

# Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA

## 2005-06 Brennan Center Symposium Lecture

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### INTRODUCTION

Social movements change the ways Americans understand the Constitution. Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution’s rights guarantees. To show how constitutional culture channels social movement conflict to produce enforceable constitutional understandings, I consider how equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment’s defeat.

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<sup>†</sup> Nicholas deB. Katzenbach Professor of Law and Professor of American Studies. It was a great joy to give this lecture first at Boalt Hall, where I started teaching, and then at Yale, where I studied and now teach, in a classroom filled with my friends, teachers, students, and family, including my brother Fred, who brought my sister Laura, mother Eve, and his wife Jane and son Yale, to hear me speak. The occasion was shining and whole, and continues to light this lecture, even as his great struggle for life marked its writing. I am grateful to my friends Bruce Ackerman, Larry Kramer, Martha Minow, and Robin West for their comments on this lecture—a rich moment in a long-running conversation from which I am always learning—as well as to Robert Post and Jack Balkin, with whom I write on these questions. I was also fortunate to discuss the manuscript with Jorge Contesse, Barry Friedman, Michael Graetz, Ariel Lavinbuk, Ron Levy, Jane Mansbridge, Judith Resnik, and Steve Teles, as well as participants in workshops at Harvard, N.Y.U., University of Pennsylvania, and University of Toronto law schools. I owe thanks to Caitlin Casey, Ron Levy, David Tannenbaum, and especially Nels Ylitalo for research assistance. Finally, I would like to thank the students of the California Law Review for their hard work in publishing this piece, and their kind understanding.

For the first century of the Fourteenth Amendment's life, no court interpreted the Constitution to prohibit state action favoring men over women.<sup>1</sup> In the 1970s, a mobilized feminist movement persuaded Congress to send an Equal Rights Amendment to the states for ratification. With energetic countermobilization, the ERA was defeated. In this same period, the Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment's proponents—so much so that scholars have begun to refer to the resulting body of equal protection case law as a “de facto ERA.”<sup>2</sup> When President Reagan proposed a nominee to the Supreme Court who argued that the original understanding of the Fourteenth Amendment allowed government to discriminate between the sexes, the Senate rejected his nomination. Instead of viewing Fourteenth Amendment cases influenced by the ERA as an antidemocratic usurpation, the public viewed the authority of a nominee who questioned the sex discrimination case law as suspect.<sup>3</sup> Debate over whether to amend the Constitution changed the meaning of the Constitution—in the process forging modern understandings of discrimination “on account of sex.”<sup>4</sup>

The ERA was not ratified, but the amendment's proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination. Yet constitutional law lacks tools to explain constitutional change of this kind. No act of lawmaking produced the sex discrimination cases; and if the cases can be justified as legitimate judicial interpretations of eighteenth- and nineteenth-century constitutional text, it is only by repressing their roots in popular mobilization for and against an Article V amendment. Citizens regularly seek constitutional change through the arduous lawmaking procedures of Article V as well as outside of them, and officials charged with enforcing the Constitution often act in response to their claims; yet when these interactions do not conform to paradigms of lawmaking or adjudication, constitutional law discounts their role in constitutional change.

In this Lecture, I resist the dichotomy between lawmaking and interpretation, and focus instead on the field of constitutional culture to explore the formal and informal interactions between citizens<sup>5</sup> and officials that guide constitutional change. Such interactions include but are not limited to lawmaking and adjudication; confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches all

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1. See *infra* note 39.

2. See *infra* text accompanying notes 23-32.

3. See *infra* text accompanying notes 272-277.

4. Cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004) (reconstructing how social movement conflict shaped modern understandings of discrimination “on account of race”).

5. I use the term “citizen” to refer to persons living in a community governed by a constitution who are not government officials.

may provide occasion for citizen deliberation and mobilization and for official action in response to constitutional claims. The Lecture employs the term “constitutional culture” to refer to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning.<sup>6</sup>

The Lecture does not use the concept of constitutional culture as some in constitutional theory employ it: as social values relevant to matters of constitutional law that an official engaged in responsive interpretation incorporates into the fabric of constitutional law. Rather than focus on officials as change-agents, I employ the concept of constitutional culture to explore how changes in constitutional understanding emerge from the interaction of citizens and officials. In this usage, constitutional culture shapes both popular and professional claims about the Constitution and enables the forms of communication and deliberative engagement among citizens and officials that dynamically sustain the Constitution’s democratic authority in history.<sup>7</sup>

The Lecture analyzes constitutional culture as a field in which citizens and officials interact; some interactions are formalized, like the procedures

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6. In analyzing the way the Constitution’s meaning arises out of interactions among members of the polity and between members of the polity and government officials, this account of constitutional culture is indebted to Robert Cover’s account of jurisgenesis. Robert Cover first used the term “jurisgenesis” in *Nomos and Narrative* to describe the way that legal meaning is created in the normative universe, or “nomos,” of the polity; Cover emphasized that jurisgenesis did not require formal lawmaking. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11-19 (1982) (“[T]he creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium. Although the state is not necessarily the creator of legal meaning, the creative process is collective or social.”) (footnote omitted). As Martha Minow describes Cover’s vision:

Cover placed at the center of law the communal groups that would seem peripheral if the government’s own world view were the starting point. In so doing, Cover set in motion three captivating arguments: (1) government should be understood as one among many contestants for generating and implementing norms; (2) communities ignored or despised by those running the state actually craft and sustain norms with at least as much effect and worth as those espoused by the state; and (3) imposition of the state’s norms does violence to communities, a violence that may be justifiable but is not to be preferred a priori.

NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 2 (Martha Minow et al. eds., 1992). Cover’s work has proven enormously influential among legal scholars of popular constitutionalism. See Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959, 975 (2004). Jim Pope first employed the concept of jurisgenesis to describe the way social movements forge constitutional understandings. See James Gray Pope, *Labor’s Constitution Of Freedom*, 106 YALE L.J. 941, 954 (1997) (“Robert Cover’s concept of jurisgenesis, the creation of legal meaning, provides the foundation for a theory about the role of legal thought and practice in sustaining resistance, and thus for an ideal type of constitutional insurgency that proceeds from localities to the center.”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (contrasting a judge-centered, “Constitution-as-common-law” account of the rise of sex discrimination law with an account that includes the jurisgenerative efforts of the women’s movement).

7. Siegel, *supra* note 6, at 320 (“While the authority of the Constitution is sustained in part through practices of veneration and deference, it is also sustained through a very different kind of relationship, in which citizens know themselves as authorities, as authors of the law.”).

for amending the Constitution set forth in Article V, while others are not and require complex literacy about the forms of authority and argument that citizens and officials may employ in various institutional settings. For example, ERA proponents correctly anticipated that officials responsible for interpreting the Constitution might respond to the shifts in popular opinion that a campaign to amend the Constitution produced, even if, by formal measures, the People endorsed the status quo.<sup>8</sup>

These kinds of role-literacy are well recognized within constitutional law, but they are more likely to be understood as matters of practical judgment and professional craft than theorized as crucial to securing the Constitution's democratic authority.<sup>9</sup> There is reticence to analyze these pathways of responsiveness as providing goods we expect formal constitutional lawmaking to provide, because we see no ground to distinguish licit from illicit forms of constitutional change, in the absence of any procedure or metric for measuring democratic will.<sup>10</sup> Without such criteria, it is easier to conceive of such pressures as threats to the Constitution's democratic legitimacy than as sources of it. Thus, even as Americans regularly mobilize to shape the ways that officials enforce the Constitution's commitments, Americans are deeply ambivalent about acknowledging the influence of movements on constitutional meaning. At times, Americans see in constitutional mobilizations de Tocqueville's democratizing civic associations;<sup>11</sup> as often, they see the factions Madison feared.<sup>12</sup>

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8. See *infra* text accompanying notes 111-112 (reporting ERA advocates' expectation that the quest for an Article V amendment would and should influence adjudication of claims under the existing Constitution).

9. But cf. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970) ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.").

10. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

11. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 215-26 (Arthur Goldhammer trans., The Library of America 2004) (1835) ("There is nothing the human will despairs of achieving through the free action of the collective power of individuals. . . . When an opinion is represented by an association, it has to be expressed in a clearer, more precise form than would otherwise be the case. It calls upon supporters to stand up and be counted and enlists them in the cause. They learn about one another, and their ardor increases with their number. The association links the efforts of divergent minds and vigorously propels them toward a single goal, which it unambiguously designates.").

12. *THE FEDERALIST* No. 10, at 122-23 (James Madison) (Penguin Classics ed., 1987):

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. . . .

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

One can see the impress of this Federalist anxiety about the threat factions pose to constitutional governance in the work of Bruce Ackerman, whose work foregrounds constitutional mobilizations as a source of constitutional meaning. To answer Alexander Bickel's account of the "countermajoritarian

Acknowledging the pathways through which constitutional mobilizations influence constitutional meaning threatens the distinction between law and politics, creating uncertainty about the legitimacy of social movement influence that has in turn produced uneasy silence, internal to constitutional law, about the role of constitutional mobilizations in constitutional change.

This Lecture employs the framework of constitutional culture to analyze the ways mobilized citizens influence officials who enforce the Constitution. Constitutional culture mediates the relation of law and politics. The Lecture shows how constitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments—as well as resources to resist those proposals. Constitutional culture preserves and perpetually destabilizes the distinction between politics and law by providing citizens and officials the resources to question and to defend the legitimacy of government, institutions of civil society, and the Constitution itself.

Constitutional culture both licenses and limits change. It supplies citizens and officials understandings about authority and advocacy that empower them to act as effective change agents and to block, manage, and diffuse threats to the status quo. When constitutional culture can harness the energies of social conflict, agents of deeply agonistic views remain engaged in constitutional dispute, speaking through the Constitution rather than against it.

On the traditional account there is one avenue for mobilized citizens to pursue change within the constitutional order: through constitutional lawmaking. But we know that movements regularly succeed in changing the Constitution without amending it—the *de facto* ERA is by no means the only such case. Constitutional culture enables mobilized citizens to influence the officials who enforce the Constitution, through lawmaking and outside of it. Change through these informal pathways regularly occurs and, with equal regularity, elicits passionate protest, yet citizen confidence in the Constitution persists. This Lecture shows how constitutional culture enables proposals for change, as well as protest directed at officials who respond to these claims, giving rise to conflict that can discipline constitutional advocacy into understandings that officials can enforce and the public will recognize as the Constitution.

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difficulty,” Bruce Ackerman offers a democratic defense of judicial review that draws from *The Federalist* (esp. No. 78) a “dualist conception of political life” that sharply distinguishes between constitutional politics and ordinary politics. Only in occasional historical moments does the polity attain the forms of public-regarding consciousness and engage in acts of constitutional law making that warrant judicial deference; in normal politics, mobilized publics engage in narrow, factional, self-regarding politics that the judiciary can constrain in fidelity to the polity's prior acts of higher law making. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1022-23, 1030 (1984).

The account this Lecture offers is positive, not normative. The Lecture considers how movements can change the Constitution's meaning outside Article V—not whether they should. But it does reason from the presumption that a dynamic so persistent likely serves important system values, and offers some tentative suggestions about what they might be. Whether or not it eventuates in constitutional lawmaking, popular deliberation about constitutional questions guides officials in enforcing the Constitution and promotes citizen attachment to the Constitution. The Lecture explores the ways that constitutional culture creates community under conditions of ongoing conflict, suggesting that the constitutional order's openness to change may invite the engagement and inhibit the estrangement of a normatively divided polity, and so enable forms of solidarity that dispute resolution cannot. In a normatively divided polity, a system that permanently resolves the Constitution's meaning risks permanently estranging groups in ways that a system enabling a perpetual quest to shape constitutional meaning does not. Constitutional culture sustains the law/politics distinction dynamically, as the Constitution changes in history.

There is a growing literature in constitutional law on the role of social movements in constitutional change to which this Lecture contributes.<sup>13</sup>

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13. Recent work in constitutional theory that analyzes social movements and constitutional change includes Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 38 SUFFOLK L. REV. (forthcoming 2005) [hereinafter *Social Movements*]; Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, CARDOZO L. REV. (forthcoming 2005) [hereinafter *Plessy, Brown, and Grutter*]; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537 (2004) [hereinafter *What Brown Teaches Us*]; Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: the Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) [hereinafter *Channeling*]; William N. Eskridge, *Pluralism And Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005) [hereinafter *Pluralism and Distrust*]; William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) [hereinafter *Identity-Based Social Movements*]; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001) [hereinafter *Constitution in Exile*]; William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771 (1994); Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977 (2003); James Gray Pope, *Labor's Constitution Of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter *Labor's Constitution*]; James Gray Pope, *Republican Moments: the Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990) [hereinafter *Republican Moments*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter *Legislative Constitutionalism*]; Siegel, *supra* note 4; Reva B. Siegel, *She the People: the Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter *She the People*]; Reva B. Siegel, *"You've Come a Long Way, Baby": Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006) [hereinafter *"You've Come a Long Way, Baby"*]; Siegel, *supra* note 6; see also Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001) (reviewing social movement literature in sociology).

Perhaps most importantly, the Lecture analyzes how constitutional culture enables movements to negotiate the law/politics distinction and propose (or resist) alternative understandings of the constitutional tradition. It is through the understandings of role and practices of argument which constitutional culture supplies that citizens mobilized in constitutional politics can shape the development of constitutional law. The focus of my analysis is hermeneutic rather than institutional: I consider how constitutional culture enables interactions between citizens and officials that produce new constitutional meaning. A developed account of how constitutional culture channels movement advocacy requires institutional analysis more wide ranging than this Lecture can possibly address.

A second distinguishing feature of this account is its emphasis on the productive role of conflict in American constitutional culture. Because alternative understandings of the Constitution threaten forms of social life that familiar understandings support, new accounts of the Constitution's meaning often provoke resistance. Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution. Members of the American constitutional order intuitively grasp that conflict is an engine of constitutional change, but the social movements literature in constitutional law is only now beginning to analyze how movement conflict guides change.<sup>14</sup> This account presents the movement-counter movement dynamic as playing a crucial part in constitutional development. In so doing, it is in some tension with perspectives common in normative constitutional theory that emphasize the dangers of constitutional conflict.

Normative constitutional theory is quick to focus on the threats that constitutional conflict poses to government authority and social solidarity—and often speaks as if conflict is a risk to be avoided, managed, and repressed. But is it always beneficial to avert and suppress conflict? Are there system goods that constitutional conflict contributes? This Lecture approaches constitutional conflict as a normal feature of a democratic constitutional order. When constrained by constitutional culture, constitutional conflict can serve as a crucial engine in constitutional development, a force that can discipline and shape new claims of constitutional meaning into a form that officials can enforce and the public will respect. This is by no

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There is a large body of related work in popular constitutionalism. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); James E. Fleming, *Judicial Review Without Judicial Supremacy, Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377 (2005); Barry Friedman, *Mediated Popular Constitutionalism*, 101 *MICH. L. REV.* 2596 (2003); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 *GEO. L.J.* 897 (2005); Kramer, *supra* note 6.

14. Cf. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); Forbath, *Constitution in Exile*, *supra* note 13; Michael J. Klarman, *Brown and Lawrence (and Goodrich)*, 104 *MICH. L. REV.* 431 (2005); Siegel, *supra* note 4.

means an inevitability, but it is a crucial possibility, whose logic I explore through the medium of a case study of the de facto ERA.

Case studies analyze parts of a larger universe, and so the representativeness of the transactions they sample is always in question. But the dynamics case studies illuminate can alert us to relationships that have otherwise eluded attention, and so change the questions we ask in ensuing cases. By reconstructing the story of the de facto ERA, we can better understand the pathways through which movements can secure recognition of alternative constitutional understandings, and appreciate how social movement conflict hones these new understandings into a form that officials will enforce and the public will recognize as the Constitution.

Others have recounted the history of the ERA campaign,<sup>15</sup> analyzed the litigation strategies of the ACLU's Women's Rights Project,<sup>16</sup> and are now exploring the dual strategy by which the women's movement pursued constitutional change through simultaneous Article V and Article III initiatives.<sup>17</sup> The advocacy history of Phyllis Schlafly's STOP ERA organization is, by contrast, less well chronicled.<sup>18</sup> I draw on these historical accounts, and a variety of primary sources, to consider some of the less visible pathways through which constitutional culture channels social movement conflict so that it guides officials in determining the Constitution's meaning.

Examining how the ERA's proposal and defeat shaped the modern law of sex discrimination provides a rich demonstration of how American constitutional culture enables creative new claims about the Constitution's meaning, as well as how counter movements can discipline an insurgency's transformative claims on the Constitution so that proposed understandings ultimately assume a form in which they can be integrated into the tradition they challenge. The dynamic is recurrent. As movement and counter-movement struggle to persuade (or recruit) uncommitted members of the public, each movement is forced to take account of the other's arguments, and in time may even begin to incorporate aspects of the other's arguments into its own claims—a dynamic that can transpire unconsciously or with the quite conscious purpose of strengthening arguments under conditions

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15. *E.g.*, MARY FRANCES BERRY, *WHY ERA FAILED* (1986); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA* (1990); GILBERT YALE STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

16. *See* Jane Sherron De Hart, *Litigating Equality: Ruth Bader Ginsburg, Feminist Lawyers and the Court* (forthcoming).

17. Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004).

18. *See* DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE* (2005); CAROL FELSENTHAL, *THE SWEETHEART OF THE SILENT MAJORITY: THE BIOGRAPHY OF PHYLLIS SCHLAFLY* 244 (1981); TANYA MELICH, *THE REPUBLICAN WAR AGAINST WOMEN: AN INSIDER'S REPORT FROM BEHIND THE LINES* 47, 49 (1996). The organizational history of STOP ERA remains largely uncharted. *See infra* note 188.

of adversarial engagement. Bitter constitutional dispute can be hermeneutically constructive, and has little noticed socially integrative effects.

During the ERA campaign, hope of the amendment's ratification led the many in the women's movement to define sex discrimination narrowly in matters concerning reproduction and sexuality in order to respond to concerns raised by the traditional-family-values movement. At the same time, fear of the amendment's ratification led the many in the traditional-family-values movement to defend gender roles in egalitarian terms in order to address concerns raised by the women's movement. Adversaries honed their arguments to meet their opponent's most powerful claims, and the quest to persuade created areas of apparent or actual convergence in which the Court could decide cases. In this period, the Court began to prohibit, as discrimination subject to the equal citizenship principle, forms of sex-based regulation that, until the 1960s, it understood as rationally reflecting family roles. As it did so, the Court incorporated into equal protection law a restricted definition of discrimination "on account of sex," prohibiting sex-based state action in terms that were silent about the regulation of abortion, childbearing, rape, and same-sex relations. Understandings consolidated in the ERA debate guided the Court as it ruled that sex discrimination violated the equal citizenship principle *and* as it limited the kinds of practices that would be cognizable as sex discrimination.

Reading the sex discrimination cases in light of debates over ERA, abortion, and same-sex marriage that raged in the 1970s, we can better appreciate how a polity renegotiates status relations, and confront all manner of disturbing questions about the interaction of democracy and inequality in the formation of constitutional meaning. The history of the *de facto* ERA suggests some less visible ways in which law disestablishing a status order can become entangled in its reproduction and preservation.<sup>19</sup> As it does so, it illuminates limits on the sex-stereotyping concept that persist in modern equal protection law, yet are contested and starting to erode in recent litigation under state equal rights amendments. Recovering this lost history reveals hidden gender anxieties that continue to shape debates over abortion and same sex marriage today.

My argument unfolds in five parts. Part I introduces the puzzle of the *de facto* ERA. Part II considers what this puzzle might teach about the law/politics distinction. Partisan advocacy that changes the Constitution without amending it is often understood to threaten to the Constitution's democratic authority, yet the sex discrimination cases are widely accepted

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19. For an illustration of this dynamic with respect to discrimination on account of race, see Siegel, *Equality Talk*, *supra* note 4; Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms Of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997), and on gender, see Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

as constitutional law, despite their roots in a failed Article V amendment. This Part considers whether and how citizen efforts to change the Constitution without amending it might contribute to the Constitution's authority. It introduces constitutional culture as understandings about role and practices of argument that citizens and officials employ to negotiate the law/politics distinction as they seek constitutional change.

Part III considers how the understandings that constitutional culture supplies could sustain the Constitution's authority as the Constitution changes in history. It shows how the Constitution's democratic authority could be sustained dynamically, by abstracting beliefs about authority and advocacy into a set of constraints on argument—the consent condition and the public value condition—and demonstrating through historical example how the interaction of these constitutive beliefs has encouraged and channeled the constitutional-utopian claims of American social movements. It suggests how these same features of American constitutional culture encourage and constrain the organization of counter-movements seeking to defend the customary forms of life constitutional insurgencies challenge. By showing how the beliefs that underwrite constitutional insurgencies also support countermobilization in defense of the existing constitutional order, it suggests how American constitutional culture invites and disciplines social movement conflict that can hone new claims of constitutional meaning into enforceable constitutional understandings.

Part IV employs a case study of the de facto ERA to analyze how social movement conflict, channeled by constitutional culture, can guide officials in finding new meaning in the abstract language of the Constitution's rights guarantees. A postscript links the story of the de facto ERA to contemporary disputes over same-sex marriage. Part V concludes.

## I

### THE PUZZLE OF THE DE FACTO ERA

In the last several years, the Equal Rights Amendment has undergone a remarkable and little remarked upon transformation: scholars now commonly describe a failed constitutional amendment as a successful one. In the late 1980s, academics chronicled the ERA's demise in full length books with titles like *Why ERA Failed*<sup>20</sup> and *Why We Lost the ERA*.<sup>21</sup> During the 1990s, the Twenty-Seventh Amendment's belated ratification (some two centuries after it was first proposed) prompted debate about whether the ERA, too, might still be ratified.<sup>22</sup> But in the last several years,

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20. BERRY, *supra* note 15.

21. MANSBRIDGE, *supra* note 15. For other works chronicling the ERA's defeat, see MATHEWS & DE HART, *supra* note 15; STEINER, *supra* note 15.

22. In 1992, Michigan became the 38th state to ratify the Congressional Pay Amendment, initially proposed without a deadline, and submitted to the states for ratification with the Bill of Rights

talk about the ERA has taken a decidedly different cast. No longer do professors write lengthy books analyzing why the ERA failed. Instead, in the legal academy, at least, the talk is about why the ERA prevailed.

