suffragette/abolitionists.

44. Klein, *supra* note 6, at 106.

45. *Id.* at 107, 118.

was met with fierce opposition, Klein confronts dark aspects of white women's quest for equality.⁴⁶ Specifically, Klein reminds us that among the first laws to liberate white women, the Married Women's Property Acts, the "rights of free white women" were advanced "at the expense of Black women."⁴⁷ Klein discusses the "forgotten" truth that the first "property" white women were permitted to own was Black slaves.⁴⁸ At the time, it was common to gift property or place it in trust for the benefit of one's children.⁴⁹ Lucky daughters were often gifted fertile Black woman slaves.⁵⁰ White daughters could rent or sell their slaves as well as the children of their slaves.⁵¹ Thus, the true story of white women's freedom and certain aspects of first wave feminism is deeply linked to the enslavement and torture of Black women.

Professor Nan Hunter, in her article *In Search of Equality for Women: From Suffrage to Civil Rights*, also discusses the experiences of Black women during first wave feminism, noting that "Black women struggled in addition with exclusion from all public and private spaces marked as white, not least among them large parts of the women's rights movement itself."⁵²

Therefore, while it is clear that the fight for equality since suffrage has been fraught, it is also clear that women's gains over the last century have been formidable. The quality of women's lives, the autonomy that they experience, and the power they yield has increased exponentially in the century since suffrage. However, women continue to confront the consequences of patriarchal, sexist, and misogynistic social, economic, and legal systems that continue to deprive them the right to the wage they earn, their bodily integrity, their physical safety, their reproductive autonomy, and an equitable share of power. Women are less likely than men to be paid for their work.⁵³ When they are paid, they are paid less than men

46. *Id.* at 106–08, 118.

47. *Id.* at 107, 110.

48. *Id.* at 107–08, 118.

49. *Id.* at 109, 117–19.

50. *Id.* at 108–09, 112, 118. For a fictionalized tale of the life of first-wave feminist and abolitionist Sarah Grimke and Hetty, the slave she was gifted as a child, see SUE MONK KIDD, *THE INVENTION OF WINGS* (2014).

51. Klein, *supra* note 6, at 112, 118.

52. Hunter, *supra* note 2, at 130.

53. See ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (2012). "[W]omen spend 37% more time doing unpaid care work than men Over a year, that means women are working more than 95 extra 8-hour-days for no pay" Catherine Clifford, *Global Wealth Inequality Is Founded on Sexism*, *Says Oxfam International*, CNBC (Jan. 19, 2020, 7:06 PM), <https://www.cnbc.com/2020/01/17/global-wealth-inequality-is-founded-on-sexism-oxfam-international.html>; see also Gus Wezerek & Kristen R. Ghodsee, *Women's Unpaid Labor Is*

for the same work.⁵⁴ Women of color experience the wage gap to a greater degree.⁵⁵ Women are more likely than men to be raped,⁵⁶ sexually assaulted,⁵⁷ harassed,⁵⁸ and suffer violence at the hands of an intimate partner.⁵⁹ Women of color experience violence against them on the basis of their sex at higher rates than white women.⁶⁰ Women control significantly less of the nation's wealth than men.⁶¹ Women of color control less of the wealth than white women.⁶² Though Hillary Clinton emphatically declared in 1995 that “human rights are women’s rights . . . [a]nd women’s rights are human rights,”⁶³ for many American women, the right to be recognized as fully human has yet to be realized.⁶⁴ Today, in the United States of America, a nation often characterized as the most free on earth, girls and women are bought and sold in a barely hidden multi-billion dollar industry in which they are systematically raped, drugged, and tortured.⁶⁵ Today, in the United States of America,

Worth \$10,900,000,000,000, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html>.

54. Kristin S. Wilkerson, *Bridging the Gap: Achieving Pay Equity Between Men and Women*, 42-APR WYO. LAW. 16, 17 (2019).

55. *Id.* at 16–17.

56. Natasha McKeever, *Can a Woman Rape a Man and Why Does It Matter?*, 13 CRIM. L. & PHIL. 599, 608 (2019).

57. Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 324–26 (2020).

58. John Gramlich, *10 Things We Learned About Gender Issues in the U.S. in 2017*, PEW RSCH. CTR. (Dec. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/>.

59. Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release*, CDC 1, 2–3 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

60. *Where We Stand: Racism and Rape*, NAT’L ALL. TO END SEXUAL VIOLENCE, https://www.endsexualviolence.org/where_we_stand/racism-and-rape/ (last visited Mar. 8, 2021).

61. Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. 665, 672 (2020).

62. See Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J. L. & SOC. POL’Y 265, 270 (2020); Katherine Richard, *The Wealth Gap for Women of Color*, CTR. GLOB. POL’Y SOL. (Oct. 2014), <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf>.

63. Hillary Clinton, Remarks at the United Nations Conference on Women (Sept. 5, 1995) (transcript available at <https://china.usc.edu/hillary-clinton-remarks-un-conference-women-1995>) (omission in original); *Hillary Clinton Declares “Women’s Rights Are Human Rights”* (WQED broadcast Sept. 8, 1995) (available at <https://www.pbs.org/weta/washington-week/web-video/hillary-clinton-declares-womens-rights-are-human-rights>).

64. See generally CATHARINE MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (2006).

65. Carmen Niethammer, *Cracking the \$150 Billion Business of Human Trafficking*, FORBES (Feb. 2, 2020, 7:04 AM), <https://www.forbes.com/sites/carmenniethammer/2020/02/02/cracking-the-150-billion-business-of-human-trafficking/?sh=5770e1774142>. The global human trafficking industry is estimated to be a \$150 billion/year industry. *Id.*;

girls and women are incarcerated at higher rates than ever before, stealing mothers from their children and leaving them more vulnerable to sexual assault, drug abuse, crime, poverty, and their own incarceration.⁶⁶ Today in the United States of America, more pregnant women are incarcerated than in any other nation.⁶⁷ Today, in the United States of America, one out of three girls will be sexually assaulted.⁶⁸ One in nine girls is sexually abused by an adult, thirty-four percent by a family member.⁶⁹ In 2021, in the United States of America, one in four women will experience severe violence perpetrated by an intimate partner,⁷⁰ and approximately 1,600 of them will be killed as a result.⁷¹ Women in America have not yet achieved equality. Women do not have access to safety, economic power, political power, professional success, or reproductive freedom equal to that experienced by men. Women are not equal to men and the law continues to justify the deprivation of such equality.⁷² In the century since suffrage, women have achieved a great deal—but, we

Cara Kelly, *13 Sex Trafficking Statistics That Explain the Enormity of the Global Sex Trade*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2019/07/29/12-trafficking-statistics-enormity-global-sex-trade/1755192001/> (July 30, 2019, 8:11 AM). Profits from global sex trafficking are estimated to be \$99 billion and sex trafficking through illicit massage parlors alone are estimated to yield \$2.5 billion in profits in the United States. *Id.*

66. Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435, 438–42 (2020).

67. “[T]he United States has the highest rate of female incarceration in the world. Between 1980 and 2014, the number of women in American prisons and jails rose from 26,378 to approximately 215,000, an increase of over 800%.” Wesley Smithart, *Pregnant in Captivity: Analyzing the Treatment of Pregnant Women in American Prisons and Immigration Detention Centers*, 71 ALA. L. REV. 867, 870 (2020). Moreover, the World Health Organization estimates that 24,000–60,000 pregnant women are incarcerated worldwide. Molly Skerker et al., *Improving Antenatal Care in Prisons*, WHO (Aug. 31, 2015), <https://www.who.int/bulletin/volumes/93/10/14-151282/en/>. “Exactly how many . . . [incarcerated] women are pregnant is unknown, but studies from the early 2000s suggested that over 9,000 pregnant women are incarcerated [in the United States] each year.” Cara O’Connor, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 112 (2019). See generally Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 [J]AMA J. ETHICS 779 (2013); see also *First of Its Kind Statistics on Pregnant Women in U.S. Prisons*, JOHNS HOPKINS MED. (Mar. 21, 2019), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/first-of-its-kind-statistics-on-pregnant-women-in-us-prisons> (conducting a study of twenty-two prisons and finding that 1396 women were pregnant at intake).

68. *Nearly One in Three Teenage Girls Has Experienced Sexual Assault or Other Violence, New NWLC National Survey Shows*, NAT’L WOMEN’S L. CTR. (Apr. 19, 2017), <https://nwlc.org/press-releases/nearly-one-in-three-teenage-girls-has-experienced-sexual-assault-or-other-violence-new-nwlc-national-survey-shows/>.

69. *Children and Teens: Statistics*, RAINN, <https://www.rainn.org/statistics/children-and-teens> (last visited Jan. 30, 2021).

70. *National Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ncadv.org/statistics> (last visited Feb. 9, 2021).

71. *When Men Murder Women*, VIOLENCE POL’Y CTR. 1, 3 (2020), <https://vpc.org/studies/wmmw2020.pdf>.

72. See Jacobs, *supra* note 7, at 95.

have yet to even begin to taste true equality. This Symposium Issue serves as a reminder of how far we have come, how difficult the road has been, how much we have to celebrate, and, just as importantly, how much more we must fight to achieve true equality.

“An Atrocious Way to Run a Constitution”¹: The Destabilizing Effects of Constitutional Amendment Rescissions

*Danaya C. Wright**

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I. INTRODUCTION

On January 27, 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment (ERA).² Yet despite having met the amending requirements of Article V, the Twenty-Eighth Amendment has not been promulgated by the National Archivist,

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1. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 138 (1977) (testimony of Prof. Van Alstyne).

2. S.J. Res. 1, 2020 Leg. Reg. Sess. (Va. 2020); see Complaint at 10–11, *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. June 12, 2020) (No. 20-242).

as required by federal statute.³ The ERA remains in legitimacy limbo⁴ as we await judicial resolution of a number of legal questions. And while we wait, the two-year window continues to wind down for federal, state, and local governments to implement the equality mandate of equal rights on the basis of sex.⁵ Whether the Supreme Court will grant *certiorari*, or will decide the issues in favor of equality, are questions that only the nine unelected justices can answer. But the future implications of any decision the Court makes will likely stretch far beyond the Twenty-Eighth Amendment, as the ERA has landed in a vortex of constitutional indeterminacy. For nearly two-and-a-half centuries, numerous substantive and procedural questions have arisen, been dismissed or narrowed, lingered in the shadows, become moot, or otherwise left unresolved, apparently awaiting the perfect test case. Virtually all of these unresolved issues are implicated by the century-long passage of the ERA.

The ERA was first proposed in 1923 at the urging of suffragette Alice Paul. But it did not receive Congressional approval until forty-nine years later, in 1972. But when submitted to the states for ratification, it was saddled with a seven-year deadline in its preamble.⁶ Only thirty-five states had ratified by the end of the seven-year deadline and five states had purported to rescind their ratifications. In 1978, Congress extended the deadline by three years and three months, until June 22, 1982;⁷ however, no states ratified or rescinded during the extension period. When the ratification period expired, the proposal was lacking either three or eight ratifications to reach the thirty-eight required by Article V. In 2017, however, Nevada ratified the ERA, Illinois did so in 2018, and Virginia did in 2020, forty-eight years after it was sent to the states.⁸ After ninety-seven years, the legal issues underlying the ERA are no longer mere abstractions, but present direct, unresolved

3. 1 U.S.C. § 106(b) (requiring the Archivist to cause the amendment to be published when he has received the requisite number of certificates of ratification).

4. Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 570 (1997).

5. Section 3 of the ERA provides that the amendment “shall take effect two years after the date of ratification.” H.R.J. Res. 208, 92d Cong. (1972).

6. *Id.* (“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress[.]”).

7. See H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

8. Kathryn Elizabeth Colohan et al., *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited Mar. 20, 2020).

constitutional questions about the scope and interpretation of the Article V process.

Article V provides two roles for Congress: to propose amendments with a two-thirds super majority (a power it shares with the states), and to determine the mode of ratification (between state legislatures and state conventions).⁹ The mode-of-ratification power is not shared with the states, which have the sole power to ratify. Article V states that amendments shall be deemed “valid to all Intents and Purposes, as Part of [the] Constitution, *when* ratified by the Legislatures of three-fourths of the several States”¹⁰ The relatively spare language of Article V does not expressly grant to Congress the power to impose deadlines on the states for ratification, nor does it expressly permit states to rescind their prior ratifications. It does not give to Congress the power to determine how, when, or whether an amendment shall be ratified. Nor does it grant to Congress the power to determine the legal sufficiency of state ratifications. These glaring gaps have been the subject of intense scholarship, some limited judicial precedents, and many self-serving pronouncements by members of Congress, and yet all these questions remain essentially unsettled.¹¹ More importantly, their resolution may have lasting effects on constitutional law and constitutional reform.

In a nutshell, there are at least four unprecedented legal issues that require resolution to determine the validity of the ERA: two substantive and two procedural. First, it must be determined if the seven-year deadline for ratification is a permissible exercise of Congress’ Article V powers, or if it is an impermissible infringement of the states’ sole power to control ratification. For a variety of structural and federalism reasons, the history and allocation of powers of Article V suggest that Congress may not impose such a draconian limit on the states, which potentially thwarts their constitutional function to determine both whether to ratify and when to ratify

9. Article V states in full:

[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

U.S. CONST. art. V.

10. *Id.* (emphasis added).

11. For the most thorough and measured exposition of virtually all matters involving Article V, see DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015* (2016).

proposed constitutional amendments.¹² Second, it must be determined if the five states that purportedly rescinded their ratifications may do so. Although states have attempted to rescind in the past, no rescission has ever been recognized as valid.¹³ As yet, however, the federal courts have not weighed in on the matter.¹⁴

Third, the procedure for certifying an amendment calls for the National Archivist to proclaim the amendment's passage when he receives the required number of state ratification certificates.¹⁵ This duty was first assigned to the Secretary of State, then to the Administrator of General Services, and now resides with the Archivist.¹⁶ It is a ministerial duty and does not authorize the Archivist to judge the legal sufficiency of the ratifications he has received and yet, to date, the Archivist has not proclaimed the ERA as the Twenty-Eighth Amendment.¹⁷ He is relying on a Department of Justice opinion that the seven-year deadline is valid to justify his failure to act.¹⁸ That reliance may violate his statutory obligation, and potentially interposes the executive branch in the Article V amendment process. And fourth, Supreme Court precedent has been interpreted to hold that determining the answer to some or all of these questions might fall within the political question doctrine and should be left to Congress, one of the parties whose Article V powers is at issue.¹⁹

These four questions create a truly tangled web of constitutional indeterminacy. If Congress has the sole jurisdiction to settle Article V controversies, then it has the power to aggrandize itself at the expense of the states. If Congress may give the Archivist the power

12. See Danaya C. Wright, “*Great Variety of Relevant Conditions, Political, Social and Economic*”: *The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V*, 28 WM. & MARY BILL RTS. J. 45 (2019).

13. See discussion *infra* notes 95–113 and accompanying text.

14. The federal District Court for the District of Idaho did address the validity of Idaho's rescission of the ERA in *Idaho v. Freeman*, 529 F. Supp. 1107, 1111 (D. Idaho 1981), but that decision was vacated by the Supreme Court when the deadline passed. See *Nat'l Org. for Women v. Idaho*, 459 U.S. 809 (1982) (mem.). What that Court planned to do with the decision, which is ill-reasoned and problematic on many levels, as explained below, is anyone's guess. What the current Court will do, is also anyone's guess.

15. 1 U.S.C. § 106(b).

16. Until 1818, the Secretary of State certified amendments as a matter of course. In 1818, Congress enacted a statute officially assigning that duty to the Secretary. In 1951, Congress amended the statute to transfer the responsibility to the Administrator of General Services who was in charge of publishing the Federal Register. See H.R. 3899, 82d Cong. § 106(b) (1951). In 1984 the job was transferred to the National Archivist. See 1 U.S.C. § 106(b).

17. Press Release, National Archives, Statement on Equal Rights Amendment Debate (Dec. 19, 2019), <https://www.archives.gov/press/press-releases/2020/nr20-26> (requesting guidance on actions to take after the ERA's ratification from the Office of Legal Counsel).

18. Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 1 (2020).

19. *Coleman v. Miller*, 307 U.S. 433 (1939).

to determine the validity of state ratifications, then Congress is giving power to the Executive branch that Article V clearly does not grant to it. Logically, the federal courts, and the Supreme Court in the end, are the sensible repositories of power to resolve these questions, and yet the Court has historically been very reluctant to interpose. In the rare instances in which the Court has addressed Article V challenges, it has generally upheld the questioned acts, whether they are allegedly improper state ratifications or the validity of an amendment saddled with an arguably unconstitutional deadline.²⁰ In some instances, the Court has held that certain matters are conclusive, like the Secretary of State's certificate of ratification, and that there is no scope for judicial review of the adequacy of earlier steps in the amendment process.²¹ Of most concern, however, is the Court's suggestion that Article V issues are non-justiciable political questions, leaving to Congress the power to decide whether states have properly ratified amendment proposals.²² And in analyzing these issues together, one is easily turned around and upside down, dizzy with trying to make sense of the Court's brief and enigmatic pronouncements in this area.

Yet, if we disaggregate the various issues and hone in on the substantive merits of each, we can begin to make some sense of the unprecedented indeterminacy underlying Article V. In this article, I focus exclusively on the narrow issue of whether states may change their minds, whether they may ratify after having rejected an amendment, and whether they may rescind after having ratified. The Supreme Court has held that a state may ratify after rejection,²³ but it has not provided any clear precedent on whether states may rescind, and Article V does not provide any explicit power to do so. Any implied powers seem inconsistent with the text and historical understanding of Article V, and prior precedents have denied states the power to rescind.²⁴ Moreover, legislation and amendments proposed by Congress to expressly permit states to rescind up until the ratification by three-fourths of the states have all failed.²⁵ Numerous states that have considered whether they can

20. *Chandler v. Wise*, 307 U.S. 474, 477-78 (1939); *Coleman*, 307 U.S. at 456; *United States v. Sprague*, 282 U.S. 716, 734 (1931); *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922); *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *Dillon v. Gloss*, 256 U.S. 368, 376 (1921); *Hawke v. Smith*, 253 U.S. 221, 231 (1920); *Rhode Island v. Palmer* (National Prohibition Cases), 253 U.S. 350, 388 (1920).

21. *Chandler*, 307 U.S. at 477-78; *Sprague*, 282 U.S. at 734; *Leser*, 258 U.S. at 137.

22. *Coleman*, 307 U.S. at 450.

23. *Id.* at 456; *Chandler*, 307 U.S. at 477-78.

24. See discussion *infra* notes 95-113 and accompanying text.

25. *KYVIG*, *supra* note 11, at 251-53; see also George Stewart Brown, *The "New Bill of Rights" Amendment*, 9 VA. L. REV. 14, 14-24 (1922).

rescind have concluded that rescission is ineffective.²⁶ The Office of Legal Counsel (OLC) determined that rescissions are ineffective,²⁷ and scholars agree that rescissions have never been legally effective.²⁸ Nevertheless, Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979) attempted to rescind their ratifications of the ERA and, unless five other states ratify in short order, the constitutionality of state rescissions will need to be resolved before the ERA is recognized as the Twenty-Eighth Amendment.²⁹ In this article, I explore the complex process underlying the rescission question and the evidence a court is likely to examine in its effort to settle this intriguing question. But first, we must descend into the rabbit hole that is Article V.

II. INTO THE RABBIT HOLE: THE STATES' RATIFICATION FUNCTION UNDER ARTICLE V

The amendment process outlined in Article V of the Constitution gives the states sole authority to ratify a proposed amendment. The text states that an amendment becomes valid “to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”³⁰ The only legally-operative act through which the states exercise power under Article V is to ratify. Once states have ratified, their Constitutional role has arguably ended.³¹ Though it might be tempting to conclude that if the ratification power resides solely in the states, they should also have the power to rescind, that conclusion is problematic on many levels. It is inconsistent with both the amendment process and the drafters’

26. See THOMAS JAMES NORTON, *THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION* 171 (1922) (“In 1919 the Supreme Judicial Court of Maine, in answer to a question propounded by the Governor, declared that the legislature could not rescind its ratification of the Eighteenth Amendment, establishing prohibition.”); see also Memorandum from Gov. Marcus L. Ward to the Senate of the State of New Jersey (Feb. 25, 1868) (“When such proposal is accepted and approved, the amendment ratified and returned to the General Government by which it was submitted, the transaction is completed, the decision of the State has been rendered, and the power of the Legislature over the subject is spent. No further action can be taken”).

27. Memorandum from John M. Harmon, Assistant Attorney General, to the Honorable Robert J. Lipshutz, Counsel to the President (Oct. 31, 1977); see also H.R. REP. NO. 95-1405, at 12–16 (1978); Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 15 (1977).

28. See discussion of scholarship *infra* at notes 170–183 and accompanying text.

29. John Carrol, *Constitutional Amendment; Rescission of Ratification; Extension of Ratification Period*, State of Idaho v. Freeman, 16 AKRON L. REV. 151, 153 n.16 (1983).

30. U.S. CONST. art. V.

31. See 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION* 1310–11 (1910).

intent, as it would deviate from prior precedent and the general consensus of scholars, judges, and members of Congress, and, most importantly, it would impose an element of uncertainty that would be destabilizing to the constitution-making process.³² For we must begin any analysis of Article V procedures sensitive to the fact that ratifying the Constitution in 1789, and amending it through the finely-wrought process set out in Article V, are acts of constitution-making that can, and have, profoundly affected the legitimacy of our constitutional republic and the rule of law.

Perhaps the foremost principle in this constitution-making process is the fact that Article V establishes a procedure in which states, *qua* states, are the key participants in the project. States, through their elected conventions, ratified the constitution in 1789, and their legislatures ratified every subsequent amendment except the Twenty-First. The framers were clear that the drafting of the constitution, and any amendments, was a process to be driven by the states.³³ The original draft of the constitution had no role for Congress in the amendment process; the power to propose amendments along with the states was added only after Alexander Hamilton argued that the national government would be more attuned to any defects in its organic document than the states.³⁴ But the framers were quite clear that the states were both necessary and sufficient participants in the amendment process, as they could call a convention to propose amendments, and they have the sole ratification power. The states, as legal actors, have the power to amend the constitution when they deem it necessary, regardless of the wishes of Congress, as they did when they ratified the new constitution in 1789.

It does not help matters, however, that the Article V process for ratifying is assigned to state legislatures with no guidance as to what bodies constitute a legislature³⁵ or what process a state

32. RICHARD B. BERNSTEIN WITH JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 254 (1st ed. 1993) (“Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification To permit rescission of a ratification would be to confuse and perhaps derail the amending process’s orderly functioning.”); *see also* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 421–27 (1983); SAMUEL S. FREEDMAN & PAMELA J. NAUGHTON, *ERA: MAY A STATE CHANGE ITS VOTE?* (1978).

33. The framers expressly rejected a provision that would require Congressional approval of constitutional amendments, and only added Congress’ power to propose as an afterthought. KYVIG, *supra* note 11, at 56–57.

34. *Id.*

35. The Supreme Court rejected the argument that the term legislature in Article V referred to the general public in which all legislative powers ultimately lie in *Hawke v. Smith*, 253 U.S. 221, 228–29 (1920).

legislature must follow when engaging in their constitutional role.³⁶ James Madison insisted that such “difficulties . . . as to the form, the quorum, &c. . . in Constitutional regulations ought to be as much as possible avoided.”³⁷ As a result of this lack of detail, some legislatures have established clear guidance, such as a supermajority of both houses of its legislature;³⁸ others have not.³⁹ Some require only a simple majority; others treat ratification like a regular bill and perhaps require gubernatorial approval.⁴⁰ Some have required an intervening election of at least one house before a constitutional amendment proposal may be ratified, although that requirement has been held to be unconstitutional.⁴¹ Some treat the process as similar to bill passage while others treat it as a resolution.⁴² Some require amendments be ratified by the same margin as a state constitutional amendment.⁴³ A few states even have different rules for their house and their senate.⁴⁴ And what is worse,

36. This makes some sense as the states were sovereign entities and could be assumed to have a process in place for making decisions that would bind the states qua states. For a discussion of the relationship between the people and the states, *see generally* Andrew G.I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061 (2014).

37. BERNSTEIN WITH AGEL, *supra* note 32, at 21.

38. *See* SUSAN W. KANNARR, RULES OF THE KAN. H. OF REPS., 2019–2020 SESS., at § 2707 (2019) (requiring a two-thirds majority of all elected members to ratify a *constitutional* amendment); S. Res. 17(f)(4) (Colo. 2019); H.R. Res. 26(b) (Colo. 2019) (requiring a two-thirds majority of all elected members to ratify a constitutional amendment); *see also* ILL. CONST. art. XIV, § 4 (requiring a three-fifths vote of all elected members of each house, as well as an intervening election); DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 2 n.4 (1997) (stating that Delaware, Georgia, Idaho, and Alabama also require supermajorities of all elected members). *But see* Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (holding the Illinois Constitution’s three-fifths majority was non-binding, despite Illinois’s legislative rules also calling for a three-fifths majority vote).

39. Florida has no rules on whether ratification follows regular bill procedures or resolution procedures, and the Florida Constitution requires an intervening election, which has been held to be unconstitutional. *See* FLA. CONST. art. X, § 1; Trombetta v. Florida, 353 F. Supp. 575, 578 (M.D. Fla. 1973).

40. Interim Governor of Kentucky, Thelma Stovall vetoed the resolution rescinding the ERA as did Governor Ward of New Jersey in 1868. Livingston Taylor, *ERA Rescission Vetoed in Kentucky*, WASH. POST (Mar. 21, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/21/era-rescission-vetoed-in-kentucky/b6a72232-f433-40b5-b2be-ddd23914e204/>; Ward, *supra* note 26.

41. Tennessee and Florida both have provisions in their constitutions requiring an intervening election, but they have been held to be unconstitutional in *Walker v. Dunn*, 498 S.W.2d 102, 106 (Tenn. 1972) and *Trombetta*, 353 F. Supp. at 578.

42. Seventeen states appear to require a simple majority, the same as is required for bill passage, while a handful (three) require different majorities between their two houses. *See* Dyer, 390 F. Supp. at 1305 n.34.

43. Twenty-four states require a constitutional majority. *Id.*

44. *See id.*

the rules are usually located deep within their legislative rulebooks, are difficult to locate, and may change with every session.⁴⁵

This diversity in procedure means that the validity of ratification, and its justiciability, can be quite complicated questions. Consider a few situations. A state legislature could, after ratifying a constitutional amendment by a simple majority, in violation of its own rules requiring a super-majority, send a certificate of ratification to the Secretary of State.⁴⁶ Would it be in violation of Article V? Since many states permit ratification by a simple majority, why would the federal courts intervene to uphold a state rule that the state has chosen to ignore? What benefit would the federal courts see in enforcing a more stringent standard, even if that is the law of the state? On the other hand, if a state submitted a certificate of ratification after the proposal failed to receive even a majority of legislative votes, one would hope that the federal courts would strike that certificate. But on what basis should we draw such a distinction other than on some implied Article V baseline? Assuming there is some procedural requirement that legislative ratification requires, at minimum, a majority vote of a state legislature, does that mean a majority of the elected members, or just a majority of those present, or a majority of a quorum? Could ten legislators vote in the dead of night?

Robert Hajdu and Bruce Rosenblum suggest that in questionable cases "the propriety of state efforts should depend upon whether these efforts interfere with the constitutionally protected role of the legislatures."⁴⁷ In other words, where states establish rules that create impediments to the ratification process, courts should be skeptical and strike them down, as with an intervening election or requirement of a popular referendum, and where the state rules attempt to dictate the substantive outcome of legislative participation under Article V, the courts also should intervene. But where state rules simply facilitate the ratification process, they should be judged deferentially.

Thus, if a state legislature violated its own procedure it would seem to be an appropriate issue for state courts, although what kind of remedy would be available from a state court against a legislature engaging in a federal constitutional function is another

45. See DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 5 (1997). Legislative rules are usually voted upon at the beginning of each session of a state's legislature.

46. Certain members of the Illinois legislature attempted to do precisely this, but the decision in *Dyer*, 390 F. Supp. at 1308-09, upheld the super-majority requirement.

47. Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 116 (1979).

interesting question.⁴⁸ But back to the simple question at hand. If a state has a rule requiring a super-majority and a legislature ratifies with a simple majority, it would have violated its own rules but not necessarily Article V. But if it ratified on less than a majority, presumably that would fall below the basic constitutional threshold and violate Article V in a determination that should be made by the federal courts. Similarly, if the governor simply sent an executive order ratifying an amendment, it should be rejected, but if the lieutenant governor voted to break a tie in the state senate,⁴⁹ there would be no constitutional infirmity since state law permits executive officials to have some limited legislative functions. Whether these are substantive/procedural distinctions or not is unclear. But the questions force us to think about the basic framework of Article V, which requires state legislatures to exercise the constitution-making function within some range of acceptable standards appropriate to a representative body but with absolutely no guidance from Congress or Article V.

An interesting version of this issue arose when the Illinois legislature voted to ratify the ERA, but it could only muster a simple majority, and not the three-fifths required by their legislative rules and by the Illinois Constitution. Judge John Paul Stevens, prior to his stint on the Supreme Court, ruled in *Dyer v. Blair* that the super-majority legislative rule was permissible, but that the Constitutional super-majority rule was not, which seems puzzling at first glance.⁵⁰ In analyzing the ratification function articulated in Article V, Judge Stevens reasoned:

[w]e may take it as decided, therefore, that an extraordinary majority is not *required* by federal law. There is, moreover, some evidence that when article V was drafted the framers assumed that state legislatures would act by majority vote. That evidence, like the text of article V itself, is equally consistent with the view that a majority of a quorum would be sufficient,

48. There are real questions about what remedy a state court can give if a state legislator claims that its body failed to comply with its own rules. Could an injunction issue against the National Archivist to return the certificate? Could an injunction issue against the governor to request return of the certificate? Would the Archivist be compelled to return the certificate if the governor asked for it back? These issues were dodged in *Chandler v. Wise*, 307 U.S. 474 (1939), but have arisen in the context of the ERA as litigants wonder what remedy is appropriate and who the proper defendant should be. See also *Chase v. Billings*, 170 A. 903, 905 (Vt. 1934) (grappling with this very issue).

49. This was alleged to be one of the infirmities in *Coleman v. Miller*, 307 U.S. 433, 446–47 (1939), for which the Court failed to muster a majority to determine whether the tie-breaking vote was a violation of the state’s ratification procedure.

50. *Dyer*, 390 F. Supp. at 1307.

or with a view that a majority of the elected legislators would be required. And, of course, it is also consistent with the view that the framers did not intend to impose either of those alternatives upon the state legislators, but, instead, intended to leave that choice to the ratifying assemblies. . . . If the framers had intended to require the state legislatures to act by simple majority, we think they would have said so explicitly. . . . We think the omission more reasonably indicates that the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself.⁵¹

Judge Stevens concluded that Article V neither requires nor prohibits either a simple majority or a super-majority, and that each state legislature may decide for itself what constitutes ratification of a constitutional amendment.⁵² Assuming Article V did not establish a standard, Stevens then concluded that the legislature may set a three-fifths requirement in its rules, and that requirement would be binding.⁵³ But the people of Illinois do not have the constitutional right to determine the legislative standard, and therefore the Illinois Constitution's requirement was void under Article V.⁵⁴ Stevens therefore concluded that Illinois had not ratified the ERA even though the resolution had received a positive majority vote, which was all that Article V required or that the framers likely intended, because the Illinois legislature had chosen a higher standard.

While this decision is not inconsistent with the spare language of Article V, it leaves us with little guidance on what would happen if Illinois, in violation of its own rules, had submitted the certificate of ratification to the Secretary of State⁵⁵ or had set a rule that was perhaps too stringent, like requiring a unanimous vote of both houses. Hajdu and Rosenblum's functionalist rules may allow states some latitude when they are not attempting to make the ratification process too cumbersome, but the proverbial devil is in the details. Consider the role of public opinion in legislation. What if the populace of a state opposed a proposed amendment and voted a

51. *Id.* at 1305–06 (emphasis added).

52. *Id.* at 1307.

53. *Id.* at 1308.

54. *Id.*

55. In *Chandler v. Wise*, it was alleged that the Kentucky legislature's ratification of the Child Labor Amendment was unconstitutional because Kentucky had previously rejected the amendment. The Kentucky Supreme Court agreed that the legislative ratification was *ultra vires*, but the Supreme Court held that the certificate of ratification sent by the governor was conclusive, thereby declining to intervene in the state's procedural spat. 307 U.S. 474 (1939).

state constitutional amendment to prohibit its legislature from ratifying the proposal? If the legislature ratified anyway, would that ratification be valid? What if the legislature did not ratify but would have done so except for the state constitutional bar? Should a court strike the state constitutional amendment as a barrier to a federal constitutional process? What if the legislature opposed an amendment, but the public voted to amend the state constitution to require the legislature vote to ratify despite its opposition? Could the popular will be expressed through legislative referenda, as in California, if it expressly sought to ratify an amendment proposal? If a popular vote can result in legislation pursuant to state law, why could a popular referendum not result in a constitutional amendment ratification if the state's law provides that constitutional amendments are ratified through the same process as bill passage?⁵⁶

Although these questions may seem like a riff on law school exams, they are not entirely farfetched. Ohio had a law requiring a public referendum following a state legislative vote to ratify any amendment, to ensure that the legislature's ratification reflected the popular will. It was stricken by the Supreme Court in *Hawke v. Smith*⁵⁷ on the grounds that the framers intended the term *legislature*, in Article V, in its common-sense meaning as the representative body of the state. But if the people can pass legislation through referenda, then why could they also not act in a legislative capacity and vote to ratify an amendment legislatively? This is a particularly relevant question in the context of the ERA, which has the support of more than eighty percent of the public, but could be blocked by a bare majority of the elected members of the smallest of thirteen state legislative houses.⁵⁸ If a state legislature is badly gerrymandered, and a majority of the people of the state want a constitutional amendment that, for instance, limits

56. See Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

57. 253 U.S. 221, 230 (1920).

58. *ABA 2020 Survey of Civic Literacy*, AMERICAN BAR ASSN., https://www.americanbar.org/content/dam/aba/administrative/public_education/2020-survey-civ-lit-full-report.pdf (last visited Jan. 23, 2020). If the smaller legislative house of the thirteen least populous states (Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, Montana, Maine, New Hampshire, Hawaii, West Virginia, and Idaho) blocked a popular amendment, then a bare majority of representatives of roughly 14.5 million people could thwart the wishes of the other 315 million people. Of course, this was a concern during debates over Article V and is endemic to our constitutional structure which gives the smaller states more power.

gerrymandering, should they not be able to either force their legislature to ratify, or ratify the amendment themselves?⁵⁹

These questions are unanswered by the sparse text of Article V, and the problems become even murkier as we explore the gray areas between legislative and constitutional decision-making. As Hajdu and Rosenblum note, expressions of popular will that may be objectionable if they determine the outcome, but not if they are merely advisory, can be difficult to distinguish when we consider that political pressures and responsiveness to one's constituents is the hallmark of representative democracy.⁶⁰ During the intense debates before and after adoption of the Eighteenth Amendment, there were numerous lawsuits brought over state referendum procedures where opponents of the amendment sought to get on the ballot a bill opposing Prohibition and mandating that the state legislatures rescind.⁶¹ Some were couched as advisory opinions. But in a similar case involving the ERA in 1978, the opponents to the referendum cogently argued that a referendum would upset the Article V process by making proponents engage in lobbying for general support throughout the state and not just with legislators, fundamentally changing the nature of amendment ratifications.⁶² For if a legislator voted against the "advisory opinion," that vote would surely be used against him or her in the next election.

The framers may have envisioned state legislatures as bulwarks against populist pressures, but today they can be bellwethers of popular consensus or be captured by special interests and act counter to the popular will. If the framers chose legislatures as the ratifying bodies because they had some particular characteristic that was crucial to the ratification process, then it is not at all clear that they have those same characteristics today. But it is clear that the political lobbying efforts will be very different if the audience is the state legislature only, or the population generally.

A further unknown is whether Congress could mandate a particular state legislative procedure. Scholars have suggested that it is unlikely that Congress could constitutionally legislate a particular

59. This is particularly salient in a state like Florida with its constitutional referendum procedure and a heavily gerrymandered legislature that has not ratified the Sixteenth, the Seventeenth, the Twenty-Third, or the Twenty-Sixth Amendment, nor has it ratified the ERA.

60. Hajdu & Rosenblum, *supra* note 47, at 115 n.28.

61. *See generally* Barlotti v. Lyons, 189 P. 282 (Cal. 1920); Prior v. Noland, 188 P. 729 (Colo. 1920); Decher v. Sec'y of State, 177 N.W. 388 (Mich. 1920); Carson v. Sullivan, 223 S.W. 571 (Mo. 1920); State *ex rel.* Gill v. Morris, 191 P. 364 (Okla. 1920).

62. Kimble v. Swackhamer, 584 P.2d 161, 163-64 (Nev. 1978) (Gunderson, J., dissenting).

procedure, and previous Congressional efforts to require certain procedures, such as a popular referendum, an intervening election, or when the state legislatures must take up a proposal, have all failed.⁶³ One bill went so far as to dictate what days a state legislature must take up an amendment proposal after its submission to the state.⁶⁴ So far, Congress has been circumspect and the only legislation it has passed dealing with Article V is the very simple provision requiring the National Archivist, and before that the Secretary of State, to publish an amendment once the requisite number of state ratification certificates were received.⁶⁵ To the extent Article V places the ratification power solely in the states, Congressional legislation that defines how that ratification power shall be exercised (by a super-majority, for instance), when it shall be exercised (within a specific period of time), or what counts as ratification (conditional or not) would profoundly change the balance of power between the states. Congress could certainly propose a constitutional amendment to the Article V process clearing up many of these uncertainties, but simple legislation cannot override the process detailed in the Constitution, even if it is vague and porous. And although I personally try to embrace indeterminacy and ambiguity, as they make life a bit more interesting,⁶⁶ I am not enamored of them in the procedural details of amending a constitution.

Furthermore, in case the lack of express guidance in Article V and Congress' inaction is not enough indeterminacy, the Supreme Court has avoided most legal challenges to the sufficiency of state ratifications, instead ruling that a ratification certificate is conclusive that the state followed its own procedures.⁶⁷ Or the Court has sidestepped the issue, as in *Coleman v. Miller*, when it refused to decide whether Kansas had properly ratified the Child Labor Amendment when the Lieutenant Governor broke a tie in the state

63. Lester Orfield, in his 1942 treatise, argued that Congress does not have this power. LESTER BERNHARDT ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 64–65 (1942); see *Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 15 (1977) (stating that Congress cannot give to the States a right to rescind by any means short of amending Article V of the Constitution.).

64. In 1869, a resolution was introduced to require that state legislatures discuss proposed constitutional amendments on the sixth day of their next legislative session and continue to discuss it until a final decision is made. CONG. GLOBE, 41st Cong., 1st Sess. 75, 102, 334 (1869). See also Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 208 (1951) (“Whether such a measure is within the power of Congress incident to the submission of amendments is doubtful.”).

65. 1 U.S.C. § 106(b).

66. I live by Marc Poirier’s wonderful article, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

67. *Chandler v. Wise*, 307 U.S. 474, 477 (1939); *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

Senate.⁶⁸ In *Chandler v. Wise*⁶⁹ the Court dismissed a challenge to a post-rejection ratification as moot, and in *Fairchild v. Hughes*⁷⁰ it dismissed a challenge to state ratifications of the Nineteenth Amendment for lack of standing. The only Article V cases questioning the validity of state ratifications that the Supreme Court has decided on the merits were the rejection of Ohio's requirement of a public referendum in *Hawke v. Smith* and the dismissal of challenges to the Nineteenth Amendment on the grounds that women's suffrage conflicted with state constitutional requirements in *Leser v. Garnett*.⁷¹ All five of these decisions resulted in affirmance of the state legislative ratifications, despite allegations of impropriety in the ratification process, although three were not even on the merits.⁷²

Lest we shrug off the indeterminacy as mere matters of detail that raise concerns only in rare and exceptional cases, the experience of history speaks otherwise. When opponents of the Fourteenth Amendment in the Tennessee legislature decided to skip town to defeat a quorum, they were located, held under arrest, and counted for quorum purposes even though they were not allowed to vote.⁷³ The case of Texas Democratic legislators leaving the state to prevent voting on redistricting legislation in 2003 and Oregon Republican legislators leaving to prevent a vote on climate change reminds us that not that much has changed in state politics since 1867 and the Tennessee experience is sadly not as exceptional as one might hope.⁷⁴ With the Trump administration's severe testing of constitutional standards and norms in so many areas, the

68. 307 U.S. 433, 456 (1939).

69. 307 U.S. at 477.

70. 258 U.S. 126 (1922).

71. 258 U.S. at 130; *Hawke v. Smith*, 253 U.S. 221 (1920).

72. The Court has only decided nine Article V cases, the other four being irrelevant: *United States v. Sprague*, 282 U.S. 716 (1931) (holding that there was no distinction in Article V that would preclude certain types of amendments that were ratified by legislatures rather than conventions); *Dillon v. Gloss*, 256 U.S. 368 (1921) (holding that amendments are self-executing upon ratification by the last state, and that validly-ratified amendments containing Congressional deadlines are not ipso facto void); *Rhode Island v. Palmer* (National Prohibition Cases), 253 U.S. 350 (1920) (holding that there were no substantive limits on the types of amendments that could be ratified under Article V); *Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (holding that the Presidential signature is not required in Article V amendments).

73. KYVIG, *supra* note 11, at 170.

74. Ed Lavandera, *Texas House Paralyzed by Democratic Walkout*, CNN (May 19, 2003, 12:12 PM), <https://www.cnn.com/2003/ALLPOLITICS/05/13/texas.legislature>; see also Chip Brownlee, *Oregon's Legislative Chaos Has Senators Fleeing to Idaho and a Militia Threatening the Capitol*, SLATE (June 24, 2019, 6:30 PM), <https://slate.com/news-and-politics/2019/06/oregon-legislature-climate-change-bill-chaos.html>.

indeterminacy of Article V could leave open a relatively easy path toward repeal of the Twenty-Second Amendment.

III. WHO SHOULD DECIDE IF A STATE RATIFICATION IS VALID?

Just because we have little guidance on how to determine if a state's ratification or rescission is valid does not mean we are completely lost if we could feel comfortable knowing that there was a competent body to settle any disputes based on a commitment of creating clear, universal standards. But sadly, we do not have even that shaky ground to stand on. Should the state courts decide because ratification procedures are creatures of state law, or should the federal courts decide since ratification is a federal constitutional function? Should Congress decide because these are non-justiciable political questions, or should the National Archivist decide as the executive agent charged with publishing an amendment? As one can see, if we do not have clear rules on what constitutes ratification and what body (the state courts, federal courts, Congress, the Archivist) can confirm compliance, there is virtually no guidance on the very real and present question of whether states can rescind their ratifications of the ERA. For instance, if rescissions are permissible, how do we know if rescissions have to be by the same process as ratification, for Idaho attempted to rescind the ERA through a simple majority vote, even though Idaho legislative rules required a super-majority to ratify.⁷⁵ And the acting Kentucky governor vetoed Kentucky's rescission even though governors usually do not play a role in amendment ratifications.⁷⁶ Unlike the hypotheticals explored in the discussion above, like the popular mandate or the governor's executive order, states have attempted to rescind their ratifications after submitting certificates of ratification to the Secretary of State, and they have ratified after rejecting an amendment. And although the courts have addressed the latter,⁷⁷ they have so far dodged the question on rescissions, even though the first rescission arguably occurred over a century and a half ago.

75. When Idaho decided to rescind its ratification of the ERA, Senator Edith Miller Klein, chair of the Senate Judiciary and Rules Committee, determined that rescission would require a two-thirds vote. But that decision was overruled by the full Senate, which ultimately voted to rescind on an 18-17 vote. See Betsy Z. Russel, *Idaho's Role in the Equal Rights Amendment Ratification Saga*, KTVB (Dec. 17, 2019, 11:11 AM), <https://www.ktvb.com/article/news/politics/idaho-equal-rights-amendment-history/277-99a830f9-fc5f-4697-b7c4-c2632af2e8ab>; see also *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

76. See Taylor, *supra* note 40.

77. As discussed below, the Court has held that ratification after rejection is valid. See discussion *infra* notes 126–127 and accompanying text.

Eventually someone will need to decide if rescissions are effective, and the ERA is directly posing that issue.

The vagueness of the constitutional process and the importance of the outcome make it highly inappropriate for the National Archivist to rule on the legal sufficiency of any state's ratification.⁷⁸ If anything, it would seem that determining the legal sufficiency of a state's ratification should fall either to the state's own judiciary or the federal courts.⁷⁹ Yet because state legislatures are engaging in a federal constitutional function when they ratify an amendment, the federal courts would seem to be the most logical body to determine if a state's ratification complies with Article V.⁸⁰ But given that the constitution grants to the state legislatures the power to ratify, and presumably the power to determine the process for ratification, it truly is an open question whether ratification challenges should be decided by the state or the federal courts.

For reasons discussed much more thoroughly in other scholarship, Congress is also a problematic option.⁸¹ It would be like putting the fox to guard the henhouse to give Congress the power to determine the boundaries between Congressional and State-granted functions under Article V, as would be the case with the seven-year deadline. But even in the matter of balancing the power of the states vis-à-vis each other, Congress is a political body, and the ratification function arguably should be standardized. Judge

78. *United States v. Sitka*, 845 F.2d 43 (2d Cir. 1988); *United States v. Stahl*, 792 F.2d 1438 (9th Cir. 1986); U.S. *ex rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920); *see also* Congressional Pay Amendment, 16 Op. O.L.C. 85 (1992).

79. However, in at least one instance, the Supreme Court refused to defer to the state's highest court when it had ruled that a post-ratification public referendum was valid, and in another the Court declined to intervene and instead held the certificate to be conclusive despite a state court determination that the ratification was invalid. In *Chandler v. Wise*, the Court accepted the state's ratification certificate as conclusive, as it did in *Leser v. Garnett*, 307 U.S. 474, 477 (1939); 258 U.S. 130 (1922). In *Chandler v. Wise* the Court did not engage the substantive issue of post-rejection ratification on the merits, as had the Kentucky Court of Appeals, but instead dismissed the grant of *certiorari* on the grounds that the governor had already submitted the certificate of ratification to the Secretary of State and the issue was therefore moot. *Chandler*, 307 U.S. at 474. But in *Hawke v. Smith*, the Court did not defer to the Ohio Supreme Court's determination that a public referendum did not violate Article V procedures. 126 N.E. 400 (Ohio 1919), *rev'd*, 253 U.S. 221 (1920).

80. Numerous courts have held that states are engaging in a federal function when they ratify an amendment proposal. *See Hawke*, 253 U.S. at 230; *Leser*, 258 U.S. at 136-37; *Dyer v. Blair*, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975); *Trombetta v. Florida*, 353 F. Supp. 575, 578 (M.D. Fla. 1973).

81. *See, e.g., Dellinger, supra* note 32, at 411-17; William L. Dunker, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93 (1973); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63, 90 (1978); Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?*, 42 WAYNE L. REV. 1685 (1996); Hajdu & Rosenblum, *supra* note 47, at 144-59; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 706-21 (1993).

Stevens rejected the political question doctrine in *Dyer v. Blair*, stating that “[w]e are persuaded that the word ‘ratification[.]’ as used in article V of the federal Constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making.”⁸² With his inimitable optimism, he offers some hope for those seeking an escape from the Article V morass. He reminds us that “[t]he mere fact that a court has little or nothing but the language of the Constitution as a guide to its interpretation does not mean that the task of construction is judicially unmanageable.”⁸³

So even though federal precedent is vague and indeterminate, we should examine the arguments a court would likely use to determine if a state may rescind its ratification under Article V. And that means that we should look to the function of ratification as a process of constitution-making to guide us, remembering that the constitution establishes a federation of states as independent sovereignties. As Hajdu and Rosenblum explain, Article V’s delegation of the ratification function to the *several* states implies that each should operate independently of the others:

While article V implicitly denies a state legislature any power to interfere with the overall process of ratification, it also assigns to that body a specific constitutional function—the act of ratification. The extent to which this assignment to the state legislature is exclusive—prohibiting interference either by Congress or by the state itself—remains unclear. An analysis of the state’s role in the amending process indicates, however, that the balance between state and federal powers in the amending process, the “federal function” of the state legislatures, and the role of the legislatures as the voices of the states can best be effectuated if Congress has no power to control the act of ratification, and if the power of the states is limited to matters of procedure rather than matters of substance.⁸⁴

Now that we have a better understanding of the complexity inherent in the question of who gets to decide the legal sufficiency of state ratifications, and on what criteria, we can finally consider the validity of state rescissions. In order to guide us toward a rational determination of whether Article V allows states to rescind, we should examine the original understanding of the ratification

82. 390 F. Supp. at 1303.

83. *Id.* at 1302.

84. Hajdu & Rosenblum, *supra* note 47, at 113.

process and prior precedents in light of the essential function of ratification intrinsic to the making of a constitution.

IV. SHOULD STATES BE ABLE TO CHANGE THEIR MINDS IN THE RATIFICATION PROCESS?

It is tempting to view changes to state ratifications as equivalent, so that a post-rejection ratification is equivalent to a post-ratification rescission, but that symmetry is problematic for many reasons. It is problematic because ratification is a process of transition from operating under no legal duty to accepting a legally binding obligation. If one is not legally bound to protect equal rights, then rejecting the obligation is merely a continuation of one's original position. Choosing to be bound by the legal obligation is the act that changes the status quo. Rejecting the change has no legal significance. The same is true with constitutional amendments, as we saw with Prohibition, which required a second amendment to void the effects of the first bad decision. The very existence of the amendment power, which creates a process for fixing bad decisions, is evidence that the process must be started all over again if the first is to be undone.⁸⁵ Lessons can be learned from the Eighteenth Amendment, in which there were unsuccessful legal challenges, attempts to simply ignore the Amendment's requirements, and legislative efforts to undermine it that were all unsuccessful, leading to a push for repeal through another amendment.⁸⁶

A. Evidence from Original Intent

When the drafters discussed whether the Constitution would include a provision for amendments, they were clear that the unanimity requirement for amendment under the Articles of Confederation was the single greatest hurdle to success of the new republic.⁸⁷ Thus, Article V was drafted to require only a two-thirds majority of Congress to make proposals, with a three-fourths majority of the states needed to ratify.⁸⁸ This ensured that constitutional changes

85. The Twenty-First Amendment repealed the Eighteenth Amendment after much discussion and litigation over the best way to minimize the effects of Prohibition. See KYVIG, *supra* note 11, at 275–88.

86. See *id.* at 249–51, 295.

87. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996) (“Article V was a reaction to the rigid unanimity requirement of Article XIII of the Articles of Confederation. In Madison’s language, Article XIII resulted in ‘the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth’ . . .”).

88. U.S. CONST. art V.

were supported by significant majorities of law-makers and the public, but that ratifying an amendment was not a virtual impossibility and would not force us toward revolution.

During the drafting, James Madison made it clear that states could not condition their ratification of the Constitution on the actions of other states or retain the power to withdraw their ratification. In discussing whether New York could conditionally ratify the new constitution, he explained:

[m]y opinion is that a reservation of a right to withdraw if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification, that it does not make N. York a member of the New Union, and consequently that she could not be received on that plan. Compacts must be reciprocal, this principle would not in such a case be preserved. The Constitution requires an adoption *in toto*, and *for ever* [sic]. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only.⁸⁹

To get the new constitution ratified, Madison realized it was fundamentally important that states not be given the power to condition their ratifications on the actions of other states or on inclusion of a bill of rights; ratification needed to provide certainty for subsequent states engaging in the deeply consequential process of adopting a new constitution. Because ratification is the only legally effective act recognized in Article V, implying a power to rescind would seem to go against the principles of constitutionalism by undermining the methodical step-by-step process of achieving consensus. The framers viewed ratification of the Constitution as a simple, unconditional acceptance with no take-backs, and there is no evidence that they wanted to treat amendments differently.

This need for certainty is perhaps even more important today than it was in 1787, as the number of states and their populations and political views are more diverse. With greater political, economic, social, and cultural pressures facing state legislatures, they need to feel confident about the status of an amendment proposal before they expend the political capital and scarce legislative time to consider ratifying a proposed amendment. If a state legislature believes that its ratification effort will put an amendment over the line, it would be intolerable if an earlier ratifying state could rescind

89. Letter from James Madison to Alexander Hamilton (July 20, 1788) (on file with the National Historical Publications and Records Commission).

just as another state's legislature is involved in the complex politics of ratifying. For what state legislature would expend the political resources to ratify if it could not rely on the stability of earlier ratifications? And what state would ratify a constitution containing an amendment procedure that would allow for ever-fluctuating positions on constitutional structures and procedures?

Richard Bernstein and Jerome Agel explain:

the prevailing view is that the amending process may be understood as working in only one direction. Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification. Why should this be the case? A state's decision to adopt an amendment forms the basis for later states' decisions to adopt or to reject. To permit rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning. By contrast, if a state reconsiders its rejection of an amendment, its action does not undercut the basis for later states' decisions. A state should be free to change its mind about rejecting an amendment if other states' actions demonstrate that the amendment has general popular support.⁹⁰

Like the conditional ratifications of the Constitution that the framers expressly rejected, rescissions undermine the amendment process by breeding greater uncertainty and making the process more susceptible to changing political winds. It would also make amendments more difficult. Members of Congress know that sanctioning rescissions destabilizes the amendment process.⁹¹ Consequently, legislative efforts to recognize rescissions have been offered only by Congressmen who opposed particular amendments; allowing rescissions has never been supported by amendment proponents.

90. BERNSTEIN WITH AGEL, *supra* note 32, at 254.

91. One obvious reason for the rejection by Congress of efforts to permit rescission by the states is the uncertainty that it would inject into an otherwise relatively straight-forward process. Congressmen quickly criticized the Wadsworth-Garrett resolution to allow rescissions as creating additional uncertainty, "because any intervening election or new political and social conditions could cause the legislature to retract its vote either to ratify or reject an amendment proposal." RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 122 (2019); *see also* Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 10 MINN. L. REV. 185 (1926) (exploring the history and implications of the Wadsworth-Garrett proposal, noting that it would make amendment much more difficult for many of the reasons stated here).

As with legislation that, in hindsight, proves unworkable, constitutional amendments too are not etched in stone. When the great Prohibition experiment proved a failure, the Twenty-First Amendment solved the problem, being one of the quickest to be ratified, in under ten months. Because there is a viable process for when states change their minds, and because allowing rescissions can destabilize the amendment process, there seems to be no clear justification for implying a power to rescind in Article V.

B. Prior Precedents Have Consistently Rejected Rescissions

Numerous times Congress has faced attempted rescissions by states, and it has introduced legislative proposals to give legal effect to rescissions, and all have been rejected. States purported to rescind their ratifications of the Fourteenth, the Fifteenth, and the Nineteenth Amendments and all were rejected by Congress.⁹² Although acceptance by Congress is not relevant under the Article V process,⁹³ and ultimately enough states ratified all three amendments that counting the rescinding states was unnecessary, the precedent is instructive. The fact that the Secretary of State counted the rescinding states in the number of ratifying states, and then Congress subsequently rejected legislation and amendment proposals to recognize rescissions, shows that the prevailing Congressional consensus over a century and a half is that rescissions are ineffective.⁹⁴

When the Fourteenth Amendment was close to ratification, New Jersey and Ohio ratified the amendment and later passed resolutions attempting to rescind their approval of the amendment.⁹⁵ Nonetheless, the Fourteenth Amendment was certified by the Secretary of State as valid, including Ohio and New Jersey as ratifying states, essentially ignoring their rescissions. Congress later affirmed by joint resolution the adoption of the Fourteenth Amendment and included in its resolution that Ohio and New Jersey had ratified.⁹⁶ As David Kyvig concluded, Congress took the position that “[c]onstitutional amendment was a specific procedure, not an ordinary legislative process, and therefore conventional practices of

92. And unfortunately, the issues were not litigated because they ultimately became moot when additional states ratified all of these amendments. Harmon, *supra* note 27.

