

EQUALITY WRIT LARGE

Phyllis Goldfarb*

TABLE OF CONTENTS

INTRODUCTION	565
I. DECLARING PARTIAL LAW	567
A. <i>The Road Not Taken</i>	567
B. <i>Interactive Activism</i>	569
C. <i>Interlocking Legal Theories</i>	571
II. RE-CONSTITUTING AMERICA: LAW AND POLITICS IN FOURTEENTH AMENDMENT JURISPRUDENCE.....	574
A. <i>HerStory and History</i>	574
B. <i>The Nineteenth Century’s (Un)Popular Constitutionalism</i>	576
C. <i>W(h)ither Privileges and Immunities?</i>	582
1. <i>Bradwell’s Argument</i>	582
2. <i>Analysis of the Argument</i>	584
III. LEARNING FROM LOSS	591
A. <i>Radical Inclusion</i>	591
B. <i>Strategic Choices</i>	595

INTRODUCTION

For *Feminist Judgments: Rewritten Opinions of the U.S. Supreme Court*, I authored a feminist revision of the 1873 case of *Bradwell v. Illinois*,¹ in which the U.S. Supreme Court upheld the denial of a license to practice law to Myra Bradwell—publisher of a highly regarded legal newspaper in Chicago—solely

* Jacob Burns Foundation Professor of Clinical Law, George Washington University Law School. I extend my gratitude to Professors Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford for instigating and shepherding the U.S. Feminist Judgments Project and inviting me to rewrite from a feminist perspective the 1873 Supreme Court case of *Bradwell v. Illinois*. The insights in this article grew from accepting their invitation. I extend special gratitude to Linda Berger, who edited my contribution to the *Feminist Judgments* volume with skill, grace, and kindness. Thanks also to the Center for Constitutional Law at the University of Akron School of Law for hosting an invigorating *Feminist Judgments* symposium in October 2016. The symposium provided a welcome forum for engaging with others in refining these insights.

¹ *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1872) (holding that “admission to the bar of a State of a person who possesses the requisite learning and character” is not a privilege and immunity of citizenship that, under the Fourteenth Amendment, a state must grant to a qualified woman).

on the grounds that she was not a man.² In rewriting *Bradwell*, I was bound by the guidelines of the Feminist Judgments Project that required authors to use the legal doctrine available at the time.³ Since I was assigned an opinion written in 1873, initially that requirement worried me. But I came to appreciate it, because it prompted my immersion in the fascinating conceptual world of mid-to-late nineteenth century America, a time and place rocked by dramatic cultural change and possibility.⁴

Since I was writing as a nineteenth century judge—by definition, a man—I began by reading about law and legal theory in the nineteenth century, in an effort not only to understand the doctrinal constraints of the era but also to capture the mindset of an 1870s judge. What were the events, issues, and dynamics that would be most salient and influential in the thinking of a judge writing at that time? How would those salencies affect the judge’s patterns of thought and language? I asked these questions because I wanted my 1873 opinion to be as authentic a ruling as I could make it when writing from my early twenty-first century vantage point.

Additionally, because I was engaged to write a feminist opinion for *Bradwell*, I needed to identify a legal pathway for the decision of an 1870s judge who believed in principles of equality under law and who cared about women’s lives and opportunities.⁵ I soon discovered that my task was not as creative as I first expected. To the contrary, I found that in the 1870s there was a sturdy legal architecture to support women’s equality, that there were vibrant equality movements articulating sound legal arguments, and that Myra Bradwell was not just a woman who wanted to be a lawyer but also a participant in those movements.⁶

Once my research brought the legal and political world of the nineteenth century into sharper relief, I saw vividly how much the arguments for women’s

² See Phyllis Goldfarb, *Judgment: Bradwell v. Illinois, 83 U.S. 130 (1873)*, in FEMINIST JUDGMENTS 60, 60 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

³ See Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in FEMINIST JUDGMENTS, *supra* note 2, at 9 (“To make the point that law may be driven by perspective as much as *stare decisis*, it was critical that the feminist justices be bound, just as the original justices were, to the law and precedent in effect at the time.”).

⁴ For a masterful examination of the tumult of the Reconstruction era following the devastation of the Civil War, see ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at xxv (Henry Steele Commager & Richard B. Morris eds., 1988) (“[Reconstruction] produced a sweeping redefinition of the nation’s public life and a violent reaction that ultimately destroyed much, but by no means all, of what had been accomplished.”).

⁵ See Berta Esperanza Hernández-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, in FEMINIST JUDGMENTS, *supra* note 2, at 25 (“Despite varied meanings and diverse participants, feminisms throughout time have sought to better the conditions of women’s lives, to advocate for the rights of women, to pursue women’s equality, and to liberate women and all sexes from cultural, legal, social, economic, and political subordination.”).

⁶ See *infra* notes 32–122 and accompanying text.

equality in the 1870s were connected to the issues and dynamics surrounding slavery, abolition, and the Civil War.⁷ The ways they were connected were interesting and complicated, embedded in one gripping historical narrative after another. In this Article, proceeding in three parts, I will share some of these nineteenth century narratives, analyze them, and try to pull some of their lessons into the twenty-first century.

In Part I of this Article, I describe the relevant legal backdrop to *Bradwell*, the intertwined arguments of the Reconstruction-era movements for racial justice and gender justice, and the partial perspectives of the jurists deciding how to allocate rights and entitlements under the new constitutional mandates that followed the end of the Civil War.⁸ In Part II, I examine the relevant political backdrop to *Bradwell*'s claims and describe how law and politics intersected in battles over the meaning of the Reconstruction Amendments, most notably Section One of the Fourteenth Amendment, which requires states to protect all Americans' privileges or immunities of citizenship.⁹ In Part III, I seek to extract timeless lessons for twenty-first century anti-subordination movements from the rich narratives and analyses evoked by the nineteenth century movement for women's equality.¹⁰

I. DECLARING PARTIAL LAW

A. *The Road Not Taken*

One of the first insights revealed by my time travel was this: We could have had women's formal equality under law a century before *Reed v. Reed* outlawed sex discrimination.¹¹ A significant part of the reason that the nineteenth century ended before women's formal equality began was that courts refused to adopt what I now view as the best understandings of constitutional requirements in 1873.¹² This result was not accidental but structural. The fact that all courts, by

⁷ See *infra* notes 32–50 and accompanying text.

⁸ See *infra* notes 11–50 and accompanying text.

⁹ See *infra* notes 51–170 and accompanying text.

¹⁰ See *infra* notes 171–218 and accompanying text.

¹¹ See *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding that an Idaho statute's sex classification giving mandatory preferences to males as estate administrators violates equal protection under the Fourteenth Amendment).

¹² The groundwork for the Court's rejection of *Bradwell*'s argument was laid in the *Slaughter-House Cases*. See *Slaughter-House Cases*, 83 U.S. 36, 53–55 (1872) (adopting a restrictive interpretation of the privileges and immunities of citizenship in denying relief to a group of independent butchers whose livelihoods were impeded by a Louisiana statute creating a slaughterhouse monopoly). See generally John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1430–33 (1992) (arguing that the Privileges or Immunities Clause is the Fourteenth Amendment's foremost guarantee of equality because, unlike the Equal Protection Clause, it addresses which laws can be made and enforced).

definition and design, were staffed by judges who were beneficiaries of the structural inequalities whose legalities they were determining is not beside the point but likely is one of the central points itself.¹³

If some number of the justices had acknowledged that their own perspectives were affected or skewed by their role as beneficiaries of the prevailing hierarchies, and tried to correct for the biases that this reality inevitably produced when these hierarchies were challenged under law, the constitutional perspective I articulated in *Bradwell* might have been represented on the Supreme Court bench in the 1870s.¹⁴ Had that occurred, the law might have developed quite differently—not only for women but for other subordinated classes as well—over subsequent generations to the present day.¹⁵ If the strong legal arguments presented during the first wave of feminism had met more success, the second wave of feminism might have unfolded very differently and confronted different challenges.¹⁶ While it is impossible to truly re-imagine the world that might have emerged from this counterfactual history, at the very least it does seem that Pauli Murray would not have needed to devise the equal protection strategy that she articulated in *Jane Crow and the Law*,¹⁷ and Ruth Bader Ginsburg would have found other valuable pursuits for the American Civil Liberties Union's Women's

¹³ See Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 130, 148 (1999) (stating that although research on diversity's effect on justice "has been hampered in the past by the small number of non-white male judges," some recent studies indicate that "the diversity they bring to the bench has an actual effect on the outcome of cases").

¹⁴ See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1217 (1992) (arguing that impartial judging involves awareness of one's own perspectives and a sufficiently open mind to learn from other points of view, thereby avoiding the risk of "leaving unexamined the very assumptions that deserve reconsideration"); see also JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* 22 (1993) (stating that in the 1870s, "the specter of nationwide woman's suffrage" was "terrifying").

¹⁵ See Minow, *supra* note 14, at 1206 ("[T]he Court's impartiality is threatened if it appears, because of its own narrow membership, to lack an understanding of the broad range of people who come before it.").

¹⁶ The first wave of feminism is typically understood as spanning the nineteenth century women's rights movement and continuing through the passage of the Nineteenth Amendment in 1920. The second wave of feminism is understood as the women's rights movement of the late twentieth century. Some suggest that feminism is currently experiencing a third wave. See RORY DICKER, *A HISTORY OF U.S. FEMINISMS* 103 (2008) ("[I]t is relatively easy to locate the origins of the first and second waves of the women's movement . . . the Seneca Falls Convention in 1848 . . . for the first wave and . . . the Miss America protest in 1968 for the second—finding a beginning moment for the third wave . . . [is] more complicated.").

¹⁷ Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 235–42 (1965) (delineating a set of legal arguments for establishing formal gender equality under law through the Equal Protection Clause of the Fourteenth Amendment).

Rights Project besides adopting Murray's legal blueprint and litigating cases to establish simple formal equality under law on the basis of sex.¹⁸

Unfortunately, we inherited the unequal world that we did, in part because the judges of the 1870s did not understand their own partiality. In the world they knew, privileged white men had always been entrusted with shaping the rules and deciding the fates of all others, including women and African-Americans.¹⁹ In that respect, the fate of privileged white women like Myra Bradwell resembled that of African-American men and women, most of whom had just been released, penniless and despised, from more than two centuries of race-based chattel slavery.²⁰

B. Interactive Activism

Although the conditions of life for each group varied profoundly, developments in American history, including American legal history, linked the fates of those experiencing discrimination on the basis of race and those experiencing discrimination on the basis of gender.²¹ While the relevant sets of discriminatory

¹⁸ See Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html> [<https://perma.cc/KU6B-9F8N>] (“As the director of the Women’s Rights Project of the American Civil Liberties Union, Ms. Ginsburg adopted a strategy intended to convince the Justices that laws that discriminated between men and women—even those laws that were meant to help women—were based on unfair and harmful stereotypes and were in most cases unconstitutional.”).

¹⁹ See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 4 (1987) (defining the equality concerns of feminism as “opposition to one sex’s categorical control of the rights and opportunities of the other”); see also CATHERINE CLINTON, *THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY* 76 (1984) (quoting the platform of an 1851 women’s rights conference as rejecting “the right of any portion of the species to decide for another portion . . . what is and what is not their ‘proper sphere’: that the proper sphere for all human beings is the largest and highest to which they are able to attain”); DICKER, *supra* note 16, at 25 (describing the “constrained social roles available to women” in the nineteenth century, such that early feminists “advocated women’s access to education and jobs”).

²⁰ Many nineteenth century feminists like Elizabeth Cady Stanton compared the patriarchal authority that constrained women’s freedom to the condition of slavery. See CLINTON, *supra* note 19, at 70 (quoting Stanton as saying that unlike the white man “born to do whatever he can, for the woman and the negro there is no such privilege”).