In 2001, in an article entitled "The Irrelevance of Constitutional Amendments," David Strauss claimed that the ERA is the "leading recent example of [the] . . . rejected, yet ultimately triumphant" constitutional amendment:

Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted. For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender. The Court requires an 'exceedingly persuasive' justification for gender classifications, and it invalidates gender classifications that rest on what it considers "'archaic and overbroad' generalization[s]," such as the view that women are less likely than men to work outside the home. The Court does treat gender-based classifications differently from race-based classifications—the latter being the paradigmatic form of discrimination forbidden by the Fourteenth Amendment—but it has justified the difference not on the ground that the ERA was rejected, but rather on the ground that the two forms of classification sometimes operate differently.<sup>23</sup>

As Michael Dorf puts it: "The social changes that did not quite produce the Equal Rights Amendment produced a de facto ERA in the Court's equal protection jurisprudence."<sup>24</sup> "As a result of dramatic post-1970s changes in judicial interpretation of the equal protection clause," Cass Sunstein observes, "the American constitution now has something very much like a constitutional ban on sex discrimination—not because of the original understanding of its text but because of new judicial interpretations."<sup>25</sup>

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in 1789. Upon Michigan's ratification, the amendment was added to the Constitution as the 27th Amendment, touching off debate about its validity given the inordinate period of time between its proposal and ratification. This episode, in turn, elicited debate about the continued viability of the ERA, whose extended deadline had run by 1982. For an argument endorsing the ERA's ongoing viability, see Alison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997). For an opposing view, see Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT. 593 (2000).

23. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001).

24. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002) ("Indeed, it is possible that the Court's jurisprudence itself played a causal role in the states' failure to ratify the ERA because, at the margin, state legislators who otherwise might have been in favor of ratification could have thought that the Amendment was unnecessary given the Court's willingness to accomplish the same ends via the Equal Protection Clause.").

25. CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS* 125-26 (2004).

At least one of the justices concurs. Shortly after the *Virginia Military Institute*<sup>26</sup> decision, Justice Ruth Bader Ginsburg observed: "There is no practical difference between what has evolved and the ERA."<sup>27</sup> Justice Ginsburg was generous in sharing credit with the Court for this result. "Haply a woman's voice may do some good."<sup>28</sup> Bill Eskridge is more direct: "The power of the women's movement was such that the Court felt impelled in the 1970s to rule unconstitutional most invidious sex discriminations. Because the women's movement did shift public norms to a relatively anti-discrimination baseline, it was able to do through the Equal Protection Clause virtually everything the ERA would have accomplished had it been ratified and added to the Constitution."<sup>29</sup>

In short, there seems to be an emergent understanding, in the legal academy at least, that the substance of the ERA has become constitutional law through Article III rather than Article V—by judges interpreting the text of the Constitution rather than by state legislatures amending the text of the Constitution. For many, the courts are engaged in business as usual, interpreting the Constitution on the model of the common law, in light of changes in societal values.<sup>30</sup> It is through "American culture" that Cass Sunstein explains how courts can interpret a constitution lacking a general sex equality guarantee as if it had one: "In fact America is more committed to equality on the basis of sex than are many countries that guarantee it in their constitutions."<sup>31</sup>

But this account only exacerbates the legitimacy puzzle that the growth of constitutional sex discrimination doctrine presents. Cultures are not homogenous or monolithic. The ERA was the site of raging constitutional controversy, and sex discrimination doctrine grew up in its midst. "At any given moment in time, American constitutional culture, like all culture, is typically etched with deep divisions," Robert Post reminds us, and courts interpreting the Constitution take positions with respect to those conflicts:

In deciding *Brown*, for example, the Court essentially was imposing the constitutional culture of the North upon that of the

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26. *United States v. Virginia*, 518 U.S. 515 (1996).

27. Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60.

28. Linda Greenhouse, *From the High Court, a Voice Quite Distinctly a Woman's*, N.Y. TIMES, May 26, 1999, at A1; see also Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 22 (2000) (discussing Justice Ginsburg's views).

29. Eskridge, *Channeling*, *supra* note 13, at 502.

30. See Strauss, *supra* note 23, at 1478 ("What 'ratified' the ERA, in effect, was the same kind of thing that 'ratified' the Child Labor Amendment: insistent pressure from society as a whole. In the case of the ERA, this took the form of the increasing presence of women in the workplace, in politics, and in other new roles."); see generally, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

31. SUNSTEIN, *supra* note 25.

South. In deciding *Frontiero* the Court was intervening into a controversy about the nature of gender that was so intense that (as we are now likely to forget) the proposed Equal Rights Amendment was actually defeated. To the extent that constitutional culture is divided, a Court seeking to safeguard the values of constitutional culture must decide which version of constitutional culture it will support. It must decide whether to side with the constitutional culture of the North or of the South; it must choose to support either those who promote or those who oppose traditional gender stereotypes.<sup>32</sup>

Did the Court take sides in the culture wars, and impose the constitutional culture of those who oppose traditional gender stereotypes on those who promote them? And if it did, why have its sex discrimination decisions not aroused more opposition? Even if the nation now looks to the Court to settle constitutional disputes, why would it accept judicial review that seems so directly to controvert democratic will expressed in a decade of Article V lawmaking? Is *this* judicial review as democratic dialogue?<sup>33</sup> Given passionate efforts to block the ERA in the 1970s, one could easily imagine critics denouncing the constitutional law of sex discrimination as an act of effrontery and usurpation.

But this has not transpired. To be sure, sex discrimination law has its critics.<sup>34</sup> But critics have not invoked the cases as a basis for mobilizing against the Court: The sex discrimination cases have not served in politics as a symbol of the Supreme Court's antidemocratic excesses, as so many other Warren and Burger Court decisions have. Indeed, in recent years, some of the cases' most vituperative critics on the bench, such as Chief Justice Rehnquist, have begun expansively to interpret the core commitments of sex discrimination law.<sup>35</sup> The core precepts of sex discrimination law are now canonical. Even with the increasingly conservative turn of American constitutional jurisprudence, it is hard to imagine the Senate confirming to the Court any nominee who questioned basic sex discrimination

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32. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 55-56 (2003).

33. Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

34. See, e.g., *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

35. Justice Rehnquist initially opposed granting heightened scrutiny to sex-based state action under the Fourteenth Amendment's Equal Protection Clause. See *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). He then worked to restrict the emerging body of doctrine and the scope of its application. See *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion). But in his later years on the bench, he began more cautiously to endorse sex equality precedents, see *United States v. Virginia*, 518 U.S. 515, 558 (1996) (Rehnquist, J., concurring), and recently authored an opinion that expansively construed the Fourteenth Amendment's prohibition on sex-based state action and Congress' power to rectify social practices rooted in longstanding breaches of the principle. See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); see generally Siegel, "You've Come A Long Way, Baby," *supra* note 13 (tracing the evolution of William Rehnquist's views about constitutional guarantees of gender equality, from his days in the Nixon Justice Department to his decision in *Hibbs*).

doctrine.<sup>36</sup> The cases are so firmly law that leading constitutional law scholars discuss Article III interpretation as *de facto* ratifying the failed Article V amendment—without any sense that they are calling into question the legitimacy of the cases they are discussing.

What tools does constitutional theory offer to account for this episode of constitutional change? Lawmaking models that depict constitutional change as the expression of democratic will cannot account for these deep shifts in constitutional understanding. There is no act of Article V lawmaking in which we can ground the sex discrimination cases—except the exercise of Article V lawmaking that resulted in the repudiation of the ERA. Nor is it easy to identify an alternative form of constitutional law making in which the sex discrimination cases might be grounded—for example, signaling and ratifying elections that changed the composition of the representative branches in ways that courts could be read as “amendment analogues”<sup>37</sup> or electoral successes enabling “partisan entrenchment”<sup>38</sup> through judicial appointments.

If we cannot explain the sex discrimination cases as reflecting an act of constitutional lawmaking, convention has it that the cases must reflect judicial interpretation of the existing Constitution’s text. Lawyers and lay people alike call the body of sex discrimination cases the Court decided in the 1970s “interpretation” of constitutional texts adopted in the eighteenth and nineteenth centuries. But this characterization has its own problems.

The first and most noticeable problem is that the sex discrimination cases contradict the reasoning of at least a century’s worth of Supreme Court cases that authoritatively interpreted the relevant constitutional text,<sup>39</sup>—and much more closely resemble jurisprudence associated with the amendment that was proposed to overturn these cases.

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36. The sex discrimination cases have been questioned throughout the decades and in some quarters still are. But Robert Bork’s hearings demonstrated that the criticism is not of a kind that resonates with the public. The Bork hearings demonstrated that it was politically infeasible for the Senate to confirm a nominee to the Court who suggested that the Constitution did not prohibit government from discriminating against women. *See infra* notes 272-277 and accompanying text.

37. *Cf.* 2 ACKERMAN, *supra* note 10, at 269-78.

38. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-83 (2001).

39. For the first hundred years of the Fourteenth Amendment’s life, no federal court read the Amendment to prohibit state action favoring men over women; government could bar women from voting or practicing law, exclude women from juries, and prohibit women from working in the same occupations with men, and, without exception, courts deemed the exclusions reasonable exercises of public power under the Fourteenth Amendment. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding the automatic exclusion of women from juries); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding prohibition on female bartenders); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding limitations on hours worked by women); *Minor v. Happersett*, 88 U.S. 162 (1874) (upholding the denial of women’s suffrage); *Bradwell v. State of Illinois*, 83 U.S. 130 (1872) (upholding the exclusion of women from the practice of law).

The solution for this problem introduces another set of difficulties. To make plausible the claim that the sex discrimination cases reflect judicial interpretation of constitutional texts adopted in the eighteenth and nineteenth centuries, constitutional scholars depict judges interpreting the Constitution in light of changes in ambient culture—as David Strauss argues, much as judges interpret the common law.<sup>40</sup> On such an account, interpretive agency resides in legal officials, who infuse changing social mores (variously described as “constitutional culture,”<sup>41</sup> “elite opinion,”<sup>42</sup> “popular will,”<sup>43</sup> and “popular sentiment”<sup>44</sup>) into the centuries-old Constitution’s text.

This picture of responsive interpretation<sup>45</sup> legitimates the cases in the sense that it meets professional criteria that justify the exercise of Article III power. But it still does not supply a wholly satisfactory account of the *de facto* ERA, for the simple reason that it gives a suspiciously abstract picture of the nation’s “culture.” As Robert Post points out, constitutional culture is rarely homogenous, and was in fact bitterly divided about the questions the ERA posed. Post depicts the Court as taking sides in the culture wars, and through judicial review imposing the constitutional culture of some Americans on other Americans.<sup>46</sup> This account of the *de facto* ERA encounters the same difficulty as explanations of the kind Bill Eskridge and I have advanced that tie the rise of sex discrimination law to the advocacy of the women’s movement.<sup>47</sup> Even if it was the antidemocratic dynamics of Article V’s supermajority requirements that ultimately enabled the ERA’s defeat, opposition to the ERA was still organized and passionate. If the sex discrimination cases read into the Constitution the *nomos*<sup>48</sup> of a movement that was defeated in its effort to amend the Constitution, why have the cases escaped the vilification that conservative critics have directed at so many other Warren and Burger Court decisions?

Few have puzzled about this question, even students of backlash. It is as if we have forgotten how vehemently the ERA was opposed, and so lack a sense that some might deeply resent the sex discrimination cases as an affront to traditional family values and to the Article V process.

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40. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879-91 (1996); see also SUNSTEIN, *supra* note 25, at 152-53 (“[A]merican constitutional law is, to a considerable degree, a form of common law based on analogical reasoning.”).

41. See Post, *supra* note 32, *passim*.

42. See Balkin, *Social Movements*, *supra* note 13, at 32-35.

43. See Friedman, *supra* note 13, at 2597-601.

44. See Strauss, *supra* note 23, at 1493-98.

45. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978); Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13.

46. See Post, *supra* note 32 (quoted in text at note 32).

47. See Eskridge, *Channeling*, *supra* note 13, at 502; Siegel, *supra* note 6, at 311-16.

48. Robert Cover first used the term “*nomos*” to refer to the normative universe in which law is embedded and from which it takes its meaning. See *supra* note 6.

There is little in the way we reason about the sex discrimination cases that would raise such questions. The habit of justifying the sex discrimination cases as arising out of judicial interpretation of the existing Constitution's text seems generally to have dulled curiosity about the relationship of the cases to Article V debates that raged when they were decided.<sup>49</sup> This framework—and more general habits of reasoning about the judicial role forged in defense of Warren Court jurisprudence—occlude the role of social movement conflict in guiding judicial interpretation of the open-textured language of the Constitution's rights guarantees. Positive accounts of constitutional change in turn shape normative accounts, with reverberating consequences for the role prescriptions that constitutional theory generates.

The sex discrimination cases grow interesting precisely as we attend to the ways they do not fit in conventional paradigms of constitutional change. The cases reflect shifts in constitutional understanding that cannot be explained as constitutional lawmaking; and while it is possible to characterize these shifts as interpretation of the existing Constitution's text, this account only functions at a high level of abstraction, at a remove from a variety of dissonant facts. Most importantly, characterizing the sex discrimination cases as arising out of judicial interpretation of the existing Constitution's text represses their origins in social movement struggle over constitutional lawmaking. Calling the modern law of sex discrimination a "de facto ERA" expresses this category-destabilizing understanding of the cases, without exploring the questions it raises. With canonization of the sex discrimination cases, it is now possible to acknowledge their link to the ERA without impugning the legitimacy of the cases or raising questions about their constitutional underpinnings, that is, without explaining in what sense the cases are "de facto"—rather than "de jure"—ERA.

But if constitutional law offers us no framework to explain the interaction between constitutional lawmaking and constitutional interpretation that gave rise to the "de facto ERA," the ERA's advocates certainly anticipated it. They appreciated that debate about whether to amend the Constitution could have ramifications for its interpretation, and acted accordingly.<sup>50</sup> In acting on this understanding, the ERA's proponents were

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49. A justifiable interpretation of constitutional text adopted in the eighteenth or nineteenth centuries is not likely to reference debate about constitutional text proposed and defeated in the twentieth century. A justifiable interpretation of constitutional text adopted in the eighteenth or nineteenth centuries might incorporate changing social consensus, not contested or partisan understandings. A justifiable interpretation of constitutional text adopted in the eighteenth or nineteenth centuries would emphasize professional judgments about constitutional meaning—not popular understandings, except insofar as they illuminate original understanding of the Constitution's text.

50. See Mayeri, *supra* note 17, at 795 (quoting NOW's lawyer as counseling the organization's leaders that "even if the ERA fails to pass, vigorously pushing for it will show women are demanding equal rights and responsibilities under the law by the most drastic legal means possible—a constitutional amendment. The effect, provided we make clear we think [the] 14th [amendment]

employing the Article V apparatus in what may be its most common usage: as a forum in politics for expressing views about contested matters of constitutional interpretation. Just as proponents and opponents of the Human Life Amendment or the Federal Marriage Amendment aspire to influence judicial interpretation of the Fourteenth Amendment's liberty clauses, so proponents and opponents of the Equal Rights Amendment wanted their Article V struggles to reverberate through Article I, II, and III pathways, and shape judicial interpretation of equal protection under the Fifth and Fourteenth Amendments. Advocates understood that even without completed acts of constitutional law making, the Article V process offered a vehicle for influencing the constitutional judgments of judges and elected officials—offering a point of system feedback like debates over the nomination and confirmation of judges. They passionately supported and opposed the ERA on this understanding, and Congress and the Supreme Court seem to have interpreted the Constitution responsively.<sup>51</sup>

Yet we do not have tools for describing these interactions as they diverge from paradigms of constitutional law making. Despite multiplying but cursory references to the “de facto ERA,” no one in the legal academy has undertaken to make sense of the sex discrimination cases in light of the debate over the Equal Rights Amendment. Today, the ERA debates are quaint history, involving some funny business about bathrooms and bras. Law professors do not consult the ERA debates for what they might teach about how the United States Constitution changes or what its prohibition on sex discrimination means. In consequence, the modern law of sex discrimination lacks grounding in popular debate over the Constitution, appearing as an abstract (if not illegitimate) entailment of the Fourteenth Amendment, its practical meaning debated without reference to either of the great constitutional mobilizations for women's equal citizenship—the debates over the Nineteenth Amendment and the Equal Rights Amendment.

## II

### THE DEMOCRATICALLY RESPONSIVE CONSTITUTION: CHANGE THROUGH LAWMAKING AND OTHER PATHWAYS OF CONSTITUTIONAL CULTURE

Law professors now refer to the “de facto ERA” and in this and other casual ways acknowledge that the ERA campaign promoted constitutional change benefiting women. Yet constitutional law has few tools to explain the role of popular advocacy in forging the modern law of sex

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properly interpreted should give women [the] same unqualified protection, would be to improve our chances of winning the 14th amendment cases”); see also *infra* notes 112-113 and accompanying text (illustrating that proponents of the ERA believed that they could influence judicial interpretation of the Constitution through their efforts to amend the Constitution).

51. See *infra* text accompanying notes 112-113.

discrimination. As we have seen, conventional explanations depict constitutional change as resulting either from popular lawmaking that amends the Constitution's text or from judicial interpretation of the existing Constitution's text. This bifurcated explanatory framework effaces the roles citizens play in shaping constitutional law, and limits our understanding of the role played by movements that do not amend the Constitution, even if their influence on government officials in the legislative, executive, or judicial branches who are responsible for enforcing the Constitution is in fact considerable. An explanatory framework that is bifurcated between lawmaking and adjudication is not well suited to chronicling interaction between courts and legislatures, or between government and actors in civil society.

Participants in the American constitutional order at times speak as if amendment is the only way that citizens can change the Constitution, but their actions do not reflect this belief. Literate participants in the American constitutional order understand that citizens can shape constitutional understandings without amending the Constitution. They may speak of the Constitution's democratic legitimacy in paradigms of lawmaking and discourses of democratic will; but the lawmaking framework does not explain the many forms of popular engagement in constitutional advocacy or the responsiveness of officials to such advocacy. All this points to a more complex story about constitutional change and constitutional authority than the lawmaking paradigm suggests.

In what follows, I describe some ways in which interactions between citizens and officials might strengthen citizen confidence that the Constitution is theirs, even when such interactions do not conform to paradigms of lawmaking and democratic will. As we consider some of the different ways that popular engagement with constitutional questions might contribute to public confidence in the Constitution, we can better understand why we live in a constitutional order that expects and sanctions interactions between citizens and officials that diverge from the lawmaking framework. I offer this account as an interpretation of an ongoing practice, rather than a justification of it. My object is not to demonstrate that the Constitution is democratically legitimate, but instead to suggest how interactions that do not amount to lawmaking might nonetheless contribute to the public's confidence in the Constitution's democratic authority.<sup>52</sup>

Engaging in this preliminary exercise provides a glimpse of why citizens and officials who describe lawmaking as the exclusive mechanism changing the Constitution nonetheless base their expectations and actions

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52. I am speaking here of the public's confidence in the Constitution, rather than particular decisions of the United States Supreme Court. Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1827-33 (2005) (discussing the Constitution's sociological legitimacy in a variety of frameworks, including public acceptance of particular decisions).

on a very different set of understandings. I conclude this discussion by proposing the concept of constitutional culture to describe the ways that citizens and officials interact over questions of constitutional meaning. Constitutional lawmaking is part of constitutional culture; it is not the exclusive pathway of constitutional change. It affords a more expansive and supple framework in which to understand the role of popular mobilizations in forging constitutional change.

*A. Beyond Lawmaking: Democratic Goods Produced by Popular Engagement in Constitutional Debate*

Americans value citizen participation in constitutional debate as a good that is independent of constitutional lawmaking, as well as a prelude to it. This is because democracy is not simply a procedure for preference aggregation or dispute resolution. Democracy is a form of social organization that values participant engagement in collective deliberation. Collective deliberation helps establish what things mean and why they matter.<sup>53</sup> Collective deliberation is thus useful, not only as a procedure for deciding how to act, but also as a practice for articulating who we are. Collective deliberation forges the meanings through which individuals and communities can express identity, and infuses practical questions with symbolic significance so that they provide occasions for individuals and communities to vindicate values through which they define themselves. For this reason, direct popular engagement in constitutional deliberation infuses collective life with the kinds of meaning that help constitute a community as a community.

These processes of collective identity formation and deliberation are not simply goods in themselves. The authority of constitutional lawmaking depends upon them. Collective deliberation makes it possible for institutions of democratic will formation to produce the social goods we expect such institutions to produce (collective decision making, dispute resolution, etc.). Collective deliberation constructs many of the practical questions that institutions of preference aggregation address; it infuses those practical questions with the kinds of symbolic significance that cause members of a polity to care about their disposition. It helps to forge the kinds of identity and attachment that would cause a population to participate in majoritarian processes. As importantly, participation in collective deliberation leads those engaged in majoritarian decision making to respect its outcomes

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53. Cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression*, 79 N.Y.U. L. REV. 1, 35 (2004) ("A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them."); see Siegel, *supra* note 6 (discussing links between this Lecture's concept of constitutional culture and Cover's account of jurisgenesis).

when those outcomes diverge over a long period of time from the participants' own practical interests and symbolic investments.<sup>54</sup>

The authority of the federal constitution depends upon popular participation in collective deliberation. Because exercises of constitutional lawmaking play a restricted role in the American constitutional order—the United States Constitution has been amended less than twenty times since the founding<sup>55</sup>—the system needs other forms of citizen participation to ensure its continuing authority. It needs institutions that enable popular engagement in constitutional deliberation to sustain intergenerational identification with foundational acts of constitutional lawmaking—hence to maintain an understanding of the polity as a collective agent in history—as well as to deliver all the expressive, regulative, and rule-of-law goods that constitutional lawmaking delivered to the founding generations.

Given the infrequency of constitutional lawmaking, the American constitutional order seems to rely on practices of participatory engagement to deliver forms of democratic responsiveness that we often associate with formal practices of constitutional lawmaking. In the United States, popular confidence that the Constitution is the People's is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution. In the absence of constitutional lawmaking, these practices engender the understanding that citizens can influence officials in the exercise of interpretive power—or might be able to do so at some point in the imaginable future.

This expectation gives rise to two different kinds of democratic responsiveness that we might call guiding and attaching. The belief that it is possible, and appropriate, for citizens to influence government officials charged with enforcing the Constitution encourages groups to mobilize; mobilized citizenry in turn guide and discipline the exercise of official power. When government officials are not responsive to citizen influence, the belief that it might be possible to persuade (or replace) the decision-maker gives citizens reason to respect the authority of those decisionmakers with whom they disagree. Thus, the amenability of constitutional

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54. See Frank I. Michelman, *Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture*, 86 CALIF. L. REV. 399, 423 (1998) ("Perhaps the continuous and credible exposure of the regime's fundamental-legal dispensations to the critical rigors of democratic politics could allow everyone subject to the regime to abide by it out of respect for it."). First Amendment scholars have observed the importance of participation in public debate when discussing the role of free speech in a democracy. See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1527 (1997) ("The rights of speakers are protected primarily because they create the opportunity for democratic citizens to come to identify with the collective will through their own potential active participation."); cf. Balkin, *Digital Speech*, *supra* note 53, at 35 ("A democratic culture includes the institutions of representative democracy, but it also exists beyond them, and, indeed undergirds them. A democratic culture . . . is a participatory culture.").

55. But cf. 2 ACKERMAN, *supra* note 10, at 269-78.

decisionmakers to influence enables public guidance of government officials, and promotes public attachment to government officials. At the same time, the prospect of influencing officials shapes the manner in which citizens relate to government officials and to each other. Because citizens must enlist the voice and accommodate the views of others if they are to persuade officials charged with enforcing the Constitution, the quest to secure constitutional recognition may promote forms of community identification, and not merely exacerbate group division. In these and other ways, popular participation in constitutional deliberation, and the role expectations that sustain it, underwrite the legitimacy of government and the solidarity of a normatively heterogeneous community.