93. See Congressional Pay Amendment, *supra* note 78.

94. Hajdu & Rosenblum, *supra* note 47, at 119.

95. KYVIG, *supra* note 11, at 174–75.

96. *Id.* at 175. Although additional states ratified before Congress passed its resolution, making the issue moot, Congress still listed the rescinding states as ratifying states of the Fourteenth Amendment.

reconsideration did not apply.”⁹⁷ Congress’s actions during the ratification of the Fourteenth Amendment are consistent with the Department of Justice’s point of view, expressed in testimony on the ERA extension, that ratification is the only action a state can take on a constitutional amendment.⁹⁸

When New York attempted to rescind its ratification of the Fifteenth Amendment, Congress again refused to recognize the rescission and New York was listed as a ratifying state.⁹⁹ Although Congress did not formally recognize passage of the Fifteenth Amendment, as it was proclaimed effective by the Secretary of State before Congress could act, New York was included in the list of ratifying states in a joint resolution drafted to declare its passage.¹⁰⁰ Similarly, Tennessee attempted to rescind the Nineteenth Amendment but Secretary of State Colby promulgated it with no question directed to Congress as to the validity of Tennessee’s ratification, and the list of ratifying states included Tennessee.¹⁰¹ Judge Jameson, in 1887, explained the prevailing view:

The power of a State legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in the Constitution. . . . So, when the State legislature has done the act or thing which the power contemplated and authorized—when the power [to ratify] has been exercised—it, *ipso facto*, ceases to exist¹⁰²

Congress has consistently and uniformly viewed the right of states to rescind as unavailing, which is remarkable given Congress’ political character and shifting interests. Senator Roscoe Conkling in 1870 opined that rescissions after ratification were impermissible.¹⁰³ A century later, discussing the DC Representation Amendment, so too did Representative Harold Volkmer.¹⁰⁴ That

97. *Id.*

98. See H.R. REP. NO. 95-1405, at 12–16 (1978); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 939 n.122 (1979) (citing *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 121–57 (1977)).

99. H.R. REP. NO. 95-1405, at 21 (1978).

100. Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979, 999 n.116 (1977); Notice by the Secretary of State Regarding Constitutional Amendment, Pub. L. No. 15-346, 16 Stat. 1131.

101. 16 Stat. 1131; Notice by the Secretary of State Regarding Constitutional Amendment, 41 Stat. 1823.

102. JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 631–32 (1887).

103. CONG. GLOBE, 41st Cong., 2d Sess. 1477 (1870).

104. 124 CONG. REC. 5270 (1978).

rescissions are quintessentially political statements intended to impress constituents rather than effect constitutional change can be seen in the case of Oregon. Oregon ratified the Fourteenth Amendment in September 1866, then it withdrew its ratification in October of 1868 after the Amendment had reached its constitutional majority.¹⁰⁵ Oregon clearly understood that once the Amendment had been declared ratified, its rescission could have no legal effect. Oregon then re-ratified in April of 1973. As scholars have noted, the symbolism of late ratifications of the Reconstruction and Suffrage Amendments is important, even if they have no legal significance.¹⁰⁶ Oregon's rescission after the amendment was ratified clearly functioned as symbolism, not constitutionalism.

The fact that rescissions have been consistently deemed ineffective does not mean that politicians from different political parties have not tried to encourage them or give them legal effect. However, all legislative and amendment efforts to permit state rescissions have also failed. When Senator James Wadsworth of New York and Representative Finis Garrett of Tennessee proposed an amendment to Article V in 1921 that would allow states to rescind, they did so as part of an effort to make constitutional amendments even more difficult during the constitutional panic of the early 1920s.¹⁰⁷ Their colleagues quickly saw that they were trying to impose greater barriers on amendments by allowing states to destabilize the ratification process through rescissions.¹⁰⁸ Congressman Garrett stated that “it is generally regarded to be—the law that a State . . . may not reconsider and change a ratification.”¹⁰⁹ And a Senate Report of 1973 concluded that “Congress previously has taken the position that having once ratified an amendment, a State may not rescind.”¹¹⁰ Wadsworth and Garrett's bill failed.

In response to the ERA, Senator Sam Ervin, a staunch opponent, proposed legislation in Congress that would have allowed states to rescind; it too was rejected. Called “a thoroughly misconceived

105. GOV'T PUBL'G OFF., AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30 n.6 (1992), <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf>.

106. See Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 37 (2008).

107. KYVIG, *supra* note 11, at 251–53. The Wadsworth-Garrett bill would have slowed ratification by requiring an intervening election of state legislators, that ratifications be subject to popular referendum, and that states could rescind until three-fourths of states had un-rescinded ratifications.

108. *Id.*

109. 66 CONG. REC. 2159 (1925) (remarks of Rep. Garrett).

110. S. REP. NO. 93-293, at 14 (1973).

piece of legislation,”¹¹¹ Ervin’s bill included a provision that would allow a state to rescind, along with other barriers to amendment, such as an automatic seven-year deadline, and that Congress has the authority to adjudge the legal sufficiency of all ratifications that shall be binding on the courts.¹¹² And Ervin’s was not the only bill introduced to allow rescissions during the ERA extension debates.¹¹³ All ultimately failed, in part because adding barriers to an already difficult process was seen by members of Congress as destabilizing, and arguably unconstitutional.

Assuming the silence in Article V means the power to rescind was not granted to the states, legislation to permit rescissions would constitute an unauthorized amendment to the constitution, and legislation to prohibit them would be irrelevant and ineffective.¹¹⁴ In either situation, Congressional legislation runs up against the stone wall that is Article V. Because the Article V procedures are self-executing—amendments become effective immediately upon ratification by the last state¹¹⁵—there is no need for enabling legislation and no role for Congress to proclaim or actualize an amendment. Unlike Dr. Frankenstein’s creation, whose electric sparks gave him life, a constitutional amendment takes life gradually with each subsequent ratification. Congress may have the power to initiate a constitutional amendment, but it is the states that do the heavy lifting to give it life. Because the states are the most important actors in the Article V process, it makes sense that Congress can neither legislate Article V procedures, nor permit states to destabilize the constitutional functions of the other states by rescinding and throwing the amendment process into uncertainty. Furthermore, if states wish the power to rescind, they certainly

111. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 190 (1972).

112. S. 215, 92d Cong. (1971).

113. 124 CONG. REC. 26, 257–58 (1978) (rejection of Railsback Amendment); 124 CONG. REC. 33,174 (1978) (rejection of amendment No. 3674 allowing for a State legislature to rescind a ratification of the ERA); see also 124 CONG. REC. 33,366 (1978).

114. If one assumes that Article V currently permits rescissions, the same logic applies. Legislation cannot prohibit them as that would be superseding a Constitutional provision, and legislation permitting them would be ineffective. Noted scholars have also concluded that Congress has no authority to legislate such procedural matters around Article V. Lester Orfield, in 1942, admonished: “The constitutionality of Congressional regulation would seem exceedingly doubtful. The states cannot be coerced into adopting an amendment. . . . Congress has done its work when it proposes [the amendment and the mode of ratification], and the matter of adoption is for the states.” ORFIELD, *supra* note 63, at 64–65; see also Corwin & Ramsey, *supra* note 64, at 208.

115. The Supreme Court in *Dillon v. Gloss* held that the Eighteenth Amendment became effective the day of the last required ratification and that, consequently, a statute passed pursuant to the Amendment was valid to convict the defendant. 256 U.S. 368, 376–77 (1921).

have a mechanism to attain that end: a constitutional amendment clarifying and/or adjusting Article V procedures.¹¹⁶

C. *Judicial Precedent*

Judicial precedent can also be instructive as we try to forge a path to a logical conclusion on state rescissions despite what little of it being irritatingly off point. In 1939, the Supreme Court handed down two Article V decisions in cases dealing with states that changed their minds, but these involved ratifications after rejections: *Coleman v. Miller* and *Chandler v. Wise*.¹¹⁷ In 1981, the District Court for the District of Idaho ruled that Idaho could rescind its ratification of the ERA, but that decision was vacated by the Supreme Court.¹¹⁸ State court opinions have opined that rescissions are ineffective, but of course they are not binding on the federal courts. And various attorneys general have expressed their views that rescissions are ineffective, but they are merely opinions based on the same handful of enigmatic cases. In all, the paucity of cases leaves us trying to find the best path forward on this important constitutional question with little guidance.

In both Supreme Court cases dealing with post-rejection ratifications, the Court upheld the states' ratifications against allegations of legal insufficiency, although only one decision included a discussion somewhat on the merits.¹¹⁹ In *Coleman*, the Court upheld the Kansas post-rejection ratification of the Child Labor Amendment, but it could not agree and therefore failed to decide whether the lieutenant governor's vote broke either state or federal law. The Court in *Coleman* held that a state could change its mind and ratify after having rejected an amendment proposal and that ratification would be valid once a certificate of ratification was sent to Washington. The Kansas Supreme Court had upheld the post-rejection ratification on the grounds that the technical language of Article V speaks only of ratifications and that a rejection was not such an act

116. See Michael C. Hanlon, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J. L. & POL. 663 (2000).

117. *Coleman v. Miller*, 307 U.S. 433 (1939); *Chandler v. Wise*, 307 U.S. 474 (1939).

118. *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated sub nom.* Nat'l Org. for Women v. Idaho, 459 U.S. 809 (1982) (mem.).

119. In *Coleman v. Miller*, the lieutenant governor broke a tie vote in the Kansas Senate and the Kansas Supreme Court had ruled that the action did not nullify the ratification. 71 P.2d 518 (Kan. 1937), *rev'd*, 307 U.S. 433 (1939). In *Wise v. Chandler*, the Kentucky Court of Appeals had held that Kentucky was precluded from ratifying after it had previously rejected an amendment proposal, expressly adopting the theory that states could only vote once. 108 S.W.2d 1024 (Ky. Ct. App. 1937).

as to preclude future ratifications under Article V.¹²⁰ On appeal, the Supreme Court affirmed, but merely on the technical grounds that Kansas' ratification satisfied the clear language of Article V.¹²¹ The Court did not endorse any particular theory of Article V, nor did it presage how it might rule if Congress were to legislate on the matter.¹²² In the absence of any real controversy, the Court concluded that Kansas' ratification met the technical requirements of Article V, and it would not upset that technical compliance without some reason other than the fact that the Kansas legislators who brought suit were unhappy that they did not have the votes to block it.

In *Chandler v. Wise*, the Court reversed a Kentucky Court of Appeals decision striking its post-rejection ratification of the Child Labor Amendment.¹²³ That court determined that a state may only act once in response to an amendment proposal and could not change its mind, in either direction.¹²⁴ Based on the technical language of Article V and its prior decision in *Coleman*, the Supreme Court reversed and otherwise dismissed the case in *Chandler* on mootness grounds, stating that the Kentucky certification of ratification was conclusive on the courts.¹²⁵

These two cases, standing together, resolved the split in the states as to whether states could ratify after rejecting, which the Court affirmed on the basis of a technical reading of the plain language of Article V that speaks only of ratification as a constitutional act. The decisions also affirmed decades of prior practice, from the Twelfth to the Twenty-Seventh Amendments.¹²⁶ In 1870, New York

120. *Coleman*, 71 P.2d at 518.

121. *Coleman*, 307 U.S. at 433.

122. "Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections." *Id.* at 450.

123. *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. Ct. App. 1937), *rev'd*, *Chandler v. Wise*, 307 U.S. 474 (1939).

124. *Chandler*, 108 S.W.2d at 1033.

125. *Chandler*, 307 U.S. at 477.

126. Massachusetts ratified the Twelfth Amendment after having previously rejected it. New Jersey, Delaware, Kentucky, and Mississippi ratified the Thirteenth after having previously rejected it. North Carolina, Louisiana, South Carolina, Georgia, Virginia, Texas, Delaware, Maryland, and Kentucky ratified the Fourteenth after rejection. Ohio, New Jersey, Delaware, Oregon, California, Maryland, Kentucky, and Tennessee ratified the Fifteenth after rejection. Arkansas and New Hampshire ratified the Sixteenth after rejection. Delaware ratified the Seventeenth after rejection. Alabama, Virginia, Maryland, Delaware, Louisiana, Mississippi, Georgia, and South Carolina ratified the Nineteenth after rejection. And New Hampshire, New Jersey, and Rhode Island ratified the Twenty-Seventh after rejection. Of course, many of these later ratifications were after the decision in *Coleman* affirming the power of states to ratify after rejection. A list of all state ratifications with their dates is available. See DAVID C. HUCKABEE, CONG. RSCH. SERV., 97-922 GOV. RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 5 (1997).

re-ratified the Fifteenth Amendment after having ratified and rescinded. All states that have ratified after rejection, whether before 1939 or after, are considered as ratifying states, regardless of their intervening attempts to rescind.¹²⁷ Although the Supreme Court has not expressly done so, it would seem that it has rejected the claim that states may not change their minds once they have taken a vote on an amendment proposal, even though the decision in *Chandler* was based on mootness and the decision in *Coleman* was based on some vague, ill-defined attempt to decide the case without actually setting a precedent.¹²⁸ But the precedents only support the power of the states to change their minds in one direction, to ratify after prior rejection, a position that aligns with a technical reading of Article V, and say nothing about the power of states to rescind after their ratification certificates have been sent to Washington.

One court did rule on the legality of a post-ratification rejection, however, but like so many Article V cases is problematic on numerous levels.¹²⁹ The opinion reeks of partisanship and uses a questionable reading of *Chandler* and *Coleman* to conclude that rescissions are permissible, despite over a century of historical rejection. Idaho, following its rescission of the ERA in 1977, brought suit in the District Court of Idaho seeking a declaratory judgment that its rescission was valid.¹³⁰ After a long and contested process, Judge Callister issued an opinion in 1981 upholding the rescission even though the issue was arguably unripe as the ERA had not otherwise been ratified by the requisite number of states.¹³¹ On appeal, the Supreme Court vacated the decision when it granted *certiorari*, but then dismissed the case entirely on mootness grounds because the extended ERA deadline had passed with no additional ratifications.¹³²

In his deliberations on the issue of rescission, Judge Callister concluded that the Supreme Court's acceptance of post-rejection ratifications in *Chandler* and *Coleman* implied that states could change

127. Oregon, Ohio, and New Jersey all re-ratified the Fourteenth Amendment after having purportedly rescinded.

128. The Court in *Coleman* was deeply divided. See *Coleman v. Miller*, 307 U.S. 433 (1939). Four justices voted to dismiss on the grounds that all Article V issues are non-justiciable political questions. *Id.* at 456. Two justices voted to address the issues on the merits and would have voided Kansas' ratification as being stale. *Id.* at 470. Three justices, including Chief Justice Hughes, voted to address the issues on the merits but upheld the Kansas ratification. *Id.* at 435. This meant there were five votes for justiciability and seven votes to uphold the ratification, but no majority on any theory for upholding the ratification.

129. *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

130. *Id.* at 1114.

131. *Id.* at 1154–55.

132. *Nat'l Org. for Women v. Idaho*, 459 U.S. 809 (1982) (mem.).

their minds and rescind after ratifying, despite the fact that neither precedent involved that issue.¹³³ Judge Callister concluded that the Supreme Court in *Chandler* and *Coleman* had rejected prior theories of Article V, either that states could only vote once, or could only vote one-way to ratify.¹³⁴ From that, he concluded that the Court must have, *sub silentio*, determined that states could change their minds to rescind as well as to ratify.¹³⁵

This conclusion is problematic for a number of reasons. First, *Coleman* did not involve a rescission after ratification; thus, the direct question was not before the Court, so it was not argued or briefed. Second, the Court's purported rejection of the reasoning of the Kansas Supreme Court was not based on any discussion of the reasoning or discussion of any theory of Article V. Rather, the Court based its decision on different grounds, concluding that if Congress had not acted to resolve the uncertainty of whether states can change their minds, the Court would not legislate from the bench on the subject. The split on the Court also makes drawing conclusions difficult, as four justices voted to treat the issues as non-justiciable political questions, two voted to reach the merits and rule against the Kansas ratification, and three voted to reach the merits and uphold the ratification. One cannot conclude from this that the Court had implicitly adopted an interpretation of Article V that states can rescind when it was not discussed and was not an issue in either the lower decision or the final one.¹³⁶

Judge Callister's reasoning from *Chandler v. Wise*¹³⁷ is even more problematic. In *Chandler*, the Court reversed Kentucky's finding that the post-rejection ratification was invalid on the same grounds as in *Coleman*, and then it dismissed the case as moot since Kentucky had already sent its certificate of ratification to Washington.¹³⁸ Judge Callister concluded, however, that the dismissal on

133. *Freeman*, 529 F. Supp. at 1146–50.

134. *Id.* at 1147.

135. *Id.* (“[T]hey found ‘no reason for disturbing the decision of the Supreme Court of Kansas . . . its judgment is affirmed but upon the grounds stated in this opinion.’ . . . Thus they rejected the approach of the Kansas court and chose to base their decision on other criteria.”) (alteration in original) (citations omitted). That other criteria, however, was that Congress had failed to legislate on the subject. *See Coleman v. Miller*, 307 U.S. 433, 456 (1939). Holding that they would not intervene to establish a rule in the absence of Congressional action is a far cry from affirmatively rejecting any theory of Article V.

136. This is like the Court dismissing a breach of contract case on the lack of a contract, which means it does not have to get to the issue of whether a breach did or did not occur. Because the Court based its decision on different grounds, it did not expressly reject or accept the reasoning of the Kentucky Supreme Court.

137. 307 U.S. 474 (1939).

138. *Id.* at 477–78.

mootness grounds implied a rejection of the theory that states could not change their minds either way on ratification decisions.¹³⁹

By a process of elimination, Judge Callister concluded that the Supreme Court must have implicitly adopted the position that states could rescind, despite over a century of prior history concluding that rescissions were ineffective.¹⁴⁰ Given that the Supreme Court has never addressed rescissions, that *Coleman* and *Chandler* stand only for the proposition that a technical reading of Article V allows states to ratify after rejection, and that the question was unripe in the context of the ERA, Callister's reasoning is quite perplexing. We do not know how the Court planned to respond to Judge Callister's conclusion that rescissions are suddenly permissible because, although the Court granted *certiorari*, it ultimately vacated the decision and then dismissed the appeal on mootness grounds.

While there is no clear federal judicial precedent on how to handle purported rescissions of a constitutional amendment, state precedents can be instructive.¹⁴¹ Governor Ward of New Jersey vetoed the New Jersey rescission of the Fourteenth Amendment on the grounds that "New Jersey's initial 1867 endorsement had completed the amending process and bound the state to a federal contract."¹⁴² The Supreme Judicial Court of Maine came to the same conclusion that rescissions are impermissible in an opinion issued responding to a question by the Governor in 1919 regarding the Eighteenth Amendment.¹⁴³ When Kentucky's legislature brought a resolution to rescind its prior ratification of the ERA, the Lieutenant Governor, Thelma Stovall, vetoed the resolution, stating the rescission was invalid because once a legislature has voted to ratify

139. *Freeman*, 529 F. Supp. at 1147.

140. *Id.* at 1149–50.

141. Ginsburg, *supra* note 98, at 939 n.122 (first citing H.R. REP. NO. 95-1405, at 12–16 (1978) (testifying that rescissions are impermissible); and then citing *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 121–57 (1977) (Harmon Memo and Testimony)).

142. KYVIG, *supra* note 11, at 174.

143. *In re Op. of the Justices*, 107 A. 673, 674 (Me. 1919) ("Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly.").

an amendment, its constitutional act is final.¹⁴⁴ The Kentucky decision follows the longstanding precedent set when, a century earlier, the Kentucky Governor had also determined that rescissions were impermissible.¹⁴⁵ Later, the Kentucky Court of Appeals and the Supreme Court of Kansas also implicitly rejected the validity of rescission after ratification.¹⁴⁶ Moreover, the Department of Justice recognized that ratification is "an act that cannot be accompanied by strings or conditions, a final act that cannot be withdrawn."¹⁴⁷

Furthermore, it is notable that there are other situations in which states have not been allowed to rescind after they have agreed to participate in other multi-state activities, as in multi-state compacts. For instance, in *West Virginia ex rel. Dyer v. Sims*, West Virginia was not allowed to withdraw from a pollution control contract for the Ohio River.¹⁴⁸ The Court held that since Congress must agree to all interstate compacts, and they are justiciable in the federal courts, provisions in West Virginia's Constitution prohibiting the compact were superseded.¹⁴⁹ A similar outcome occurred in *Nebraska v. Iowa*, with the Supreme Court retaining jurisdiction to determine the validity of interstate compacts, and nullifying state law conflicts.¹⁵⁰ Similarly, in the context of Indian affairs, where the federal government has superior authority, the courts have held that actions by states are final, even if they contain irregularities, and that the states cannot change their minds.¹⁵¹ As one commentator noted:

[t]he compact and state resolution situations indicate that withdrawal by a state from a previous commitment has often been denied by the courts. The amending of the United States Constitution is a function in which the federal government exercises more control over the states than either the compact or resolution situations and, therefore, state procedural

144. Taylor, *supra* note 40.

145. See JAMESON, *supra* note 102, at 630 (quoting the message of Governor Bramlette).

146. *Wise v. Chandler*, 108 S.W.2d 1024, 1033 (Ky. Ct. App. 1937) ("[A] State can act but once . . . upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress."); *Coleman v. Miller*, 71 P.2d 518, 524 (Kan. 1937) ("[A] ratification once given cannot be withdrawn.").

147. Ginsburg, *supra* note 98, at 939; See Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 13-15 (1977).

148. 341 U.S. 22 (1951).

149. *Id.* at 30-32.

150. 406 U.S. 117 (1972).

151. See *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Neb. v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971).

irregularities would seem even less of a reason to allow rescission in that area.¹⁵²

In the end, however, there is no precedent stating that states may not rescind, Article V is silent on the issue, and although no state's rescission has ever been recognized, that fact did not matter because additional ratifications made up the difference. The courts dealing with the ERA's validation are likely to have to resolve this thorny question, as it is unlikely that an additional five states will ratify in the near future. If prior precedent is insufficient to convince a court of the invalidity of the rescissions, then we generally turn to policy and canons of construction to fill in the details that James Madison left in Article V.

V. OUT OF THE RABBIT HOLE: THEORIES OF RESCISSION AND RATIFICATION

In considering whether states should be allowed to rescind their prior ratifications of the ERA, it seems courts should focus on the function of ratification in our constitutional system and the relationship of states to each other. Like legislation, ratification is an affirmative decision by a representative body to adopt a rule that becomes legally binding once the requisite number of states have ratified. As with all legislation, the process takes time and each state's ratification can be seen as one step in a multi-step process. The ultimate question, therefore, is whether the Article V ratification process is a single ticket to ride, a one-way escalator, or thirty-eight separate elevators leading to a single destination.

Commentators analyzing the issue of post-rejection ratification and post-ratification rescission have identified three general theories for analyzing the ratification power.¹⁵³ The first is that states may only act once, either by rejection or by ratification and, once they have taken that step, their decision is binding and may not be revisited.¹⁵⁴ This is the *one-bite-at-the-apple* theory, which is based primarily on the convention mode rather than the legislative mode, for once a convention has been dismissed, it is not reassembled and is unable to revisit the matters for which it was assembled.¹⁵⁵ Ratification under this model would be like having one ticket to ride at Disneyland. You can use it to go up Space Mountain, or you can use

152. Raymond M. Planell, *The Equal Rights Amendment: Will States Be Allowed to Change Their Minds?*, 49 NOTRE DAME L. REV. 657, 661 (1974).

153. See Dunker, *supra* note 81, at 94–96; Hajdu & Rosenblum, *supra* note 47, at 119–22.

154. Dunker, *supra* note 81.

155. See *id.*

it to ride the teacups. But once a state has used its ticket, there are no more rides.

This theory has an attractive logic, but, upon closer analysis, we can see that rejection and ratification function in fundamentally different ways when it comes to the process of affirming a legislative bill or resolution. Although a legislature might choose to reject a proposed amendment by a majority vote, it might also ignore, table, or otherwise bury it. A proposal may fail for many substantive or procedural reasons that make it difficult to determine whether a state has firmly and officially rejected it or is simply kicking the can down the road. If it were tabled it could come back the following year. And if there are not enough votes to get the proposal out of committee one day, there might be enough votes another day. At what point in the process can one reasonably say that a legislature has reached finality? A vote to ratify, however, is not so indeterminate, and for that reason most commentators agree that ratification has a different legal meaning than rejection.¹⁵⁶ Because a formal vote of rejection is the functional equivalent of inaction, logically both have been treated as non-binding.¹⁵⁷

The second theory recognizes the difficulty in determining whether inaction should count as rejection, and therefore counts ratification as final, but rejection and inaction as subject to revision.¹⁵⁸ This is the *one-way-street* theory. And although some are uncomfortable with its lack of symmetry, it is the more logical position given Article V's reference only to ratification, and the different

156. Because non-ratification reflects the status quo, it makes sense to treat ratification as the endgame. Until a legislature acts to ratify a proposal, it is in progress, and once accomplished, the process ends.

157. *Chandler v. Wise*, 307 U.S. 474 (1939); *Coleman v. Miller*, 307 U.S. 433 (1939). The same is true of legislation. Legislation that fails in one session can return over and over, with changes or without, and if it is eventually approved, then it becomes legally binding. And although legislatures could repeal legislation after it has gone into effect, doing so requires a majority vote to affirmatively reject the legislation. That affirmative vote is quite different from sequestering, tabling, or otherwise rejecting the legislation in the first place.

158. *Dunker*, *supra* note 81. There is an interesting, although perhaps academic, issue as to whether an amendment proposal can linger until it receives the appropriate number of ratifications, or whether it can be deemed terminally dead when one state legislature, more than one-quarter, officially rejects it. This question has arisen periodically, but there has been no satisfactory answer. If it takes thirty-eight states to ratify an amendment proposal, presumably thirteen can reject it. To date, however, no amendment proposal has been deemed to be completely rejected even when more than one-quarter of the states have voted to reject it. The Child Labor Amendment was rejected by fifteen states between 1924 and 1927 and yet it remained alive and well, and subject to a flurry of ratifications in the 1930s. In litigation as to whether a state can ratify after it has rejected, the topic was often discussed, with opponents of the ratification arguing that rejection is a firm and final act. However, the Supreme Court held otherwise in *Coleman v. Miller*, that states could ratify after rejecting, which should put to rest the one-bite argument that states may only act once on an amendment. The decision in *Coleman* was not conclusive on this issue.

effects of, and reliance of interests on, ratification and rejection. Ratification under this model is like asking all the states to get on a one-way escalator to the top floor. They may get off before reaching the top, as when one house of a state legislature rejects or tables an amendment proposal. But once the state has reached the top, it remains there with no way down. They can get on the escalator as many times as it takes, but once they get to the top, they are done. The one-way-street theory analogizes ratification to passing legislation where, upon affirmation by all the relevant parties, it becomes legally binding and the only way to reverse it would be to start at the bottom again and re-ascend the escalator.

The third position resurrects the symmetry of the one-bite theory but would allow states to reject or ratify at will, as many times as they like.¹⁵⁹ Under this theory, no amendment would be ratified until there were thirty-eight un-rescinded ratifications existing at a particular moment.¹⁶⁰ This can be termed the *contemporaneousness* theory, which requires a super-majority all being in relative synchronous agreement, regardless of the uncertainty that might produce throughout the ratification process as states changed their positions. Ratification under this model would be akin to thirty-eight separately-controlled elevators, all going up and down, but if at some point all thirty-eight are stopped on the top floor, then ratification would be deemed effective. Not surprisingly, this model increases the difficulty of ratification, potentially destabilizes the process, and can lengthen the time it takes for an amendment to be ratified. Consequently, opponents to particular constitutional amendments have offered up numerous legislative and amendment proposals to permit rescissions and to impose deadlines designed to prevent the elevators all reaching the top, thus making ratification significantly more difficult.

The current view, which has been accepted for the past century and a half, is the *one-way-street* theory.¹⁶¹ But some who argue in favor of rescission advocate for the *contemporaneousness* theory,

159. Dunker, *supra* note 81.

160. It is also tempting to view the ratification process, as well as the amendment proposal process, as a straightforward legislative exercise where one legislature cannot bind a future one and subsequent legislatures can change their mind. But ratification clearly is not the same function as legislating. Constitutional proposals, once made, cannot be withdrawn by a later Congress, unlike simple legislation that can be amended or repealed. Similarly, ratifications by the states are constitutional functions. They have special meaning and require special rules. Lester Orfield explained that “[t]he legislature in ratifying an amendment is not exercising a legislative function, just as Congress, when it proposes, is not legislating.” ORFIELD, *supra* note 63, at 62.

161. See Dunker, *supra* note 81.

while no one seems to advocate for the *one-bite* theory.¹⁶² Although it is clear that Article V does not mandate a particular model for ratification, nor does it expressly reject a particular model, the current default seems more consistent with the framer's rejection of conditional ratifications, analogizes the ratification process to the legislative process, and protects states from the destabilizing acts of other states.

Contemporaneousness sounds like a good idea given our commitment to democratic decision-making, but there are concerns with it. For instance, how long do we leave a window open for states to achieve contemporaneousness? Is it fair to assume that a state that has not changed its mind still agrees? Should states have to assert their support for an amendment every few years, or every time a new state ratifies? More to the point, however, if there was always a risk of rescission, proponents of an amendment would need to seek approval of all fifty states in order to compensate for the possibility of states rescinding, thus increasing the numbers needed for ratification to more than the already significant three-fourths and moving the process closer to the unanimity requirement of the unwieldy Articles of Confederation. If the five state rescissions of the ERA are deemed valid, amendment proponents must seek five additional ratifications, bringing the total to forty-three, or eighty-six percent of states, far more than is required by the already onerous three-fourths of Article V.

And I would argue that the destabilizing effects are the most important. As the Supreme Court held in *M'Culloch v. Maryland*, all the people joined the federal alliance, but they did not intend to give up to the people of one state the power to negatively affect the national interests or the sovereignty of other states.¹⁶³ That same reasoning applies even more to the process of ratifying constitutional amendments than to taxing a national bank. As Chief Justice Marshall expounded:

[i]f any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers

162. See Paulsen, *supra* note 81, at 721–23 (advocating for the contemporaneousness theory); see also Dunker, *supra* note 81 (stating that the predominant theory is the one-way-street theory). But see *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. Ct. App. 1937) (adopting the one-bite theory).

163. 17 U.S. 316 (1819).

are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them.¹⁶⁴

Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.¹⁶⁵

The people of all the states have created the general government, and have conferred upon it the general power of taxation. . . . But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.¹⁶⁶

Although *McCulloch* was about a state exercising sovereignty over the national bank created by Congress, the underlying principle is that the constitution establishes national supremacy within certain bounds, and that individual states may not exercise sovereignty over the national interest, or the interests of other states. For “no state is willing to allow others to control them.”¹⁶⁷ This principle, embedded in our constitutional agreement, provides for the furtherance of national interests and prevents states from asserting their sovereignty at the expense of other states. This

164. *Id.* at 405.

165. *Id.* at 431.

166. *Id.* at 435–36.

167. *Id.* at 405.

principle is subverted by rescissions when states can destabilize the amendment process and undercut the sovereign acts of other states. The founders' rejection of conditional ratification of the constitution is consistent with Chief Justice Marshall's assertion that a single state may not upset the balance of power between different sovereign states.

A. Nice Sharp Quillets of Law

Given the lean language of Article V, and the lack of relevant judicial precedent, other relevant sources are the writings of scholars and commentators who have been studying the process of rescissions since those involving the Fourteenth Amendment. Yet unlike the opinion of the lawyers for the Kentucky legislators in *Chandler v. Wise*,¹⁶⁸ I would argue that scholarly opinion is valuable when there is no better source. In his brief in *Chandler*, attorney Lafon Allen opined:

[a] great deal of nonsense has been written on this subject, as was perhaps to be expected from commentators who, having no clear precedent to guide them and being free from that sobering sense of responsibility which affects the judgment of a court, are prone to seize upon faint analogies and other "nice sharp quillets of the law" to sustain their conjectures. All such catch-penny arguments we would put aside, in the very beginning, believing them to be unworthy of serious consideration. Great as is the respect due Judge Jameson's views on questions of constitutional law, it must be admitted, we think, that he is responsible for the currency of some of these frail analogues and precedents, which, through constant repetition, have come to have a sort of ritualistic importance in the eyes of his disciples.¹⁶⁹

Whether they are sharp quillets of law and frail analogues or cogent rationales, scholarship may be the only guide out of this intellectual morass of constitutional indeterminacy that is Article V. Fortunately, despite attorney Allen's self-serving snipes, there seems to be no question that scholars concur on the point that rescissions are currently ineffective. Until the Fourteenth Amendment, there was no real discussion of state rescissions by treatise writers. After the civil war amendments, Judge Jameson's treatise

168. 307 U.S. 474 (1939).

169. Brief for Respondents at 2-3, *Chandler v. Wise*, 307 U.S. 474 (1939) (No. 14).

was the first to discuss rescission, and he flatly concluded that rescissions were unacceptable.¹⁷⁰ He reasoned that if the framers had intended to permit rescissions, Article V would read:

that the amendment should be valid “when ratified by the legislatures of three-fourths of the States, each adhering to its vote until three-fourths of all the legislatures should have voted to ratify.” It is enough to say that such is not the language of the Constitution; but that it shall be valid when ratified by the legislatures of three-fourths of the States.¹⁷¹

Jameson’s final conclusion about allowing states to rescind could not be put better. “Such a mode of transacting business of so transcendent importance would be puerile.”¹⁷² David Watson, in 1910, echoed Jameson’s view that rescissions were impermissible.¹⁷³

The issue of rescissions did not again grip the scholarly consciousness until the early 1920s with passage of the Eighteenth and Nineteenth Amendments. When the Prohibition Amendment passed so quickly, despite strong popular opposition and procedural obstacles, a spate of law review articles discussed Congress’ power to impose obstacles and the general concern over the changing character of amendments.¹⁷⁴ Some attention was paid to the Wadsworth-Garrett plan to issue a constitutional amendment proposal to permit state rescissions, with the opinion being that it was both a bad idea and an overreaction to the unprecedented number of amendments ratified in the early years of the twentieth century.¹⁷⁵

Again, in the late 1930s and early 1940s, there was more attention paid to the issue of rescissions around the revival of the Child Labor Amendment and the Court’s shift away from the *Lochner* era and, again, the consensus was that rescissions were impermissible.¹⁷⁶ Lester Orfield’s treatise in 1942 clearly stated that

170. JAMESON, *supra* note 102, at 632.

171. *Id.*

172. *Id.*

173. 2 WATSON, *supra* note 31, at 1310.

174. See Herman V. Ames, *The Amending Provision of the Federal Constitution in Practice*, 63 PROC. OF THE AM. PHIL. SOC’Y 62 (1924) (discussing the issue of rescissions without expressing an opinion thereon, although he argues we should not make amendments too easy); W. F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321 (1921); William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223 (1919); Miller, *supra* note 91.

175. See Ames, *supra* note 174, at 70–73; Miller, *supra* note 91, at 190–91.

176. See generally ORFIELD, *supra* note 63; Corwin & Ramsey, *supra* note 64; Frank W. Grinnell, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A. J. 1164 (1959); Norman Stevens, Comment, *Constitutional Law—Ratification of Proposed Federal Amendment After Prior Rejection*, 11 S. CAL. L. REV. 472 (1938).

rescissions were invalid because the state legislatures were engaged in a special constitutional function when they ratified the constitution itself and when they ratified amendments.¹⁷⁷ Their power was granted through Article V and was not an incident of state sovereignty and therefore could not be exercised like normal legislation.¹⁷⁸

With passage of the ERA proposal and then the subsequent rescissions, another flood of articles and books emerged discussing the rescission issue.¹⁷⁹ Most recited the history given here and concluded that rescissions are impermissible.¹⁸⁰ Some argued that rescissions should be allowed.¹⁸¹ Yet all concurred that the issue was not firmly settled by any Supreme Court precedent either way. With the ratification of the Twenty-Seventh Amendment in 1992, another surge in law review articles and books hit the shelves, each rehashing much of the earlier history.¹⁸² And others are arriving now in response to the final ratification of the ERA.¹⁸³

With so many voices opining as to the logic of *Coleman* or the validity of the Congressional precedent of the Fourteenth Amendment rescissions, it can seem difficult to identify where there is consensus and where there is not. But the evidence is remarkably clear

177. ORFIELD, *supra* note 63, at 62.

178. *Id.*

179. See generally FREEDMAN & NAUGHTON, *supra* note 32; A. Diane Baker, Comment, *ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications*, 28 EMORY L.J. 71 (1979); Dunker, *supra* note 81; Elder, *supra* note 81; Lynn Andretta Fishel, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147 (1973); Ginsburg, *supra* note 98; Hajdu & Rosenblum, *supra* note 47; Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL'Y 19 (1979); J. William Heckman, Jr., *Ratification of a Constitutional Amendment: Can a State Change Its Mind?*, 6 CONN. L. REV. 28 (1973); Kanowitz & Klinger, *supra* note 100; Planell, *supra* note 152; Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980); Norman Vieira, *The Equal Rights Amendment: Rescission, Extension and Justiciability*, 6 S. ILL. U. L.J. 1 (1981).

180. See Hajdu & Rosenblum, *supra* note 47, at 119–22; Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 134 (1997); Kanowitz & Klinger, *supra* note 100, at 999–1005.

181. See Hatch, *supra* note 179, at 46–47; Rees, *supra* note 179, at 929–30.

182. See generally BERNSTEIN WITH AGEL, *supra* note 32; Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992); Steward Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994); Ishikawa, *supra* note 4; Paulsen, *supra* note 81; Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, 4 WOMEN'S RTS. L. REP. 209 (1978); Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494 (1978).

183. See generally Hanlon, *supra* note 116; Held et al., *supra* note 180; Wright, *supra* note 12; Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437 (1999).

in the scholarly record. Everyone admits that (1) no state rescission has ever been recognized, (2) that there is no federal judicial precedent allowing or disallowing state rescissions, (3) that there have been Congressional efforts in the past both to permit rescissions and to prohibit them, none of which have successfully passed, (4) that all state courts, state executives, and many Congressmen have concurred that rescissions are prohibited, and (5) that the uncertainty of whether or not a state may rescind remains and continues to overshadow the amendment process.

Scholars disagree, however, on how much weight should be given to the Congressional precedents of the Fourteenth, Fifteenth, and Nineteenth Amendment rescissions. Scholars also disagree on whether determining the validity of rescissions under Article V is justiciable or lies solely in the hands of Congress. They disagree as to whether Madison's stricture about unconditional ratifications should apply to amendments, and they disagree as to whether principles about conventions should apply to Congressionally-proposed and legislatively-ratified amendments. They even disagree whether Congress would have the power to legislate as to the validity of rescissions. And those who favor allowing rescissions generally do so on federalism grounds or parity, expressing dislike for the current asymmetric rule. Those who argue against allowing for rescissions usually do so on the grounds that rescissions inject uncertainty, they make amending more difficult, that ratification is a special constitutional function that is fundamentally different from legislation, and that precedent should be respected. In essence, they agree that the current rule is that ratification is a one-way street, but some advocate that the courts should adopt the contemporaneousness theory that would permit unlimited rejections and ratifications.

There is agreement on this, however:

[t]his uncertainty [about the validity of rescissions] has already delayed the acknowledgment of several amendments well beyond their constitutional validity. These amendments—including the Twelfth, Fifteenth, and Nineteenth Amendments—received the requisite number of ratifications, but with at least one state attempting to rescind, languished in legitimacy limbo until an equal number of states as those rescinding had unequivocally ratified. This represents an impermissible encroachment of the central government on the prerogative of

states to alter the Constitution with a three-quarters concurrence.¹⁸⁴

More to the point, Professor William Van Alstyne testified that allowing states to rescind would be “an atrocious way to run a constitution.”¹⁸⁵ It seems to me that Van Alstyne was exactly right, as rescissions threaten the balance of power between the states in contravention of the founders’ insistence that there should be no conditional ratifications and the careful balance of power between the separate sovereign states articulated throughout the constitution.

VI. CONCLUSION

At the end of the day, no amendment has ever been held by Congress or the Courts to be void if it has met the technical requirements of Article V, which is the potential fate of the ERA. It seems beyond a doubt that the irregularities of the rescissions are insufficient to set a precedent of this magnitude. Any interpretation of Article V’s grant of the power to ratify must promote a reasonably defensible interpretation that does not undermine the power and the provision that is being exercised. Unreasonable interpretations are not constitutional if there are other interpretations that better align with the principles of constitutionalism and the rule of law.¹⁸⁶ Allowing states to rescind and throw the process into turmoil is not only unreasonable but untenable in the heady realm of constitution-making.

Of course, no state is required to ratify an amendment proposal. But once it does, it has given its quantum of the life force to the amendment, and states that come later should be able to rely on the consequences of prior state acts. If ratifications were not binding, then early ratifying states would have more power vis-à-vis later ratifying states—a situation hardly to have been acceptable to the

184. Ishikawa, *supra* note 4, at 570 (footnotes omitted). The Twelfth Amendment did not involve a rescission, but it did involve a claim of legal insufficiency. The New Hampshire legislature ratified the amendment with a simple majority, but the governor vetoed the resolution, and the legislature did not have the two-thirds majority to override the governor’s veto. Although New Hampshire’s ratification was most likely the final one needed, the Secretary of State did not certify and publish the amendment until after another state, Tennessee, ratified. See *Idaho v. Freeman*, 529 F. Supp 1107, 1149 (D. Idaho 1981).

185. *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 138 (1977) (testimony of Prof. Van Alstyne).

186. See *Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (“We must endeavour [sic] so to construe [Constitutional provisions] as to preserve the true intent and meaning of the instrument.”).

thirteen states that understood at the founding that ratification of the constitution could not be conditional.

And for those involved in the difficult political process of garnering support, rescissions impose a significant hardship, requiring that they focus on ratifications in all fifty states because later states can never know if an earlier state will stick by its ratification. Prohibiting the destabilizing effects of rescissions from upsetting the reliance of other states, like prohibiting state taxation of the national bank, is a principle deeply rooted in our constitution. States must play fair and cannot have an undue influence in national politics.

Protecting Women’s Rights by Keeping Religious Liberty in Its Lane

*Leslie Gielow Jacobs**

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INTRODUCTION

Women have acquired substantial rights under the Constitution interpreted by the federal courts.¹ These include the right to be

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1. I delivered the talk, which became this paper, on a panel focused on women’s rights. Most of what I have to say about existing doctrine, and the impact of doctrinal changes on women’s rights, applies more generally to the rights of historically disadvantaged minorities and other groups with less power than others in the private ordering.

treated the same as men under the Equal Protection Clause² and the right to make certain intimate and reproductive choices under the Due Process Clause.³ But the federal courts are no longer a hospitable environment in which to argue to expand women's rights.⁴ The Court has always limited the scope of the equal protection guarantee to prohibit only purposefully equal treatment by the government.⁵ Now, the Court may be inclined to contract its interpretation of Congress's power to choose to implement a broader equality right for women, or for other historically disadvantaged minorities.⁶ Existing interpretations of the scope of intimate and reproductive rights guaranteed by the Constitution are in danger.⁷ Recent statutory interpretations expand the rights of employers to

2. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that women must be admitted to Virginia Military Institute according to the same qualification criteria that apply to men); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (holding that sex-based classifications are subject to heightened, intermediate scrutiny).

3. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (re-affirming a constitutional right to choose abortion prior to viability); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a state may not criminalize abortion prior to viability); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state may not criminalize use of contraceptives by married women).

4. Many women choose to align their lives and identities according to religious beliefs and to structure their conduct according to what those beliefs require. Many other women, however, do not choose religious beliefs as their source of meaning and identity or as their guide to what roles they should occupy, in private or in public, or to how they should otherwise behave. Women's rights protect the abilities of all women to believe what they choose and to structure their conduct to fulfill those beliefs. Because women choose to believe and behave in many different ways, religious beliefs, and the conduct they mandate or forbid, when enacted into law or interpreted to define the scope of a constitutional rights guarantee, restrict the rights of women as a class.

5. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271–73 (1979) (upholding a Massachusetts statute preferring veterans against an equal protection claim that the statute discriminated against the female plaintiffs based on their sex); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting “the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact”).

6. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (upholding authority of Congress to create disparate impact liability in housing law, with Justice Kennedy, who has now been replaced by Justice Kavanaugh, providing the fifth vote); *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (warning of a coming “war between disparate impact and equal protection”); *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, 639 F.3d 1078 (D.C. Cir. 2011) (rejecting disparate impact liability, with Judge Kavanaugh joining the majority opinion).

7. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring) (joining the majority holding that the abortion restrictions are invalid, but rejecting the balancing test set out by the Court in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)); see also *June Med. Servs. L.L.C.*, 140 S. Ct. at 2142 (Thomas, Alito, Gorsuch, and Kavanaugh, J., dissenting) (arguing, inter alia, that abortion providers lack standing to assert women's rights).

avoid complying with laws expanding their employees' reproductive rights.⁸

Now, the Court's interpretations are expanding the scopes of the First Amendment speech and religious liberty rights.⁹ The Constitution's individual rights guarantees are not absolute. In its determination of the scope of an individual right, the Court must necessarily interpret a balance between the individual's right to assert it and the power of democratically elected officials and bodies to implement policy choices, which balance the many individual and public rights impacted in an interaction differently. As the scope of individual rights expand, the authority of democratically elected officials and entities to regulate the individual conduct protected by the rights guarantee contracts. With respect to the First Amendment rights of speech and religious liberty specifically, the Court's expanding interpretations of their scopes contract the power of democratically elected entities at all government levels to enact and administer laws that adjust private market power relations for the purpose of implementing various forms of civil rights guarantees.¹⁰

The shift in interpretation threatens women's ability to retain and expand democratically enacted rights.¹¹ But a direct assault on the changing doctrine is unlikely to succeed. No Archimedean point exists from which to argue the fundamental soundness of the

8. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (holding that the Affordable Care Act authorized the Health Resources and Services Administration to grant exemptions to employers with religious or moral objections to providing no-cost contraceptive coverage to their employees); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the federal Religious Freedom Restoration Act exempted "closely held" for-profit corporations from the obligation to provide employees with contraceptive coverage under the Affordable Care Act).

9. See Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 197–98 (2018) (describing the Court's decision in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018), as "cement[ing] the Roberts Court as the most libertarian in our nation's history on free-speech issues"); Linda Greenhouse, *The Many Dimensions of the Chief Justice's Triumphant Term*, N.Y. TIMES (July 16, 2020), <https://nyti.ms/32nTaML> (observing Chief Justice Roberts' "project" of expanding religious liberty rights and commenting, as to three religion cases in the 2019 Term, that they "went considerably further than they needed to, each one taking and running with one of the [C]ourt's recent applicable precedents").

10. See Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) ("It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation."); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453–55 (2015) (comparing Free Exercise doctrine to the "ideal of private ordering and the resistance to redistribution" found in the "widely criticized use of freedom of contract to strike down economic regulation at the turn of the last century").

11. Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2230 (2018) (observing that victims of the free speech expansion include "proponents of campaign finance reform, opponents of cigarette addiction, the LBGTQ community, labor unions, animal-rights advocates, environmentalists, targets of hate speech, and abortion providers").

balance between the exercise of democratic power and individuals' power to avoid it that the Court interprets into the expanding rights, or the specific methods of interpretation it employs. For many of us, the pedigree of Court composition, conferred by neutral rules of procedure, consistently applied, no longer exists either.¹² Still, the Court must be concerned about some version of legitimacy, which distinguishes its interpretations from political decision making.¹³ What remains, in the interpretation of the expanding First Amendment rights, is the legitimacy that may be obtained by consistent application of core methodologies for articulating and applying rules and for evaluating evidence.¹⁴

The longstanding doctrine of women's rights under the Equal Protection Clause reveals these methodologies.¹⁵ Courts of changing compositions over decades have articulated and embraced the doctrine of women's equal protection rights.¹⁶ Its core methodologies transcend the particular choices of weight between individual rights and government authority, and among interpretive methodologies. One element of the core methodology stems from the struggle to change the Court's interpretation of the scope of women's right to equal protection from what it was according to tradition and history, and what it had to be to implement the enduring constitutional principle in altered social and economic circumstances.¹⁷ This is that religious belief, and the conduct it requires or condemns, does not determine the scope of individual conduct protected by a rights guarantee not aimed explicitly at protecting religious liberty.

12. The rules do not state whether a President's nominee should receive a hearing and be confirmed during an election year, but whatever the rule is, the Senate must apply it consistently. See U.S. CONST. art. II, § 2, cl. 2 (entrusting the Senate with the duty to confirm Supreme Court nominees); U.S. CONST. art. I, § 5, cl. 2 (conferring discretion on the Senate to make its own rules, subject to the unwritten norm that the rules be consistently applied). *But see* Carl Hulse, *For McConnell, Ginsburg's Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES, <https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html> (Nov. 3, 2020) (comparing approaches to the nominations of Chief Judge Merrick Garland and Justice Amy Coney Barrett).

13. *Obergefell v. Hodges*, 576 U.S. 644, 708 (2015) (Roberts, C.J., dissenting) ("The legitimacy of th[e] Court ultimately rests 'upon the respect accorded to its judgments.' . . . [which] flows from the perception—and reality—that [the Court] exercise[s] humility and restraint in deciding cases according to the Constitution and law.") (citation omitted).

14. See *infra* Part II (examining the Court's consistency in expanding interpretations of the First Amendment rights).

15. See *Reed v. Reed*, 404 U.S. 71 (1971) (initiating a change in doctrine in the early 1970s by holding that the equal protection guarantee prohibited a state from using sex as a classification to qualify estate administrators).

16. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

17. *Morales-Santana*, 137 S. Ct. at 1693 (holding that laws that allocate benefits according to "stereotypes about women's domestic roles" violate the equal protection principle).

The second element is evidentiary. By the Court's interpretation, equal protection of the laws means equal treatment by the government according to protected traits. A developed methodology exists for evaluating evidence to determine whether government actions disadvantage women because they are women, or because of an overlapping characteristic, which dissolves an inference of discriminatory purpose. A finding of discriminatory purpose to disadvantage individuals because they exhibit a protected trait plays the same critical role of shifting the balance between individual rights and government authority in particular applications under the free speech and religious liberty guarantees.

We can use both of these elements of methodology to examine the consistency of the Court's expanding interpretations of the First Amendment rights with the structure that defines the scope of women's constitutional rights. Part I provides brief background. Section I.A. describes the evolution of women's equal protection rights and the core methodologies embedded in the Court's reasoning and evaluations of evidence. Section I.B. sets out the doctrine that defines the expanding scope of the free speech and religious liberty rights. Part II uses the example of the Court's recent decision in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*)¹⁸ to examine the consistency of the Court's expanding interpretations of the First Amendment rights with the structure that defines the scope of women's constitutional rights. Section II.A. describes the doctrinal dilemma posed by the facts and the Court's resolution. Section II.B. examines the reasons offered by the Court for its critical doctrinal distinction between licensed professional client counseling at pregnancy centers and other types of speech that the government may regulate more extensively and identifies the creep of religious belief into the definition of the scope of the free speech right. Section II.C. identifies inconsistencies in the Court's evaluation of evidence of discriminatory purpose when religiously motivated speakers challenge official action with the methodology that limits the scope of women's equal protection rights. These seemingly skewed evaluations of official motivations not only advantage the claims of individuals asserting the expanding rights, but threaten to chill criticism by official decision makers of religiously motivated conduct, which harms women or others and for that reason violates public policies, by presenting or construing statements criticizing the conduct and its harmful consequences as expressions to discriminate because of the religious motivation.

18. 138 S. Ct. 2361 (2018).

I. THE METHODOLOGY AND DOCTRINE OF CONSTITUTIONAL RIGHTS

The Court uses a common methodology to interpret the scope of individual rights. The guarantees within the Constitution's rights can appear absolute. But they cannot possibly be. Government actions abridge individuals' liberty to act in countless ways, which implicate the constitutional rights guarantees. The primary realm established by the Constitution for balancing individual interests is the political process. The Court's interpretation of the scope of an individual right necessarily balances the individual interest in absolute freedom of action with democratic government's authority and responsibility to balance the many rights held by members of its electorate differently. By means of distinctions among circumstances where an individual's exercise of a right and a government action conflict, the Court determines levels of the rigor of judicial review of the justification for the government's action. These distinctions and the levels of judicial review they invoke form the doctrine, which defines the scope of the right. Circumstances that pose a high danger that the government's action violates the core protection of a rights guarantee provoke strict judicial scrutiny of the government's explanation for its action, while circumstances that do not provoke a lower level of review. The Court must find the distinctions among circumstances that it interprets into doctrine by tracing them to implementing the core principles that underpin the rights guarantee. When the Court changes the distinctions that mark the balance between the scope of the rights-holder and the government's authority to regulate, it must do so according to this same methodology that legitimates the newly found distinction as an act of interpretation rather than of judicial will.

A. *Equal Protection*

The development of the doctrine of women's equal protection rights illustrates and adds nuance to the common methodology of interpreting the scope of individual rights. The first nuance exists when the Court interprets the key distinctions that determine the level of judicial review into doctrine. The Equal Protection Clause demands "equal protection" of all "persons" within a jurisdiction, but the doctrine has always hinged on distinctions among groups according to their characteristics. The Court cannot carefully review all the many classifications in law, and should not, because the Constitution commits those policy decisions to the democratic

process. So, by means of levels of review, the Court has segregated the classifications into those that presumptively violate the core principles of the Equal Protection Clause and those that do not. The history of the Equal Protection Clause shows an intent by those who wrote and ratified it to protect former slaves, so from the beginning of its interpretation, the Court distinguished legal classifications that disadvantaged that group from other types of classifications.¹⁹ The Court quickly generalized this protection to all types of racial classifications and reviews them under strict scrutiny.²⁰

It took a century after the Equal Protection Clause became a part of the Constitution, and fifty years after women got the right to vote, for the Court to interpret it to require equal treatment of men and women.²¹ Sex classifications did not appear as presumptively violating Equal Protection Clause principles at the time the amendment became a part of the Constitution.²² Instead, these classifications reflected widespread attitudes about the different roles of women and men in society, differences that the Court viewed as normal and natural, and so within the discretion of democratically elected governments to implement through law.²³ The Court changed the doctrine of the Equal Protection Clause, raising the level of review of sex-based classifications, when it came to view these classifications as “arbitrary,” rather than grounded in differences that relate sufficiently to fulfilling public purposes.²⁴

19. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (stating that the aim of the Equal Protection Clause was “against discrimination because of race or color,” not against distinctions based on such attributes as sex, land ownership, age, or educational qualifications).

20. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese race and ancestry); *see also Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying “the most rigid scrutiny” to a classification based on Japanese ancestry, although upholding it).

21. The Fourteenth Amendment, which contains the Equal Protection Clause, was ratified in 1868. U.S. CONST. amend. XIV. The Nineteenth Amendment, which granted women the right to vote, was ratified in 1920. U.S. CONST. amend. XIX. The Court began its interpretation of a right to equal treatment for women into the Equal Protection Clause in *Reed v. Reed*, 404 U.S. 71 (1971).

22. *See The Originalist*, CAL. LAW. (Jan. 2011), https://podcast.uctv.tv/webdocuments/legally-speaking/11_01LegallySpeaking_Scalia.pdf (quoting Justice Scalia as remarking: “Nobody ever thought that [prohibiting sex discrimination is what the Equal Protection Clause] meant. Nobody ever voted for that.”).

23. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding a state law requiring women to opt in to jury service, observing that a “woman is still regarded as the center of home and family life”).

24. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”).

In changing the significance of the sex distinction in doctrine from what it had been, the Court followed the common methodology of tracing the newly located distinction to implementing the core equal protection right. Distinctions based on sex, a four-justice plurality explained, in many relevant ways resembled the race distinctions, which the clause was clearly intended to eliminate.²⁵ To make this change, the Court had to reject “archaic and overbroad” generalizations about the relative economic situations of men and women, and “outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’” as determinative of the relevance of the sex trait to implementing the equal protection guarantee.²⁶ In a long series of opinions, the Court reiterated that stereotypes, old notions, and traditional ways of understanding the socially appropriate roles of men and women²⁷ do not determine the scope of the constitutional right when the circumstances to which the Court must apply the core principle that drives the right have changed.²⁸

These traditional ideas about the appropriate role and conduct of women very often stem from, and mirror, religious beliefs.²⁹ So, the rejection of old ideas as guides to the scope of application of the equal protection guarantee is a rejection of religious beliefs about appropriate individual conduct as determinative when interpreting the scope of the constitutional right. This recognition that religious beliefs and practices do not determine the scope of individual

25. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (comparing sex to race as “an immutable characteristic determined solely by the accident of birth,” and noting that neither slaves nor women could hold office, serve on juries, or bring suits in their own name for much of the nineteenth century).