²¹ *Id.* (“[W]omen abolitionists were formidable opponents in the moral war against slavery. . . . [W]omen turned these egalitarian sentiments for blacks into the basis for a ‘holy war’ for themselves.”). Of course, women of color experienced the interaction of race and gender discrimination. See Adrien Katherine Wing, *Introduction* to *CRITICAL RACE FEMINISM* 1, 7 (Adrien Katherine Wing ed., 2d ed. 2003) (“[W]omen of color are not merely white women *plus* color or men of color *plus* gender. Instead, their identities must be multiplied together to create a holistic One when analyzing the nature of the discrimination against them.”) (footnote omitted).

practices diverged dramatically for these groups, challenges to each set of practices were legally linked.²² Prospects for successful legal challenges depended on making similar claims, which were grounded in similar understandings of democratic equality, federal-state power relations, and the post-Civil War legal structure.²³

Consequently, the theory and practice of the major anti-subordination movements of the nineteenth century overlapped significantly. There were many types of overlap, including people involved in both movements.²⁴ Many Northern white women, assigned by nineteenth century gender ideology to the domestic sphere, first developed self-identities as public actors in the movement to abolish slavery.²⁵ Their public roles expanded during the Civil War, as they participated in war relief efforts and took over civic and commercial activities in place of men gone to battlefields.²⁶ At war's end, some women became active in federal government efforts during Reconstruction, including the Freedmen's Bureau, while others traveled South as teachers to participate in literacy education for the millions of people newly freed from slavery's deprivations.²⁷

Many of the women who participated, in ways large and small, in remaking American society before and after the Civil War had internalized the egalitarian rhetoric of the era, seeing its application not only to the lives of freed slaves but to their own lives as well.²⁸ They glimpsed a future in which full "citizenship" rights—their conceptual category for the entitlements due to all inhabitants of a

²² DICKER, *supra* note 16, at 39 ("At the end of the war, abolitionists and women's rights activists formed the American Equal Rights Association (AERA), whose goal was to gain civil rights for both black people and [white] women.").

²³ See *infra* notes 32–50 and accompanying text.

²⁴ See CLINTON, *supra* note 19, at 54 ("Female moral reformers and abolitionists were mainstays of the antebellum women's movement.").

²⁵ *Id.* at 71–72 ("[F]emale participation was not only substantial but essential to bringing the slavery issue to the forefront of sectional politics. . . . [T]he fight to free slaves propelled women into an equally long, rigorous fight for their own liberation. . . . [M]ost feminists acquired public-speaking skills in the antislavery forum.").

²⁶ *Id.* at 81 ("When war broke out, it was easy for the government to draw on middle-class women's talent and experience on behalf of war relief. . . . Women used many of the innovations developed during the antislavery days, such as the sponsoring of fairs and bazaars, to raise funds."); *id.* at 92 ("The war gave many unparalleled opportunities to explore new fields and to pioneer on behalf of their sex. . . . afford[ing] access to jobs which [white women] were denied in peacetime.").

²⁷ *Id.* at 88 ("[N]orthern women . . . serve[d] in the South, to fill positions with the newly established Freedmen's Bureau. . . . to assist freed blacks By 1869 there were nine thousand teachers for ex-slaves in the South, and nearly half were women.").

²⁸ See JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION 123–24 (1983) ("[L]egislation on the basis of woman's traditional role in the family amounts to a role assignment by the dominant members of society for their own convenience, and that sounds suspiciously like slavery. If slavery for blacks was odious, so is pseudo-slavery for women.").

democratic republic—belong not just to white men but equally to all people, regardless of race, gender, or class.²⁹ These ideas took their most organized form in the women’s suffrage movement, though its claims for civil and political rights went well beyond attaining the franchise.³⁰ Former slaves and African-American activists, such as Frederick Douglass and Ida B. Wells-Barnett, were also involved in the movement for women’s suffrage.³¹

C. Interlocking Legal Theories

An important path towards equality forged by nineteenth century activists pursuing both race and gender justice was a legal theory rooted in constitutional design. The theory began with the awareness that in establishing America’s foundational principles as a republic, the Declaration of Independence had declared a human rights principle as a self-evident truth: that all were created equal and that by virtue of their fundamental equality, all people were entitled to inalienable rights.³² Of course, colonial and antebellum practices—most notably, slavery and coverture—contradicted this anti-subordination philosophy, but nineteenth century equality theorists did not view these practices as undermining the Constitution’s true meaning.³³

In fact, powerful factions of the anti-slavery movement expressed claims in the idiom of constitutionalism. These abolitionists challenged the constitutionality of slavery with the argument that the egalitarian language of the Declaration

²⁹ See Norma Basch, *Reconstructing Female Citizenship: Minor v. Happersett*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE* 52, 52 (Donald G. Nieman ed., 1992) (“As black codes menaced the viability of black citizenship and promoted efforts to define and guarantee citizenship through constitutional amendments, the amendments, in turn, unleashed a long and arduous struggle over the terms of female citizenship.”).

³⁰ The Declaration of Sentiments, drafted by Elizabeth Cady Stanton and her colleagues who attended the first women’s convention at Seneca Falls, New York in 1848, listed numerous grievances and resolutions, one of which was “the duty of the women of this country to secure to themselves their sacred right to the elective franchise.” RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 92 (2016). In the nineteenth century, the women’s movement was known as “the woman movement.” See COTT, *supra* note 19, at 3 (“Nineteenth-century women’s consistent usage of the singular *woman* symbolized, in a word, the unity of the female sex.”).

³¹ Frederick Douglass, who attended the Seneca Falls Convention and was the only man at the convention to speak on behalf of women’s suffrage, persuaded Elizabeth Cady Stanton, who was initially reluctant to do so, to include suffrage in the list of resolutions. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER* 126 (1984). Ida B. Wells-Barnett founded a black women’s suffrage organization, and was an associate of Susan B. Anthony’s. *Id.* at 120, 125 (“Wells-Barnett and Anthony would have long discussions about the race and women’s issues.”).

³² See GARRETT EPPS, *AMERICAN EPIC* 141 (2013) (“The Framers all more or less subscribed to the idea Jefferson phrased memorably in the Declaration of Independence: ‘that all men . . . are endowed by their creator with certain unalienable rights.’”).

³³ See BAER, *supra* note 28, at 64 (quoting John Bingham, principal drafter of the Fourteenth Amendment, who observed that “[t]he equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests”).

of Independence, the document that established the principles that launched the nation, was incorporated into the Constitution, the document that established the nation's rules of operation.³⁴ Despite the fact that slavery is not prohibited by the text of the original Constitution—because the political realities of forming a union of free and slave states in 1787 could not accommodate such a prohibition—some abolitionists argued that the Declaration's equality principles imbued the spirit of the Constitution.³⁵ It could not be otherwise, their argument ran, because our two national blueprints could not be inconsistent.³⁶ The egalitarian spirit necessary to each simply became more explicit as a constitutional principle once the Reconstruction Amendments were adopted.³⁷ Echoing the Declaration, the ratification of the Fourteenth Amendment made equality—inchoate and contested as its meaning was—a universal entitlement of American citizenship.³⁸

Consequently, by the 1870s, the legal theory of equal justice for both African-Americans and white women rested on a reading of the Fourteenth Amendment, understood at the time as explicitly translating the central equality premise of the Declaration of Independence into the constitutional text.³⁹ The language of the Amendment was inclusive, proclaiming that citizens of the states were also federal citizens who had privileges and immunities by virtue of their status as Americans.⁴⁰ As a result, the federal government was obliged to protect their broad rights as national citizens—which included the rights to due process and equal protection of the laws—by limiting any state's abrogation of these national citizenship rights.⁴¹

³⁴ *Id.* at 62 (“Not only was the Declaration, in effect, part of the Constitution, but, *a fortiori*, so were the principles of natural law which it expressed. Men were equal, and endowed with rights, under the United States Constitution; therefore, slavery violated it.”).

³⁵ *Id.* (quoting an abolitionist who testified to Congress in 1836 that “slavery makes war upon the principles of the Declaration, and the spirit of the Constitution”).

³⁶ *Id.* at 60–61 (describing the abolitionist view that “the Constitution already forbade slavery” because its text had to be interpreted “to incorporate, or at the very least not to traduce, the ideas of the Declaration”).

³⁷ *Id.* at 64 (asserting that the Fourteenth Amendment was “conceived of as ‘declaratory’ of what was already in the Constitution”).

³⁸ *Id.* at 102–04 (arguing that congressional debates on the Fourteenth Amendment suggest that the Amendment is grounded in “a notion of equality [under law] based on natural entitlement [of human beings] to rights, derived from the Declaration” and intended to protect all American citizens from oppression).

³⁹ See Basch, *supra* note 29, at 53 (“[T]he spacious terms of the first section of the Fourteenth Amendment carried a new, albeit ambiguous, promise of legal and constitutional equality.”).

⁴⁰ *Id.* (“In gender-neutral language [the Fourteenth Amendment] prohibited states from denying any person equal protection of the laws or abridging the privileges and immunities of U.S. citizens.”).

⁴¹ See Thurgood Marshall, Essay, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1340–41 (1987) (“[After the Civil War] arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.”).

Not surprising in the wake of the secession and treason of the slave states that had galvanized the Civil War, the Fourteenth Amendment accorded the federal government power over states in protecting individual freedom.⁴² While the colonists at the time of the Revolutionary War may have been most concerned with the tyranny of centralized power like the monarchy they were overthrowing, Americans by the time of the Civil War vividly discerned the problem created by the tyranny of a state's decentralized power as well.⁴³ Therefore, the Fourteenth Amendment clarified that, as a constitutional matter, the states had to protect the rights of their citizens just as the federal government was required to do.⁴⁴ Moreover, the Fourteenth Amendment clarified the power of Congress to pass federal legislation that enforced all citizens' Fourteenth Amendment rights.⁴⁵

After the ratification of the Fourteenth Amendment in 1868, the women's suffrage movement argued that Section One granted women full national citizenship, with all its entitlements, just as the Reconstruction Amendments granted full national citizenship—at least in theory—to African-American men.⁴⁶ Unfortunately, when women like Myra Bradwell asked courts to uphold the robust legal protections embedded in the Fourteenth Amendment's language, most judges rejected the arguments.⁴⁷ The perceived link between Bradwell's asserted right under the Constitution to a profession of her choosing and the highly contentious issue of women's right to suffrage created a volatile context for fair adjudication

⁴² See EPPS, *supra* note 32, at 169 (“[T]he new nation that emerged from the Civil War could not exist as a self-governing, democratic republic without strong federal monitoring of individual rights.”).

⁴³ *Id.* at 158 (“[T]he Fourteenth [Amendment] radically alters the structure of the government created in 1787”); see also Rogers M. Smith, “*One United People*”: *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J. L. & HUMAN, 229, 229 (1989) (explaining that Americans replaced “English subjectship with the particular political status they created, citizenship in a commercial republic guaranteeing various personal, economic, and intellectual freedoms”); *id.* at 239 (describing Revolutionary War views of states as a bulwark against “potentially despotic central government” that provided “a frequent, effective shield for state and local oppressions against women and other unempowered groups,” the problem which the Reconstruction Amendments sought to address).

⁴⁴ See EPPS, *supra* note 32, at 168 (“[The Fourteenth Amendment] indicates that states must respect the same limits as the federal government when they deal with any American citizen, their own citizens or not.”).

⁴⁵ *Id.* at 181 (“Section Five . . . points to Congress as the enforcer of all four sections [of the Fourteenth Amendment],” giving Congress “the power, ‘by appropriate legislation,’ to enforce the amendment.”).

⁴⁶ See Ellen Carol DuBois, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s*, in *VISIBLE WOMEN* 19, 22 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993) (elaborating the suffragists' argument that “national citizenship had finally been established as supreme by the first section of the Fourteenth Amendment,” and that “the benefits of national citizenship were equally the rights of all”).

⁴⁷ See *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1872) (holding by a vote of 8–1 that a qualified woman's choice to enter the profession of law is not a privilege of national citizenship protected by the Fourteenth Amendment).

of her claims.⁴⁸ Similarly, the link between arguments for broad construction of the Fourteenth Amendment made on behalf of women's rights activists and those made on behalf of freed African-American slaves tapped into a roiling controversy that impeded impartial and independent consideration of Bradwell's arguments.⁴⁹ Many among the powers-that-be sought to limit and control the societal reconstruction that the Civil War had necessitated.⁵⁰

II. RE-CONSTITUTING AMERICA: LAW AND POLITICS IN FOURTEENTH AMENDMENT JURISPRUDENCE

A. *HerStory and History*

The cultural and legal conflicts that influenced Bradwell's case had pervaded her life from the start.⁵¹ Born into an active abolitionist family, Myra Bradwell was likely familiar with the constitutional vision of equality that characterized the anti-slavery movement.⁵² This vision may have influenced her thinking during the Civil War when she was involved with other women in war relief and substantial fundraising efforts for wartime medical care.⁵³ The combination of a constitutional vision of universal citizenship rights and women's increased involvement in civic activities foreshadowed Bradwell's decision to apply for a license to practice law.⁵⁴ Her decision to do so enabled her to make a case for

⁴⁸ See DuBois, *supra* note 46, at 23–25 (describing the Fourteenth Amendment arguments made by the suffragists as “militant” and “activist,” because their “basic message was that the vote was already women’s right; they merely had to take it,” leading to numerous examples of “women’s direct action voting” between 1868–72); see also CHUSED & WILLIAMS, *supra* note 30, at 857 (“In many ways, [Bradwell’s] case encapsulated the history of the post-War suffrage movement.”).