Popular engagement in constitutional deliberation sustains the democratic authority of original acts of constitutional lawmaking and supplements constitutional lawmaking as a source of the Constitution's democratic authority. Yet we do not have a good account of these other pathways for securing democratic responsiveness in matters of constitutional governance.<sup>56</sup> More deeply: the assumption that the Constitution's democratic responsiveness is secured through lawmaking leads us to reason about the Constitution's democratic responsiveness in paradigms that not only deflect attention from these other pathways, but render them suspect—so that, at times, these forms of popular engagement appear as a threat to the Constitution's democratic authority, rather than a ground of it.

*B. Lawmaking as Regulative Discourse: Constitutional Lawmaking as Role-Based Restriction on Popular Participation in Constitutional Change*

We have seen that there are a variety of democratic goods produced by popular debate over questions of constitutional meaning. Popular debate over questions of constitutional meaning produces understandings that ground individual and collective identity. Popular debate about the Constitution forges relations among citizens and officials, promoting forms of attaching and enabling forms of steering that enhance the public's confidence that the Constitution is theirs. Collective deliberation gives infrequent acts of constitutional lawmaking much of the democratic authority they possess. Yet, our language for recognizing and valuing such activity is impoverished. The language of constitutional lawmaking supplies the dominant idiom in which we explain how the public participates in changing the Constitution. This language does not merely obscure the heterogeneous forms of participation on which the Constitution's democratic

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56. See Postings of Frank Cross, [crossf@mail.utexas.edu](mailto:crossf@mail.utexas.edu), Earl Maltz, [emaltz@camden.rutgers.edu](mailto:emaltz@camden.rutgers.edu), John Noble, [jfnbl@earthlink.com](mailto:jfnbl@earthlink.com), Malla Pollack, [mpollack@uidaho.edu](mailto:mpollack@uidaho.edu), Mark Scarberry, [mark.scarberry@pepperdine.edu](mailto:mark.scarberry@pepperdine.edu), Howard Schweber, [schweber@polisci.wisc.edu](mailto:schweber@polisci.wisc.edu), Robert Sheridan, [bobsheridan@earthlink.net](mailto:bobsheridan@earthlink.net), & Sean Wilson, [whoooo26505@yahoo.com](mailto:whoooo26505@yahoo.com), to [conlawprof@lists.ucla.edu](mailto:conlawprof@lists.ucla.edu) (Oct. 30, 2005) (on file with author).

authority depends; in some usages, it impugns these forms of popular engagement in constitutional change as "mere politics," as *threats* to the Constitution's democratic authority. In short, the discourse of constitutional lawmaking is prescriptive as well as positive; it serves a regulative function in enforcing the law/politics distinction.

On the orthodox, lawmaking account, there is no popular participation in the formation of constitutional understandings, except as an *antecedent* to constitutional lawmaking. The law/politics distinction that produces the Constitution as the foundation of the legal system and underwrites judicial authority to intervene in politics is often expressed in terms of this role-based limitation on popular participation. The people make constitutions; they do not interpret them. Judges (and other official interpreters) are directed to attend to the constitutional convictions of the generations who made the Constitution, not the political convictions of generations who live under the Constitution.<sup>57</sup> As Justice Scalia expresses this understanding:

At an even more general theoretical level, originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. *The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.*<sup>58</sup>

In this conventional, lawmaking paradigm, judicial attention to the constitutional beliefs of current generations appears as *infidelity* to the

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57. Cf. 1 ACKERMAN, *supra* note 10, at 263 ("During normal politics, nobody represents the People in an unproblematic way—not the Court, nor the President nor the Congress nor the Gallup polls . . . . We must instead face up to the Publian truth: during normal politics, the People simply do not exist; they can only be represented by 'stand-ins.'"); *id.* (proposing a theory of dual democracy that distinguishes between ordinary politics and higher lawmaking, and suggesting that in the United States judges interpret the Constitution in fidelity to popular will expressed in acts of constitutional law making).

58. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (emphasis added); cf. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?: Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13-14-15 (Sanford Levinson ed., 1995) (noting that underlying debates on constitutional change is the formal premise that, in theory at least, a "crucial contrast [exists] between ordinary development by [judicial] 'interpretation' and extraordinary development by 'amendment'").

lawmaking of past generations,<sup>59</sup> as law-making from the bench, as a corruption of judicial judgment.

A descriptive account of how these other mechanisms work would begin with the understanding that advocates seeking constitutional change outside the lawmaking process generally understand themselves to vindicate, rather than violate, the distinction between constitutional law and politics. Citizens seeking to influence constitutional understanding without constitutional lawmaking continue to speak through a law/politics distinction. Advocates regularly express their claims on the Constitution as the Constitution, as the truest and best understanding of Constitution's history and commitments—not as some partisan or partial account of the Constitution's meaning. In this way, advocates reinscribe the authority of the law/politics distinction, even when they strategically deploy it to advance particular, substantive aims. Judges and other legal officials who invoke the Constitution as a ground for particular, contested exercises of authority understand that they must respect the distinction between constitutional law and politics, while at the same time exercising constitutional authority in ways that respond to constitutional convictions of present generations, if they wish the public to respect their judgments about the Constitution's meaning.<sup>60</sup> As the enforcement of *Brown* and reception of the Warren Court has come to symbolize, officials can invoke the Constitution in ways that diverge (sometimes even dramatically) from the understandings of the polity, but ultimately such an exercise of authority depends on the officials' ability to find, or construct, public support—an understanding of role-authority that officials and the public appreciate and are well-versed in negotiating.<sup>61</sup>

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59. Drawing upon *Federalist* No. 78, Bruce Ackerman explains the "democratic case for judicial review":

When normal representatives respond to special interests in ways that jeopardize the fundamental principles for which the Revolutionaries fought and died, the judge's duty is to expose them for what they are: merely "stand-ins" for the People themselves. . . . Rather than trying to immobilize the People, *the Supreme Court's task is to prevent the abuse of the People's name in normal politics*. The Court's job is to force our elected representatives in Washington to engage in the special kind of mass mobilization required for a constitutional amendment if they hope to overrule the earlier achievements of the American Revolution.

Ackerman, *supra* note 12, at 1030 (emphasis added).

60. See Post, *supra* note 32, at 107 ("Because the legitimacy of constitutional law is rooted in constitutional culture, the Court can transform the content of constitutional law in controversial ways only by simultaneously transforming constitutional culture. The nation must come to believe that the Court's distinct vision of constitutional law also expresses the country's fundamental convictions and beliefs. The Court is vulnerable in this process, for the nation may follow the Court's lead, as in *Brown*, or it may turn against the Court, as at the time of Dred Scott or the New Deal.") (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 239 (2d ed. 1986), as observing "that '[t]he Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.'").

61. See Siegel, *supra* note 4 (tracing the construction of *Brown*'s meaning through a half century of social movement struggle over its enforcement).

This complex literacy enables citizens and officials to denounce constitutional change that occurs without lawmaking, even as they pursue constitutional change without the intermediation of constitutional lawmaking. We see this dynamic at work in debates over *Lawrence v. Texas*.<sup>62</sup> In condemning the majority opinion for authorizing same-sex marriage, Justice Scalia's dissent was implicitly, but urgently, warning opponents of gay rights that *if* they did not mobilize to protest the Court's decision in *Lawrence*, *then* the *Lawrence* opinion would soon be read to authorize gay marriage.<sup>63</sup> His warning was perfectly well understood. Within days of the *Lawrence* decision, Randall Terry quoted the passages of Justice Scalia's *Lawrence* dissent that predicted the constitutionalization of same-sex marriage in fundraising letters that Terry posted on a website called "twistedsix.com," which sought to organize those interested in impeaching the six justices responsible for the *Lawrence* decision.<sup>64</sup> Justice Scalia and

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62. 539 U.S. 558 (2003).

63. *Id.* at 590 (Scalia, J., dissenting) ("Every single one of these laws [against same-sex marriage, among others] is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding."); *id.* at 601 ("[Justice O'Connor's] reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."); *id.* at 604-05 ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is 'no legitimate state interest' . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ?").

64. In his fundraising letter, Terry warns his readers that a Supreme Court decision authorizing same-sex marriage is imminent, quoting liberally from Justice Scalia's *Lawrence* dissent:

As you probably know, on June 26, 2003, the Supreme Court ruled 6-3 in *Lawrence vs. Texas* that homosexual perversions are a "liberty" guaranteed by our Constitution. *This decision clears the way for so-called "homosexual marriage," and other crimes.*

This decision puts our Republic in great danger. I beg you to read and weigh these words, and *prayerfully consider what you should do to turn back this assault.*

Our children's and grandchildren's future is surely at stake. So that you can see how horrifying the long term effects are on our nation, here is a portion of Justice Scalia's scathing dissent:

"State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of . . . validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.

"Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), 'when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring, what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution?' (emphasis added) [sic]

Letter from Randall Terry, President, The Society for Truth and Justice, to Christian Activists Nationwide (July 12, 2003), <http://web.archive.org/web/20040604083853/http://www.twistedsix.com/> (emphasis omitted) (although the twistedsix.com website no longer exists, archived copies of its pages, including this letter, can be found at the Internet Archive Wayback Machine). A contemporaneous report about the site can be found at U.S. News Wire, Founder of Operation Resume, Launches Plan to Oppose 'Homosexual Marriage' (July 31, 2003), <http://releases.usnewswire.com/printing.asp?id=19315>. Terry uses similar language and the same Scalia quote in an online petition to impeach

Randall Terry exhort counter-mobilization in the expectation and fear that the constitutional order will soon respond to gay rights mobilization, unless opponents of same-sex marriage organize to stop it.

There is a dual literacy at work here. Justice Scalia regularly insists that the only popular views a court should heed in interpreting the Constitution are the views of the Constitution's framers. It would seem to follow that a movement seeking constitutional change needs to engage in constitutional lawmaking to be heard. Yet Justice Scalia and other avatars of the Reagan revolution regularly employ the language of originalism to exhort Americans to mobilize against the Court and seek constitutional change without the intermediation of constitutional lawmaking. Originalism, in other words, is not merely a jurisprudence. It is a discourse employed in politics to mount an attack on courts. Since the 1970s, originalism's proponents have deployed the law/politics distinction and the language of constitutional restoration in the service of constitutional change—so successfully that, without Article V lawmaking, what was once the language of a constitutional insurgency is now the language of the constitutional establishment.<sup>65</sup>

Once we understand originalism as a language employed to pursue constitutional change *in politics and through adjudication*, we can see that denouncing constitutional change without constitutional lawmaking is a rhetoric used to pursue constitutional change without constitutional lawmaking. If proponents of originalism seek constitutional change without constitutional lawmaking, then such change cannot be, as the old saying goes, all bad. Instead it appears that, in American constitutional culture, common ways of talking about legitimate forms of constitutional change are at odds with common practices for pursuing constitutional change.

In the orthodox view, the people can change the Constitution only through lawmaking, and officials are to interpret the Constitution in ways that are semantically closed to the constitutional beliefs of current generations, except as those beliefs find expression through new acts of

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Justices Stephen G. Breyer, Ruth Bader Ginsburg, Anthony Kennedy, Sandra Day O'Connor, David H. Souter, and John Paul Stevens, which has been active for more than two years at Randall Terry, Stop 'Gay Marriage'! Impeach the 'Twisted Six' on U.S. Supreme Court (July 4, 2003), <http://www.conservativepetitions.com/petitions.php?id=222> (last visited Oct. 16, 2005). Randall Terry is the founder of Operation Rescue, an anti-abortion group known for its civil disobedience and targeting of individuals who provide abortion services. See Dan Barry, *Icon for Abortion Protesters Is Looking for a Second Act*, N.Y. TIMES, July 20, 2001, at A1.

65. See Dawn Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (analyzing the constitutional vision of the Meese Justice Department as expressed in guidelines for constitutional litigation); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988); and a report exploring the judicial appointment power as one means of influencing development of the law, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988).

constitutional law making. Practices of interpreting the Constitution without attending to the beliefs of current generations preserve the Constitution's democratic legitimacy, and thus protect constitutional law from contamination by politics.

Yet, as Justice Scalia's example illustrates, those who subscribe to this view nonetheless find ways to act on a very different set of understandings. On this second, often implicit, set of understandings, the officials who enforce the Constitution are and should be amenable to the influence of current generations—especially when current generations express their claims by appeal to constitutional history. The institutional arrangements and role-based understandings that make officials responsive to the constitutional convictions of current generations vindicate a system good. The democratic authority of the Constitution, on this account, depends upon its *openness* to the constitutional convictions of current generations, and not merely its closure to them.<sup>66</sup>

But how could the semantic permeability of the Constitution in the absence of constitutional lawmaking be a system good? Doesn't it erode the Constitution's power to ground and redeem politics? If the Constitution is not a foundation for politics, immune from politics unless there are acts of constitutional lawmaking, what makes the Constitution a constraint on politics at all? Without practices to protect and distinguish constitutional meaning from politics, isn't the Constitution *merely* politics?

In the answer I will be sketching below, the implicit role-based understandings that open the Constitution to the influence of present generations simultaneously work to channel the ways citizens express their claims on the Constitution and the ways officials respond to them. On this view, the Constitution's constraints are not forged in a few heroic acts of lawmaking. Instead, the democratic authority of foundational acts of constitutional lawmaking is sustained through understandings and practices that govern the ways members of the polity make and oppose claims on the Constitution, as well as the ways that officials charged with enforcing the Constitution respond to these conflicting claims—understandings and practices that I refer to as constitutional culture.

### C. *Constitutional Change through Constitutional Culture*

As I will be arguing in the remainder of this Lecture, constitutional culture supplies understandings about role and practices of argument that shape the way citizens and officials engage in disputes about constitutional

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66. We could locate the roots of these dialectical understandings in constitutional design: the Constitution's semantic openness to the beliefs of current generations is structurally secured by the ways it houses in the representative branches of government the appointment and confirmation of judges, the enforcement of their judgments, and the organization of the court system, while the Constitution's semantic closure to the beliefs of current generations is structurally secured by the grant of life tenure to Article III judges.

meaning. These understandings and practices may eventuate in constitutional lawmaking. But, as the de facto ERA illustrates, these same forms of engagement need not eventuate in constitutional lawmaking to enable constitutional change. Since the Civil War, the understandings and practices of American constitutional culture have constrained conflict sufficiently and with sufficient creativity that long-running constitutional disagreement has created new understandings that officials can enforce and the public will recognize as the Constitution.

Constitutional change without constitutional lawmaking is possible because of the understandings of role and practices of argument that American constitutional culture provides citizens and officials. In American constitutional tradition, the roles of citizens and various officials are differentiated yet interdependent. Each has different forms of authority and owes others different forms of deference. Especially given ambiguities about the scope of the authority each possesses and the deference each owes,<sup>67</sup> citizens can make claims about the Constitution's meaning that diverge from government officials and government officials can make claims about the Constitution's meaning that diverge from citizens—even as the claims of each constrain the other. The complex understanding of role-authority that allows citizens and officials to assert independence from one another, while laboring under the constraint to defer to one another, plays a crucial role here, enabling the forms of communication, coordination, and accommodation among citizens and officials that allow the Constitution to change in ways that seem to sustain its democratic legitimacy over time.<sup>68</sup> Throughout long stretches of American history, feedback mechanisms in a variety of institutional settings have sustained these diverging claims about matters of constitutional authority and constitutional meaning in dynamic equilibrium, in ways that anchor the legitimacy of government and identity of the polity under conditions of ongoing and unresolved normative conflict.<sup>69</sup>

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67. In the American constitutional order, the scope of citizen and official authority in matters of constitutional interpretation is riddled with deep ambiguities. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (1988) ("As to the ultimate authority to interpret the source of doctrine, the protestant position is based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation . . . while the catholic position is that the Supreme Court is the dispenser of ultimate interpretation . . ."); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030-34 (2004) (discussing theories of departmentalism and judicial supremacy).

68. Siegel, *supra* note 6, at 320 ("While the authority of the Constitution is sustained in part through practices of veneration and deference, it is also sustained through a very different kind of relationship, in which citizens know themselves as authorities, as authors of the law.").

69. For an illustration of this dynamic in the decades of conflict over the Court's desegregation orders in *Brown*, see Siegel, *supra* note 4, at 1546 ("Today, most Americans believe that state action classifying on the basis of race is unconstitutional—yet there remains wide-ranging disagreement about the understandings and practices this presumption implicates, and why. The presumption's capacity to sustain this form of conflicted assent would seem to be the ground of its constitutional authority. For a

Constitutional culture supplies the understandings of role and authority and the practices of advocacy and argument that sustain this dynamic equilibrium. As our analysis of the law/politics distinction suggests, advocates in constitutional argument invoke the Constitution as foundational and prior to politics. In these appeals to the Constitution, advocates make claims on a common tradition—a body of narratives and principles, history and commitments—that they share with audiences to whom they appeal. In this way, American constitutional culture supplies practices of argument that channel the expression of disagreement into claims about the meaning of a shared tradition, teaching advocates to express claims of partisan conviction in the language of public value. Even as it authorizes members of the polity to advance dissenting claims of constitutional meaning, constitutional culture disciplines these claims by requiring their expression in the medium of a common tradition. Disputes about forging a common future are thus expressed as claims about the meaning of a shared past.<sup>70</sup> Perpetual contest about the Constitution's past and future dynamically sustains its democratic authority.

As I will be demonstrating in more detail, these understandings about authority and argument work to license and to limit dispute in the United States constitutional order. Constitutional culture invites members of the polity to contest reigning constitutional understandings under semantic constraints that encourage claimants to translate challenges *to* the constitutional order into the language *of* the constitutional order, and that subjects dispute to the judgment of the extended constitutional community. When dispute is channelcd by constitutional culture, it can shape the self-understanding of disputants and the publics before whom they argue and hone new claims of constitutional meaning into enforceable constitutional understandings, without the intermediation of constitutional lawmaking.

### III

#### CONSTITUTIONAL CULTURE AND SOCIAL MOVEMENT CONFLICT

A full account of constitutional culture in the United States would describe the institutions in which members of the polity argue over the Constitution's meaning—including institutions of civil society, the political and juridical dimensions of federated government, and much more.

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norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation's constitutional commitments evolves in history.").

70. Claims on the Constitution are often expressed in the historical register, as claims of original understanding, national history, or precedent. But disputants seeking to unseat or defend reigning constitutional understandings can also invoke the Constitution as a text, as a system of representative government, as judicial doctrine, as a way of life, or as justice; they can tap powerful analogies, deploy iconography, reference narrative, and summon collective memory. Constitutional culture supplies different ways of making these claims in the institutions of civil society (media, the academy), as well as in electoral politics and adjudication.

Such an account might examine how constitutional claimants who succeed in eliciting public response secure official recognition of their views. It would consider how, in a federated system of government with separated powers, disputants can employ understandings and practices of norm contestation in an effort to capture sites of norm articulation.<sup>71</sup> It would observe that constitutional culture supplies members of the polity and government officials with an understanding of how to negotiate these fora, extraordinarily complex modes of argument appropriate to each, and role moralities to structure their engagement. These role moralities enable officials to attend or disattend to constitutional claims, in actions formally cognizable as lawmaking or interpretation, and in less formal acts of the kind Keith Whittington refers to as construction—the forms of constitutional understanding that shape and are expressed through regularities of governance.<sup>72</sup>

My ambitions are more modest. In what follows I examine American constitutional culture as practice of argument—more precisely as a set of constraints on argument that guide the ways advocates make claims of constitutional meaning. Certain implicit presuppositions of our constitutional order authorize and constrain dispute; these enabling and constraining understandings in turn produce conflict that destabilizes the constitutional order in ways that strengthen it. In this way, constitutional culture invites and channels conflict over the Constitution's meaning that forges potent new constitutional understandings.

To simplify this account, I have disaggregated a set of concurrent and historically evolving understandings, and expressed them as a set of constraints on argument that shape constitutional contest among members of the polity, in the institutions of civil society and in formal arenas of governance. Internalization of these understandings enables members of the polity to contest officially pronounced constitutional meanings, to propose new understandings for official recognition, and to defend those newly pronounced views.

Throughout this account I focus on social movements as agents of constitutional change. The constraints on argument I am describing shape the claims of individual citizens and government officials making new claims of meaning, as well as the claims of collectivities such as political parties, unions, and the like. I focus on social movements as interpretive change agents among other reasons because I understand constitutional

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71. Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1980-1981) (arguing that jurisdictional overlap or "redundancy" in the American legal system persists because of its utility for litigants exercising the dispute resolution and norm articulation functions of adjudication).

72. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

dispute to be a collective practice that unfolds outside the formal auspices and institutional apparatus of governance, as well as within it.

*A. The Consent and Public Value Conditions*

To act as effective change agents within the American constitution order, a social movement must advance its claims in accordance within certain constraints imposed by constitutional culture. Two constraints immediately present themselves, which I term the "consent condition" and the "public value condition."

The consent condition is an historically evolving set of understandings about how citizens and officials interact when their views about the Constitution diverge. The consent condition requires those who disagree about questions of constitutional meaning to advance their views through persuasion, by appeal to the Constitution. It is a constraint on argument that shapes the roles of citizens and officials in a constitutional democracy, and enacts community bound by conviction rather than coercion.

History teaches that those who disagree can advance their views by a wide variety of means, including terror or war or other forms of violent coercion. As Larry Kramer has richly reminded us, at the root of the American constitutional tradition lie acts of mobbing and violent protest that culminate in revolutionary war.<sup>73</sup> Kramer recounts how tolerance for certain of the practices that gave birth to the American constitutional order waned with its growth, and constitutional contest was institutionalized in the party system and judicial review.<sup>74</sup> Yet, despite the development of a vibrant constitutional culture in the first decades of the nation's life, by the mid-nineteenth century, constitutional conflict exploded in civil war. Citizens and government enforced their views through violence.

The consent condition is thus a significant constraint on advocacy. Those who disagree about the Constitution's meaning must advance their views without resort to violent coercion. Government retains a distinctive prerogative to employ force, but even this authority is limited by the consent condition, which imposes historically evolving constraints on the ways government can deploy its authority to settle constitutional conflicts. As the consent condition elevates persuasion over coercion, it both limits and frees advocacy. By limiting the exercise of public and private violence, the consent condition empowers citizens to advance dissenting views about the meaning of the United States Constitution.

Citizens who express dissenting views under the constraints of the consent condition must advance their views by persuasion, by appeal to the Constitution. The claim need not conform to any official accounts of the Constitution's meaning, nor need it be pursued through any official forum

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73. See KRAMER, *supra* note 13, at 24-39.

74. See *id.* at 35-72, 165-69.

for articulating the Constitution as law. A dissenting claim can diverge from established interpretations so long as it makes appeal to its addressees in the form of an assertion about the meaning of a constitution to which speaker and addressee share fealty. However minimal this requirement, it nonetheless exerts a significant constraining effect. The consent condition channels dispute by requiring advocates to express disagreement within a shared tradition, rather than by withdrawal from it.