26. *Craig*, 429 U.S. at 198–99 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)) (first citing *Frontiero*, 411 U.S. at 689 n.23; and then citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975)).

27. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (noting that the law before it “date[s] from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are”); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (rejecting laws based on “[s]tereotypes about women’s domestic roles”).

28. *Morales-Santana*, 137 S. Ct. at 1690 (“[N]ew insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”) (alteration in original).

29. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (reasoning that a restriction of public gatherings to ten people “might operate to exclude all women, considering [ten] men are necessary to establish a *minyán*, or a quorum” in the Orthodox Jewish community); *Stanton v. Stanton*, 421 U.S. 7 (1975) (invalidating a Utah law requiring parents to support men, but not women, past age eighteen); David Crary, *Women Strive for Larger Roles in Male-Dominated Religions*, ASSOCIATED PRESS (Jan. 14, 2019), <https://apnews.com/article/3dc6b0999bf04614b1de21863cbfdd66>; Tanya Riches & Mark Jennings, *Explainer: Why Some Churches Teach That Women Are ‘Separate but Equal’*, THE CONVERSATION, <https://theconversation.com/explainer-why-some-churches-teach-that-women-are-separate-but-equal-64305> (Dec. 21, 2016, 7:41 PM).

conduct protected by a rights guarantee other than religious liberty is apparent in the doctrine of the Due Process Clause as well.³⁰

The second nuance of methodology that stems from interpretation of the equal protection guarantee involves the evidence sufficient to show that a government entity acted with a purpose to distinguish individuals according to protected traits in a particular case such that the Court presumes a constitutional violation and raises the level of scrutiny. The equality right that women and other minorities have achieved by means of dynamic interpretation of the equal protection guarantee is substantial. However, it is also substantially limited by the Court's doctrinal decision that the equal protection right refers to freedom from purposeful government action and does not include freedom from disproportionate harms imposed by laws on members of a protected class.³¹ So, even an extraordinarily strong showing that a law disproportionately disadvantages a protected class, like women, is not enough, by itself, to cause the Court to review the law according to the standard that applies to explicit sex-based classifications.³² Mere awareness by a government decision maker that a law's disadvantageous effect will fall dramatically disproportionately,³³ or even exclusively,³⁴ on women does not show a sufficient purpose if a valid public policy objective can explain the government's choice.³⁵ Sufficient evidence from the circumstances of the impact or of other types must show that the government "selected or reaffirmed a particular course of

30. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (acknowledging that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises" but holding that "sincere, personal [beliefs]" violate the rights of other people when "enacted [into] law and public policy"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (acknowledging "beliefs" about the consequences of abortion "for the life . . . that is aborted" and the "vision" of woman as noble mother, which has been "dominant . . . in the course of our history and our culture," even as it distinguishes these determinants of difference from the norm appropriate to guide its interpretation of the scope of the constitutional liberty right, which is that government actions must preserve the same right for men and women to shape their destinies according to their own "conception[s] of [their] spiritual imperatives and [their] place[s] in society"); *Roe v. Wade*, 410 U.S. 113 (1973) (rejecting an interpretation that would find a fetus is a "person" with a constitutional life or liberty right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating state ban on distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state ban on the use of contraceptives).

31. See *Washington v. Davis*, 426 U.S. 229 (1976).

32. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (refraining from applying heightened review to the exclusion of pregnancy from California's disability compensation program despite disadvantaging only women).

33. See *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979).

34. See *Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy from California's disability compensation program).

35. See *Feeney*, 442 U.S. 256 (rewarding veterans for their service); *Aiello*, 417 U.S. 484 (limiting disability payments to limit the amount of required contributions by employees and employers).

action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group” whose members exhibit a protected trait.³⁶ In rare instances, where no valid public purpose could explain a strong statistical showing of adverse impact, the Court has found administrative decisions targeting, or electoral districts drawn for the purpose to discriminate on the basis of, race.³⁷ But where a plausible purpose other than disadvantaging a protected class exists, a purpose to disadvantage individuals according to a protected trait, is very difficult to prove.³⁸ Seemingly, a showing based on impact alone must demonstrate that both the class benefited by the law and burdened by it are grouped according to the protected trait. So, a showing that the benefits of a law accrue almost exclusively to one class, like men, is not enough, if both men and women are in the disadvantaged class.³⁹ Similarly, a showing that the burdens of a law fall exclusively on one class, like women, is not enough, if not all women fall within the class that experiences the burden.⁴⁰ This very high evidentiary threshold for showing an unconstitutional purpose to discriminate on the basis of a protected trait substantially limits the scope of women’s equal protection right.

B. Free Speech

Like the equal protection guarantee, the Court has qualified, by interpretation, the First Amendment’s seemingly absolute mandate that the government “make no law . . . abridging the freedom of speech”⁴¹ The core distinction that identifies the meaning of the right stems from the Equal Protection Clause and segregates laws according to whether they depend for their application on the

36. *Feeney*, 442 U.S. at 279.

37. *See* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding a local act altering the shape of a city from a square to a twenty-eight-sided figure that removed all but a few of the 400 Black voters and no white voters constituted unconstitutional discrimination); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

38. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996) (noting that to raise a prima facie case of race-based prosecution, it was not sufficient to show that all the defendants in crack cocaine cases were Black, defendant needed to provide evidence “that similarly situated individuals of a different race were not prosecuted”); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that a defendant must show that his decision maker acted with discriminatory purpose and so a detailed and inclusive statistical study showing Georgia jurors across a series of years consider race in imposing the death penalty was not sufficient to show that the jury that imposed defendant’s death sentence acted with this purpose).

39. *See Feeney*, 442 U.S. 256.

40. *See Aiello*, 417 U.S. 484.

41. U.S. CONST. amend. I.

content of the speech.⁴² The content distinction identifies apparent government censorship of ideas, and thereby implements the core Free Speech Clause's purposes, which include facilitating citizen participation in the democratic process; ensuring an uninhibited marketplace in which speakers and listeners may exchange information, ideas, and opinions about the whole range of human activities; and promoting individual self-development.⁴³ The determination of whether a law is content-based or content-neutral determines the level of scrutiny the Court applies.⁴⁴ Content-based restrictions are "presumptively unconstitutional" and subject to strict scrutiny.⁴⁵ But the Court has interpreted many exceptions to this rule, when the circumstances of the individual speech and government regulation trace differently to implementing the core principles that explain the existence of the right.⁴⁶

And the Court's interpretation of the identity and location of these distinctions has changed. In recent years, the Court has expanded the scope of laws it deems to discriminate according to content,⁴⁷ and viewpoint,⁴⁸ and are therefore subject to the most rigorous judicial scrutiny. The Court identified viewpoint discrimination as "an egregious form of content discrimination" in the circumstances of a public university, which excluded publications proselytizing religion from distribution from a student activities fund otherwise generally available to publications by student groups.⁴⁹ "The government must abstain from regulating speech when the

42. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding a sign ordinance limiting size, duration, and location of temporary signs directing the public toward events loosely defined as a meeting of a nonprofit group violated free speech rights); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (holding that a city ordinance prohibiting all picketing within 150 feet of a school made an unconstitutional exemption for peaceful labor picketing but not all forms of peaceful picketing).

43. See *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534–35 (1980); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

44. *Gilbert*, 576 U.S. at 163.

45. *Id.* The Court continues to apply a lower level of scrutiny to some scope of commercial speech. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744 (2017).

46. See *Tam*, 137 S. Ct. at 1765 (Kennedy, J., concurring in part and concurring in the judgment) ("Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (setting out the types of forums and the different rules that apply to regulations of speech in them).

47. *Gilbert*, 576 U.S. at 162 (holding that a law that distinguishes according to the content of directional signs is subject to strict scrutiny).

48. *Tam*, 137 S. Ct. 1744 (holding that a law prohibiting issuing a trademark to content that disparages individuals or groups according to certain traits is viewpoint-based).

49. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 825, 829 (1995) (university excluded funding for "religious activit[ies]" defined as those that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality") (alteration in original).

specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,” the Court explained.⁵⁰ The Court has interpreted laws penalizing speech critical of religious beliefs, institutions, and practices as viewpoint-based and subject to strict scrutiny as well.⁵¹

The Court has expanded its interpretations of the constitutional protection for commercial speech and other speech by corporations and actors in the commercial marketplace. It has held, and expanded upon holdings, that payment of money to produce speech is fully protected as speech;⁵² that corporations have the same speech rights as individuals;⁵³ and that commercial speech should, in increasing types of instances, receive the same level of constitutional protection as public issue speech.⁵⁴ These latter expansions build on a changed interpretation of the level of constitutional protection for commercial speech articulated by the Court in the mid-1970s.⁵⁵ At that time, the Court distinguished regulation of commercial speech from regulation of other types of speech, which provokes strict scrutiny.⁵⁶ The value of commercial and corporate speech, the Court explained back then, stems primarily from its value to listeners.⁵⁷ More recently, the Court has merged the interests of listeners with full protection of corporate speakers when linking its

50. *Id.* at 829.

51. *Snyder v. Phelps*, 562 U.S. 443 (2011) (invalidating intentional infliction of emotional distress conviction for speakers criticizing, among other things, the conduct of officials within the Catholic Church); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (holding breach of the peace conviction unconstitutional applied to speaker attacking “all organized religious systems as instruments of Satan,” and “singl[ing] out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows”).

52. *Buckley v. Valeo*, 424 U.S. 1 (1976).

53. *Citizens United v. FEC*, 558 U.S. 310 (2010).

54. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 158 (2010) (“[C]orporate speakers soon became the principal beneficiaries of [the Court’s holding that the Constitution protects commercial speech].”).

55. *Va. State Bd. of Pharmacy*, 425 U.S. 748 (1976) (finding a strong interest in the “free flow of commercial information”).

56. *Id.* at 771 n.24 (finding “commonsense differences” between commercial speech and other types, which “suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired”).

57. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 766 (listing the “substantial individual and societal interests” that support constitutional protection for commercial speech).

expanding interpretations of the right to implementing constitutional principles.⁵⁸

The same strict scrutiny that applies to content-based speech restrictions applies to content-based compulsions that individuals include messages mandated by the government in their speech. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,” the Court emphasized as it invalidated a flag salute imposed on a school child whose parents’ religious beliefs forbade the conduct.⁵⁹ A “Live Free or Die” license plate motto forced upon a driver who found the message “morally, ethically, religiously and politically abhorrent” fared no better.⁶⁰ “A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts,” the Court explained, and the difference between an active flag salute, and passive display of the motto, was merely “one of degree.”⁶¹ The license plate-display requirement, like the salute, “forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”⁶² The Court has invalidated other government mandates that individuals deliver or affirm ideological messages.⁶³

The Court has, however, distinguished certain types of information-delivery requirements imposed on product and service providers, holding that a lower level of judicial review applies and, therefore, that democratically elected bodies have greater constitutional authority to impose them for the purpose of achieving public purposes. Soon after raising the constitutional protection for commercial speech, the Court in *Zauderer v. Office of Disciplinary*

58. *Citizens United*, 558 U.S. at 340–41 (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”).

59. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

60. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

61. *Id.* at 714–15.

62. *Id.* at 715.

63. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013) (statement of opposition to prostitution); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (including a gay contingent in a privately organized parade); *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (speech opposing newspaper editors’ viewpoints); *W. Va. State Bd. of Educ.*, 319 U.S. 624 (child in school required to salute the flag).

Counsel upheld the constitutionality of a state disciplinary rule requiring any attorney advertisement that mentioned contingent fee rates to disclose that clients might still be required to pay litigation costs.⁶⁴ It interpreted a distinction between speech compulsions imposed on public issue and commercial speech,⁶⁵ and between regulations that restrict commercial speech and those that require disclosure of additional information.⁶⁶ The Court described the state rule as requiring that advertisements include “purely factual and uncontroversial information about the terms under which . . . services will be available.”⁶⁷ Linking the distinction to constitutional principle, the Court noted “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [so] appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”⁶⁸ In recent years, and in tandem with the Court’s interpretations applying “heightened scrutiny” to an expanding scope of commercial speech restrictions,⁶⁹ corporate litigants have aggressively—and frequently successfully—litigated to narrow application of the *Zauderer* exception.⁷⁰ But still, the exception remains, along with the reality that legislative bodies and government agencies impose a wide variety of information-delivery requirements on product and service vendors.⁷¹

64. 471 U.S. 626 (1985).

65. *Id.* at 637 (observing that “commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech’”).

66. *Id.* at 650–53 (rejecting the attorney’s argument that “precisely the same inquiry as determining the validity of . . . restrictions on advertising content” should apply to determine the constitutionality of the disclosure requirement).

67. *Id.* at 651.

68. *Id.* (citation omitted). The Court also noted that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’” *Id.* (alterations in original). Without clearly identifying a level of review, the Court noted that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech,” but that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Id.*

69. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

70. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://nyti.ms/2ID0Wov> (“[B]usinesses mount[ed] First Amendment challenges to gun control laws, securities regulations, country-of-origin labels, graphic cigarette warnings and limits on off-label drug marketing.”).

71. Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376 (2018) (“[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”); Fredrik Gronkvist,

A plurality of the Court articulated the other exception, somewhat offhandedly, in the context of state-mandated information disclosure to clients by abortion providers. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality addressed the constitutionality of a state requirement that abortion providers inform their patients of “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child,’” as well as the availability of printed material prepared by the State, which provided information about the fetus and assistance available to support raising a child.⁷² The plurality addressed two claims with respect to the information-delivery requirement. The first was whether it violated the new “undue burden” standard the plurality interpreted as marking a violation of the woman’s right to choose the procedure. In determining that the disclosure requirements at issue did not do so, the plurality explicitly rejected prior Court holdings that only a purpose to protect women’s health could support required disclosure. It held that states may select information and mandate disclosure for the purpose of protecting fetal life and “to persuade her to choose childbirth over abortion,” at least so long as the information required to be presented is “truthful and not misleading.”⁷³

The *Casey* plurality only briefly addressed the abortion providers’ claim that the mandated disclosures violated their Free Speech Clause rights. “[T]he physician’s First Amendment rights not to speak are implicated,” it reasoned, “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State”⁷⁴ The reference to states’ power to license and regulate medical professionals, although conclusory, identifies the same type of doctrinal distinction as more fully explicated in *Zauderer* between circumstances in which the Constitution commands that speakers’ rights to speak without restraint prevail and those where the Constitution permits democratically elected bodies to choose to implement a different balance of interests between speakers and listeners for the purpose of protecting the health, safety, and welfare of their citizenry, as determined through their political processes. For decades, states with democratically elected majorities that oppose abortion have relied on the discretion the *Casey* exception interprets to enforce many different types of information-

United States Product Labeling Requirements: An Overview, COMPLIANCEGATE (Dec. 16, 2020), <https://www.compliancegate.com/united-states-product-labeling-requirements/>.

72. 505 U.S. 833, 881 (1992).

73. *Id.* at 877–79, 882.

74. *Id.* at 884 (citation omitted).

disclosure requirements for the purpose of persuading women not to choose abortion, which makes women's access to the procedure more time-consuming, cumbersome, and expensive.⁷⁵

C. *Religious Liberty*

The Constitution contains two religious liberty guarantees. The government may “make no law” either “respecting the establishment of religion” or “prohibiting the free exercise thereof”⁷⁶ The Establishment Clause limits the assistance governments may provide to religious entities generally or to particular religious sects. The Free Exercise Clause limits the extent to which laws may restrict religious practice. As with the other provisions, “no law” does not mean that governments must avoid assisting or disadvantaging religion or those who practice it. Instead, reflecting the common methodology, the Court has interpreted key distinctions into the doctrine. These distinctions implement the balance between rights-holders and government authority by separating circumstances of aid and burden to religion into those that presumptively violate core principles and those that do not, and thereby establishing levels of judicial review. The doctrine of the two clauses is complex and in flux.⁷⁷ Over the past few decades, and at an accelerating pace, the Court has expanded religious liberty rights by means of changing interpretations of the scope of both clauses. At this time, the core distinction between equal, or “neutral,” treatment and unequal, or discriminatory, treatment of religion by the government when distributing benefits and burdens unites the two sides of the doctrine.

By application of the equal treatment distinction, the Court has contracted the scope of acts of government assistance that violate the Establishment Clause. Increasingly, the equal treatment distinction hinges on a showing that the government acted with a purpose to aid religion akin to the “‘because of,’ not merely ‘in spite of’” showing required under the Equal Protection

75. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (Feb. 1, 2021).

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

77. See *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.) (presenting the question of whether to overrule *Emp't Div. v. Smith*, 494 U.S. 872 (1990)); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (abandoning the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Am. Humanist Ass'n*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring) (identifying five paradigms of Establishment Clause cases unexplained by *Lemon*); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (overlapping both clauses when applying the “ministerial exception”).

Clause.⁷⁸ It used to be that the government could violate the anti-establishment mandate by providing various types of aid to religious entities, particularly religious schools.⁷⁹ Now, the apparent neutrality of the government assistance toward religious and non-religious entities determines its consistency with the anti-establishment mandate.⁸⁰ With monetary aid to religious groups, neither the amount, either absolute or by percentage, or the reality that some of it will fund religious proselytizing signal unconstitutionality.⁸¹ A law may list religious entities specifically as recipients of largesse, so long as a secular purpose is evident from a list of beneficiaries, which includes more than exclusively religious entities.⁸² Government use of religious symbols is increasingly permissible so long as the Court determines that the government does not act with a purpose to proselytize religion.⁸³

Neutrality guides the Free Exercise Clause inquiry as well, rather than the weight of the burden on religious practice.⁸⁴ In *Employment Division v. Smith*, the Court articulated this reinterpretation of free exercise doctrine.⁸⁵ Laws that are neutral on their face, such as the drug law before it, do not threaten the principle of religious liberty contained within the clause, and so do not raise the

78. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (describing the methodology for finding discriminatory purpose under the Free Exercise Clause, and quoting Justice Harlan, speaking in “the related context of the Establishment Clause,” to say that “[n]eutrality in its application requires an equal protection mode of analysis”) (alteration in original) (first citing *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979) (articulating the “because of,” not merely “in spite of” standard) and then citing *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

79. *E.g., Lemon*, 403 U.S. 602 (invalidating state salary supplements to teachers of secular subjects in religious schools).

80. *See, e.g., Am. Humanist Ass’n*, 139 S. Ct. at 2086–87; *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

81. *See, e.g., Zelman*, 536 U.S. 639 (upholding vouchers despite ninety-six percent of participants being enrolled in private religious schools); *Id.* at 665 (O’Connor, J., concurring) (noting that the absolute amount of aid provided by the school voucher program paled in comparison to the billions of dollars of aid that flow from the government to religious organizations through tax exemptions and other programs). *Compare Lemon*, 403 U.S. 602 (finding unconstitutional state salary supplements to teachers of secular subjects in private religious schools), *with Zelman*, 536 U.S. 639.

82. *Walz*, 397 U.S. at 666–67 (upholding state tax exemption for “property used exclusively for religious, educational or charitable purposes”). *But see Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating sales tax exemption exclusively for books and periodicals proselytizing religion).

83. *See Am. Humanist Ass’n*, 139 S. Ct. 2067 (upholding permanent display of thirty-two-foot high Latin cross memorializing World War I soldiers); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

84. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Emp’t Div. v. Smith*, 494 U.S. 872, 879–80 (1990).

85. 494 U.S. 872, 881 (1990) (distinguishing, rather than overruling, prior cases in which the Court had held that the Free Exercise Clause “bars application of a neutral, generally applicable law to religiously motivated action”).

level of judicial review.⁸⁶ A showing of purpose to regulate the conduct of individuals “only when they are engaged in [it] for religious reasons,” once again mirroring the Equal Protection Clause showing, is required.⁸⁷

This distinction initially seemed to contract the scope of application of the Free Exercise Clause from prior doctrine under which a substantial burden on religious practice would raise the level of review.⁸⁸ Soon after *Smith*, however, the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁸⁹ In that case, the Court held that a combination of several ordinances enacted by the City of Hialeah, which outlawed animal sacrifice, violated the free exercise rights of a Santeria church, which had recently moved into the area.⁹⁰ The ordinance, as enacted, prohibited animal “sacrifice,” but did not specifically mention religion.⁹¹ Relying specifically on the equal protection definition of when a discriminatory purpose sufficient to lift the level of review exists, the Court examined the structure of the facially neutral ordinance, and other evidence, and found a purpose, on the part of the City of Hialeah, “to target animal sacrifice by Santeria worshippers because of its religious motivation.”⁹² In so doing, the Court cautioned against “subtle departures from neutrality,’ . . . and ‘covert suppression of particular religious beliefs’”⁹³ and expressed a resolve to “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”⁹⁴

Increasingly, the rule of discriminatory purpose, which had seemed to contract the scope of the Free Exercise Clause, has become a tool of expansion as the Court locates an official purpose to target conduct because of its religious motivation in new circumstances. With respect to free exercise, it used to be that states could

86. *Id.* at 886 (rejecting the “private right to ignore generally applicable laws,” which strict scrutiny based on only a substantial burden on religious practice would create, as “a constitutional anomaly”).

87. *Id.* at 877–78.

88. *Hobbie v. Unemployment Appeal Comm’n*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

89. 508 U.S. 520.

90. *Id.* at 547.

91. *Id.* at 527.

92. *Id.* at 542; *see id.* at 540 (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)) (“That the ordinances were enacted ‘because of,’ not merely ‘in spite of,’ their suppression of Santeria religious practice, . . . is revealed by the events preceding their enactment.”) (citation omitted); *see also id.* (finding guidance in equal protection cases to conduct the analysis into whether the city acted with discriminatory purpose and noting Establishment Clause analysis is a “related context”).

93. *Id.* at 534 (citation omitted) (first quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971); and then quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)).

94. *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

choose not to include tax dollar payments to promote religious activities.⁹⁵ Now, the Court has changed its interpretation to find the failure to include religious entities in a general aid program to show a purpose to discriminate.⁹⁶ It has found the failure to include religious schools in generally available aid programs to evidence a purpose to discriminate in violation of the Free Exercise Clause.⁹⁷

Most recently, the Court has reviewed requests for emergency orders prohibiting application of restrictions imposed by state governors on religious exercise in response to the COVID-19 pandemic. Transmission of the virus at places of worship had proven to be a significant source of COVID-19 outbreaks.⁹⁸ The Court initially denied the requests in divided decisions⁹⁹ and then, in a similarly split decision, granted a request, finding that a set of New York restrictions were not “neutral because they single[d] out houses of worship for especially harsh treatment.”¹⁰⁰ The opinions in these cases show that four justices—and now the Court, after its composition has changed—would find a purpose to discriminate sufficient to invoke strict scrutiny and invalidate a particular restriction of religious practice based on a lesser evidentiary showing than the Court requires under the other rights guarantees.

Pandemic restrictions mention the activity of religious worship explicitly, but they group it with other secular activities. States explain the groupings as identifying categories of activities that pose similar risks of transmission of the disease. New York, for example, argued that religious gatherings posed a “super-spreader” potential greater than activities subject to lesser restrictions because of the distinct conduct that tends to characterize them.¹⁰¹ The

95. See *Locke v. Davey*, 540 U.S. 712 (2004) (holding that state refusal to fund a devotional theology instruction did not violate Free Exercise Clause).

96. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (determining that denial of church’s application for grant to purchase rubber playground surface violated the Free Exercise Clause).

97. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

98. Kate Conger et al., *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases.*, N.Y. TIMES, <https://nyti.ms/3iG8GJw> (July 10, 2020); Ryan Lizza & Renuka Rayasam, *Pence and the Power of Positive Thinking*, POLITICO (June 26, 2020, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly-coronavirus-special-edition/2020/06/26/pence-and-the-power-of-positive-thinking-489656>.

99. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.).

100. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 66 (2020) (finding that, apart from direct evidence of motivation, the restrictions are not “neutral because they single out houses of worship for especially harsh treatment,” without distinguishing the conduct that occurs in the houses of worship from the religious motivation).

101. *Id.*; *Opposition to Application for Writ of Injunction at 22, Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87) (they “tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended

states' explanations that their restrictions of places of worship are based upon the conduct that tends to occur at them, rather than the religious motivation for it, is at least plausible.¹⁰² And a plausible explanation based in conduct for a disproportionate disadvantage placed by law on groups that exhibit protected traits¹⁰³—or for explicit mention of such groups when receiving the benefit of legislation¹⁰⁴—is all that is required to dispel an inference of an unconstitutional discriminatory purpose under the doctrine of the Equal Protection and Establishment Clauses, which is supposed to guide the Free Exercise determination as well. Instead, the justices second-guess the explanations for the differences in treatment of activities and interpret states' explicit choices to restrict religious worship services as a choice to aim at the religious motivation, rather than worshippers' conduct. Both of these moves are inconsistent with established methodology¹⁰⁵ and expand the scope of the Free Exercise Clause right. It may well be that the inconsistent labeling signals a change of interpretation of the core meaning of the free exercise guarantee from freedom from laws targeting conduct because of its religious motivation to freedom from laws placing a substantial burden on religious practice.¹⁰⁶ But until the Court changes the rule explicitly, it is important to recognize the inconsistency in locating a purpose to discriminate on the basis of a protected trait across the rights guarantees.

period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. . . . Particularly because COVID-19 may be spread by infected individuals who are not yet, or may never become, symptomatic, the aforementioned features combine to generate an unusually high likelihood that infected persons will be present, that they will expel respiratory droplets and aerosols in close proximity to others and infect them, and that those newly-infected persons will further spread the virus after they disperse and go their separate ways”).

102. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (finding California's restrictions consistent with the Free Exercise Clause of the First Amendment despite placing restrictions on places of worship, “[s]imilar or more severe restrictions apply to comparable secular gatherings, . . . [a]nd the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”).

103. *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

104. *See Walz v. Tax Comm'n.*, 397 U.S. 664 (1970).

105. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., joined by Thomas, J., and Gorsuch, J., dissenting) (arguing the state “may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship”); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (mem.) (Alito, J., dissenting from denial of application for injunctive relief) (describing Nevada Governor Sisolak's directive to prevent the spread of COVID as “discriminatory treatment of houses of worship [and] violat[ing] the First Amendment”).

106. *See Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.) (presenting the question of whether to reconsider *Smith*).

II. ANALYZING A RECENT EXPANSION

In *NIFLA*, the Court held that a requirement, enacted by the California Legislature, that licensed medical facilities that provide limited pregnancy services post a notice informing clients that the state provides full services, including abortion, unconstitutionally compelled the facilities, which were primarily religiously affiliated and ideologically opposed to abortion, to speak.¹⁰⁷ This recent expansion shifts the balance between rights-holders and the authority of democratically elected bodies to regulate in ways that will contract the abilities of those democratically elected bodies to choose to provide consumers more information to aid their decision making in all sorts of contexts where speakers communicate with clients or potential clients about products or services.¹⁰⁸ Additionally, however, the recent result, and its reasoning, expands the rights of speakers motivated by religious belief and contracts the ability of democratically elected governments to implement a different policy choice as to the appropriate balance of power between speaker and listener, one crafted specifically, in the case before the Court, to protect women's rights. The overlap of free speech, religious liberty, and women's rights provides an opportunity to identify the strands of each in the decision, and to examine how they do, and should or should not, intersect. The Court identified and changed key distinctions in doctrine and also suggested strongly that the evidence was sufficient to show a government purpose to discriminate against the speakers because of their viewpoints. The opinion thus provides a vehicle to analyze the consistency of its methodology for identifying and changing key distinctions in doctrine and its evaluation of evidence sufficient to show a purpose to discriminate with the methodologies applied to make similar determinations regarding other constitutional rights, and to identify the possible creep of priority protection for religiously motivated conduct, which characterizes the free exercise right, into the interpretation of the scope of the free speech guarantee.

A. *National Institute of Family & Life Advocates v. Becerra*¹⁰⁹

Crisis pregnancy centers, or, according to more recent terminology, pregnancy centers, exist as part of the overall anti-abortion

107. 138 S. Ct. 2361 (2018) (invalidating a notice provision applied to unlicensed facilities as well).

108. See McNamara & Sherman, *supra* note 9, at 197 (noting that the *NIFLA* decision "significantly expand[s] protection for speech in the commercial marketplace").

109. 138 S. Ct. 2361 (2018).

movement.¹¹⁰ They came into being as states began to decriminalize abortion, and the Court interpreted the constitutional right to choose abortion in *Roe v. Wade*.¹¹¹ Up to 4,000 currently operate across the United States, mostly under the auspices of several large, faith-based organizations, which provide advice and financial support.¹¹² The National Institute for Family and Life Advocates (NIFLA), the lead plaintiff in the lawsuit, is one such umbrella organization.¹¹³ The centers actively advertise to attract women experiencing an unplanned pregnancy and at risk of choosing abortion, and often locate near clinics that provide abortions.¹¹⁴ Their avowed purpose is to persuade these women to choose childbirth. They do so by offering free counseling, products, and services to support the choice.¹¹⁵ Initially mostly unlicensed, the centers are increasingly acquiring licenses to operate as medical facilities, which gives them access to government funding and allows them to

110. See Olivia Aveni Briscoe, *Pregnancy Centers in Virginia and Nationwide Deserve Recognition, Respect*, NAT'L INST. FAM. & LIFE ADVOCS., <https://nifla.org/pregnancy-centers-in-virginia-and-nationwide-deserve-recognition-respect/> (last visited Jan. 2, 2021) ("The pregnancy center community is one of the most essential aspects of the pro-life movement in our society today.").

111. 410 U.S. 113 (1973); see Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, 2 GUTTMACHER REP. ON PUB. POL'Y (2002), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/tgr/05/2/gr050204.pdf>.

112. *Id.*

113. NIFLA, <https://nifla.org/> (last visited Jan. 6, 2021) ("Founded in 1993, the National Institute of Family and Life Advocates provides pro-life pregnancy centers and medical clinics with legal counsel, education, and training. While supplying legal support needed to protect the work of these life-affirming centers and better equipping them to serve in their communities, NIFLA continues to grow and now represents more than 1,500 member centers across the country.").

114. See Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Area*, N.Y. TIMES (Jan. 4, 2013), <https://nyti.ms/X7ppVE> ("As [pregnancy centers] expand, they are adding on-call or on-site medical personnel and employing sophisticated strategies to attract women, including Internet search optimization and mobile units near Planned Parenthood clinics."); Joanne D. Rosen, *The Public Health Risk of Crisis Pregnancy Centers*, GUTTMACHER INST. (Sept. 10, 2012), <https://www.guttmacher.org/journals/psrh/2012/09/public-health-risks-crisis-pregnancy-centers> ("Many [pregnancy centers] advertise their services on their Web sites, in high school and college newspapers, on buses and subways, and on billboards.").

115. See Belluck, *supra* note 114 ("With free pregnancy tests and ultrasounds, along with diapers, parenting classes and even temporary housing, pregnancy centers are playing an increasingly influential role in the anti-abortion movement."); Briscoe, *supra* note 110 ("Pregnancy centers provide women and their families with medical exams and ultrasounds, prenatal care, STI testing and treatment, fertility awareness methods, caring consultation, parenting education programs, material assistance to families, after-abortion support and recovery, and more."); Margaret H. Hartshorn, *The History of Pregnancy Help Centers in the United States*, HEARTBEAT INT'L (Mar. 13, 2007), https://www.heartbeatinternational.org/pdf/History_of_Centers.pdf ("Approximately [two] million Americans are served yearly, by professional staff and thousands of trained volunteers, providing confidential medical services, education, material aid, and a wide variety of care and support services, all at no cost to clients.").

provide services such as medical exams and ultrasounds.¹¹⁶ Many different types of licensed medical professionals may staff the centers.¹¹⁷ The centers, and those who support their activities, cite the one-on-one counseling, and the free ultrasounds they provide, as critical and effective tools to persuade women to choose child-birth.¹¹⁸

Abortion choice supporters have always criticized some of the activities of pregnancy centers as providing incomplete, inaccurate, or misleading information and counseling about risks and options to the women who seek their services, who are in “crisis” because of an unexpected pregnancy and who are “disproportionately young, poorly educated or poor.”¹¹⁹ The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act)¹²⁰ stemmed from these types of concerns. An Assembly committee received evidence that the “nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers” operating in the state were “disseminating medically inaccurate information about [available] pregnancy options”¹²¹ According to the bill analysis, the pregnancy centers “present themselves as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions.”¹²² These centers, the bill analysis continued, employ “intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making

116. *About NIFLA*, NAT'L INST. FAM. & LIFE ADVOCS., <https://nifla.org/about-nifla/> (last visited Jan. 2, 2021) (describing “two key programs to support compliance and conversion for pregnancy centers [to licensed medical facilities]”).

117. *Nat'l Inst. of Fam. & Life Advocs. v. Harris*, 839 F.3d 823, 831 (9th Cir. 2016) (listing the staff of Pregnancy Care Clinic, the licensed pregnancy center plaintiff in the case, as including “two doctors of obstetrics and gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers”).

118. *See* Belluck, *supra* note 114 (quoting Jeanneane Maxon, vice president for external affairs at Americans United for Life, an anti-abortion group, who describes the centers’ “ground level, one-on-one, reaching-the-woman-where-she’s-at approach”); *About NIFLA*, *supra* note 116 (“NIFLA recognized the importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women more than two decades ago, and has been pioneering the way in which the pro-life movement uses this important tool ever since. Ultrasound offers a window to the womb, and this impacts a woman’s decision to choose life . . .”).

119. *Rosen*, *supra* note 114; *see* Belluck, *supra* note 114 (quoting Jean Schroedel, a Claremont Graduate University politics professor, to say that “there are some positive aspects” to centers, but that “things pregnant women are told at many of these centers, some of it is really factually suspect”); *see also* Amy. G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, *AMA J. ETHICS* (Mar. 2018), <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03>.

120. CAL. HEALTH & SAFETY CODE §§ 123470–123473.

121. Joint Appendix at 84, 86, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

122. *Id.* at 85.

fully-informed, time-sensitive decisions about critical health care.”¹²³

Although the activities of pregnancy centers prompted legislative research and action, the FACT Act defined the class of regulated facilities more broadly.¹²⁴ The FACT Act’s purpose, according to the bill’s author, was “to provide reproductive health assistance to low income women” and, more specifically, “because pregnancy decisions are time sensitive,” to ensure that “California women . . . receive information about their rights and available services at the sites where they obtain care.”¹²⁵ The Act required all licensed covered facilities¹²⁶ to disseminate¹²⁷ a notice stating, “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”¹²⁸

123. *Id.*

124. CAL. HEALTH & SAFETY CODE §§ 123470–123473; Nat’l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 830 (9th Cir. 2016), *rev’d & remanded by* 138 S. Ct. 2361 (2018) (“[T]he Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics unable to enroll patients in state-sponsored programs to state the existence of these services. Assem. Bill No. 775 § 1(c)–(d).”); Joint Appendix, *supra* note 121, at 86 (“Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.”).

125. Joint Appendix, *supra* note 121, at 84.

126. The FACT Act defines a licensed covered facility as “a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services,” and that also satisfies two or more of the following criteria:

- (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
- (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
- (3) The facility offers pregnancy testing or pregnancy diagnosis.
- (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
- (5) The facility offers abortion services.
- (6) The facility has staff or volunteers who collect health information from clients.

CAL. HEALTH & SAFETY CODE § 123471.

127. The FACT Act requires that the Licensed Notice be disclosed by licensed facilities in one of three possible manners:

- (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
- (B) A printed notice distributed to all clients in no less than 14-point type.
- (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.

Id. § 123472(a)(2).

128. *Id.* § 123472(a)(1).

Prior to the effective date of the FACT Act, NIFLA and other organizations filed a lawsuit arguing that its notice provisions¹²⁹ violated their federal constitutional free speech rights by compelling them to speak a government message contrary to their beliefs.¹³⁰ The Court accepted review of the case at the preliminary injunction stage and reversed the decision of the court of appeals which, like the district court, had found the regulated entities to have no likelihood of success under established precedent.¹³¹

With respect to the licensed center notice, the court of appeals had addressed both the general question of where to place the circumstances presented by the case within existing free speech doctrine, to determine the level of review and analysis, and the specific question whether the circumstances of the FACT Act, neutral on its face, revealed a purpose by the California Legislature to discriminate against the pregnancy centers because of their viewpoints, which would provoke strict scrutiny review. The court first found no purpose to discriminate against the pregnancy centers' viewpoint.¹³² In so doing, it reviewed the classification of centers subject to the notice requirement and found the exemption of facilities enrolled in state programs to be sufficiently explained by the fact that they "already provide all of the publicly-funded health services outlined in the [notice]."¹³³ The court next addressed the doctrinal question of what level of scrutiny should apply to the circumstances of the notice imposed on licensed pregnancy centers, and on the licensed medical professional within them, presented by the case. Although it acknowledged that the notice requirement was content-based, it considered the exceptions to the general rule that content-based regulations of speech provoke strict scrutiny. It quickly rejected application of the *Zauderer* exception¹³⁴ but found the notice requirement analogous to the one imposed on abortion providers

129. In addition to the licensed center notice, the FACT Act requires unlicensed clinics to post a notice informing clients that they were unlicensed. *Id.* § 123472(b). The licensed center notice is the focus of this article.

130. *Nat'l Inst. of Fam. & Life Advoc. v. Harris*, 839 F.3d 823 (9th Cir. 2016).

131. *Id.* at 845.

132. *Id.* at 835 ("The Act . . . does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services.").

133. *Id.*

134. *Id.* at 834 n.5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. . . . Commercial speech 'does no more than propose a commercial transaction.' . . . The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.") (citations omitted) (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985), then quoting *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010)).

upheld by the Court in *Casey*.¹³⁵ It noted a split among the circuits as to whether the *Casey* plurality had identified a level of review for regulations of medical professional client counseling of the same type, and concluded that, in its brief statements, it had not. Applying circuit precedent, the court of appeals reasoned that “the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum.”¹³⁶ On one end of the continuum, when a professional engages in “public dialogue,” the context of the speech is “constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection,” implemented by strict scrutiny review of government actions that alter the content of the speech.¹³⁷ On the other end of the continuum, “lies professional conduct, where the speech at issue is, for example, a form of treatment.”¹³⁸ When regulating conduct, “the state’s power is great, even though such regulation may have an incidental effect on speech,” so content-based actions imposed on professional conduct, which occurs by means of speech, are subject to rational basis scrutiny.¹³⁹ Professional client counseling exists at the midpoint, where:

“the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it” because “[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.”¹⁴⁰

At this midpoint, the court determined that an intermediate level of review best balanced the speech rights professional speakers retain, when counseling clients, and the enhanced authority of the state to regulate their speech to protect the interests of their client listeners.¹⁴¹

135. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–75 (2018); *see also id.* at 2372 (rejecting application of the disclosure standard established in *Zauderer*, 471 U.S. 626, on the ground that pregnancy facility speech is not commercial speech).

136. *Harris*, 839 F.3d at 839; *see Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014), *overruled in part by Becerra*, 138 S. Ct. 2361; *see also King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 568–70 (4th Cir. 2013).

137. *Harris*, 839 F.3d at 839.

138. *Id.*

139. *Id.* at 839 (quoting *Pickup*, 740 F.3d at 1229).

140. *Id.* (alteration in original) (quoting *Pickup*, 740 F.3d at 1228).

141. At the mid-point, the court found applying intermediate scrutiny is consistent with the principle that “within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished,” *Pickup*, 740 F.3d at 1228, but that

The court found the California notice to apply to professional speech at this midpoint. The distinction among speech between a professional and a client and other types of speech, it explained,

stems from the belief that professionals, “through their education and training, have access to a corpus of specialized knowledge that their clients usually do not” and that clients put “their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity.”¹⁴²

“There is no question,” according to the court, “that [pregnancy center] clients go [there] precisely because of the professional services [they] offer[], and that they reasonably rely upon the[m] for [their] knowledge and skill.”¹⁴³ The court applied intermediate scrutiny to the California notice and upheld it.¹⁴⁴

The Supreme Court disagreed with the evaluation of the evidence of a purpose to discriminate against the pregnancy centers on the basis of their viewpoints and with its doctrinal reasoning. As to purpose, it noted “serious concerns” that sufficient evidence of viewpoint discrimination by the California Legislature was present, which Justice Kennedy, joined by three other justices from the majority, echoed in concurrence.¹⁴⁵ Rather than rest its decision on that ground, however, the Court based its finding that the petitioners had shown a likelihood of success on the merits on its analysis of doctrine, and its placement of the notice as outside the exceptions that would provoke some type of deferential review.¹⁴⁶ It rejected application of the *Zauderer* exception on multiple grounds, including that mention of abortion fails the requirement that the content of the information the state requires be delivered be “uncontroversial.”¹⁴⁷ It rejected application of the *Casey* exception on the ground that it applied only to information-delivery requirements imposed

professionals also do not “simply abandon their First Amendment rights when they commence practicing a profession.” *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014).

142. *Harris*, 839 F.3d at 839 (alteration in original) (quoting *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014)).

143. *Id.* at 840.

144. *Id.* at 842 (“We conclude that the Licensed Notice is narrowly drawn to achieve California’s substantial interests.”).

145. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2370 n.2 (2018); *id.* at 2378 (Kennedy, J., concurring).

146. *See id.* at 2378–79 (Kennedy, J., concurring) (expressing relief that the Court’s analysis was not confined to finding a discriminatory purpose in the circumstances of the particular case before the Court because then “some legislators might have inferred that if the law were reenacted with a broader base and broader coverage it then would be upheld”).

147. *Id.* at 2372.

on medical professionals as part of obtaining informed consent to a medical procedure.¹⁴⁸ It also rejected the court of appeals' conclusion that a standard other than strict scrutiny should apply to information-delivery requirements imposed on professional speech.¹⁴⁹ Instead, it likened "professional speech" to fully protected public issue speech, which the rule of strict scrutiny of content-based classifications applies.¹⁵⁰ Harkening to the principle of an unrestricted marketplace of ideas, it noted the diverse views that professionals may have, which lead to "good-faith disagreements" about topics within their fields and listed instances of dangerous censorship of speech by medical professionals and by authoritarian governments in the past as warnings of the consequences of upholding laws, like the one before it, which "manipulat[e] the content of doctor-patient discourse"¹⁵¹

B. The Doctrinal Distinction Between the Circumstances of Client Counseling

The notice provision imposed on licensed professional client counseling at pregnancy centers queued up a question at the heart of free speech doctrine. The Court had to classify the novel circumstances of the communications at issue in the case within existing doctrine, which draws a highly significant distinction between communications within the public realm of information and ideas, which must remain unrestricted by government judgments about their content,¹⁵² and communications instrumental to transactions among individuals. The Court has always interpreted the Constitution to permit the government to regulate to fulfill its function of protecting the health, safety, and welfare of its citizenry.¹⁵³ The

148. *Id.* at 2373–74.

149. *Id.* at 2371.

150. *Id.* at 2375 (finding no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles," but stating that it did not "foreclose the possibility that some such reason exists").

151. *Id.* at 2374.

152. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

153. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1652 (2009) ("There are countless ways in which civil liability implicates free speech, such as the torts of defamation, invasion of privacy, intentional infliction of emotional distress, and the right of publicity. Even tort actions for negligence can be brought in response to a person's speech. Numerous contracts restrict speech, such as employment contracts, settlement arrangements, and confidentiality agreements. Trade secret law can also restrict speech, as can other forms of intellectual property law. There are numerous restrictions in condos, cooperatives, and apartment buildings about when, where, and how residents can display signs or otherwise engage in speech.") (footnotes omitted).

new circumstances had attributes that could put the communications on either side of the line. On the one hand, the speakers self-identify as proselytizing ideology, and particularly a deeply felt ideology commanded by religious doctrine. They also self-identify as extraordinarily burdened by the requirement that they acknowledge the existence of the procedure they oppose because any information, and particularly this most detested information, injected into advocacy changes its content and disrupts their abilities as speakers to curate the information and opinions they present to persuade their listeners to agree with them and choose the course of conduct they recommend. Proselytizing religion is a type of communication that classifies as most highly protected from government intervention. On the other hand, the speakers do so in their roles as licensed medical professionals, providing counseling and services to individuals clients drawn to listen because of the professionals' greater expertise, and performing procedures and using tools, which they must have a government issued license to deploy. In these ways, the communications track as instrumental to providing individualized services, a type of communication which governments have had longstanding constitutional authority to choose to regulate to protect the abilities of citizen listeners to make decisions about their own health, safety, and welfare.

Classifying the circumstances of the pregnancy center notice required the Court to compare the contexts of the communications and the form and content of the information-delivery requirements in doctrine, and their links to implementing free speech principles. With respect to the context of the communication, the Court did not classify the full range of professional client counseling as the same doctrinally, or even the full range of licensed medical professional counseling of pregnant women about their medical procedure options. Instead, the Court distinguished the circumstances of client counseling in pregnancy centers from facilities that provide abortions and, to a lesser extent, the form and content of the notice from the information-delivery requirements that remain subject to lower level review. This doctrinal distinction leaves the pregnancy center communications, curated to influence the clients' choices, in place and unsupplemented, and, as is the nature of doctrinal distinctions, protects communications of the same type from regulation as well. At the same time, the distinction leaves in place the authority of states to continue to require doctors performing abortions, and other procedures important to women's health, to deliver information curated by the state to influence the clients' choices. Both

results diminish women's rights to exercise autonomy in health and life decision making.

The methodology of changing the doctrinal distinction that expanded the scope of women's right to equal protection provides a background against which to examine this harmful combination of results for consistency. This Part examines each subpart of the Court's reasoning—rejecting application of the *Zauderer* and *Casey* exceptions and application of the new exception for professional client counseling—in turn.¹⁵⁴

1. *Zauderer*¹⁵⁵

The *Zauderer* exception, understood to apply to commercial speech, is not the more natural fit of the existing exceptions to the circumstances of the case. The Court discussed it briefly and dismissed its application to the notice requirement at issue on multiple grounds.¹⁵⁶ All of these will further liberate commercial speakers from regulation for the purpose of providing more information to the customers and clients they seek to persuade. One particularly impacts the authority of states to regulate to protect the rights of women to receive information important to their decision making.

The content of the notice, according to the Court, failed to meet the requirement that it be “purely factual and uncontroversial” because it included mention of the availability of abortion, which is “anything but an ‘uncontroversial’ topic.”¹⁵⁷ Situated within the reasoning of the exception, the requirement that an information-delivery requirement be “uncontroversial” implements constitutional principle by segregating ideological messages that advocate opinions imposed on individuals outside the commercial context from requirements that commercial speakers deliver additional facts to consumers to enhance their abilities to make informed, personal choices among products and services.¹⁵⁸ Corporate speakers

154. See *Becerra*, 138 S. Ct. at 2379–89 (Breyer, J., dissenting) (making a number of the same points as are made in these parts, without a particular focus on women's rights or religious liberty and joined by Justices Ginsburg, Sotomayor, and Kagan).

155. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626 (1985).

156. *Becerra*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651) (noting that the nature of the communication between medical professionals and clients seeking pregnancy-related counseling and services is different than the “commercial advertising” to clients, or potential clients, about the speaker's “terms [of] service,” to which *Zauderer*'s “lower level of scrutiny” applies and the content of the notice—“disclos[ing] information about *state*-sponsored services”—“in no way relates to the services that licensed clinics provide”).

157. *Id.* at 2372.

158. *Zauderer*, 471 U.S. at 651 (distinguishing the government's action to prescribe orthodoxy in commercial advertising from prescribing “what shall be orthodox in politics,

have relied upon it to narrow the *Zauderer* exception to gain protection from particular forms of information-delivery requirements, such as graphic warnings on cigarette packages, which they have successfully argued send an opinion, rather than only facts.¹⁵⁹

The contents of these information-delivery requirements, and the claims based on them, however, are different from the content of the California notice and the claims that may be based upon it. The content of the California notice delivered a fact about abortion—it is a service supported by resources available from the state. Perhaps even more significantly, the contents of the California notice were the same as the *Casey* information-delivery requirement, which required doctors to deliver factual information about child-birth and which the Court reaffirmed as consistent with the free speech guarantee.¹⁶⁰

The Court's quick conclusion that mere mention of abortion is controversial, and thereby expands the right of speakers to avoid government regulations that include it, requires examination because it suggests a slip of ideological preference into the definition of the scope of the free speech right. The Court seems to say that mention of the fact of the availability of abortion is controversial, and akin to opinion advocacy, because in the public realm its appropriateness remains hotly contested or perhaps because the speakers upon whom the information-delivery requirement is imposed disagree strongly with the decisions that have made it a legal option, and so experience the imposition of the information-delivery requirement in this way. In their strong objections—based on commands they understand to come from an authority greater than themselves and superior to the state—the pregnancy center

nationalism, religion, or other matters of opinion”) (quoting *W. Va. State Bd. of Educ. v. Barrette*, 319 U.S. 624, 642 (1943)).

159. Ellen P. Goodman, *Corporate First Amendment Grab: Three Trends and a Data Application*, MEDIUM (May 29, 2016), <https://ellgood.medium.com/corporate-first-amendment-grab-three-trends-and-a-data-application-5046103e6628> (“With varying degrees of success, groups like the Washington Legal Foundation and Cato Institute have challenged country-of-origin labels, mercury disposal labels, graphic tobacco warnings, calorie disclosures, airline tax disclosures, obesity warnings for sugary sodas, and product sourcing disclosures. They argue that these government-mandated disclosure regimes mask ideological agendas, and that the information that must be disclosed is either not purely factual or tendentious, or both.”).

160. The *Casey* plurality's brief discussion did not explicitly require that the information the state required doctors to deliver be uncontroversial. It emphasized, however, that it should be “truthful, nonmisleading information,” which presumably implements the same constitutional principle. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

speakers resemble the speakers whose claims generated compelled speech doctrine.¹⁶¹ But there the resemblance ends.

The controversial nature of the topic of abortion in public discussion or the perception of particular speakers that the mere mention of the procedure is opinion advocacy, however strongly held, cannot change the constitutional significance of the words the state requires them to disseminate. The availability of abortion is a fact, because the decisions to make the procedure legal and available have been made by means of judicial interpretation and through the democratic process. The legality of abortion and the availability of resources to support it are facts in California, just like the legality of childbirth and the availability of resources to support it were facts in Pennsylvania.¹⁶² Distinguishing between the two circumstances, on the ground that one presents controversial opinion and the other does not, does not link to implementing free speech principles.

With the link from application to principle stripped away, the possibility arises that the circumstances of the case influenced this identification of a distinction in the doctrine, which will reverberate far beyond them. Specifically, the possibility arises that the ideology of the speakers, upon whom the information-delivery requirement was imposed, influenced the determination of which content is controversial within the meaning of the free speech guarantee, and which is not. And here, that ideology stems from sincere and strongly held religious beliefs. In this way, and according to this close examination, the Court's conclusion that the mere mention of abortion imposed on religiously motivated medical professionals—but not childbirth imposed on those acting according to a secular ideology—is “controversial” and tips the constitutional balance and risks incorporating the religious motivation of medical professionals when counseling clients into the definition of the scope of the free speech right. This potential for priority protection for religiously motivated speakers, to avoid disclosing a fact they deem controversial, would reach beyond medical professionals, to the full range of product and service providers subject to the *Zauderer* exception. Women need products and services to exercise their rights, and they need facts about those products and services to make

161. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting state government from requiring a Jehovah's Witness to use his vehicle license plates to display the state motto “Live Free or Die,” which he found repugnant to his religious beliefs); *Barnette*, 319 U.S. 624 (preventing enforcement of a regulation forcing Jehovah's Witnesses to salute the American flag in schools, which would violate the religion's command to “not bow down thyself . . . nor serve” any “graven image”).

162. *Casey*, 505 U.S. at 854–55.

informed decisions about how to exercise them. Recognizing and challenging the creep of religious belief into the definition of the constitutional right against compelled speech is crucial to protecting the authority of democratically elected bodies to regulate to protect women's rights.

2. *Casey*¹⁶³

The nature of the professional-client counseling communication and the content of the information-delivery requirement in *Casey* looked much like the nature of the communication and the content of the notice requirement in *NIFLA*. In both, licensed medical professionals counseled individual pregnant clients about their health care options in circumstances where a choice to undergo a medical procedure must be made and provided services, including medical procedures, to implement and support the clients' choices. The information-delivery requirements, to which the professional speakers objected, listed resources available from the state to support the client's choice of medical procedures that the facility did not provide. The *NIFLA* Court nevertheless distinguished the nature of the communications by describing the *Casey* requirement as a "regulation of professional conduct that incidentally burden[ed] speech" whereas the California licensed facility notice regulated "speech as speech."¹⁶⁴ According to the Court, the *Casey* requirement was "incidental" because it regulated speech "only as part of the practice of medicine," mandating that a medical professional provide a patient "certain specific information" as part of the traditional process of obtaining consent to perform a medical procedure.¹⁶⁵ By contrast, the California notice by form and content did not fit the model of informed consent "firmly entrenched" in American law because it was not "tied to a procedure" and did not, in addition to listing state resources supporting alternate choices, provide information about the risks and benefits of the procedures the facilities provide.¹⁶⁶ The Court noted as well, in summary, that it "d[id] not question the legality of health and safety warnings long considered permissible,"¹⁶⁷ which presumably in form and content extend beyond the

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

164. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018).

165. *Id.* at 2373.

166. *Id.*

167. *Id.* at 2376.

narrow confines of informed consent to a procedure a medical professional proposes to provide.¹⁶⁸

The Court did not directly link its fine distinctions between the types of licensing medical professional client counseling communications or the content of the information-delivery requirements to free speech principles.¹⁶⁹ This link would explain why speech preceding a procedure that the medical professional proposes to perform defines the outer boundary of the state's authority to regulate professional speech to serve client listeners' interests in full information to aid their decision making. In fact, in its discussion of *Casey* and its application, the Court focused exclusively on the comparative proximity of medical professional speakers to performing procedures and did not identify, or differentiate according to their constitutional significance, the interests of the client listeners in receiving complete information about medical care alternatives at all. Instead, the difference it spotted, and repeatedly emphasized, is that the nature of the communication and the form and content of the *Casey* requirement is consistent with "[l]ongstanding," "traditional," and "firmly entrenched" understandings of the scope of government regulation of the interactions between medical professionals and clients.¹⁷⁰ The California requirement, however, imposed on a facility as a notice posted to all its clients advising them of resources relevant to them all because of their shared health condition, to the Court, seems new.¹⁷¹

The lesson of the evolution of the doctrine of women's rights is that traditional understandings of what the Constitution's broad principles mean, in application to particular practices, do not legitimize current interpretations of these applications, when the circumstances of regulation and the exercise of the rights have changed. The California notice requirement addresses the new circumstance of facilities using their state-licensed status to draw low-income clients in with promises of client-centered counseling. This advice is offered for free and of the type traditionally offered by medical professionals, but may often be decidedly untraditional because the medical professional's counseling and advice may prioritize an ideology that dictates choices according to an overriding divine mandate, rather than for reasons that relate to the risks and

168. See Reply Brief for Petitioners at 16–18, *Becerra*, 138 S. Ct. 2361 (No. 16-1140) (arguing that protecting NIFLA's rights would not undermine routine disclosure requirements).

169. *Becerra*, 138 S. Ct. at 2385 (Breyer, J., dissenting) (concluding that the distinction "lacks moral, practical, and legal force").

170. *Id.* at 2372–73.

171. *Id.* at 2373–74.

benefits of alternate choices based on the client's particular physical, social, and economic circumstances.¹⁷² Nothing in the distinction between old and new circumstances of providing medical counseling and services to pregnant clients explains why the balance between speakers' rights and the authority of the state to regulate to provide full information to aid client decision making differs in the two circumstances. In fact, the way many abortions occur has changed. A third of early abortions do not occur by means of a medical procedure,¹⁷³ a reality that the Court seems not to have recognized when relying on traditional practices to ground its result. So, what was old is now new. Medical technology has outpaced the precedent that interprets its constitutional significance, at least as described by the Court.