⁴⁹ See CHUSED & WILLIAMS, *supra* note 30, at 864 (“Though her brief was a bit vague, Bradwell was presumably arguing that the recently ratified Fourteenth Amendment established protections for women as well as freed slaves.”).

⁵⁰ See DuBois, *supra* note 46, at 32 (stating that after the Presidential election of 1872, the Republican Party “retreat[ed] from the radical implications of the postwar amendments”); see also BAER, *supra* note 28, at 105 (“The promises of Reconstruction were not kept.”).

⁵¹ See FRIEDMAN, *supra* note 14, at 35 (stating that though “little is known about Myra’s childhood . . . [b]oth of her parents were prominent in the antislavery movement”).

⁵² *Id.* (noting that Bradwell’s parents were “close friends of the family of Elijah Lovejoy, a newspaper publisher and staunch abolitionist who was murdered . . . by a proslavery mob” and that Myra’s friend Owen Lovejoy, Elijah’s brother, “frequently” told Myra the “story of Lovejoy’s role in the abolitionist struggle”); see also JILL NORNGREN, *REBELS AT THE BAR* 39 (2013) (observing that in 1870, “[c]itizenship and political rights were very much on Bradwell’s mind”).

⁵³ During the war, Myra Bradwell was exceptionally active in fundraising and other war relief efforts, serving as president of the Chicago Soldiers’ Aid Society. See FRIEDMAN, *supra* note 14, at 42 (indicating that Bradwell “became intensely involved in a number of women’s philanthropic organizations that had been formed for the purpose of raising money for the Union Army’s sick and wounded soldiers and their families”).

⁵⁴ Bradwell’s application to the Illinois bar was submitted approximately six weeks after the first woman in the country was admitted to the bar—Arabella Mansfield in the state of Iowa.

women's rights and opportunities while lending support to their professional ambitions.⁵⁵

After reading law in her husband's law office and passing the state bar exam with high honors,⁵⁶ Bradwell founded the *Chicago Legal News*, a respected weekly newspaper for the legal profession.⁵⁷ With the success and demands of her growing publishing business, it is unclear whether she actually intended to practice law, but there is no question that she was qualified to become a member of the bar.⁵⁸ When Illinois denied her application solely on the ground that she was a woman, she appealed to the Illinois Supreme Court.⁵⁹

Some of Bradwell's able appellate arguments in support of her admission were grounded in state law, such as: (1) the absence of an express statutory provision prohibiting women from becoming lawyers in Illinois; (2) the directive in a state statutory instruction to construe the word "he" to mean "he or she"; and (3) the revisions in state law that had undermined the disabilities that accompanied coverture and permitted her to make her own contracts and retain her own earnings.⁶⁰ But after the heavily publicized ratification process of the ballyhooed Reconstruction Amendments, she added to her state law arguments a claim that the state's refusal on the grounds of gender to grant her membership in the bar denied her a privilege of citizenship—the right to choose a livelihood—that she

Id. at 18 (stating that "Mansfield was a teacher of English and history who had no intention of practicing law" but her admission was part of a plan devised to promote women's equality).

⁵⁵ *Id.* at 20 (In her brief to the Illinois Supreme Court challenging the denial of her admission to the bar, Bradwell cited changes in state law granting women social and economic rights, reported on the admission of some women to law schools, and "discussed the recent opening to women of other trades and occupations from which they had previously been barred.").

⁵⁶ *Id.* at 18.

⁵⁷ See NORGREN, *supra* note 52, at 30 ("It was . . . Myra's genius to . . . use her training in law as well as [her] management skills acquired during the war to build a national publishing empire specializing in legal materials. . . . [T]he *Chicago Legal News* . . . would make her wealthy while providing a place for the advocacy of women's rights.").

⁵⁸ *Id.* at 28, 37–38 (stating although once Myra might have wished to enter the bar to help her husband in his law practice, the subsequent success of her publishing business suggested that "[f]or Bradwell, bar admission would be a personal and political victory, reinforcing women in their professional ambitions and quest for rights").

⁵⁹ Initially the Illinois Supreme Court rejected her bar application because she was a married woman. See FRIEDMAN, *supra* note 14, at 18–19 (quoting the letter Bradwell first received from the court's reporter stating that she was denied bar membership because "you would not be bound by the [contractual] obligations necessary to be assumed where the relation of attorney and client shall exist, by reason of the disability imposed by your married condition") (alteration in original) (emphasis omitted). But when Myra challenged this decision, arguing in part that Illinois statutes had recently removed some of the historical legal disabilities for married women, the Illinois Supreme Court stated that denial of Bradwell's bar application was based not on her status as a married woman but simply on her status as a woman. *Id.* at 20.

⁶⁰ See Nancy T. Gilliam, *A Professional Pioneer: Myra Bradwell's Fight to Practice Law*, 5 L. & HIST. REV. 105, 109–10 (1987) (delineating Bradwell's state law arguments).

was guaranteed under the Fourteenth Amendment.⁶¹ When the Illinois Supreme Court denied all her arguments, she petitioned the United States Supreme Court for its first interpretation of the meaning of the brand new Fourteenth Amendment.⁶²

B. The Nineteenth Century's (Un)Popular Constitutionalism

The constitutional arguments that Bradwell would advance at the Supreme Court were gathering steam among nineteenth century activists. In 1869, Francis and Virginia Minor, a lawyer-husband and suffragist-wife team living in Missouri, developed a sophisticated constitutional argument for women's equality with men as autonomous political actors.⁶³ Although the specific version of their argument that addressed women's suffrage would reach the Supreme Court after Bradwell's case, their general constitutional arguments for women's rights had been shared in women's suffrage gatherings and publications, where Bradwell likely encountered them and later incorporated them into the litigation challenging her exclusion from the profession of law.⁶⁴ Therefore, although Bradwell

⁶¹ *Id.* at 114 (stating that on December 31, 1869, Bradwell filed in the Illinois Supreme Court a document containing two constitutional arguments, "an undeveloped equal rights claim and a privileges and immunities argument").

⁶² *Id.* at 116–17 ("Because this was the first examination by the Supreme Court of the meaning of the Civil War amendments . . . [t]he issue is usually phrased thusly: Did the fourteenth amendment bring about a radical change in the balance of power between the state and federal governments?").

⁶³ See DuBois, *supra* note 46, at 21–22 (noting that in October 1869, Francis and Virginia Minor presented the women's suffrage movement with "an elaborate and elegant interpretation of the Constitution" for advancing women's rights, including the right to vote).

⁶⁴ The Minors' constitutional argument for women's suffrage was rejected by a unanimous Supreme Court. *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (holding that suffrage was not a protected right of citizenship guaranteed to women by the Fourteenth Amendment). Myra Bradwell was "one of the Midwest's preeminent suffragists," whose efforts on behalf of the women's suffrage movement were "substantial." See FRIEDMAN, *supra* note 14, at 167. Bradwell served as corresponding secretary of the women's suffrage convention held in Cleveland in November 1869, where the Minors' argument was likely discussed. *Id.* at 170–71. The convention had been called by Lucy Stone to organize the American Woman Suffrage Association for suffragists who, unlike Stanton and Anthony, did not oppose the Fifteenth Amendment. *Id.* at 169–70. In January, 1869, the National Woman Suffrage Association adopted a resolution stating that women's disenfranchisement violated the privileges and immunities of citizenship protected by the Fourteenth Amendment. See Basch, *supra* note 29, at 53–54. In January, 1870, Francis Minor published a letter indicating that the legal strategy he had developed with his wife was presented as a resolution at the Missouri National Woman Suffrage Association, where Virginia Minor was the president. *Id.* at 59. Serving as an officer in the American Woman Suffrage Association and a member of the executive committee of the Illinois State Suffrage Association, and keeping abreast of developments in the struggle for woman suffrage for her newspaper, Bradwell undoubtedly was aware of the constitutional interpretations emerging at that time from the suffragists' movement. See FRIEDMAN, *supra* note 14, at 176–77 (stating that Bradwell not only served as an officer of suffrage organizations, she also reported frequently on the organizations' activities).

may have been the lone plaintiff in her case, she represented the hopes of swelling numbers of nineteenth century women who sought autonomy, choice, and larger civic and political roles.⁶⁵

The contested question of the hour was whether all American citizens would be entrusted with full and equal rights of citizenship. Bradwell understood that her case would bear broadly and directly on women's civil and political rights, including the right to suffrage, which women had been pressing to attain for a number of years.⁶⁶ A victory in her case before the Supreme Court that recognized women's citizenship rights might encompass women's right to the franchise as well.⁶⁷ What Bradwell may not have foreseen was that from 1869–73, the protracted period during which her case was awaiting the Supreme Court's decision, the political climate would become increasingly belligerent and the actual legal issues in her case would be overshadowed by the intensifying dynamics of Reconstruction and women's suffrage to which they were conceptually tied.⁶⁸

Bradwell's legal issues were substantial. The Minors' argument from which she borrowed was centered on the Fourteenth Amendment, but it also drew from across the Constitution.⁶⁹ The language of Article IV, Section Four of the Constitution provided that the "United States shall guarantee to every State in this Union a Republican Form of Government."⁷⁰ To disenfranchised women—half the country's citizens deprived of a political voice—the form of government they experienced, according to the Minors, was not republicanism but despotism.⁷¹

⁶⁵ FRIEDMAN, *supra* note 14, at 164 (noting that Bradwell engaged in numerous endeavors to "secure occupational and professional freedom for *all* women"); *see also* NORGREN, *supra* note 52, at 40 ("Bradwell was one of several activists gamely making [the Fourteenth Amendment argument framed by the Minors] and devising strategy to make it a reality.").

⁶⁶ *See* NORGREN, *supra* note 52, at 39–40 ("The failure of the women's movement to win . . . explicit inclusion of women's rights in the Fourteenth and Fifteenth Amendments . . . led Bradwell to hope that her case might result in a sweeping judicial decision supporting women's status as full citizens, with all of the rights and privileges of that status.").

⁶⁷ The reverse was also true. After the Illinois Supreme Court denied her application to the bar, Bradwell saw its broad adverse implications for women's rights. *See* FRIEDMAN, *supra* note 14, at 21 (Bradwell wrote in her newspaper that the Illinois court's decision to uphold denial of her application to the bar was "to the political rights of women in Illinois" what the U. S. Supreme Court's decision in *Dred Scott* was "to the rights of the negroes as citizens of the U.S."—"annihilation.") (quoting Myra Bradwell, Opinion, *A Woman Cannot Practice Law or Hold Any Office in Illinois*, CHI. LEGAL NEWS, Feb. 5, 1870, at 146–47).

⁶⁸ *See* Gilliam, *supra* note 60, at 107 (labeling this general time period "a most turbulent era" following "disunion and civil war" and the "spectacular political upheaval of Reconstruction," as well as the upheaval created by women's suffrage activism); *see also* DuBois, *supra* note 46, at 23–32 ("By 1871 hundreds of women were trying to register and vote in dozens of towns all over the country," and Susan B. Anthony was arrested and convicted for voting in 1872); Basch, *supra* note 29, at 57 (stating that in the 1870s, as the viability of women's suffrage increased, its prospect "[was] met with savage derision in the press").

⁶⁹ *See* Basch, *supra* note 29, at 59–61 (detailing the Minors' constitutional arguments).

⁷⁰ U.S. CONST. art. IV, § 4.

⁷¹ *See* Basch, *supra* note 29, at 61 ("Implicit here was the claim that unless public authority—in this case the Supreme Court—reconstructed female citizenship to encompass suffrage, it

From this perspective, denying women political rights amounted to abandoning a fundamental principle of the Declaration of Independence, that “governments derive their just powers from the consent of the governed.”⁷² When Section One of the Fourteenth Amendment clarified that all Americans were entitled to the privileges or immunities of citizenship, its terms confirmed the equal rights of all citizens, including women, under the overall constitutional structure.⁷³

Drawing on this Fourteenth Amendment argument, Bradwell petitioned the Supreme Court to hear her case in 1870.⁷⁴ Shortly thereafter, a Fourteenth Amendment argument similar to Bradwell’s and supportive of the rights of women was advanced in the November 1870 issue of *Woodhull & Claflin’s Weekly*, a newspaper published by charismatic activist Victoria Woodhull.⁷⁵ In January 1871, Congressman Benjamin Butler of Massachusetts invited Woodhull to address the combined Judiciary Committees of the House and Senate about her interpretation of women’s constitutional rights.⁷⁶ Drawing from the Minors’ constitutional arguments, Woodhull—the first woman to testify before Congress—told the assembled Congressmen that the language of Section One of the Fourteenth Amendment established the supremacy of national citizenship over state citizenship and accorded all rights of citizenship without regard to sex.⁷⁷ Since the foremost right of citizenship was the right to vote, the Fourteenth Amendment secured the franchise for women, and the federal government was obliged to protect the franchise for all its citizens, male and female, along with all other civil and political rights.⁷⁸ Woodhull urged Congress to pass enabling

had no legitimacy because it reflected not a republican form of government, but rather ‘despotism.’”).