The consent condition shapes understandings of authority in the American constitutional order in ways that license and limit dispute. We can see this distinctive orientation to constitutional conflict emerging in the initial phases of the struggle over slavery. William Lloyd Garrison famously urged abolitionists to denounce the Constitution as a pact with the devil, to forswear complicity with the Constitution by renouncing aspiration to vote or hold public office, and to seek disunion with slaveholder states.<sup>75</sup> But others adopted a very different orientation to the Constitution as they argued the case against slavery. Abolitionists Lysander Spooner and Frederick Douglass asserted—most public authority to the contrary notwithstanding—that the American constitution was an antislavery constitution,<sup>76</sup> and by this quintessentially “protestant” innovation in constitutional culture unleashed a form of reasoning about the Constitution that ultimately found expression in the Reconstruction amendments.<sup>77</sup> The two groups of abolitionists had different understandings of authority. Garrison deferred to government’s authority to interpret the Constitution: He did not challenge official accounts that interpreted the Constitution to protect slavery<sup>78</sup> when he urged Americans to condemn the Constitution as violating a higher law. Garrisonian orator Wendell Phillips argued in this same spirit

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75. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 151 (1975); see also WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 232 (1977) (“The extreme logical outcome of this [Garrisonian nonresistant pacifism] appeared in a remark of Henry C. Wright, who stated that he would not vote, even if by his one vote he could free all the slaves.”).

76. See, e.g., Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), in 2 *LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467-80 (Philip S. Foner ed., 1950); Frederick Douglass, *The Meaning of July Fourth for the Negro*, Speech Delivered at Rochester, New York (July 5, 1852), in 2 *LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra*, at 181-204; Randy E. Barnett, *Was Slavery Unconstitutional Before the 13th Amendment?: Lysander Spooner’s Theory of Interpretation*, 28 *PAC. L.J.* 977, 988-1010 (1977). Douglass gradually relinquished his belief in the Garrisonian disunion/pro-slavery Constitution and embraced a union/anti-slavery Constitution over a period of years leading up to 1851; Douglass attributed this change in opinion to “‘a careful study’ of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell.” *Id.* at 54.

77. See generally, JACOBUS TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); WIECEK, *supra* note 75.

78. Garrison’s jurisprudence made him an apologist for a pro-slavery Constitution, which his moral perfectionism condemned absolutely. Indeed, the pamphlet, “The Constitution a Pro-Slavery Compact,” written by the Garrisonian spokesperson, Wendell Phillips, was lauded by pro-slavery politicians. WIECEK, *supra* note 75, at 240.

that "the only path to justice 'is over the Constitution, trampling it under foot; not under it, trying to evade its fair meaning.'"<sup>79</sup> Garrisonian abolitionists sought change through persuasion, but not by appeal to the Constitution. By contrast, Spooner and Douglass sought change under the constraints of the consent condition: they disputed the officially sanctioned and common-sense understanding that the Constitution protected slavery and exhorted audiences to embrace an alternative understanding of the Constitution's meaning—a practice that led Robert Cover to characterize them as constitutional utopians.<sup>80</sup>

Considered in long enough units of political time, Frederick Douglass' appeal to the antislavery constitution was richly jurisgenerative—as were the claims of women in the abolitionist movement who cited the Declaration of Independence,<sup>81</sup> the clauses of the "antislavery Constitution,"<sup>82</sup> and the privileges and immunities clause of the newly ratified Fourteenth Amendment<sup>83</sup> on behalf of women's right to vote as constitutional equals of men. These claims satisfy the consent condition, not simply because they are efforts to persuade through nonviolent means, but also because they meet the consent condition's minimal criterion of participation in the constitutional order: political-abolitionists and suffragists

79. WIECEK, *supra* note 75, at 246 (1977) (quoting WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY 35 (Boston, Andrews & Prentice 1845)).

80. COVER, *supra* note 75, at 154-58; *see also* Cover, *supra* note 6, at 39-40; Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 502 (2004); Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1356-64 (1995).

81. *See* The Declaration of Sentiments, in Report of the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19 & 20, 1848, at 6 (Rochester, John Dick 1848).

82. Suffragists invoked the Preamble ("We, the People" and the General Welfare Clause), the Privileges and Immunities Clause of Article IV, the Guarantee Clause, and the Titles of Nobility and Bills of Attainder Clauses. *See* 2 HISTORY OF WOMAN SUFFRAGE 408-09 (Elizabeth Cady Stanton et al. eds., photo. reprint 1985) (1882). Many of these clauses played a central role in abolitionist arguments that slavery was unconstitutional. *See* WIECEK, *supra* note 75, at 265-71 (discussing abolitionist arguments based on the Due Process Clause of the Fifth Amendment, the Guarantee Clause, the Privileges and Immunities Clause of Article IV, and the General Welfare Clause); Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337, 345, 350-51 (1986) (discussing abolitionist arguments based on the Due Process Clause of the Fifth Amendment, the Preamble, and the Guarantee Clause).

83. In 1869 the woman's movement adopted the "New Departure" strategy of asserting the constitutional right to vote on the basis of the Privileges or Immunities Clauses of the newly ratified Fourteenth Amendment. It maintained this position until the Supreme Court's final repudiation of the claim in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). *See* 2 HISTORY, *supra* note 82, at 407-11. The National Woman Suffrage Association adopted the strategy as laid out in the resolutions of an 1869 St. Louis convention. The resolutions begin by articulating the movement's claims based on the Citizenship and the Privileges or Immunities Clauses of the Fourteenth Amendment and then proceed to detail all constitutional provisions on which the movement based the suffrage claim. *See id.* at 408-09. Quoting the Privileges and Immunities Clause of Article IV, the resolutions observe parenthetically: "The elective franchise is one of the privileges secured by this section—*See* Corfield vs. Coryell, 4 Washington Circuit Court Rep. 380." *Id.* at 409. For the movement's elaboration of this claim in various settings before Congress, *see id.* at 407-520. On the New Departure, *see* Siegel, *She the People*, *supra* note 13, at 960-77.

endeavored to pursue change by appeal to the Constitution. To achieve change, political-abolitionists and suffragists repudiated officially sanctioned accounts of the Constitution's meaning and sought community recognition of new accounts of the Constitution's meaning. The claim is performative in form. The Constitution comes into being in virtue of the mode of address, the aspiration to persuade, the appeal for communal recognition of a claim of constitutional meaning. The Constitution, and with it a certain form of constitutional community, is realized through the practice of constitutional argument.

As these examples of utopian constitutionalism might suggest, participation in the American constitutional order is characterized by a distinctive attitude toward authority. The American constitutional tradition counsels respect for judges and other legal officials who pronounce constitutional law; yet, the tradition also views citizens as having special standing to judge the meaning of a constitution whose preamble announces it is authored by "We the People," offering them a diverse array of techniques to contest the actions of officials and others with whom they disagree. Movements advance their constitutional views through the ordinary channels, litigating and organizing in an effort to build support for constitutional amendments. But they also engage in procedurally irregular, disruptive activities in an effort to make themselves heard, at times using unlawful conduct for these purposes. At crucial junctures of American constitutional development, groups have effectively employed civil disobedience to advance claims about the meaning of the United States Constitution.<sup>84</sup> Given the consent condition, unlawful conduct must function as part of an effort to communicate and persuade—as some acts of

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84. In the conflict over southern desegregation, both sides employed tactics of civil disobedience. In 1957, Orval Faubus, then Governor of Arkansas, refused to permit the Supreme-Court-mandated integration of the Little Rock Central High School; on the day the school was to be integrated, he dispatched units of the Arkansas National Guard to Central High School to prevent black children from entering the building. For an account of Faubus' civil disobedience and the Court's response, see *Cooper v. Aaron*, 358 U.S. 1 (1958); Keith E. Whittington, *The Court as the Final Arbiter of the Constitution: Cooper v. Aaron (1958)*, in *CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT* (Gregg Ivers & Kevin McGuire eds., 2004). For an account of civil disobedience among proponents of civil rights, see ADAM FAIRCLOUGH, *BETTER DAY COMING: BLACKS AND EQUALITY, 1890-2000*, at 241-47, 252-56, 273-79 (2001) (describing sit-ins of 1960, freedom rides of 1961, and protests in Birmingham in 1963).

The women's movement employed civil disobedience at crucial junctures in its quest for the vote. After ratification of amendments that conferred citizenship on the emancipated slaves, hundreds of women across the nation cast ballots with the collaboration of poll officials, and were arrested for voting "unlawfully." See Ellen Carol Dubois, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s*, in *WOMAN SUFFRAGE AND WOMEN'S RIGHTS* 114 (1998). During World War I, with the possibility of ratifying a suffrage amendment in sight, women seeking President Wilson's support regularly chained themselves to the fence encircling the White House. See ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (1975).

mobbing once did.<sup>85</sup> The universe of strategies a movement promoting change through persuasion, rather than coercion, might employ is in fact quite broad, and often includes forms of procedurally nonconforming, socially disruptive, and unlawful conduct that draws attention to the movement's claims.

It should be emphasized that because the consent condition does not guarantee speakers equality of resources or authority, it can naturalize radically antidemocratic forms of subordination. The forms of community realized through constitutional argument depend on the social structures that mediate the relation of speaker and addressee. If the constitutional order is marked by social stratification or opportunities for democratic voice are formally or structurally unequal, the consent condition is likely to operate in ways that will reproduce and legitimate these conditions.

In the United States, constitutional culture imposes a second condition on those who advocate constitutional change which I will call "the public value condition." While the consent condition requires participants in the constitutional order to resolve conflict through persuasion and by appeal to the Constitution, the public value condition requires advocates to justify new constitutional understandings by appeal to older constitutional understandings that the community recognizes and shares. Advocates need not defer to authoritative accounts of constitutional meaning, but they must contest prevailing understandings of the Constitution by appeal to shared and uncontested understandings of the Constitution. The public value condition requires advocates to translate partial and partisan judgments about

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85. For an account of "mobbing" in Revolutionary America, see KRAMER, *supra* note 13, at 24-39. Throughout American history, violence has been recurrently employed to intimidate and coerce as well as to communicate. At least by the late twentieth century, the use of violence in public acts of intimidation has drawn into question the democratic legitimacy of the constitutional order, and so has generally worked to discredit a movement's claims. While southern whites have employed violence to control freedom claims of black Americans since the days of slavery, their use of violence to block the civil rights movement of the Second Reconstruction helped legitimate the movement's constitutional claims. See, e.g., Robert J. Norrell, *One Thing We Did Right: Reflections on the Movement*, in *NEW DIRECTIONS IN CIVIL RIGHTS STUDIES* 72 (Armstead L. Robinson & Patricia Sullivan eds., 1991) (noting that televised images of white Southerners attacking peaceful protesters "caused a mass revulsion from racial violence that aided the civil rights cause immeasurably"); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141 (1994) (arguing that "the Kennedy and Johnson administrations were spurred into action when the nation—including, most significantly, northern whites—was appalled to witness the spectacle of southern law enforcement officials brutally suppressing generally nonviolent civil rights demonstrations").

The "pro-life" movement, protesting the Supreme Court's decision to protect the abortion right, has employed violence to deter or punish women visiting abortion clinics, and to intimidate doctors engaged in the practice. Most notoriously, a "pro-life" organization established a website in 1997 known as "The Nuremberg Files," which published the names, photographs, home addresses, and telephone and license plate numbers of dozens of abortion providers; lines were drawn through the names of doctors killed by "pro-life" activists. See *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc) (holding that "The Nuremberg Files" constituted a "true threat" and was therefore unprotected by the First Amendment).

constitutional meaning into the language of a common tradition. When dissent from authoritative accounts of constitutional meaning is expressed under the constraints of the consent and public value conditions, it creates a stock of new constitutional understandings for the community to adopt.<sup>86</sup>

Together, the consent condition and the public value condition discipline the ways that movements make constitutional claims to others who do not share the movement's interests and aims. In recruiting members to its ranks, a movement may emphasize the injuries or values that differentiate the group's members from the rest of society,<sup>87</sup> but a movement cannot satisfy its aims or secure recognition of its constitutional claims by these same forms of appeal. Instead, advocates must defend their interpretation of the Constitution as vindicating principles and memories of a shared tradition.<sup>88</sup> A movement's efforts to satisfy these conditions of argument will lead it to pursue its partisan aims in ways that can transform the meaning of the tradition and the self-understanding of those who make claims upon it.

One can see these constraints at work in the arguments of the nineteenth-century woman suffrage movement.<sup>89</sup> In recruiting women to

86. Cf. Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMING* 270-71 (Doug McAdam et al. eds., 1996) ("Social movements not only draw upon and recombine elements of the cultural stock, they add to it. The frames of winning movements get translated into public policy and into the slogans and symbols of the general culture.").

87. In recruiting members to its ranks, a movement seeking constitutional change may emphasize the kinds of injuries or values that differentiate the group's members from the rest of society; movement theorists characterize the semantics of mobilization as "frame alignment."

Social movement theory observes that mobilization depends upon the creation of "collective action frames," or "sets of collective beliefs that serve to create a state of mind in which participation in collective action appears meaningful." See BERT KLANDERMANS, *THE SOCIAL PSYCHOLOGY OF PROTEST* 17 (1997). Collective action frames generate social change through a process that social theorists refer to as "frame alignment," whereby individuals reconceptualize their identities in ways that move them to action. See David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 *AM. SOC. REV.* 464, 464 (1986) (defining "frame alignment" as "the linkage of individual and SMO [social movement organization] interpretive orientations, such that some set of individual interests, values, and beliefs and SMO activities, goals, and ideology are congruent and complementary"). Sociologist William Gamson has identified three conditions that must be present for frame alignment to occur: 1) a sense of injustice; 2) an element of identity; 3) a belief in one's agency. See WILLIAM A. GAMSON, *TALKING POLITICS* 7 (1992). "Social movements . . . draw on the cultural stock for images of what is an injustice, for what is a violation of what ought to be. . . . Contemporary framing of injustice and of political goals almost always draw upon the larger societal definitions of relationships, of rights, and of responsibilities to highlight what is wrong with the current social order, and to suggest directions for change." Zald, *supra* note 86, at 266-67.

88. Cf. SIDNEY TARROW, *POWER IN MOVEMENT* 109 (2d ed., 1998) ("Out of a cultural reservoir of possible symbols, movement entrepreneurs choose those that they hope will mediate among the cultural understandings of the groups they wish to appeal to, their own beliefs and aspirations, and their situations of struggle."); Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY* 271 (Mayer N. Zald & John D. McCarthy eds., 1987) ("To some extent, new leaders resurrect old exemplars and issues, recreate, selectively, our past to fit present needs.").

89. The analysis that follows is drawn at least in part from Siegel, *supra* note 6, at 337-38.

the suffrage cause, the movement challenged laws that gave women "virtual representation" through male heads of household, arguing that laws produced under conditions of male suffrage injured women.<sup>90</sup> Its mobilizing arguments emphasized differences of interest and position between the sexes. But in attempting to persuade men outside its ranks to enfranchise women, the movement emphasized the principles and memories that united citizens into a community rather than the values and interests that divided citizens in the community. Suffragists argued subject to the public value condition: They expressed the vision of some in the language of all, showing how women's right to vote was required by the principles and was resonant with the memories of the constitutional tradition that advocates shared with the audience they were endeavoring to persuade. Arguing in this discursive register, the suffrage movement urged that virtual representation inflicted the same injustice on women as it inflicted on men: a regime of male suffrage violated the principle of "no taxation without representation," the principle for which the American revolution against the British crown was fought. By appeal to the founding principles and memories of the American constitutional tradition, women asserted that men who refused their claims violated the rights of women just as the British king had violated the rights of the colonists.<sup>91</sup>

Today, this analogy has the force of common sense, but it was not persuasive when first asserted, or for generations after. Before the rise of the suffrage movement no one thought that the principles of the American Revolution required enfranchising women; Americans had long thought about the family in paradigms of sovereignty, as a natural form of hierarchy. The suffragists sought to change constitutional understandings held by members of their community by citing against itself the tradition they held in common. Their argument was, if anything, too powerful. The suffrage claim challenged customary understandings about the natural domain of constitutional principles in ways that drew into question fundamental social arrangements. Precisely because it did so, "the woman question," as the suffrage claim was known, was the subject of constitutional contest for generations.

*B. Making Claims on Public Values: Contesting the Jurisdiction of Constitutional Principles*

The suffrage argument illustrates how social movements advancing their partisan aims under the constraints of the public value condition can propose new constitutional understandings for the community to adopt. If we examine the persuasive power of the suffrage claim, as well as the resistances it triggered, we can better understand the way this works. In the

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90. See, e.g., Siegel, *She the People*, *supra* note 13, at 992-93.

91. See Siegel, *supra* note 6, at 337.

quest for suffrage, the women's movement made new claims about the meaning of memories and principles at the root of the American constitutional tradition. The suffrage example demonstrates how movements seek to redefine the semantic reference of a tradition's memories and principles, as well as the difficulty of doing so.

The principles and memories of a constitutional tradition have power because they make sense of a nation's way of life. The principles and memories of a constitutional tradition take their authority from the forms of life they explain, and in turn imbue these forms of life with legitimacy. As the suffrage example demonstrates, the principles and memories that make up a constitutional tradition have particular fields of reference, rendering intelligible some institutions and practices, and not others. An implicit or explicit frame of reference relates particular principles and memories to particular domains of social life.<sup>92</sup>

Given the forms of legitimacy that that inhere in the relation of constitutional principle and social practices, advocates have great difficulty disrupting a principle's ordinary range of reference.<sup>93</sup> The prize is great if they can, however. As the suffrage example illustrates, advocates can create powerful reasons for change they otherwise lack power to achieve if they succeed in destabilizing the reference of constitutional principles and memories. The quest creates compelling incentives for advocates to adhere to the public value condition: to express contested constitutional understandings in the language of uncontested constitutional understandings that they share with the audiences to whom they are appealing.

Constitutional culture supplies understandings about the forms of social life to which the principles and memories of the constitutional tradition properly apply, as well as techniques for contesting and disrupting these jurisdictional understandings, so that the tradition's principles and memories can be redeployed to create new meaning. Of course, innovative claims within a tradition, even if intelligible within a tradition, will remain marginal claims if they do not persuade. And new claims about the reference of constitutional principles are not likely to persuade if they represent the meaning of the constitutional tradition in terms that threaten their audience's status or way of life. Persuasion, of course, has a politics. The

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92. Cf. Balkin & Siegel, *supra* note 13, at [ms. at 2]:

[L]egal principles are intelligible and normatively authoritative only insofar as they presuppose a set of background understandings about paradigmatic cases, practices, and areas of social life to which they properly apply. Principles always come with an imagined regulatory scene that makes the meaning of the principle coherent to us. When that background understanding is disturbed, the principle becomes "unstuck" from its hermeneutic moorings; it no longer seems clear how it applies or whether it should apply.

93. Often advocates depend on the intermediation of some other development (e.g., technological change) to unstick principles and practices. See Balkin & Siegel, *supra* note 13, at 934-37 (discussing effects of technological change on First Amendment and copyright doctrine).

conditions of the Constitution's intelligibility constrain changes in its meaning, even without the intermediation of the state.

To see these dynamics at work, it helps to consider again more carefully the jurisgenerative potency and threat of the suffrage movement's claim. Since the founding, Americans made sense of the world through a constitutional tradition that included principles of self-government as well as principles that naturalized various forms of status inequality, such as the principle of male household headship. The belief that American society conformed to its constitutional commitments depended on mediating understandings that regulated the application of constitutional principles to social practices. The nation understood itself as keeping faith with its constitutive commitments because the jurisdiction of each of its constitutive commitments was carefully delimited—each principle in the constitutional tradition explained some social arrangements, and not others. Changing a principle's customary frame of reference would thus raise deep questions about fundamental social arrangements.

By making claims on the principle of self-government, suffragists found a powerful authority to deploy in support of their right to vote. But their bid to disrupt the relations of constitutional principle and social practice was deeply threatening, in ways that actually undermined the persuasive power of their argument for the audiences to whom it was addressed. Critics demanded that the movement explain the implications of this new understanding of self-government for the family. If women were allowed to vote because the nation was committed to principles of self-government, would male household headship survive as an organizing principle of family life in any other respect? In what social arenas and practices was the principle of male household headship properly expressed? Wouldn't recognizing women as self-governing in the public arena warrant giving women more autonomy in the domestic sphere as well? Allowing women to vote under principles of self-government would intrude upon the jurisdiction of another constitutive commitment, the principle of marital unity—and transform the family beyond recognition.<sup>94</sup>

To allay such anxieties and persuade those outside its ranks to apply the principle of self-government to the question of women voting—an application today we find wholly uncontroversial—the movement added to its liberal arguments for woman suffrage a different kind of claim, which came to be known as the “social housekeeping” argument for the vote. During the progressive era, the suffrage movement began to argue that women needed to vote so that women could discharge their roles as mothers and provide for their children's health and safety in the emerging

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94. See Siegel, *She the People*, *supra* note 13, at 977-97.

welfare state.<sup>95</sup> The social housekeeping argument was designed to reassure the American public that women who voted would continue to act *within* traditional family roles. Enfranchising women would not destroy the family, as antisuffragists argued. It was possible to qualify jurisdiction of the male household headship principle and enfranchise women, without too radically transforming the structure of family life. After generations of advocacy, the suffrage movement altered the jurisdiction of the self-government principle, in ways that began to reshape understandings of the state and the family. The movement persuaded the public that women were self-governing agents subject to the “no taxation without representation” principle—at the same time working to reassure the public that this new understanding of the nation’s commitment to principles of self-government would not too radically alter traditional family structure. Recognizing women as voters was not a wholesale repudiation of understandings that differentiated male and female authority with respect to other practices. In this way, the very effort to persuade the public to accept its new interpretation of the American constitutional tradition drew the suffrage movement into reaffirming the gendered structure of family life. In the quest for the vote, the movement simultaneously destabilized and reaffirmed understandings of citizenship and family in the American constitutional tradition.

As the abolitionist and woman suffrage examples illustrate, the combined operation of the consent condition and the public value condition discipline the partisan energies of movements for constitutional change so that they make claims on the society’s values, principles, memories, and symbols in ways that transform their meaning. This drive to persuade by translating partisan vision into public value, which arises out of combined operation of the consent and public value conditions, makes movements advancing constitutional claims singularly creative change agents. Constitutional mobilizations incubate legal normativity, playing a crucial role in democratic constitutional development.<sup>96</sup>

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95. See AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* (1965).

96. The dynamics of movement advocacy we have been examining are democratizing—but not in ways recognized by lawmaking models that express constitutional change through a metric that measures changes in democratic will. As movements arguing subject to the consent and public value conditions endeavor to persuade the community to respond to their concerns by making claims on a shared constitutional tradition, they infuse new sense into that tradition. The society’s understanding of the lived meaning of its normative commitments is thus continuously refreshed by mobilized collectivities of citizens speaking to other citizens and to the representative and judicial branches of government. New constitutional understandings emerge from networks of associations in civil society, framed by a movement’s members, leaders, and lawyers in terms that make such new understandings candidates for assimilation into law. Yet this dynamic occurs in ways that do not satisfy criteria of procedural regularity or majoritarianism that the lawmaking model associates with democratic constitutionalism. The informality, partiality, and lack of public accountability of a social movement make it a poor candidate to represent the demos within a law-making model of constitutional change.