Once again, with a grounding in principle removed, the distinction between the essentially similar circumstances of medical professional counseling suggests a preference among speakers, because of what they say or, perhaps, why they say it.¹⁷⁴ The preference appears even more vivid when viewed in combination with the states' retained constitutional authority to require doctors who perform abortions to deliver information outside the traditional informed consent boundaries of the "risks or benefits of th[e] procedure[]" and intentionally crafted to persuade women to make a personal health care choice to serve public priorities.¹⁷⁵ The apparent preference critically defines the scope of the free speech right, leaving in place the authority of states to continue to impose ever more burdensome speech requirements on abortion providers when counseling clients while carving from the state's reach medical professionals' client counseling motivated by the anti-abortion viewpoint which, by emphasis by the Court, aligns quite precisely with religiously motivated speech.¹⁷⁶ It could be that the Constitution permits neither the California nor the Pennsylvania types of regulation of the client counseling speech by licensed medical professionals. But the heads-I-win-tails-you-lose conclusion of the Court cannot be explained by reference to implementing constitutional principles. Like the *Zauderer* "controversial" distinction, it raises the possibility that particular circumstances of the speakers, the cause to

172. Bryant & Swartz, *supra* note 119.

173. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (June 8, 2020), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

174. *See Becerra*, 138 S. Ct. at 2388 (Breyer, J., dissenting) (suggesting the same possibilities).

175. *See id.* at 2373–74.

176. *Id.* at 2368.

which they are “devoted,” and perhaps the religious belief that motivates the devotion, have crept into the doctrine that defines the scope of the free speech right.

3. *Professional Speech*

After distinguishing the circumstances of the California covered facility notice from those that fall within exceptions to the rigorous review that applies to content-based speech regulations, the *NIFLA* Court rejected the court of appeals’ determination that mid-level review best implements constitutional principles in the circumstances of the California notice imposed on the medical professional speech to clients that occurs in pregnancy centers.¹⁷⁷ In so doing, it failed to reference the court of appeals’ “continuum” of types of professional speech, specifically its determination that client counseling differs from public advocacy in a way that should change the constitutional balance between speakers’ rights and states’ rights to supplement the information available to the client listeners. Instead, it frames the issue as whether it should treat the entire category of “professional speech” as “a unique category that is exempt from ordinary First Amendment principles.”¹⁷⁸ Not surprisingly, the Court found that it should not.

Addressing the broad range of “professional speech,” the Court linked full protection for it to fulfilling core constitutional principles. First, professional speech conveys valuable ideas and information. The Court has “long protected” the free speech rights of professionals in diverse contexts.¹⁷⁹ It has “stressed” that such protection is particularly important “in the fields of medicine and public health, where information can save lives.”¹⁸⁰ Second, content-based regulation of professional speech threatens harmful censorship by the government of “unpopular ideas or information” in the guise of fulfilling “legitimate regulatory goal[s].”¹⁸¹ With respect to medicine specifically, doctors’ “candor is crucial” to “help patients make deeply personal decisions”¹⁸² Throughout history, governments have “manipulat[ed] the content of doctor-patient discourse’ to increase state power and suppress minorities”¹⁸³

177. *Id.* at 2375 (finding no “persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles”).

178. *Id.*

179. *Id.* at 2374.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (alteration in original).

Specifically, the Nazi regime “violated the separation between state ideology and medical discourse” by teaching German doctors that “they owed a higher duty to the ‘health of the Volk’ than to the health of individual patients.”¹⁸⁴ Third, regulation of professional speech threatens the emergence of truth through competition in an “uninhibited marketplace of ideas.”¹⁸⁵ Professionals “have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.”¹⁸⁶ The people, as marketplace participants, must choose what is true from amongst the wide variety of information and opinions that professionals may offer, rather than the government deciding which ideas should prevail.¹⁸⁷ Finally, the category of “professional speech” is a “difficult category to define with precision” and could extend to cover “a wide array of individuals.”¹⁸⁸ This broad definition would give states “a powerful tool to impose ‘invidious discrimination of disfavored subjects’” by requiring that individuals acquire a license to operate.¹⁸⁹

The reach of the Court’s reasoning is vast. Its application to the particular circumstance of pregnancy center speech to clients adds more weight to the conclusion that a speaker’s religious motivation has now entered into free speech doctrine to define the scope of the right. The abortion advocacy activities that receive the highest protection from government regulation occur in all venues of public communication—media, internet, streets, outside government buildings—and in all stages of the political process. Within the geographic vicinity of medical facilities that offer abortions, the speech occurs as abortion protests outside, sidewalk counseling of individual clients as they enter, and marketing campaigns geofenced to target women in the waiting rooms.¹⁹⁰ This speech can be graphic, accusatory, tailored to persuade the listeners to the ideological position, and can present information curated to persuade without disclosing that it is not accepted by medical

184. *Id.*

185. *Id.*

186. *Id.* at 2374–75.

187. *Id.* at 2375.

188. *Id.*

189. *Id.* at 2366 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n.19 (1993)).

190. *All About Geofencing*, CHOOSE LIFE MKTG. (Oct. 22, 2019), <https://www.chooselife-marketing.com/all-about-geofencing/> (describing how the geofencing “advertising tactic” allows a pregnancy center to set up a “virtual fence” around “[an] abortion clinic down the street from their office” so that “[w]hen ever an [sic] abortion clinic clients walk into that zone, they can be shown ads [on their phones] that give information about the pregnancy center’s free ultrasounds and pregnancy tests”).

professionals.¹⁹¹ Prioritizing speaker autonomy in these contexts fulfills free speech principles more generally because listeners receive access to everything, so that they may listen, evaluate, and participate as equals in the discussion and debate. All participants in the public exchange of ideas understand that the other speakers are speaking from their own experience, according to their own perspectives, and quite likely curating the information and advice they present to persuade listeners to engage in conduct that fulfills the speaker's interests, without respect to the different circumstances and interests of the listener.

The Court reasons that the Constitution grants medical professionals counseling clients in pregnancy centers the same scope of discretion to use their tools, and craft their speech, to fulfill their own persuasive objectives as public advocates possess when arguing opinions more generally. The Court seems to say that all individuals offering personalized services, whether operating under a state license or not, possess this broad right to curate their speech to clients to persuade them to a choice, which may implement an ideological mandate outside the particular circumstances of the client. But this cannot be correct. By law, many types of professionals must offer advice crafted to serve the best interests of the client and must avoid conflicts of interest that would influence their advice.¹⁹² Suppose a number of "bankers," "accountants," or well-funded investment advisors were committed to the belief that making high-return investments is the best way to lift low-income individuals out of poverty. Could they advertise free advice and counseling, set up pop-up clinics in the neighborhoods where their target clientele reside, provide information and advice curated to persuade them to acquire high-risk investments, and resources to support their decisions to do so? Could they provide tablets, Internet access, website addresses for making investments and trades, and remain

191. See Diana Pearl, *Free Speech Outside the Abortion Clinic*, THE ATLANTIC (Mar. 19, 2015), <https://www.theatlantic.com/health/archive/2015/03/free-speech-outside-the-abortion-clinic/388162/> (describing the experience of one woman who after arrival at an abortion clinic was surrounded by a "group of 12 wield[ing] signs covered in photos of aborted fetuses with the word 'murder' printed across them in big block letters"); see also Dennis Carter, *The COVID-19 Crisis Hasn't Stopped Abortion Protests. Now, Clinics Need Backup.*, REWIRE NEWS GRP. (Apr. 15, 2020, 4:21 PM), <https://rewire.news/article/2020/04/15/the-covid-19-crisis-hasnt-stopped-abortion-protests-now-clinics-need-backup/>.

192. For example, "Regulation Best Interest (BI) is a 2019 Securities and Exchange Commission (SEC) rule requiring broker-dealers to only recommend financial products to their customers that are in their customers' best interests, and to clearly identify any potential conflicts of interest . . ." Adam Hayes, *Regulation Best Interest (BI)*, INVESTOPEDIA (Feb. 4, 2021), [https://www.investopedia.com/what-is-the-sec-s-regulation-bi-best-interest-rule-4689542#:~:text=Regulation%20Best%20Interest%20\(BI\)%20is,financial%20incentives%20the%20broker%2Ddealer.](https://www.investopedia.com/what-is-the-sec-s-regulation-bi-best-interest-rule-4689542#:~:text=Regulation%20Best%20Interest%20(BI)%20is,financial%20incentives%20the%20broker%2Ddealer.)

constitutionally immune from a state mandate that these clinics post a notice stating that information about the risk of various types of investments is available on the Internet, and providing links to several websites? Does the Court really mean that lawyers, who deem prenuptial agreements imprudent, may advertise free pre-marriage counseling to individual clients, and in those conversations, selectively omit the option and otherwise craft the information and expert advice presented to persuade all clients to that choice, and escape discipline?¹⁹³

It could be that the Court really intends to sweep away almost all of the government's traditional authority to license professionals and regulate, under the auspices of the license, the activities of the professionals that take the form of speech. But this seems unlikely. And if the Court does not intend to interpret the Constitution to protect all instances of licensed professional client counseling, offered free, and out of strong and sincere ideological motivation, from information-delivery requirement regulation, then the question arises: What distinction rooted in constitutional principle explains why some instances, but not others, receive preference? Once again, the Court's doctrinal reasoning raises the possibility that concerns specific to the content of the notice at issue and the impact on the particular professional speakers played a role in the interpretation.

The Court's descriptions of the link to free speech principles exude an undertone of a threat to religious liberty. The references to government efforts to "suppress unpopular ideas" under the guise of valid public purposes and the use of state power to "suppress minorities" and "invidious[ly] discriminat[e against] disfavored subjects"¹⁹⁴ mirror the Court's increasing vigilance to root out by means of application of the free exercise guarantee, "subtle departures from neutrality" and "covert suppression of particular religious beliefs."¹⁹⁵ Then, a new move seems to happen when the Court imports the goal of preserving an uninhibited marketplace of ideas into the licensed professional client counseling relationship, which includes all the many perspectives that may result in "good faith disagreements" among professionals. Applied to the situation of pregnancy centers before it, achieving this goal means leaving the

193. *Cf. Becerra*, 138 S. Ct. at 2374–75 (offering, among the types of "good-faith disagreements" among professionals, the examples of "bankers and accountants" who "might disagree about the amount of money that should be devoted to savings," and "lawyers and marriage counselors [who] might disagree about the prudence of prenuptial agreements").

194. *Id.*

195. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

licensed professional client conversations within them unregulated by the state. The perspective that escapes regulation is that no client should choose abortion and, behind that, the “good faith” and “fair minded” perspective¹⁹⁶ that a command superior to the client’s personal circumstances should guide the licensed professional’s advice. The Court’s comments that the “candor” of medical professionals in client counseling is crucial and that substitution by medical professionals of a “higher duty” for concern for “the health of individual patients” presents a great danger to them are interesting, in light of its holding that states must allow medical professionals to omit relevant treatment options for the purpose of persuading patients to conform their health decisions to a higher command.¹⁹⁷ While the Court is highly concerned about professional speakers manipulating client decision making in the former situation, when driven to do so by state mandate, it simply does not perceive a problem in the latter, in which its interpretation forbids the state to intervene in any way. At least in application to the case before it, the distinction the Court draws precludes the state from choosing to protect health care consumers by counteracting gaps in information about options imposed by the overlay of religious belief onto the practice of medicine.

The link to constitutional principle that the Court articulates, merging all instances of “professional speech” that reflect religious perspectives, particularly endangers the ability of women to maintain and expand democratically enacted rights to support their autonomous decision making in the specific circumstances of client counseling. Governments must treat religious perspectives equally with all others when it regulates publicly directed speech.¹⁹⁸ The Court’s holding extends this equal treatment rule into the client counseling relationship, based on an implicit determination that the balance between speaker and listener interests in the two contexts are the same. But the Court never addresses the circumstances of pregnancy center clients, or the state’s claim that their medical condition, and economic circumstances, make them particularly in need of assistance in receiving full information about their options, rather than having to fend, in the marketplace of licensed

196. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (acknowledging that the view of marriage as “a gender-differentiated union of man and woman . . . has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world”); *id.* at 692, 712 (Roberts, C.J., dissenting) (“These apparent assaults on the character of fair-minded people will have an effect, in society and in court.”).

197. *Becerra*, 138 S. Ct. at 2374 (quoting *Wollschlaeger v. Governor*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring)).

198. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 825 (1995).

professional opinions, for themselves. Transposing the rule of equal treatment from the realm of publicly directed speech into the circumstances of licensed medical professionals' counseling means that states may not choose to ensure a base level of client focus in the licensed professional-client relationship, in the form of information to aid the nonexpert listeners, who depend upon the expert advice to make their own "deeply personal decisions," which impact the fulfillment and direction of their lives.¹⁹⁹ More explanation of why constitutional principle commands this balance between individual right and government authority to regulate in the specific and limited context of individualized client counseling by licensed professionals is required to dispel the inference that religious motivations of the speakers has entered into defining the scope of the free speech right.

C. Purpose

Although the *NIFLA* Court does not hinge its decision on a finding that the California Legislature acted with discriminatory purpose when it enacted the notice requirements, it notes, at the beginning of its opinion, that it had "serious concerns" that it did so.²⁰⁰ Hints, tentative conclusions, and historical examples of governments "manipulat[ing]" speech "to increase state power and suppress minorities" run through its opinion.²⁰¹ Justice Kennedy wrote separately, joined by the three justices who also joined the Court's opinion, to "underscore that the apparent viewpoint discrimination . . . is a matter of serious constitutional concern."²⁰² Petitioners did not develop evidence of discriminatory purpose through discovery, and because the case was only at the preliminary injunction stage, such facts had not been presented or refuted at trial.²⁰³

But the Court's selective recitation of facts, its multiple references to the suspicious scope of the FACT Act's coverage, and the content of briefs filed in the case make reasonably clear the

199. *Cf. Becerra*, 138 S. Ct. at 2374 (quoting *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring)).

200. *Id.* at 2370 n.2.

201. *Id.* at 2374.

202. *Id.* at 2378 (Kennedy, J., concurring).

203. *Id.* at 2389 (Breyer, J., dissenting) (noting that petitioners did not, at any level of review, present facts to support their claim that the Act's provisions disproportionately impact facilities with pro-life views); see Transcript of Oral Argument at 40–42, *Becerra*, 138 S. Ct. 2361 (No. 16-1140) (exhibiting that Justice Alito cited an amicus brief that says 98.5% of covered facilities are CPCs, but state counsel disputed that and said a state study showed a significant number of non-pro-life centers covered by the Act and noted the information-gathering problem because it depended upon centers self-reporting their covered status).

evidence the Court relied upon to express its “concerns” that, despite the facial neutrality of the California statute, unconstitutional discrimination against petitioners based upon their “pro-life (largely Christian belief-based)”²⁰⁴ viewpoint “apparent[ly]” occurred.²⁰⁵

1. *Disproportionate Impact*

The Court’s suggestions that the notice provisions are the product of unconstitutional viewpoint discrimination refer in large part to the disproportionate impact of its provisions on the pregnancy centers.²⁰⁶ The FACT Act identifies covered facilities according to the services they provide or advertise.²⁰⁷ The Court’s suggestions mirror petitioners’ argument that the description of services, combined with the exemptions the FACT Act provides, single out pregnancy centers in application.²⁰⁸ The inference of purpose to target pregnancy centers because of the viewpoints they express depends upon its conclusion that the exempt facilities are the same as covered facilities with respect to serving the state’s asserted purpose.²⁰⁹ But differences between the types of facilities exist. With respect to the licensed center notice requirement, general practice clinics require payment, whereas pregnancy centers offer their services for free.²¹⁰ The legislature aimed the licensed notice requirement particularly at addressing the information needs of low-income women. Therefore, exemption of general practice clinics from the notice requirement that applies to pregnancy centers can be explained by the different “patients the group[s] generally serve[] and the needs of that population.”²¹¹ The exemption from the licensed notice requirement of facilities that agree to enroll patients in state programs that provide the full range of pregnancy services,

204. *Becerra*, 138 S. Ct. at 2368.

205. *Id.* at 2378 (Kennedy, J., concurring).

206. *Id.* at 2374 (“Tellingly, many facilities that provide the exact same services as covered facilities . . . are not required to provide the licensed notice.”); *id.* at 2375–76 (citing *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 802 (2011) (“If California’s goal is to educate low-income women about the services it provides, then the licensed notice is ‘wildly underinclusive’” and, therefore, “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”)); *id.* at 2377 (the unlicensed notice “covers a curiously narrow subset of speakers”).

207. CAL. HEALTH & SAFETY CODE § 123471(a)–(b).

208. See Brief for Petitioners at 62, *Becerra*, 138 S. Ct. 2361 (No. 16-1140).

209. *Becerra*, 138 S. Ct. at 2388–89 (Breyer, J., dissenting) (summarizing petitioners’ claims, particularly that the statute “does not cover facilities likely to hold neutral or pro-choice views, because it exempts facilities that enroll patients in publicly funded programs that include abortion”).

210. *Id.* at 2368.

211. *Id.* at 2386 (Breyer, J., dissenting).

including abortion, could be explained by a showing that these facilities are significantly more likely to inform patients about the existence of these programs than are the pregnancy centers.²¹²

These reasons for the different treatment of pregnancy centers and exempted facilities, especially at the preliminary injunction stage, plausibly relate to characteristics of the pregnancy centers other than their advocacy of a viewpoint and serve the legitimate public policy purposes that the legislature articulated. Under the methodology for determining whether the disproportionate disadvantage a law imposes on individuals shows a government purpose to target them because they exhibit a protected trait, a plausible purpose should be enough.

As women well know, even a perfect or near-perfect overlap between a targeted condition or status and a protected characteristic does not prove a legislative purpose to target the characteristic in Equal Protection Clause doctrine, even when attributes of the condition or status link to fulfilling the legitimate purpose that the government articulates. Funding pregnancy benefits would raise the cost of funding a disability insurance program, so the cost of the condition—and not that exclusively women experience it—explained the exclusion.²¹³ The information-delivery and waiting-period requirements imposed exclusively on women seeking abortions are not targeted at them because of the sex trait, rather the requirements fulfill the state's legitimate interest in ensuring that "important decisions will be more informed and deliberate . . ." ²¹⁴ An absolute preference for veterans for state employment serves the purpose of rewarding service, not disadvantaging women, although it dramatically disproportionately did so.²¹⁵ The state's awareness of the impact, and its attempt to ameliorate it with respect to low-level clerical positions, did not change the Court's conclusion.²¹⁶

California's explanations for its exemptions rely on attributes of the condition of offering medical services to low-income women for free, which is distinct from the viewpoint the pregnancy centers advocate.²¹⁷ The exemption that depends upon agreeing to enroll women in state services may overlap very significantly with centers that do not have ideological objections to the contraceptive and abortion services that the state provides. Like women's conditions

212. See *id.* at 2389 (stating that the record needs to be developed to determine whether this is true).

213. See *Geduldig v. Aiello*, 417 U.S. 484, 493–94 (1974).

214. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992).

215. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 278–81 (1979).

216. *Id.* at 281–82 (Marshall, J., dissenting).

217. See *Becerra*, 138 S. Ct. at 2375.

that stem from their biology or legal status derived from a separate source of authority, pregnancy centers' condition of not enrolling women in state programs derives from their ideological objections but the condition, not the protected characteristic from which the condition derives, explains why the law treats them differently.

The Court's serious concern that the law's disproportionate disadvantage on pregnancy centers shows a legislative purpose to target their religiously motivated anti-abortion speech, when their activities provide a plausible reason for the law's distinctions, reflects a different degree of sensitivity to unequal treatment than the Court's consistent refusal to draw an inference of a government purpose to favor religious institutions in private school funding programs that foreseeably, and dramatically, disproportionately benefit them.²¹⁸ The Court adheres to this rule even when the provisions of the aid programs overlap with the characteristics of religious schools quite precisely.²¹⁹ The theory that the Court has consistently accepted, with respect to laws that dramatically disproportionately benefited religious schools, is that they were nevertheless neutral because nonreligious private schools could choose to open and become eligible to receive the financial benefit.²²⁰ So, too, in California, nonreligious pregnancy centers could choose to open, and they would be subject to the notice requirement. In both instances, the likelihood is low, because religious motivation, and funding from the religious organization for the purpose of promulgating belief, explains the existences of the schools, and pregnancy centers, with the particular characteristics, specifically offering lower tuition or pregnancy services for free. But the likelihood that the relative proportions of benefited entities will shift does not matter to the determination of discriminatory purpose when the question is whether the government unconstitutionally favors religious entities. When the question is reversed, to ask whether a disproportionate disadvantage shows a purpose to discriminate against religious entities, it should not matter either.

The more generous standard the Court applies to find discriminatory purpose under the Free Speech Clause appears like the moving standard under the Free Exercise Clause. It may be that the Court will reinterpret the meaning of that clause to provoke strict

218. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 703 (2002) (Souter, J., dissenting) (noting that 96.6% of all students participating in state voucher program go to religious schools).

219. See *id.* at 704–05 (Souter, J., dissenting) (explaining that a few open spaces exist at the few nonreligious schools and the amount of the voucher mirrors full tuition at religious schools, while tuition at nonreligious private schools is much higher).

220. See *id.* at 652; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

scrutiny review on a showing less than a purpose to discriminate on the basis of religious motivation.²²¹ And even if it does not, the inconsistency between the label and the methodology would be restricted to the interpretation of the single clause, where an interpretation could be that it provides a priority to religious exercise, rather than equal treatment. But the core meaning of the Free Speech Clause, as emphasized by the *NIFLA* Court, is to guarantee equal treatment of all speech from multiple viewpoints.²²² A purpose to discriminate against a viewpoint, not a substantial burden on the speakers, is its mark of unconstitutional action, and that standard is not moving. So, when the Court uses the looser Free Exercise Clause-type methodology to determine whether the government acts with a purpose to discriminate against viewpoints expressed by religious speakers, it seems to incorporate religious belief into its interpretation of the scope of the free speech guarantee.

2. *Direct Evidence*

Although the *NIFLA* Court does not rely on it, the case provides a vehicle to consider the type of direct evidence the Court has found to overcome the facial neutrality of a government action to show that the government decision maker acted with unconstitutional animus. The *NIFLA* Court's short, one-paragraph recitation of facts sets the stage for the theme of unconstitutional viewpoint discrimination by the California Legislature that runs through the opinion. The first sentence targets the purpose of the FACT Act to regulate the pregnancy centers, which it identifies as motivated by a pro-life viewpoint and religious belief. It then selectively quotes the bill's author:

“[U]nfortunately,” the author of the FACT Act stated, “there are nearly 200 licensed and unlicensed” crisis pregnancy centers in California. . . . These centers “aim to discourage and prevent women from seeking abortions.” . . . The author of the FACT Act observed that crisis pregnancy centers “are commonly affiliated with, or run by organizations whose stated goal” is to oppose abortion—including “the National Institute of Family and Life Advocates,” one of the petitioners here. . . . To address this perceived problem, the FACT Act imposes two

221. See *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.).

222. *Becerra*, 138 S. Ct. 2361.

notice requirements on facilities that provide pregnancy-related services²²³

By means of this series of sentences, the Court portrays the “perceived problem” that the legislature sought to remedy to be the existence of facilities, which advocate from a pro-life and religious point of view.²²⁴ Indeed, if burdening “some speakers whose speech [the author] d[id]n’t much like” were the problem that legislature sought to remedy by means of the FACT Act, the claim of unconstitutional gerrymandering might raise “a serious issue.”²²⁵ The catch, however, is that the meaning attributed to the author by the Court’s quotations is not the meaning contained within the bill analysis, from which the Court drew its description. The full quotation reads:

[t]he author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with a woman’s ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women’s health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.²²⁶

So, this full description does not portray the “problem” perceived by the bill’s author, or the members of the California Legislature who voted in favor of the bill, to be the mere existence of pro-life, faith-based pregnancy centers or their religiously motivated, anti-abortion viewpoints. The bill analysis describes the problem perceived by the author to be the conduct of pregnancy center personnel when undertaking the activities of advertising and counseling, and the harm that conduct causes to members of the public, which the California government has the authority and responsibility to protect. These are very different meanings with respect to the

223. *Id.* at 2368 (alteration in original) (citations omitted).

224. *Id.*

225. Transcript of Oral Argument, *supra* note 203, at 38 (Kagan, J.); see *Becerra*, 138 S. Ct. at 2389 (Breyer, J., dissenting) (“[I]f there are not good reasons [for the exemptions,] the petitioners’ claim of viewpoint discrimination becomes much stronger.”).

226. Joint Appendix, *supra* note 121, at 84–85.

inference of viewpoint discrimination, which the Court draws and as to which it seeks to persuade readers.²²⁷

So much of the difference in meaning between the descriptions of the author's statements in the Court's opinion and in the bill analysis hinges on what about the pregnancy centers, precisely, the bill author judged to be "unfortunate." If the author expressed a judgment of dislike for the speakers because of their religious beliefs or anti-abortion ideology, this judgment, by a lawmaker and if attributed to the entire legislature, would support a finding of unconstitutional viewpoint discrimination. The Court's felt need to present this meaning to support its tentative conclusion of discriminatory purpose, as opposed to a meaning under which the focus of the lawmakers' judgment was on the actions of the speakers and the impact of those actions on members of the public, emphasizes the different constitutional significances of these two meanings. The meaning the Court presents supports a finding of a discriminatory purpose. The words the bill's sponsor said, did not.²²⁸ Muddying the distinction risks chilling criticism by lawmakers of conduct that may be motivated by religious belief, which they have a First Amendment right to express.

Another example from the same Supreme Court term underscores the threat to free speech by public officials, which the Court's merging of religiously motivated conduct with speech to find a purpose to discriminate on the basis of the latter presents. By contrast to the implication of viewpoint discrimination by the *NIFLA* Court, the Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* hinged its decision on a finding that the Colorado Civil Rights Commission did not consider the case before it "with the

227. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (selective quotations may form the basis for defamation liability if they do not meet the standard of "substantial truth").

228. The Court quotes loosely again when reviewing the unlicensed pregnancy center notice requirement, which required the centers to post a notice informing clients they were not licensed. The Court stated:

[t]he only justification that the California Legislature put forward was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals." . . . At oral argument, however, California denied that the justification for the FACT Act was that women "go into [crisis pregnancy centers] and they don't realize what they are."

Becerra, 138 S. Ct. at 2377 (alteration in original) (citation omitted). The Court implied that the state's counsel denied that the purpose of the unlicensed notice requirement was to inform clients, who may not know the licensed or unlicensed status of the centers, what it was. But the state's counsel did not say that. The entire colloquy, which contains a subsequent qualification by counsel about the statute's dual purposes, shows that the questions and the answers related to the *licensed* clinic notice. The quoted reference to what women do or do not know when they go into pregnancy center did not relate to whether or not they were licensed at all. Transcript of Oral Argument, *supra* note 203, at 44.

religious neutrality that the Constitution requires.”²²⁹ The Court declined to expand the scope of “speech” under the Free Speech Clause to protect a business person who objected on religious grounds from complying with a state public accommodations law that required him to create and supply a cake to a same-sex couple to be used at their wedding.²³⁰ Instead, the Court relied on what it perceived to be different treatment of bakers with similar claims, and statements by members of the Colorado Civil Rights Commission to find that the commission violated the Free Exercise Clause by acting with a purpose to discriminate against him because of his religious beliefs.²³¹

Perspectives may differ on the meaning of words, as the Court acknowledges, with respect to several official comments that it cites as evidence of the commission’s “hostility” toward the claimant’s sincere religious beliefs.²³² Nevertheless, the Court drew the clear conclusion that one set of comments, by a commissioner, “disparage[d the claimant’s] beliefs,” and that the comments, combined with the failure of the commission as a whole, and the state in its brief to the Court, to disavow the comments,²³³ “cast doubt on the fairness and impartiality of the Commission’s adjudication of [the] case.”²³⁴ The commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.²³⁵

229. 138 S. Ct. 1719, 1724 (2018).

230. *Id.* at 1723–32.

231. *Id.*

232. *Id.* at 1729 (“Standing alone, these statements are susceptible of different interpretations.”).

233. Pressed by Justice Kennedy at oral argument, counsel for the state disavowed the statement, to the extent it could be interpreted to show a purpose to target the baker because of his religious motivation. Transcript of Oral Argument at 53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (“JUSTICE KENNEDY: Do you now disavow or disapprove of that statement? MR. YARGER: I -- I do, yes, Your Honor. I think -- I need to make clear that what that commissioner was referring to was the previous decision of the Commission, which is that no matter how strongly held a belief, it is not an exception to a generally applicable anti-discrimination law.”).

234. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

235. *Id.* at 1729.

The Court reasoned as follows:

[t]o describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.²³⁶

The Court noted further:

[m]embers of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. . . . In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.²³⁷

A comparison between the expression of dislike the *Masterpiece Cakeshop* Court interpreted to show hostility toward religious belief by an adjudicatory body and the statements of dislike made by the justices themselves in the course of adjudication is at least interesting. Neither of the *Masterpiece Cakeshop* Court's conclusions about the meaning of the Colorado commissioner's statement are inevitable. The Colorado commissioner did not describe religious belief as "despicable." What he described as despicable was using religious belief as the rhetoric that justifies conduct that "hurt[s] others."²³⁸ Use of the word "rhetoric" does not necessarily imply that the beliefs are insincere.²³⁹ In its traditional sense, rhetoric is the use of words

236. *Id.*

237. *Id.* at 1730 (first citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–542 (1993); and then citing *id.* at 558 (Scalia, J., concurring in part and concurring in judgment)).

238. *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

239. See Marc Gold, *The Rhetoric of Rights: The Supreme Court and the Charter*, 25 OSGOODE HALL L.J. 375, 376–77 (1987) ("The study of rhetoric currently enjoys a Renaissance in a variety of disciplines. No longer pejoratively considered to be ornamental and usually misleading speech, rhetoric is now understood to be an indispensable and inescapable tool of practical reason in all domains of human activity.").

as a means of persuasion.²⁴⁰ The commissioner expressed strong dislike for the use of freedom of religion as a tool to persuade listeners that discrimination that hurts others is justified. And the historical examples the commissioner offers are true, as is the phenomenon that freedom of religion has in the past, and is currently used, to justify discrimination. So, the Court seems to say that a decision maker acts with unconstitutional discriminatory purpose toward religious belief when the decision maker acknowledges a judgment of strong dislike for citing one's own belief system as the justification for conduct that interferes with others' rights.

The *NIFLA* Court and concurrence use rhetoric strikingly similar, in words and meaning, to that used by the Colorado commissioner to support his point of view. The Colorado commissioner lists historical examples to illustrate the extreme consequences of accepting the claim of the litigant before the adjudicatory body. The *NIFLA* Court lists historical examples from China's Cultural Revolution, Stalin's Soviet Union, Nazi Germany, and Ceausescu's Romania to illustrate the extreme consequences of accepting California's claim that it may require licensed medical professionals to post the informational notices.²⁴¹ The Colorado commissioner expresses extreme dislike for the rhetorical justification of religious belief for the particular conduct that is the subject of the adjudication. Those concurring in *NIFLA* express strong disdain for the California Legislature's "congratulatory statement" that the FACT Act was part of a "legacy of 'forward thinking'" with respect to the public policy choice to be at the forefront of the nation in protecting women's reproductive rights.²⁴² It is "not forward thinking," the concurring justices insist, to rely upon that ideology, in the Act's official history, as a justification for engaging in conduct which, in their view, interferes with others' rights.²⁴³ To be sure, "despicable" is a strong word. But "egregious" is a strong word, too, and the Court has placed this label on the conduct of government officials, including by implication the members of the California Legislature, who have acted according to sincerely held ideological beliefs.²⁴⁴

240. *Id.* at 377 (footnote omitted) (stating that the "traditional conception" of rhetoric, "based upon the Aristotelian definition" is "as the faculty of discovering the available means of persuasion in a given case"); *id.* ("Rhetorical analysis thus conceived involves the analysis of the means used to persuade the audience that the result in a given case or set of cases was justified.")

241. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018).

242. *Id.* at 2379.

243. *Id.*

244. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (funding religious speakers would violate the Establishment Clause).

The selective quotation by the *NIFLA* Court to support its concerns that a purpose to discriminate against the anti-abortion viewpoint, motivated by religious beliefs, and the interpretation of the commissioner's words, and the failure of other government officials to disavow the them, present the real possibility that the Court's increasingly fervent efforts to root out official discrimination against religious beliefs will chill protected criticisms of the conduct that results from them. A reasonable conclusion that both lawmakers and adjudicators could draw is that it is safer to avoid acknowledging the religious motivation of the activities they regulate or adjudicate at all, lest they get called out in the United States Reports as having acted with a purpose to discriminate against deeply and sincerely held beliefs rather than the conduct those beliefs command.²⁴⁵ And this silencing of statements acknowledging the religious motivation for conduct that hurts other people, and, although a closer question, of criticism of religious belief as an appropriate justification for such conduct, by public officials will hurt women specifically, as they work to secure and maintain rights through the democratic process, which they do not possess through the Constitution. Whatever the movement in Free Exercise Clause doctrine turns out to be, the doctrine of the Free Speech Clause is that religious viewpoints and practices are entitled to equal—but not specially advantaged—treatment with the viewpoints and practices motivated by other ideologies.²⁴⁶ If this is so, then decision makers, whether lawmakers or adjudicators, must have the freedom to express dislike for religiously motivated conduct, because of the harm they perceive the conduct to cause to other people, without raising the inference that their actions stem from a purpose to discriminate on the basis of the religious motivation. Otherwise, because of its special relevance to a finding of discriminatory purpose on the part of official decision makers, religious belief has crept into the definition of the scope of the free speech right.

245. Elizabeth Clark, *Symposium: And the Winner Is . . . Pluralism?*, SCOTUSBLOG (June 6, 2018, 11:36 AM), <https://www.scotusblog.com/2018/06/symposium-and-the-winner-is-pluralism/> ("Public commentators on national media regularly and casually describe measures promoting religious freedom as 'religious bigotry,' an 'invitation to discriminate,' 'not about religious freedom,' 'a fig leaf for intolerance,' or the like. [In light of the *Masterpiece Cakeshop* interpretation, if this sort of language is used or relied on by legislators, or especially adjudicative bodies, it now can be considered clear evidence of lack of neutrality.").

246. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

CONCLUSION

Women's rights and religious liberty exist in tension. To the extent that the Constitution protects an individual right to one of them, it prohibits those who prioritize the other from writing that priority into law, binding everyone subject to it to the conduct, mandates, and prohibitions that priority mandates. The Court interprets the point of equilibrium, and these interpretations fluctuate. But over the years, by means of layered and cemented interpretations, a core truth has emerged to manage the tension between the two important rights guarantees. This is that religious liberty may flourish and reign within the clauses under which those who wrote and ratified the Constitution intended to protect it specifically. But outside the twin provisions that the Court interprets to define its boundaries, it does not define the scope of constitutional rights guarantees—those that protect women's rights or any others.

Now, the Court's aggressive interpretations of the scope of religious liberty under the explicit rights provisions threaten to cross the line, injecting a priority for religious motivation into the definition of the scope of the free speech guarantee. The methodology of interpreting the scope of women's rights provides a baseline against which to examine and check this spread. We can check that the Court transparently traces the new doctrinal distinctions it makes to implementing constitutional principles. Although we may not agree with it, we will understand. Examining the reasoning for the link to principle will reveal when it fails to exist. In these circumstances, and when claims of religious liberty appear in cases that do not implicate the specific guarantees directly, we can examine whether religious beliefs may have influenced the distinctions the Court draws, and thus crept into the definition of the constitutional right. We can also look carefully at the Court's evaluation of the evidence of the disproportionate impact of seemingly neutral government action to ensure that its conclusions adhere to the "because of not merely in spite of" standard, which constrains the scope of women's equal protection rights. We can check its conclusions about the words of government officials as well, to ensure that those assessments' separate meanings that show a purpose to discriminate against religiously motivated conduct, or the appropriateness of religious beliefs as a justification for conduct that hurts others, from a purpose to discriminate against the beliefs themselves, and so do not chill the criticisms of religiously motivated conduct which may attach to women's efforts to secure rights through the democratic process.

Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture

*Diane Klein**

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I. INTRODUCTION

There is a received narrative about women’s rights, and especially the quest for women’s formal legal equality in the United States (U.S.), that focuses primarily on the emergence of economic and political rights for women, especially wives. It begins with resistance to coverture and carries us through the Married Women’s Property Acts, suffrage, the Nineteenth Amendment, and beyond.

* Professor of Law, University of La Verne College of Law (2004–2020). Both the title and the idea for this Article are drawn from Stephanie Jones-Rogers’ book, *They Were Her Property*. See STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* (2019). An earlier version of this Article was presented at the Women in Legal Education Section event at the 2020 Association of American Law Schools annual meeting, and I would like to thank Prof. Rona Kaufman, organizer, and Professors Nan Hunter, Leslie Jacobs, and Danaya Wright, sister panelists, for their presentations, and all the attendees at that event for their feedback.

There is also a now-familiar critique of that narrative, one that points out that the situation and experiences of American women of color, especially enslaved and formerly enslaved women of African descent, are frequently omitted from what is ostensibly feminist or “women’s” history. Often, these women’s experience is completely ignored; when included, it is frequently marginalized, just as (white) women’s experience was formerly left out of history itself.¹

The critique rightly reveals *exclusion*, and thus demands *inclusion*. Where generalizations about (unmodified) “women” do not apply to or include women of color, where (especially) celebratory and progressivist narratives about the improvement of “women’s” legal condition in America are not borne out by the lived experiences of non-white/BIPOC² women, history must be revised. This essential critique challenges us to think about how priorities have been and should be set in feminist movements and in historical accounts of those movements.

But this critique does not always go far enough. Nineteenth century legal feminism, nominally aimed at the expansion of women’s rights in the U.S., not only reflected but also actively furthered racism and white supremacy. Nineteenth century legal arrangements, including coverture, may have disfavored free white women vis-à-vis their white husbands, brothers, fathers, and sons—but the dismantling of coverture in the antebellum period only put more distance between Black and white women. The Married Women’s Property Acts and the early women’s suffrage laws, twin pillars of what is sometimes called “first wave” feminism, did not simply ignore or overlook the concerns of non-white women (generally without making that explicit). In the name of all women, these movements largely advanced the rights of free white women at the expense of Black women. But that is *not* how the story is typically told.

Consider how the most recent edition of the most widely used Property law textbook in the U.S. begins its description of the Married Women’s Property Acts: “Beginning with Mississippi in 1839,

1. There is a similar important critique made from the LGBTQ perspective, related to the exclusion of non-heterosexual women, which is beyond the scope of this Article. See Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 DUQ. L. REV. 125 (2021).

2. This acronym stands for Black, Indigenous, and People of Color, and has been in use since about 2013. It is intended to reflect the various experiences and identities of non-white people. Because this Article includes discussion of both Black and Indigenous people, it is appropriate to employ it. See Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html>.

all common law property states had, by the end of the nineteenth century, enacted Married Women's Property Acts."³

Wait, what? *Mississippi? In 1839?* Though the authors glide right past it, the attentive reader is certain to ask herself how *that* happened. Antebellum Mississippi is hardly known as a bastion of progressive legal reform. But Mississippi was the first state to do this? Not Massachusetts, the home of Yankee individualism? Or the frontier territory of Wyoming, the first state where women had the right to vote?⁴ No, it was Mississippi.

The casebook (which has five male authors, none of them BIPOC) continues:

[t]hese statutes removed the disabilities of coverture and gave a married woman, like a single woman, control over all her property. Such property was her separate property, immune from her husband's debts. The wife also gained control of all her earnings outside the home.

The Married Women's Property Acts, prompted by a desire to protect a wife's property from her husband's creditors, as well as to grant her legal autonomy, did not give the wife full equality. Husband and wife were expected to play complementary roles. The husband, employed outside the home, remained head of the family and owed his wife a duty of support; his wife, mistress of the household and in charge of rearing the children, owed him domestic services. Although the wife was given control over her property, it was unlikely that—as an unpaid homemaker—she would have much of that commodity.⁵

3. JESSE DUKEMINIER ET AL., PROPERTY 385 (8th ed. 2014). The second Concise Edition of the same casebook omits to mention Mississippi, but says this:

In the 1800s, most common law property states enacted Married Women's Property Acts. These statutes gave a married woman, like a single woman, control over all her property The wife also gained control of all her earnings outside the home.

The Married Women's Property Acts did not give the wife full equality. The husband remained head of the family; the wife, although given control over her property, was unlikely, as an unpaid homemaker, to have much property.

JESSE DUKEMINIER ET AL., PROPERTY: CONCISE EDITION 268 (2d ed. 2017).

4. *Wyoming Legislators Write the First State Constitution to Grant Women the Vote*, HIST., <https://www.history.com/this-day-in-history/wyoming-legislators-write-the-first-state-constitution-to-grant-women-the-vote#:~:text=On%20September%2030%2C%201889%2C%20the,its%20female%20citizens%20to%20vote> (Sept. 28, 2020).

5. DUKEMINIER ET AL., PROPERTY, *supra* note 3, at 385. The second Concise Edition of the same casebook says this:

[i]n the 1800s, most common law property states enacted Married Women's Property Acts. These statutes gave a married woman, like a single woman, control over all her property The wife also gained control of all her earnings outside the home.

What that deracinated discussion completely neglects to mention is that the “property” Mississippi wives first won the right to control was property in enslaved human beings—especially fertile women of African descent. The value of enslaved labor and the offspring of enslaved people frequently made them the most attractive assets in the marital estate of an otherwise impecunious debtor—and the most fiercely defended by his propertied slave-owning wife. The nineteenth century scenario was more “Gone with the Wind”⁶ than “The Adventures of Ozzie and Harriet.”⁷ The women who lived and died in slavery would never be wives, because they were legally prohibited from marrying.⁸ Nor did they have control over their property or earnings, despite their single status—not because they were 1950s-style “unpaid homemakers” (though they were surely that, as well), but because they were lifelong hereditary slaves.

Whether coverture was respected, avoided, or dismantled, enslaved Black women were exploited. Under coverture, the protection of free white married women’s property in human beings was occasionally accomplished through creative trust arrangements. The first American Married Women’s Property Act was born from a desire to simplify that situation and improve it—but only for the free white married women it protected, not for the enslaved Black women under their ownership and control. Like so much of American law, the origin story of the Married Women’s Property Acts comes complete with a racist original sin.

II. SLAVEOCRACY, COVERTURE, AND GIFTS AND TRUSTS OF ENSLAVED PEOPLE

Antebellum property dispositions and estate plans in the American South reflected a political economy and regime of ownership that was both gendered and raced. Those aspects of marital property law encompassed by the doctrine called “coverture” radically

The Married Women’s Property Acts did not give the wife full equality. The husband remained head of the family; the wife, although given control over her property, was unlikely, as an unpaid homemaker, to have much property.

DUKEMINIER ET AL., PROPERTY: CONCISE EDITION, *supra* note 3, at 268.

6. The 1939 film *Gone with The Wind*, based on Margaret Mitchell’s book of the same name, is the (inflation-adjusted) highest-grossing film of all time. It is set in Civil War-era Georgia. Jennifer Schuessler, *The Long Battle Over ‘Gone with The Wind’*, N.Y. TIMES, <https://www.nytimes.com/2020/06/14/movies/gone-with-the-wind-battle.html> (June 15, 2020).

7. *The Adventures of Ozzie and Harriet*, Wikipedia, https://en.wikipedia.org/wiki/The_Adventures_of_Ozzie_and_Harriet (Oct. 22, 2020, 1:51 PM).

8. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 335–36 nn.192–95 (2006).

disempowered women upon and during marriage. Astute planners employed traditional Anglo-American common-law devices, especially trusts known as “marriage settlements,” to protect marriage-eligible women in this unique legal context, where other women and men, especially fertile enslaved Black women, were a crucial component of the wealth of the wealthiest families. As historian Jennifer Morgan expresses it, “slaveowners supplemented the present value of enslaved persons with the speculative value of a woman’s reproductive potential”⁹ Early on, gifts of enslaved people to free women (daughters, wives, widows, and wives-to-be) were structured to avoid some of the undesirable consequences of coverture. Later came a more straightforward assertion of the free married woman’s property rights—including rights in other human beings.

A. *A Note on Terminology: “Plantocracy” or “Slaveocracy”?*

There is no single, widely accepted term for the racialized political and economic arrangement that prevailed in the antebellum Southern states of the U.S., whose distinctive feature was the large plantation with an enslaved labor force. Although the plantation is paradigmatic of the “old South,” it was hardly typical: nearly three-quarters of Southern white people had no property in enslaved people at all, and only about twelve percent of slaveholders enslaved more than twenty individuals.¹⁰ Wealth was extremely concentrated: more than ninety percent of all agricultural wealth was owned by slaveholders.¹¹ Two terms in use since the mid-nineteenth century to describe this are “plantocracy” and “slaveocracy.”

“Plantocracy” was first used in print in 1846 and occasionally thereafter, to mean “[a] dominant class or caste consisting of planters.”¹² It has been used by many leading American historians,¹³ including C. Vann Woodward in the mid-twentieth century,¹⁴ and has the benefit of sharing the etymological structure of “democracy,”

9. JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 91 (Daniel K. Richter & Kathleen M. Brown eds., 2004).

10. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221, 224 n.6 (1999) (citing ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 86 (1988); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 27 (1956)).

11. PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 180 (1993).

12. 11 *Plantocracy*, *OXFORD ENG. DICTIONARY* (2d ed. 1989); see also *Plantocracy*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/plantocracy> (last visited Oct. 29, 2020).

13. See Davis, *supra* note 10, at 224 n.6.

14. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1374 (1988) (citing C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1958)).

“aristocracy,” and similar terms, in identifying the ruling class in the word itself. As Adrienne Davis explained in her 1999 article, *The Private Law of Race and Sex: An Antebellum Perspective*, the term “describe[s] the southern political economy in which the mode of production, slavery, structured social and economic relationships.”¹⁵ It also builds in the idea that a plantation economy, in which the profitable cultivation of crops effectively requires a bound labor force, encourages distinctive political arrangements.¹⁶ However, the term itself omits any mention of slavery, and has generally been used more often to describe the West Indies than the U.S.¹⁷

“Slaveocracy” (with the occasional variant spelling “slavocracy”), defined as “[t]he domination of slave-holders; slave-holders collectively as a dominant or powerful class,”¹⁸ not only mentions slavery but was used from the beginning by abolitionists in the U.S. context.¹⁹ The term is also a few years older than “plantocracy.”²⁰ It was used by Hermann von Holst in his magisterial 1879 *Constitutional and Political History of the United States*, and has been used in the law reviews for more than one hundred years.²¹ Most recently, in 2019, constitutional scholar Paul Gowder described Frederick Douglass as knowing “that the slaveocracy would not follow the Constitution, at least not until they were forced to do so at

15. See Davis, *supra* note 10, at 224 n.6.

16. See, e.g., EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2016); SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014).

17. BECKERT, *supra* note 16; see also *Plantocracy*, LEXICO, <https://www.lexico.com/en/definition/plantocracy> (last visited July 19, 2020). See, e.g., Eleanor Marie Lawrence Brown, *On Black South Africans, Black Americans, and Black West Indians: Some Thoughts on We Want What's Ours*, 114 MICH. L. REV. 1037, 1057 (2016) (West Indies); Eleanor Marie Lawrence Brown, *How the U.S. Selected for a Black British Bourgeoisie*, 27 GEO. IMMIGR. L.J. 311, 337 (2013) (West Indies); Giselle Reid, *The Legacy of Colonialism: A Hindrance to Self-Determination*, 10 TOURO INT'L L. REV. 277, 284–85 (2000) (Jamaica).

18. 15 *Slaveocracy*, OXFORD ENG. DICTIONARY (2d ed. 2001) [hereinafter OED XV] (noting pedantically that the word is formed “with erroneous application” because of its structure).

19. *Id.* at 670 (“slavocracy”); “Slaveocracy” redirects to “slavocracy.” *Id.* at 688 (citing to an 1840 Illinois newspaper that stated hopefully, “The reign of the slaveocracy is hastening to a close”; an 1842 letter that referred to “Slaveocrats in Georgia”; and an 1848 *New York Express* article which was “[a]n exhortation to curb the slaveocracy”).

20. *Id.* at 670.

21. Lindsay Rogers, *Federal Interference with the Freedom of the Press*, 23 YALE L.J. 559, 559 n.2 (1914) (citing generally 2 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (John J. Lalor trans., 1888), where the term appears more than sixty times); see also Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1301 (1937) (Roger Taney, John C. Calhoun, and Thomas Benton are described as taking “the localist-slaveocracy side” of a debate about the role and meaning of the U.S. Constitution).

gunpoint.”²² Based on its more precise descriptiveness and its comparable provenance, “slaveocracy” will be used here, though the significance of a plantation economy must also be kept in mind.

B. *Coverture and Creditors’ Rights*

“Coverture” is the name given to the legal dimensions of the marriage relationship in the common law, especially for the wife, and more specifically, “the subordinating effects” of marriage on her “personhood and property.”²³ “Coverture held, most basically, that a husband’s legal identity covered that of the woman he married.”²⁴ This gave the husband tremendously broad powers over the property and economic activity of his wife, in life and death: the married woman could neither enter into contracts nor make a will.²⁵ Any real property she owned at marriage was placed entirely under his control and management;²⁶ personal property became his outright.²⁷ This institution was shockingly durable: although the world changed a great deal between the high Middle Ages and the Victorian era, in England, “[t]he main consequences of coverture at common law changed little from at least the twelfth century until the latter decades of the nineteenth century.”²⁸ To the extent that the American common law of marriage relied on British law—which it did, well into the nineteenth century—the situation in the U.S. was similar, although there was some variation between states (especially community property states), and protection for American wives’ property rights arrived somewhat sooner.²⁹

More specifically, coverture, in its American form, had some specific consequences for creditors’ rights. Property a woman owned premaritally became reachable by her husband’s creditors once they were married.³⁰ At common law, property inherited by a wife during the marriage also “could be seized and sold on execution by the creditors of the husband.”³¹ On occasion, an equity court would

22. Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. Rev. 335, 400 (2019).

23. MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 6 (Tim Stretton & Krista J. Kesselring eds., 2013).

24. *Id.* at 7.

25. *Id.* at 8.

26. *Id.*

27. *Id.*

28. *Id.* at 7.

29. LYNN DENNIS WARDLE ET AL., *FAMILY AND SUCCESSION LAW IN THE USA* (4th ed. 2018).

30. *E.C. Parks, & Co. v. Cushman*, 9 Vt. 320, 325 (Vt. 1837).

31. *Starr v. Hamilton*, 22 F. Cas. 1107, 1109 (D. Or. 1867) (No. 13,314) (citations omitted); see also *Brown v. His Creditors*, 17 La. Ann. 113 (La. 1865).

deviate from the strictest application of these principles, and make some provision for a wife and her children from an inheritance, as against the husband's creditors. For example, a Kentucky court did so in 1827, in *Elliott v. Waring*.³² But these were exceptions that proved the rule.

C. *Gifts and Trusts of Enslaved People*

Because of the way a plantation economy operates, the land is made valuable only when coupled with bound labor; crops like sugar, rice, and cotton could not profitably be grown without it.³³ As historian Jennifer Morgan explained, "ownership of land meant nothing without workers to cultivate it."³⁴ This fact, coupled with coverture, presented a planning challenge for the antebellum *paterfamilias*, who wished to provide appropriately both for sons, who could manage an estate, and for daughters, who, after marriage, could not—and might be subjected to the vagaries of a financially irresponsible or unlucky spouse.

For those with enough property to carry it out, the solution was to divide the property between the son(s), who received land and enslaved persons to work it, outright; and the daughter(s), who received enslaved people, whether outright or in trust, ideally including fertile enslaved women of childbearing age.³⁵ These enslaved people should not be thought of simply as unpaid domestic labor for her and her household: maids, cooks, or future wet nurses or nannies. They and their progeny, prospective and actual, were valued like livestock: to be sold if needed, rented out for profit, and capable of reproducing and creating greater wealth.³⁶ Even for those with less property, gifts of fertile enslaved women were especially significant. As Morgan puts it, "[o]nly through a black woman's body could a struggling slaveowner construct munificent bequests to family and friends."³⁷ Both lifetime and testamentary gifts followed this pattern—daughters endowed on birthdays, holidays, and,

32. 21 Ky. (5 T.B. Mon.) 338, 341 (Ky. 1827).

33. See WOODWARD, *supra* note 14, cited in Crenshaw, *supra* note 14, at 1374; see also MORGAN, *supra* note 9, at 168.

34. MORGAN, *supra* note 9, at 71.

35. *Id.* ("Land was customarily divided between sons, with the eldest receiving the land on which the family home stood. If the estate was large enough, both sons and daughters would receive slaves."); *id.* at 97–98 (describing the estate plans of Robert Gretton, Miles Braithwaite, and Phillip Lovell); *id.* at 101 (describing the estate plan of Arthur Hall); *id.* at 102 (describing the estate plan of James Goodbe).

36. Diane J. Klein, *Emancipation Un-Locke'd: Partus Sequitur Ventrem, Self-Ownership, and "No Middle State" in Maria v. Surbaugh*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 73, 80–82 (2020).

37. MORGAN, *supra* note 9, at 92.

especially, at marriage, with human property, often in trust for their benefit.

An example of such a plan was the one used by Richard Harris of “Carolina,”³⁸ who died in 1711 (a year before the colony was divided into North Carolina and South Carolina).³⁹ His moderately-sized estate included land, eight enslaved people, and some thirty head of cattle.⁴⁰ His eldest son received the land, the house, and two enslaved people (“Pompey, Catharina, and ‘her increase’”).⁴¹ His daughter, Anne, received “one slave boy named Jack and a slave girl [sic] named Flora and her increase and ten cows and calves and their increase.”⁴² His other daughters received similar bequests.⁴³ Here, in Colonial America, the propertied testator has made a conventional plan. The primogenitary impulse is expressed by leaving the land (including the plantation house) to a son, generally the eldest son, together with an enslaved workforce necessary to make it valuable; and by endowing a daughter or daughters with enslaved people, especially enslaved women of childbearing age and potential, persons whose slavery was, quite literally, her freedom.

D. The U.S. Supreme Court Validates Premarital Trusts of Enslaved People

Richard Harris’s 1711 plan, and others like it, gave enslaved people to daughters outright.⁴⁴ Should Anne Harris marry, her husband would control that property, and his creditors might seize it. As time went by, planning became more sophisticated. As historian Walter Edgar described the situation in South Carolina, “[t]he families of wealthy women sometimes resorted to marriage settlements to protect the property and interests of their womenfolk from unscrupulous spouses.”⁴⁵ Under one type of settlement, “a bride and her male relatives established a trust that was administered in her interests by male kinfolk” (as trustees).⁴⁶ “So numerous did these marriage settlements become that the secretary of the province had to create a separate record group for them.”⁴⁷

38. *Id.* at 91.

39. Robert J. Cain, *Carolinas, Separation of*, ENCYC. OF N.C. (William S. Powell ed., 2006), <https://www.ncpedia.org/carolinas-separation>.

40. MORGAN, *supra* note 9, at 91.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. WALTER EDGAR, *SOUTH CAROLINA: A HISTORY 168* (1998).

46. *Id.*

47. *Id.*

In 1809, in *Pierce v. Turner*, the U.S. Supreme Court validated such a trust of enslaved people for the benefit of a married woman against the claims of her husband's creditors, notwithstanding a defect in recordation.⁴⁸

Before her marriage, Rebecca Kenner of Virginia owned both land and enslaved people.⁴⁹ On February 14, 1798, she and her fiancé Charles Turner entered into an early version of a “prenup”: she conveyed her property into a trust, for the benefit of the two of them for their joint lives, then to the survivor for life, and then to her (not his or their) heirs.⁵⁰ As a result, Charles would never have more than a life estate in the property. Both of them executed the conveyance.⁵¹ They married within the next few weeks.⁵² However, the deed was never fully executed and recorded during his lifetime, as Virginia law required.⁵³ They lived in Alexandria until “the autumn of 1801, when they removed into the county of Northumberland,” where the land was located.⁵⁴ He died in December of 1802,⁵⁵ and was declared intestate in February 1803.⁵⁶ In the autumn of that year the widowed Rebecca returned to Alexandria, bringing enslaved people with her.⁵⁷ The entirety of Turner's estate, worth \$4,631.72, was distributed to his creditors—but some debt remained.⁵⁸ As the court expressed it, “Turner died insolvent, unless the said slaves are charged with his debts.”⁵⁹ Are they to be so charged? The U.S. Supreme Court said no, even while acknowledging, “[t]hat creditors of the husband, or purchasers from him, may be injured by the construction . . . but it is not for this tribunal to afford them relief.”⁶⁰

Naturally, in the years following *Pierce*, such marriage settlements became even more common.⁶¹ The effect was at least a

48. 9 U.S. (5 Cranch) 154, 164 (1809).