⁷² *Id.* (“Either we give up a fundamental principle of our government . . . that ‘governments derive their just powers from the consent of the governed,’ or we acknowledge the legitimacy of the plaintiff’s claim.”).

⁷³ *Id.* at 60 (describing the Minors’ argument that the original Constitution protected women’s right to vote, that women’s disenfranchisement “was the result of a monumental misreading of the original text,” and that the Fourteenth Amendment “merely obliterated any remaining doubts on the subject”).

⁷⁴ See Gilliam, *supra* note 60, at 116 (“The progression to the federal court in 1870 was made promptly after the Illinois record was prepared for transmission.”).

⁷⁵ See NORGREN, *supra* note 52, at 40 (“Victoria Woodhull brought this idea to the public in a November 19, 1870 article in her newspaper, *Woodhull & Claflin’s Weekly* . . .”).

⁷⁶ See DuBois, *supra* note 46, at 26 (“In January of 1871 Woodhull appeared before the House Judiciary Committee to make the constitutional case for women’s right to vote. . . . Her appearance was sponsored by Massachusetts Republican Benjamin Butler . . .”).

⁷⁷ *Id.* (“No woman had ever before been invited to address a committee of the U.S. Congress. . . . Like the Minors, Woodhull argued that the Fourteenth Amendment established the supremacy of national over state citizenship and the obligation of the federal government to protect the rights of all citizens equally.”).

⁷⁸ *Id.* (“[W]omen along with men were citizens of the United States, and foremost among the ‘privileges and immunities’ of national citizenship was the right to vote.”); see also Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 15, 70 (2011) (observing that “[a]nyone who has equal political rights must by definition also have equal civil rights” because throughout American history “if a class had political rights, it would be guaranteed full civil rights”).

legislation that clarified and enforced women's right to suffrage under the Fourteenth Amendment.⁷⁹

When Elizabeth Cady Stanton called the Minor-Woodhull argument a "new departure" for the women's suffrage movement, the constitutional interpretation it advanced became known as the movement's New Departure strategy.⁸⁰ Congress subsequently issued two reports in response to Woodhull's New Departure arguments.⁸¹ A Majority Report rejected the interpretations she had articulated, and a Minority Report accepted her broad vision of the Fourteenth Amendment.⁸² With a significant number of supporters in Congress, suffragists began lobbying for adoption of the interpretations framed in the Minority Report.⁸³ Fear of their potential success rallied the opposition.

Concerned about the increasing traction of the New Departure position, including the version before the Supreme Court in Bradwell's case, opponents sought to discredit it through a not unfamiliar political tactic.⁸⁴ They smeared the messenger, accusing Woodhull of espousing "free love"—an accusation she did not deny—and they cast related reputational aspersions on suffragists who allied with her.⁸⁵ During Reconstruction, the politics of inclusionary democracy were sufficiently frightening to some that they resorted to extraordinary and questionable means to hold back the forces of change.⁸⁶

While Woodhull's position was being weakened through its association with defiance of sexual norms, a widespread grassroots movement, persuaded by the New Departure's suffrage rhetoric, determined that women should begin voting

⁷⁹ See DuBois, *supra* note 46, at 26 (stating that Woodhull "asked Congress to pass legislation clarifying the right of all women to vote under the new Reconstruction amendments").

⁸⁰ See NORGRÉN, *supra* note 52, at 40 ("Elizabeth Cady Stanton declared that the Minor/Woodhull argument amounted to a 'new departure,' radically changing the 'manner of agitation.' The supporters of the 'New Departure' . . . called for a strategy of federal enabling legislation in support of Minor's theory and Supreme Court decisions built on Minor's reasoning.").

⁸¹ See DuBois, *supra* note 46, at 27 ("The House Judiciary Committee issued two conflicting reports on the constitutional issues [Woodhull] raised.").

⁸² *Id.* (" 'Thus it can be seen,' Woodhull observed archly, 'that equally able men differ upon a simple point of Constitutional Law.' ").

⁸³ *Id.* ("In 1871 two committee rooms in the Capitol were put at the disposal of the suffragists to facilitate their lobbying efforts.").

⁸⁴ See NORGRÉN, *supra* note 52, at 40 ("Bradwell's appeal was to be one of those [New Departure] high court cases."); see also DuBois, *supra* note 46, at 28 ("[A]s Republicans struggled over the claims of the New Departure and suffragists grew hopeful," Woodhull's opponents introduced "her shady sexual reputation . . . to divert attention from the constitutional arguments she made.").

⁸⁵ See DuBois, *supra* note 46, at 28 ("Suffrage leaders allied with Woodhull were either accused of sharing her 'free love' sentiments or warned against the consequences of associating with disreputable women."); see also CHUSED & WILLIAMS, *supra* note 30, at 841–44 (describing the Woodhull "free love" scandal and its impact on the women's suffrage movement).

⁸⁶ See FRIEDMAN, *supra* note 14 ("The prospect of women casting the ballot, which was both a symbol and an instrument of independence, was troublesome to every man who feared his wife's (sister's, daughter's, etc.) partial freedom from male control.").

because their right to vote had been affirmed by the Fourteenth Amendment.⁸⁷ During this time, women sought to register to vote in many communities around the country.⁸⁸ In some instances, groups of women showed up at the polls to cast ballots, their actions indicating that they saw collective qualities in individual rights.⁸⁹ Although most election officials refused their votes, some officials were persuaded to register them as voters, and some accepted their ballots.⁹⁰ When Congress passed the 1870 Enforcement Act, which allowed federal court action against election officials who interfered with the suffrage rights of freedmen, women began suing under the Enforcement Act those officials who refused to permit women to vote.⁹¹ Even though federal courts were typically unsympathetic to these women's lawsuits, the activists' attempts to seize voting power were sounding alarms across the country.⁹²

This was the turbulent prelude to the issuance of the opinion in *Bradwell*. The prelude was soon to become more turbulent due to the 1872 Presidential election, a crisis for the Republican Party which had split into two.⁹³ Ulysses S. Grant was the incumbent Republican presidential candidate, but Republicans concerned about accretions of federal power had formed an independent party and nominated for president New York publisher Horace Greeley, an avowed opponent of women's rights.⁹⁴ Suffragists, who like the freedman had come to understand that the best chance for obtaining and protecting their rights was through federal sources of power, campaigned for Grant, who tantalized them with speeches vaguely alluding to more rights for women.⁹⁵ When Grant won the Presidency, suffragists felt that his administration would reward their efforts on

⁸⁷ See DuBois, *supra* note 46, at 23–32 (describing women's direct action voting that began in 1868 and increased over the next few years, not only due to the language of the Fourteenth Amendment, but also due to the 1870 passage of a federal statute, the Enforcement Act, that provided federal court remedies when election officials reject citizens' lawful votes).

⁸⁸ *Id.* at 23 (“By 1871 hundreds of women were trying to register and vote in dozens of towns all over the country.”).

⁸⁹ *Id.* at 25 (“The voting women of the 1870s often went to the polls in groups.”).

⁹⁰ *Id.* (stating that some election officials accepted women's votes).

⁹¹ *Id.* 25–26 (reporting women's use of the Enforcement Act in seeking authority to vote, and the lawsuits women filed under the Act when their votes were refused, such that “[b]y 1871 numerous New Departure woman suffrage cases were making their way through the federal courts”).

⁹² *Id.* at 29 (noting denial of the Enforcement Act claims of Sarah Spencer and seventy other women in the District of Columbia in an 1871 court opinion that expressed fear of the social and political turbulence that had already ensued following Reconstruction's expansion of the franchise).

⁹³ *Id.* at 31 (describing the breakaway segment of the Republican Party in the 1872 election).

⁹⁴ *Id.* (explaining the negative response of women suffrage activists to Greeley's nomination to run against Grant).

⁹⁵ *Id.* (“[M]any New Departure suffragists campaigned actively for Ulysses Grant,” whose Republican party “cultivated their support” and included “reference to ‘additional rights’ for women in their [party] platform . . .”).

his behalf by granting them political and civil rights, including the right to suffrage.⁹⁶

This was a miscalculation. Once in office, the Republican administration shrunk from broad meanings of the Reconstruction Amendments.⁹⁷ Deciding to crack down on women who had voted, federal officers arrested the most prominent suffragist, Susan B. Anthony, on charges of election fraud because Anthony had persuaded Rochester, New York election officials to let her vote.⁹⁸ In what appeared to be an orchestrated show trial with a pre-ordained outcome, Anthony's federal trial was moved out of her home county and presided over by Justice Ward Hunt, a recent appointee to the U.S. Supreme Court.⁹⁹ Determining that there were no issues of fact, only of law, Hunt took the case away from the jury, directed a verdict of guilty—a procedure later deemed unconstitutional¹⁰⁰—and ordered Anthony to pay a fine.¹⁰¹ When Anthony refused to pay, the Grant administration did not prosecute her for non-payment, effectively depriving her of a public forum for a potential appeal to the Supreme Court.¹⁰² The message was clear: the federal government did not support the New Departure arguments for women's suffrage.¹⁰³

It was in this ominous context that Bradwell's New Departure case, albeit a non-suffrage case, would be decided by the Supreme Court. The Court had held

⁹⁶ *Id.* (“[Susan B.] Anthony expected that if Republicans won, they would reward women with the suffrage by recognizing the New Departure claims.”).

⁹⁷ *Id.* at 32 (“In general, the outcome of the election cleared the way for the Republican party to retreat from the radical implications of the postwar amendments.”).

⁹⁸ *Id.* at 31 (reporting that for the 1872 Presidential election, Susan B. Anthony gathered others with her, went to her polling place in Rochester, New York, and persuaded local election officials to accept her vote, along with the votes of fourteen other women. Anthony was arrested a few weeks after the election).

⁹⁹ *Id.* (stating that the change of venue for her trial and the appointment of Judge Ward Hunt—who was soon to provide the fifth vote for the majority in the *Slaughter-House Cases*—to preside over the trial served to reinforce suspicions that Anthony's arrest and trial “had been authorized at the highest level of government”).

¹⁰⁰ See *United States v. Anthony*, 24 F. Cas. 829, 833 (N.D. N.Y. 1873); see also CHUSED & WILLIAMS, *supra* note 30, at 875 (describing Judge Hunt's violation of the usual practice of sending the case to the jury and instructing them on the law).

¹⁰¹ See CHUSED & WILLIAMS, *supra* note 30, at 877 (providing a transcript of the sentencing hearing in which Judge Hunt fined Anthony \$100 plus the costs of prosecution and Anthony vowed never to “pay a dollar of your unjust penalty”). Norma Basch describes Anthony's trial as a “legal melodrama” and Anthony as “an eloquent martyr prodding the conscience of the nation.” Basch, *supra* note 29, at 58 (“By casting herself as a modern Joan of Arc confronting the full force and fury of the U.S. government, [Anthony] evoked . . . sympathy and press coverage . . .”).

¹⁰² Basch, *supra* note 29, at 56 (explaining that Judge Hunt's directed verdict of guilty and the Grant administration's failure to prosecute Anthony for not paying her fine “crushed Anthony's bid to bring her case up to the Supreme Court on appeal”).