What constraints might constitutional culture supply to enable a social movement to move the public—or its official representatives—to embrace its partisan and transformative understandings of a constitutional tradition? To foreshadow this next turn in my argument, I will be suggesting that political conflict plays an important role in public acceptance and official recognition of new claims about constitutional meaning. Conflict disciplines a movement's interpretive claims and structures dispute so as to enable officials to enforce the Constitution in new ways. To explore the role of movement conflict in enabling institutional adoption of new claims of constitutional meaning, I will be returning once again to the woman suffrage example we just considered, before examining how these dynamics produced modern sex discrimination law.

*C. Conditions of Public Argument:  
The Mobilization-Countermobilization Dynamic*

Movements make claims on a constitutional tradition, and endeavor to satisfy the consent and public value conditions under special conditions of public argument. Members of the polity understand the Constitution's meaning to be dynamic and responsive to public engagement. For this reason, when a movement for constitutional change is gaining in credibility, it can prompt the organization of a counter-movement seeking to defend the longstanding understandings and arrangements that a constitutional insurgency is challenging.

The logic of countermobilization is rather simple. Once a movement contests the jurisdiction of a constitutional principle in a bid to renegotiate social structure, those who benefit from the contested understandings and arrangements have reason to mobilize in their defense.<sup>97</sup> Countermobilization is likely to occur only as movement claims begin to elicit public response. Utopians and cranks can make all the claims on a constitutional tradition they want; but they are by definition marginal. On the other hand, when a movement advances transformative claims about constitutional meaning that are sufficiently persuasive that they are candidates for official ratification, movement advocacy often prompts the organization of a counter-movement dedicated to defending the status

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Paradoxically, it is these same qualities of informality, partiality, and lack of public accountability that allow a social movement to pursue its constitutional vision with the single-minded intensity that makes it a powerful force in constitutional development. It is because a movement speaks for only some of the people that it has both the incentives and freedom to act as a change agent, and to express values and pursue ends with the kind of clarity that would be impossible were the movement obliged to speak for all.

97. See Zald & Useem, *supra* note 88, at 247-48. ("Our central argument is that movements of any visibility and impact create the conditions for the mobilization of countermovements. By advocating change, by attacking the established interests, by mobilizing symbols and raising costs to others, they create grievances and provide opportunities for organizational entrepreneurs to define countermovement goals and issues.").

quo.<sup>98</sup> At just the point that a movement for social change begins to elicit public response, it is likely also to elicit this energetic defense of status quo, which, since the filibuster over the 1964 Civil Rights Act, has been referred to as “backlash.”<sup>99</sup>

The organization of counter-movement intent on defending understandings and practices that another movement is challenging dramatically changes the conditions of argument. A countermovement will endeavor to reinvigorate justifications for contested understandings and practices, and rebut new interpretive claims on the constitutional tradition.<sup>100</sup> To persuade the public, a movement advancing a new interpretation now must answer the countermovement’s objections and allay the concerns its opponents raise. Countermobilization makes it more difficult for a movement making claims on a constitutional tradition to satisfy the consent and public value conditions.

Who exactly is the audience for these arguments and counterarguments about the Constitution’s meaning? The audience includes the legal officials who have the authority to recognize or refuse the movement’s claims, as well as the public whose confidence is ultimately necessary to legitimate that exercise of authority. Winning the public’s confidence is important even when argument unfolds in adjudicative rather than electoral arenas.<sup>101</sup> The same elements of constitutional culture that authorize

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98. See generally RALPH H. TURNER & LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* 317-18 (2d ed., 1972) (“The presence of any vested interest group whose prerogatives seem to be threatened by the initial movement is a primary source of countermovements. The likelihood that opposition from vested interests or other groups will be organized into a countermovement depends on the supposed strength of the initial movement itself.”).

99. The term “backlash” was not used in a political context until the passage of the 1964 Civil Rights Bill:

A minor feature of the election campaigns of 1964 was the extension of usage of the word *backlash*. The word did, indeed, become a shooting star of the season’s political heavens. . . . In 1934 . . . *backlash* denoted “a sudden violent movement backward, as the recoil of waves or the rebound of a falling tree” and was also used with reference to angling and machinery. . . . [I]t is evident from the nonappearance of *backlash* in even the most recent of political dictionaries that it was not considered a political term prior to 1964. . . . With the President’s signature on July 2, the Civil Rights Bill became law. Meanwhile, *backlash* began a race for wider usage.

Felice A. Stern, “*Backlash*”, 40 AM. SPEECH 156, 156 (1965) (footnotes omitted).

100. See Zald & Useem, *supra* note 88, at 270:

Countermovements have a special problem. . . . Often their leaders and cadre are in the position of defending policies whose justifications have receded into the routine grounds. They seem to be going backward, their policies justify the status quo and established routines. The problem for many countermovements is how to make older symbols relevant to newer situations. They must both discredit the ideas of the movement and show how older ideologies have relevance to new situations. Sometimes they must reframe older symbols or ideas in new terms—antiabortion becomes pro-life, pro-nuclear power becomes pro-energy.

101. Cf. WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 55-82 (2002) (describing the public engagement campaign undertaken between the Vermont Supreme Court’s decision mandating civil unions in the state and the state legislature’s passage of the civil unions bill); Michael Rebell, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99 (1996) (arguing that engaging

members of the polity to contest official pronouncements of constitutional meaning in turn teach constitutional disputants that they must persuade other citizens as well as officials who have the authority to recognize their claims.<sup>102</sup>

This struggle to win the public's confidence often has a moderating influence on the claims movements advance.<sup>103</sup> In early stages of the conflict, movements proposing transformative constitutional understandings may argue to ideal publics of the future, but as a movement for constitutional change begins to elicit response to its claims, the quest for public acceptance supplies incentives to qualify those claims. Countermobilization can accelerate this dynamic. As countermovements revitalize justifications for contested social arrangements, each movement will find itself seeking public recognition of a constitutional understanding that its adversary is seeking to discredit. The quest to persuade a public that is responding to both movements' claims gives each movement reasons to respond to the other. Response may be explicit or implicit. As a countermovement begins persuasively to rebut new constitutional claims, a movement for social change has incentives to qualify its claims so that those claims are likely to be understood as a reasonable account of the tradition to those whom the movement must persuade. The countermovement is of course subject to the same constraints. Movements often bitterly divide about the wisdom of such strategic compromises.<sup>104</sup>

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constituent communities in a "consensual dispute resolution procedure" can facilitate judicial intervention in school reform).

102. Zald, *supra* note 86, at 269 ("Movements and countermovements not only are involved in mobilization contests to demonstrate who has the most support and resources at their command, they are involved in framing contests attempting to persuade authorities and bystanders of the rightness of their cause."); Zald & Useem, *supra* note 88, at 270 ("Movement and countermovement must develop ideologies that convince bystanders and authorities of the rightness of their views.").

103. Zald & Useem, *supra* note 88, at 256. ("[A] factor much overlooked in the study of movements as well as countermovements, the public agenda may or may not 'permit' the emergence of movement or countermovement."); *see also supra* note 107 and accompanying text (discussing how the quest to win the public's confidence may lead movements into internalizing elements of their opponents' arguments).

104. I write from personal observation. Social movement theorists, working in different traditions, describe some of these dynamics as well. For example:

Countermovement activity . . . influences the way a movement presents its demands, as well as the demands themselves. . . . [M]ovement leaders are always faced with tensions stemming from the need to appeal to activist as well as to the public and third parties. The presence of an opposing movement makes these tensions more acute because there is greater pressure to move to a moderate position in order to compete for public support. Consequently, there are likely to be numerous "frame disputes" [ ] as leaders seek to moderate their rhetoric and limit claims in response to the opposing movement rather than to frame demands in a manner calculated to appeal to longtime movement supporters.

David S. Meyer & Suzanne Staggenbord, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1652 (1996); *see also* TURNER & KILLIAN, *supra* note 98, at 318-19:

The most important determinant of changes in the ideology of a countermovement is the increasing success or failure of the initial movement. When the latter is weak, the countermovement ideology is likely to describe its personnel as traitors, heretics,

This contest for the public's confidence draws movements into engagement with each other. As movements endeavor to persuade the public of the merits of their claims, they are forced to reckon with the arguments of their opponents. Vying movements may view each other with enmity, but to make claims that satisfy the consent and public value conditions, movements need, however indirectly, to answer objections the other has raised. Answering an opponent's objections is a practice of recognition, however begrudging. In the course of answering an opponent's objections, advocates may begin to qualify their arguments in ways that recognize each other's claims, and, in this process, come to internalize at least in part their opponents' normative concerns.<sup>105</sup> The countermobilization dynamic thus disciplines the ways movements make interpretive claims on a constitutional tradition,<sup>106</sup> and structures dispute in such a way as to prepare the ground for lawmaking by public officials.

The woman suffrage example vividly illustrates the disciplining effects of countermobilization. For decades the movement challenged male suffrage as enforcing second-class citizenship for women and sought the vote in order to change the relations of the sexes. Over these decades, the movement made expansive claims upon principles of self government, but did so under the objections of a vocal and powerful antisuffrage movement.

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conspirators—terms that completely outgroup the members and evoke intolerant suppressive activity. When the initial movement is strong, however, the countermovement cannot afford to attack its members in this manner but must treat them with some respect and depict them as well-meaning but misguided, misled by an insidious minority, victims of propaganda and the like.

105. Ralph Turner and Lewis Killian observe:

A more fundamental change in countermovement ideology also takes place with the increasing success of the initial movement. The countermovement begins to adopt popular elements of the initial movement's ideology as its own, attempting thereby to satisfy some of the discontent and also to get the opposed movement identified with only the most extreme portions of its whole program. Where movement and countermovement are of long standing, it is not infrequent for the countermovement eventually to promote everything that the early adherents of the initial movement sought. At times a movement and countermovement become ideologically indistinguishable.

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[C]ountermovements depend chiefly on evoking the established myths of the society to oppose change. However, as a countermovement absorbs elements from the new movement's ideology it must reinterpret the societal mythology into consistency with these additions. It is thus through the agency of the countermovement that far-reaching changes are incorporated into the society's values without loss of continuity.

TURNER & KILLIAN, *supra* note 98, at 318-19; see also Tahi L. Mottl, *The Analysis of Countermovements*, 27 SOC. PROBS. 620, 627-28 (1980) (observing that when an initial movement is successful a countermovement may internalize in part some of its more powerful arguments); Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. OF SOC. 107, 119 (1982) ("[O]ften, especially if the challenging movement is strong, a countermovement's defense of the established order will adopt parts of the challenging movement's program. . . . Interaction between movement and countermovement may produce convergence not only in values and goals, but also in movement tactics.").

106. Zald & Useem, *supra* note 88, at 271 ("The debate between movement and countermovement draws upon the cultural stock, but transforms it.").

Over time, in order to persuade men of its claims and to recruit more citizens to its ranks, the movement began to advance social housekeeping arguments for voting designed to demonstrate that recognizing women as self-governing citizens wouldn't too dramatically transform the structure of family life. The social housekeeping argument suggested that enfranchised women would assume new roles in politics without changing roles in the family sphere. It expressed the right to self-government in a form that reaffirmed continuing role differentiation between the sexes.

The suffrage example illustrates how constitutional struggle can pressure proponents of a new constitutional understanding into responding to an opponent's claims and how this dynamic can hone proposed understandings into a form that can be assimilated into the fabric of a constitutional tradition without too greatly disrupting existing ways of life.

The forms of movement conflict that led to ratification of the Nineteenth Amendment can produce enforceable constitutional understandings, even when there is no formal act of Article V lawmaking. Debates about the kinds of family life consistent with women's equal citizenship persisted over the decades, and ignited a new movement for constitutional change in the 1960s and 1970s. In this era movement conflict, channeled by constitutional culture, enabled constitutional change, producing the cases some refer to as a *de facto* ERA without constitutional lawmaking satisfying Article V criteria, or some other metric for expressing democratic will.

#### IV

##### SOCIAL MOVEMENT CONFLICT AND THE *DE FACTO* ERA

The story of the *de facto* ERA illustrates many of the dynamics of constitutional culture that we have been examining. It shows informal pathways of communication amongst mobilized citizens, their lawyers, and officials who enforce the Constitution. It demonstrates the resources and strategies that constitutional culture supplies citizens interested in challenging official accounts of the Constitution's meaning, as well as the resources that constitutional culture supplies to those who would defend existing understandings of the tradition. And it reveals quiet but powerful forms of constraint that operate on those who question reigning constitutional understandings, especially when they challenge long entrenched forms of social authority. In this history, we can observe how social movement struggle to win the American people's confidence plays a crucial role in guiding judicial interpretation of the Constitution. Reconstructing these informal pathways of change, it is easier to appreciate the forms of democratic dialogue at work in constitutional adjudication, and perhaps more darkly, to appreciate the many forces that discipline dissent as it is integrated into the tradition.

The de facto ERA grew out of a movement's decision to pursue a "dual strategy" for constitutional change involving both constitutional lawmaking and litigation.<sup>107</sup> The dual strategy reflected intra-movement politics, and a sophisticated appreciation of how to conduct a public conversation with the American people and the officials they vested with responsibility for enforcing the Constitution.

In the 1960s, coalition building was the first and most important issue facing the women's movement. After attaining suffrage in the 1920s, the women's movement had divided in vision, tactics, and membership, with the National Women's Party proposing an equal rights amendment, and those more closely affiliated with the labor movement seeking change through legislation, concerned to protect the gendered provisions of protective labor legislation from the reach of an omnibus equality law.<sup>108</sup> This internal dispute and energetic countermobilization against the suffragists in the aftermath of ratification<sup>109</sup> helped demobilize the women's movement, even as movement leaders continued to shape governance in the emerging welfare state.<sup>110</sup> During the political ferment of the 1960s, however, the surviving leaders of the suffrage campaign began working with younger women in the antiwar movement, the civil rights movement, and the labor movement in an effort to find a shared feminist vision and legal claims to vindicate it. As Serena Mayeri shows, pursuit of constitutional change by amendment and litigation held together this coalition: The National Women's Party drew younger women into the quest for enactment of the Equal Rights Amendment, while the labor movement and its friends advocated a Fourteenth Amendment approach, a strategy that also appealed to advocates in the civil rights movement loath to separate the constitutional law of race and sex equality.<sup>111</sup>

In 1967 NOW's lawyer, Mary Eastwood, advised her organization that pursuing constitutional change through both lawmaking and adjudication might serve to hold together the movement and strengthen its case. Eastwood and others argued that mobilizing for an Article V amendment might move the Court differently to interpret the existing Constitution's

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107. See Mayeri, *supra* note 17, at 759.

108. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, 78 J. AM. HIST. 188 (1991).

109. Attainment of suffrage prompted waves of feminist political activism and violent backlash by groups determined to protect family and state from progressive and feminist reform. For discussion of the ways countermobilization against the suffrage movement in the 1920s was expressed in discourse of family-preservation, federalism, and red-baiting, see J. STANLEY LEMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S* 25-30 (1973); KIM E. NEILSEN, *UN-AMERICAN WOMANHOOD: ANTIRADICALISM, ANTIFEMINISM, AND THE FIRST RED SCARE* (2001).

110. LEILA J. RUPP & VERTA TAYLOR, *SURVIVAL IN THE DOLDRUMS: THE AMERICAN WOMEN'S RIGHTS MOVEMENT, 1945 TO THE 1960S* (1987).

111. For a rich account of this "dual strategy," see Mayeri, *supra* note 17, at 764.

text: "[E]ven if the ERA fails to pass, vigorously pushing for it will show women are demanding equal rights and responsibilities under the law by the most drastic legal means possible—a constitutional amendment. The effect, provided we make clear we think [the] 14th [amendment] properly interpreted should give women [the] same unqualified protection, would be to improve our chances of winning the 14th amendment cases."<sup>112</sup> Proponents and opponents discussed change through adjudicative and legislative pathways throughout the ERA hearings in 1970 and 1971, with proponents openly arguing that an objective of Article V lawmaking was to move the Court. As Professor Leo Kanowitz put it: "I believe it is of crucial importance that this committee and Congress, in adopting the proposed equal rights amendment, make clear their hope and expectation that forthcoming decisions of the U.S. Supreme Court will soon transform that amendment into a constitutional redundancy."<sup>113</sup>

Advocates anticipated the interaction between lawmaking and adjudication that ultimately produced the de facto ERA. They acted with a sophisticated grasp of constitutional culture, making constitutional arguments in multiple arenas and employing practices of norm contestation to capture official sites of constitutional norm articulation. Change began in the executive branch, led by women convened by President Kennedy's Commission on the Status of Women,<sup>114</sup> and over the decade spread to Congress, and then finally to the courts. Constitutional change was produced by the steady iteration of a claim across institutional settings, with new constitutional understandings emerging from efforts to enforce new forms of federal civil rights legislation,<sup>115</sup> from litigation claiming rights under the Fourteenth Amendment,<sup>116</sup> and from Article V lawmaking.

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112. *Id.* at 795.

113. *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong., 2d Sess. 166 (1970) (testimony of Prof. Leo Kanowitz). Ginsburg would refer to the amendment as a form of democratic "signaling" to the Court, which in turn divided in its views of the amendment's relevance to the interpretation of the provisions of the existing constitution. *See* Mayeri, *supra* note 17, at 817-23. Over the course of the twentieth century, Article V has been used by movements to communicate with courts. Most recently, the increasing receptivity of public officials to same sex marriage claims has prompted proposals to preserve family law through Article V. *See* Carl Hulse & David D. Kirkpatrick, *Conservatives Press Ahead on Anti-Gay Issue*, N.Y. TIMES, July 9, 2004, at A15 (noting that, although conservatives "admit[] upfront that they do not expect to win," they continued to press for an amendment to the United States Constitution defining marriage as a union between a man and a woman).

114. On the Commission, *see* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 89-105 (1988); RUPP & TAYLOR, *supra* note 110, at 174-76; Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. AND MARY L. REV. 209 (1998).

115. In a decade the movement sought enactment of the Equal Pay Act and the sex discrimination provisions of the 1964 Civil Rights Act, and then during the 92nd Congress when the Equal Rights Amendment was enacted, the movement secured enactment of a vast array of civil rights statutes, covering education, employment, childcare, and more. *See generally* Post & Siegel, *supra* note 13, at 1994-96. (discussing the legislation enacted by the 92nd Congress as it forwarded the ERA to the states

The history of the ERA richly illustrates how constitutional culture can channel social movement conflict to produce enforceable new understandings of the Constitution's text. In this history, we see how movements arguing under the consent and public value conditions can propose innovative understandings of the constitutional tradition that call into question longstanding customs. And we see how Americans mobilizing to defend the status quo can block proponents of change and lead them to qualify and moderate their claims.

The ERA's proponents were sufficiently persuasive that its critics endorsed women's equality in an effort to preserve credibility as they opposed the ERA. At the same time, the ERA's opponents stirred sufficient concern with the argument that the ERA would constitutionalize abortion and same sex marriage that its proponents came to endorse limitations on the sex discrimination concept so as to preserve the state's authority to regulate reproduction and sexuality. In the effort to make their claims on the tradition credible to the public, advocates on each side acknowledged and internalized some of the more powerful elements of the others' arguments, and the Court interpreted the Constitution in ways that moved between them.

Thus, an extended and highly structured national conversation about questions of equal citizenship and the family focused public debate on how the abstract principles of the constitutional tradition applied to concrete practices, and provided material on which different members of the Court would draw as they argued over the meaning of the Constitution's equal protection guarantee in the ensuing decade. Interaction between movements and the Court helped forge the understanding that the Equal Protection Clause prohibited classifications "on the basis of sex," as well as understandings about the particular practices this prohibition constrained. Long running dispute about whether to amend the Constitution's text changed public understandings of the Constitution's text, and so imbued the Court with authority to enforce the Constitution in new and unprecedented ways. Reconstructing these interactions suggests how the Constitution's openness to change helps sustain its normative vitality, and reveals informal but powerful constraints on change that discipline constitutional development outside the lawmaking process.

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for ratification); *see also* sources cited *supra* note 114 (discussing movement legislative advocacy in early 1960s).

116. During the mid-1960s, the ACLU brought a suit challenging the exclusion of blacks and women from an Alabama jury that acquitted white defendants accused of murdering two civil rights workers. The suit gave Pauli Murray an opportunity to deploy arguments drawing on concepts of stereotyping and the race-sex analogy. *See White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (holding that de facto exclusion of blacks from jury service violated the Fourteenth Amendment, and also holding that the de jure exclusion of women from jury service violated equal protection because the exclusion was arbitrary; noting that the court's function was "to apply the Constitution as a living document to the legal cases and controversies of contemporary society").

A. *The Public Value Condition: Contesting the Reference of Constitutional Principles and Memories*

Because the women's movement was successful in securing legal recognition of so many of its claims, we have lost sight of the strategies it used to make the case that the Constitution should prohibit sex-based discrimination. Establishing this claim required challenging the longstanding constitutional understanding that women's rights were defined by their family role. To question the justice of customary assumptions and show why sex-based differentiation injured women, the movement invoked constitutional principles and memories never before thought to bear on these practices. In other words, it argued under the public value condition, seeking a common constitutional language in which to express a new constitutional understanding. I briefly consider two such efforts: the movement's efforts to redeploy the prohibition on race discrimination and to reinterpret the memory of the Nineteenth Amendment's ratification.

To contest longstanding constitutional precepts about the differing roles of the sexes, the second wave feminist movement drew upon the prohibition on race discrimination as it was understood in the early years of the Second Reconstruction.<sup>117</sup> Pauli Murray, an African-American lawyer in the civil rights and women's rights movements who was appointed by President Kennedy to serve on the Commission on the Status of Women, played a crucial role in theorizing connections between race and sex equality, and building movement coalitions to support them.<sup>118</sup> In an article co-authored with Mary Eastwood entitled "Jane Crow and the Law"<sup>119</sup> published just after passage of the 1964 Civil Rights Act, Murray set forth an argument that sexism and racism were analogous and often overlapping

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117. During the first Reconstruction, the woman suffrage movement had drawn comparisons between sex and race, but the political salience and appeal of the analogy waned with the repudiation of the New Departure, the demise of Reconstruction, and the spread of Jim Crow. With the dawn of the Second Reconstruction, the women's movement gave the analogy new life, as the movement sought to persuade Congress and the courts that women were entitled to the kinds of rights then accorded racial minorities. Cf. Serena Mayeri, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045, 1052-81 (2001); see also Balkin & Siegel, *supra* note 13, at 943 (discussing how a social movement's interest in redeploying a precedent and its ability to do so may depend on changes in constitutional ecology—and illustrating how technological change or the enactment of a major statute like the 1964 Civil Rights Act can change the environment of argument in ways that motivate and enable movements to disrupt the jurisdiction of constitutional principles).