49. *Id.* at 165.

50. *Id.* at 164–65.

51. *Id.* at 154.

52. *Id.* at 155.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 156.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 167.

61. *See, e.g.*, *Ward v. Amory*, 29 F. Cas. 162 (C.C.D. Mass. 1853) (No. 17,146) (instructing trustees to create a trust for daughters during coverture); *Mitchell v. Moore*, 57 Va. (16 Gratt.) 275, 275 (Va. 1861) (creating a trust of engaged woman's property with her brother as trustee); *Land v. Jeffries*, 26 Va. (5 Rand.) 211, 211 (1827) (validating a trust created just a few minutes before the marriage).

limited avoidance of coverture for women like Rebecca—but not, of course, any benefit to the enslaved persons.

III. MISSISSIPPI AND AMERICA'S FIRST MARRIED WOMEN'S PROPERTY ACT

The ongoing attempt to protect the property, and especially the enslaved human property, of free married women leads directly to the case that gave rise to the first Married Women's Property Act in the U.S. Notably, the married woman in question, despite being descended from three British grandparents, was an indigenous Chickasaw woman in the eyes of both the tribe and Mississippi law, and Chickasaw marriage law turns out to be central to the case.

A. *Fisher v. Allen*, 3 Miss. (2 Howard) 611 (Miss. 1837)

James Allen, the debtor in *Fisher v. Allen*, was married to a woman named Elizabeth (“Betsy”) Love.⁶² Although she is not a party, the case cannot be properly understood without knowing who she is. Although of predominantly European descent, Elizabeth Love's family tree had deep roots in the Chickasaw nation. Her mother, Sally Colbert, was the child of James Logan Colbert, a Scottish trader who first settled in Alabama in 1729.⁶³ Logan, thrice married, fathered eight children, of whom Sally was one.⁶⁴ Elizabeth's father, Thomas Love, was “a British Loyalist who fled to the Chickasaw Nation after Britain's defeat in the American [Revolution]”⁶⁵ Although Chickasaw-U.S. relations were normalized in the Treaty of Hopewell in 1786,⁶⁶ the Chickasaw had allied with the British during the Revolutionary War.⁶⁷ When Love married Sally, he joined this leading mixed-heritage Chickasaw family.⁶⁸ Thomas and Sally had ten children, one of whom was Elizabeth Love, born around 1790.⁶⁹ Thus, although Elizabeth had just one Chickasaw grandparent (Sally's mother), she and her siblings, like

62. *Fisher v. Allen*, 3 Miss. (2 Howard) 611 (Miss. 1837). See also Robert Gilmer, *Chickasaws, Tribal Laws, and the Mississippi Married Women's Property Act of 1839*, 68 J. MISS. HIST. 131, 132–33 (2006).

63. Phillip Knecht, *The Chickasaw Cession*, HILL COUNTRY HIST., <https://hillcountryhistory.org/chickasawcession/> (last visited Oct. 30, 2020).

64. Gilmer, *supra* note 62, at 138.

65. *Id.* at 132.

66. Treaty of Hopewell, Choctaw-U.S., Jan. 3, 1786, 7 Stat. 21.

67. Knecht, *supra* note 63.

68. Gilmer, *supra* note 62, at 138.

69. Photograph of the Grave of Elizabeth “Betsy” Love Allen, in FIND A GRAVE (Aug. 6, 2009), <https://www.findagrave.com/memorial/40350133/elizabeth-allen>. Note that her gravestone mistakenly identifies her as the wife of “John” Allen.

her mother and her maternal aunts and uncles, were all members of the Chickasaw tribe, which used matrilineal descent for purposes of tribal membership.⁷⁰

The Colbert and Love families were prominent in the Chickasaw Nation and in Chickasaw-U.S. relations for decades prior to this case. At least one historian has argued that the Colberts effectively took over the Chickasaw Nation, politically and economically, early in the nineteenth century.⁷¹ Although that may overstate matters, they were surely a leading family, and they were plantation slaveholders.⁷² They remained important for decades: George Colbert and Benjamin Love were part of the Chickasaw delegation that signed the 1834 supplemental treaty to the Treaty of Pontotoc Creek, which resulted in the “near total removal of Chickasaw Indians west of the Mississippi River and the loss of the Chickasaw homelands.”⁷³

Betsy Love and James Allen lived on Chickasaw Nation land that was included in Monroe County, Mississippi,⁷⁴ and they were married there.⁷⁵ Betsy Love was a wealthy woman. In 1829, she gave away twenty-five enslaved people to her ten children.⁷⁶ Only a handful of Chickasaw tribal members received more than she did when their land was sold in 1836 as part of the removal process, and when she died the next year, her estate included twelve enslaved people.⁷⁷ In the 1829 distribution, Betsy’s younger daughter Susan received an enslaved boy, Toney.⁷⁸

The suit that would become *Fisher v. Allen* has its origins in a dubious land deal made by Allen. Long before the case was filed, Allen agreed to sell a tract of land on the Duck River in the Appalachian Mountains (Tennessee) to Alexander Malcolm.⁷⁹ The price was five thousand pounds of North Carolina currency—there was not yet a national currency.⁸⁰ Malcolm paid, but Allen never deeded the land to him.⁸¹ Allen vigorously opposed government efforts in the 1820s to reach a land deal with the Chickasaw in Mississippi

70. Gilmer, *supra* note 62, at 131; *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 615 (Miss. 1837).

71. *See generally* ARRELL M. GIBSON, *THE CHICKASAWS* (1971).

72. *Id.* at 99, 150.

73. Knecht, *supra* note 63.

74. *Fisher*, 3 Miss. (2 Howard) at 612.

75. *Id.*

76. *Id.* at 615; Gilmer, *supra* note 62, at 142.

77. Gilmer, *supra* note 62, at 142.

78. *Fisher*, 3 Miss. (2 Howard) at 613–15.

79. Gilmer, *supra* note 62, at 132.

80. *A History of American Currency*, AM. NUMISMATIC SOC’Y (2016), <http://numismatic.org/a-history-of-american-currency/>.

81. Gilmer, *supra* note 62, at 132.

because it would potentially make him liable to suit.⁸² While Allen resided in Chickasaw territory, however, Malcolm had no remedy against him—until 1830, when Mississippi law changed.⁸³ Malcolm promptly sued, and Allen hired attorney John Fisher to represent him.⁸⁴ Allen promised to pay Fisher \$200—and did not.⁸⁵ *Fisher v. Allen* is a suit for attorney's fees.⁸⁶

In Fisher's suit against Allen, in May 1831, Fisher initially prevailed (Allen did not appear), and was awarded \$208.08 (plus \$23.24 in costs).⁸⁷ Fisher sought to force the sale of Toney to satisfy the debt.⁸⁸ The \$650 bond posted by Susan's brother George, and her great-uncle James Colbert (Sally's brother), shows that Toney's value considerably exceeded what Allen owed Fisher.⁸⁹ Susan (a minor, represented by her "next friend," her older brother, George) argued, ultimately successfully, that Toney had been her mother Betsy's separate property; that Betsy had given Toney to Susan; and that Toney was therefore unreachable for Allen's debt to Fisher.⁹⁰ Benjamin Love was one of the witnesses who testified, most likely about Chickasaw law and marital property.⁹¹

As some commentators have noted, the Mississippi court rightly saw this as a choice of law case. While Mississippi law made the property of a Mississippi wife available to her husband's creditors, Chickasaw tribal law and custom did not—it permitted married women to own and transfer their premarital property and gave no right in it to their husbands upon marriage.⁹² The transfer to Susan took place in 1829, Mississippi law (including marriage law) was not "extended over the Indians" until January 1830, and that law is not retroactive.⁹³ The 1830 law specifically validated marriages "entered into by virtue of any custom or usage" of the Chickasaw,⁹⁴ together with applicable marital property laws.⁹⁵ Susan "wins,"

82. *Id.* at 140.

83. *Id.* at 132–33.

84. *Id.* at 133.

85. *Id.*

86. *Id.*

87. *Id.* at 134.

88. *Id.*

89. Robert Gilmer, *Chickasaws, Tribal Laws, and the Mississippi Married Women's Property Act* (Nov. 21, 2003) (senior thesis, University of North Carolina at Asheville) (on file with author).

90. *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 614 (Miss. 1837).

91. Gilmer, *supra* note 62, at 134.

92. *Fisher*, 3 Miss. (2 Howard) at 615.

93. *Id.*

94. *Id.* at 613.

95. *Id.* at 613–14.

Fisher loses, Allen never pays his debt—and Toney remains enslaved.

Are we then to see tribal law as more enlightened than common law, simply because it respects the rights of married women as property owners, with no regard for the “property” in question?⁹⁶ The Chickasaw law deferred to here, no less than American law at the time, permitted hereditary chattel slavery of persons of African descent, the transfer and sale of these persons, and their treatment as assets.⁹⁷ Any moral superiority Chickasaw law might enjoy over Mississippi law with respect to the rights of free wives must surely be tempered by a clear-eyed assessment of its complicity and defense of slavery. Both served the slaveocracy.

B. Mississippi’s Act for the Protection and Preservation of the Rights of Married Women

In the aftermath of this case, the Mississippi legislature changed the law. In a nutshell, as historian Robert Gilmer explains:

Mississippi lawmakers, like Senator T.B.J. Hadley, hurt by the Panic of 1837, saw an opportunity to protect their own interests by using part of the Chickasaw tribal law found in the *Fisher v. Allen* decision and applying it to all married women in Mississippi by the passage of the Married Women’s Property Act of 1839.⁹⁸

The law that took effect on February 15, 1839, called “An Act for the Protection and Preservation of the Rights of Married Women,” consisted of five short sections, four of which explicitly address property in enslaved people.⁹⁹ It is worth quoting nearly in its entirety, which makes its emphasis on enslaved human property quite apparent:

96. See, e.g., 1 J.F.H. CLAIBORNE, MISSISSIPPI, AS A PROVINCE, TERRITORY AND STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 475 (1880) (“It is singular that an uncivilized tribe of Indians in the interior of Mississippi, in this respect, have anticipated the action of more enlightened communities, in a reform of the common law, now acknowledged to be not only just and proper, but in strict conformity to the highest principles of equity.”); Gilmer, *supra* note 62; *The Chickasaw Who Changed the Law*, in UNCONQUERED AND UNCONQUERABLE: PART I OF MISSISSIPPI’S INDIANS 64 (Aug. 18, 2016) https://is-suu.com/meekschool/docs/chickasawnation_1_2016_web/64.

97. Nor is this an isolated incident. See BARBARA KRAUTHAMER, BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH (2013).

98. Gilmer, *supra* note 62, at 148.

99. A failed proposed amendment also addressed enslaved people specifically, requiring their registration as an anti-fraud measure. *Id.* at 136.

§1. *Of what Wife may be Separately Possessed.* Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name and as of her own property: *Provided*, The same does not come from her husband after coverture.

§2. *To Hold Slaves Possessed at Marriage.* Hereafter when any woman possessed of a property in slaves, shall marry, her property in such slaves and their natural increase shall continue to her, notwithstanding her coverture: and she shall have, hold, and possess the same as her separate property, exempt from any liability for the debts or contracts of the husband.

§3. *May take Slaves by Conveyance, Gift, &c.* When any woman, during coverture, shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall inure and belong to the wife, in like manner as is above provided as to slaves which she may possess at the time of the marriage.

§4. *Husband's Control; Suit by Him and Her; Descent of Slaves.* The control and management of all such slaves, the direction of their labor, and the receipt of the productions thereof, shall remain to the husband agreeably to the laws heretofore in force. All suits to recover the property or possession of such slaves, shall be prosecuted or defended, as the case may be, in the joint names of the husband and wife. In case of the death of the wife, such slaves descend and go to the children of her and her said husband, jointly begotten; and in case there shall be no child born of the wife during such her coverture, then such slaves shall descend and go to the husband and to his heirs

§5. *Sale of her Property by Joint Deed.* The slaves owned by a femme covert under the provisions of this act, may be sold by the joint deed of the husband and wife, executed, proved, and recorded, agreeably to the laws now in force, in regard to the conveyance of real estate of femme coverts [sic], and not otherwise¹⁰⁰

100. A. HUTCHINSON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848 (1848). An Act for the Protection and

The connection between *Fisher v. Allen* and the subsequent passage of the Act is widely noted.¹⁰¹ Neither the case nor the Act can be understood in isolation from the history of Mississippi in the 1830s, and specifically, of the State's relationship with the Chickasaw Nation.¹⁰² The Act coincided with the removal of indigenous people from Chickasaw land and facilitated it. "Chickasaw matrilineal customs dictated that women were the primary landholders within the Chickasaw Nation, and because of this tradition, Mississippians needed them to be able to consent to sell their lands on their own, without first receiving permission from a male relative or tribal leader."¹⁰³

The Act was introduced by Senator Thomas B.J. Hadley,¹⁰⁴ and some scholars have focused on the activities of Piety Smith Hadley, his wife, in insuring its passage.¹⁰⁵ But Mrs. Hadley was not just a legislator's wife who ran a boardinghouse in Jackson, Mississippi.¹⁰⁶ She was also the beneficiary of a testamentary trust including enslaved people, and no doubt eager to protect her property in light of her husband Thomas's financial difficulties.¹⁰⁷ Those who opposed the Act were acutely aware of the risks to creditors and the opportunity for fraud.¹⁰⁸ But they did not prevail.

Like many legal reforms, it was overdetermined. But whether Mississippi's "Act for the Protection and Preservation of the Rights of Married Women" is credited primarily to the influence of the acquisitive, ambitious mixed-indigenous Love-Colbert family, or to the connivance of Piety Hadley and her husband, what cannot be denied is that the primary beneficiaries of the law were free married women whose property consisted largely of enslaved Black women and the enslaved people born to them. We cannot and should not accept any version of legal history that omits to mention

Preservation of the Rights and Property of Married Women, ch. 46, 1838–1839 Miss. Laws 72 (current version at MISS. CODE ANN. § 93-3-1).

101. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 60–61 (1981).

102. Max Grivno, *Antebellum Mississippi*, MISS. HIST. NOW (July 2015), <http://www.mshistorynow.mdah.ms.gov/articles/395/antebellum-mississippi>.

103. Gilmer, *supra* note 89.

104. Gilmer, *supra* note 62, at 136.

105. Elizabeth Gaspar Brown, *Husband and Wife: Memorandum on the Mississippi Women's Law of 1839*, 42 MICH. L. REV. 1110, 1113 (1944); Sandra Moncrief, *The Mississippi Married Women's Property Act of 1839*, HANCOCK CNTY. HIST. SOC'Y., <http://www.hancockcountyhistoricalsociety.com/vignettes/the-mississippi-married-womens-property-act-of-1839/> (last visited Oct. 31, 2020).

106. Brown, *supra* note 105, at 1113; Moncrief, *supra* note 105.

107. Brown, *supra* note 105, at 1113; Moncrief, *supra* note 105.

108. Gilmer, *supra* note 62, at 146.

this,¹⁰⁹ and instead celebrates the case or the Act that followed as an uncomplicated victory for “women’s” rights.

IV. LESSONS STILL UNLEARNED: MEMORIALIZING SUFFRAGE

Unlike the story of *Fisher v. Allen* and the Mississippi Act, the story of racism in the women’s suffrage movement has frequently and compellingly been told.¹¹⁰ The history of the women’s suffrage movement included explicit racism on the part of leaders of the movement and in the appeals made for it.¹¹¹ The Nineteenth Amendment was passed at the very same time as the “Red Summer” of race massacres in the U.S.,¹¹² and that is no coincidence: both can be seen as assertions of white supremacy. Black women, though not explicitly excluded from the coverage of the Nineteenth Amendment, were subjected to the same violent voter suppression as Black men. This is widely known. And yet, when the time came to memorialize women’s suffrage for its centennial year, the very same mistakes of exclusion and subordination recurred.

In all of New York City, just five of 150 statues are of real women.¹¹³ None of the twenty-three statues of historical figures in Central Park, the third most visited tourist attraction in the world,¹¹⁴ honors a real woman.¹¹⁵ An all-volunteer group calling

109. See, e.g., Bernie Jones, *Revisiting the Married Women’s Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. U. J. GENDER SOC. POL’Y & L. 91 (2013) (describing the history of the Married Women’s Property Act without mentioning Mississippi, slavery, or *Fisher v. Allen*).

110. See, e.g., ANGELA Y. DAVIS, WOMEN, RACE & CLASS 70–86 (1981); FAYE E. DUDDEN, FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA 3 (2011); ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA 1848–1869, at 95–96, 100, 110 (1978); THE ELIZABETH CADY STANTON–SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITING, SPEECHES 120 (Ellen Carol DuBois ed., 1981). See generally LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA (2020); LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE (2009); ROSALYN TERBORGH-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920 (1998).

111. See sources cited *supra* note 111.

112. Richard Wormser, *Red Summer: 1919*, PBS, https://www.thirteen.org/wnet/jimcrow/stories_events_red.html (last visited Oct. 31, 2020).

113. Sofia Quaglia, *The U.S. Has Fewer Than 400 Statues of Women—But That’s Changing*, QUARTZ (Oct. 23, 2019), <https://qz.com/1732974/new-york-citys-central-park-will-get-its-first-statue-of-women/>.

114. *Central Park Is Third Most Visited Tourist Attraction in the World*, CENTRALPARK.COM, <https://www.centralpark.com/news/central-park-third-visited-tourist-attraction-world/#:~:text=Central%20Park%20came%20in%20third,receives%2039.2%20million%20visitors%20annually> (last visited Oct. 31, 2020).

115. Jeanne Gutierrez & Nicole Mahoney, “Breaking the Bronze Ceiling”: *The Elizabeth Cady Stanton and Susan B. Anthony Woman Suffrage Movement Monument*, N.Y. HIST. SOC’Y MUSEUM & LIBR.: WOMEN CTR. (July 24, 2018),

itself “Monumental Women” was founded in 2014, with the goal of erecting a monument to women’s suffrage in Central Park in time for the 2020 centennial of the ratification of the Nineteenth Amendment.¹¹⁶ After years of fundraising and a design contest, their memorial to founding suffragettes Elizabeth Cady Stanton, Susan B. Anthony, and Sojourner Truth, paid for by donations from, among others, the Girl Scouts of Greater New York,¹¹⁷ was unveiled on August 26, 2020.¹¹⁸

But what has already been completely scrubbed from Monumental Women’s website is that their initial proposal included Stanton and Anthony, alone—Stanton, who said about Black male suffrage, “it becomes a serious question whether we had better stand aside and [let] ‘Sambo’ walk into the kingdom first,”¹¹⁹ and Anthony, who once said of the Fifteenth Amendment, “[I will] cut off [this] right arm [of mine] before [I will] ever work for or demand the ballot for the Negro and not the woman.”¹²⁰ The group’s legal name is the Elizabeth Cady Stanton and Susan B. Anthony Statue Fund, Inc.¹²¹ Nor does the site’s page mention that the original commission was for a monument to those two women only (it was not the winning sculptor Meredith Bergmann’s choice).¹²² Once unveiled, the original design encountered resistance, from Gloria Steinem and others,¹²³ resulting in its redesign and the inclusion of Sojourner Truth.¹²⁴ “Ain’t I a Woman?,” indeed.¹²⁵

<http://womenatthecenter.nyhistory.org/breaking-the-bronze-ceiling/>; see also MONUMENTAL WOMEN, monumentalwomen.org (last visited Nov. 12, 2020).

116. MONUMENTAL WOMEN, *supra* note 115.

117. *Finalists for Central Park Women’s Suffrage Monument Unveiled*, GIRL SCOUTS OF GREATER N.Y. (Mar. 19, 2018), https://www.girlscoutsnyc.org/en/our-council/about-gsgny/news/2018/finalists_for_centra.html.

118. Karen Matthews & Ted Shaffrey, *Central Park Monument Honors Women’s Rights Pioneers*, AP NEWS (Aug. 26, 2020), <https://apnews.com/article/ab166fb617d1d73e0930f0e6f2a9af78>.

119. DAVIS, *supra* note 110, at 70.

120. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO PRESENT* 143 (1986).

121. MONUMENTAL WOMEN, *supra* note 115.

122. Gutierrez & Mahoney, *supra* note 115.

123. Ginia Bellafante, *Is a Planned Monument to Women’s Rights Racist?*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/is-a-planned-monument-to-womens-rights-racist.html>.

124. Valentina Di Liscia, *Monument to Susan B. Anthony, Elizabeth Cady Stanton, and Sojourner Truth Unveiled in Central Park*, HYPERALLERGIC (Aug. 27, 2020), <https://hyperallergic.com/584676/monument-to-susan-b-anthony-elizabeth-cady-stanton-and-sojourner-truth-unveiled-in-central-park/>.

125. *Sojourner Truth: Ain’t I a Woman?*, U.S. NAT’L PARK SERV., <https://www.nps.gov/articles/sojourner-truth.htm> (Nov. 17, 2017).

Whatever the benefits and limitations of bronze statues in Central Park as a way to memorialize women's history,¹²⁶ one cannot help but wonder how, in the current decade, in New York City, a monument to women's suffrage was designed and approved with no thought about whether it uncritically memorialized and thus perpetuated a white supremacist narrative about the struggle to win the franchise for women. This is white supremacy as an intellectual disease, slaveocracy as epistemology, shaping what we know, allow ourselves to know, and hold ourselves responsible for knowing or failing to know. It clearly continues to ail us.

From where we are now, we cannot change some of the shameful aspects of early legal feminism in America, which must be understood predominantly as an attempt to elevate and improve the position of free white women, married or single, to that enjoyed by their free white brothers, fathers, husbands, and sons. These efforts were not just radically insufficient and under-inclusive. They actively perpetuated the subordination of enslaved and formerly enslaved Black women. Whether from blindness, malice, or greed, whichever aspects of slaveocracy and white supremacy were activated, they cannot be expunged from our past. What we can and must do, however, is tell the fuller truth about that past now.

126. Diane Klein, *When Flesh and Blood Meet Bronze and Marble*, MEDIUM (July 6, 2020), <https://medium.com/@dianeklein/when-flesh-and-blood-meet-bronze-and-marble-47f05cee1292>.

In Search of Equality for Women: From Suffrage to Civil Rights

*Nan D. Hunter**

ABSTRACT

This article analyzes women's rights advocacy and its impact on evolutions in the meaning of gender equality during the period from the achievement of suffrage in 1920 until the 1964 Civil Rights Act. The primary lesson is that one cannot separate the conceptualization of equality or the jurisprudential philosophy underlying it from the dynamics and characteristics of the social movements that actively give it life. Social movements identify the institutions and practices that will be challenged, which in turn determines which doctrinal issues will provide the raw material for jurisgenerative change. Without understanding a movement's strategy and opportunities for action, one cannot know why law developed as it did.

This article also demonstrates that this phase of women's rights advocacy comprised not one movement—as it is usually described—but three: the suffragists who turned to a campaign for an Equal Rights Amendment (ERA) after winning the Nineteenth Amendment; the organizations inside and outside the labor movement that prioritized the wellbeing of women workers in the industrial economy; and the birth control movement. All three branches engaged with courts, legislatures, and other lawmakers, using a variety of methods and a mixture of complementary and contradictory arguments in an effort to secure full citizenship status for women in the political, economic, and family realms.

Different approaches to equality, however, created a significant movement disability. Prioritizing the ERA cemented that branch's allegiance to what would now be called formal equality, the principle that men and women should be held to the same rights and duties under law. This absolute equality stance precluded support for laws setting protective working standards only for women, the paramount goal of those most concerned with women working in

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factories. ERA advocates saw protective laws as Trojan horses that promised minimum wages and a cap on hours but also disqualified women from some of the highest-paying jobs. Labor activists saw the disabilities associated with women's political and family status as problematic, but secondary to economic issues. Birth control advocates developed arguments that sidestepped the frame of equality altogether.

The absence of a united position on the scope of gender equality under the law facilitated the silence of the Supreme Court, which perpetuated a discourse of domesticity with respect to the legal status of women that began before suffrage and continued long after. The gap in constitutional law as to gender not only stymied doctrinal development but also deprived women's rights advocates of the cultural power that attaches to an overarching equality narrative. Yet although the discourse of law drove the branches of women's rights advocacy apart, it also provided a venue in which equality had to be, and ultimately could be, defined, at least for regulatory purposes.

It was the labor-oriented portion of the movement that brought an anti-discrimination model into women's rights advocacy. Demands for equal pay combined the no-differential-treatment approach of the ERA wing with the workplace-only focus of the labor movement. This linkage ironically brought the women workers groups substantively closer to the anti-classification position associated with the equality/sameness understanding advocated by supporters of the ERA. The institutional mechanism that instantiated this melding was a presidential commission that produced a report which appeared destined for the shelves of the bureaucracy. Beneath the surface, however, the commission served the function of aggregating and integrating women's rights advocacy across all three movement branches.

The conventional understanding that feminism was dormant between adoption of the Nineteenth Amendment and the eruption of rights claims in the 1960s is wrong. Examining the campaigns for legal change across the branches of the movement during this time reveal an increase, not a diminution, in demands for full and equal citizenship in multiple arenas. What was dormant was the development of the concept of gender equality in constitutional law, but that was not for lack of activity by women on the ground.

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I. INTRODUCTION

In 1966, the National Organization for Women (NOW) declared in its Founding Principles that it sought to fill a yawning political gap: “[t]here is no civil rights movement to speak for women, as there has been for Negroes and other victims of discrimination.”¹ The implicit message that there was no comprehensive social movement focused on equality under law for women was both right and wrong. It was wrong because, by 1966, decades of work by multiple organizations that were feminist in function, if not always in name, had produced not just the Nineteenth Amendment’s promise of suffrage,² but also social insurance programs that partially

1. Betty Friedan, *The National Organization for Women’s 1966 Statement of Purpose*, NAT’L ORG. WOMEN, <https://now.org/about/history/statement-of-purpose/> (last visited Oct. 10, 2020).

2. I use the term “promise” to reflect the reality that only white women and Black women outside the South received the benefits of the Nineteenth Amendment. In the remainder of this article, I sometimes use “women” when the proper referent would be “white women.” Rather than seek to specify differential consequences for each instance, I make note here that the organizations, strategies, and concepts of law discussed throughout were pervasively racialized. Foundationally, the Nineteenth Amendment itself had little impact on Black women in southern states who were disenfranchised by Jim Crow laws in 1920 and

compensated for gendered economic structures, nationwide access to birth control, and Congressional enactment of two anti-discrimination statutes. NOW was right, though, that there had not been a successful litigation campaign framed in terms of women's rights of the kind that the NAACP had brought to the campaign for racial justice.

The desire by NOW's founders to mimic the role of the NAACP, and especially its Legal Defense Fund, reinforced the belief during the 1960s that creating new law, especially in and through the process of Supreme Court rulings, constituted the most effective strategy to achieve equality. By that measure, women's rights advocacy was indeed several steps behind efforts to end discrimination based on race. And the path suggested by NOW proved to be essential. Politically and doctrinally, feminist arguments succeeded only after they built directly on the analogy to race. The civil rights movement—a phrase generally used as synonymous with seeking to secure racial equality—has provided the dominant narrative for all American social movements for equality.

As a result, most legal scholarship on law and social movements has taken race-oriented efforts as the starting point for the field.³ The early conventional wisdom was that these campaigns were centered on litigation, a strategy later imitated by many movements.⁴ More recently, the literature has stressed that reliance on litigation renders social movements susceptible to the multiple flaws that come from assuming that the courts can produce significant reallocation of power relations or reworking of structural practices.⁵

remained so for many years thereafter. Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 19TH AMEND. ED. GEO. L.J. 73, 75 n.3 (2020). Their inability to benefit from the Amendment was well known at the time. See Elsie Hill & Florence Kelley, *Shall Women Be Equal Before the Law?*, NATION (Apr. 12, 1922), <https://www.thenation.com/article/archive/shall-women-be-equal-law/> (“Today millions of American women . . . are kept from the polls in bold defiance of the Suffrage Amendment.”). In the effort to win ratification by the necessary number of states, suffragists vacillated repeatedly over how much to accommodate the white political leadership in southern states. See generally AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890–1920*, at 163–218 (1965).

3. Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1439–41 (1984); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN L. REV. 207, 208 (1976). As Houck notes, free legal aid for persons who could not afford lawyers also began in this period; however, I am examining only cause-oriented organizations.

4. Rabin, *supra* note 3, at 215. The history of the NAACP, which relied on litigation to a greater extent than the other rights groups, provides some justification for this approach. Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC'Y REV. 367, 375–76 (2020). The ACLU and other groups followed suit. *Id.* at 380–81, 390.

5. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2037, 2043–47 (2008).

This article analyzes the dynamics of law and social change movements from a different perspective: the role of legal advocacy in women's rights campaigns from the cusp of the Nineteenth Amendment to the enactment of the 1964 Civil Rights Act. We still tend to think of legal equality for women as beginning with the suffrage campaign, culminating in adoption of the Nineteenth Amendment in 1920, and followed by an effort to enact the Equal Rights Amendment that withered into obscurity until its rebirth in the 1970s.⁶ The lens that I use in this article brings into focus three distinct movements or movement branches that dominated the fifty-year interim and utilized new concepts of women's equality and a wide range of methods—inside and outside courts—to achieve it.

In those first years after suffrage, three powerful movements formed that were organized explicitly or implicitly around gender and the role of law in gender formation: the Equal Rights Amendment (ERA) campaign, the campaign for women workers' rights, and the birth control campaign. All were efforts self-consciously directed at enhancing women's power in society, in varying contexts. In each, the associated legal change efforts highlighted the life conditions of women, even if the terminology of equality was not used.

Methodologically, except for the birth control movement, women's rights advocates during this period largely avoided litigation, having learned that lawsuits produced fights that they could not win. In court, they faced a discourse of domesticity that reigned in constitutional law until the 1970s. Viewed from today's perspective, in which society uses the extent of legal equality to measure a civil rights movement's success, the result is a blank space for women in the history of equal protection law until the 1970s.⁷ The absence of successful litigation challenges under the Equal Protection Clause created a lacuna for women's rights not just in equal protection doctrine but also in the broader concept of equality. The greatest significance of the litigation gap was the absence of the legitimating effects of judicial text, not the absence of that particular method of change. The third branch of women's rights—the birth control movement—initially sought to end the double standard between men and women with regard to the prerogatives and responsibilities for sexual behavior, but soon based its legal arguments on free expression and deference to medical authority.

6. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 17–18 (1986).

7. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 *YALE L.J.F.* 450, 454, 479 (2020); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 953–56 (2002).

The division of women's rights advocacy into three branches reflected the failure to develop a shared understanding of their goal. The political and economic branches bitterly and publicly disagreed about what equality for women meant. Potentially, there could have been a positive side to the divisiveness: the inability to settle on a definition left space for the concept of equality to evolve, develop new meanings, and emerge from jurisgenerative venues other than the courts. In the venue of state legislatures, on an issue other than the struggle between labor and management, there was a glimmer of greater flexibility and intra-movement accommodation. For the most part, however, feminists surmounted these divisions only much later by adopting the paradigm of civil rights, a resolution that continues to beg the question of whether equality is synonymous with full political, economic, and sexual rights or only with a much more limited claim against discrimination.

The complexities of gender equality predate even the right to vote. Beginning with the Seneca Falls Declaration of Sentiments in 1848, the goal of ending coverture—which sounded in a frame of collective liberty more than equality—carried as much importance as securing the vote.⁸ The two goals were inextricably linked, at the superficial level because married women were thought to be already represented through the votes of their husbands who were understood to hold dominion over households, and at a deeper level, because coverture was the enforcement arm of a legal system that accorded marriage the status of quasi-sovereignty in its jurisdictional authority over women. Subordination within the family was both the predicate for and product of political subordination. The legal and social insulation of family governance undercut efforts to apply the constitutional norms of equality or liberty.

After the adoption of the Nineteenth Amendment, women still faced a matrix of oppressive institutions (somewhat relaxed but continuing) that was anchored in the state, the family, and the economy. Black women struggled in addition with exclusion from all public and private spaces marked as white, not least among them large parts of the women's rights movement itself.⁹ Divided not only by race but also by economic status and ideological

8. Hunter, *supra* note 2, at 90–92, 95–96; Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STAN. J. C.R. & C.L. 349, 350–51 (2020).

9. See generally Evelyn Brooks Higginbotham, *Clubwomen and Electoral Politics in the 1920s*, in AFRICAN-AMERICAN WOMEN AND THE VOTE, 1837–1965 (Ann D. Gordon ed., 1997); see also SUZANNE M. MARILLEY, *WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES, 1820–1920*, at 178 (1996); PAULA A. MONOPOLI, *CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT* 53–55 (2020).

priorities, women undertook multiple, sometimes contradictory, campaigns to change the law of marriage, of economic structures, and of state regulation of sexuality.

Notwithstanding the combined scope of these campaigns, women's rights advocates failed to develop an analysis that addressed the interlocking nature of the domestic and economic aspects of women's citizenship. The three components of women's rights advocacy developed on different tracks, producing different understandings of equality, leading to a failure for several decades to develop a coherent theory of equality or a strategy that addressed the inseparability of family and work life. The result was a gap—intellectually, legally, and theoretically—at heart of the effort.

This intra-movement impasse ended with the adoption by women's advocates, led by Pauli Murray in the early 1960s, of what I will call the civil rights paradigm, *i.e.*, the anti-discrimination model for laws prohibiting race discrimination.¹⁰ The largely forgotten President's Commission on the Status of Women in 1961 to 1963 served as the institutional venue for the work by Murray and others that led to the inclusion of "sex" in the 1964 Civil Rights Act. The civil rights paradigm was an imperfect fit for gender subordination, but it provided a workable compromise position for both ERA advocates and labor union women, who had developed a deep enmity in the course of battles over protective labor laws.

This article takes as its starting point that it has become part of American political culture that persons who seek justice do so in significant part by pursuing rights. Law is a strategy; litigation is one tactic. Participants in movements identify goals and select target institutions subject to a variety of internal and external pressures—the available resources; the preferences of funders, members and staff; the need to enhance the organization's status vis-à-vis rival groups in the same struggle; the state of the substantive law; and the ideological complexion of courts and legislatures. At bottom, political strategy guides the selection of institutions to be challenged, which, in turn, determines which doctrinal issues will provide the raw material for jurisprudential change.

The legal system is not merely a passive venue, however. Legal discourse, understood as this is an ongoing process, translates and frames ideas in ways that can change social meanings and structural relationships. New interpretations of collective experience align with popular understandings of law. Meanings evolve as they

10. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968, at 126–30 (1988). See generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

are (re)produced in and through social relationships, practices, institutions, and knowledges. In the course of that evolution, new political explanations emerge, which then produce new meanings, in an iterative process.

This article contributes to the scholarship both on law and social change and on gender equality. It is the first to link the history of the three branches of the early twentieth century women's movement by analyzing how each used law as a key ideological and strategic resource. This approach yields several insights.

First, divisions in the struggle to define gender equality, both in popular discourse and in legal terms, led to multiple, competing understandings of what that concept meant. Groups focused on eliminating discriminatory laws, especially with respect to families, pursued the goal of equal treatment as subjects of the state. Groups concerned with the special harshness of women's working conditions sought ameliorative steps that could be justified legally on necessity rather than equality grounds. The birth control branch of the movement sidestepped equality arguments, and perhaps because of that, had the greatest success in litigation.

These arguments forestalled the capacity to build coalitions, even—and perhaps especially—among women's groups. The exception came in the context of state-level legislative work, where cross-organizational collaboration occurred more frequently, likely because of the lower visibility of geographically dispersed state campaigns and the more pragmatic, adaptive nature of legislative lobbying compared to litigation. Regardless, women's rights advocates were left without a master frame or even a coherent argument for gender equality.

Second, the turn of the century—roughly coincident with the Nineteenth Amendment—was the period when law-focused organizational efforts for social change began. During the Progressive era, in the wake of the Reconstruction Amendments and as legal formalism declined, the major institutional bases for civil rights lawyering were founded. Organized and strategic constitutional litigation became a social movement tool. Each of the three branches of the women's rights movement had its own distinct relationship to and experience with litigation, and their continuing reliance on legislation, direct action, and public education illustrates that today's focus on alternatives to litigation is not new.

Third, when one does narrow the focus to litigation, legal realism emerges as a dominant factor both for the substantive content and the tactical innovations in women's rights law. This effect continues throughout the period before World War II and provides an

important linkage between legal realism and the legal liberalism associated with postwar civil rights campaigns. Ironically, the model for anti-discrimination law as applied to women, often criticized for its grounding in notions of formal equality now considered conservative, grew out of the branch of the movement most closely associated with the political left and the rights of women in the workforce.

Throughout, the article demonstrates that one cannot separate the conceptualization of equality or the jurisprudential philosophy undergirding it from the dynamics and characteristics of the social movements that actively give it life.

II. DÉBUT DE SIÈCLE

“[This] is the first hour in history for the women of the world. This is the woman’s age!”¹¹

Millions of American women had become engaged in political advocacy by the time that the Nineteenth Amendment was adopted in 1920. Although it secured the vote for many women, the Amendment lagged the front edge of a surge of social change at the beginning of the century that was driven by Progressive era reform, an urbanizing economy and culture, and an unprecedented level of women’s activism.¹² At the same time, by its formalization of full citizenship status for women independent of husbands and outside the structure of the family, the Amendment also outpaced norms that still held sway in many parts of the country. For millions of women, the realities of life had not caught up to the opportunities that they could imagine or read about. The racial justice and labor movements also expanded during this period, albeit often in the face of violent opposition. One product of the disjuncture between the traditional structures and practices perpetuated by the legal system and the pressures for progressive change was the birth of social movement lawyering.

11. J. STANLEY LEMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S*, at 20 (1973) (quoting the President of the National Women’s Trade Union League in an address to the organization’s biennial convention in 1917).

12. Women during this era were, if anything, “overorganized.” Nancy F. Cott, *Across the Great Divide: Women in Politics Before and After 1920*, in *WOMEN, POLITICS AND CHANGE* 153, 161 (Louise A. Tilly & Patricia Gurin eds., 1990) (quoting Inez Haynes Irwin, author and former National Woman’s Party suffragist). The inter-war period was the time of women’s greatest level of involvement in various reform efforts. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 97 (1987); see also LEMONS, *supra* note 11, at 41–58; NANCY WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE* 382–416 (1984).

A. *The Iron Triangle of Gender*

Socially and legally, women have long faced an exit/entry trap with respect to marriage and economic independence. Divorce was rarely attainable in the nineteenth century, and while opportunities for higher education and paid employment increased, the best paths for mobility remained closed to women.¹³ From its inception, the suffrage movement sought three goals alongside the vote, each of which would open new economic and social possibilities for women as well as reform the law: to democratize marriage, to liberalize divorce, and to improve access for women to paid employment. Today, we think of these as equality goals, but to be historically accurate, they first arose in a discourse of emancipation.¹⁴

Prior to the Civil War, women's rights and abolition advocates were often closely linked.¹⁵ After the war, in debates over the Reconstruction Amendments, Congress refused to consider women as a group for whom it was necessary or appropriate to guarantee equality in the incidents of citizenship.¹⁶ At the heart of congressional debates were fundamental questions of personhood and equality. White women were gendered as property under the law of coverture but raced as fully human, although unequal. For Black Americans, both legal personhood and equality were at stake. Congress extended minimal constitutional personhood to formerly enslaved persons through the Thirteenth Amendment and its embedded repudiation of the Supreme Court's *Dred Scott* decision.¹⁷ The issue of constitutional equality for Black Americans became focused most sharply on the right to vote, resulting in the last in the series of Reconstruction Amendments—the Fifteenth, adopted in 1870—which guaranteed suffrage regardless of race.

Achieving the vote thus became the dominant framework after the Civil War for understanding equality of citizenship more generally. The Fifteenth Amendment reflected and embodied the belief that voting and political equality mutually defined each other. In response, women who had previously been focused on ending the regime of coverture as much as on suffrage began to prioritize

13. WOLOCH, *supra* note 12, at 221, 276.

14. Hunter, *supra* note 2, at 86–89.

15. ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE & WOMEN'S RIGHTS* 65 (1998).

16. *Id.* at 90–94; MARILLEY, *supra* note 9, at 66–76; Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994).

17. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

achieving the vote as the path to what was understood to represent equal political status and full (that is, voting) citizenship.¹⁸

The most promising constitutional basis for securing political rights for women initially appeared to be Section One of the Fourteenth Amendment, which nationalized the concepts of equal protection of the law and the benefits of citizenship without an explicit limiting reference to race as the basis for coverage. In 1875, however, the Supreme Court ruled that voting was not among the privileges and immunities of federal citizenship, thus leaving women's access to the vote based on sex up to states.¹⁹ And in 1880, the Court made clear its view that the Fourteenth Amendment as a whole, including the Equal Protection Clause, addressed only race discrimination.²⁰ In boxing women out of Fourteenth Amendment protection, the Court invoked the *de jure* subordination of wives to husbands and the "natural" role of women.²¹ These rulings thereby installed an industrial age version of the feudal concept of *coverture*.²² They conflated law and nature, creating the jurisprudential category of woman, defined by marriage.

The Nineteenth Amendment relaxed the legal bonds of gender and signaled the increasing social independence of women, but a quasi-carceral matrix of subordinating institutions remained in place. One can envision these components of the matrix as forming an iron triangle generated by the three primary domains in which women were fighting for freedom and equality: the state, the family, and the economy. Each wall of the triangle connected and was secured by two discursive and institutional regimes. Each dimension of the triangle was fully and *de jure* determined by gender.

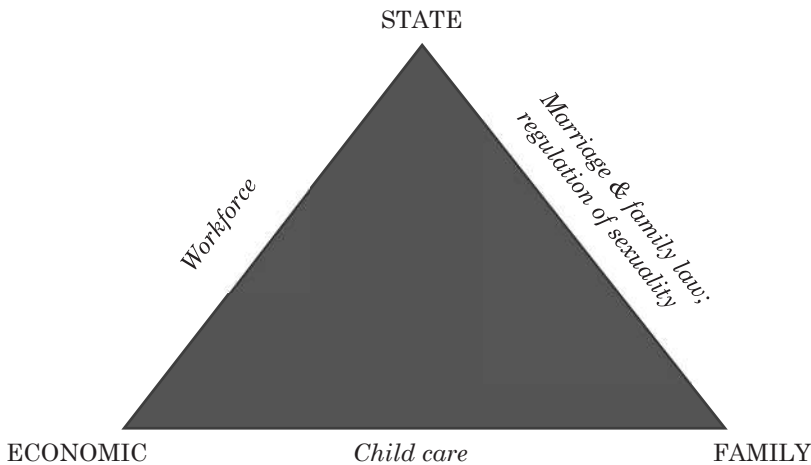
18. Thomas, *supra* note 8, at 369–70.

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

20. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880); see Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 724–25 (1935).

21. Most famously, see *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

22. LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 38–40 (1969).



For women, political status, family life, and economic need were symmetric and parallel, and the intersecting axes of the triangle formed what amounted to a triple bind. Few women could leave a marriage given financial dependence on husbands and the dearth of viable job opportunities outside marriage. During marriage, the law granted husbands an enforceable right to economic dominance. Until the Nineteenth Amendment, women had no independent capacity as citizens to use the vote to alter these rules. Although these dimensions of women's lives were changing both inside and outside the realm of legal structures, the triangle continued in law in the late nineteenth and early twentieth century, and its vestiges persisted long afterward.

B. A New Relationship Between Social Movements and Law

At the same time that women's rights advocates were regrouping after their exclusion from protection under the Reconstruction Amendments, other social justice movements were beginning to generate planned, sustained litigation or legislation to secure or enforce constitutional protections. These efforts were made possible by two substantive pillars that had emerged as the basis for rights-based arguments: the Reconstruction Amendments with regard to race and the invocation of the First Amendment by political dissenters, especially leftists engaged in labor organizing. Debates over the Reconstruction Amendments set the stage for an explosive growth in "[t]he idiom of rights,"²³ including those framed in terms

23. LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 125–26 (2015).

of “equality.”²⁴ As leftists pressed for structural change in economic relations, they found a powerful resource in the First Amendment’s promise (if often not a reality) of protection for speech.²⁵

With these new or newly invigorated constitutional bases, social movement litigation as a distinctive, organized enterprise began in the period surrounding the turn of the twentieth century, roughly from 1890 to 1920. Political organizations dedicated to systematic law reform as a strategy for social change began to appear, creating what was the first wave of coordinated social movement lawyering in the courts. Not until the 1960s and 1970s, with the birth of multiple legal defense organizations, was there a period of similar expansion.²⁶

The NAACP began in 1909, preceded by two smaller organizations that had sponsored litigation efforts to reinforce and expand the protections of the Reconstruction Amendments.²⁷ Early efforts were led by white lawyers, some of whom were veterans of abolitionist efforts.²⁸ With the increasing education of Black lawyers, a path broken by Charles Houston’s conversion of Howard University School of Law into virtually a training ground for rights advocacy, Black lawyers and other professionals took over the leadership of the NAACP.²⁹ The organization rapidly came to dominate the field then known as race law.

Lawyers affiliated with the labor movement had begun fighting anti-labor injunctions in the late 1800s.³⁰ As protests over labor-related issues increased, lawyers supportive of labor drove the development of First Amendment expression law.³¹ The right to organize and to picket generated the core of the field.³² Some small firms specialized in labor-side representation, and unions created their own legal departments.

24. Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1930*, 103 AM. HIST. REV. 1440, 1473 (1998).

25. CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 28–53 (2007); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 75–86, 122–26 (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 (1997).

26. Rhode, *supra* note 5, at 2033.

27. SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915, at 58–62, 122–41, 252–66 (2013).

28. *Id.* at 277.

29. Steven D. Jamar, *Charles Hamilton Houston (1895–1950)*, HOW. UNIV. SCH. OF L., <http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html> (2004); NAACP *Legal History*, NAACP, <https://naacp.org/naacp-legal-team/naacp-legal-history/> (last visited Nov. 11, 2020).

30. *See, e.g.*, *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894) (upholding injunction).

31. *See generally* RABBAN, *supra* note 25.

32. Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 302, 309–10 (2014).

The National Consumers League (NCL), which began in 1891,³³ was predominantly a women's organization in fact³⁴ and was led, beginning in 1899, by social justice powerhouse Florence Kelley.³⁵ The NCL focused during this period primarily on labor issues (despite its name),³⁶ especially the concerns of women and children who worked in factories or at home as piece workers. The NCL enlisted Louis Brandeis to defend the constitutionality of state laws that guaranteed women minimum wages and maximum hours.³⁷ The result was what became known as the Brandeis brief,³⁸ famously successful in *Muller v. Oregon*.³⁹ After *Muller*, the political stature of the NCL soared.⁴⁰ In 1919, on the eve of suffrage, the organization adopted an ambitious ten-year strategy for legal reform based on enactment of protective labor laws for women.⁴¹ Over time, Brandeis was joined or succeeded by other elite attorneys who represented the NCL in the effort to preserve such laws.⁴²

Emerging from prior groups that provided support first for pacifists and then for workers, the American Civil Liberties Union (ACLU) began in 1920.⁴³ Among its earliest endeavors was advocacy for the speech rights of Margaret Sanger, who launched the American birth control movement.⁴⁴ Facing legal threats in 1916, Sanger reached out to Roger Baldwin, who later co-founded and became the first director of the ACLU, whom she knew from their shared social circle of leftists and progressives.⁴⁵ This connection forged a link between women seeking reproductive control and leaders in the mobilization of legal representation for progressive

33. LONDON R. Y. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 14 (2000).

34. *Id.* at 13–14, 259–61, 264–69.

35. NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S, at 61–62 (2015).

36. The name derived from the principle of “[e]thical consumption,” a tradition associated with women who boycotted British goods during the Revolutionary period and slave-made goods prior to the Civil War. STORRS, *supra* note 33, at 19.

37. NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 26–28 (1996).

38. I use the term Brandeis-Goldmark brief in the remainder of this article because the massive body of empirical research for the brief was done by a team led by Josephine Goldmark. *See id.* at 28–31; *see also* Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

39. 208 U.S. 412 (1908).

40. WOLOCH, *supra* note 37, at 87.

41. *Id.* at 125.

42. Brandeis's successors as legal advisors to the NCL included Felix Frankfurter, Roscoe Pound, Benjamin Cohen, and Dean Acheson. STORRS, *supra* note 33, at 37.

43. *See generally* RABBAN, *supra* note 25.

44. LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 11 (2013).

45. *Id.* at 22–25.

causes that began before the formal establishment of either the ACLU or what became Planned Parenthood.

C. Confluence

The period encompassing the last quarter of the nineteenth century and the first quarter of the twentieth century solidified the structural apparatus for civil rights movements. A profoundly ambivalent constitutional discourse of equality and free expression emerged in the Supreme Court's interpretations of constitutional law during that period, inspiring a burst of new legal rights claims but validating only some. The structural apparatus of law-focused organizations made possible the cross-fertilization of doctrine and strategy in at least two respects.

First, it fostered the first politically-driven formations of lawyers in support of social justice causes. Organized legal advocacy for constitutional rights was born during this period. The political and cultural ascendance of equality and expression claims combined with the new lawyer-led advocacy groups intensified the power of law and specifically of constitutional rights claims as the primary frame for the contestation of gendered and raced power relations and the suppression of dissent. Lobbying of state legislators continued, as well as direct action, protests, and public education. Litigation documents, such as briefs, began to be published and circulated after the end of lawsuits, sometimes achieving substantial distribution.

Second, the lawyers affiliated with these organizations developed strong professional and interpersonal ties that facilitated the migration of strategies, tactics, and doctrinal evolution across progressive causes. Allying themselves with the jurisprudence of legal realism, then at the height of its challenge to formalist reasoning, these lawyers helped to channel judicial attention to "sociological facts" generated by empirical or expert studies.⁴⁶ One example of this technique—the Brandeis-Goldmark brief—migrated from the NCL to the ACLU to the birth control movement.

III. THREE ROADS DIVERGED

By 1920, when suffrage was achieved, the movement for women's rights had already fractured. During the post-Civil War period, advocacy organizations diverged into three distinct branches that

46. See generally Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 *LAW & SOC. INQUIRY* 493 (2020).

roughly corresponded to the iron triangle. Organizations focused on women workers and the lines or spokes emanating from the economy node in the triangle—the Women’s Trade Union League (WTUL)⁴⁷ and the NCL—were in place by the turn of the century. The almost 400,000 women who had joined unions by 1920 could vote as union members before they had a right to vote as citizens.⁴⁸ The birth control movement, focused on the lines emanating from the family node in the triangle, also began before 1920. The oldest of the cluster—the suffrage movement—had long been focused on the meaning of citizenship for women, at the state node of the triangle. Because so many vestiges of coverture remained in place, suffragists could declare only partial victory after winning the vote in 1920. They redirected energy and resources toward the crusade for a second constitutional amendment.

Each of these movements faced the challenge of defining equality.⁴⁹ The conventional wisdom among historians is that the promotion of so-called protective laws by organizations focused on women workers represented the “difference” approach to women’s equality, an assertion that women could secure equal opportunity only if the law accommodated the family and reproductive roles that seemed inevitable. By contrast, the former suffragists adopted what we now call an equal treatment approach, stressing arguments that women were the same as men in their political roles and social capacities, leading to the demand for equal laws that was embodied in the proposed ERA. These women, often educated and economically secure, saw protective laws as enforcing a ceiling as much as a floor, while working class women needed the floor more than they feared the ceiling. Only the birth control movement avoided the equality versus difference trap by choosing neither, and reframing its rights claims on libertarian rather than egalitarian arguments.

In reality, the discursive battle between the ERA-focused groups and the worker-focused groups was even more complex than this dichotomy suggests because both invoked both understandings of equality for women. Their efforts illustrate concretely how the indeterminacy of the idea of equality, and specifically of the idea of

47. The Women’s Trade Union League formed in 1903 and was “the first national body dedicated to organizing women workers.” PHILIP S. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM COLONIAL TIMES TO THE EVE OF WORLD WAR I* 120 (1979).

48. MAURINE WEINER GREENWALD, *WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES* 39 (1980).

49. See generally Nancy F. Cott, *Historical Perspectives: The Equal Rights Amendment Conflict in the 1920s*, in *CONFLICTS IN FEMINISM* 44–59 (Marianne Hirsch & Evelyn Fox Keller eds., 2016).

gender equality, shaped U.S. politics and law in the early twentieth century. The problem was less the movement than what were understood to be the parameters of “equality.”

A. *The Women’s Movement for Citizenship*

What was known then as “the woman’s movement” pivoted after suffrage was achieved. Organizations seeking suffrage disbanded, and one—the Congressional Union—essentially reconstituted itself the next year as the National Women’s Party (NWP), with the goal of eliminating laws that perpetuated the residual effects of coverture and restricted women in a variety of arenas. The NWP initially hoped to convert women’s votes into support for legislative repeal of discriminatory laws. When that voting bloc failed to materialize, the NWP dove into an ultimately futile effort to achieve the same result with an Equal Rights Amendment.

The ERA was designed to use the scope and power of the Supremacy Clause to remove all remaining legal disabilities that applied to women. It was of a piece with the Nineteenth Amendment, which rectified the omission of women from the scope of the Fifteenth Amendment by guaranteeing the right to vote regardless of sex. The ERA’s function would have been to correct for the exclusion of women from the scope of the Fourteenth Amendment by effectively expanding the Equal Protection Clause to reach inequality based on sex.

The ERA campaign continued the movement’s focus on state actors, political citizenship, and—because so many of the laws to be attacked were grounded in family law—especially on the linkage between government and family. Uniquely for women as a class, unlike groups demarked by racial or ethnic bias or economic status, the family was a major institutional factor in the vectors of subordination.⁵⁰ The post-Nineteenth Amendment effort to enact an ERA would have, and was intended to, build on the understanding that, to be meaningful, political citizenship had to encompass the democratization of family and marriage.⁵¹

In their public advocacy of the ERA, NWP leaders referred almost exclusively to family law issues, as evident in the debate-style features on the disputes among feminists over strategy published by

50. Hunter, *supra* note 2, at 82, 85–86, 90–92, 95–96; Thomas, *supra* note 8, at 369–70; CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 165–67, 175 (1980).

51. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 7, at 473.

popular magazines in the decade after the Nineteenth Amendment.⁵² The pieces written by NWP spokeswomen emphasized the imperative to eliminate state laws that privileged the authority of husbands over the bodies, domicile, and property of wives, as well as the father's entitlement to legal control of children. The ERA held the promise of achieving this goal with one effort rather than the multiple and repeated campaigns required to change laws in each state, thereby replacing the long state-by-state campaign to enact Married Women's Property Acts, an effort that had begun before the Civil War and continued after the Nineteenth Amendment.⁵³

In the first years after suffrage was won, Congress responded positively to ameliorative legislation for women framed in different ways. "Equal treatment" arguments prevailed in the successful campaign by a coalition of women's groups to enact the Cable Act in 1922, which eliminated the disparity in the use of marital status to determine citizenship. On a parallel track but using maternalistic arguments, the same coalition secured enactment and continuation for several years of the Shepherd-Towner Act that provided services to pregnant women and infants.⁵⁴

Other than the legal incidents of marriage, jury service was the issue that continued longest and most clearly bridged family law and citizenship status after suffrage was secured. In general, states relied on voter rolls to generate jury lists, and logic and precedent supported the argument that once women had won equal voting rights under the Nineteenth Amendment, they should be equally subject to and eligible for jury service.⁵⁵ Nonetheless, the mean length of time after suffrage before states adopted equal treatment provisions for women on juries was 21.7 years.⁵⁶

The jury service effort produced both litigation and legislative battles, which were fought by women's rights advocates on grounds of both equal treatment principles and the value of different perspectives associated with women jurors. Most campaigns were directed at state legislatures. Litigation challenges arose, but most

52. See, e.g., Hill & Kelley, *supra* note 2; Inez Haynes Irwin, *The Equal Rights Amendment: Why the Woman's Party Is for It*, GOOD HOUSEKEEPING, Mar. 1924, at 18.

53. DEGLER, *supra* note 50, at 332-33.

54. COTT, *THE GROUNDING OF MODERN FEMINISM*, *supra* note 12, at 98-99.

55. Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2183-85 (1993).

56. HOLLY J. MCCAMMON, *THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT* 192 (2012). McCammon references one movement participant as saying that the effort to change jury service laws required something very like a second suffrage campaign. *Id.* at 3.

of those were brought by (typically male) defendants appealing a criminal conviction, with no apparent participation by women's groups.