¹⁰³ *Id.* at 57 (“The outcry from friends of woman suffrage over procedural irregularities, coupled with the sheer political volatility of the *Anthony* case, may very well have pointed to the need for a clear and authoritative judicial resolution.”).

the case pending the outcome of the 1872 presidential election.¹⁰⁴ After the election, there were fewer political costs for Republicans in rejecting the gender justice movement's interpretation of the Fourteenth Amendment.¹⁰⁵

C. *W(h)ither Privileges and Immunities?*

1. *Bradwell's Argument*

Bradwell's central argument was based on the unqualified language of Section One of the Fourteenth Amendment, which clarified that all Americans have rights as citizens that the federal and state governments must respect.¹⁰⁶ By its terms, Section One forbids states from abridging the privileges or immunities of citizenship of all American citizens.¹⁰⁷ Most nineteenth century thinkers understood the privileges or immunities of citizenship to encompass the civil rights found at common law and deemed sufficiently fundamental that they belonged, as a matter of right, to the citizens of all free governments.¹⁰⁸

Under this understanding of the privileges or immunities of citizenship, Bradwell had a strong argument that the Fourteenth Amendment's Privileges or Immunities Clause protected her right to enter a profession.¹⁰⁹ In the 1823 case of *Corfield v. Coryell*, a citizen's fundamental privileges or immunities included "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property . . . and to pursue and obtain happiness and safety . . ." ¹¹⁰ *Corfield's* litany of the privileges or immunities of citizenship echoed through the Civil Rights Act of 1866, which guaranteed racial equality with respect to the common law rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . ." ¹¹¹ This

¹⁰⁴ See DuBois, *supra* note 46, at 31 ("The Supreme Court held back its decision on *Bradwell* until after the election.").

¹⁰⁵ *Id.* ("To trace the final judicial disposition of the suffragists' constitutional arguments, we have to understand what was at stake in this election . . .").

¹⁰⁶ See *Bradwell v. Illinois*, 83 U.S. 130, 133–37 (1872) (stating the argument for the plaintiff in error, and elaborating the guarantees of the Privileges or Immunities Clause of the Fourteenth Amendment).

¹⁰⁷ U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

¹⁰⁸ See Calabresi & Rickert, *supra* note 78, at 21 ("The privileges or immunities of state citizenship were common law rights . . . and the Privileges or Immunities Clause forbade the making of any law that abridged those rights of state citizenship.").

¹⁰⁹ See Gilliam, *supra* note 60, at 120 ("The privileges and immunities clause of the fourteenth amendment opened all professions to blacks and must, [Bradwell's attorney] argued, in the absence of limiting language, also extend to whites, female as well as male.").

¹¹⁰ *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C. E.D. Pa. 1823).

¹¹¹ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

language evinces the nineteenth century understanding that a central injustice of slavery was the denial of the fundamental right of all people to own their own labor and to reap its benefits by contracting for gainful employment.¹¹²

The actions of the former Confederate states in enacting the Black Codes, discriminatory state statutes that denied fundamental civil rights to freed slaves, were rendered unlawful through the Civil Rights Act of 1866, which passed over President Johnson's veto.¹¹³ To prevent a future majority from repealing the federal civil rights statute, and to prevent the U.S. Supreme Court from striking it down, Congress decided to constitutionalize the substance of the statute—which in turn had codified an aspect of common law—through the Fourteenth Amendment.¹¹⁴ In the political bedlam that followed the Civil War, this was deemed the safest course.¹¹⁵

Importantly, Congress chose language for the Fourteenth Amendment that was more expansive than the language of the Civil Rights Act, removing its reference to race and protecting from abridgement the privileges or immunities of citizenship for all classes of citizens.¹¹⁶ This expansiveness was deliberate.¹¹⁷ Congress had rejected an early draft of the Fourteenth Amendment that limited its prohibitions only to discrimination on the basis of race.¹¹⁸ This history suggests that the Reconstruction Congress, while deeply concerned about racial inequality after slavery's abolition, made a conscious choice to embed in the Fourteenth Amendment a wider set of protections and a broader anti-subordination aim.¹¹⁹

¹¹² See Smith, *supra* note 43, at 257 (arguing that the ideology underlying the Constitution's three post-war amendments was "the central importance of free labor as the source of all productive value" and that "every human being had a natural right to pursue his trade and reap the fruits of his labor," making slavery "the height of injustice").

¹¹³ See Calabresi & Rickert, *supra* note 78, at 27 ("Before the Fourteenth Amendment was introduced, the Civil Rights Act of 1866 was passed by Congress, vetoed by President Johnson . . . and then passed again over his veto.").

¹¹⁴ *Id.* ("The uncertain future of the Act was the most pressing reason for a constitutional amendment. The idea was to give the Civil Rights Act of 1866 a more secure constitutional footing and to immunize it from the attacks of future majorities in Congress. . . .").

¹¹⁵ *Id.* at 28 ("[S]upporters of the Civil Rights Act of 1866 feared that even if the Act initially survived judicial review, as a mere statute, it might be repealed by a future Democratic Congress or struck down by some future Democratic Supreme Court.").

¹¹⁶ *Id.* at 6 ("[T]he words of the Fourteenth Amendment are general and are not confined to discrimination or abridgements on the basis of race.").

¹¹⁷ *Id.* ("The Constitution's text alone is evidence of the Fourteenth Amendment's broad scope"); *id.* at 16 ("[T]he Framers' use of broad language in Section One of the Fourteenth Amendment was no accident.").

¹¹⁸ *Id.* at 32 ("The narrow scope of this proposed race discrimination version of the Fourteenth Amendment caused the draft to be rejected . . . by members of Congress on the left who wanted to prohibit all forms of caste").

¹¹⁹ *Id.* at 19 ("The Fourteenth Amendment's legislative history in Congress and the ratifying state legislatures confirms that the inclusion of language at a high level of generality was purposeful and was understood to be addressed to a broad problem. This history reveals that Section One was understood to ban *class legislation* and systems of *caste*").

As a matter of constitutional right, the Fourteenth Amendment applied to all classes of citizens, who were understood to be equal classes before the law, extending across generations a principle of equality writ large.¹²⁰ The Amendment authorized federal power to invalidate discriminatory state laws and practices, including those that treated whole classes of people as less than full citizens.¹²¹ Bradwell had reason to believe that the Fourteenth Amendment, interpreted in light of this history, protected her right to a law license as a privilege of citizenship accorded equally to all qualified applicants and that the Supreme Court had constitutional grounds to overturn the state court's refusal to issue her license because of her membership in a class defined by gender.¹²²

2. *Analysis of the Argument*

Unfortunately for those seeking equality, the Court retreated from the structural innovations of the postwar Constitution.¹²³ This became apparent when the Court decided the *Slaughter-House Cases* on the day before *Bradwell*.¹²⁴ In construing the Fourteenth Amendment to uphold a monopoly on the slaughtering business created by the Louisiana legislature and rejecting the challenge of a group of independent butchers whose businesses were impaired by the statutorily created monopoly, the *Slaughter-House* Court disregarded popular understandings of the Amendment and the common law, constricting beyond recognition the apparent meaning of the privileges and immunities of citizenship granted unqualifiedly to all American citizens.¹²⁵ Diverging from popular understandings

¹²⁰ See EPPS, *supra* note 32, at 164–66 (“The Fourteenth [Amendment] begins by throwing a national aegis of protection over all. . . . The tone of [Section One of the Fourteenth Amendment is] inclusive, universal, and comprehensive.”).

¹²¹ See Smith, *supra* note 43, at 259 (elaborating the post-war legal argument that “the [Reconstruction] amendments had decisively repudiated the states’ rights . . . views of citizenship prevalent in the antebellum South, rendering national citizenship unquestionably primary” and “based on the liberal commitment to securing fundamental rights against all threats, including any from the states”).

¹²² Bradwell stated that she filed suit not to gain admission to the bar but to vindicate the Fourteenth Amendment’s broad principle of equality. See Gilliam, *supra* note 60, at 115 (stating that Bradwell believed “liberty of pursuit was guaranteed to every citizen by the fourteenth amendment, under laws which should operate equally upon all”) (quoting Myra Bradwell, *The XIV Amendment and Our Case*, CHI. LEGAL NEWS, Apr. 19, 1873, at 354).

¹²³ See EPPS, *supra* note 32, at 169 (“That decision was not based on what the Constitution said so much as it was on the idea that the Framers could not have really meant what they said.”).

¹²⁴ *Slaughter-House Cases*, 83 U.S. 36, 81–83 (1872) (narrowly construing the protections of the Privileges or Immunities Clause of the Fourteenth Amendment in holding that a Louisiana statute granting a corporate slaughterhouse monopoly did not violate plaintiffs’—a group of independent butchers’—right to a livelihood).

¹²⁵ See CHUSED & WILLIAMS, *supra* note 30, at 866 (asserting that in the *Slaughter-House Cases*, the Court found that “[r]ather than being an expansive repository of new federal rights as many had hoped, the [Privileges or Immunities Clause of the Fourteenth Amendment] just gave to blacks the pre-existing [limited national rights of citizenship] held by whites”); see

of the privileges or immunities of citizenship, the opinion drained the lifeblood from the clause, “placed first among section one’s grand restraints on government,” soon after its birth.¹²⁶

Ignoring the longstanding common law meaning of privileges and immunities as fundamental civil rights—including the right to a vocation—and ignoring the Fourteenth Amendment’s authorization of federal power to prevent states from interfering with those rights, the *Slaughter-House* majority, voting five to four, stated that the Amendment’s privileges or immunities guarantee applied only to those rights affecting a citizen’s relationship with the federal government not the states.¹²⁷ Whereas Congress had designed the Fourteenth Amendment to restrict a state’s authority to maintain subordinate classes—including subordinate labor classes—and some of its drafters and ratifiers might have identified constitutional infirmities under the Fourteenth Amendment of a state’s attempt to exclude a class of people from a vocation, the Supreme Court’s majority did not.¹²⁸ This context—and other contexts emerging from the federal government’s retreat from Reconstruction’s legal protections—provides support for the proposition that in the late nineteenth century, the Supreme Court betrayed the Fourteenth Amendment’s new promises.¹²⁹

The obvious need to reorganize the operation of government after the Civil War had led to a bold restructuring of the Constitution’s design, one that explicitly recalibrated the relationship between citizen and state and between state and federal power.¹³⁰ But seeing the extent of societal change that the Fourteenth Amendment might support, in the highly charged atmosphere that followed its adoption, some Congressmen lost their nerve, their taste for change, or both.¹³¹

also EPPS, *supra* note 32, at 166 (“The striking thing about . . . Section One of the Fourteenth Amendment . . . is that it carefully does not limit any of its concepts to any racial group.”).

¹²⁶ See Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 406, 413 (1972) (“Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a ‘practical nullity’ by a single decision of the Supreme Court rendered within five years after its ratification.”) (quoting THE CONSTITUTION OF THE UNITED STATES OF AMERICA 965 (Edward S. Corwin ed., 1953); see also BAER, *supra* note 28, at 259 (asserting that “[t]he [*Slaughter-House*] decision effectively killed the privileges-and-immunities clause” and the Court “has not overextended the [fourteenth] amendment; it has shackled it”).

¹²⁷ *Slaughter-House Cases*, 83 U.S. 36, 78 (1872) (stating that the Court would not interpret the Fourteenth Amendment to impose federal rights on the states, because it would “fetter and degrade” the states and “it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people”).

¹²⁸ See Smith, *supra* note 43, at 258 (“[T]he Supreme Court read the Thirteenth and Fourteenth Amendments very narrowly, overruling interpretations grounded in the free labor ideology of the governing Republican Party, out of an explicit concern to prevent the amendments from interfering extensively with traditional state prerogatives.”).

¹²⁹ See EPPS, *supra* note 32, at 169 (“The Fourteenth Amendment clearly changes something. Courts have been stuck with the ‘federal rights only’ reading . . .”).

¹³⁰ *Id.* at 167 (“[T]he Fourteenth Amendment revolutionizes the membership of the American Republic. . . . [then] radically alters its nature.”).

¹³¹ See *supra* notes 81–82 and accompanying text.

In other words, it was not just the Court that re-interpreted the original protective scope of the Fourteenth Amendment within a few years after its ratification.¹³² Many decisionmakers balked at the boldness and breadth of the text of the laws enacted in the early days of Reconstruction.¹³³

When they balked, does that mean they altered or limited the original meaning of the Fourteenth Amendment? Although that is a matter of interpretive philosophy, it seems entirely fair to respond in the negative. The meaning of the text does not change simply because its authors and ratifiers did not anticipate or approve some of the applications of the text.¹³⁴ Therefore, even though the application to women's suffrage was one that some of the Fourteenth Amendment's ratifiers did not consider and did not relish, it cannot be denied that broad and expansive words have broad and expansive applications in relevant situations, even those not specifically envisioned by those who wrote and approved the words.¹³⁵ As Professor Stephen Calabresi has observed: "[W]e are governed by the constitutional law that the Framers of the Fourteenth Amendment wrote and not by the unenacted opinions that its members held. . . . [S]ex discrimination is precisely the kind of discrimination prohibited by the Fourteenth Amendment"¹³⁶

After unleashing the democratic, egalitarian principles of Section One of the Fourteenth Amendment, many Republicans sought to control how those principles applied in specific situations.¹³⁷ Bradwell's attorney, Matthew Hale Carpenter—a U.S. Senator, constitutional lawyer, and rising star in the Republican

¹³² See Smith, *supra* note 43, at 261 (stating that the Court's narrow interpretations of the Fourteenth Amendment "prevailed only by working in alliance with republican concerns for states' rights").