118. As a young lawyer, Murray contributed to the NAACP's litigation strategy in *Brown v. Board of Education*, and in 1961, she was appointed to the President's Commission on the Status of Women. While serving on the commission and studying at Yale, Murray authored a series of papers outlining a legal strategy for challenging sex discriminatory state action that drew upon the litigation strategies and constitutional arguments of the civil rights movement. See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 188-99 (1998); Mayeri, *supra* note 117, at 1056-72.

119. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). For more on Murray's views on the intersection of sex and race, see ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 226-34 (2001); Mayeri, *supra* note 17, at 776-77.

forms of discrimination.<sup>120</sup> *Jane Crow*'s interpretation of Title VII and the Equal Protection Clause, published between *McLaughlin*<sup>121</sup> and *Loving*,<sup>122</sup> expressed the harm of sex discrimination in language that the Court was just then beginning to use to speak the harm of race discrimination: as the harm of a "classification" that denied recognition to the "individual."<sup>123</sup> Feminists also employed the concept of the "stereotype" that the civil rights movement was then using to express the wrongs of laws that distinguished among racial, ethnic, and religious groups<sup>124</sup> to explain why laws distinguishing between men and women did not rationally reflect differences in the family roles of men and women, but instead inflicted constitutionally cognizable harm on "individuals."<sup>125</sup> Famously, Ruth Bader Ginsburg, the young law professor chosen by the ACLU to write the appellant's Supreme Court brief in *Reed v. Reed*<sup>126</sup> honed the race/sex analogy into an argument for applying to sex-based state action the same strict scrutiny the Court had recently begun to apply to race-based state action.<sup>127</sup> Throughout the 1960s, feminists challenged prevailing understandings about women's status under the Constitution by argument in accordance

120. Pauli Murray coined the term "Jane Crow" in the 1940s. See Rosalind Rosenberg, *The Conjunction of Race and Gender*, 14 J. WOMEN'S HIST. 68, 68-73 (2002).

121. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

122. *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

123. See Murray & Eastwood, *supra* note 119, at 239-40 (citations omitted) (quoted *infra* at note 140).

*Muller* does not use the language of "classification by sex," but it does speak in the discourse of classification that Murray and Eastwood could assimilate to the strict scrutiny framework the Court had begun to build for race discrimination law in *McLaughlin*. See *Muller v. Oregon*, 208 U.S. 412, 422 (1908) ("Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.").

124. By the 1960s, the civil rights movement had established that racial stereotyping "results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding ground for irrational treatment of them." Louis Lusk, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450 (1963-1964).

125. Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 255 (1971):

Stereotypes function to rationalize discriminatory attitudes and practices toward an identifiable group. When they are ascribed to groups on the basis of observable permanent biological characteristics such as race and sex, they resist change stubbornly. Sexual stereotypes have undergirded laws and customs which treat *all* women as a single class and make distinctions based upon the sole factor of their sex. They disregard the fact that women vary as individuals in their body structure, physical strength, intellectual and emotional capacities, aspirations and expectations, just as men do.

126. 404 U.S. 71 (1971).

127. Ginsburg's brief developed the race analogy, emphasizing the injustice of discrimination based on traits that were "immutable" and "highly visible," arguing that "American women have been stigmatized historically as an inferior class" and "lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally." Brief for Appellant at 20, 25, 26, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4). Because "legislators have found it easy to draw gross, stereotypical distinctions" on the basis of the sex characteristic, it was necessary for the Court to subject sex-based legislation to the same forms of Fourteenth Amendment the Court applied to race-based legislation *Id.* at 16, 20.

with the public value condition, working to disrupt and enlarge the jurisdiction of the emergent constitutional prohibition on race discrimination.

However it might seem today, the similarities between race and sex discrimination were not intuitive; the Court had not been moved by them in the century since the Fourteenth Amendment's ratification,<sup>128</sup> and as late as 1961 asserted that "a woman is still regarded as the center of home and family life"<sup>129</sup> as reason to uphold against equal protection challenge a statute that exempted women from jury service. Notwithstanding the power of the civil rights movement in the 1960s, there were important differences between race and sex classifications—points of disanalogy that haunt sex discrimination law to this day. By the 1960s, many Americans were prepared to acknowledge that claims of race difference were often based on caste assumptions, but few were prepared to say the same about claims of sex difference.<sup>130</sup> What picture of family life would that presuppose? Was the assumption of role-differentiation or of dependency irrational or invidious? When and why? Was it wrong to assume that women had responsibilities that disabled them from performing as men's equals? If so, when and why? To make the race/sex analogy persuasive and make palpable "the individual" who was harmed by being interpellated as a woman, the movement needed to address questions concerning the social organization of the family: to demonstrate that women's exclusion from certain forms of civic life was neither a benign nor an inevitable incident of their roles as wives and mothers. The National Organization of Women's founding Statement of Purpose, coauthored by Betty Friedan and Pauli Murray in 1966, invited Americans to reimagine the social organization of the family so that it would no longer constitute an impediment to women's participation in public life:

"WE BELIEVE that this nation has a capacity at least as great as other nations, to innovate new social institutions which will enable women to enjoy true equality of opportunity and responsibility in society, without conflict with their responsibilities as mothers and homemakers . . . We do not accept the traditional assumption that a woman has to choose between marriage and motherhood, on the

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128. See *Strauder v. State of West Virginia*, 100 U.S. 303, 310 (1879) ("[A state may limit juries] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color."); see also cases cited *supra* note 39.

129. *Hoyt v. Florida*, 368 U.S. 57 (1961).

130. To make this case, Murray and Eastwood invoke Gunnar Myrdal's *An American Dilemma*, and Ashley Montagu's *Man's Most Dangerous Myth*, as well as Simone de Beauvoir's *The Second Sex*. See Murray & Eastwood, *supra* note 119, at 234. They also cite Helen Mayer Hacker, *Women As A Minority Group*, 30 SOC. FORCES 60, 65 (1951), as listing "a number of similarities in the status of Negroes and the status of women." Ginsburg draws on these authorities in her *Reed* brief. Brief for Appellant, *supra* note 127, at 17 n.1.

one hand, and serious participation in industry or the professions on the other. We question the present expectation that all normal women will retire from job or profession for 10 or 15 years, to devote their full time to raising children, only to reenter the job market at a relatively minor level. . . . Above all, we reject the assumption that these problems are the unique responsibility of each individual women [sic], rather than a basic social dilemma which society must solve. True equality of opportunity and freedom of choice for women requires such practical, and possible innovations as a nationwide network of child-care center[s], which will make it unnecessary for women to retire completely from society until their children are grown, and national programs to provide retraining for women who have chosen to care for their own children full-time.<sup>131</sup>

Mobilizing feminists turned to the collective memory of suffrage struggle in order to stimulate public skepticism about the rationality of sex-based differentiation and raise questions about the justice of traditional family roles. Like constitutional principles, the constitutional narratives are another rich source of shared understandings that movements arguing under the public value condition can redeploy to create new constitutional meaning.<sup>132</sup> We can see this at work in the way NOW employed the commemoration of the Nineteenth Amendment's ratification to raise questions about gender justice in the family.

On August 26, 1970, the half-century anniversary of the Nineteenth Amendment's ratification, the National Organization of Women staged a one-day strike in forty cities.<sup>133</sup> The strike commemorated the suffrage struggle, drawing upon this narrative to argue that vindicating women's right to equal citizenship required changes in the structure of the family.

The strike drew upon the memory of suffrage struggle in a variety of ways. It invoked the suffrage struggle as a positive precedent, to illustrate that women acting in concert could change the world. As NOW's President

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131. Nat'l Org. for Women, Statement of Purpose (1966), reprinted in *FEMINIST CHRONICLES*, 1953-1993 159, 161-62 (Toni Carabillo et al. eds., 1993).

132. On the concept of collective memory, see IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* (1994); Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "The Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131, 163-66 (Austin Sarat & Thomas R. Kearns eds., 1999).

133. For more on the strike, see JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 84-85 (1975); RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 92-93 (2001); Bonnie J. Dow, *Spectacle, Spectatorship, and Gender Anxiety in Television News Coverage of the 1970 Women's Strike for Equality*, 50 COMM. STUD. 143 (1999); Post & Siegel, *supra* note 13, at 1988-2004; Judy Klemesrud, *A Herstory-Making Event*, N.Y. TIMES, Aug. 23, 1970, § 6 (Magazine), at 6, 14; Shirley Bernard, *The Women's Strike: August 26, 1970* (1975) (unpublished Ph.D. dissertation, Union Graduate School of Experimenting Colleges and Universities, Antioch College) (on file with author and The California Law Review).

Betty Friedan recalled: "We needed an action to show them—and ourselves—how powerful we were."<sup>134</sup> Just as vividly, the strike deployed the memory of suffrage struggle as negative precedent, pointing to the nation's past wrongs to raise questions about the justice of its present practices. Shirley Bernard recalled in 1975: "The significance of August 26th as an important date in women's history and its relationship with the women's strike was explained over and over in newspapers and rallies. It provided a bridge between the first movement and ours. *It served as a structure to educate the general public about the conditions of life that had provoked both the suffrage movement and the present one.*"<sup>135</sup>

NOW's calls for the strike produced carnival-like demonstrations protesting the gender politics of every day life,<sup>136</sup> broad-based participation

134. Betty Friedan recalls the origins of the strike as follows:

The media was still treating the women's movement as a joke . . . . And fear of ridicule still kept a lot of women from identifying themselves as feminist, identifying with the women's movement—especially if they were isolated, in all those cities and suburbs and offices and universities where there weren't any NOW chapters, or consciousness-raising groups . . . . [D]espite the new consciousness, and the media attention, our real demands weren't being taken seriously as yet, by politicians, employers, church or state.

We needed an action to show them—and ourselves—how powerful we were. And if I was right, and all those women across the country were ready to identify with the women's movement, we needed an action, an issue women could do something about, originate, without much central organization. A woman from Florida had written me about a general strike of women that had been proposed in the final stages of the battle for the vote, reminding me that the fiftieth anniversary of the vote was August 26, 1970.

On the plane to Chicago, I decided to propose such a strike for August 26, 1970 on all the major issues of the unfinished business of women's equality . . . . [W]e were a very small organization still to mount such a huge action—but I sensed that the women "out there" were ready to move in far greater numbers than even we realized[,] that a loose sort of strike encouraging any women anywhere to get together in their own place, and strike would give scope to all the ingenuity surfacing in the women's movement, channel the energies into action, transcend the differences—and kindle a chain reaction among women that would be too powerful to stop, or divert, or manipulate—or laugh at, or ignore.

Betty Friedan, Introduction: Call to Strike, in *HERSTORY PART II* 1, 10-12 (n.d.) (unpublished manuscript, on file in the Betty Friedan Papers, Schlesinger Library, Harvard University, Carton 30, Folder 1010).

135. Bernard, *supra* note 133, at 262 (emphasis added). See *id.*:

The strike was used as a vehicle to educate the general public about some of women's history. Many of the strike day activities included former suffragists. Their stories were heard and applauded. Their sacrifice appreciated. Their victory acclaimed. Many newspapers ran articles on the history of woman suffrage and the major figures of the suffrage movement.

136. 116 CONG. REC. 22, 216 (1970) (reprinting Margaret Crimmins, *Drum-Beating for Women's Strike*, WASH. POST, June 30, 1970, at D3). Crimmins emphasized the national and international character of the event, writing:

It's like a tribal drum—it's beating all over the country," chortled NOW (National Organization for Women) founder Betty Friedan after today's press conference announcing details of the Women's Strike for Equality Day called for August 26.

Mrs. Friedan . . . said women in Boston plan to distribute 4,000 cans of contraceptive foam on the Boston Common and Buffalo, N.Y., women are saying they won't iron on that day, which marks the 50th anniversary of the amendment giving women the vote.

"We want women to get ideas from others and do their own thing, wherever they see a need for equality . . . ."

"We're going to bring babies for a baby-in to sit on the laps of city fathers to show the need for child care centers in New York."

that wildly exceeded the organizers' expectations and prompted heavy media coverage.<sup>137</sup> Strike organizers shaped these performative enactments of women's second-class citizenship into ironic commentary on the meaning of the Nineteenth Amendment's ratification.

As one looks back at the strike, it is apparent that the feminists used the practice of commemoration to contest the reference of the enfranchisement narrative just as surely as the movement was contesting the jurisdiction of the antidiscrimination principle. In the 1960s, women's enfranchisement was remembered—and forgotten—as an occasion when the nation had righted a great constitutional wrong and made good on its founding principles. The Women's Strike for Equality, in message and design, insistently argued that the Nineteenth Amendment had *not* repaired the constitutional injury it was supposed to repair: a half century after enfranchisement women were still not equal citizens with men.<sup>138</sup> The strike demonstrated that women were still second-class citizens, despite constitutional recognition of their right to vote, advanced a structural explanation of *why* equal suffrage had not made women equal citizens, and argued that women would not become equal citizens with men unless there were fundamental changes in the family form.

In addition to ratification of the Equal Rights Amendment, the strike sought three reforms that would realize the Nineteenth Amendment's promise of equal citizenship: equal opportunity in jobs and education, free abortion on demand, and free twenty-four-hour childcare centers. In these three demands, the movement was arguing that equal citizenship required more than equal suffrage: it required a transformation of the conditions in which citizens worked and raised families. The strike demands represented the crystallization of movement advocacy in the late 1960s—expressing

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. . . Karen DeCrow of Syracuse, N.Y., one of the plaintiffs in the case against McSorley's saloon (an all-male bar in which women won seating) said friends in Finland are planning projects to "support their American sisters."

"Freedom trash cans will be set up all over the country, so that women can bring items that oppress, like aprons, curlers, and hairpins."

*Id.* at 22, 216-17.

137. On turn out, see Bernard, *supra* note 133. On media coverage, see Dow, *supra* note 133.

138. The women's movement managed to get the Nixon Whitehouse to make this understanding the official, commemorative narrative for a national holiday marking ratification of the Nineteenth Amendment. On August 26, 1972, President Nixon issued Proclamation 4147, Women's Rights Day, which stated, in part:

Fifty-two years ago the Secretary of State issued a proclamation declaring the addition of the Nineteenth Amendment to our Constitution. That act marked the culmination of a long struggle by the women of this country to achieve the basic right to participate in our electoral process.

As significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. Rather, it brought an increased awareness of other rights not yet realized. . . .

Proclamation No. 4147, *reprinted in* 8 WEEKLY COMP. PRES. DOC. 1286, 1286-87 (Aug. 26, 1972).

aims formalized in NOW's founding statement of principles and shared by other groups in the feminist movement in this period.<sup>139</sup>

Thus, during the 1960s, the feminist movement argued under the public value condition, working to re-signify the prohibition on race discrimination and the memory of suffrage struggle so as to support a new understanding of the constitutional tradition. Feminists argued that policies premised on the assumption that all women were dependent caregivers inflicted gendered harm. And they argued that the social arrangements that produced caregiver dependency inflicted gendered harm. According to the emerging tenets of second wave feminism, these practices and arrangements inflicted dignitary and distributive injustices that—like race discrimination and women's disfranchisement—were neither reasonable nor necessary but instead were better understood as wrongful and remediable.<sup>140</sup>

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139. See Nat'l Org. for Women, Bill of Rights in 1968, *reprinted in FEMINIST CHRONICLES*, *supra* note 131, at 214; see also FREEMAN, *supra* note 133, at 58 (in 1967 women in Students for a Democratic Society advocated "communal childcare, wide dissemination of contraceptives, easily available abortions, and equal sharing of housework"). In the late 1960s and early 1970s, there was a wide range of women's groups advocating that the polity assume some form of collective responsibility for childcare. See LAURI UMANSKY, *MOTHERHOOD RECONCEIVED: FEMINISM AND THE LEGACIES OF THE SIXTIES* 46-50 (1996); Deborah Dinner, *Transforming Family and State: Women's Vision for Universal Childcare, 1966-1971* (Interdisciplinary Law and Humanities Junior Scholar Workshop Paper 2004), <http://ssrn.com/abstract=582001>. The demand reflected the animating concerns of the second wave movement, first expressed in Betty Friedan's *The Feminine Mystique*, first published in 1963. On Friedan's account, the work of family maintenance presupposes the dependence, exclusion, and nonparticipation of half the society's adult members. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 336-37 (Dell Publ'g 1983) (1963). For a widely circulating critique of the family of the era, see Pat Mainardi, *The Politics of Housework*, in *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* 447 (Robin Morgan ed., 1970). For a rich account of the many voices in which the second-wave movement addressed the institution of motherhood, see UMANSKY, *supra*.

140. Note that the three demands of the suffrage strike, which the movement recited at every opportunity, represent sex equality in very different terms than does the discrimination claim advanced through the race analogy. The strike demands represent equality as question of social structure. Sex equality redresses harms of exclusion suffered by caregivers when basic institutions are structured so that the work of raising a family precludes those who perform it from participating in core activities of citizenship, leaving them economically and politically dependent on others. By contrast, the discrimination claims advanced through the race analogy focus on the ascriptive harm that laws classifying on the basis of sex inflict when they presume individuals have caregiving responsibilities that leave them dependent and unable to participate in economic and political life on the same terms as others. For the structural/institutional model, inequality is a question of distributive justice that rectifying the social relations producing caregiver dependency can ameliorate. For the discrimination model, inequality is a question of misrecognition that rectifying the ascription of caregiver dependency can ameliorate.

Feminist advocates spoke in both registers. They argued that the assumption that all women were dependent caregivers inflicted gendered harm, and they argued that the social arrangements that produced caregiver dependency inflicted gendered harm. According to the emerging tenets of second wave feminism, each was the contingent and each was remediable; sex stratification, like race stratification, inflicted wrongs of recognition and distribution that reasoning from the body legitimated. Pauli Murray and Mary Eastwood expressed the basic elements of this worldview in *Jane Crow*:

By the decade's end, the movement's efforts bore spectacular fruit. Congress responded to the movement's wide-ranging constitutional appeal by enacting the ERA, and by passing legislation directing the EEOC to enforce the sex discrimination provisions of Title VII as seriously as its race discrimination provisions,<sup>141</sup> numerous civil rights laws prohibiting sex discrimination in other institutional settings, and funding and tax credits for child care programs on the universal coverage model.<sup>142</sup> At the same time, the Court decided in *Reed* to strike down a statute that preferred men over women as estate administrators—the first decision construing the Fourteenth Amendment to prohibit legislation that discriminated against women since the amendment's ratification.<sup>143</sup>

But these spectacular signs of the movement's success in contesting prevailing understandings of the equal citizenship principle do not tell the whole story. Movement advocates anticipated and encountered resistance on all fronts. The coalition of feminists who converged to support the "dual strategy" contained many in its ranks who had long opposed the ERA as threatening laws that protected working mothers. Even if these feminists had come to embrace new strategies for securing the welfare of working women, they appreciated that the movement's constitutional claims might

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It may not be too far-fetched to suggest that [Muller's doctrine of "classification by sex"] as presently applied has implications comparable to those of the now discredited doctrine of "separate but equal." . . . Through unwarranted extension, it has penalized all women for the biological function of motherhood far in excess of precautions justified by the findings of advanced medical science. Through semantic manipulation, it permits a policy originally directed toward the protection of a segment of a woman's life to dominate and inhibit her development as an individual. It reinforces an inferior status by lending government prestige to sex distinctions that are carried over into those private discriminations currently beyond the reach of law.

Murray & Eastwood, *supra* note 119, at 239-40.

141. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (extending Title VII's prohibition of sex discrimination in employment to the states); H.R. REP. No. 92-238, at 5 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2141 ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."); see also S. REP. No. 92-415, at 7-8 (1971) (expressing this understanding).

142. For a more detailed account, see FREEMAN, *supra* note 133, at 202-04; Post & Siegel, *supra* note 13, at 1995-96.

143. It was only in the spring of 1971 that the ACLU enlisted Ruth Bader Ginsburg to draft the Supreme Court brief in *Reed v. Reed*, which she did, building upon the work of Pauli Murray and Dorothy Kenyon. See Brief for Appellant, *supra* note 127; Mayeri, *supra* note 17, at 814-15. The Court decided *Reed* unanimously in November 1971, on narrow "rational basis" grounds; apart from ruling that the state's use of sex distinctions to distribute the opportunity to administer a decedent's estate was irrational, the Court adopted none of the brief's path-breaking argument. See *Reed v. Reed*, 404 U.S. 71 (1971).

In March 1972, the ACLU responded to the ERA's passage by creating the Woman's Rights Project and appointing Ginsburg to head it. See SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 82 (1998). It was not until January 1973, ten months after the Senate sent the ERA to the states for ratification, that Ginsburg argued the second major women's rights case, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), before the Supreme Court as head of the ACLU Women's Rights Project. See Mayeri, *supra* note 17, at 817.

appear to many to threaten women's welfare. For those who held traditional understandings of women's family role—and traditional understandings of how law was to protect women in traditional family roles—the ERA posed a threat, not just to men and conventional understandings of the family, but to women as well. And it was fiercely resisted on just these grounds. The feminist movement encountered passionate opposition to the ERA in Congress that deepened as the debate moved to state houses across the nation.

If one looks at how the movement gave legal expression to its vision of women as equal citizens, one can see that feminists anticipated, internalized, and accommodated resistance to their arguments in the way they crafted their constitutional claims. Thus, even as the constitutional tradition provided feminists authority to argue for a new constitutional understanding of the family, the effort to make that vision persuasive to an audience that was accustomed to, and invested in, traditional family roles induced feminist advocates to qualify their constitutional arguments in crucial ways.

Closer scrutiny of feminist arguments for the ERA shows how deeply the quest to persuade those outside the movement's ranks shaped the way many in the movement defined equality for women—a disciplining dynamic that grew more severe under conditions of escalating counter mobilization. Reconstructing this process illustrates how feminists came to define discrimination “on account of sex” in ways that internalized in part the world view and concerns of their opponents. This disciplining process helped shape a movement's transformative understanding of equal citizenship into terms that courts could enforce and the public would recognize as the Constitution.

*B. Movement/Counter-Movement:  
Sex Classifications and Unique Physical Characteristics*

In 1972, nearly a half century after it was first proposed, Congress enacted the ERA by large margins. Within the following two years, thirty of the required thirty-eight states had ratified it. Thereafter, the pace of ratification slowed dramatically, and then ground to a halt, with proponents unable to secure the states need to ratify, despite strenuous advocacy and a three-year extension.<sup>144</sup> As this trajectory suggests, within a few years, the

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144. See STEINER, *supra* note 15, at 26. After the ERA was enacted, many states rushed to pass it, many without formal debate. Hawaii began the ratification process within five minutes of the Senate's approval and had passed it by day's end. Delaware, Nebraska, and New Hampshire ratified it the next day. Idaho and Iowa ratified the third day. Twenty-two of the necessary thirty-eight states ratified the ERA in the first year. After that, however, progress for the pro-ERA forces slowed. Eight states ratified in 1973, only three in 1974, one in 1975 and none in 1976. In 1977, Indiana was the last state to ratify the ERA even as rescission forces began to mobilize in some states where it had already been approved. For a general overview of the chronology of the ERA, see Roberta Francis, National

groundswell of support for the ERA had provoked energetic countermobilization. Opposition began with impassioned debate over the ERA's meaning that transpired before Congress was willing to enact it—and grew more heated as the decade wore on.