What is most noticeable about the legislative campaigns was the willingness of advocates to blend the positions on both goals and framing. Although they disagreed about whether to seek a jury service only bill or a blanket ERA-style bill, the two sides did not undercut each other in negotiations with state legislatures, as did their counterparts who worked on proposals for the ERA in Congress.⁵⁷ They also displayed a willingness to shift back and forth between equality and difference frames, unlike the much more tenacious adherence to one argument or another that characterized disputes over protective labor laws.

Organizationally, the equal jury law advocates appear to have operated with very little national direction.⁵⁸ State chapters of the League of Women Voters (LWV) led the effort in most places, a group that resembled the NWP in its middle-class, essentially all-white membership and that tended to favor an equal treatments frame for its arguments.⁵⁹ Unlike the NWP, however, it did not prioritize the goal of ERA-style blanket bills over specific legislation such as jury service bills. But as they operated in legislative venues at the state level, the cluster of women's groups involved were usually flexible on both points.

Exceptions to this pattern occurred in a handful of states when significant tensions over goals arose within the coalition of women's groups. But the effect appears not to have been seriously negative; the fine-tuning of arguments to counter the argument frames of local opponents may have amounted to "productive conflict" that was a net benefit to the coalition.⁶⁰ And even in those states, there was a significant period of time in which groups that prioritized different goals collaborated.⁶¹

In the end, only one state—Wisconsin—enacted a blanket ERA-style bill,⁶² but the equal treatment frame was nonetheless validated. An analysis of framing strategies used in fifteen state-level

57. The process of drafting the ERA produced months of intensive wrangling among organizations and the lawyers advising them. Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 203–22 (1991).

58. MCCAMMON, *supra* note 56, at 230.

59. SUSAN D. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS* at 204–11 (1981).

60. MCCAMMON, *supra* note 56, at 227–28.

61. *Id.* at 79, 101–07.

62. *Id.* at 131–35.

campaigns for equal jury service laws between 1911 and 1967 found that arguments based on women's differences from men constituted approximately twenty-five percent of the recorded examples of framing.⁶³ Arguments based on the concept that women and men should have equal rights and duties with respect to jury service were not only more frequent but also more likely to succeed, to a statistically significant degree, than arguments based on the theme that women brought unique perspectives to jury service.⁶⁴

The "equal treatment" frame also dominated arguments in state courts as well as legislatures but it was rarely successful.⁶⁵ In states where advocates sought to use litigation to achieve equality of jury service, courts unanimously ruled against them. The courts rejected any version of an equality analysis, usually justifying their holding with a finding of no legislative intent to include women within the parameters of jury statutes, a narrow reading of the Nineteenth Amendment as concerning only the vote, and the reiteration of the inapplicability of the Reconstruction Amendments to questions of discrimination based on sex.⁶⁶ Litigation successes occurred when the issue presented was the validity of a prior legislative enactment that had extended jury responsibilities to women.⁶⁷

Litigation was also pursued for secondary goals. In the handful of jury service cases in which the NWP participated, organizational records show that the NWP's motivation for litigation was often more to build publicity around the arguments that they were advancing in state legislatures than to win the case at hand.⁶⁸ Their perspicacity may have derived from personal or institutional memory of the Reconstruction era efforts to win a right to vote under a Fourteenth Amendment theory, an effort that one political scientist described as a strategy in which litigation was used primarily as a method to gain greater public visibility for suffragist arguments.⁶⁹

The point is not the absence of consistency or of philosophical purity, which in politics is probably impossible and almost certainly at times counterproductive, but the alignment of which approach

63. Holly J. McCammon et al., *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements*, 72 AM. SOCIO. REV. 725, 728 tbl. 2 (2007).

64. *Id.* at 740.

65. Brown, *supra* note 55; Richard F. Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Right*, 9 AM. U. J. GENDER SOC. POL'Y & L. 97, 117 (2001).

66. *See, e.g.*, *Commonwealth v. Welosky*, 177 N.E. 656 (Mass. 1931).

67. MCCAMMON, *supra* note 56, at 61 n.5.

68. Hamm, *supra* note 65, at 116–17.

69. KAREN O'CONNOR, *WOMEN'S ORGANIZATIONS' USE OF THE COURTS* 56–57 (1980).

was more successful in which (legislative versus litigation) venue. One reason that may help explain why the sameness/equality argument made much less progress in courts than in legislatures is the background law on women's family responsibilities. Courts adjudicating family law disputes invoked gender as ordained by nature and the need for "family harmony" to reject wives' claims for independent rights to material goods or the indicia of separate legal status. A discourse of domesticity crowded out rights arguments, allowing courts to effectively delegate authority to the family as an intermediary lawmaking institution.

The imprimatur for domesticity flowed directly from the Supreme Court, where it had begun in *Bradwell v. Illinois*⁷⁰ and *Minor v. Happersett*,⁷¹ and persisted for half a century.⁷² As late as 1961, the U.S. Supreme Court perpetuated the domesticity rationale in holding that there was no federal constitutional barrier to exclusionary or differential laws regarding women on juries,⁷³ a ruling that was not reversed until 1975.⁷⁴

Initially, the difference in results between legislative and judicial venues seems counterintuitive. One might expect that judges—especially if not elected—would be more receptive than legislators to politically or socially disruptive arguments. But, in a moment of changing norms, a wall of negative judicial precedent—even if not binding—may shift the balance in the relative appeal to movement advocates of legislative and litigation avenues. Especially when one is seeking an under-the-radar approach, legislation offers its own set of advantages. A key difference between the venues is intrinsic to each institution: courts must give reasons as well as reach outcomes. Members of legislatures can more easily hide controversial results by alluding to collateral reasons for their actions and avoid explicitly endorsing as radical a principle sex equality was then. In addition, state-level legislative contests may be more manageable because there are relatively low stakes involved. There is no doctrine of preclusion to prevent re-argument of issues that did not prevail in previous years, and more personalized and informal contact with both decisionmakers and opponents is the accepted norm.

The judicial discourse of domesticity proved to be strikingly resilient. Equality advocates had little success in court well past the middle of the twentieth century. In *United States v. Yazell*, for

70. 83 U.S. (16 Wall.) 130 (1872).

71. 88 U.S. (21 Wall.) 162 (1875).

72. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948).

73. *Hoyt v. Florida*, 368 U.S. 57 (1961).

74. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

example, the Supreme Court in 1966 ruled that there was no substantial national interest in the federal government adopting contract enforcement principles contrary to the coverture-based state law which was then still applicable in twelve states.⁷⁵ Referring to the “peculiarly local jurisdiction of these States”⁷⁶ and the “peculiarly domestic” nature of the laws,⁷⁷ the Court found no reason to countermand “the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements”⁷⁸ Like what critical race scholars have called “the Confederate narrative” that persisted in law long after the Civil War,⁷⁹ the discourse of domesticity expressed and helped maintain legal structures of subordination.

B. The Women’s Movement for Economic Rights

The steady growth, beginning in World War I, of women working outside the home gave visibility and recognition to what became the most significant branch of the women’s rights movement early in the century. Economic citizenship issues arose in two kinds of organizations: labor unions and progressive women’s reform organizations, most prominently the WTUL and the NCL.⁸⁰ The focus on workplace issues brought pressure to bear on the state-economy nexus of the iron triangle, specifically on the options for entry into the paid labor market and the conditions under which women worked outside the home.

This branch of the movement prioritized the enactment of protective labor laws designed for women factory workers that set a maximum number of hours in the work week, a minimum hourly wage, restrictions on night work, and regulated a variety of other conditions of employment. The NCL agreed with the NWP on the need to eliminate abuses of women tolerated by traditional family law but argued that the NWP approach was too rigid in its insistence on a sameness approach across the board: “Sex is a biological fact. The political rights of citizens are not properly dependent upon sex, but social and domestic relations and industrial activities are. . . . Women will always need many laws different from those needed by

75. 382 U.S. 341, 351–53 (1966).

76. *Id.* at 353.

77. *Id.* at 358.

78. *Id.* at 353.

79. See generally Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301 (2017).

80. WOLOCH, *supra* note 12, at 209.

men.”⁸¹ At a 1921 conference called to determine the direction of women’s rights advocacy after suffrage, the split over this issue became irreparable.⁸² The disagreement between the ERA advocates and the worker-centered organizations about protective labor laws dominated women’s rights political debates until the 1960s.⁸³

Where the NWP saw protective laws as providing incentives for employers to hire male workers to avoid the restrictions,⁸⁴ the NCL and its allies viewed the NWP as taking the wrong side in the class war.⁸⁵ Both sides were at least partially correct. Support for the protective legislation did often come from employers who were willing to accept a floor for women’s wages so long as it was sufficiently low, and reliably preserved a cheap source of labor for undesirable jobs, and from male workers who understood that the protections effectively eliminated competition by women for work that may have been more physically demanding, but also was more highly paid. Union support for protective laws derived from mixed motives, some supportive of women’s rights, others seeking to preserve higher pay for men and the exclusivity of “men’s jobs.”⁸⁶

Although the NCL and labor union women stressed that protective legislation was a necessary means to shield the most vulnerable workers, they also lacked a coherent conceptual model of gender equality. Unions held out the hope of providing “the greatest good [for] the greatest number,”⁸⁷ but most were led and controlled by men with little regard for women workers, whose numbers fell far short of half of the membership. The excesses of capitalism, or capitalism itself, loomed for the unions as an ideology to be fought. By contrast, gender was seen not as an ideology but as an attribute of nature. When confronted by ERA advocates with examples of protective laws that harmed women, women worker-oriented groups

81. Hill & Kelley, *supra* note 2.

82. The NWP established itself as an organization focused solely on equality between the sexes in significant part through its rejection in 1921 of the concerns as to race, international peace, and socialist politics presented by delegates, such as Florence Kelley. COTT, *THE GROUNDING OF MODERN FEMINISM*, *supra* note 12, at 68–71.

83. See *infra* text accompanying note 152.

84. The NWP endorsed laws that extended the same wages, hours, and other limitations to all workers, but unions at the time believed such comprehensive protections to be politically infeasible.

85. One particularly acute moment of such tension was when women in the NWP collaborated with business interests to produce a Supreme Court brief advancing a liberty of contract theory grounded in the absence of a need by modern women for protective laws, an argument successfully deployed in support of the invalidation of a minimum wage law in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

86. FONER, *supra* note 47, at 339–96.

87. COTT, *THE GROUNDING OF MODERN FEMINISM*, *supra* note 12, at 136.

often responded with proposals to fix each situation one-by-one with “specific bills for specific ills.”⁸⁸

Social conventions of male dominance depended on a family structure that exemplified and perpetuated those norms, and that family structure, in turn, depended on higher wages for men.⁸⁹ Union women were divided among themselves in their allegiance to the wife-mother model as primary life aspiration and public policy goal.⁹⁰ It was generally, and probably correctly, believed that most women union members wanted a heteronormative home life as well as better working conditions in paid jobs. Women in union leadership positions navigated these conflicting interests by trying to avoid the politics of family, the zone in which ERA advocates sought the greatest change. The inseparability of family and economic systems rendered this avoidance ultimately impossible for groups affiliated both with workers and the ERA.

The unions’ belief that a fair exchange for one’s labor was the most important issue for all workers produced a gender-neutral rhetoric that masked a gender-stratified reality. It contained no understanding of the vestiges of coverture or the gendered nature of industrial capitalism but was more sensitive to the economic power relations to which the NWP women paid less attention. The union approach was more successful than the ERA campaign in generating a universalist vocabulary, even if at that time there were many fewer women in the workforce—and certainly in unions—than there were women in marriage.

But even if unions’ rhetorical frame was universalist, their actual demands perpetuated material effects skewed by gender. A protected status for women structured wages in a way that buttressed men’s status as the primary wage earner. Women’s minimum wage laws amounted to a kind of social pay—wages were set at a level thought to provide sustenance income for an individual woman. The family wage—also socially determined—was thought to provide men with remuneration that could support a wife and children. Both so-called women’s wages and the family wage represented a negotiated midpoint between the ideal social policy and a market-based approach. Neither corresponded (or was meant to) with any understanding of equality.

88. This phrase persisted in the arguments by ERA opponents for decades. See *Equal Rights Amendment: Hearing on H.J. Res. 75 Before the H. Comm. on the Judiciary*, 68th Cong., 2d Sess. 43, 46 (1925); HARRISON, *supra* note 10, at 39.

89. ALICE KESSLER-HARRIS, *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 9, 122 (1990).

90. See BECKER, *supra* note 59, 122–23.

The ERA campaign continued to shrink, with support for it drained by the economic crisis of the Depression, the urgency of World War II, and a postwar surge of suburbanization, until a new generation of feminists revived it in the early 1970s. By contrast, the focus on workers and economic citizenship during the New Deal contributed to a growth of unions, and the war brought a massive need for more women in the paid workforce. The worker-centered branch of the women's rights movement grew in vitality as the ERA campaign faded.

Throughout this period, the NCL and union women dug into a "difference," as opposed to an "equality" politics. Although the justifications for most selective protections for women essentially died with the enactment of nationwide minimum wage and maximum hour laws for men as well as women,⁹¹ the NCL and unions continued to support the categorization of women as workers needing special legal protections. Path dependence and lingering internecine battle wounds among the women's rights advocates made the positions difficult to change, as well as the extent to which protective laws had become popular, for different reasons, among both men and women workers.

Beyond the specifics of protective laws, the labor union movement provided women with a parallel model of governance—"the workplace constitution"—and an alternative concept of equality, grounded in claims for economic citizenship.⁹² The unions' concept of "industrial equality" referred to the achievement of at least a somewhat level playing field between men and women, secured by special treatment laws protecting women wage-earners.⁹³ Correlatively, unions framed the concept of "industrial liberty" as a negative liberty shield against government power.⁹⁴

On this key question of relationship with the state, worker-oriented women's rights groups, such as the NCL, split with unions. Unions sought and needed a shield from the state for their institutional existence, to allow them to organize workplaces and bargain collectively without repression by employers. They also sought semi-autonomy from government in order to secure social welfare

91. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219; see DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 96 (2004); STORRS, *supra* note 33, at 177–79.

92. See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

93. WOLOCH, *supra* note 35, at 131, 134; Sybil Lipshultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 *YALE J.L. & FEMINISM* 131, 158 (1989).

94. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 7 (1991).

type benefits through collective bargaining, so that workers would depend on their unions, rather than on government, for important benefits. Unions sought to provide both economic power and self-governance for workers, reflecting a rough calculation that union-management negotiations would determine male wages, while government could set minimums for women's jobs that men did not want.⁹⁵ The NCL, by contrast, adopted a much more cooperative attitude toward the state and called on government to furnish social insurance-type benefit programs regardless of the nature of the individual's relationship to the workplace.

Concretely, this philosophical difference facilitated the development of an institutional capacity for rights advocacy that distinguished women workers' rights groups from the other two branches of feminism. The collaboration among worker-centered women's rights advocates inside and outside unions led to the establishment of an ongoing institution within government that was essentially the voice of women in labor. It also facilitated the development of a pipeline of progressive feminists who led it and other social insurance-oriented agencies for decades. That new institution was the Women's Bureau of the Department of Labor, which opened in 1920 as an outgrowth of the influx of women into the non-domestic workforce during World War I. The Women's Bureau became the pre-eminent center for research on the status of American women workers. It was able to draw on resources for advancing the interests of women workers that the non-governmental groups did not have. It specialized in investigations of working conditions, data collection, and publication and dissemination of those findings.⁹⁶ Its Labor Advisory Committee functioned as a law and policy think tank for women's economic citizenship issues.⁹⁷

The new pipeline that the Women's Bureau enabled was the steady migration of women leaders from workplace-related positions into the New Deal. Many women who worked in some capacity with the Women's Bureau during the 1920s later flowed into New Deal policymaking positions and helped to cement the role of social insurance in American policy and politics.⁹⁸ In terms of building movement capacity and sustainability, the instantiation of

95. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 83 (2001).

96. Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J.L. & GENDER 170, 194–96 (2008).

97. COBBLE, *supra* note 91, at 52.

98. WOLOCH, *supra* note 35, at 154.

feminist perspectives through the Women's Bureau in the Department of Labor paid countless dividends.

C. *The Women's Movement for Sexual Autonomy*

The third component of women's rights advocacy—the birth control movement—provides another distinctive example of how advocates used the mechanisms of the legal system in conjunction with a rights-oriented social movement. It was by far the most successful branch in the arena of litigation, an achievement likely attributable at least in part to its frequent positioning as defendants in criminal prosecutions rather than as plaintiffs in constitutional challenges, and to the benefits of using free speech arguments rather than pressing rights explicitly grounded in gender specifically or equality more generally. The political message that emerged from birth control advocacy was at once anti-statist, liberal, and feminist, with each of these themes dominating at particular points in time.

The demand for birth control can be traced to what the authors of the Seneca Falls Declaration and other early feminists described as a right to self-sovereignty. Emma Goldman reframed self-sovereignty as grounded in a left anarchist ideology of personal freedom.⁹⁹ Margaret Sanger began with a leftist political analysis, oriented to workers' rights groups, and went on to build a social movement centered on the needs of women that added dimensions of health and sexual autonomy to citizenship and economic justice issues.¹⁰⁰ Sanger developed a political framework that appealed to bohemians, medical professionals, wealthy liberals, and eugenicists as well as to women concerned with gender equality. Over time, her arguments grew more conservative, initially having been grounded in sexual freedom and public health frameworks, and later including anti-immigrant and racist themes as well.¹⁰¹

The legal architecture for suppression of birth control information and devices lay in federal and state statutes that defined such materials as categorically obscene.¹⁰² Birth control advocates

99. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA 215–17 (1990); DAVID M. KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER 10–12, 74 (1970).

100. GORDON, *supra* note 99, at 203–04, 217–18, 227; KENNEDY, *supra* note 99, at 15–17.

101. GORDON, *supra* note 99, at 222–26, 239–40, 245–47; KENNEDY, *supra* note 99, at 107.

102. In 1873, Congress enacted a law, known colloquially as the Comstock Act, that criminalized “obscene literature and articles of immoral use.” It prohibited use of the mails to transmit contraceptives and information about contraception. Comstock Act of 1873, ch. 238, 17 Stat. 598. A number of states enacted copycat laws. Alvah W. Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 LAW & CONTEMP. PROBS. 593, 600 (1960).

pursued two strategies: statutory repeal and challenges in court. The group using the first approach, led by Mary Ware Dennett, made no headway against legislators who would not publicly criticize the suppression of behavior commonly considered to be sexually immoral.¹⁰³ The second, pursued by Sanger, successfully used litigation in increasingly sophisticated ways.¹⁰⁴

The first phase of birth control litigation grew out of Sanger's prosecution for violation of the New York state obscenity statute after she opened the first American birth control clinic in 1916. Her lawyer, Jonah Goldstein, offered the constitutional argument that the prohibition of birth control access denied women the right to enjoy sexual relations without fear, in violation of liberty rights. In addition, in a variation on the Brandeis-Goldmark brief's use of social facts, he sought to introduce the testimony of physicians and women who had used Sanger's clinic to demonstrate the physical and emotional effects of unwanted pregnancy.¹⁰⁵

Neither the trial judge nor the appellate court took the constitutional argument seriously, but the latter reinterpreted the statute in a way that transformed the legal dynamics of the birth control movement. The New York Court of Appeals ruled that birth control information and services for women could fall within the disease prevention exception to prosecution on the theory that pregnancy by itself (*i.e.*, without sexually transmitted infection) could constitute a disease.¹⁰⁶ Even though limited to doctors, the new interpretation of the obscenity statute opened the space for women's access to birth control to become a reality.

Thus, the keystone to the first phase of birth control rights was replacement of sexual radicalism by deference to medical authority. The judiciary granted physicians the power to provide birth control without fear of prosecution, while also not necessarily upsetting the culture of shame associated with women seeking to have sex without risk of pregnancy. The medical deference model aligned as well with other early twentieth-century trends: toward greater professionalization of medicine and the concentration of power under the control of formally trained doctors.¹⁰⁷

103. KENNEDY, *supra* note 99, at 76–77, 94, 221–24.

104. GORDON, *supra* note 99, at 292; KENNEDY, *supra* note 99, at 226–40.

105. ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* 152–53, 157 (1992). Goldstein's brief on appeal cited *Muller v. Oregon*. *Id.* at 529 n.6.

106. *People v. Sanger*, 118 N.E. 637 (N.Y. 1918).

107. *See generally* PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 79–144 (1984).

The New York decision also brought into focus a third method for eliminating repressive statutes: not by repeal or by invalidation on constitutional grounds but by reinterpretation of statutory text. By construing statutory language, a court leaves open the possibility that the outcome of its ruling may be effectively overruled by the legislature to mandate a different interpretation of statutory text, thus making the judicial decision less binding and less normatively weighty. At the same time, such a decision establishes a new status quo: legislators who were willing to accept the new meaning, but not willing to go on record by voting to change the old meaning, had the perfect solution; they could do nothing.

And on the surface, nothing was precisely what happened after the *Sanger* decision, not only in the New York legislature but in state legislatures around the country. By the late 1930s, birth control advocates claimed that physicians in forty states were “free to act in the field of contraception.”¹⁰⁸ In virtually every state, however, the rule of law was actually more a gentlemen’s agreement of silence.¹⁰⁹ As a result, by 1930, fifty-five clinics had opened in twelve states.¹¹⁰ By 1944, approximately 800 contraceptive service providers existed, located in Planned Parenthood and other non-profit clinics, public health agencies, and hospitals.¹¹¹

With doctors shielded from criminal liability, advocates undertook the second phase of birth control litigation as an attempt to create a uniform national rule and to bring more pressure on physicians to provide their patients with access to contraceptives.¹¹² On the surface, it addressed a supply-side problem: even if prescribed by doctors, some devices were not available for legal purchase because of restrictions on use of the mail. In the early 1930s, federal courts had ruled that the government could bar condoms from the mail only if prosecutors demonstrated that their intended use was only for contraception and not disease prevention, an impossible burden of proof, which effectively barred restrictions on shipments of condoms.¹¹³ But devices that women could use on their own remained at risk of confiscation.

108. Frederick A. Ballard et al., *Contraceptive Advice, Devices and Preparations*, 108 [J]AMA 1819, 1820 (1937).

109. Harriet F. Pilpel & Abraham Stone, *The Social and Legal Status of Contraception*, 22 N.C. L. REV. 212, 220 (1944) (“only one of these laws has ever been changed”).

110. GORDON, *supra* note 99, at 266.

111. Pilpel & Stone, *supra* note 109, at 215–16.

112. See KENNEDY, *supra* note 99, at 240–50.

113. *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corp., Inc. v. C.I. Lee & Co., Inc.*, 45 F.2d 103 (2d Cir. 1930).

By this point, Goldstein had become a judge, and Sanger sought the assistance of Morris Ernst, the ACLU general counsel who had begun to build a reputation for winning acquittals in obscenity prosecutions.¹¹⁴ He had successfully defended two birth control advocates, one indicted for violation of the Comstock Act for sending information through the mail¹¹⁵ and the other prosecuted under the Tariff Act for materials imported into the U.S.¹¹⁶ In each, Ernst relied on extensive expert testimony as to the characteristics and social value of the information, and in each, the court rejected a First Amendment challenge to the suppression of speech but interpreted the statute to rule that the material in question did not fall within its definition of obscenity. The strategy culminated in what became Ernst's most famous case: the 1934 ruling that James Joyce's *Ulysses* could not be barred from the country on the ground that it was obscene.¹¹⁷

Sanger and Ernst developed a test case for birth control law that combined the doctor's only defense with a statutory argument that contraceptive devices, as well as information, fell outside the scope of federal obscenity law.¹¹⁸ They facilitated prosecution in the case—*United States v. One Package*—by ensuring that federal authorities would seize a shipment of Japanese diaphragms that were in transit to Dr. Hannah Stone, head of the Sanger-affiliated Birth Control Research Bureau in New York. Again relying on physician testimony, Ernst won a ruling from the Second Circuit that the prohibition of obscenity in the Tariff Act did not apply to “things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the wellbeing of their patients.”¹¹⁹

The Solicitor General declined to seek Supreme Court review, leaving the Second Circuit decision governing imports through New York, the nation's largest port of entry. Taking their cue from the Department of Justice decision not to appeal the Tariff Act case, federal prosecutors stopped prosecutions under the Comstock Act as well since both statutes used the term “obscene.”¹²⁰ *One Package*

114. Alden Whitman, *Morris Ernst, 'Ulysses' Case Lawyer, Dies*, N.Y. TIMES, May 23, 1976 at 40.

115. *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930).

116. *United States v. One Obscene Book Entitled "Married Love,"* 48 F.2d 821 (S.D.N.Y. 1931); *United States v. One Book Entitled "Contraception,"* by Marie C. Stopes, 51 F.2d 525 (S.D.N.Y. 1931).

117. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

118. CHESLER, *supra* note 105, at 331–73; KENNEDY, *supra* note 99, at 248–50.

119. *United States v. One Package*, 86 F.2d 737, 739 (2d Cir. 1936).

120. Ballard et al., *supra* note 108, at 1819–20.

thus effectively eliminated enforcement of federal obscenity laws against birth control providers.

One Package also strengthened the gentlemen's agreement that grew of the *Sanger* decision in New York.¹²¹ There were, however, two exceptions. Pushback came in Massachusetts and Connecticut, where state courts rejected the statutory interpretation strategy—both the “doctors only” exception and construction of the meaning of “obscene.”¹²² By World War II, these were the only two states where prosecutions for birth control materials or information continued.¹²³

Of the three branches of the women's rights movement, birth control advocates—both the (mostly women) leaders and the (mostly male) lawyers—were the least constrained in their framing of the issues, which one might characterize as highly adaptive or, less benignly, relentlessly opportunistic. The movement's incrementalistic litigation efforts were far more successful than its legislative campaigns. In particular, the “doctors only” strategy served several functions simultaneously, illustrating how the structure of legal argument can shape broadly cultural as well as narrowly legal ideas. In addition to its doctrinal impact, the “doctors only” argument created a new narrative in which professional, male authorities asserted scientific bases for their defense of innocent women facing physical harm; and it provided a rhetoric of reassurance that a dependable male institution would protect society against unconstrained female immorality.

D. Summary

Women's rights advocacy in the years immediately prior to and after the Nineteenth Amendment reflected a moment of great flux in constitutional history and social movement development. The Reconstruction Amendments had redefined citizenship and equality but had ducked the question of gender with regard to both, deferring instead to a concept of family as quasi-sovereign and semi-autonomous with regard to the state. The use of First Amendment arguments by left-liberal lawyers in other contexts opened up

121. Less than a year after the decision, the American Medical Association voted for the first time to officially recognize birth control as a legitimate part of medical practice. William L. Laurence, *Birth Control Is Accepted by American Medical Body*, N.Y. TIMES, June 9, 1937 at 1, 26.

122. Pilpel & Stone, *supra* note 109. Voters in Massachusetts also twice rejected referendum proposals that would have liberalized state law. *Id.*

123. In 1965, the Supreme Court eventually forced these two states into what had become the new national consensus. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

avenues for the birth control movement. Overall, women's rights advocates developed distinctive positions on the relationship between gender and law.

The broader context held multiple cross-currents. Suffrage had so powerfully reshaped the discourse of gender that white women's claims to economic citizenship as independent workers and to sexual pleasure as autonomous actors became thinkable. At the same time, racism so powerfully poisoned political discourse, including concepts of women's rights, that broad-based opposition to equality was strengthened and the naturalization of hierarchy reinforced. The capacity of Progressives to leverage the power of the state for social goals waned in the period between the Nineteenth Amendment and the New Deal. As the nation grew more conservative in the latter part of the 1920s, right wing reaction manifested itself in the resurgence of the Ku Klux Klan¹²⁴ and enactment of harsh quotas in the 1924 Immigration Act.¹²⁵

The following chart summarizes the internal dynamics in women's rights advocacy after adoption of the Nineteenth Amendment:

124. *See generally* THOMAS R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S (2011).

125. *See generally* JIA LYNN YANG, ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924–1965 (2020).

Social Movement Theory and Women's Rights Advocacy from
Suffrage to the Second Wave

	ERA / “sameness” theory of equality	Worker-focused / “differences” theory of equality (1) Unions (2) NCL	Birth control/ sexual autonomy
Theory of change	Democratize marriage; transform family and divorce law	(1) Transfer economic power to workers (2) Transfer economic power to women workers	Liberate individuals from state interference with sexual decisions and conduct
Relationship to state	Reform family law	(1) Transfer state powers of governance to unions (2) Reform the state to enhance protections for vulnerable women workers	Decriminalize and deregulate
Relationship to market	Reform employment law	Share control of the economy between workers and the state as well as the private sector	Deregulate as to reproductive and sexual medicine
Relationship to family	Confront	Accommodate	Allow private decisions to produce change in norms
Primary venues of legal advocacy	State legislatures, Congress	(1) Legislatures (2) Executive Branch during New Deal	Federal and state courts, state legislatures
Discourse of oppression	Domesticity	Free contract	Morality
Method of grassroots mobilization	Direct action	(1) Strikes and strike support (2) Lobbying	Clinic services

IV. STATE, FAMILY, MARKET

Equality for women proved much easier to invoke than to define. If equality remained within the frame of voting and formal political citizenship, it was possible to imagine, effectuate, and defend. Equality in the context of family or sexuality, by contrast, fell short on all three measures. Advocates needed a framework for the theory and praxis of gender equality that applied across the board, but legal institutions are seldom sufficiently capacious to encompass such range in a single concept. Nor were women's rights advocates able to offer one.

The multiple meanings of women's equality demonstrate how contingent the concept of equality is on context and time. The history of the women's legal advocacy illustrates that equality is not one idea that can be applied to different social groups, with minor variations, as it is interpreted and taught in constitutional law. The women's rights movement experience in the early twentieth century shows that a melding, even a scrambling, of contradictory ideologies contributes to the popular discourse of equality. Understanding it as the linear development of a standardized concept of equal rights is both erroneous and misleading.

Today, law and a culture of civil rights have condensed equality into one conceptual mass, which typically manifests in law in two modalities: legislatively by the enumeration of protected categories and judicially by official suspicion of certain legislative classifications. Together, these two devices comprise what I am calling the civil rights paradigm. Going as far back as Reconstruction, and especially since civil rights statutes began to appear in significant numbers after World War II, the chief goal of equality advocates has been to add new categories and classifications to the list. This is the version of equality that dominates the legal system, major institutions, market actors, and popular understanding.

Women's rights organizations, however, lacked the essential ingredients to draw on that conceptual universe. There was neither a working and workable shared definition of gender equality nor was there widespread legibility of women as a "minority," *i.e.*, a political and social group that was defined by its legal status.¹²⁶

126. I am using the term "minority" to include both an internal and external dimension. The internal, subjective dimension refers to a group of persons experiencing a sense of "witness" typical of civil rights constituencies. The external dimension refers to the understood similarity among members of the group, including a socially constructed or accepted pattern of unequal treatment. See generally Helen Mayer Hacker, *Women as a Minority Group*, 30 SOC. FORCES 60 (1951) (one of the first applications in sociological literature of the term "minority" to women).

The Supreme Court accepted the legitimacy of using judicial power to invalidate majoritarian legislation in 1938 in the famous Footnote Four of *United States v. Carolene Products Co.*,¹²⁷ by acknowledging the democracy deficit that attaches to minorities. Women, however, did not comfortably fit the *Carolene Products* analysis because they are not a numerical minority, and despite the ongoing campaign for equal rights under law for women that followed the adoption of the Nineteenth Amendment in 1920, they were not considered analogous to the categories of race or religion for purposes of the first antidiscrimination statutes. Today, women are often subsumed in a social and cultural category of “minority” in popular discussion.

If one re-imagines women’s equality as a claim for justice on behalf of a numerically large group united more by its subordinate relationship to power structures than by any shared characteristics, economic class might have been the better analogy. That speculation has to remain counterfactual, however, because the bulk of the labor movement at that time did not welcome women as equal comrades. One can imagine that this shift in analogy might have opened up the concept of legal equality for women to deeper understandings of the role of economic status in equality under law. But neither constitutional discourse, with its heritage of the Reconstruction Amendments excluding women as a class and its *Carolene Products* emphasis on minorities unable to engage in pluralist bargaining, nor the labor movement, with its concept of equality as exogenous to the state, made such a possibility even thinkable.

Strategically and conceptually, the divergence between the three branches of feminism rendered the articulation of equality as a master frame for women’s rights impossible during this period. The ERA and worker-focused branches demonstrated the shortfalls of addressing one side of the iron triangle—the state-family or the state-economy side—without tackling the others. Operating on a parallel doctrinal track, but without addressing equality head-on, the birth control movement more successfully engaged the family-market axis but only by relying on medical authority.

In movement organizational terms, each major component of women’s rights advocacy had a comparative advantage. The NWP proposed to eliminate discriminatory state laws with a constitutional amendment, building on its track record of winning the Nineteenth Amendment; unions brought their knowledge and skills in confronting the power of capital; worker-focused women’s groups,

127. 304 U.S. 144, 152 n.4 (1938).

such as NCL, expertly navigated positions of power within the state; and the birth control movement, largely through the ACLU and its affiliated lawyers, brought its growing ability to make successful constitutional arguments in the courts. But the multiple comparative advantages together created a huge minus: the inability to make a coherent legal equality argument for a unified concept of women's rights across issues and zones of political, economic, and social life.

V. BRIDGE DISCOURSES

In 1920, when victorious suffragists celebrated the Nineteenth Amendment, and confidently turned to their next project, the relative power of the three components of women's rights advocacy movements had already begun to shift away from them. Campaigners for the ERA continued during the 1930s and 1940s to battle NCL and other feminists, but support and enthusiasm for the ERA at the grassroots level ebbed. The ascent of women workers' concerns followed the increasing power of the New Deal and the labor movement. The birth control movement, just beginning in 1920, grew in power and influence as liberal First Amendment arguments were used to defeat restrictive contraception and obscenity laws but did not directly challenge the other two branches as to conceptualizations of equality.

Beneath the surface, even as the returning male veterans of World War II took or took back the well-paid industrial jobs that women had performed during the war, an even more important and longer lasting shift was occurring. After the loss of jobs in the immediate postwar period, the number and percentage of women working outside the home increased during the 1950s.¹²⁸ By 1960, key demographic indicators had reversed: marriage rates fell, the average age at marriage increased, the fertility rate began to decline, and the divorce rate was growing.¹²⁹

A. *Seeds of the Civil Rights Paradigm*

The unprecedented numbers of women who came into the civilian workforce during World War II, many doing what had been considered to be men's jobs, brought the demand for equal pay into new

128. EUGENIA KALEGIN, *MOTHERS AND MORE: IN THE 1950S*, at 64 (1984).

129. ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 221 (1988); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 203 (1988).

prominence for the worker-focused women's rights advocates.¹³⁰ At the same time, racial justice advocates were developing the model for statutory civil rights law. The anti-discrimination paradigm in federal law initially emerged in pre-war Department of Interior regulations developed by Robert Weaver and Harold Ickes.¹³¹ Its first prominent use came in an Executive Order against discrimination based on race (but not sex) in war-related industries, which established a Fair Employment Practices Commission charged with enforcing the Executive Order.¹³² New York enacted the first statewide statute providing comprehensive anti-discrimination protection in the workplace based on enumerated protected characteristics in 1945, also covering race but not sex.¹³³

Women in unions began to incorporate and adapt the civil rights approach. Ironically, this brought them substantively closer to the anti-classification position associated with the equality/sameness understanding advocated by the ERA supporters who opposed protective workplace laws for women. But although ERA advocates and women worker groups fought each other for decades over protective employment laws, the two camps had always agreed on the principle of equal pay for equal work. In normal times, the sex segregation of the workforce rendered this issue largely irrelevant: men and women rarely did the same jobs. Only with the emergency conditions of women performing "men's jobs" during wartime did the principle of equal pay acquire practical and political importance.¹³⁴

The opposing camps within the women's rights movement had argued not only over what "equality" meant, but also, correlatively,

130. Earlier, during the relatively short life of the National Recovery Administration, NCL (and NWP) had fought against the sex-based wage differentials that were built into the NRA codes at the beginning of Roosevelt's first term. STORRS, *supra* note 30, at 108. Once the codes, although discriminatory, were adopted, NCL organized workers to demand their enforcement and supported enactment by state legislatures of what were effectively minimum wage laws intended as a response to the economic emergency. COBBLE, *supra* note 91, at 112–13, 115–19, 121–22. This effort cemented both equality and difference women's rights advocates as sharing the same position as to unequal pay and also placed them in alliance with the efforts by the NAACP to stop race differentials in the same codes.

131. See generally JILL WATTS, *THE BLACK CABINET: THE UNTOLD STORY OF AFRICAN AMERICANS AND POLITICS DURING THE AGE OF ROOSEVELT* (2020); Walter B. Hill, Jr., *Finding a Place for the Negro: Robert C. Weaver and the Groundwork for the Civil Rights Movement*, PROLOGUE, Spring 2005, <https://www.archives.gov/publications/prologue/2005/spring/weaver.html>.

132. Exec. Order 8802, 6 Fed. Reg. 3109 (June 27, 1941).

133. Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 420 (1945).

134. Equal pay legislation was first introduced in Congress in 1945. COBBLE, *supra* note 91, at 51–52.

what constituted “discrimination.”¹³⁵ Among union women, references to “discrimination” increased beginning in the 1940s in the context of women’s war work, and gradually expanded in scope as some women began to see the old protectionist laws in that light.¹³⁶ In the late 1930s, the National Labor Relations Board began to deny requests by unions or employers to certify collective bargaining units that excluded women workers.¹³⁷ In 1942, two unions successfully brought General Motors (GM) before the National War Labor Board over its policy of paying women less than men for doing what had been men’s jobs.¹³⁸ The GM suit led to the Board’s promulgation of General Order 16 that endorsed equalization of male and female wage rates but made compliance voluntary.¹³⁹ Other Board decisions involving sex discrimination addressed issues of pay and seniority.¹⁴⁰

State laws banning job discrimination based on race were enacted beginning in 1920 in Massachusetts and New Jersey, initially covering only specific categories of public sector jobs.¹⁴¹ By 1945, fourteen states had at least one such law, amounting to thirty-eight enactments in all, nearly half of which were adopted during World War II.¹⁴² Of the thirty-eight provisions, three included sex discrimination.¹⁴³ In addition, Michigan enacted a separate equal pay law for women.¹⁴⁴ By the end of 1945, three other states had followed New York in enacting comprehensive anti-discrimination laws;¹⁴⁵ one, New Jersey, included sex as a prohibited classification.¹⁴⁶ Between 1945 and 1964, only one other state adopted a law that included protection from sex discrimination.¹⁴⁷ Male union leaders often supported these laws on the ground that they would prevent employers from lowering the pay assigned to the jobs that men were expected to have when the war ended, and the War Labor Board

135. *Id.* at 62–65.

136. *Id.* at 88–92, 98–99.

137. Murray, *supra* note 133, at 398.

138. FONER, *supra* note 47, at 357.

139. *Id.* at 357–58. Framing the order to merely permit rather than require equal pay standards was justified as necessary under a Presidential directive to prevent wage inflation. On the same rationale, the Board postponed ruling in thirty other equal pay cases until its authority to order pay upgrades was restored. WILLIAM HENRY CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920–1970*, at 156 (1972).

140. Murray, *supra* note 133, at 416–17.

141. *Id.* at 418.

142. *Id.*

143. *Id.* at 419 n.111.

144. FONER, *supra* note 47, at 359.

145. Murray, *supra* note 133, at 420.

146. COBBLE, *supra* note 91, at 257 n.95.

147. *Id.* at 89.

justified its endorsement of the equal pay principle as necessary for the maximum utilization of “manpower.”¹⁴⁸ Problems in enforcement, however, exacerbated the spotty coverage and limited the laws’ effects.¹⁴⁹

After the war, sex segregation returned in force and stymied the campaign for equal pay. Employers refused to give up the cheap labor pool of women workers by setting pay based on the skill levels associated with the job. The expanded campaign to increase the pay for women and for women’s jobs offered the opportunity for rapprochement between the two sides that had fought so many intra-movement battles. Pursuing common ground gradually became easier as a new generation of leaders took over the feuding organizations. Forty years after a failed attempt to coalesce the branches of the women’s rights movement immediately after suffrage,¹⁵⁰ women from the various wings of the movement tried again and succeeded.

B. *Truce*

The institutional mechanism for integrating women into the civil rights paradigm was the President’s Commission on the Status of Women (PCSW), “the first effort on the part of the Federal government to address the question of women in American society” in a comprehensive way.¹⁵¹ Created by President Kennedy in 1961, the PCSW was led by Esther Peterson, whom President Kennedy appointed as Director of the Women’s Bureau after she had worked as a lobbyist at the AFL-CIO. Peterson’s selection to lead the PCSW made her the highest-ranking federal official until that time to have an explicit women’s rights portfolio in national politics.

Tensions that had never fully healed from the split between the ERA equal treatment wing and the protective labor laws difference wing initially dogged the members of the Commission. They were unable to agree on whether to endorse the ERA, and instead adopted a compromise position that the ERA “need not now be sought” because properly interpreted, the Fourteenth Amendment would bar discrimination.¹⁵² Very little of the Commission report

148. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 92–93 (2002).

149. CHAFE, *supra* note 139, at 154–58; FONER, *supra* note 47, at 357–59; LICHTENSTEIN, *supra* note 148, at 93–94.

150. COTT, *THE GROUNDING OF MODERN FEMINISM*, *supra* note 12, at 66–72.

151. DEGLER, *supra* note 50, at 441.

152. AMERICAN WOMEN: REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN 45 (1963).

addressed issues of race. In the end, it was organized modestly into goals and steps. Its only immediate concrete product was President Kennedy's issuance of a directive ending sex discrimination in federal jobs.¹⁵³

But the Commission was nonetheless a turning point for women's rights. Although punting on the ERA, the Commission endorsed Pauli Murray's pathbreaking analysis under which sex was formulated as a minority-like classification entitled to coverage under the Equal Protection Clause. Inclusion as a protected characteristic in civil rights statutes proceeded on the same logic.¹⁵⁴ Murray's work on the Commission led to both the foundational law review article making this argument¹⁵⁵ and a memorandum to Congress that proved decisive in coverage of sex under Title VII of the 1964 Civil Rights Act.¹⁵⁶

The analogy of sex to race has become the dominant analytic mode throughout civil rights law with regard to gender equality. Its adoption by women's rights advocates during the deliberations of the Commission and its acceptance by Congress during debates over the 1964 Civil Rights Act presaged the extension of that understanding of equality rights to other socially disfavored groups as well.

C. *Childcare: The Missing Link*

At Women's Bureau conferences in 1945 and 1946, delegates expressed the desire that ending discrimination against women workers be done in such a way as not to penalize women for motherhood.¹⁵⁷ Overcoming the last link in the iron triangle, that connecting family and the economy, has proven to be an insuperable political barrier for every wave of the women's movement. The difficulty in securing reasonably priced child care is its most acute contemporary manifestation.

There is a long history of efforts to reallocate the burdens of childcare from individual families to collective entities.¹⁵⁸ Like many of the organizations discussed in this article, the leading actors have been women leading groups with a membership largely composed

153. HARRISON, *supra* note 10, at 145.

154. AMERICAN WOMEN, *supra* note 152, at 44–45.

155. See generally Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

156. MAYERI, *supra* note 10, at 22.

157. COBBLE, *supra* note 91, at 57.

158. See generally Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577 (2010).

of women. But childcare is an economic issue that does not fit into the wages and hours paradigm. As a result, the social insurance principle—in this context, treating the family as the economic entity that it is—is rarely characterized as an essential part of the civil rights paradigm. After President Nixon’s veto of a childcare bill in 1971, its proponents were unable to revive it enough to secure enactment.¹⁵⁹

VI. CONCLUSION

Contestation over the meaning of equality, within the framework of law, had a profound impact on women’s rights. It helps explain why a movement led by white women, and thus doubly majoritarian, could not plausibly invoke majoritarian rhetoric in support of its demands and instead adopted the social position of minority. Analysis of social movement-based arguments also helps us understand the structural implications of the law’s creation and fostering of the quasi-sovereignty of family law; its regulation of the labor pool; and the resistance to incorporation of social insurance principles in the understanding of equality. These issues have produced unique challenges for women’s rights movements seeking to take advantage of a master frame of equality that could align with legal discourse.

Then Professor Felix Frankfurter wrote in 1938 that:

[t]he legal position of woman cannot be stated in a single, simple formula, because her life cannot be expressed in a single, simple relation. . . . The law must have regard for woman in her manifold relations as an individual, as a wage-earner, as a wife, as a mother, as a citizen.¹⁶⁰

It is ironic, but more than coincidental, that Frankfurter’s essay appeared in the same year that *Carolene Products* was decided; it resonates with the Supreme Court’s assumption that women did not belong in a list of groups marked most indelibly by lack of political power. To Frankfurter and the Court, what we recognize today as the many forces that produce the social construction of woman rendered her illegible as a coherent legal subject apart from her social, especially family, roles.

159. Emily Badger, *That One Time America Almost Got Universal Child Care*, WASH. POST (June 23, 2014, 5:52 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/06/23/that-one-time-america-almost-got-universal-child-care/>; Jack Rosenthal, *President Vetoes Child Care Plan as Irresponsible*, N.Y. TIMES, Dec. 10, 1971, at 1.

160. “*Equal Rights*” for Women?, NEW REPUBLIC, Feb. 1938, at 34.

Between the adoption of the Nineteenth Amendment and the inclusion of women in anti-discrimination laws—between suffrage and civil rights—women’s advocates sought to bend both the meaning and the law of equality into a principle that was expansive enough to encompass the reality of all dimensions of women’s lives. That effort continues.

Criminalizing Prenatal Opioid Use: The Creation of a Gender-Based Crime

Hannah French*

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INTRODUCTION

The opioid epidemic affects all generations—even those unborn.¹ Fetuses can be exposed *in utero* to substances that a pregnant woman ingests.² State courts are arriving at different conclusions about how to handle these expectant mothers' drug use: specifically,

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1. Julie Turkewitz, *The Pills Are Everywhere: How the Opioid Crisis Claims Its Youngest Victims*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/us/opioid-deaths-children.html>.

2. Beth A. Logan et al., *Neonatal Abstinence Syndrome: Treatment and Pediatric Outcomes*, 56 CLINICAL OBSTETRICS & GYNECOLOGY 186, 187 (2013).

whether women should be held criminally liable.³ These women may not have started to use opioids for illicit purposes.⁴ In fact, they may have taken steps to mitigate the adverse effects of opioids on their fetus.⁵ However, courts are finding these women criminally liable without taking the disease of addiction or a woman's intent into account.⁶ Notably, fathers are not prosecuted.⁷ This crime is only being prosecuted against a single gender: women.⁸

This article proposes that prosecuting women for child endangerment to a fetus is a gender-based crime,⁹ violative of the Equal Protection Clause of the Constitution.¹⁰ Opening the door to litigation for opioid use during pregnancy can lead to the prosecution of women for their lack of prenatal care,¹¹ which disproportionately affects marginalized women from lower socioeconomic backgrounds.¹² Prosecuting women is not deterring them from abusing drugs during pregnancy; rather, it is forcing women to forego basic medical care for fear of serving prison time and losing custody of their unborn child.¹³ Part I of this article provides a brief history of the constitutional protections for women under the Equal Protection Clause and Due Process Clause. Part II gives an overview of the opioid epidemic. Part III discusses the dichotomy between state judicial and legislative approaches to women who give birth to children addicted to opioids. Part IV argues that prosecuting women for ingesting drugs during pregnancy creates a gender-based crime that perpetuates gender stereotypes. Finally, this article concludes that prosecuting women for prenatal conduct violates the Equal Protection Clause.

3. See generally *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016).

4. See, e.g., *N.J. Div. of Child Prot. & Permanency v. K.M.*, 133 A.3d 643, 645 n.2 (N.J. Super. Ct. App. Div. 2016) (noting that opioids were prescribed to a friend for knee pain).

5. *Id.* at 645–46.

6. *Id.* at 648.

7. Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 995 (2017) (“[L]egislators continue to disregard the significant role . . . the father’s own behavior play[s] in harms experienced by a developing fetus and child.”).

8. Vanessa Reid Soderberg, *More Than Receptacles: An International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299, 325 (2016). In this article, “women” refers to cisgender women and people with uteruses.

9. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 772, 808 (2020).

10. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

11. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

12. See generally Bridges, *supra* note 9.

13. Livia Areas-Holmblad, *The Legal Consequences of Using Drugs While Pregnant*, ADDICTION NOW (Jan. 20, 2017), <https://www.drugaddictionnow.com/2017/01/20/legal-consequences-using-drugs-pregnant/3/>.

I. CONSTITUTIONAL PROTECTIONS

The United States Constitution was enacted to curtail government infringement of citizens' rights.¹⁴ Mothers, as well as all other citizens, are entitled to rights that protect them from government interference under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁵

A. *The Equal Protection Clause*

The Equal Protection Clause defends protected classes of individuals to ensure that similarly situated people are not treated differently.¹⁶ Equal Protection warrants judicial scrutiny at differing levels.¹⁷ Strict scrutiny requires that the law at issue be narrowly tailored to the accomplishment of a compelling government interest.¹⁸ Rational basis scrutiny requires only that a challenged statute be rationally related to a legitimate state purpose.¹⁹ The United States Supreme Court has also found an "intermediate scrutiny plus" standard for gender classifications.²⁰ This requires a state to provide an "exceedingly persuasive justification" that the challenged law is substantially related to some important governmental objective.²¹

Statutes that distinguish between males and females are subject to scrutiny under the Equal Protection Clause.²² In fact, the creation of a gender-based crime involving heightened sanctions must be substantially related to the achievement of its purpose.²³

In *United States v. Virginia*,²⁴ the United States Supreme Court held that the Constitution precludes public institutions from being accessible solely to men.²⁵ The Court found that "a party seeking to uphold [a] government action based on sex must establish an 'exceedingly persuasive justification' for the classification."²⁶ To

14. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1235–36 (2000).

15. U.S. CONST. amend. XIV, § 1.

16. *Id.* (including race and gender).

17. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 L. & INEQ. 239, 350 (1999).

18. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

19. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

20. James E. Fleming, "There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's *Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2307 (2006).

21. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

22. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

23. *Country v. Parratt*, 684 F.2d 588, 592 (8th Cir. 1982).

24. 518 U.S. 515 (1996).

25. *Id.* at 519.

26. *Id.* at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

succeed in an action based on sex, the state must show “at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”²⁷ The Court soundly noted that sex classifications “may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.”²⁸ Just as states can have some role in the Due Process context,²⁹ states also control the “gates to opportunity” under Equal Protection.³⁰ However, states “may not rely on ‘overbroad’ generalizations to make ‘judgments about people that are likely to . . . perpetuate historical patterns of discrimination.’”³¹ The Court closed by reminding the courts below that gender-based classifications are subject to heightened scrutiny.³²

Notwithstanding, the Court has upheld gender classifications based on stereotypes.³³ To be upheld, the laws must satisfy an important governmental objective.³⁴ Reduction in economic disparity between men and women caused by “the long history of discrimination” has been recognized as such an objective.³⁵ However, “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”³⁶ Statutes that discriminate based on gender have been upheld, but the law must still satisfy the heightened standard.³⁷

Pregnancy discrimination, which has been reviewed by the United States Supreme Court, has seen an evolution of greater protection.³⁸ The Court began its analysis in *Geduldig v. Aiello*,³⁹ where it held that an employment insurance package was constitutional where it excluded pregnancy as a disability.⁴⁰ The Court stated that this was not in violation of the Equal Protection Clause

27. *Miss. Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

28. *Virginia*, 518 U.S. at 534 (citation omitted).

29. *See Roe v. Wade*, 410 U.S. 113, 162 (1973).

30. *Virginia*, 518 U.S. at 541.

31. *Id.* at 542 (alteration in original) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

32. *Id.* at 555.

33. *See, e.g., M. v. Superior Ct.*, 450 U.S. 464 (1981); *Rotsker v. Goldberg*, 453 U.S. 57 (1981).

34. *Craig v. Boren*, 429 U.S. 190, 199 (1976).

35. *Califano v. Webster*, 430 U.S. 313, 317 (1977).

36. *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

37. *See Nguyen v. INS*, 533 U.S. 53, 73 (2001).

38. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 868–69 (2014).

39. 417 U.S. 484 (1974).

40. *Id.* at 497.

because “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”⁴¹ However, the Court did not comment on the decision of whether pregnancy discrimination was sex discrimination by opining that, “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification”⁴²

Congress has since passed the Pregnancy Discrimination Act, which finds that for purposes of the Civil Rights Act of 1964,⁴³ pregnancy discrimination is sex discrimination.⁴⁴ Following the Act’s passage, the Court refined its prior holding in *Nashville Gas Co. v. Satty*.⁴⁵ In *Satty*, the Court found that pregnancy discrimination may be sex discrimination.⁴⁶ However, until the Supreme Court has held definitively that pregnancy discrimination is subject to heightened scrutiny, like gender discrimination, pregnancy discrimination may be subject only to a rational basis standard.⁴⁷

B. *The Due Process Clause*

The right of privacy is recognized as a “liberty” interest under the Due Process Clause of the Fourteenth Amendment.⁴⁸ Privacy is an implicit fundamental right that protects citizens from governmental intrusion.⁴⁹ Privacy has been interpreted to include the “interest in independence in making certain kinds of important decisions.”⁵⁰ Decisional privacy, such as when a mother chooses to continue or terminate her pregnancy,⁵¹ is designed to protect personal affairs, that are central to an individual’s person, from

41. *Id.* at 496 n.20.

42. *Id.*

43. 42 U.S.C. § 2000e.

44. 42 U.S.C. § 2000e(k).

45. 434 U.S. 136 (1977).

46. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 407 (2008).

47. Monica Carusello, *Sentencing Pregnant Drug Addicts: Why the Child Endangerment Enhancement Is Not Appropriate*, 5 TENN. J. RACE, GENDER & SOC. JUST. 69, 79 (2016).

48. See *Roe v. Wade*, 410 U.S. 113, 152–56 (1973).

49. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

50. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

51. Julia Epstein, *The Sacred Body in Law and Literature: The Pregnant Imagination, Fetal Rights, and Women’s Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 160 (1995).

governmental intrusion.⁵² Once an interest has been classified as a fundamental right, then the government must show a compelling reason to intervene in order to survive strict scrutiny.⁵³

The right of privacy was first established by the United States Supreme Court in a First Amendment case that held that parents have the right to educate their children as they choose.⁵⁴ Since then, the right of privacy has been contemplated and found in matters of marriage and family life.⁵⁵ “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and protects the person from unwarranted government intrusions into a dwelling or other private place.⁵⁶

There is considerable support for the right to privacy encompassing the right to procreate, but a fetus’ right of autonomy is part of ongoing dispute.⁵⁷ The decision to bear children is “at the very heart” of these constitutionally protected choices.⁵⁸ In *Griswold v. Connecticut*,⁵⁹ the United States Supreme Court recognized that married couples have a right to privacy in the context of contraception.⁶⁰ The Court emphasized that not only does the Fourteenth Amendment protect privacy, but that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”⁶¹ Further, the Fourth and Fifth Amendments have been described “as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”⁶² The Court concluded that the right of privacy is a protected right.⁶³

52. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446–67 (1983).

53. See *Roe*, 410 U.S. at 155.

54. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

55. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding same-sex couples have a fundamental right to marry); *Roe*, 410 U.S. 113 (recognizing a right to choose whether to terminate pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that there is a right to choose one’s spouse irrespective of race); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing a right to procreate); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding there is a right to select the type of schooling of children in one’s custody).

56. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

57. Exploring the right of a fetus to bodily autonomy is beyond the scope of this article. Instead, the focus of this article is the autonomy of mothers to carry their pregnancy to full-term without being forced to face criminal charges.

58. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977).

59. 381 U.S. 479 (1965).

60. *Id.* at 485.

61. *Id.* at 483.

62. *Id.* at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

63. *Id.* at 485; see also *id.* at 491 (“To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.”) (Goldberg, J., concurring).