¹³³ *Id.* (stating that decisionmakers preferred arguments that "permitted them simply to defer to the states, instead of explicitly endorsing hierarchical views," enabling them to "evade, rather than directly oppose, the liberal claims of basic human rights that the 'free labor' ideology of the amendments clearly advanced").

¹³⁴ See Calabresi & Rickert, *supra* note 78, at 3 ("[I]t does not follow that the original meaning of a clause or text is defined by the Framers' original expected applications."); see also CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. VI: RECONSTRUCTION AND REUNION, 1864–88, PART ONE 1301 (1971) ("[T]he particular application with which a general provision was identified at the outset should not so limit its future operation as to produce a public inconvenience—notably when this would deny that perfect equality of rights among citizens which the Constitution contemplates.").

¹³⁵ See Calabresi & Rickert, *supra* note 78, at 48 ("The Fourteenth Amendment's creators knew well that their Amendment, once adopted, could be applied in ways contrary to their expectations . . .").

¹³⁶ *Id.* at 9, 14.

¹³⁷ See FAIRMAN, *supra* note 134, at 281–85 (providing a letter written by Justice Miller to a relative in Texas that describes Republican efforts to control the scope of the Fourteenth Amendment); see also Smith, *supra* note 43, at 262 (observing that the Court "deferred to the state's republican powers of self-governance, in order to appear to confer equal citizenship nationally while acquiescing in the creation of second-class citizens by the states").

Party—was among them.¹³⁸ Disturbingly, Carpenter who argued for a broad understanding of the Fourteenth Amendment in *Bradwell* had also been engaged by the state of Louisiana to argue for a narrow understanding of the Fourteenth Amendment in *Slaughter-House*.¹³⁹ Whether it was despite or because of this obvious conflict, Carpenter also imposed limits on his broad argument for Fourteenth Amendment protections in *Bradwell*.¹⁴⁰ He told the Court that granting women like Bradwell the right under the Fourteenth Amendment to pursue a chosen vocation did not necessarily entail granting them the right to suffrage.¹⁴¹

Carpenter's actions, manifesting an intolerable ethical conflict under current professional standards,¹⁴² may represent the Republican Party's determined efforts in the late nineteenth century to navigate volatile postwar politics and the meaning of the Fourteenth Amendment in ways perceived to best advance Republicans' political standing and control.¹⁴³ The patriarchal imagery of privileged men making self-serving choices purporting to protect women's interests presents an ironic backdrop to the substance of the gender equality arguments raised in Bradwell's case.¹⁴⁴ It is unclear whether Carpenter consulted Bradwell and obtained her consent to his assuming a conflicted legal stance and drawing lines within his Fourteenth Amendment argument in *Bradwell*.¹⁴⁵ Suffragists were angered by Carpenter's manipulation of Bradwell's New Departure claims to undermine the women's suffrage position.¹⁴⁶

¹³⁸ See Gilliam, *supra* note 60, at 116 (“Forty-five years old, eight years at the Supreme Court Bar, and a freshman Senator, Carpenter was one of the more famous American attorneys of that time. . . . He was an acknowledged authority on constitutional issues . . .”).

¹³⁹ *Id.* at 118 (“While his theme in Bradwell’s case was the broad language of the amendment, Carpenter’s argument on behalf of the monopoly slaughterhouse must have stressed the unintended ‘startling consequences’ of an expansive reading of the amendment’s language.”).

¹⁴⁰ *Id.* at 120 (noting that Carpenter saw the language of the Reconstruction Amendments as distinguishing the right to vote from privileges and immunities).

¹⁴¹ *Id.* (“[Carpenter] emphatically disassociated Bradwell’s quest for admission to the bar from the campaign for women’s suffrage . . .”).

¹⁴² See CHUSED & WILLIAMS, *supra* note 30, at 865 (“[L]awyers today could not simultaneously represent clients with such obviously opposing interests in the same court at the same time.”).

¹⁴³ See DuBois, *supra* note 46, at 39 n.47 (arguing that Carpenter’s arguments in *Slaughter-House* and *Bradwell*, including his argument to exclude suffrage from the privileges and immunities of citizenship, while appearing to be inconsistent, were actually consistent to the extent of “Carpenter’s determination, on behalf of the Republican leadership, to control and limit the breadth of the Fourteenth Amendment”).

¹⁴⁴ See Gilliam, *supra* note 60, at 131 (“[We cannot] know the effect of Carpenter’s conflicting stances on the Court’s decision.”).

¹⁴⁵ In December, 1871, Bradwell wrote to Carpenter asking about the progress of her case, and Carpenter replied with a sloppy note in mid-January indicating that the oral argument would be the next day—before she received his reply. See *id.* at 119 (“Evidently it was difficult for Bradwell to stay in touch with her attorney at such a long distance Apparently, Carpenter had made his plans without any counsel from his client. In any event, he sent her a copy of the brief only after it was submitted to the Court.”).

¹⁴⁶ See FRIEDMAN, *supra* note 14, at 22–23 (“Carpenter’s position in Bradwell’s case infuriated many suffragists, particularly Susan B. Anthony, who wrote indignantly to Myra: ‘Carpenter’s

At the same time, Carpenter's strategic judgment about the strongest posture for Bradwell's case—if made through a consultative process—was not wholly indefensible. In the nineteenth century, the argument that the privileges or immunities of citizenship encompassed the right to practice a vocation was stronger than the argument that they encompassed women's suffrage.¹⁴⁷ The right to enter contracts to receive the benefits of one's own labor had long been a principal understanding of what the privileges and immunities of citizenship meant.¹⁴⁸ The distinction that Carpenter was drawing was between civil and political rights, a common dichotomy of nineteenth century thought.¹⁴⁹ Having constitutionalized the Civil Rights Act of 1866 and applied it to all classes of Americans, the Fourteenth Amendment, even when construed narrowly, should have protected at least Bradwell's civil right to choose a trade and enter a profession.¹⁵⁰

Yet the political and legal connection between Bradwell's New Departure argument and the New Departure arguments of the women's suffrage movement likely impeded Bradwell's chances of success.¹⁵¹ In the 1870s, the atmosphere surrounding women suffrage was polarized and fractious.¹⁵² Even though nineteenth century jurists distinguished between civil and political rights, they knew that upholding constitutional protection of women's civil rights would lay helpful groundwork for a subsequent constitutional claim that the Fourteenth Amendment protected women's ultimate political right to exercise the franchise.¹⁵³ Unwilling to lend that incremental assistance, the Court deemed Bradwell's compelling civil rights argument to fall short.¹⁵⁴

argument was such a school boy pettifogging speech—wholly without a basic principle . . . ?”).

¹⁴⁷ See Calabresi & Rickert, *supra* note 78, at 11 (“The category of civil rights is broader and more inclusive than the category of political rights.”).

¹⁴⁸ *Id.* at 71–72 (asserting that the common-law rights incorporated into the Civil Rights Act of 1866, including the right to make contracts and hold property, were understood “by the Framers of the Fourteenth Amendment to shed light on the meaning of that Amendment’s Privileges or Immunities Clause”).

¹⁴⁹ *Id.* at 71 (“[I]n the nineteenth century, it was widely accepted that there was a difference between political and civil rights, including by members of Congress.”).

¹⁵⁰ *Id.* at 6–7 (“Any law that discriminates or abridges civil rights to set up a hereditary caste system violates the command of Section One of the Fourteenth Amendment.”).

¹⁵¹ See DuBois, *supra* note 46, at 30 (“Bradwell’s case was closely watched by suffragists as an indication of how much support to expect from the Republican Party.”); see also CHUSED & WILLIAMS, *supra* note 30, at 871 (“Bradwell’s attorney, Matthew Carpenter, spent a great deal of time in his argument before the Supreme Court trying to convince the Justices that her case was not a stalking horse for the suffrage movement.”); *id.* at 857 (“In many ways, [Bradwell’s] case encapsulated the history of the post-War suffrage movement.”).

¹⁵² See *supra* notes 80–105 and accompanying text; see also Basch, *supra* note 29, at 57 (“Although the prospect of woman suffrage still met with savage derision in the press, it was a viable reality.”).

¹⁵³ See DuBois, *supra* note 46, at 30 (reporting Elizabeth Cady Stanton’s view of the *Bradwell* case that “if women were covered along with men under the Fourteenth Amendment, wasn’t the fundamental point of equal rights won?”).

¹⁵⁴ See Calabresi & Rickert, *supra* note 78, at 60 (indicating that in *Bradwell*, the Court “managed to resist the Amendment’s full scope”).

Perversely, the wide scope of the Fourteenth Amendment's terms may constitute an important part of the reason that nineteenth century decisionmakers engaged in concerted—even if legally questionable—efforts to apply its inclusive vision stingily. Undoing the hierarchies of the past is especially difficult when all of those charged with the mechanisms of undoing must undo their own hierarchical positions in the process. Standing at the top rungs of the hierarchies of race and gender that were being challenged, it is no surprise that the feet of Reconstruction era decisionmakers turned cold once the accompanying claims of women and African-Americans revealed the extent to which true equality would reallocate social power.¹⁵⁵

Gender ideology, in particular, may have played a key role in turning decisionmakers' feet cold and undercutting the Fourteenth Amendment's promise. The activism of women who read the Fourteenth Amendment as making them fully autonomous political citizens startled those—like many of the judges and members of Congress—whose entire lives, public and private, were thoroughly structured around the nineteenth century's gender ideology of separate spheres.¹⁵⁶ The prospect of upheaval in the gender relations that organized their lives may have combined with other concerns to lead decisionmakers away from a robust understanding of the universal language of the Fourteenth Amendment.¹⁵⁷

Justice Bradley's infamous concurring opinion in *Bradwell*, joined by Justices Field and Swayne, supports this understanding.¹⁵⁸ Bradley, Field, and Swayne had been proponents of a capacious reading of the Privileges or Immunities Clause in *Slaughter-House* but could not sustain their broad reading in *Bradwell*.¹⁵⁹ An explanation of this inconsistency lies in a commitment to status quo gender relations, even though these three Justices—unlike the majority of

¹⁵⁵ See BAER, *supra* note 28, at 111 (describing the “incredulous tone” of the privileges and immunities decisions, which implied that “surely the authors of the Fourteenth Amendment could not have intended to change the world quite this much. The Court did not entertain the possibility that drastic fundamental change was just what the authors had intended.”).

¹⁵⁶ See CHUSED & WILLIAMS, *supra* note 30, at 893–94 (observing that “longstanding opposition to suffrage . . . tapped into a powerful strain of antagonism in late nineteenth century America to the demand by public feminists that women be treated as individuals fully equal to men”).

¹⁵⁷ See DuBois, *supra* note 46, at 30 (reporting Victoria Woodhull's concern that “women might be admitted to the benefits of the postwar amendments only to find those amendments so narrowed that they bestowed virtually nothing”).

¹⁵⁸ See *Bradwell v. Illinois*, 83 U.S. 130, 139–42 (1872) (Bradley, J., concurring) (asserting that the right to a vocation is not one of the privileges or immunities of women's citizenship, because “nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman”).

¹⁵⁹ See Gilliam, *supra* note 60, at 126 (“In a concurring opinion, joined by Justices Swayne and Field, Justice Bradley set forth his own reasons why the Illinois judgment should not be disturbed. . . . Men and women moved in different spheres due to the natural differences in their respective abilities.”).

the Court—expressed a willingness to use the Fourteenth Amendment, as intended, to strike down discriminatory state practices and alter the status quo in American race relations in states across the country.¹⁶⁰

The intellectual challenge of maintaining law’s resistance to equality for women and African-Americans multiplied significantly after the Civil War, once equality became constitutionally required by the Fourteenth Amendment.¹⁶¹ But a judiciary composed entirely of privileged white men did what it could to rise to that difficult challenge.¹⁶² They sustained their resistance for decade upon decade.¹⁶³

The reasons to have waited until the mid-to-late twentieth century to outlaw Jim Crow and Jane Crow are not found in law but perhaps in fear—fear of the implications of unsettling status quo hierarchies by those who most benefitted from them. White men in black robes grasped at arguments—many of them fairly meager—that left white women and African-Americans subject to virulent discrimination of many kinds.¹⁶⁴ Indeed, the twentieth century’s civil rights’ movements were organized in significant part around concerns that courts had spent decades taking away from African-Americans, women, and other subordinated people the entitlements and protections that the Fourteenth Amendment had given.¹⁶⁵ The Civil Rights movements of the mid-to-late twentieth century ultimately generated a second Reconstruction, at least in formal law, moving the

¹⁶⁰ See *Slaughter-House Cases*, 83 U.S. 36, 83–130 (1872) (Field, J., dissenting) (stating that the drafters and ratifiers of the Fourteenth Amendment intended that the Privileges or Immunities Clause protect the fundamental rights of citizens, including the right to lawful employment, from deprivation by the states).