The ERA provided “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>145</sup> Opponents portrayed the ERA as a threat to traditional family roles; at times criticism of the ERA eerily echoed antisuffrage themes, voicing alarm that constitutional change would destroy the family.<sup>146</sup> William Rehnquist, then in the Justice Department, explained the “overall implication” of the ERA as “nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable.”<sup>147</sup> In considering its implication for common law domicile rules, Rehnquist warned that the ERA would transform “holy wedlock” into “holy deadlock.”<sup>148</sup> Rehnquist was blunt in expressing his mistrust of the amendment's proponents:

I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.<sup>149</sup>

Few who opposed the ERA argued for woman's inequality; instead they urged the importance of preserving her traditional family role. Preserving woman's “traditional difference” in turn preserved the traditional “family unit.” Senator Sam Ervin, who mobilized congressional opposition to the ERA, worked endlessly to qualify its language in ways that

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Council of Women's Organizations, *The History Behind the Equal Rights Amendment*, <http://www.equalrightsamendment.org/era.htm> (last visited April 4, 2005).

145. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). The second section of the amendment read: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” *Id.*

146. See Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 937-38 (1979) (“The ERA will wreck the home and family is perhaps the most familiar broadside, the very same one most frequently raised in opposition to the Women's Suffrage amendment. (If women gain the vote, the antisuffragists insisted, it will change the basis of our government from the family as a unit to the individual. This would lead to disaster . . . .)”) (footnote omitted).

147. Rehnquist offered these observations in 1970 as Assistant Attorney General in an internal Justice Department memorandum addressed to Leonard Garment, a special consultant to President Nixon. Memorandum from William Rehnquist, Assistant Attorney General, to Leonard Garment, Special Counsel to the President, *reprinted in Rehnquist: ERA Would Threaten Family Unit*, LEGAL TIMES, Sept. 15, 1986, at 4.

148. *Id.*

149. *Id.*

would recognize gender-conventional differences in sex roles, especially in the family. Ervin proposed many ERA substitutes along the following lines:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. This article shall not impair, however, the validity of any law of the United States or any state which exempts women from compulsory military service or which is reasonably designed to promote the health, safety, privacy, education, or economic welfare of women, or to enable them to perform their duties as homemakers or mothers. . . .<sup>150</sup>

ERA supporters resisted every effort to add qualifying language to the text of the ERA. They pointed to judges' habit of justifying sex discrimination as reasonably reflecting sex-role differences and insisted that "the constitutional mandate must be absolute." "Equality of rights means that sex is not a factor."<sup>151</sup> Yet, they gave ground in part, defining the "sex classifications" that the ERA prohibited in terms that anticipated and accommodated some of their opponents' strongest objections.

While there are many sites in which one can investigate ERA conflict—protective labor legislation, the military, sex-segregated bathrooms, and much more—this account examines the ERA conflict at a site that has largely escaped scrutiny. It considers how proponents defined the ERA's master interpretive principle in such a way as to anticipate and, in part, to accommodate resistance to the amendment.

The ERA provided that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."<sup>152</sup> Emerson and the Yale Law students who wrote the ERA's unofficial legislative history defined the ERA in light of an anticlassification principle that resonated deeply with equal protection race cases of the 1960s.<sup>153</sup> The ERA's unofficial legislative history observed that "[t]he fundamental legal principle underlying the Equal Rights Amendment . . . is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex."<sup>154</sup> But

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150. *Equal Rights 1970*, *supra* note 113, at 7-8 (statement of Sen. Ervin). Variations included: 70 S. REP. NO. 689, 92d Cong., 2d Sess. 5 (1972) ("The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.").

151. Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 892 (1971).

152. See H.R.J. 208 and S.J. 8, *supra* note 145.

153. See *infra* notes 158-166 and accompanying text.

154. Brown, Emerson, Falk & Freedman, *supra* note 151, at 893.

what exactly was a “classification based on the broad and impermissible attribute of sex”?

Examining ERA jurisprudence reveals how social movement struggle forged modern understandings of a sex classification.<sup>155</sup> As proponents well appreciated, the stakes in this seemingly obscure question were great. I show how the movement’s efforts to restrict the reach of the “sex classification” concept anticipated, but in the end were not sufficient to block, passionate objections to the ERA involving abortion and homosexuality in which the ratification campaign ultimately foundered. Reconstructing this history shows how the quest to persuade can lead adversaries to acknowledge and sometimes to accommodate each other’s claims on constitutional meaning—a dynamic that can produce convergent understandings that officials can enforce as the Constitution. It also shows how concerns about the preservation of traditional sex roles shaped modern sex discrimination law, limiting its reach in matters concerning reproduction and sexuality, where constitutional conflict has enforced boundaries on the concept of a “sex classification” and “sex stereotype” that only now are beginning to give ground under pressure of movement advocacy.

### I. “Sex Classifications” and “Unique Physical Characteristics”

ERA’s proponents sought to transform a constitutional tradition that for centuries had justified gender-differentiated regulation as reasonable exercises of state power. To challenge these entrenched habits of justification, the ERA’s proponents insisted that the ERA’s text should be interpreted through a principle absolutely prohibiting sex classifications. But they then defined a “sex classification” in such a way as to exclude laws that regulated “unique physical characteristics.”<sup>156</sup>

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155. Cf. Siegel, *supra* note 4, at 1497-1500, 1501-32 (discussing social movement conflict informing the Court’s embrace of the strict scrutiny framework in *McLaughlin* and *Loving*; analyzing forces that shaped understandings of the social practices that the legal system characterized as “race classifications”). For other accounts of the normative concerns that inform characterizations of social practices as “classifying” on the basis of group membership, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 28 (2003); Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11-18 (Catherine A. MacKinnon & Reva B. Siegel eds., 2003).

156. The unofficial legislative history authored by Tom Emerson and three Yale Law students explained:

The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. *This principle, however does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. . . .* So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

Brown, Emerson, Falk & Freedman, *supra* note 151, at 893 (emphasis added).

What laws regulated "unique physical characteristics"? In the quest for a politically viable version of the amendment, ERA advocates qualified the ERA's prohibition of sex classifications with a subsidiary principle that excluded from the ERA's reach many laws that opponents criticized the amendment for imperiling. In the ERA's unofficial legislative history, Professor Tom Emerson frankly acknowledged that the ERA's subsidiary principle was responsive to opponent concerns:

Instances of laws directly concerned with physical differences found only in one sex are relatively rare. *Yet they include many of the examples cited by opponents of the Equal Rights Amendment as demonstrating its nonviability.* Thus not only would laws concerning wet nurses and sperm donors be permissible, but so would laws establishing medical leave for childbearing (though leave for childrearing would have to apply to both sexes). Laws punishing forcible rape, which relate to unique physical characteristic of men and women, would remain in effect. So would legislation relating to the determination of fatherhood.<sup>157</sup>

In the concept of "unique physical characteristics" Emerson consolidated work begun by Pauli Murray and Mary Eastwood in *Jane Crow*. The 1964 Senate Report on the ERA had characterized laws regulating maternity benefits and criminal rape laws as "reasonable classifications"—as *exceptions* to the ERA's nondiscrimination principle.<sup>158</sup> A year after the Court announced that racial classifications were presumptively unconstitutional in *McLaughlin*,<sup>159</sup> Murray and Eastwood proposed a similar approach for review of sex classifications, proposing to exclude laws that "can apply only to [one sex]" from the scope of a sex classification and

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157. *Id.* at 894.

158. See S. REP. NO. 1558, 88th Cong., 2d Sess. 2 (1964). Just as equal protection of the law under the Fourteenth Amendment is not a mathematical equality, this [equal rights] amendment does not contemplate that women must be treated in all respects the same as men. Nor does it mean that all legal differentiation of the sexes will be abolished. "Equality" does not mean "sameness." "Equal" rights does not necessarily mean "identical" rights. For instance, a law granting maternity benefits to women would not be an unlawful discrimination against men. As a grant to mothers, it would be based on a reasonable classification despite its limitation to members of one sex.

Nor would the amendment mean that criminal laws governing sexual offenses would become unconstitutional. The public has such an interest in relations between the sexes that the conduct of both sexes is subject to regulation under the police power apart from any considerations of unequal treatment or protective status.

159. See *McLaughlin v. Florida*, 379 U.S. 184, 191-94 (1964) (restating *Brown* as requiring strict scrutiny of racial classifications); Murray & Eastwood, *supra* note 119, at 241 ("There are a few laws that refer to women or men or males or females, but that in reality do not classify by sex and accordingly would not be constitutionally objectionable if classification by sex were prohibited. For example, a law that prohibits rape can apply only to men; a law that provides for maternity benefits can apply only to women. If these laws were phrased in terms of 'persons' rather than 'men' or 'women,' the meaning or effect could be no different. Thus, the legislature by its choice of terminology has not made any sex classification."); see also Siegel, *supra* note 4, at 1501-05 (describing how strict scrutiny was deployed as a means of "cooling" the public debate that *Brown* unleashed).

noting that such an approach would exempt from the presumption of unconstitutionality practices that the Senate Report had characterized as reasonable classifications.<sup>160</sup> During hearings in the 1970s, Emerson packaged this approach to defining a sex classification as the “unique physical characteristics” qualification to the ERA’s absolute nondiscrimination principle;<sup>161</sup> he then presented it as a “subsidiary principle” to the amendment’s nondiscrimination principle in various academic settings.<sup>162</sup> In academic

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160. Murray and Eastwood explained that they had defined the concept of sex classification so as to exempt from the reach of the sex equality principle practices that the Senate Judiciary Committee then considered reasonable exceptions to the ERA. As Murray and Eastwood make the argument, they drop a footnote observing:

The two examples of laws which probably would not be considered unconstitutional under the proposed equal rights amendment given in the Senate Judiciary Committee report on the amendment, S. Rep. No. 1558, 88th Cong., 2d Sess. (1964), would fall in this category. The report states, “a law granting maternity benefits to women would not be an unlawful discrimination against men. . . . Nor would the amendment mean that criminal laws governing sexual offenses would become unconstitutional.”

*Id.* at 2. Murray & Eastwood, *supra* note 119, at 241 n.49.

161. *Equal Rights 1970*, *supra* note 113, at 298-99 (testimony of Prof. Thomas Emerson).

162. See Thomas Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 225, 225-26 (1970-1971); see also Brown, Emerson, Falk & Freedman, *supra* note 151, at 893-902. (warning that “[u]nless principle is strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity [such as those] courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights.”). Sometimes advocates spoke of unique physical characteristics as a narrow exception; sometimes they asserted that strict scrutiny would govern unique physical characteristics in ways that would extend equality analysis into the domain of practices covered by the exception. Compare Ruth Bader Ginsburg, *The Status of Women*, 20 AM. J. COMP. L. 585, 589 (1972) (Symposium Introduction) (“The principle of the Equal Rights Amendment that, with narrow exceptions for personal privacy or physical characteristics unique to one sex, sex is not a permissible factor in determining the legal rights of women or of men, reflects a practical judgment that ‘equal status can be achieved only by merging the rights of men and women into a “single system of equality.”’) with Ruth Bader Ginsburg, *Realizing the Equality Principle*, in SOCIAL JUSTICE & PREFERENTIAL TREATMENT 135, 145 (William T. Blackstone & Robert D. Heslep eds., 1977) (“Under the Equal Rights Amendment, classifications based on physical characteristics unique to one sex would be an exception to the general rule that gender is an impermissible factor in determining the legal rights of people. Indeed, flat prohibition of such gender-linked classifications would lead to absurd results: Laws relating to the nursing of children or donations to sperm banks would be rendered invalid even though noninvidious, narrowly drawn, and serving a legitimate purpose. Presumably, however, classification based on a sex-unique characteristic would be subject to strict scrutiny to insure that the design of the basic principle—to establish full equality of the sexes—is not undermined.”). As courts began to restrict the ways that the Fourteenth Amendment’s equal protection clause applied to claims of sex discrimination concerning pregnancy, advocates became more cautious, and perhaps less confident, about the scope of the exception. See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 25-27 (1975) (“According to the Senate report on the amendment, ‘a law providing for payment of the medical costs of child bearing’ also exemplifies a reasonable classification based on a characteristic unique to one sex. Further elaboration would have been helpful. Did the Senate Committee have in mind coverage under a national health insurance program, unrelated to employment? Government sponsored employment-related insurance plans? And how would the Committee appraise a government sponsored medical insurance plan that excludes payment of the costs of child-bearing?”).

presentations, advocates emphasized that unique physical characteristics would be governed by "careful judicial scrutiny" that restricted the principle's application, which was to be "strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic"<sup>163</sup>—a constraint that Emerson on occasion omitted in testimony.<sup>164</sup>

The unique physical characteristics exception proved to be a persuasive qualification of the ERA's antidiscrimination principle: It was a pragmatic compromise that seemed reasonable because it fused the comparative logic of antidiscrimination law with traditional modes of "reasoning from the body" of the kind the amendment was proposed to combat.<sup>165</sup> Unique physical characteristics modernized *Muller's* reasoning<sup>166</sup> as an expression of antidiscrimination law.

In the unique physical characteristics argument we can see how a creative constitutional claim is qualified under conditions of adversarial engagement. The women's movement advanced a powerful, but also threatening, claim on the antidiscrimination principle's jurisdiction, seeking through the ERA to have the Constitution treat sex-based laws as it treated race-based laws. Advocates offered unique physical characteristics as a subsidiary principle that would restrict the proposed jurisdiction of the antidiscrimination principle in the hopes that the modification might enhance the proposal's chance of public acceptance.<sup>167</sup> The unique physical characteristics concept limited the reach of the race analogy much as the suffragists' social housekeeping argument limited the reach of the self-government principle. An argument that challenged traditional gender arrangements incorporated traditional modes of reasoning about gender arrangements in order to preserve the intelligibility of gender in the very act of changing it.

The movement's approach to defining sex classifications was by no means inevitable. Indeed, it is profoundly at odds with understandings of sex equality advanced by Murray and Eastwood, Friedan, and others in the 1960s. Proponents of the ERA asserted that the amendment would not

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163. Brown, Emerson, Falk & Freedman, *supra* note 151, at 894.

164. See *infra* text accompanying note 181 (1971 Senate Hearings).

165. See Brown, Emerson, Falk & Freedman, *supra* note 151, at 894:

[W]hile differentiation on the basis of a unique physical characteristic does not impair the right of a man or woman to be judged as an individual, it does introduce elements of a dual system of rights. That result is inevitable. Where there is no common factor shared by both sexes, equality of treatment must necessarily rest upon considerations not strictly comparable as between the sexes. This area of duality is very limited and would not seriously undermine the much more extensive areas where the unitary system prevails. But the courts should be aware of the danger.

166. See *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) ("The two sexes differ in structure of body, in the functions to be performed by each . . . . This difference justifies a difference in legislation . . . .").

167. Cf. text at note 157.

apply (or might differently apply) to laws regulating pregnancy—even as this threatened to exclude from the ERA's reach matters at the very core of NOW's vision of equality for women.<sup>168</sup>

Given tensions between the unique physical characteristics argument and the aims of the second-wave feminist movement, it is not surprising that outside the ERA debate, movement lawyers approached the question of defining a sex classification differently. In constitutional and Title VII litigation in the early 1970s, feminist lawyers including Ruth Ginsburg, Wendy Williams, and Susan Deller Ross urged another approach to defining a sex classification, arguing that regulations pertaining to pregnant women were sex-based, subject to heightened scrutiny, and wrongful when they enforced stereotypical understandings of women's roles.<sup>169</sup> Their case was persuasive to many: a number of courts,<sup>170</sup> the EEOC,<sup>171</sup> and the

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168. Cf. Philip B. Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. C.R.-C.L. L. REV. 243, 251 (1971) ("Some of the primary planks of the 'women's liberation' platform, such as the right to abortion, or to 'child care centers,' would be totally unaffected by the [ERA] even in its 'unisex' version."). As the material quoted in the preceding pages should illustrate, ERA proponents differed in the degree of care they devoted to analyzing the unique physical characteristics concept, and tended to discuss judicial review of laws regulating pregnancy under the ERA when asked to speak in academic settings.

169. The movement's constitutional lawyers argued that regulation of the pregnant woman was presumptively unconstitutional when it enforced stereotypes and sex role prescriptions of the separate-spheres tradition. A classic expression of this understanding is an equal-protection brief that Ruth Ginsburg filed in 1972 in a case involving a woman who faced an involuntary discharge from the Air Force because she was pregnant. See Brief for Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178); the brief argued that "sex discrimination exists when all or a defined class of women (or men) are subjected to disadvantaged treatment based on stereotypical assumptions that operate to foreclose opportunity based on individual merit," and urged that the pregnancy regulations "should be subject to close scrutiny, identifying sex as a suspect criteria for governmental distinctions." *Id.* at 15, 26; see also Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1447 (2002) (observing that the *Struck* case was "an ideal case to argue the sex equality dimension of laws and regulations regarding pregnancy and childbirth."). Other briefs arguing that the Supreme Court should recognize regulation of pregnancy as sex-based state action under the Equal Protection Clause prominently include Wendy Williams's brief in *Geduldig v. Aiello*. Brief for Appellees at 24, *Geduldig v. Aiello*, 417 U.S. 484 (1974) ("As with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny.").

Susan Deller Ross played a key role in providing arguments to the EEOC that the Equal Protection Clause reached pregnancy discrimination. See Mayeri, *supra* note 17, at 798 n.206 and accompanying text; Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES, Jan. 25, 1977, at A33 ("Employers will continue to regard women as people who neither need nor want to remain in the labor market for more than a temporary sojourn. Traditional states of mind about women's proper work once the baby comes are difficult to abandon, even for gray-haired jurists.").

170. See, e.g., *Cohen v. Chesterfield County Sch. Bd.*, 474 F.2d 395, 401 (4th Cir. 1973) (holding that mandatory maternity leave policy was sex-based discrimination subject to equal protection scrutiny) ("Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.") (quoting *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969) (dissenting from denial of motion for rehearing en banc)); *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 505 n.1 (S.D. Ohio 1972) (relying on *Reed* to invalidate regulations requiring termination of employment at a fixed stage of pregnancy) ("[D]efendant Board's treatment of

Department of Health, Education, and Welfare (HEW)<sup>172</sup> were beginning to respond positively to these claims. Despite this conflict, movement leadership including Martha Griffiths,<sup>173</sup> Bella Abzug,<sup>174</sup> and Betty Friedan,<sup>175</sup> subscribed to the ERA's definition of sex classifications.<sup>176</sup> In short, even if

pregnancy . . . is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that [the plaintiff] does not fit neatly into the stereotyped vision . . . of the 'correct' female response to pregnancy should not rebound to her economic or professional detriment."); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972) (relying on *Reed* to hold that mandatory maternity leave policy violated equal protection); cf. *Sprogis v. United AirLines*, 444 F.2d. 1194, 1198 (7th Cir. 1971) (interpreting sex-discrimination provisions of Title VII) ("Discrimination is not to be tolerated under the guise of physical properties possessed by one sex.").

171. "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b) (1972).

172. "Pregnancy and related conditions. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient." 34 C.F.R. 106.40(b) (1980).

173. *Equal Rights for Men and Women 1971: Hearings on H.R.J. Res. 35, 208, and Related Bills, and H.R. 916 and Related Bills Before the Subcommittee No. 4 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 51 (1971) (statement of Martha Griffiths) ("But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference."); 116 CONG. REC. 28005 (daily ed. Aug. 10, 1970) (statement of Rep. Griffiths) ("This law does not apply to criminal acts capable of commission by only one sex. It does not have anything to do with the law of rape or prostitution. You are not going to have to change those laws.").

174. 117 CONG. REC. 35312 (Oct. 6, 1971) (statement of Rep. Abzug).

The equal rights amendment proposes to give equality of rights to women and men, so that sex is not a factor in determining what rights one enjoys. There are two qualifications to this general rule: The equal rights amendment will not preclude legislation, or official action, relating to physical characteristics unique to one sex and will not preclude legislation respecting personal privacy. For example, laws providing maternity benefits will not be violative of the equal rights amendment since only women can qualify as mothers. Similarly, laws regulating sperm donors would stand since only men can fulfill this function. This is not discrimination: It is simple recognition of a physical characteristic unique to one or the other sex.

175. *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 493 (1970) (statement of Betty Friedan) ("[T]he only full special protection that women need is in the matter of maternity and childbearing and none of the so-called protective laws cover this. And furthermore, that is a functional distinction that the equal rights amendment wouldn't touch because men don't bear babies.").

176. At the 1976 Women and the Law Conference, two authors of the Yale ERA article narrowly construed the unique physical characteristics principle in explaining how the ERA would affect laws concerning pregnancy:

gender-conventional reasoning moved many ERA proponents to adopt the unique physical characteristics approach, the quest to make ERA acceptable to those outside the feminist movement seems to have motivated many feminist leaders to endorse the unique physical characteristics argument.

The pragmatic political considerations that shaped development of the unique physical characteristics argument also shaped its practical reach. Practices said to be covered by the unique physical characteristics qualification fluctuated over time, as debate shifted ground.<sup>177</sup> At the outset, advocates suggested that laws regulating maternity benefits would be excluded from the ERA's reach, or at least differently considered; advocates felt the need to reassure the public that government could still regulate reproduction under the amendment, even as they sought tighter oversight of such regulation in litigation and legislative arenas, and even as they drew the line by insisting that unique physical characteristics only exempted laws governing childbearing, *not* child rearing, from ERA's reach.<sup>178</sup> The unique physical characteristics qualification also seemed to function as an at-times capacious exemption for laws criminalizing sexual conduct; it was invoked to explain why the ERA would not constrain laws regulating rape, statutory rape, and sometimes even prostitution.<sup>179</sup> During Congress's deliberations over whether to enact the ERA, there were several occasions in which advocates invoked unique physical characteristics to explain the ERA's application to laws criminalizing abortion and

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Under the equal rights amendment, those statutes treating pregnancy and childbirth differently from other physical disabilities or reasons for taking a leave of absence will be impermissible. The analysis applied to laws concerning pregnancy is somewhat different from the general equal rights amendment analysis. Since pregnancy is a condition unique to women, there is no exact analogy in men. However, women are discriminated against by rules about pregnancy which are not related to those features of pregnancy which make it unique. In most legislative contexts, pregnancy is of concern because it causes temporary disability or may be the basis for a request of leave from work. In those respects it is identical to all other temporary disabilities or personal reasons for requesting leave. Under the ERA, a strict scrutiny test is applied when legislation concerns a unique physical characteristic, to assure that the legislation is closely related to a compelling state interest in the unique aspects of the characteristic and that it is not being used to shield sex discrimination under the uniqueness rubric.

Barbara A. Brown, Ann E. Freedman, Harriet N. Katz, & Alice M. Price, *The Impact of the Equal Rights Principle on State Unemployment Compensation Laws*, in *WOMEN AND THE LAW: SYMPOSIUM ON SEX DISCRIMINATION* 29, 33 (published by Temple University School of Law, Women's Caucus in Honor of the Seventh National Conference on Women and the Law, March 12-14, 1976).