The Supreme Court has continued to extend the right of privacy.⁶⁴ In *Eisenstadt v. Baird*,⁶⁵ the Court recognized a right to privacy for unmarried individuals to have contraceptives.⁶⁶ The Court emphasized that “[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁷

In *Roe v. Wade*,⁶⁸ the court addressed that women have a right to privacy in their decision to terminate a pregnancy.⁶⁹ The Court began by stating the limits of personal privacy, yet acknowledged that the right has extended into marriage, procreation, and child rearing.⁷⁰ The Court concluded that the decision to have an abortion is a protected right of privacy, but it “is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”⁷¹ Notably, however, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,”⁷² thus, fetuses are not entitled to Due Process rights and Equal Protection under the law.⁷³ Although fetuses do not receive this protection, the Court recognized that the state “does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still [another] important and legitimate interest in protecting the potentiality of human life.”⁷⁴ The state’s interest in both the pregnant woman and the fetus grows as the woman comes to term.⁷⁵

Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁶ the Court refined its holding in *Roe*, and explained that although the State has an interest in preserving the life of both the born and unborn, “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the

64. See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

65. *Id.*

66. *Id.* at 454.

67. *Id.* at 453.

68. 410 U.S. 113 (1973).

69. *Id.* at 164–67.

70. *Id.* at 152–53.

71. *Id.* at 155.

72. *Id.* at 158.

73. William E. Buelow III, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963, 986 (1998).

74. *Roe*, 410 U.S. at 162.

75. *Id.* at 163.

76. 505 U.S. 833 (1992).

procedure.”⁷⁷ The Court established that the liberty guaranteed by the Due Process Clause is a “rational continuum” and “includes a freedom from all substantial arbitrary impositions” such that it requires “particularly careful scrutiny” when a state attempts to abridge this right.⁷⁸

II. THE OPIOID EPIDEMIC

Every day, more than 130 people die in the United States from overdosing on opioids.⁷⁹ Use and abuse of opioids and opiates has transformed our society.⁸⁰ These opioids, consisting of prescription pain relievers, heroin, codeine, oxycodone, and synthetic opioids, like fentanyl, affect the youngest to oldest members of society.⁸¹ Prescriptions for opioids increased in the late 1990s and have since surged since the 2010s.⁸² The number of prescriptions becomes even more alarming upon discovering that approximately three out of four new heroin users say they abused prescription opioids before turning to heroin.⁸³ The Center for Disease Control (CDC) estimates that the “economic burden” of prescription opioid misuse, in the United States alone, is \$78.5 billion per year, including costs of healthcare and criminal justice involvement.⁸⁴

The Opioid Crisis is not new; rather, litigation has been ongoing since the early 2000s,⁸⁵ involving oxycodone (OxyContin).⁸⁶ Purdue Pharma, a manufacturer of OxyContin, produced documents during

77. *Id.* at 846.

78. *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

79. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), <https://www.cdc.gov/drugoverdose/epidemic/>.

80. *Commonly Used Terms*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 5, 2020), <https://www.cdc.gov/drugoverdose/opioids/terms.html> (defining that opiates refers to natural opioids, like heroin, morphine, and codeine, and that opioids refer to all natural, semisynthetic, and synthetic opioids).

81. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one>.

82. *Opioid Prescribing*, CTRS. FOR DISEASE CONTROL AND PREVENTION (July 6, 2017), <https://www.cdc.gov/vitalsigns/opioids/index.html>.

83. Mina Dixon Davis, “Bad Moms” and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South, 25 GEO. J. POVERTY L. & POL'Y 305, 308 (2018).

84. Curtis Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States*, 54 MED. CARE 901 (2016).

85. Alexander C. Egilman et al., *Confidentiality Orders and Public Interest in Drug and Medical Device Litigation*, 180 [J]AMA INTERNAL MED. 292 (2019).

86. See *Medication Guide Oxycontin*, U.S. FOOD & DRUG ADMIN. (Aug. 2015), <https://www.fda.gov/media/78453/download> (“A strong prescription pain medicine that contains an opioid (narcotic) that is used to manage pain severe enough to require daily around-the-clock, long-term treatment with an opioid, when other pain treatments such as non-opioid pain medicines or immediate-release opioid medicines do not treat your pain well enough or you cannot tolerate them.”).

litigation detailing how the company down-played the drug's risk of abuse and addiction.⁸⁷ However, this leaked information is one of only few pieces revealed to the public due to drug companies pursuing settlement.⁸⁸ Though, the tides may change soon because the population harmed by opioids continues to grow and may lead to more class action lawsuits due to similar factual circumstances—for example, newborns with Neonatal Abstinence Syndrome (NAS).⁸⁹

NAS is a withdrawal symptom that “impacts newborns who were exposed to opioids in utero, and then are rapidly shut off from access to the drug at birth.”⁹⁰ Effects include “excessive high-pitched cry, reduced quality and length of sleep after a feeding, increased muscle tone, tremors, and convulsions . . . dysregulation ([including] sweating, frequent yawning and sneezing, increased respiration) and gastrointestinal signs ([such as] excessive sucking, poor feeding, regurgitation or vomiting, and loose or watery stools).”⁹¹ Hospitals are becoming inundated with babies born with NAS: citing a rise from 13,500 in 2009 to 25,000 in 2016.⁹² In Pennsylvania alone, NAS rates increased by over one thousand percent between 2000 and 2018.⁹³ Despite the severity of symptoms, there is little research discussing the impact of pregnant opioid use or NAS on long-term brain development.⁹⁴ The uncertainty of the long-term impact of NAS has generated much debate about whether pregnant women should be prosecuted for drug use.⁹⁵

Like all drug addiction, opioid addiction is a disease.⁹⁶ The World Health Organization promulgated an authoritative definition of

87. Egilman et al., *supra* note 85.

88. Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2302–03 (2017).

89. *Id.* at 2304.

90. Cara O'Connor, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 108 (2019).

91. *Id.* at 108–09 (alterations in original) (quoting Beth A. Logan et al., *Neonatal Abstinence Syndrome: Treatment and Pediatric Outcomes*, 56 CLINICAL OBSTETRICS & GYNECOLOGY 168 (2013)).

92. Sean Withington & Shannon M. Monnat, *The Increase in Neonatal Abstinence Syndrome from Opioids Affects Us All*, LERNER CTR. FOR PUB. HEALTH PROMOTION (Apr. 16, 2019), https://lernercenter.syr.edu/wp-content/uploads/2019/04/Withington_NAS_FINAL.pdf.

93. *Id.*

94. See Fran Smith, *Babies Fall Victim to the Opioid Crisis*, NAT'L GEOGRAPHIC (Sept. 2017), <https://www.nationalgeographic.com/magazine/2017/09/science-of-addiction-babies-opioids>.

95. See Cara Angelotta & Paul S. Appelbaum, *Criminal Charges for Child Harm from Substance Use in Pregnancy*, 45 J. AM. ACAD. PSYCHIATRY L. 193 (2017).

96. S. REP. NO. 92-1071, at 3 (1971) (expanding the Narcotic Addiction Rehabilitation Act to include methadone maintenance).

heroin addiction, which lists characteristics such as a “strong desire or need to continue taking the drug,” “a psychic dependence on the effects of the drug,” and “a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn.”⁹⁷ Congress has also defined “addict” to include one “who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.”⁹⁸

The United States Supreme Court, in *Robinson v. California*,⁹⁹ held that addiction is not a crime; rather, it is an illness “which may be contracted innocently or involuntarily,”¹⁰⁰ and cannot be prosecuted. Justice Douglas concluded that addiction is not punishable as a crime¹⁰¹ because, “[i]f addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.”¹⁰²

III. DICHOTOMY OF APPROACHES

Courts and legislatures have been working to identify the potential liability for drug use during pregnancy.¹⁰³ Their efforts show the vast difference in interpreting the requirements for pregnant women.¹⁰⁴

A. *Judicial Approach*

The most frequently relied upon case for fetal child abuse due to drug addiction deals with cocaine.¹⁰⁵ Regina Kilmon gave birth to a baby boy that had the presence of cocaine in his bloodstream.¹⁰⁶ Ms. Kilmon was charged with second degree child abuse, reckless endangerment, and possession of a controlled substance and pled guilty to reckless endangerment.¹⁰⁷ The Maryland Supreme Court looked to its child endangerment statute, where in relevant part

97. WORLD HEALTH ORG. [WHO], WHO TECHNICAL REPORT SERIES NO. 273: WHO EXPERT COMMITTEE ON ADDICTION-PRODUCING DRUGS 13–14 (1964).

98. 21 U.S.C. § 802(1).

99. 370 U.S. 660 (1962).

100. *Id.* at 667.

101. *Id.* at 674 (Douglas, J., concurring).

102. *Id.*

103. See Barry M. Lester et al., *Substance Use During Pregnancy: Time for Policy to Catch Up with Research*, HARM REDUCTION J., Apr. 20, 2004, at 3.

104. See *id.*

105. *Kilmon v. State*, 905 A.2d 306 (Md. 2006).

106. *Id.* at 307.

107. *Id.*

states, that a person recklessly “engage[s] in conduct that creates a substantial risk of death or serious physical injury to *another*.”¹⁰⁸ The court held that “another” meant another person.¹⁰⁹ As such, the person allegedly endangered by Ms. Kilmon’s conduct was not the fetus, but the child, after the child’s birth.¹¹⁰

The court recognized that an injury committed while a child is still *in utero* can produce criminal liability if the child is later born alive.¹¹¹ Distinguishing *Williams*, the court noted that reckless endangerment, not intent to injure, is the key element of the offense.¹¹² The court took issue that if the statute is applied to the effect of a pregnant woman’s conduct on the fetus she is carrying, it could be construed to include not just the ingestion of unlawful controlled substances “but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature”¹¹³ The court then provided a list of the potentially reckless behavior that could be captured under the reckless endangerment statute:

everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability.¹¹⁴

The court acknowledged that a pregnant woman, like anyone else, may be prosecuted for her own possession of controlled

107. *Id.*

108. MD. CODE ANN., CRIM. LAW § 3-204(a)(1) (emphasis added).

109. *Kilmon*, 905 A.2d at 308.

110. *Id.* at 309.

111. *Id.* at 310; *see, e.g., Williams v. State*, 561 A.2d 216, 219 (Md. 1989) (concluding that when a pregnant woman was shot with an arrow and child died shortly after birth that defendant could lawfully be convicted of manslaughter for the death of the child).

112. *Kilmon*, 905 A.2d at 311.

113. *Id.*

114. *Id.*

substances.¹¹⁵ Despite being importuned on numerous occasions, the Maryland General Assembly has “chosen not to impose additional criminal penalties for the effect that her *ingestion* of those substances might have on the child, either before or after birth.”¹¹⁶ Recognizing an anomaly in the jurisprudence, the court proffered that it would be nonsensical that a pregnant woman who, by ingesting drugs and recklessly causing the death of a viable fetus, would suffer no criminal liability for manslaughter, but, if the child survived, she could be imprisoned for five years for reckless endangerment.¹¹⁷

Subsequently, New Jersey addressed whether a pregnant woman seeking treatment for her opioid addiction can be held criminally responsible for her child being born with NAS.¹¹⁸ At a routine doctor’s appointment, Y.N. learned that she was four months pregnant.¹¹⁹ During the preceding four months, Y.N. had been taking Percocet¹²⁰ for injuries from a car accident and became dependent on the medication.¹²¹ Hospital staff advised her not to stop taking Percocet abruptly because it could endanger her pregnancy.¹²² Instead, hospital staff recommended that Y.N. enter a methadone maintenance treatment program, which she did four months later, just a month before she gave birth to her son.¹²³ Y.N.’s son suffered methadone withdrawal symptoms at birth and remained hospitalized for about seven weeks.¹²⁴

Y.N. was found strictly liable for abuse and neglect.¹²⁵ The New Jersey Supreme Court reversed and held “absent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn’s enduring methadone withdrawal following a mother’s timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she has made

115. *Id.* at 314.

116. *Id.*

117. *Id.*

118. N.J. Div. of Child Prot. and Permanency v. Y.N., 104 A.3d 244 (N.J. 2014).

119. *Id.* at 246.

120. Percocet contains oxycodone, an opioid, and is used to treat moderate to severe pain. See *Percocet (Oxycodone and Acetaminophen Tablets, USP)*, ENDO PHARMS. (July 2018), https://www.endo.com/File%20Library/Products/Prescribing%20Information/PERCOCET_prescribing_information.html. The FDA warns that there has been not been established study indicating that Percocet is safe to use during pregnancy. *Id.*

121. Y.N., 104 A.3d at 246.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* But see N.J. Dep’t of Child. & Families, Div. of Youth & Fam. Servs. v. A.L., 59 A.3d 576, 590 (N.J. 2013) (holding that mother had not abused or neglected her child when the infant was born with cocaine metabolites in her system because the record revealed little about any future degree of harm).

full disclosure.”¹²⁶ The court referenced the United States Department of Health and Human Services and concluded that methadone maintenance treatment can save the lives of newborns.¹²⁷ Although the infant may experience methadone withdrawal, ultimately, it is better than the infant being addicted to heroin.¹²⁸ The court reasoned that, finding a mother liable of abuse or neglect as a result of her newborn’s NAS diagnosis, after the mother made an informed medical decision to undergo methadone maintenance treatment, would discourage women from entering detoxification programs that may improve their child’s health.¹²⁹

The Vermont Supreme Court addressed a similar issue regarding whether a woman should continue her use of opioids during pregnancy.¹³⁰ In that case, the pregnant woman revealed to a nurse that she had been using street buprenorphine.¹³¹ The nurse educated that she should continue to use the drug to avoid intrauterine damage to the fetus and herself if she were to suddenly stop.¹³² The nurse prescribed Subutex (buprenorphine),¹³³ but her son was born opioid-dependent and required two months of treatment.¹³⁴ The court held that because the mother was suspended from treatment, accessed un-prescribed Subutex off the street, and did not return to a medically monitored program until a month before the birth of her child, the mother was guilty of child abuse towards the fetus.¹³⁵

Justice Beth Robinson, concurring in part and dissenting in part, noted that the court “should not presume that *every* child born opioid-dependent is by definition [abused] on account of the fact that the child developed an opioid dependence in utero.”¹³⁶ Child-protection statutes are not designed to punish prepartum conduct.¹³⁷ Although a parent’s conduct prior to a child’s birth may support inferences about the parent’s ability to care for the child upon birth, Justice Robinson did not believe that an abuse finding is predicated

126. *Y.N.*, 104 A.3d at 246.

127. *Id.* at 255–56.

128. *Id.* at 256.

129. *Id.*

130. *In re M.M.*, 133 A.3d 379 (Vt. 2015).

131. *Id.* at 382.

132. *Id.*

133. Subutex is used to treat opioid dependence. See *Subutex (Buprenorphine Sublingual Tablets) for Sublingual Administration*, U.S. FOOD & DRUG ADMIN. (Feb. 2018), https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/020732s018lbl.pdf. Subutex can result in NAS. *Id.*

134. *In re M.M.*, 133 A.3d at 382.

135. *Id.* at 386.

136. *Id.* at 389 (Robinson, J., concurring in part and dissenting in part).

137. *Id.* at 390.

based on harm inflicted on a fetus before birth.¹³⁸ Studies have shown that fear of punitive responses and loss of custody is a deterrent to pregnant women seeking treatment for drug addiction.¹³⁹ A policy, presumptively holding that a child born with NAS is abused, would deter pregnant opioid-addicted women from taking steps to protect both their own health and that of their fetus.¹⁴⁰

The West Virginia Supreme Court handled the novel situation of whether a pregnant woman could be convicted of child neglect resulting in death, when a child is born addicted to methamphetamines and consequently dies.¹⁴¹ Stephanie Louk intravenously injected methamphetamines when she was thirty-seven weeks pregnant.¹⁴² Within a few hours of the injection, Ms. Louk began experiencing breathing problems and went to the hospital.¹⁴³ Doctors diagnosed Ms. Louk with acute respiratory distress which, when pregnant, displaces the blood that usually goes to the fetus and diverts it back to the woman.¹⁴⁴ Doctors performed an emergency cesarean, and upon delivery, the child was pronounced brain dead.¹⁴⁵ The child died eleven days later.¹⁴⁶ Ms. Louk was convicted of one felony count of child neglect resulting in death and sentenced to three to fifteen years' incarceration.¹⁴⁷

Citing to *Kilmon*, the West Virginia Supreme Court expressed concerns that numerous prenatal activities could harm the fetus, such as poor nutrition, poor prenatal care, and caffeine consumption.¹⁴⁸ The court was concerned about the same anomaly, that prenatal ingestion of drugs resulting in the birth of a surviving child would be criminalized but the same conduct resulting in the fetus dying *in utero* would not be criminalized.¹⁴⁹ The court overturned Ms. Louk's conviction, but stated that with the rising opioid epidemic, the legislature would need to rewrite the statute if they wanted prenatal conduct criminalized.¹⁵⁰

Most recently, the Pennsylvania Supreme Court addressed whether a woman's use of opioids while pregnant, which results in

138. *Id.*

139. *Id.*

140. *Id.* at 394.

141. *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016).

142. *Id.* at 220.

143. *Id.*

144. *Id.* at 221.

145. *Id.* at 222.

146. *Id.*

147. *Id.*

148. *Id.* at 225–26.

149. *Id.* at 226.

150. *Id.* at 228.

a child born suffering from NAS, constitutes child abuse.¹⁵¹ The woman was released from incarceration and relapsed into drug addiction, specifically using opioids and marijuana.¹⁵² Upon learning she was pregnant, she sought treatment for her addiction, first through a methadone maintenance program, and then with Subutex.¹⁵³ She relapsed, and a couple of weeks before giving birth, she tested positive for opiates, benzodiazepines, and marijuana—none of which were prescribed to her.¹⁵⁴ Within three days of her child being born, the child began exhibiting symptoms of NAS.¹⁵⁵ Child and family services filed a dependency petition alleging, among other things, that the child was a victim of child abuse by a perpetrator, and the mother caused bodily injury to the child through a recent act.¹⁵⁶

The case was decided based on the unambiguous language of the Pennsylvania child abuse statute.¹⁵⁷ Although the opinion primarily focused on whether the fetus was considered a child *in utero* and whether the woman was considered a mother prior to birth, the court held that the woman was not a perpetrator of child abuse.¹⁵⁸ In addition, the court opined that labeling a woman as a perpetrator of child abuse does not prevent her from becoming pregnant, and it does not ensure that the same woman will not use illegal drugs if she becomes pregnant again.¹⁵⁹ Once given the label of a perpetrator of abuse, the likelihood that a new mother will be able to assimilate into the workforce and participate in activities in the child's life would be diminished.¹⁶⁰

Contrasting with the preceding cases, the Tennessee Court of Appeals did not consider any privacy or policy considerations in favor of the mother and, rather, focused on the child when deciding prenatal opioid use.¹⁶¹ The appellate court addressed whether a woman's drug use during pregnancy constituted severe child abuse where she had previously given birth to a child who was harmed by drug abuse.¹⁶² In this case, the mother had previously given birth to a child suffering from NAS, and she had been referred to a

151. *In re L.J.B.*, 199 A.3d 868, 870 (Pa. 2018).

152. *Id.* at 871.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. 23 PA. CONS. STAT. § 6386.

158. *In re L.J.B.*, 199 A.3d at 877.

159. *Id.*

160. *Id.*

161. *In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009).

162. *Id.* at 845.

methadone clinic.¹⁶³ She was expelled from the methadone clinic due to her use of methamphetamine—a violation of the clinic's rules.¹⁶⁴ About a year later, she was taken to a hospital for a possible drug overdose when she discovered she was pregnant.¹⁶⁵ Subsequently, she used methadone purchased illegally and failed to receive prenatal care.¹⁶⁶ Her son was born prematurely and exhibited signs of opiate withdrawal.¹⁶⁷ The court held that severe child abuse can be found where a child is born injured from exposure to opiates during pregnancy.¹⁶⁸

Although the facts of each case are unique, the courts, overall, seem to be coming to nearly the same conclusion: pregnant women cannot be found criminally responsible for their prenatal use of opioids.¹⁶⁹ Courts are concerned with the woman's fundamental right to privacy.¹⁷⁰ If the courts follow Tennessee's lead and issue a finding of child abuse whenever a child is born with injuries sustained from the mother's prenatal opioid use, it can potentially open the door to a wider range of conduct that the courts can control.¹⁷¹ However, courts have opined that the decision of criminal culpability may not be an issue for the judicial branch to handle; rather, it should be decided by the legislatures.¹⁷² As the West Virginia Supreme Court stated, it is for the legislature to define what constitutes child abuse and whether that includes specific prenatal conduct, including consumption of illegal substances.¹⁷³

B. Legislative Approach

Maryland has created a statute that specifically addresses reporting on substance-exposed newborns.¹⁷⁴ Therein, Maryland defines controlled substances to include all substances on Schedules I through V.¹⁷⁵ Newborn is also defined as "a child under the age of 30 days who is born or who receives care in the State."¹⁷⁶ The

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 845–46.

167. *Id.* at 846.

168. *Id.* at 850.

169. *See, e.g.,* *Kilmon v. State*, 905 A.2d 306, 314 (Md. 2006); *State v. Louk*, 786 S.E.2d 219, 228 (W. Va. 2016).

170. *See Kilmon*, 905 A.2d at 311.

171. *Id.*; *see In re Benjamin M.*, 310 S.W.3d at 844.

172. *See Louk*, 786 S.E.2d at 228.

173. *Id.*

174. MD. CODE ANN., FAM. LAW § 5-704.2.

175. *Id.* § 5-704.2(a)(2).

176. *Id.* § 5-704.2(a)(4).

statute states that a new born is “substance-exposed” where the newborn:

(1) displays a positive toxicology screen for a controlled drug as evidenced by an appropriate test after birth; (2) displays the effects of controlled drug use or symptoms of withdrawal resulting from prenatal controlled drug exposure as determined by medical personnel; or (3) displays the effects of a fetal alcohol spectrum disorder.¹⁷⁷

Thus, the statute addresses not only prenatal drug use but also prenatal alcohol use.¹⁷⁸ Most importantly, the statute states that “[a] report made under this section does not create a presumption that a child has been or will be abused or neglected,” thus, expressing the intent that expectant women are not subject to strict liability for prenatal conduct.¹⁷⁹ The Legislature is leaving it to the courts to determine whether the prenatal conduct of the mother is indicative of abuse.¹⁸⁰

New Jersey has yet to pass a statute specifically addressing newborns and instead relies upon its general child abuse statute.¹⁸¹ Under the New Jersey statute, a child is defined as “any child alleged to have been abused or neglected.”¹⁸² An abused or neglected child is “a child less than 18 years of age whose parent or guardian . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement”¹⁸³ The statute is quite broad and allows courts to interpret the statute as they see fit.¹⁸⁴ However, the New Jersey legislature has introduced multiple bills in the last few years seeking to address substance-exposed newborns, indicating that the legislature may, in a few years, more strictly define abuse in this context.¹⁸⁵

West Virginia views controlled substance use during pregnancy as falling under its child neglect statute.¹⁸⁶ Therein, the statute simply refers to whether a parent, guardian, or custodian, neglects

177. *Id.* § 5-704.2(b).

178. *Id.*

179. *Id.* § 5-704.2(i).

180. *Id.*

181. N.J. STAT. ANN. § 9:6-8.21.

182. *Id.* § 9:6-8.21(b).

183. *Id.* § 9:6-8.21(c).

184. *Id.*

185. *See, e.g.*, Assemb. B. 926, 217th Gen. Assemb., Reg. Sess. (N.J. 2016).

186. W. VA. CODE ANN. § 61-8D-4a.

a child under his or her custody or control.¹⁸⁷ This is one of the broadest statutes and makes no reference to what constitutes neglect or abuse.¹⁸⁸ This provides courts with broad discretion in their decision-making.¹⁸⁹ The West Virginia Supreme Court in *Louk* called for a stricter statute due to this broad power. Because West Virginia is the leader in opioid overdoses,¹⁹⁰ it is likely that a stricter statute will be created.¹⁹¹

Similarly to New Jersey and West Virginia, Pennsylvania also does not have a statute specifically addressing newborns affected by NAS.¹⁹² Integral in the decision of *In re L.J.B.*, was the definition of perpetrator of abuse, postulating that it must be, among others, the parent of the child.¹⁹³ Child abuse is defined as “intentionally, knowingly[,] or recklessly . . . [c]ausing bodily injury to a child through any recent act or failure to act.”¹⁹⁴ In the case, the opinion turned upon the definition of parent and child, which in the statute, does not specifically address whether a fetus is a child and at what point one becomes a parent.¹⁹⁵

Tennessee, although not possessing a statute solely addressing prenatal conduct, does have provisions dealing with child abuse resulting from consumption of illegal substances.¹⁹⁶ A child is defined as anyone under eighteen years of age.¹⁹⁷ Severe child abuse is defined as “[t]he knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death”¹⁹⁸ Severe child abuse can also be found where a parent knowingly allows a child “to be present within a structure where the act of creating methamphetamine . . . is occurring”¹⁹⁹ Furthermore, severe child abuse exists where a parent “[k]nowingly or with gross negligence allow[s] a child under eight

187. *Id.* § 61-8D-4a(a).

188. *Id.*

189. *Id.*

190. *West Virginia: Opioid-Involved Deaths and Related Harms*, NAT'L INST. ON DRUG ABUSE (Apr. 3, 2020), <https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/west-virginia-opioid-involved-deaths-related-harms>.

191. See generally Nathan R. Hamons, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating a Public Nuisance*, 121 W. VA. L. REV. 257 (2018).

192. Compare *In re L.J.B.*, 199 A.3d 868 (Pa. 2018), with 23 PA. CONS. STAT. § 6303.

193. 23 PA. CONS. STAT. § 6303.

194. *Id.* § 6303(b.1).

195. The definitions of when one becomes a parent and when one is considered a child is a major issue when discussing whether mothers should be held liable for their prenatal conduct, but it will not be addressed here.

196. TENN. CODE ANN. § 37-1-102.

197. *Id.* § 37-1-102(b)(5)(A).

198. *Id.* § 37-1-102(b)(27)(A)(i).

199. *Id.* § 37-1-102(b)(27)(D).

(8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child.”²⁰⁰ As the court found in *In re Benjamin M.*, a child also includes a fetus.²⁰¹ Although the statute does not specifically address fetal conduct, the statute can be construed to a finding of child abuse.²⁰²

Florida has specifically addressed substance exposure in newborns.²⁰³ Harm is found where a child has been exposed to a controlled substance or alcohol.²⁰⁴ This can be determined by “[a] test, administered at birth, which indicate[s] that the child’s blood, urine, or meconium contained any amount of alcohol or a controlled substance or metabolites of such substances, the presence of which was not the result of medical treatment administered to the mother or the newborn infant.”²⁰⁵ Florida has specifically carved out that a mother has harmed her child, but this is not a presumptive finding of child abuse.²⁰⁶ Florida, like the states above, has left it to the discretion of the courts.²⁰⁷

States have implemented new statutes and regulations to better protect babies born with NAS and get care for women addicted to opioids.²⁰⁸ Twenty-five states and the District of Columbia require health care professionals to report suspected prenatal drug use.²⁰⁹ Eight states require health care professionals to test for prenatal drug exposure if they suspect drug use.²¹⁰ Nineteen states have either created or funded drug treatment programs specifically targeting pregnant women,²¹¹ and an additional seventeen states and the District of Columbia provide pregnant women with priority access

200. *Id.* § 37-1-102(b)(27)(E).

201. *In re Benjamin M.*, 310 S.W.3d 844, 850 (Tenn. Ct. App. 2009).

202. *Id.*

203. FLA. STAT. ANN. § 39.01.

204. *Id.* § 39.01(35)(g).

205. *Id.* § 39.01(35)(g)(1).

206. *Id.*

207. *Id.*

208. *See generally* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, NO. 711, OPIOID USE AND OPIOID USE DISORDER IN PREGNANCY (Aug. 2017).

209. *Substance Use During Pregnancy*, GUTTMACHER INST. (Dec. 1, 2020), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (Alaska, Arizona, Arkansas, California, District of Columbia, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, and Wisconsin).

210. *Id.* (Indiana, Iowa, Kentucky, Louisiana, Minnesota, North Dakota, Rhode Island, and South Dakota).

211. *Id.* (Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Maryland, Minnesota, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, and Wisconsin).

to state-funded drug treatment programs.²¹² Moreover, ten states prohibit publicly funded drug treatment programs from discriminating against pregnant women.²¹³

State legislatures are taking a wide array of approaches to address the opioid epidemic's effect on newborns.²¹⁴ As the opioid epidemic continues, more legislation specifically addressing substance exposure in newborns, like in Maryland, will likely be written.²¹⁵ As seen in Maryland and Florida, the statutes not only address opioids but other illegal substances and alcohol.²¹⁶ As other states write or amend their legislation, opioids, alcohol, and possibly other prenatal conduct may be introduced as a finding of harm to a fetus.²¹⁷

IV. CRIMINALIZING PREGNANCY CREATES A GENDER-BASED CRIME

Most states, and the federal government, criminalize “substance possession, not use, criminalizing substance use during pregnancy represents an expansion of the criminal law.”²¹⁸ This expansion of criminal law will only be prosecuted against those people who can become pregnant: women.²¹⁹ Thus, because pregnancy is a necessary element of substance use during pregnancy, this criminalization creates a gender-based crime.²²⁰

These statutes have treated pregnancy as an essential element for criminal prosecution, thereby exclusively crafting a statute that applies to women and no one else.²²¹ Looking at a study between 1973 and 2005, most of the more than 400 interventions of pregnant women for substance use during pregnancy,²²² “pregnancy provided

212. *Id.* (Alabama, Arizona, Arkansas, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Ohio, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin).

213. *Id.* (Alabama, Florida, Illinois, Iowa, Kansas, Kentucky, Missouri, Ohio, Oklahoma, and Tennessee).

214. *See* Bridges, *supra* note 9, at 810–14.

215. *See id.*

216. FLA. STAT. ANN. § 39.01; MD. CODE ANN., FAM. LAW § 5-704.2.

217. *See* Kilmon v. State, 905 A.2d 306, 311 (Md. 2006).

218. Bridges, *supra* note 9, at 808.

219. *Id.*

220. *Id.* This article recognizes the implications of criminalizing pregnancy, and specifically looks at how this disproportionately affects minorities. This is a valid argument, but it is beyond the scope of this article.

221. Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1167 (2017).

222. *See generally* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013).

a ‘but for’ factor, meaning that but for the pregnancy, the action taken against the woman would not have occurred.”²²³

The most common response to why substance use should be criminalized during pregnancy is that the criminal justice system operates as an effective deterrent to convince pregnant women with substance use disorder to get treatment.²²⁴ The idea is that a pregnant woman suffering from drug dependence will choose treatment, thereby increasing the probability that she will stop abusing drugs and give birth to a healthy child.²²⁵

However, criminalizing substance use during pregnancy opens the door to a slippery slope for the criminalization of other activities—even legal activity—that can pose a risk to fetuses.²²⁶ This is far from a novel idea: women have historically been refused the opportunity to have certain jobs²²⁷ and equal employment benefits.²²⁸ Today, new legislation has been proposed to criminalize cigarette smoking by pregnant women,²²⁹ but this may just be the beginning. This endangers not only women who use opioids during pregnancy, but even women who fail to obtain prenatal care.²³⁰ Lynn Paltrow, program director of National Advocates for Pregnant Women, states that “according constitutional rights to fetuses would not only jeopardize women’s lives and health by denying them access to legal abortion[s], but would also undermine substantially their status as constitutional persons including their ability to participate as full and equal citizens in our society.”²³¹ If a woman is held criminally responsible, then she may be listed on a child abuse registry

223. *Id.* at 301.

224. Bridges, *supra* note 9, at 804.

225. Erin D. Kampschmidt, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX 487, 501–02 (2015).

226. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

227. See *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (holding that legislation is justified to protect women from the greed and passion of man); *Bradwell v. Illinois*, 83 U.S. 130, 132 (1872) (recognizing that God created different sexes and that they are to belong to separate roles).

228. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976) (challenging private insurance plans that excluded pregnancy); *overruled by* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

229. Timor Faber et al., *Smoke-Free Legislation and Child Health*, 26 PRIMARY CARE RESPIRATORY MED. 16067 (2016).

230. See, e.g., Antonia Noori Farzan, *Yes, You Can Fail a Drug Test by Eating a Poppy Seed Bagel, as a Maryland Mother Learned*, WASH. POST (Aug. 8, 2018, 6:22 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/08/yes-you-can-fail-a-drug-test-by-eating-a-poppy-seed-bagel-as-a-maryland-mother-learned/> (explaining that mothers have been reported to state services for testing positive for opiates without allowing mothers to explain that they had eaten a poppy seed bagel).

231. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1009 (1999).

which can result in potential reputational harms, such as impeding the ability to obtain employment.²³² Thus, the more rights and protections that are given to fetuses, the fewer that remain for the woman who carries the fetus.²³³

Although violating the fundamental right to bear children is, on its own, enough to trigger strict scrutiny under Equal Protection, the protected status of addiction is also subject to heightened scrutiny.²³⁴ If “drug use by pregnant women is [a crime], then pregnancy constitutes ‘a necessary element of a remarkable new status-based criminal offense: [p]regnancy by a drug-dependent person, or drug use by a pregnant woman.’”²³⁵ It is the “coexistence of two unpunishable statuses—a drug addiction and pregnancy”—that results in the creation of a “new status crime.”²³⁶

Moreover, prosecuting pregnant women violates Equal Protection because this robs women of the fundamental right to bear children.²³⁷ The right to procreate is “one of the basic civil rights”²³⁸ *Skinner* clearly held that the right to beget a child is a fundamental right that cannot be abridged without satisfying strict scrutiny.²³⁹ Punishing mothers who are drug-addicted burdens their right to bear children.²⁴⁰ Here, although there is a state interest in protecting the life of fetuses,²⁴¹ there is currently not enough research to determine how much opioid use during pregnancy will affect the fetus, or even if there will be any long-term effects.²⁴² Moreover, states are only recognizing the woman’s role in fetal health, and failing to recognize the male role.²⁴³ By prosecuting women for their prenatal conduct, courts are punishing

232. See *Kane v. Comm’r of Dep’t of Health & Hum. Servs.*, 960 A.2d 1196, 1202 (Me. 2008) (holding that “[t]he stigma of being listed as ‘substantiated’ for child abuse combined with the adverse professional and social consequences of being listed in the database implicates a fundamental liberty interest.”).

233. Ehrlich, *supra* note 46, at 382–83.

234. *Id.* at 412.

235. Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 520 (1990) (alteration in original).

236. *Id.*

237. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

238. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

239. *Id.*

240. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1464 (1991).

241. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

242. Smith, *supra* note 94.

243. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 997 (1984).

women for addiction and opening the floodgates to future litigation for other conduct.²⁴⁴

A. *Criminalizing Pregnancy Perpetuates Gender Stereotypes*

Legislators focus exclusively on the pregnant woman's role in the health of the fetus, while failing to recognize that men also have an impact.²⁴⁵ The United States Supreme Court opined that male health may have just as much influence on the fetus as the expectant woman's health.²⁴⁶ A man's exposure to toxins in his workplace can be potentially damaging to fetal development.²⁴⁷ There is even a similarly proposed potential harm linking paternal drug use and fetal health.²⁴⁸ Both male and female alcohol consumption decreased the chance of a live birth and increased the risk of a miscarriage.²⁴⁹

Smoking can also damage sperm DNA.²⁵⁰ For example, heavy smoking by a man at the time of conception "increases the child's risk of childhood leukemia and shortens [the] reproductive lifespan of daughters."²⁵¹ Beyond the effect that exposure to toxins, smoking, and drinking alcohol have on a man's sperm, his "drug use in the presence of a pregnant partner could potentially further impact fetal health"²⁵² Legislators' refusal to incorporate the male's role in fetal health merely continues the stereotypes of parenthood.²⁵³

B. *Prosecuting Women Fails to Deter Drug Use*

Women are being treated as incubators for new life while their fundamental interests in liberty and freedom of autonomy are

244. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

245. See, e.g., Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 447 (2010).

246. Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991).

247. *Id.* at 198.

248. Collier, *supra* note 245, at 447.

249. Gill Homan, *Effects of Caffeine, Alcohol, and Smoking on Fertility*, FERTILITY SOC'Y OF AUSTL. (Oct. 2015), [https://www.yourfertility.org.au/sites/default/files/201808/FSA%20Effects%20of%20caffeine,%20alcohol%20and%20smoking%20on%20fertility%20\(2016\).pdf](https://www.yourfertility.org.au/sites/default/files/201808/FSA%20Effects%20of%20caffeine,%20alcohol%20and%20smoking%20on%20fertility%20(2016).pdf).

250. *Id.*

251. *Id.*

252. Ehrlich, *supra* note 46, at 390.

253. Law, *supra* note 243, at 997 ("When the [c]ourt upholds a statutory scheme because it considers fatherhood solely in terms of 'opportunity,' and motherhood in terms of 'unshakable responsibility,' it reinforces stereotypes and perpetuates male irresponsibility.").

constrained.²⁵⁴ Five states have enacted laws that authorize the civil commitment and detainment of pregnant women for their use of drugs and alcohol.²⁵⁵ These laws have been criticized as permitting an unconstitutional deprivation of liberty.²⁵⁶ Specifically, Wisconsin's statute²⁵⁷ was struck down as violative of the Due Process Clause because it "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement."²⁵⁸ Paltrow commented that the continued enforcement of civil commitment law:

takes away from a pregnant woman virtually every right associated with constitutional personhood—from the most basic right to physical liberty to the right to refuse bad medical advice . . . [t]his kind of dangerous, authoritarian state-action, is exactly what happens when laws give police officers and other state actors the authority to treat fertilized eggs, embryos, and fetuses as if they are already completely separate from the pregnant woman.²⁵⁹

The American College of Obstetrics and Gynecologists argues that "punitive policies are potentially counterproductive because they are likely to discourage prenatal care and successful treatment while undermining the patient-physician relationship."²⁶⁰ Instead, legislators, judges, and prosecutors are choosing to criminalize pregnancy and push opioid-using women away from prenatal care.²⁶¹

Courts acknowledge that prosecuting pregnant women potentially incentivizes abortion because the law better protects a drug addicted woman who chooses to terminate her fetus than a woman who gives birth to a child after abusing substances during her pregnancy.²⁶² This does not deter women from stopping consumption of

254. Goodwin, *supra* note 38, at 814.

255. MINN. STAT. § 253B.02(2); N.D. CENT. CODE § 12.1-04.1-22; OKLA. STAT. tit. 63, § 1-546.5; S.D. CODIFIED LAWS § 34-20A-63; WIS. STAT. § 48.193.

256. Amnesty Int'l, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA 21–22* (2017), <https://www.amnesty.org/download/Documents?AMR5162032017ENGLISH.pdf>.

257. WIS. STAT. § 48.193.

258. *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 906 (W.D. Wis. 2017).

259. Press Release, Nat'l Advoc. for Pregnant Women, *First Federal Challenge to Pregnant Woman's Arrest under "Personhood"-Like Measure Filed in Wisconsin* (Oct. 2, 2013), <https://www.nationaladvocatesforpregnantwomen.org/first-fed-challenge-to-pregnant-womans-arrest-under-personhood-like-measure/>.

260. *See generally* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, NO. 664, *REFUSAL OF MEDICALLY RECOMMENDED TREATMENT DURING PREGNANCY* (June 2016).

261. Ehrlich, *supra* note 46, at 392.

262. *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991).

opioids; rather, these prosecutions deter pregnant women from seeking prenatal care and drug counseling.²⁶³

C. *Women and Fetal Rights*

Fetal rights have been recognized by Congress under the Unborn Victims of Violence Act (UVVA).²⁶⁴ The UVVA makes conduct causing the death or injury of a fetus a separate offense, punishable by the same sentence, such as in cases of murder or assault.²⁶⁵ The UVVA applies where the individual killed was a pregnant woman, regardless of the actor's intent and whether or not the actor knew the woman was pregnant, effectively making the Act strict liability.²⁶⁶ However, the UVVA does not apply to prosecutions of pregnant women for giving birth to a child while addicted to opioids.²⁶⁷ In fact, the language of the UVVA specifically exempts any act a woman undertakes regarding her fetus.²⁶⁸

There is limited information regarding what impact, if any, pregnant opioid use or NAS has on long-term brain development.²⁶⁹ Some studies suggest that elementary school children who were exposed to opioids *in utero* may exhibit “motor and cognitive impairments,” including higher instances of Attention-Deficit/Hyperactivity Disorder.²⁷⁰ However, the little amount of research that does exist was completed prior to the widespread use of highly potent synthetics, such as fentanyl.²⁷¹

Although the long-term effects are unknown, it is undisputed that the majority of newborns exposed to opioids *in utero* will experience withdrawal.²⁷² Treating a fetus suffering from withdrawal—not considering the other physical ailments—increases the costs of the health system.²⁷³ An analysis done by the Pennsylvania Health Care Cost Containment Council found that the hospital care for all

263. Lia A. Mandaglio, *The Punitive Pregnancy Matrix: Thinking Critically About the Patriarchal Motivations Behind Child Abuse Prosecutions for Prenatal Drug Use Among American Mothers*, 19 DIG. 27, 34 (2011).

264. Unborn Victims of Violence Act (Laci and Conner's Law), 18 U.S.C. § 1841.

265. *Id.* § 1841(a)(1)–(2)(B).

266. *Id.*

267. Ehrlich, *supra* note 46, at 396.

268. 18 U.S.C. § 1841(c).

269. Smith, *supra* note 94.

270. Emily J. Ross et al., *Developmental Consequences of Fetal Exposure to Drugs: What We Know and What We Still Must Learn*, 40 NEUROPSYCHOPHARMACOLOGY REVS. 61, 68 (2015).

271. Smith, *supra* note 94.

272. O'Connor, *supra* note 90, at 109.

273. Noah Addis, *Pregnant on Opiates: When Following Doctors' Orders Breaks the Law*, NBC NEWS (May 9, 2014, 4:42 AM), <https://www.nbcnews.com/news/us-news/pregnant-t-opiates-when-following-doctors-orders-breaks-law-n100781>.

babies born with substance abuse issues added 27,385 hospital days in Pennsylvania alone.²⁷⁴ This cost Medicaid an additional \$20.3 million dollars.²⁷⁵ These numbers may sound astronomical, but the average length of a hospital stay for a baby with NAS is thirty days.²⁷⁶ Once these babies do go home, they are at a higher risk of neglect or abuse under the care of mothers still battling addiction.²⁷⁷

Current therapies, such as opioid agonist therapy,²⁷⁸ may increase the number of NAS cases.²⁷⁹ Currently, there is no way to know whether the infants exposed to NAS *in utero* were exposed to opioid agonist therapy or to illicit opioids.²⁸⁰ What was discovered, however, is that women with opioid use disorder undergoing opioid agonist therapy showed improved outcomes for the mother and child.²⁸¹

D. *Women Should Not Be Prosecuted for Addiction*

In 1962, the United States Supreme Court held that drug addiction is an illness that cannot be criminally punished.²⁸² Opioid addiction rewires the brain.²⁸³ The first stage, known as intoxication, involves opioids producing a reward sensation in the brain.²⁸⁴ The second stage, known as negative affect, causes the brain to need more of the opioid to experience the reward sensation, and withdrawal begins when the drug is not obtained.²⁸⁵ Finally, the brain enters preoccupation-relapse, which involves chronic relapse, often

274. Marie McCullough & Don Sapatkin, *Report: More Pa. Babies Are Born Addicted to Opioids*, PHILA. INQUIRER (Sept. 27, 2016, 4:00 AM), <https://www.inquirer.com/philly/health/addiction/Report-More-Pa-babies-are-born-addicted-to-opioids.html>.

275. *Id.*

276. *Id.*

277. Marie McCullough & Dylan Purcell, *Babies Addicted to Opioids: A Crisis Crying for a Count*, PHILA. INQUIRER (Feb. 23, 2018, 5:00 AM), <https://www.inquirer.com/philly/health/addiction/opioid-addiction-crisis-babies-mothers-data-20180223.html>.

278. Jonathan Giftos & Lello Tesema, *When Less Is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 JUDGES' J. 28 (2018) ("Buprenorphine and methadone . . . mimic short-acting opioids such as heroin or oxycodone by binding to the same receptors in the brain . . . [I]t prevents onset of withdrawal symptoms and . . . block[s] the euphoric response to additional opioids the patient may take, thereby reducing the incentive to use.").

279. Davida M. Schiff & Stephen W. Patrick, *Treatment of Opioid Use Disorder During Pregnancy and Cases of Neonatal Abstinence Syndrome*, 171 [J]AMA PEDIATRICS 707, 707 (2017).

280. *Id.*

281. *Id.*

282. *Robinson v. California*, 370 U.S. 660, 667 (1962).

283. Gary Peltz & Thomas C. Südhof, *The Neurobiology of Opioid Addiction and the Potential for Prevention Strategies*, 319 [J]AMA 20, 2071 (2018).

284. *Id.*

285. *Id.*

triggered by external cues.²⁸⁶ Although these brain modifications occur in other addictions, such as alcoholism, the “women targeted for prosecution based on addiction do not engage in any act other than giving birth.”²⁸⁷

The National Institute on Drug Abuse suggests that treatment success should be holistic and include a combination of approaches that address the entire patient, such as her “age, race, culture, sexual orientation, gender, pregnancy, housing and employment, as well as physical and sexual abuse.”²⁸⁸ In July of 2016, Congress passed the Comprehensive Addiction and Recovery Act (CARA), a bipartisan effort to help curb the opioid crisis.²⁸⁹ CARA outlines a number of harm reduction efforts, including a stipulation that treatment for pregnant women should be prioritized.²⁹⁰ This legislation is certainly a step in the right direction for women to obtain treatment, but this may still result in them losing custody of their children.²⁹¹

Furthermore, the United States Supreme Court has consistently drawn a distinction between a state requiring a benefit for pregnant women and a state imposing a burden on pregnant women.²⁹² The passage of the Pregnancy Discrimination Act showed Congress’ intent that pregnant women are a protected class under the Civil Rights Act of 1964.²⁹³ The Court has also held that prosecuting pregnancy and drug addiction, both of which are independently protected statuses, violates the Equal Protection Clause.²⁹⁴ Although there is no constitutionally recognized right to use illicit drugs,²⁹⁵ one does have a constitutionally protected right not to be punished simply for being addicted.²⁹⁶

286. *Id.*

287. Ehrlich, *supra* note 46, at 413.

288. NAT’L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 13 (1999).

289. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695.

290. *Id.* § 501, 130 Stat. at 701–02.

291. See Stephanie Tabashneck, *Family Drug Courts: Combating the Opioid Epidemic*, 52 FAM. L.Q. 183, 195–96 (2018) (arguing that Adoption and Safe Families Act “time limits are considerably shorter than the period of time most individuals take to enter stable recovery. Thus, even for parents receiving effective, evidence-based treatment, the goal of operating within the timeframe is often unreachable.”).

292. Ehrlich, *supra* note 46, at 399–400.

293. 42 U.S.C. § 2000e(k).

294. Ehrlich, *supra* note 46, at 412.

295. *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

296. *Robinson v. California*, 370 U.S. 660, 667 (1962).

CONCLUSION

Although the opioid epidemic is sending shock waves through society, the answer to this crisis does not lie in prosecuting women for the prenatal use of illicit substances. This punishment tactic does not deter women from taking opioids; rather, it encourages pregnant women to not seek prenatal care. Due to the possibility of facing criminal punishment, women may even feel pressured to terminate their pregnancy. States have created a gender-based crime, arguably violating Equal Protection, when states should instead be seeking new treatment methods for all that have fallen victim to the disease of addiction.

State legislatures and courts need to work together to better protect children born with NAS, without punishing an expectant woman's prenatal conduct. States could potentially hold expectant fathers' criminally responsible for their role in fetal health; however, courts would still be penalizing individuals for their addiction. Thus, instead of prosecuting women for their role in fetal health, courts and legislators should seek to better help women by providing rehabilitation and counseling.

A Tale of Two Bills: A Four-Factor Consideration of Pennsylvania’s Legislative Response to Judicial Legitimacy Concerns

*Emily Peffer**

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I. INTRODUCTION

“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹

This article examines Pennsylvania’s present judicial selection method and two proposed amendments to Pennsylvania’s Constitution that would change the method of selecting the state’s appellate judiciary.² These two changes to appellate judicial selection and their impact on judicial legitimacy are explored against the backdrop of existing scholarly work and a recent controversial decision from the Supreme Court of Pennsylvania. The issues that arise surrounding judicial selection methods are not new to legal scholarship.³ In fact, the best method of judicial selection has been discussed since the first, independent, state court systems were established in the United States.⁴ Pennsylvania’s position in this ongoing conversation is unique due to the length of time that Pennsylvania’s appellate judiciary has existed and the various selection methods that have been adopted and disavowed.⁵

Even where the selection process is not specifically at issue, legitimacy issues can arise regarding perceived un-judicial behavior, and those perceptions can trigger renewed discussions about changing a state’s method of judicial selection.⁶ In Pennsylvania, the current renewal of such discussion is especially noticeable because the public’s perception has been impacted by a recent, controversial Pennsylvania Supreme Court decision.⁷

1. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS’N 2010).

2. See H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (House Bill 111); H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (House Bill 196).

3. See, e.g., Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 74–75 (2007); J. Christopher Heagarty, *Selection of State Appellate Judges: Judicial Campaigns and Voters’ Experience: Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287, 1288 (2003); Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829, 832–33 (2016); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 38 (1995).

4. See Heagarty, *supra* note 3, at 1288.

5. Sandra Schultz Newman & Daniel Mark Isaacs, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1, 6–7 (2004).

6. See, e.g., *Republican Party v. White*, 536 U.S. 765 (2002) (triggering renewed discussion regarding political speech of judges); *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018) (concerning unconstitutional gerrymandering and reinvigorating conversations about judges’ political motivation).

7. See *League of Women Voters*, 175 A.3d 282; Mike Folmer, *Judicial Activism by Pa. Supreme Court on New Congressional Maps*, YORK DAILY REC. (Feb. 26, 2018, 11:26 AM),

Although many judges and Justices have “strong political connections,” there is generally an expectation that the judiciary be independent and fair.⁸ These qualities create a reputation of legitimacy and are not typically expected of the more political branches of our government.⁹ Where a judicial decision contradicts the public perception of legitimacy, there is a response.¹⁰ This response can come in the form of public outcry in the media, as well as through legislative action.¹¹

This article will address the public’s recent outcry following a controversial 2018 Pennsylvania Supreme Court decision and Pennsylvania’s legislative response; both of which, unfortunately, appear to indicate a lack of faith in the judiciary.¹² Part II articulates the history of the Unified Judicial System of Pennsylvania. Part II.A then explains the current method of appellate judicial selection: state-wide partisan elections. Parts II.B and II.C next examine two proposed amendments to the state Constitution that are currently dueling to become the new method by which Pennsylvania selects its appellate judiciary. Part III of this article proposes four factors, based on guidance from both judicial opinions and scholarly articles, that, if met, should foster the public’s perception of legitimacy for the bench. Part III continues on to test the impact of the proposed amendments through the lenses of these four factors to determine whether the amendments would generate more or less faith in the judiciary.

<https://www.ydr.com/story/opinion/columnists/2018/02/26/judicial-activism-pa-supreme-court-new-congressional-maps/373036002>; Paul Muschick, *Pennsylvania Gerrymandering Case Shows Need for Merit Selection of Appellate Judges*, THE MORNING CALL (Feb. 21, 2018, 8:00 AM), <https://www.mcall.com/opinion/mc-opi-pa-gerrymandering-supreme-court-merit-selection-muschick-20180220-story.html>.

8. Raymond J. McKoski, *The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives*, 80 U. PITT. L. REV. 245, 298 (2018) (“Judges are experts in politics. Many have a history of political activity before assuming the bench and many have ‘strong political connections.’ . . . The reality is that judges are frequently politically inclined.”).

9. See Neal Devins & Nicole Mansker, *The Judiciary and the Popular Will: Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456 (2010); Johnsen, *supra* note 3, at 831.

10. See, e.g., *Merit Selection System*, PENNSYLVANIANS FOR MOD. CTS., <https://www.pmc.org/merit-selection-reform.html> (last visited Nov. 2, 2019); Mary Beth Schluckebier, *We Should Keep Partisan Politics Out of Pennsylvania’s Judicial Elections*, WHYY (Nov. 7, 2017), <https://whyy.org/articles/keep-partisan-politics-pennsylvanias-judicial-selection/>.

11. See Muschick, *supra* note 7; Schluckebier, *supra* note 10.

12. See *League of Women Voters*, 175 A.3d 282; Folmer, *supra* note 7; Marc Levy, *GOP Eyes Shakeup of Pennsylvania’s Democratic-Majority Court*, ASSOCIATED PRESS NEWS (Jan. 18, 2020), <https://apnews.com/0fc8dbdf1f455e7d457ab6d2c5ce413d>.

II. BACKGROUND

Pennsylvania has experienced variations of both appointed and elected appellate judiciary methods.¹³ Since 1968, Pennsylvania follows a partisan election selection method, with a “yes/no” retention election.¹⁴ However, Pennsylvania’s judiciary has taken several decades to reach its current selection method.¹⁵ About three centuries ago, in 1722, the Supreme Court of Pennsylvania was established by the Judiciary Act.¹⁶ The creation of the Supreme Court, along with the Court of Common Pleas in Philadelphia, Bucks, and Chester Counties, set the stage for the later creation of Pennsylvania’s Unified Judicial System.¹⁷ In 1895, the General Assembly established the Superior Court.¹⁸ The initial purpose of the Superior Court was to ease the workload of the Supreme Court and establish statewide judicial districts.¹⁹ In 1968, nearly 250 years after the initial establishment of the Supreme Court of Pennsylvania, the state Constitution was amended to create the Commonwealth Court and reorganize the state’s lower court system.²⁰ This amendment established Pennsylvania’s Unified Judicial System as we know it today.²¹ Since its establishment, Pennsylvania’s judicial structure—specifically the process by which judges and Justices become a part of that structure—has become the topic of substantial scholarly discussion.²² But, conversations focused on politics in the selection of a state’s appellate judiciary and concerns regarding judicial legitimacy are by no means exclusive to Pennsylvania.²³

Before analyzing Pennsylvania’s current selection method or any proposed changes to this method, one must understand how the various selection methods that may be adopted function in practice.

13. Newman & Isaacs, *supra* note 5, at 6–8; *see also* *Judicial Selection in Pennsylvania*, BALLOTPEdia, https://ballotpedia.org/Judicial_selection_in_Pennsylvania (last visited Nov. 2, 2019).

14. *Judicial Selection in Pennsylvania*, *supra* note 13; Newman & Isaacs, *supra* note 5, at 8–9.

15. *See* *History*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn/history> (last visited Nov. 2, 2019).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *See id.*

22. *See, e.g.*, Newman & Isaacs, *supra* note 5.

23. *See, e.g.*, *Legislative Assaults on State Courts – 2019*, BRENNAN CTR. FOR JUST. (Jan. 24, 2020), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019>; Kevin Townsend, *A Supreme Court Impeachment Fight That’s Already Under Way*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/politics/archive/2018/10/impeachment-west-virginias-supreme-court/574495/>.

There are two general selection methods: appointment and election.²⁴ Each have their own sub-methods for selection.²⁵ Additionally, unless the judge or Justice is serving a life tenure, a method of re-selection must be chosen.²⁶ The pros and cons of both initial selection and re-selection methods have been highly discussed;²⁷ the following is a brief summary of these methods.

First, an appellate judicial election may be partisan or non-partisan.²⁸ Pennsylvania currently follows a partisan election process.²⁹ In a partisan election system, judicial candidates run under a party label;³⁰ in a non-partisan selection system, candidates place their names on a ballot without any party label.³¹ In both of these systems, as is the case with most election processes, campaign finance can become an issue.³² In Pennsylvania specifically, concern and even litigation have stemmed from the appearance of impropriety; notably where, after a judge is elected, an entity, who previously contributed financially to a judicial campaign, becomes involved in a case before that judge.³³ The appearance of impropriety that may arise from campaign contributions also exists where an elected judge or Justice has previously held a position of authority, such as District Attorney, which later impacts their ability to decide the case before them.³⁴ Issues may also arise where the public perceives that elected judges and Justices make judicial decisions to satisfy the public that elected them or those who contributed to the judge or Justices' campaign.³⁵

24. *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Feb. 10, 2020).

25. *Id.*

26. *Id.*

27. Devins & Mansker, *supra* note 9, at 462. *See generally* Johnsen, *supra* note 3.

28. *Judicial Selection in the States*, *supra* note 24.