¹⁶¹ See Calabresi & Rickert, *supra* note 78, at 16 (“Any person reading these clauses [of the Fourteenth Amendment] for the first time would immediately conclude that they mandate, in some sense, ‘equality before the law.’”).

¹⁶² See Hernández-Truyol, *supra* note 5, at 41 (reporting that when Jimmy Carter became President in 1977, “there were only eight women on the federal bench, with only one out of ninety-seven on federal courts of appeal, making women less than 1 percent of the total federal judiciary”).

¹⁶³ See BAER, *supra* note 28, at 283 (“Over the years, those [lavish Fourteenth Amendment] guarantees have shrunk, as Congress has rarely enforced them and the courts have timidly construed them.”).

¹⁶⁴ *Id.* at 105 (“The [Fourteenth Amendment’s] lavish grant of liberty and equality was narrowed into a guarantee of a few rights that were not, in fact, protected . . .”).

¹⁶⁵ *Id.* at 111–12 (arguing that due to narrow court decisions that “prevailed as law, though increasingly shaky law, until 1954. . . the United States remained a society of racism [and sexism] under law, almost as if the Civil War amendments had never been passed”).

country from *Bradwell v. Illinois*¹⁶⁶ to *Reed v. Reed*¹⁶⁷ and from *Plessy v. Ferguson*¹⁶⁸ to *Brown v. Board of Education*.¹⁶⁹ While these were welcome legal developments, the second Reconstruction, like its nineteenth century counterpart, has shown considerable vulnerability.¹⁷⁰

III. LEARNING FROM LOSS

A. *Radical Inclusion*

How should contemporary feminist thought take account of the interconnections between the anti-subordination movements of women and African-Americans and the legal theories they espoused? What lessons emerge from the equality struggles and defeats of the nineteenth century?¹⁷¹ What do these struggles and outcomes teach us about the prospects and mechanisms for challenging subordination?

While these questions cannot yield straightforward answers, I start with a suggestion that the overlap in the history of the struggles for race and gender justice lends support to a radically inclusive feminist theory.¹⁷² As a correlate, the overlap suggests that feminist principles, while speaking directly to structures

¹⁶⁶ See *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1872) (holding that a state’s denial of a woman’s right to a vocation does not violate her privileges or immunities of citizenship under the Fourteenth Amendment).

¹⁶⁷ See *Reed v. Reed*, 404 U.S. 71, 75–77 (1971) (holding that a state statute automatically preferring men over women as estate administrators is an arbitrary legislative classification that violates the Fourteenth Amendment’s Equal Protection Clause).

¹⁶⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding under the Fourteenth Amendment racial segregation in railway transportation).

¹⁶⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that school segregation imposed by the dominant group on racial minorities violates the Fourteenth Amendment).

¹⁷⁰ See MANNING MARABLE, *RACE, REFORM, AND REBELLION* vii–viii (2007) (comparing the civil rights and black power movements of the 1950s and 1960s to Reconstruction, and highlighting the historical events in each era that led to the “continuous reality of black stigmatization, exclusion, and marginalization” that has “revers[ed] blacks’ hopes for a more inclusive, democratic, racially just society”); see also BAER, *supra* note 28, at 106 (countering those who suggest that “if the Court initially narrowed the Fourteenth Amendment, since 1954 it has enlarged it beyond recognition” by observing that the Court’s Fourteenth Amendment interpretations remain “stingy and niggling”).

¹⁷¹ See CHUSED & WILLIAMS, *supra* note 30, at 845 (“Ignoring what is painful in woman suffrage history diminishes the capacity to build on its strengths by learning from past mistakes.”).

¹⁷² See Basch, *supra* note 29, at 52 (“[I]n the thoughts and actions of reformers, the constitutional avenues for ameliorating sexism and racism have run along closely related lines, and perhaps nowhere more so than in the post-Civil War era.”); Calabresi & Rickert, *supra* note 78, at 53 (observing that while “[i]t would be an exaggeration to suggest that the position of white women and slaves” was nearly the same, “[t]he point is that both groups had their options in life curtailed by law, making their abilities, merits, and desires irrelevant, and leaving them to some degree at the mercy of the [white] men who benefited from their unpaid labor”).

of gender, cannot be confined within gender borders.¹⁷³ In fairness, this is not the only reading of the nineteenth century struggles recounted here, as historical events like these contain multiple contradictory meanings. Nonetheless, it is possible to identify in the history of the nineteenth century's struggles for equality the seeds of an intersectional feminism centered on women's multidimensional identities and challenges to subordination in all its forms.¹⁷⁴

Contrary arguments are supportable as well. For example, although the overlap between the nineteenth century racial justice and gender justice movements was considerable, there were times when historical events drove them apart.¹⁷⁵ In particular, fissures developed between the gender justice and racial justice movements when African-American men were enfranchised during Reconstruction and women were not, disrupting the solidarity that had prevailed through wartime.¹⁷⁶ One unfortunate result is that some suffragists opposed the Fourteenth and Fifteenth Amendments for supporting the enfranchisement of African-American men but not women of any race or class.¹⁷⁷ This opposition severed the women's rights movement, with a faction of suffragists supporting the passage of the Fourteenth and Fifteenth Amendments (in particular, those affiliated with the American Woman Suffrage Association) and another faction opposing it (in particular, those—like Elizabeth Cady Stanton and Susan B. Anthony—affiliated with the National Woman Suffrage Association).¹⁷⁸ The accompanying arguments about Reconstruction constitutionalism made by some women's rights activists contributed to a perception that the women's movement was concerned primarily with the lives of privileged white women.¹⁷⁹

¹⁷³ See Smith, *supra* note 43, at 255 (“The antebellum era . . . witness[ed] the rise of a staunchly egalitarian and liberal women’s movement, triggered by the abolitionist crusade and its revitalization of the ideals of the Declaration of Independence.”).

¹⁷⁴ See Stanchi, Berger, & Crawford, *supra* note 3, at 21 (“Beyond the recognition of multiple forms of oppression, intersectionality provides a theoretical framework through which the law can recognize and remedy those multiple oppressions instead of forcing a case into one distilled category of discrimination.”).

¹⁷⁵ See Basch, *supra* note 29, at 53 (“It was to these flexible, indeterminate promises [of the Fourteenth Amendment] that the radical wing of the women’s movement committed itself, even as it contested the ratification of the amendment, jettisoning its old abolitionist ties and setting the campaigns against sexism and racism at odds with each other.”).

¹⁷⁶ See Smith, *supra* note 43, at 257 (“[A]bolitionism and women’s rights diverged because many women refused to subordinate their claims to those of the freedmen, a subordination evident in the failure of the postwar amendments to address female concerns explicitly.”).

¹⁷⁷ See DuBois, *supra* note 46, at 20 (“Most histories of women’s rights . . . have emphasized the initial rage of women’s rights leaders at the Radical Republican authors of the Fourteenth and Fifteenth amendments,” first for including the word “male” in Section Two of the Fourteenth Amendment “defin[ing] the basis of congressional representation” and then for excluding sex from the “prohibited disfranchisements” of the Fifteenth Amendment).

¹⁷⁸ See Smith, *supra* note 43, at 257–58 (describing the split between the National and the American Associations of Woman Suffrage); see also CHUSED & WILLIAMS, *supra* note 30, at 830–45 (same).

¹⁷⁹ See GIDDINGS, *supra* note 31, at 66 (detailing the racist rhetoric in *The Revolution*, the newspaper of Stanton and Anthony, when discussing issues of women’s suffrage during the postwar period).

To my mind, these contrary interpretations do not undermine the fundamental insight that anti-subordination movements are interdependent and that anti-subordination arguments necessarily cross boundaries from particular socially defined categories into others. Understandably, suffragists who had fought for years for women's right to vote were disappointed that the Reconstruction Amendments did not address women's enfranchisement in so many words.¹⁸⁰ But surely the needs for federal protection of freed slaves, male and female, who were already experiencing brutal discrimination in the Confederate states and beyond, were acute.¹⁸¹ Opposing these protections because they were incomplete seemed, at the very least, insensitive to a profound and substantial issue of justice as well as self-undermining of the related anti-subordination arguments that women continued to need to promote.

Given this interdependence, the opposition of some women activists to the Reconstruction Amendments produced unintended negative consequences.¹⁸² Not only did it split and thereby weaken the women's suffrage movement, it generated an uncomfortable posture for those who had opposed the Fourteenth and Fifteenth Amendments for failing to enfranchise women in explicit terms when they later found themselves arguing—with ample justification—that Section One of the Fourteenth Amendment had enfranchised them nonetheless.¹⁸³ Supporting from the outset any available anti-subordination tools—as some of the suffragists did—served to promote solidarity across anti-subordination movements, generate intersectional understandings, and strengthen the theory and practice of equality writ large.¹⁸⁴

¹⁸⁰ See CHUSED & WILLIAMS, *supra* note 30, at 811 (describing the outrage of women suffragists that Section Two of the Fourteenth Amendment “enshrined male voting privileges in the Constitution for the first time”).

¹⁸¹ At an 1869 suffrage convention, Frederick Douglass powerfully expressed this view:
When women, because they are women, are hunted down through the cities of New York and New Orleans, when they are dragged from their houses and hung upon lamp posts . . . when they are objects of insult and outrage at every turn; when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have an urgency to obtain the ballot equal to our own.

GIDDINGS, *supra* note 31, at 67 (quoting 2 HISTORY OF WOMAN SUFFRAGE 382 (Elizabeth Cady Stanton et al. eds., 1887)).

¹⁸² See CHUSED & WILLIAMS, *supra* note 30, at 845 (“Mainstream suffragists in the American wing—the overwhelming majority—found the anti-Fifteenth Amendment campaign not only politically unwise, but morally repugnant.”).

¹⁸³ See DuBois, *supra* note 46, at 21 (“After the Fifteenth Amendment was finally ratified, the suffragists . . . shifted from the claim that the Reconstruction amendments excluded women and began to argue instead that they were broad enough to include women's rights along with those of the freedmen.”).

¹⁸⁴ See Andrea Moore Kerr, *White Women's Rights, Black Men's Wrongs, Free Love, Black-mail, and the Formation of the American Woman Suffrage Association*, in ONE WOMAN, ONE VOTE 61, 71 (Marjorie Spruill Wheeler ed., 1995) (quoting a letter from Lucy Stone expressing the concern that “[i]t is not true that our movement is opposed to the negro. But it will be very easy to make it so, to the mutual harm of both causes”).

Of course, political dynamics played a significant role in driving a wedge between the anti-subordination movements of the nineteenth century.¹⁸⁵ When decisionmakers recognized in the roomy language of the Fourteenth Amendment the civil and political rights of African-American men—at least at first and at least in principle—but refused the inclusion of women in that large constitutional vision, they disrupted the linkages that promoted easy solidarity between the two movements.¹⁸⁶ Time and again, decisionmakers refused to see women’s equality claims among the entitlements of all Americans, pushing the women’s movement away from their early intersectional arguments about the equality rights of all.¹⁸⁷

After numerous crushing blows, including *Bradwell*, women retreated from their intersectional equality claims under the Fourteenth Amendment and developed another species of argumentation.¹⁸⁸ They began asserting, for example, that women’s differences from men made them especially important contributors to political life.¹⁸⁹ Difference arguments, such as those that underlay the emergence of cultural feminism, gained more political traction and helped women achieve political equality through the Nineteenth Amendment, ratified at long last in 1920.¹⁹⁰

Necessity may well have played a role in inventing the politics of difference feminism.¹⁹¹ But it moved activists away from mid-to-late nineteenth century efforts to emphasize the similarities between women’s struggles for equality and

¹⁸⁵ CHUSED & WILLIAMS, *supra* note 30, at 834 (describing the anti-black Democratic Party’s pretense of supporting women’s suffrage in 1866, in an effort to split the suffrage movement on racial grounds).

¹⁸⁶ *Id.* at 811 (“The decision of most prominent male abolitionists in and out of Congress to support the Fourteenth Amendment outraged a number of women suffragists” because Section Two tied congressional representation to the number of male voters).

¹⁸⁷ See DuBois, *supra* note 46, at 19 (describing the value of the women suffrage movement’s initial universal arguments about equality in helping to “situate women’s emancipation in the larger context of humanity’s freedom”).

¹⁸⁸ See CHUSED & WILLIAMS, *supra* note 30, at 888 (“Given the religious, domestic violence, and morality issues inherent in the temperance movement, it was not surprising that the equality-based rhetoric of the abolitionist movement and segments of the post-Civil War suffrage movement ebbed away to be replaced by arguments about the special roles women could play in politics.”).

¹⁸⁹ *Id.* (describing “the growth of arguments for suffrage based on the higher moral standing of women in American society,” an argument that “men began to accept” as “a basis for extending suffrage”).

¹⁹⁰ For an historical analysis of the ratification of the Nineteenth Amendment and the conservatism of some of the arguments in support of it, see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

¹⁹¹ See DuBois, *supra* note 46, at 19 (“Here, in the post-Civil War years, we can see proponents of women’s rights as they move from universal to particularistic arguments, providing us with the Gilded Age equivalent of the shift from ‘equality’ to ‘difference’ in the feminism of our own time.”).

all struggles for equality.¹⁹² The nineteenth century's intersectional approach had focused on devising legal strategies to develop generous constitutional interpretations, aided by the new Fourteenth Amendment's equality provisions.¹⁹³ Because women's rights activists did not succeed in this endeavor in the first wave of feminism, the inverse became true.¹⁹⁴ A miserly approach to Fourteenth Amendment interpretation emerged from their litigation, with negative consequences for all who identified with any equality struggle.¹⁹⁵

Indeed, there were cascading consequences of *Bradwell*. If a desire to protect status quo power structures, including structures of gender, had provoked decisionmaking men to retreat from the apparent meaning of the privileges and immunities of citizenship protected by Section One of the Fourteenth Amendment, the retreat could not stop there.¹⁹⁶ Once the retreat had begun, a narrowed understanding of the Fourteenth Amendment adversely affected other Fourteenth Amendment claimants.¹⁹⁷ Unfortunately, African-Americans suffered profoundly from the justice system's constitutional retreat, as an enfeebled Fourteenth Amendment was not a sufficiently powerful basis for the federal protection that they desperately needed from the discriminatory commitments of the former Confederate states.¹⁹⁸

B. Strategic Choices

These events counsel caution about the limits of legal strategies.¹⁹⁹ Yet, while it would have been foolhardy for subordinated groups to place their fate

¹⁹² See Smith, *supra* note 43, at 264 (“Egalitarian views did not completely disappear from the woman’s movement, but they became less prominent.”).

¹⁹³ See DuBois, *supra* note 46, at 27 (“[D]ebate over the feminists’ particular constitutional arguments was inseparable from questions of the larger meaning of the Reconstruction amendments.”).

¹⁹⁴ *Id.* at 34 (“With the defeat of the New Departure, winning the vote for women was no longer tied to an overall democratic interpretation of the Constitution.”).

¹⁹⁵ *Id.* at 29 (“[D]enying women the rights they claimed under general provisions weakened those provisions in general.”).

¹⁹⁶ See Smith, *supra* note 43, at 231 (noting the dynamics that led to legal decisions which “buttressed the social composition and hierarchies preferred by more established citizens—denials of citizenship, or conferral of second-class citizenship, on women and minorities in ways that liberalism should logically have opposed”).

¹⁹⁷ See DuBois, *supra* note 46, at 32 (“There is a link between the judicial dismissal of the feminists’ New Departure and the larger repudiation of the postwar amendments.”).

¹⁹⁸ See *id.* at 33 (“The rejection of woman suffrage arguments on the grounds that the Fifteenth Amendment was only intended to forbid disenfranchisement by race paved the way for a reading of the Fifteenth Amendment that was so narrow it did not even protect the freedmen themselves.”).

¹⁹⁹ The indeterminacy of legal doctrine allows it to be interpreted progressively or regressively, such that legal reform is limited in its capacity to undermine subordination. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988) (“The civil rights community . . . must come to terms with the fact that antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality. . . .

entirely into the hands of legal decisionmakers who were drawn exclusively from dominant groups disinclined to identify and recognize their justice claims, it would also have been foolhardy to abandon legal avenues, especially in the climate of profound political and legal transformation that followed the Civil War.²⁰⁰ One critical meaning of subordination is that the disempowered are generally addressing their appeals to those who, unlike them, are empowered to decide.²⁰¹ As fraught and challenging as legal strategies may be in this context, subordination restricts the available tools.²⁰² Moreover, as described above, the women's suffrage movement was active on multiple fronts using multiple tools, such as campaigning for mainstream candidates, testifying to Congress, and engaging in direct action voting and other forms of civil disobedience.²⁰³ Their legal arguments were part and parcel of a larger political movement.

During Reconstruction, their legal arguments were potent enough to take center stage. Section One of the Fourteenth Amendment, speaking in expansive terms to the rights of equality, actually could have embraced women's rights far earlier if only the political landscape had been somewhat more favorable.²⁰⁴ If Lincoln had remained alive, if Victoria Woodhull had not been as vulnerable to political attack, if Reconstruction and its legal underpinnings could have survived for a longer period—if only, if only—the fundamentally solid legal arguments of the late nineteenth century women's movement might have prevailed.²⁰⁵

In the tumultuous political dynamics of post-Civil War America, those who were treated unequally and asserted claims to equality needed a broad reading of the Fourteenth Amendment.²⁰⁶ In this regard, efforts to secure autonomy and

[T]he victories [antidiscrimination law] offers can be ephemeral and the risks of engagement substantial.”)

²⁰⁰ *Id.* at 1366 (“[E]ngaging in rights rhetoric can be an attempt to turn society’s ‘institutional logic’ against itself—to redeem some of the rhetorical promises and the self-congratulations that seem to thrive in American political discourse.”).

²⁰¹ *Id.* at 1358–59, 1365 (“It matters little whether the coerced group rejects the dominant ideology and . . . offer[s] a competing conception of the world; if they have been labeled ‘other’ by the dominant ideology, they are not heard. . . . The underlying problem . . . [is] how to extract from others [what] others are not predisposed to give.”).

²⁰² *Id.* at 1385 (noting “the limited range of options . . . [for those] deemed ‘other,’ and the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms”).

²⁰³ See DuBois, *supra* note 46, at 20–23 (“[T]his episode in women’s rights . . . treats rights . . . as something to be won and exercised collectively rather than individually; as the object of political struggle as much as of judicial resolution . . . Reconstruction was an age of popular constitutionalism. . . . The New Departure took on meaning precisely because of this direct action element.”).

²⁰⁴ *Id.* at 27 (“[S]ome of the leaders of the Republican party supported women’s rights claims on the Constitution.”).

²⁰⁵ *Id.* at 34 (“The deepest mark of the New Departure . . . was to make women’s rights and political equality indelibly constitutional issues.”).

²⁰⁶ *Id.* at 21–22 (observing that the suffragists’ constitutional strategy “embodied a radical democratic vision”).

freedom for women were inextricable from efforts to secure autonomy and freedom for African-Americans.²⁰⁷ Together these movements would rise or fall. For generations, they mostly fell.²⁰⁸ Awareness of their legal linkages and of the similarity in the powers arrayed against them could have driven the anti-subordination movements into coalition.²⁰⁹ While for a variety of reasons this did not always occur, the substantive and strategic reasons to build coalitions were discernable then—as, I would suggest, they are discernable now.²¹⁰

When women’s rights activists in the nineteenth century deployed America’s constitutional discourse to challenge the structural inequalities that limited women’s autonomy and women’s freedom, they drew on the emancipation arguments of African-Americans freed from slavery.²¹¹ Periodically, they showed cognizance of the reality that the category “woman” included many who were multiply oppressed by race, class, national origin, and other socially defined categories, glimpsing the connections between, and the complexity of, parallel liberation struggles.²¹² Sometimes they also showed cognizance of the reality that insistence on equality, an important aspect of the women’s movement, was a generalizable principle.²¹³ Autonomy, equality, freedom—even when framed legalistically as the rights of citizenship—belonged to all human beings, placing

²⁰⁷ *Id.* at 22 (articulating the suffragists’ view that “[i]n the battle for the rights of the black man, the rights of all had been secured”).

²⁰⁸ *Id.* at 30–31 (noting Victoria Woodhull’s observation in the early 1870s that “Republicans, ‘frightened by the grandeur and the extent’ of the amendments they had enacted, had retreated to the enemies’ doctrine of states’ rights, where their own greatest achievements would ultimately be undone”).

²⁰⁹ See BAER, *supra* note 28, at 25, 90 (stating that joined by “the ease with which dominant groups can exploit them,” the equality movements for African-Americans and for women both advanced Fourteenth Amendment arguments, because “[t]he language of Section I, on its face, was broad enough to protect women as well as racial minorities”); see also Smith, *supra* note 43, at 240–41 (“[P]atriarchy’s appeal is in large measure the same as the appeal of racial and ethnic forms of civic inequality: all these hierarchies preserve a community order and identity that the dominant white male citizens find more comfortable, particularly in times of change and stress, than . . . egalitarianism.”).

²¹⁰ See CHUSED & WILLIAMS, *supra* note 30, at 845 (“Consensus building, the choice of rhetoric, decisions about which issues to include or exclude, and other strategic questions are as problematic to feminists today as those that confronted our foremothers.”); see also Smith, *supra* note 43, at 264 (describing developments that undermined the suffrage movement’s alliances with working women, immigrants, and blacks).

²¹¹ See BAER, *supra* note 28, at 71, 73 (presenting historical evidence that “[t]he anti-slavery theory of equality, derived from the Declaration and its belief that all were equally entitled to rights,” was “enacted” into the Fourteenth Amendment).

²¹² See DuBois, *supra* note 46, at 26–27 (reporting Victoria Woodhull’s argument that the disenfranchisement prohibited by the Fifteenth Amendment implicitly included women, because “a race comprises all the people, male and female”).

²¹³ *Id.* at 22 (explaining the “radical reconstructionist” argument made by the women’s suffrage movement that “[t]he war had expanded the rights of ‘proud white man’ to all those who had historically been deprived of them,” such that “the benefits of national citizenship were equally the rights of all”).

the struggle for women's rights under the spacious umbrella of other important struggles for equality.²¹⁴

The universal discourse of citizenship adopted in feminism's first wave linked women's nascent autonomy claims to the autonomy claims of other subordinated groups who were challenging the unjust hierarchies embedded in nineteenth century American society. Coalitional needs and prospects, though only partially realized, emerge from the dynamics of nineteenth century activism. In a meaningful sense, this context breaks ground for the "intersectionality" and "anti-essentialism" analyses that were yet to be framed.²¹⁵

Hierarchy excludes many, and anti-subordinationists, feminists among them, are joined in the fight to reconstruct social structures—including the legal system—to more fairly and equally allocate material and social power.²¹⁶ Although the Privileges or Immunities Clause was hollowed out by nineteenth century judges, its anti-subordination language remains part of our constitutional inheritance.²¹⁷ This inheritance poses a nagging question for equality movements not only about what might have been, but also—given the right confluence of legal strategy and jurisprudential will—what might still be.²¹⁸

²¹⁴ See Hernández-Truyol, *supra* note 5, at 51 ("Feminist judging liberates . . . all sexes, from the intertwined subordinations of gender, sex, sexuality, race, ethnicity, class, religion, nationality, language, culture, and ability. Feminist judging embraces all people as fully human and deserving of real equality.").

²¹⁵ See Stanchi, Berger & Crawford, *supra* note 3, at 21 (asserting that intersectionality and anti-essentialism are recurring feminist themes).

²¹⁶ This result would fulfill the wishes of those like Chase Going Woodhouse, an early twentieth century feminist, who used to say that she hoped her tombstone could be inscribed with the words: "Born a woman. Died a person." See COTT, *supra* note 19, at 238 (describing the desire among early feminists to leave subordination behind and to "break into the human race").

²¹⁷ See Kurland, *supra* note 126, at 420 ("[T]here the clause is, an empty and unused vessel which affords the Court full opportunity to determine its contents . . .").

²¹⁸ See *id.* at 419–20 (arguing that the contents of the Privileges or Immunities Clause are capable of revival, providing more substantive protections of adequate opportunities for all Americans than do the concepts of due process and equal protection).