29. PA. CONST. art. V, § 13(a) (amended 1979).

30. Devins & Mansker, *supra* note 9, at 462.

31. *Id.*

32. *Id.* at 467–68; *see also* Ann A. Scott Timmer, *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts*, 82 L. & CONTEMP. PROB. 27, 44 (2019).

33. *See* Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 254 (3d Cir. 2013); *see also* Devins & Mansker, *supra* note 9, at 495 (alterations in original) (quoting Justice Kennedy's explanation that "[w]e weren't talking about [money in judicial elections] [thirty] years ago because we didn't have money in [judicial] elections. Money in elections presents us with a tremendous challenge"); *Merit Selection System*, *supra* note 10 (importantly, the homepage of this site sports the slogan "Merit not Money").

34. *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (addressing the appearance of impropriety requiring recusal where a state supreme court Justice was, in a previous capacity, involved in administering death penalty orders that were later on appeal before that Justice).

35. *See* Johnsen, *supra* note 3, at 837 (explaining that a judge or Justice can be tarnished by even the perception that they "may be influenced by campaign donors who helped put them on the bench"); *see also* Timmer, *supra* note 32, at 44.

Under the umbrella of appointment, there are essentially two methods by which a state's appellate judge or Justice is appointed.³⁶ A judge may be appointed by a gubernatorial (legislative) appointment process or under a merit plan.³⁷ Under a gubernatorial appointment system, "the governor or legislature selects the [judge or] justice"³⁸ Under a merit-based system, a judge or Justice is appointed based on consideration and recommendation by a board or committee.³⁹ Because of this process, enlisting an independent committee or commission to select judicial candidates, some believe merit selection systems provide a shield from financial or political influence.⁴⁰ Once selected, the judge generally faces a retention election in which there are no other candidates; rather, voters are asked whether they wish to retain that judge.⁴¹ Appointment systems, however, raise their own issues regarding potential pressure placed on a judge to remain loyal to the appointing entity rather than to the people, the law, or their independent beliefs when making influential decisions.⁴²

Additionally, although this article will not specifically analyze the impact of re-selection method, re-selection has been explored as a potential solution to calm public discontent with the judiciary.⁴³ When it comes to re-selection, there may be a partisan election, non-partisan election, retention election, appointment, or term of service for life or until mandatory retirement age⁴⁴—though the latter is only used by a notable minority of states.⁴⁵ The methods employed for retention or selection of the judiciary vary vastly from state to state and even between different levels of courts within one

36. *Judicial Selection in the States*, *supra* note 24.

37. *Id.*

38. Devins & Mansker, *supra* note 9, at 462.

39. *Id.*

40. Johnsen, *supra* note 3, at 837.

41. *Id.*

42. See Johnsen, *supra* note 3, at 840 (articulating potential disadvantages to diverse groups and concern "that merit selection tends to reinforce elitist, majoritarian, and establishment decision-making"); Timmer, *supra* note 32, at 29 (explaining the shifts in public perception including the theory that an elected judiciary "derive[] their authority from the people would be more independent-minded than hand-picked friends of governors or jurists subject to the beck and call of the legislature"); *Id.* at 45 (drawing attention to the behind the scenes politics involved in appointment process and including a state Justice's own observation that "[t]here are more politics in the appointment process"); Schluckebier, *supra* note 10, (noting that merit selection would not eliminate politics but it would move them out of the public's direct attention).

43. See generally Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61 (2017) (discussing the impact of retention method on judicial behavior and the potential repercussions on public perception of the legitimacy of the judiciary).

44. *Id.* at 72–73.

45. *Id.* at 73.

state. However, each method of selection or retention shares the same goal: to produce legitimacy on the bench and faith in the judiciary. In this way, each method addresses certain goals for the judiciary that are important not only in Pennsylvania, but also nationally.⁴⁶

A. *Pennsylvania's Current Judicial Selection Method for State-Wide Appellate Courts: Traditional Partisan Elections*

Orientation to Pennsylvania's current selection method for its appellate judiciary and the state's political climate are vital prior to any discussion of the proposed changes that the majority of this article will explore.⁴⁷ It would be naïve to think that a conversation about a change to judicial selection started without some unease stemming from a lack of faith in judicial independence.⁴⁸ There are a number of manifestations of such unease, both in Pennsylvania and across the United States; in Pennsylvania, a 2018 Pennsylvania Supreme Court decision, *League of Women Voters of Pennsylvania v. Commonwealth*, appears to have rejuvenated discussions regarding judicial reform for Pennsylvania's appellate courts.⁴⁹ *League of Women Voters of Pennsylvania* concerned the constitutionality of Pennsylvania's congressional districts drawn following the 2011 census.⁵⁰ In this case, the Supreme Court of Pennsylvania determined that the challenged map was unconstitutionally gerrymandered, seven years after it was drawn.⁵¹ Following its decision in *League of Women Voters of Pennsylvania*, the Supreme Court of Pennsylvania has come under scrutiny by the public, the state legislature, and lobbyists claiming that the decision was politically motivated.⁵² Additionally, there has been renewed concern, from both

46. Colquitt, *supra* note 3, at 74 (“[Judicial selection systems] should possess (at least) three principle features: it should adhere to democratic ideals; it should maintain as much independence as reasonably possible; and it should enjoy public acceptance and support.”).

47. See generally Schluckebier, *supra* note 10; Mark Scolforo, *House Panel Advances Changes in Pennsylvania Judge Elections*, ASSOCIATED PRESS NEWS (Apr. 30, 2019), <https://apnews.com/6eb05e080fc6417692ed59e2fe952794> (illustrating rivaling partisan support for House Bill 111 and House Bill 196).

48. Lindquist, *supra* note 43, at 63.

49. See *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018).

50. *Id.* at 284.

51. *Id.*

52. See Folmer, *supra* note 7; Levy, *supra* note 12; Muschick, *supra* note 7. Some groups even called for the impeachment of some Pennsylvania Justices, though, to no avail. See Sam Levine, *Pennsylvania Supreme Court Chief Scolds His Own Party for Trying to Impeach Justices*, HUFFPOST (Mar. 22, 2018, 4:31 PM), https://www.huffpost.com/entry/pennsylvania-supreme-court-impeachment_n_5ab3ff9ee4b054d118e0e964. However, many Justices of West Virginia's Supreme Court were not so fortunate when recently confronted with the repercussions of their less than judicial actions. See Townsend, *supra* note 23.

Democrat and Republican lawmakers, regarding the role of the Court in resolving inherently political issues such as election districts.⁵³

To be clear, *League of Women Voters of Pennsylvania* did not initiate conversations in Pennsylvania regarding the ideological and political independence of the judiciary.⁵⁴ In fact, Pennsylvania's General Assembly has previously proposed amendments to the state constitution to alter the method of appellate judicial selection.⁵⁵ Nonetheless, following *League of Women Voters of Pennsylvania*, the Republican majority of Pennsylvania's General Assembly has demonstrated renewed motivation in advocacy to reassess Pennsylvania's appellate judicial selection process.⁵⁶ Proposed changes to the selection method may make it easier to select, not a more politically independent, but rather a more "diverse" appellate bench.⁵⁷ In addition to perceived issues of political independence, organizations and scholars have called for changes to Pennsylvania's appellate selection method due to the highly impactful role of campaign finance in state judicial elections.⁵⁸

Pennsylvania currently uses a partisan election process to select its appellate judiciary, and all levels of the judiciary.⁵⁹ Under this process, the judicial candidates run in a primary election under a party label, typically Republican or Democrat.⁶⁰ The public vote in partisan primaries and the candidate from each party with the highest votes wins the nomination and represents that party in the

53. See Folmer, *supra* note 7 (opinion piece by Republican Senator Mike Folmer of Lebanon, Pennsylvania discussing the *League of Women Voters*' case and related concerns regarding the appellate bench); Muschick, *supra* note 7 (detailing the bipartisan support of House Bill 111 in an effort to secure a "fair, impartial and qualified judiciary").

54. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016) (evaluating issue of state supreme court Justice's failure to recuse); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 254 (3d Cir. 2013) (discussing partiality of decisionmaker in arbitration context); H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

55. Pa. H.R. 111.

56. According to some, the motivation behind the General Assembly's renewed efforts to alter Pennsylvania's appellate judicial selection method is the "loss" that the Republican majority suffered in the Pennsylvania Supreme Court's decision in *League of Women Voters*. See John Baer, *The Legislature Is Again Courting Changes for Pa. Courts*, PHILA. INQUIRER (May 14, 2019, 4:19 PM), <https://www.inquirer.com/opinion/john-baer-courts-reform-diamond-legislature-20190514.html>; see also Levy, *supra* note 12; Scolforo, *supra* note 47.

57. Baer, *supra* note 56 (explaining that at least one major articulated motivator for House Bill 196 is to create a more "diverse" bench).

58. See, e.g., Devins & Mansker, *supra* note 9, at 495 n.33 (alterations in original) (quoting Justice Kennedy's explanation that "[w]e weren't talking about [money in judicial elections] [thirty] years ago because we didn't have money in [judicial] elections. Money in elections presents us with a tremendous challenge . . ."); Lindquist, *supra* note 43, at 66; *Merit Selection System*, *supra* note 10.

59. *Judicial Selection in Pennsylvania*, *supra* note 13.

60. *Partisan Election of Judges*, BALLOTPEdia, https://ballotpedia.org/Partisan_election_of_judges (last visited Nov. 2, 2019).

general election.⁶¹ The public then votes in the general election for their desired judge or Justice.⁶² The judicial candidate with the highest number of votes wins and serves a ten year term.⁶³

After ten years, Pennsylvania's appellate judges and Justices must survive a "yes/no" retention election.⁶⁴ By this process, the public votes either "yes" or "no" for a judge or Justice to serve another ten year term in their respective position.⁶⁵ As occurs with most election campaign processes, there is a large, arguably problematic, amount of spending in Pennsylvania's judicial elections.⁶⁶ However, campaign spending and political speech of judicial candidates are limited and regulated by judicial rules of conduct and court decisions.⁶⁷

Concerns about judicial advocacy, specifically following *League of Women Voters of Pennsylvania*, have manifested in the form of two proposed amendments to the Pennsylvania Constitution: House Bill 111 and House Bill 196.⁶⁸ These proposed amendments would, respectively, create a merit-based appointment system and substantially revise the process of partisan-judicial elections for the appellate judiciary.⁶⁹ Because it is the "task [of] a good judicial selection system . . . not simply to fill vacancies, but to select the best candidates for judicial positions,"⁷⁰ the question is whether these competing bills would actually be a step toward producing the "best" judiciary or whether they are pure political posturing.

61. *Id.*

62. *Id.*

63. *Judicial Selection in Pennsylvania*, *supra* note 13.

64. *Id.*

65. *Id.* Although, the impact of judicial retention methods exceeds the scope of this article, there are emerging studies that the retention method may have a significant impact on the decisions and behavior of the bench. See Lindquist, *supra* note 43, at 108.

66. Lindquist, *supra* note 43, at 64; Baer, *supra* note 56; Schluckebier, *supra* note 10.

67. Lindquist, *supra* note 43, at 64; see *Republican Party v. White*, 536 U.S. 765 (2002); see also MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2010) (the judiciary should avoid actual or the appearance of impropriety).

68. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

69. Pa. H.R. 111; Pa. H.R. 196. The process to amend Pennsylvania's Constitution requires that the resolution pass both houses, in two consecutive sessions. Benjamin Pontz, *Two for the Price of One: Pair of Proposed Amendments to State Constitution Head to Pa. House*, WITF (June 29, 2020, 5:00 AM), <https://papost.org/2020/06/29/two-for-the-price-of-one-pair-of-proposed-amendments-to-state-constitution-head-to-pa-house/>. The amendment must next be publicly advertised in newspapers in every county. *Id.* Ultimately, to be adopted, it must succeed in a public vote to adopt that amendment. *Id.*

70. Colquitt, *supra* note 3, at 74.

B. Proposed Changes to Appellate Judicial Selection in House Bill 111: Merit-Based Appointment

During the 2019–2020 Session, the Pennsylvania House of Representatives considered House Bill 111 for a second time.⁷¹ This legislation would require an amendment to the state Constitution, specifically to certain Sections in Article V of Pennsylvania’s Constitution, and would establish a merit-based appointment system for selecting the appellate judiciary.⁷² Notably, it does not appear that House Bill 111 proposed any changes to the retention-election system currently practiced for Pennsylvania’s state-wide appellate courts.⁷³ Although numerous changes would be made if this Bill were to result in an amendment to Pennsylvania’s constitution, the three most significant are: (1) the division of the state into three regional districts;⁷⁴ (2) the creation of the Appellate Court Nominating Commission;⁷⁵ and (3) the modification of the procedure for filling vacancies on the appellate bench.⁷⁶

1. Redistricting: Amended Section 11

First, House Bill 111 would amend Article V Section 11. This amended section would authorize the General Assembly to establish, by law, three districts from which the appellate judiciary would then be selected.⁷⁷ Amended Section 11, would begin with a provision articulating that each judge and Justice of the appellate judiciary “shall provide every resident of this Commonwealth with approximately equal representation on a court.”⁷⁸ It further authorizes the General Assembly to establish an Eastern, Middle, and Western judicial district from which the appellate judiciary shall be

71. The General Assembly previously considered a version of House Bill 111 during the 2017–2018 Regular session that would have made similar changes to appellate judicial selection by amending the state constitution. H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017). As of the submission of this article for publication, House Bill 111 failed to receive the necessary support in the House of Representatives during the 2019–2020 Regular Session and has died in chambers. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); *Pennsylvania House Bill 111*, LEGISCAN, <https://legiscan.com/PA/bill/HB111/2019> (last visited Jan. 2, 2021). By contrast, and as will be discussed further, House Bill 196 has received the necessary support during the 2019–2020 Regular Session to be considered again in the upcoming session.

72. *Id.*

73. PA. CONST. art. V, § 15(b) (amended 2016).

74. Pa. H.R. 111, § 11(b)(1).

75. Pa. H.R. 111, § 14.

76. Pa. H.R. 111, § 13(b.1).

77. Pa. H.R. 111, § 11(b)(1).

78. Pa. H.R. 111, § 11(a).

selected.⁷⁹ Section 11(b)(1) consists of three subsections which establish the number of judges and Justices from each state-wide appellate court, the Supreme, Superior, and Commonwealth, to be selected from these three judicial districts.⁸⁰ Subsection I establishes the state-wide distribution of the Pennsylvania's seven Supreme Court Justices.⁸¹ This subsection provides that two Justices will be selected from each district; the seventh Justice will then be "selected on a Statewide basis" and may be "a resident of any of the judicial districts."⁸² Subsection II describes the distribution of the fifteen Superior Court judges.⁸³ It requires that five judges be selected from each of the three proposed judicial districts.⁸⁴ Subsection III explains that the three of the nine Commonwealth Court judges will be selected from each judicial district.⁸⁵

The general provision applicable to the drawing of judicial districts—that the "number and boundaries of judicial districts shall be changed by the General Assembly only *with the advice and consent of the Supreme Court*"—does not apply to amended Section 11.⁸⁶ Instead, amended Section 11 states that "[t]he number of Judges and Justices . . . from each judicial district shall provide every resident of this Commonwealth with approximately equal representation on a court. Each judicial district shall be composed of compact and contiguous territory as nearly equal in population as practicable."⁸⁷ These requirements look nearly identical to the General Assembly's requirements for drawing Congressional districts.⁸⁸ Section 11(c), further empowers the General Assembly to establish the qualifications for appointment to the appellate judiciary.⁸⁹ Amended Section 11 deviates from the current, statewide, election process for the appellate judiciary by vesting in the General Assembly the power to create districts from which the appellate judiciary is to be selected.

79. Pa. H.R. 111, § 11(b)(1).

80. See Pa. H.R. 111, § 11(b)(1)(i)–(iii).

81. Pa. H.R. 111, § 11(b)(1)(i).

82. *Id.*

83. Pa. H.R. 111, § 11(b)(1)(ii).

84. *Id.*

85. Pa. H.R. 111, § 11(b)(1)(iii).

86. Compare PA. CONST. art. V, § 11 (1968) (emphasis added), with Pa. H.R. 111, § 11(a).

87. Pa. H.R. 111, § 11(a).

88. PA. CONST. art. II, § 16 (amended 1968) (requiring that legislative districts "shall be composed of compact and contiguous territory as nearly equal in population as practicable").

89. Pa. H.R. 111, § 11(c).

2. *Establishing the Committee: Amended Section 14*

Amended Section 14 establishes the Appellate Court Nominating Commission (ACNC).⁹⁰ The ACNC, is to be “an independent board within the Executive Department” consisting of thirteen members.⁹¹ The thirteen members of the ACNC are appointed by the Governor (five appointees), the Senate majority leader (two appointees), the Senate minority leader (two appointees), the House of Representatives majority leader (two appointees), and the House of Representatives minority leader (two appointees).⁹² The first ACNC members will serve staggered terms; however, following this first appointment, the ACNC members will serve four year terms.⁹³ The members must be at least eighteen years old, be a resident of Pennsylvania for at least one year prior to their appointment, and maintain residency for the duration of their term.⁹⁴ Members of the ACNC may not hold political office, hold an elected or appointed position, or be an employee of the state during their term.⁹⁵ Members are not to be compensated for their service, but they may receive reimbursement for expenses incurred in the course of their official duties.⁹⁶

Amended Section 14 also establishes the procedure by which the ACNC will generate its list of judicial nominees.⁹⁷ The ACNC is to solicit applications and publicly announce that it is receiving applications from those interested in being considered.⁹⁸ The General Assembly is responsible for establishing a timeline for solicitation of applications and the procedure by which the ACNC is to evaluate potential nominees.⁹⁹ The ACNC then selects five of the most qualified applicants to be submitted to the Governor for consideration.¹⁰⁰ When making this selection, the ACNC “*may consider* that the appellate courts reflect the racial, ethnic, gender and other diversity” of Pennsylvania.¹⁰¹ The nominees submitted to the Governor by the ACNC must meet the following criteria: be a Pennsylvania resident for at least one year prior to submission of application, meet the

90. Pa. H.R. 111, § 14.

91. Pa. H.R. 111, § 14(d)–(d)(1).

92. Pa. H.R. 111, § 14(d)(1)(i)–(v).

93. Pa. H.R. 111, § 14(d)(2).

94. *Id.*

95. Pa. H.R. 111, § 14(d)(3).

96. Pa. H.R. 111, § 14(d)(5).

97. Pa. H.R. 111, § 14(h).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

residency requirements set forth in 11(c), be a licensed member of the Bar of the Supreme Court in good standing, and have “either practiced law or been in a law-related occupation” for at least ten years at the time of selection.¹⁰² In addition to these criteria, the General Assembly may establish additional nomination procedures for the ACNC and additional qualifications required for applicants to be eligible for nomination.¹⁰³ Section 14 is perhaps the most noticeable change to the selection process because it creates the ACNC which would have the responsibility, rather than the people, to select the appellate judiciary.

3. *Filling Vacancies: Amended Section 13*

Amended Section 13 establishes the process by which a vacancy on the Supreme, Superior, or Commonwealth Court shall be filled.¹⁰⁴ This section requires that vacancies be filled by appointment based on a nomination by the Governor to the Senate.¹⁰⁵ The Governor is to make his nomination from the list of five nominees provided to him from the ACNC.¹⁰⁶ This section also establishes a timeline and two-thirds majority requirement by which the Senate may approve the Governor’s nomination. If two-thirds of the Senate fails to act upon a nomination that was properly made by the Governor under this section, then the nominee will “take office as if the appointment had been consented to by the Senate.”¹⁰⁷ Additionally, if the Senate rejects the Governor’s nomination, he has the opportunity to make a substitute nomination, from the ACNC list, two additional times.¹⁰⁸ If the Governor’s nomination is rejected three times, then the ACNC is empowered to appoint any other individual on their list.¹⁰⁹ Under this scenario, the ACNC’s appointee “take[s] office upon notification of the appointment by the commission and neither the Governor nor the Senate” plays any further role in the appointment process for that vacancy.¹¹⁰

102. Pa. H.R. 111, § 14(h)(1)–(4).

103. Pa. H.R. 111, § 14(i).

104. Pa. H.R. 111, § 13(b.1)(1).

105. Pa. H.R. 111, § 13(b.1)(1).

106. *Id.*

107. *Id.*

108. Pa. H.R. 111, § 13(b.1)(2).

109. *Id.*

110. *Id.*

C. *Proposed Changes to Appellate Judicial Selection in House Bill 196: Partisan Election from “Regional Appellate Court Districts”*

House Bill 196 will, like its counterpart House Bill 111, require an amendment to Pennsylvania’s Constitution.¹¹¹ However, this bill does not change the mechanism of judicial selection; the Pennsylvania appellate judiciary would still be elected in partisan elections.¹¹² Instead, House Bill 196 would make two notable changes to the Pennsylvania Constitution—again, largely in Section 11—that would alter the organization of partisan judicial elections.¹¹³ Under House Bill 196, judicial elections would be conducted in thirty-one newly created regional districts, each providing “approximately equal representation,” as drawn by the General Assembly.¹¹⁴

Under House Bill 196, the seven state Supreme Court Justices would “be elected from seven judicial districts which shall be established by law,”¹¹⁵ and the fifteen Superior Court judges would be “elected from judicial districts which shall be established by law,”¹¹⁶ as would the nine Commonwealth Court judges.¹¹⁷ While the drawing of election districts is not technically a new job for the General Assembly, it is new in the context of state appellate judicial districts.¹¹⁸ House Bill 196 would amend Section V of the state Constitution to require that the number of judges and Justices “elected from each judicial district shall provide every resident of the Commonwealth with approximately equal representation on a court.”¹¹⁹

111. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

112. *Id.* As of submission of this article for publication, House Bill 196 has received the necessary support during the 2019–2020 Regular Session to be considered again in the upcoming session by the General Assembly. *Pennsylvania House Bill 196*, LEGISCAN, <https://legiscan.com/PA/bill/HB196/2019> (last visited Jan. 2, 2021).

113. See Pa. H.R. 196.

114. Compare Pa. H.R. 196, § 11(a), with PA. CONST. art. V, § 11 (1968). See also Baer, *supra* note 56 (“[T]he notion that judges are representative is a fairly new development. I always ask why. And usually it’s part of a movement to form a more politically responsive judiciary, . . . part of the new politics of judicial elections.”) (quoting Charles Gehy, an Indiana University Law professor).

115. Pa. H.R. 196, § 2(b).

116. Pa. H.R. 196, § 3. Importantly, the current fifteen judge Superior Court could be reduced or increased under amended Section 3 which states only that there “shall not be less than seven judges . . .” *Id.*

117. Pa. H.R. 196, § 4. There is no promise under House Bill 196 that the Commonwealth Court will continue to consist of nine judges; the only requirement is that this court “consist of the number of judges” and that those “number of judges” be elected from judicial districts established by law. *Id.*

118. See PA. CONST. art. V, §§ 2–4 (1968) (articulating that the appellate courts are to be “statewide”).

119. Pa. H.R. 196, § 11(a).

One judge or Justice would be elected from each district.¹²⁰ Additionally, this proposed amendment imparts on the General Assembly the responsibility of drawing judicial districts that are “composed of compact and contiguous territory as nearly equal in population as practicable” and articulates that “no county, city, incorporated town, borough, township or ward may be divided” unless “absolutely necessary.”¹²¹

Under House Bill 196, the creation of the judicial districts from which the Justices of the Supreme Court and the judges of the Superior and Commonwealth Court would be elected is the duty of the Pennsylvania General Assembly.¹²² This is not the extent of the General Assembly’s powers under House Bill 196’s proposed Section 11(b).¹²³ It would also be up to the General Assembly to: establish a transition into an appellate judiciary elected from judicial districts; determine what effect districts will have on retention and reelection; organize the order of each districts’ election for each court; and “realign[] the appellate judicial districts based on the Federal decennial census”¹²⁴ Notably, subsection (c) of House Bill 196’s proposed Section 11 states: “*Except as provided under subsection (b) . . . , the number and boundaries of all other judicial districts shall be established by the General Assembly by law, with the advice and consent of the Supreme Court.*”¹²⁵

House Bill 111 and House Bill 196 represent rivaling public calls for judicial legitimacy.¹²⁶ One represents the belief that removing judicial selection from the inherently political process of elections and placing it into the hands of a committee, hand selected by an elected Governor, will produce a more independent judiciary.¹²⁷ The other would allegedly produce a more representative bench than already produced by a state-wide election by dividing the state into districts by which individuals in each district would elect only one state Supreme Court Justice, one Superior Court judge, and one Commonwealth Court judge.¹²⁸ Importantly, House Bill 196 would

120. *Id.*

121. *Id.* (closely resembling the Pennsylvania Constitution’s requirements for drawing Congressional districts but excepting the judicial districts drawn under Section 11(b) from receiving the advice and consent of the Pennsylvania Supreme Court).

122. Pa. H.R. 196, § 11(b)(1).

123. *See* Pa. H.R. 196, § 11(b).

124. Pa. H.R. 196, § 11(b)(2)–(5).

125. Pa. H.R. 196, § 11(c) (emphasis added). Significantly, this amendment eliminates the General Assembly’s previously required receipt of advice and consent from the Pennsylvania Supreme Court when creating the new, regional electoral districts.

126. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); Pa. H.R. 196.

127. Pa. H.R. 111.

128. Pa. H.R. 196.

only change the way in which judicial selection would be conducted, it does not change the manner in which these elections would occur.¹²⁹ House Bill 196 would still allow for partisan elections, with which the public is familiar.¹³⁰ Thus, it is unsurprising that House Bill 196 is progressing more quickly and with stronger support from the General Assembly than House Bill 111, in its current or prior formulation, has progressed.¹³¹ The subsequent sections set forth four factors to consider when considering the impact that these proposed methods may have on the legitimacy of Pennsylvania's appellate bench.

III. PROPOSED RULE: FOUR FACTORS TO DETERMINE A "BEST" SELECTION METHOD

The ideal judiciary results from the ideal selection method. This sounds simple—use the best selection method, get the best judges. If only things were so simple.¹³² There are countless articles discussing elected versus appointed judicial selection and the unique judicial selection procedures of each state, which indicate selecting the ideal judiciary is far from a simple task.¹³³ In reality, this article posits that the goal of any selection method should be to maintain the legitimacy of the bench and instill faith in the judicial process. Accordingly, the "best" selection must promote public perception of legitimacy on the bench.¹³⁴ The relationship between the judiciary and the public is a cyclical relationship.¹³⁵ If the public

129. *Id.*

130. *Id.*

131. Compare Pa. H.R. 111 (reforming state-wide, partisan election system to regional, merit-based appointment), with Pa. H.R. 196 (reforming state-wide, partisan election system to regional, partisan elections). An alternative rationale for the progression of House Bill 196 is its partisan support from the Republican legislators that currently hold a majority of seats in the state House of Representatives and Senate. *Pennsylvania General Assembly*, BALLOTPEdia, https://ballotpedia.org/Pennsylvania_General_Assembly (last visited, Jan. 2, 2021).

132. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010) (addressing the difficulties in quantifying a "best" selection method and applying three measures of judicial quality: productivity, citations, and independence to compare appointed and elected methods); Johnsen, *supra* note 3, at 831 ("The qualities of a good judge are easy to name but sometimes difficult to discern and almost always impossible to quantify: intelligence, integrity, fairness, diligence, experience, judgement, perspective, compassion.").

133. See, e.g., Choi et al., *supra* note 132; Johnsen, *supra* note 3, at 846 (analyzing diversity, or lack thereof, of state judiciary based on judicial selection method). See generally Colquitt, *supra* note 3 (addressing the importance of selecting a competent and effective judicial selection commission and the difficulties that accompany a failure to do otherwise).

134. Lindquist, *supra* note 43, at 67–68.

135. *Id.* at 66.

lacks faith in the judiciary, then the judiciary loses its credibility.¹³⁶ And when the judiciary lacks credibility, the law and the public suffer.¹³⁷

Certain general qualifications and qualities are desired in and expected from the appellate judiciary.¹³⁸ Judges are expected to decide cases based on law, not emotions.¹³⁹ The public desires judges who follow the policy goals and purposes of the law as articulated by the legislature, not those who act on impulse.¹⁴⁰ Judges are expected not to be so influenced by a whim or personal passion that they overrule important precedent.¹⁴¹ Judges who strive for consistency and predictability of the law, while realizing that, in certain circumstances, justice and fundamental rights require expedited action that only the court can provide, are desirable.¹⁴² The ideal appellate judiciary is made up of judges with certain characteristics so that these goals may be achieved.¹⁴³ Thus, it is equally important when determining what judicial selection method is “best” that the General Assembly and the public do not act out of passion or a reactive impulse.¹⁴⁴

It is first necessary to determine what the ideal judiciary looks like, then consider which of the various selection methods will have the greatest potential to meet the goal of producing a judiciary that the public finds legitimate and credible. To best analyze what it takes to produce a judiciary in which the public has faith,¹⁴⁵ this article articulates a four-factor test by which judicial selection methods may be analyzed for their potential to produce the public perception of legitimacy. These four categories include: (1)

136. *Id.* at 67.

137. *Id.*; see also Maggie Jo Buchanan & Abbey Meller, *Brett Kavanaugh: A Representation of Damaged U.S. Judiciary*, CTR. FOR AM. PROGRESS (Oct. 1, 2019, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2019/10/01/475181/brett-kavanaugh-representation-damaged-u-s-judiciary/>.

138. Colquitt, *supra* note 3, at 78 (noting that democratic ideals, independence, and public support are vital to any judicial nomination); Newman & Isaacs, *supra* note 5, at 1 (“[T]he effective functioning of the dispute resolution process in our society requires an independent and accountable judiciary.”); Lindquist, *supra* note 43, at 62, 67.

139. See Lindquist, *supra* note 43, at 62, 67.

140. *Id.* at 67.

141. *Id.*

142. *Id.*

143. See Colquitt, *supra* note 3, at 77–78 (positing that the goals of democratic ideals of political independence and public support may be served through judicial nomination); Newman & Isaacs, *supra* note 5, 10–11, 13–14 (considering the weight placed on accountability or independence depending on favored selection method).

144. Scolforo, *supra* note 47 (illustrating the potential political motivation behind House Bill 111 and 196).

145. See generally Devins & Mansker, *supra* note 9 (addressing the importance of public opinion and public support of a judiciary regardless of selection method).

demographic diversity, (2) communicative competency, (3) ideological independence, and (4) education and experience.

A. *Demographic Diversity*

Demographic diversity requires consideration of certain socioeconomic qualities of the judge-to-be, including, but not limited to, their education, residency status, experience in the legal practice, and years admitted to the Pennsylvania bar.¹⁴⁶ Also in this category are certain personal qualities such as race, gender, identity, ethnicity, age, and religion.¹⁴⁷ The qualities listed here are by no means an exhaustive collection of those that make judges diverse. This factor contains certain quantifiable traits by which the public is able to perceive the otherwise often isolated judiciary.¹⁴⁸ The purpose of this factor is to bring into consideration the fact that the general public and legal community seek not only a qualified judiciary, but also one with which they can identify.¹⁴⁹ The public and the legal community want to be able to see a judiciary that looks like them, or at the very least does not all look the same, as well as one that is educated, experienced, and well-versed in the legal atmosphere in which they practice.¹⁵⁰

B. *Communicative Competency*

Communicative competency includes attributes such as an ability to be collegial with those of differing opinions, general communication skills, and willingness to cooperate with others.¹⁵¹ Simply put, it is important for judges and Justices, especially those at the appellate level, to communicate with each other effectively so that

146. Johnsen, *supra* note 3, at 833 (introducing the broad range of objectively diverse attributes that a bench should possess).

147. Although diversity is consistently desired, many legal scholars have found conflicting or inconclusive evidence that a certain selection method will produce diversity on the bench. See, e.g., Lindquist, *supra* note 43, at 77–78, 80.

148. See Harry T. Edwards, *Required Reading; Judicial Isolation*, N.Y. TIMES (July 16, 1984), <https://www.nytimes.com/1984/07/16/us/required-reading-judicial-isolation.html> (describing, from the perspective of a judge on the United States Court of Appeals for the District of Columbia, the isolation that accompanies the judiciary).

149. See generally Devins & Mansker, *supra* note 9.

150. See generally Johnsen, *supra* note 3.

151. See Melissa M. Berry et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 350–53 (2008) (discussing the importance of majority in presenting a cohesive bench); see also Edwards, *supra* note 148.

they produce durable and consistent opinions.¹⁵² In order to create opinions with the highest precedential value, it is best to have as many Justices in the majority as possible.¹⁵³ This requires a great deal of communication and sometimes compromise, but the integrity of the law and trust in the Court require no less.¹⁵⁴ Being a judge can be an isolating career, and the public and legal community benefit from a judiciary that can overcome this while maintaining its duty to uphold the law.¹⁵⁵

C. *Ideological Independence*

Ideological independence is not as easily explained in concrete qualities as the other factors. Rather, ideological independence is largely a quality constructed by the public's desire for impartial, accountable, and protective judges and Justices.¹⁵⁶ Ideological independence is quite possibly the most important factor of this test; however, it is the hardest to identify in a judge prior to selection.¹⁵⁷ Rather, this quality is seen through practice and continued dedication to decide controversies, even those which may upset the public, based on an impartial process that is grounded in and faithful to the law.¹⁵⁸ It is a true test of a judge or Justices' reputation if she can publish a decision on a hotly contested, and possibly divisive, issue and maintain a reputation of impartiality and legitimacy in the eye of the public.

D. *Education and Experience*

The ideal judicial candidate should have a certain degree of experience or accomplishment that may come from their education or

152. See Berry et al., *supra* note 151, at 350–53 (explaining that the goals of certainty and predictability are not supported where a judge or Justice's concurrence is motivated to create a disproportionate influence; instead, a "true majority" is preferable).

153. *Id.* at 300 ("Conflicts created by concurrences and pluralities in court decisions may be the epitome of confusion in law and lower court interpretation.").

154. *Id.* at 350–53; see also Edwards, *supra* note 148.

155. See Edwards, *supra* note 148.

156. See, e.g., Newman & Isaacs, *supra* note 5, at 4 (expressing that no matter the selection method, the goal is to create a judiciary that is independent from political interference, accountable to the public, and concerned with protecting individual's rights).

157. Devins & Mansker, *supra* note 9, at 473 (addressing the conflict that arises between the human desire to be liked and supported with the presumed need of an independent judiciary); Johnsen, *supra* note 3, at 837 ("At the very least, the perception of [a judge] is tarnished when the public believes judges may be influenced by campaign donors who helped put them on the bench.").

158. See generally Devins & Mansker, *supra* note 9.

professional experiences after obtaining their law degree.¹⁵⁹ The degree of experience may vary and may come from a number of paths that the candidate has chosen to pursue. This experience could be from years as a judge at the trial court level or expertise in a particular area or industry of legal practice.¹⁶⁰ It could similarly originate from a unique or notable educational environment or a professional experience that occurred prior to obtaining a law degree.¹⁶¹

IV. APPLICATION: FOUR FACTORS, TWO BILLS, ONE “BEST” METHOD[?]

Each factor in this test is designed to address the goal of legitimacy on the bench and to consider whether the legislative response to alleged politicization of the judiciary may do more harm than good in addressing this goal.¹⁶² In the following two sections, these four factors are applied to the proposed methods of judicial selection to consider whether they may be successful in generating a public perception of judicial legitimacy. The goal in doing so is to identify the strongest and weakest attributes of each proposed selection method and to determine if these proposed amendments fall short of generating legitimacy by serving a particular political agenda.

A. *House Bill 111*

As previously explained, House Bill 111 proposes a state constitutional amendment that would change the selection method from state-wide partisan elections to a merit-based appointment process for the selection of Pennsylvania’s Superior, Commonwealth, and Supreme Courts.¹⁶³ House Bill 111 is a reincarnation of a 2017–2018 Bill proposing the same amendment to change the selection

159. Johnsen, *supra* note 3, at 833–34 (indicating that in addition to diversity and other non-quantifiable qualities, there are “objective credentials such as judicial clerkships and attendance at ranked universities and law schools” that support a desirable and broad collection of perspectives on the bench).

160. *Id.* at 833.

161. An analysis of the rank of the institution from which a candidate obtained her legal education is of minimal importance in order to avoid crafting an elitist bench or a bench that values educational institution over diversity or experience or quality of the judge. *Cf.* Johnsen, *supra* note 3, at 840–42 (indicating concern that appointment “tends to reinforce elitist, majoritarian, and establishment decision-making” by disadvantaging “women, minorities, and those with non-traditional legal backgrounds”).

162. *See* Devins & Mansker, *supra* note 9, at 475–76 (addressing the innate fact that state appellate courts are more exposed to politics than lower courts, especially when selected under a popular election method); *see also* Levy, *supra* note 12 (calling regional judicial districts a “scheme to Gerrymander the courts”).

163. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

method for Pennsylvania's three appellate courts.¹⁶⁴ Although House Bill 111 had previously died for want of support, this renewed, bi-partisan effort to restore public perception of legitimacy in Pennsylvania's appellate courts initially showed potential to bring about a new result.¹⁶⁵ Nonetheless, this resuscitated House Bill 111 similarly died in chambers during the 2019–2020 Regular Session for failure to garner necessary support in the House.¹⁶⁶ House Bill 111 did not progress for further consideration despite the belief, shared by many legal scholars and advocacy groups,¹⁶⁷ that the appointment method is superior to elections insofar as it pertains to producing public feelings of legitimacy in the judiciary.¹⁶⁸ Despite the death of House Bill 111, the following four-factor examination provides insight into the impact that the potential, or future, adoption of a merit-based appointment method may have on the public's perception of legitimacy in Pennsylvania's appellate judiciary.

First, demographic diversity, under the merit-based appointment method, is entirely at the hands of the ACNC.¹⁶⁹ The ACNC has complete discretion, with some small legislative limitations for things like residency and prior employment, to nominate candidates.¹⁷⁰ With this discretion comes great responsibility, and the public and legal community are essentially putting their faith in the hands of a middleman (or woman) to select candidates who are not only diverse in education and experience, but also diverse in terms of race, gender, sexual orientation, physical ability, and religion.¹⁷¹ While it would be nice to assume that the ACNC would always consider demographic diversity when selecting a candidate to nominate, that assumption is not entirely supported by the experience

164. H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017), 2017 Bill Text PA H.B. 111 (LEXIS).

165. See *League of Women Voters v. Commonwealth*, 175 A.3d 282, 294 (Pa. 2018); Folmer, *supra* note 7; Muschick, *supra* note 7.

166. *Pennsylvania House Bill 111*, *supra* note 71.

167. See generally Colquitt, *supra* note 3, at 74 (expressing the ideal nominating commission and support for appointed judiciary); *Merit Selection System*, *supra* note 10 (strongly supporting a merit-based appointment system of judicial selection).

168. Although this article will not explore them further, there are two reasons that come to mind as to why House Bill 111, and other efforts to shift to judicial selection by appointment, have continued to lack momentum in Pennsylvania: (i) a fear of too drastic a change that may result from abandoning judicial selection by election and (ii) lack of support from the Republican majority of Pennsylvania's General Assembly.

169. H.R. 111, 2019 Gen. Assemb., Reg. Sess. § 14(h) (Pa. 2019) (Under H.B. 111, the ACNC “*may consider* that the appellate courts reflect the racial, ethnic, gender and other diversity . . .”) (emphasis added).

170. See *id.*

171. See Johnsen, *supra* note 3, at 833–34.

of other states that have made the switch to nominating committees.¹⁷²

Next, communicative competency may not be facially addressed under merit-based appointment.¹⁷³ However, because the members of the ACNC would be both members of the legal community and public, there is an opportunity to select candidates who have a reputation for collegiality and a willingness to communicate.¹⁷⁴ This factor could be well addressed by the ACNC in interviews and in considering applications for nomination. For purposes of this conversation, it may be assumed that the ACNC would properly place value on these qualities; meaning, at least in theory, that communicative competency would be well accounted for when the ACNC is selecting candidates.

Further, as to ideological independence, it has been proffered that such independence is secured by the diluted politics of an appointment selection system.¹⁷⁵ By contrast, these back-room politics—to create the ACNC, for the Governor to select a specific nominee, and for the Senate to actually approve that nomination—may further separate the public from the judiciary.¹⁷⁶ Although the ACNC could virtually eliminate issues of election finance, it may not be as effective at eliminating political influence as is argued.¹⁷⁷ One can easily imagine a scenario in which a member of the ACNC is selected because of a relationship or reputation of supporting a certain ideological agenda; or, where the Senate refuses to confirm the Governor's selected candidate based on diverging political or personal beliefs. In such circumstances, the political games that exist in an election would still exist, but now, rather than in plain view for public consideration prior to election, the politics would be removed from the public's plain view. It is this "behind-the-scenes" politics which could raise even deeper problems of ideological independence

172. *Id.* at 840–41; *see also* *Judicial Selection in the States*, *supra* note 24 (illustrating that twenty-eight states select state supreme court Justices through some form of appointment).

173. *See* Pa. H.R. 111, § 14(h) (remaining silent about specific communicative skills that nominees must have).

174. *See id.* (indicating through silence that ACNC has discretion to consider communicative competency and other factors when selecting candidates).

175. *See, e.g.*, Colquitt, *supra* note 3, at 90; Schluckebier, *supra* note 10; *Merit Selection System*, *supra* note 10.

176. *See* Johnsen, *supra* note 3, at 841–42 (indicating that politics and elitist concerns still exist despite the less public manifestations where there is an appointment rather than election method); Muschick, *supra* note 7.

177. *See* Muschick, *supra* note 7.

than are presently perceived to exist in Pennsylvania's partisan election process.¹⁷⁸

Nonetheless, moving politics out of the direct public attention could at least have the potential to reduce the perception that a judge is acting as an arm for a certain political agenda, which may lessen the bite of allegations of judicial advocacy. There are a number of states that have adopted merit-based appointment systems with great success.¹⁷⁹ Not to mention the fact that the United States Supreme Court is selected through appointment, albeit a different appointment method.¹⁸⁰ So, even though there is the potential that merit-based appointment would only reduce politically motivated decisions by way of appearance, there is support for the idea that appointed judges are more ideologically independent since they are not as interested in appealing to a Republican or Democrat voter populous.¹⁸¹ Moreover, there is not much support to the idea that, under merit-based appointment, a given judge would fall subject to the whim of a single political figure, such as the governor, because subsequent retention remains in the hands of the public though a "yes/no" election.¹⁸²

Finally, as to education and experience, the application process for candidates will allow the ACNC to filter out or more carefully consider those applicants whose past experiences could spark concern as to independence, such as prior political or governmental positions.¹⁸³ The fact that the ACNC acts as a middleman (or woman) is extremely helpful when it comes to considering a candidate's education and experience. It is particularly helpful in eliminating the ethical issues that stem from a reputational mudslinging campaign or those that may arise if any troublesome relationships arise after election.¹⁸⁴

178. See, e.g., Colquitt, *supra* note 3, at 109 ("Making [judicial] selection invisible . . . muffles conflict, avoids widespread competition, and strengthens the hands of political elites."); McKoski, *supra* note 8, at 289–90 (explaining that judicial transparency is preferred over a potentially problematic "ignorance is bliss" theory of judicial ethics which provides those with semi-private access to judges an advantage of those less with less judicial connections); Timmer, *supra* note 32, at 45 (articulating that "[a]lmost all the political weight is behind the scenes in the appointment selection process").

179. *Judicial Selection in the States*, *supra* note 24 (as of the submission of this article twenty-eight states select state supreme court Justices through either merit plan or gubernatorial appointment).

180. BARRY J. McMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE (2020).

181. Johnsen, *supra* note 3, at 837 (articulating the perspective that elected judges may feel obliged to appease or be improperly influenced by their campaign donors).

182. *Id.* at 838 (explaining that the governor's role in the appointment process is mitigated by the vetting process of independent nominating commission).

183. *Id.* at 839.

184. *Id.* at 837.

Inevitably, the ACNC would not entirely eliminate any and all future allegations of less than ethical judicial conduct. Nonetheless, the ACNC, through its interview and consideration of potential nominees, could act as a filter to reduce the number of claims of impropriety that impact the public's perception of judicial legitimacy.¹⁸⁵ If used wisely, the interview process has the potential to uncover any existing relationships or prior occupations that could give rise to calls to recuse or allegations of impropriety. It would be the individuals who make up the ACNC that ultimately impact the ability for a judiciary to meet some or all of the factors that would lead to the ideal bench.¹⁸⁶ Accordingly, the efficacy of merit-based selection in selecting an appellate judiciary that the public perceives as legitimate is dependent on the ability of the General Assembly and Governor to work together and select an effective ACNC. Perhaps, this dependence explains Pennsylvania's two recent and unsuccessful attempts to change to merit-based selection method.¹⁸⁷

B. *House Bill 196*

The amendment proposed by House Bill 196 is designed to create a judiciary that represents individual regions across the state.¹⁸⁸ The idea is that, when each region comes together on the bench, the ideological and demographic diversity seen across Pennsylvania would, likewise, be represented on the bench.¹⁸⁹ Support for 196 necessitates a belief that the judiciary should be representative of the people and their regional ideologies.

When it comes to demographic diversity, one would think that House Bill 196, with its goal of "equal representation" and local elections, flawlessly fulfills this factor.¹⁹⁰ However, as with any judicial selection method, a supposed strength should be thoroughly considered in order to determine whether, in practice, the method would live up to expectations. Lawmakers supporting House Bill 196, who are generally Republican, argue that judicial districts will "add a

185. See H.R. 111, 2019 Gen. Assemb., Reg. Sess. § 14(h) (Pa. 2019).

186. See Colquitt, *supra* note 3, at 86 (discussing the goals for and importance of the makeup of a nominating commission).

187. See H.R. 111 (Pa. 2019); H.R. 111 (Pa. 2017).

188. See generally H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); Baer, *supra* note 56.

189. Baer, *supra* note 56.

190. *Id.* (quoting primary sponsor of H.B. 196, Rep. Russ Diamond, explaining that the goal of regional districts is "diversity of judicial opinion").

mix of regional representation to the high courts.”¹⁹¹ By contrast, those in opposition of House Bill 196, generally Democratic lawmakers, claim that the amendment effectuated by House Bill 196 is retaliation based on the Pennsylvania Supreme Court’s controversial decision, *League of Women Voters of Pennsylvania*, in 2018.¹⁹² Although the political motivation behind House Bill 196 is more overt than House Bill 111, in this apparent battle to reform Pennsylvania’s appellate judiciary, there remains substantial support for the proposal based on the demographic diversity that smaller regional districts could generate.¹⁹³

Primary sponsor for House Bill 196, Representative Russ Diamond of Lancaster, claims that the amendment would bring demographic and racial diversity to the courts.¹⁹⁴ The rationale used is that smaller, regional races provide a greater opportunity to elect candidates who might otherwise get lost in state-wide elections.¹⁹⁵ The idea is that the judges elected from these regions would better represent the various ideological, experiential, and racial groups that exist in different parts of the state.¹⁹⁶ One reason for the support of House Bill 196, apart from the alleged judicial advocacy perceived in *League of Women Voters of Pennsylvania*, is the idea that appellate courts with state-wide jurisdiction should represent the entire state, not just the population centers of Philadelphia and Pittsburgh.¹⁹⁷ Although the motives of Republican lawmakers sponsoring this bill may be less than altruistic, as there are a minority of judges and Justices identifying as politically Republican on Pennsylvania’s appellate bench, there is legitimacy to the argument that public support for the judiciary may be more attainable

191. Stephen Caruso, *How Pa.’s Supreme Court Moved Left, and What It Means for the GOP*, PHILA. TRIB. (Nov. 1, 2019), https://www.phillytrib.com/news/state_and_region/how-pa-s-supreme-court-moved-left-and-what-it/article_2d0bb4cf-2be1-5ab6-9a7f-f60ee242e3a3.html.

192. See Baer, *supra* note 56 (“[O]ne might wonder if [House Bill 196] is real reform—or old-fashioned retaliation for the 2018 judicial smackdown of the GOP legislature.”).

193. Levy, *supra* note 12 (indicating the largely partisan support from a majority of Pennsylvania’s House of Representatives which have now passed House Bill 196 onto the state Senate for consideration).

194. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

195. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

196. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

197. Caruso, *supra* note 191; see also Levy, *supra* note 12 (indicating that, of the five democratic Pennsylvania Supreme Court Justices, one is a Philadelphia native and four are Pittsburgh natives); Schluckebier, *supra* note 10 (indicating an unprecedented \$15.8 million was spent on Pennsylvania’s last Supreme Court election campaigns).

if the court looks like and thinks like Pennsylvania's diverse citizenry.¹⁹⁸

On its face, House Bill 196 does not appear to account for communicative competency. Rather, there may be difficulty when those elected from the various districts come together since voters statewide have not come together to select the bench.¹⁹⁹ There is the potential that it will be the loudest voice from each district that is elected. With loud voices and, importantly, loud voices from areas that have previously not felt heard, these voices may try to make an impact without considering the long-term consequences.²⁰⁰ It can be said this is a necessary evil in the pursuit of a more representative bench. Nonetheless, that pursuit inherently requires one to believe that the judiciary *should* be representative. It is important to recognize however that, to legitimize the bench, the people want a bench that can communicate and decide cases based on precedent despite varying political objectives.²⁰¹ The public and the bar find more value in cases that are decided by the bench as a whole, not segmented decisions.²⁰² Thus, it is difficult to reconcile how dividing the state into thirty-one judicial districts will provide a more unified bench.

House Bill 196 also runs into trouble when considering ideological independence. Pennsylvania's appellate bench has the potential to lose some legitimacy in the eyes of the legal community and statewide public due to the divisive effect of regional districts.²⁰³ There are always arguments that the courts should not act as the legislature,²⁰⁴ but House Bill 196 may have the effect of treating the

198. See Johnsen, *supra* note 3, at 833–34 (“Diverse perspectives, knowledge and life experience promote a more robust exchange among the members of an appellate panel. . . . [D]iversity also enhances and widens public respect for the courts.”).

199. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. § 11(a) (Pa. 2019).

200. See Newman & Isaacs, *supra* note 5, at 15 (“Voters are said to be influenced by factors having nothing to do with a candidate’s ability to perform the duties of a qualified justice or judge, such as: party affiliation, name recognition, geographical location and ethnicity.”).

201. Berry et al., *supra* note 151, at 311 (“[J]udicial institutions should be guided by precedent in order to foster a rule of law.”).

202. *Id.* at 313–14.

203. In fact, in early 2020, at least one county bar association in Pennsylvania has petitioned to the state legislature in opposition of the impact that House Bill 196 could have on the independence and legitimacy of the appellate judiciary. See E-mail from Lori E. McMaster, Ass’n Pres., Allegheny Cnty. Bar Ass’n, to Hon. John Disanto, Chair, Senate State Gov’t Comm. (Mar. 5, 2020). *But see* Russ Diamond, *The Case for Regional Appellate Court Districts in Support of House Bill 196: A 50-Year Review of Individuals Serving on Pennsylvania’s Supreme, Superior, and Commonwealth Courts*, PA. HOUSE REPUBLICAN CAUCUS, <http://www.repdiamond.com/Display/SiteFiles/171/OtherDocuments/Misc/HouseBill196andtheCaseforRegionalAppellateCourtDistricts.pdf> (last visited Sept. 20, 2020).

204. See McKoski, *supra* note 8, at 309 (discussing legislation that followed an Iowa Supreme Court decision which would reduce Justices’ salaries to the General Assembly salary:

judiciary as a legislative vehicle. Under House Bill 196, district maps would be drawn and partisan elections would occur just as it is done to select the General Assembly.²⁰⁵ The only difference would be the role of the judiciary; i.e., interpreting laws rather than creating them.²⁰⁶ The appellate judiciary, under House Bill 196, has the potential to become a second legislative body that is equally, if not more, concerned about reelection than the General Assembly based on the role of the judiciary in interpreting and resolving controversial legal issues. Accordingly, House Bill 196 may amplify, not remedy, issues of perceived impropriety where the public questions a judges' ability to fairly determine a controversial issue for fear of a decision negatively affecting their position.²⁰⁷

In July 2020, the Pennsylvania House and Senate officially signed off in support of House Bill 196.²⁰⁸ This is a major step toward changing the process by which Pennsylvania's appellate courts are selected.²⁰⁹ While this support has caught the public's attention, and despite some concern about the proposed changes, it will be a waiting game to see whether House Bill 196 maintains support from the legislature for a second consecutive term.²¹⁰ Based on the above analysis of House Bill 196, a plan to create regional judicial districts has the potential to create a political and ideological divide that ultimately would not serve the statewide audience that the appellate courts are intended to represent. Likewise, House Bill 111 has its flaws under the above four-factor scrutiny and could be viewed as a pendulum swing away from Pennsylvania's current method of partisan judicial elections.

Accordingly, as this four-factor consideration has indicated, perhaps there is no perfect judicial selection method, and what is "best" changes depending on the public's perception of judicial legitimacy at a given time. That being said, this analysis also illustrates that any change to judicial selection must not be made in haste or pursuant to a political agenda. These two legislative proposals, House Bill 111 and House Bill 196, are legislative responses to feelings of

"[I]f the Supreme Court wants to act like legislators they need to start getting paid like legislators.")

205. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

206. See *id.*

207. See, e.g., McKoski, *supra* note 8, at 308 (illustrating state legislative attempts to interfere with judicial selection and function following court decisions that are unpopular with the legislature); Newman & Isaacs, *supra* note 5, at 15 (expressing concern that "justices and judges will feel obligated to the political leaders who select them and those who contribute to their campaign funds").

208. See *Pennsylvania House Bill 196*, *supra* note 112.

209. See *id.*

210. Levy, *supra* note 12.

public unrest. Ultimately, it will become the responsibility of the public to carefully consider whether these major changes to the selection of Pennsylvania's appellate judiciary would actually allow them to perceive the judiciary as more legitimate.

V. CONCLUSION

Despite what appears to be a sense of renewed urgency from the public, the bar, and the General Assembly, to achieve judicial fairness and improve perceptions of judicial legitimacy, it is important that the legislature does not act solely out of passion or politics when it comes to judicial reform. Just as an impulsive judiciary is undesirable, so too is an impulsive legislature. The state should take measured steps to achieve the four, largely universal, expectations of the judiciary discussed above. The judicial branch does not exist in a bubble. As the political climate in Pennsylvania, and the United States as a whole, continues to polarize, judges are impacted. This impact is not fully realized, however, until the public believes there is an issue and loses faith in the legitimacy of the judicial system. In the wake of recent decisions made by the Supreme Court of Pennsylvania, specifically *League of Women Voters of Pennsylvania*, the Pennsylvania legislature appears to have realized a lack of support and faith in the judiciary from some members of the public as evidenced by these dueling proposals to revise Pennsylvania's method of judicial selection.²¹¹ Perhaps ironically unique to states like Pennsylvania that conduct state-wide elections to select their appellate judiciary, the same public that takes issue with decisions like *League of Women Voters of Pennsylvania* or alleges judicial advocacy is the very public that has chosen the bench.²¹² Likewise, it is the responsibility of the public, if these proposed amendments or similar legislation continue to progress, to become educated and vote for the adoption or rejection of state constitutional amendments.²¹³ Accordingly, the legal community and

211. *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018); see Folmer, *supra* note 7; see also Muschick, *supra* note 7.

212. Lindquist, *supra* note 43, at 68.

213. As of October 2020, House Bill 196 has gained substantially more legislative momentum than House Bill 111, which died in chambers while under consideration by the Pennsylvania House of Representatives. Compare *Pennsylvania House Bill 196*, *supra* note 112, with *Pennsylvania House Bill 111*, *supra* note 71. In order to adopt House Bill 196, or make any amendment to the Pennsylvania Constitution, the Bill must maintain this momentum for another, consecutive, legislative session and then be affirmed by a majority public vote. See Pontz, *supra* note 69; see also John Finnerty, *State Senate OKs Possible Constitution Changes*, DAILY ITEM (July 16, 2020), https://www.dailyitem.com/news/state-senate-oks-possible-constitution-changes/article_46c39b56-9c8c-540d-ab7c-94e12ac7ba0b.html.

the public should hope and expect that Pennsylvania's Legislature carefully crafts proposed amendments and, if the time comes, that the public thoroughly consider whether a particular change to judicial selection method will truly further their faith in the legitimacy and trustworthiness of the appellate bench.



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