177. See, e.g., 116 CONG. REC. 35453 (Oct. 7, 1970) (statement of Sen. Bayh) ("Combat duty is more dangerous and demanding than any other job. Because combat demands absolutely unique abilities, Congress might justifiably decide that women are not physically suited for it, just as it has decided that men without the requisite physical characteristics are not suited. . . . The amendment would thus allow those women who wanted to serve to volunteer.").

178. See text at note 157 (observing that "leave for childrearing would have to apply to both sexes").

179. For one exchange on the prostitution question, see 116 CONG. REC. 35944 (October 9, 1970) (colloquy between Senator Eagleton and Senator Bayh); see also *supra* note 173 (remarks of Rep. Griffiths) and *infra* note 268 (remarks of Sen. Bayh).

homosexual conduct, anticipating debates about the ERA's reach that would dominate state ratification debates in the 1970s.

For example, when Emerson testified in 1971 before the House Judiciary committee, he explained the unique physical characteristics subsidiary principle as he had in prior testimony<sup>180</sup> but then concluded his verbatim recital of laws beyond the ERA's reach by appending to the list a new item: "Laws dealing with homosexual relations would likewise be unaffected, for such laws also deal with physical characteristics pertaining only to one sex."<sup>181</sup> During congressional debates, abortion was on occasion discussed as falling within the ambit of unique physical characteristics,<sup>182</sup> but the question did not engage the attention of those debating the ERA as it would so explosively come to over the course of the 1970s. Abortion, and especially homosexuality, are discussed during congressional deliberations on the ERA—but not as they are in ensuing years, when they become the focal point of ratification debates in the states.

ERA's passage through the 92nd Congress was triumphant. The ERA was enacted by overwhelming margins, along with a cornucopia of civil rights laws prohibiting sex discrimination and major child care legislation beginning to implement feminist vision of universal coverage.<sup>183</sup> But the right had begun to focus on the family as a site of political mobilization. Acceding to pressure from conservatives including Pat Buchanan, William F. Buckley, and James M. Kilpatrick, President Nixon decided to veto a program whose development his administration had, with qualification, supported.<sup>184</sup> In the end, Nixon only signed the child care tax credit into

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180. See *supra* text accompanying note 157.

181. Compare *Equal Rights 1971*, *supra* note 173, at 42 (statement of Prof. Thomas Emerson) with text accompanying note 180. Emerson's claim was intelligible as an account of laws criminalizing sodomy, but could well have reached any law that burdened homosexuality on the view that punishing homosexual relations promoted heterosexual coupling.

182. See 117 CONG. REC. 35302 (Oct. 6, 1971) (colloquy between Representatives Wiggins and Griffiths).

183. While nearly all the organizations that testified on behalf of the child care program emphasized its benefits for the nation's children, NOW had emphasized the legislation's emancipatory potential for women: "Perhaps the greatest cause of women's second-class status is the traditional belief that anatomy is destiny. Women will never have full opportunity to participate in America's economic, political, or cultural life as long as they bear the sole responsibility for the care of children—entirely alone and isolated from the larger world." *Comprehensive Child Development Act of 1971: Joint Hearings on S. 1512 Before the Senate Subcomm. on Employment, Manpower, and Poverty and the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare, Part 3*, 92d Cong. 751-52 (1971) (statement of Vicki Lathom, Member, National Board of Directors, Child Care Task Force, National Organization for Women) ("Although NOW is committed to work for universally available, publicly supported child care, we are in accord with flexible fees on a sliding scale, as an interim step, to reflect the urgent needs and varied resources of families.").

184. For an inside account of the forces in New Right circles, in the Nixon Whitehouse, and on the Hill that combined to pressure Nixon into a veto that would repudiate federal involvement in childcare outside the welfare context, see Kimberly Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Childcare*, 13 J. POLICY HIST. 216, 231-38 (2001). There was considerable support for federal childcare legislation in this era. A *New York Times* editorial responded

law.<sup>185</sup> In vetoing the child care bill in December 1971, President Nixon emphasized that “[t]here is a respectable school of opinion that this legislation would lead toward altering the family relationship” and urged that the nation adopt policies that “enhance rather than diminish both parental authority and parental involvement with children.” He concluded that “for the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach.”<sup>186</sup>

## 2. *Abortion, Homosexuality and Stop ERA*

As Congress was sending the ERA to the states for ratification, Phyllis Schlafly, a conservative activist who made her name supporting Goldwater’s bid for the presidency,<sup>187</sup> was forming STOP ERA.<sup>188</sup> Over the

to the CCDA veto: “[T]his attack cannot obscure the fact that the concept of child care and development enjoys broad popular support across most of the traditional divisions of politics, class, economics and race.” Editorial, *Abandoned Commitment*, N.Y. TIMES, Dec. 11, 1971, at 30. Women’s support for childcare crossed political lines: The National Women’s Political Caucus proposed comprehensive childcare programs as well as abortion on demand to the Republican Platform Committee in 1972. *Abortion and Child Care Planks To Be Proposed to the G.O.P.*, N.Y. TIMES, Aug. 11, 1972, at 8.

185. See Revenue Act of 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497, 518-520 (allowing working parents with combined incomes of up to \$18,000 a year to take a tax deduction for child care of up to \$400 a month and those with combined incomes above \$18,000 to take a more modest deduction).

186. Veto of the Economic Opportunity Amendments of 1971, 1971 PUB. PAPERS 1174, 1178 (Dec. 10). When the House Committee on Education and Labor tried to respond to Nixon’s veto with revised legislation, minority dissenters cited multiple editorials branding the child development bill as a corrosive threat to the nation. Columnist James J. Kilpatrick approved of childcare centers that provided “places where welfare mothers could leave their children while they went off to work,” but he called the proposed bill “the boldest and most far-reaching scheme ever advanced for the Sovietization of American youth.” Comprehensive Child Development Act, H.R. REP. No. 92-1570, at 45 (1972).

187. See CHRITCHLOW, *supra* note 18, at 131 (“For Phyllis Schlafly the convention was a total success. Only forty years old, she had become a star in the Republican Right as author of *A Choice Not an Echo*.”).

188. Schlafly, though a dedicated conservative activist since the 1950s, had not taken a stance against the ERA until the early 1970s. She gave her first speech on the ERA in December of 1971 and published her first anti-ERA article in the *Phyllis Schlafly Report* in February of 1972. At that point, the *Report* reached roughly three thousand subscribers. By the mid-1970s, it claimed a subscription rate of around 35,000. STOP-ERA, as a national organization, grew out of Schlafly’s call to her followers to get involved at a grassroots level. They passed out copies of the paper, marched and prayed outside legislatures, wrote letters and were willing to turn out in large numbers, at a moment’s notice. For Schlafly’s monumental impact on the anti-ERA movement, see FELSENTHAL, *supra* note 18, at 244. (“In Illinois, for example, she could rally a thousand women for a routine demonstration by notifying her top lieutenants—fifty-nine chairmen, one for each of the state’s fifty-nine legislative districts. And that was nothing because, all told, she had twenty thousand people working for her in the state, some monitoring only their block or bowling team. She communicated frequently with all of them—from the lowliest to the most powerful—via chain calls and notices in her *Eagle Forum Newsletter*. Once she triggered the system, mobilizing twelve thousand people for a rally at the Illinois Capitol was simple—and foolproof.”). For another account of the genesis of Schlafly’s career as an anti-ERA activist, see

course of the 1970s, Schlafly took the campaign against the ERA to the streets and ultimately succeeded in blocking its adoption in southern and western states whose votes were required for the ratification.<sup>189</sup> Schlafly linked together the ERA, abortion, and homosexuality in ways that changed the meaning of each, and mobilized a grassroots, "profamily constituency" to oppose this unholy trinity. Schlafly amplified the case against the ERA in part by framing the debate as conflict *between* women. Her success in mobilizing opposition to the ERA forced the women's movement to take account of her, in ways that shaped its constitutional advocacy for decades.<sup>190</sup>

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MANSBRIDGE, *supra* note 15, at 283 n.55. Schlafly's Eagle Forum still actively advocates and organizes against the passage of ERA.

Schlafly seems not to have received significant amounts of support from the leadership of the New Right until 1976. However, Senator Ervin assisted her throughout her anti-ERA work. "When Ervin retired in 1976, Schlafly teamed up with Helms and brought Religious Right women and their male allies under the New Right's umbrella . . ." MELICH, *supra* note 18, at 49.

The organizational history of groups like Schlafly's is only now being written. See, e.g., CRITCHLOW, *supra* note 18. Since most of these groups were locally based and issue oriented, they tended to exist for shorter durations and leave fewer records than larger organizations such as the National Organization for Women. For an account of conservative women's groups in this period, see PAMELA JOHNSTON CONOVER & VICTORIA GRAY, *FEMINISM AND THE NEW RIGHT: CONFLICT OVER THE AMERICAN FAMILY* 75 (Praeger Publishers 1983) ("There are hundreds, if not thousands, of grassroots groups that form on an ad hoc basis. Often an organizer like Schlafly will be in touch with the local organization but the ad hoc group will not be started by her nor will it join her organization. These groups exist until the threat is defeated, then disband."). Schlafly inspired women all over the country to form ad-hoc organizations such as the Power of Women (POW) in Wisconsin, Women Who Want to be Women in Texas and in Utah an organization named Humanitarians Opposed to Degrading Our Girls (HOTDOG). See Susan Marshall, *Ladies against Women: Mobilization Dilemmas of Antifeminist Movements*, 32 SOC. PROBS. 348, 357 (1985). For a specific account of Happiness of Womanhood, another national anti-ERA group, see Betty Liddick, *Pillow Fight: Skirmish in ERA Battle*, L.A. TIMES, Sept 4, 1972, at F1 ("The 80 women at the Satin Pillow Rally . . . had come to hear Mrs. Davison speak on Happiness of Womanhood, Inc. (HOW). She founded the group two years ago to 'preserve the family, the masculine role as guide, protector and provider and the feminine role as wife, mother and homemaker.' Membership now nears 10,000 and Mrs. Davison's extensive travel is paid for by dues of \$5 per person.").

189. When the extension of time for the ERA's ratification ran out in 1982, Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Utah, and Virginia had not ratified the amendment. See MANSBRIDGE, *supra* note 15, at 13 ("All were Mormon or southern states, except Illinois, which required a three-fifths majority for ratifying constitutional amendments and which had a strongly southern culture in the third of the state surrounded by Missouri and Kentucky.").

190. For one early glimpse of Schlafly, see Peter W. Coogan, *Symposium Panel Discussion: Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J.L. & SOC. PROBS. 77, 110 (1974):

Professor Elsen: The question to Mr. Coogan is how much effect he thinks that someone like Phyllis Schlafly [sic] may have.

Mr. Coogan: Well, it's unfortunate to say that she's come on like gang busters all over the country. It happened about six months ago. I have no idea what her sources are, but she's very well funded, and she has coordinated "grass roots" groups all over the country that started emerging recently. They have been active with pickets and placards at legislative sessions, sometimes slowing the progress of the amendment. I don't think that her arguments will in the long run have any effect. But it took a long time for Congress to figure out what the amendment does. As I was trying to explain, any time you have a possibility of throwing

Schlafly's first published attack on the ERA in February of 1972 characterized the women's movement as "anti-family, anti-children, and pro-abortion":

Women's lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society. Women's libbers are trying to make wives and mothers unhappy with their career, make them feel that they are "second-class citizens" and "abject slaves." Women's libbers are promoting free sex instead of the "slavery" of marriage. They are promoting Federal "day-care centers" for babies instead of homes. They are promoting abortions instead of families.<sup>191</sup>

The ERA's opponents in Congress had defended the family; Schlafly added to those themes another, distinctly gender-conscious argument, speaking out against the ERA on the grounds that it would harm women.<sup>192</sup> Where feminists opposed law's ascription of women as dependent caregivers and sought to end the structural conditions producing caregiver dependency, Schlafly, by contrast, looked to the law to affirm caregiver dependency, through practices of ascription and through social structure.<sup>193</sup>

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laws out as unconstitutional, it raises grave doubts among people, and she plays on those fears very effectively. Luckily, a good counterattack is being mounted by groups like B.P.W. and Common Cause trying to explain just what the amendment will do and won't do. And I think that when that education process is finished, her arguments will be shown to be of little or no value. But in the meantime, she is throwing a lot of sand in the works. And until people hear the other side, which is just going to take some time, she will be successful in obfuscating the real issues.

191. Phyllis Schlafly, *What is Wrong with "Equal Rights" for Women*, 5 PHYLLIS SCHLAFLY REP. 4 (Feb. 1972). For lengthy interviews with grassroots activists espousing these views as views that animated their work to defeat the ERA, see REBECCA E. KLATCH, *WOMEN OF THE NEW RIGHT* 119-47 (1987) (discussing how socially conservative women of the New Right view feminism, addressing themes of feminism as anti-family, feminism as the new narcissism, feminism as an attack on the status of the homemaker, and feminism as big government).

192. As Rebecca Klatch has observed:

Far from suffering from false consciousness, in fact the social conservative woman is well aware of her status as a woman and acts to defend that status. It is just that the social conservative woman's view of women's interests is at odds with a feminist view of women's interests. Clearly, the preservation of traditional gender roles is at the very core of the social conservative woman's activism.

KLATCH, *supra* note 191, at 10. In 1986, Schlafly offered a post mortem on the ERA wars that succinctly cashed out her anti-ERA arguments in the language of benefits and harms to women. See Phyllis Schlafly, *A Short History of the ERA*, 20 PHYLLIS SCHLAFLY REP. (Sept. 1986) available at <http://www.eagleforum.org/psr/1986/sept86/psrsep86.html>.

193. Schlafly gives her detailed program for "Rejecting Gender-Free Equality" in PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 68-138 (1977). It begins:

The Positive Woman will never fall into the trap of adopting gender-free equality in theory or in practice. The Positive Woman builds her power by using her womanhood, not by denying or suppressing it. The Positive Woman wants to be treated like a woman, not like a man, and certainly not like a sex-neutral "person."

*Id.* at 68.

She denounced feminists' understanding of women's interests as misguided<sup>194</sup> (and self-hating<sup>195</sup>).

While feminists sought federal support for child care, suggesting that "the greatest cause of women's second-class status is the traditional belief that anatomy is destiny,"<sup>196</sup> Schlafly encouraged women who lived according to traditional prescription to contest the new meaning and form that feminists were endeavoring to give their lives.<sup>197</sup> Constitutional arguments seeking respect and recognition for new modes of life challenge customary modes of life. It was feminists, after all, and not the ERA's opponents, who characterized women's traditional family role as a "second-class status."<sup>198</sup> In these and other ways, feminist advocacy dealt an affront and posed a threat to women who lived within traditional family roles and who—by reason of age, education, marital bargain or parenting responsibilities, resources, region, temperament or preference—were not well situated to pursue freedom, security, or status through the opportunity to be "individuals" that feminists claimed.<sup>199</sup> The claim that constitutionally sanctioned traditions inflicted constitutionally cognizable injury created new relationships among women, as well as between the sexes.

Schlafly drove these latent semantics to the surface of the ERA debate. She mobilized opposition by talking about the practical threats the ERA posed to family law that protected dependent women.<sup>200</sup> As importantly, she mobilized opposition by framing abortion and homosexu-

194. See, e.g., Phyllis Schlafly, *The Precious Rights ERA Will Take Away from Wives*, 7 PHYLLIS SCHLAFLY REP. § 2 (Aug. 1973). Some ERA proponents argue that husbands support their wives only because of love, not because of the law. Most husbands do support their wives because of love, but the high divorce rate proves that many husbands *do not* love their wives. Love may go out the window but the obligation remains, just as the children remain. ERA would remove that obligation.

195. SCHLAFLY, *supra* note 193, at 11 ("The Positive Woman . . . understands that men and women are different, and that those very differences provide the key to her success as a person and fulfillment as a woman. . . . The woman's liberationist, on the other hand, is imprisoned by her own negative view of herself and of her place in the world around her.").

196. See *supra* text at note 191.

197. Schlafly presented the aims of the women's movement as a status affront and practical threat to the women she mobilized. Cf. SCHLAFLY, *supra* note 193, at 87 ("Elimination of the role of 'mother' is a major objective of the women's liberation movement. Wives and mothers must be gotten out of the home at all costs to themselves, to their husbands, to their children, to marriage, and to society as a whole.").

198. Cf. *supra* text at note 183; SCHLAFLY, *supra* note 193, at 46 ("Long before women's lib came along and made housewife a term of derision, it had its own unique dignity.").

199. Cf. SCHLAFLY, *supra* note 193, at 80:

It is one thing for the mod young woman to say she wants to give up the rights of wives and take her chances on equality. It is something else again to change the terms of the marriage contract that older wives entered into years ago. This is what the Equal Rights Amendment would do. When senior women were married twenty, thirty, or forty years ago, marriage meant certain rights and obligations. Nothing, not even a constitutional amendment, should be permitted to change those terms now.

200. See Schlafly, *supra* note 194.

ality as potent symbols of the new family form that the ERA would promote.<sup>201</sup>

A year before *Roe*,<sup>202</sup> Schlafly attacked “Women’s lib” as “a total assault on the role of the American woman as wife and mother,” accusing women’s libbers of “promoting Federal ‘day-care centers’ for babies instead of homes [and] promoting abortions instead of babies.”<sup>203</sup> By associating the ERA and abortion as the twin aims of “women’s liberation,”<sup>204</sup> Schlafly used each to redefine the meaning of the other. Schlafly’s anti-ERA frames and networks helped construct the *Roe* decision that reverberated explosively through ERA debates in the 1970s and 1980s.

While these questions had been raised in Congress, they now moved to the foreground of the ERA debate. Throughout the 1970s and 1980s, opponents of the ERA insisted that the ERA would empower federal courts to authorize abortion and same-sex marriage. *The Power of the Positive Woman* describes the ERA’s “effect on the family” as threefold. On Schlafly’s account, the ERA would (1) “degrade the homemaker role and support economic development requiring women to seek careers”<sup>205</sup> (and requiring government to provide child care<sup>206</sup>), (2) protect the right to an abortion, on the theory that “any restriction of abortion would be . . . sex discriminatory because it impacts one sex only,”<sup>207</sup> and (3) grant same-sex couples the right to marry.<sup>208</sup> This line of argument led ERA proponents

201. For social movement theory analyzing the dynamics of mobilization through frame alignment, see *supra* note 89. For one account of the semantics of gender and family that tied abortion and ERA:

ERA was an attempt to remove sex as a classification in law, a way of separating individual women from their sex. Abortion was a way for women to avoid the natural process associated with their sexuality. Thus both undermined the family by separating familial responsibilities from women. Both ERA and abortion, therefore, were seen as ways through which women could be released from traditional roles and responsibilities; possibility was perceived as prescription. ERA and abortion could become two aspects of the same threat to women whose identity was wrapped up in motherhood.

MATHEWS & DE HART, *supra* note 15, at 159 (citing KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)).

202. *Roe v. Wade*, 410 US 113 (1973).

203. Schlafly, *supra* note 191, at 3-4 (quoted *supra* text at note 191).

204. See *supra* text at note 193.

205. SCHLAFLY, *supra* note 193, at 85 (quoting Arthur Ryman, law professor at Drake University).

206. Schlafly claimed that an Ohio ERA Task Force had decided that “the ‘equality principle’ of the ERA requires the state to provide child-care services in order that mothers can leave the home and join the work force.” *Id.* at 86 (quoting Ohio ERA task force concluding that “[t]he lack of adequate child care services in the State of Ohio raises ERA problems because the State’s failure to recognize a need for insuring adequate child care is founded on sex-stereotyped attitudes about both the ‘proper’ roles of men and women and the ‘innate’ abilities of mothers and fathers. . . .” and recommending that “the state set as a priority . . . the establishment of high quality, universally available child care services that are funded in whole or in part by the State of Ohio.”).

207. *Id.* at 89.

208. *Id.* at 90. For other expressions of these understandings, see *ADD The Impact of the Equal Rights Amendment Part I, Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 1st & 2nd Sess. (1983); Judy Klemesrud, *Equal Rights Plan and*

such as Ruth Ginsburg to deny that ERA would authorize abortion and same sex marriage:

Some legislators, perhaps deferring to Anita Bryant, have explained "nay" votes on the ground that the ERA would authorize homosexual marriage.<sup>209</sup> The congressional history is explicitly that the ERA would do no such thing. Similarly, votes against the ERA have been urged on the ground that the amendment authorizes abortion<sup>210</sup>—an inflammatory, but not an accurate charge. The Supreme Court solidly anchored its 1973 rulings in the reproductive choice cases to the due process guarantee, not to an equality idea.<sup>211</sup>

So long as proponents sought the ERA's passage, they struggled to refute these arguments and distance the ERA from them.<sup>212</sup> The effect was to discipline the ways feminists reasoned about the sex equality principle under the ERA, leading the movement to embrace positions with which it was increasingly at odds.

Schlaflly had a habit—maddening to proponents<sup>213</sup>—of arguing that the ERA would bring about states of affairs that feminists may have affirmatively desired, but had foresworn pursuit of through the ERA. As a literate member of her constitutional culture, Schlaflly did not trust legislative history as a constraint on the ERA's adjudicated meaning, much less as a constraint on its expressive meaning or the forms of legislation that its enforcement clause might come to authorize.<sup>214</sup> Schlaflly warned:

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*Abortion Are Opposed by 15,000 at Rally*, N.Y. TIMES, Nov. 20, 1977, at 32 (describing, on the occasion of the 1977 Houston Convention marking International Women's Year, a counter-rally sponsored by the Pro-Family Coalition that "unanimously passed resolutions against, abortion, the proposed equal rights amendment and lesbian rights, three issues that will also be debated at the women's conference").

209. See, e.g., MIAMI HERALD, Apr. 14, 1977, at 20-A, col. 1 (quoting Sen. Barron: "'I am convinced to a moral certainty that [under the ERA] the U.S. Supreme Court would have to say that homosexuals could marry. . . .').

210. See, e.g., *Joint Hearing of Indiana Senate Judiciary Committee and House Human Affairs Committee* (Jan. 4, 1977) (unpublished excerpts on file at the Texas Law Review) (testimony of Professor Charles E. Rice: "the ERA would preclude any restrictions whatsoever on abortion").

211. Ginsburg, *supra* note 146, at 937-38.

212. See *infra* notes 216-250 and accompanying text.

213. Proponents often complained bitterly that Schlaflly misrepresented the effects of the ERA. See, e.g., MANSBRIDGE, *supra* note 15, at 271 n.37 (summarizing testimony by Thomas Emerson "analyzing the seventeen statements in the [anti-ERA] brochure one by one, proving ten of them totally false, six of them false in part, and only one of them correct.").

214. Schlaflly did not trust that the amendment would have the limiting constructions that its proponents included in the legislative history, because she appreciated that proponents were seeking through the amendment's ratification to express symbolic support for the realization of aims that the amendment by its own, judicially enforceable terms, would not require; because she saw that the Warren Court was interpreting the existing constitution's text in ways that suggested the formal legislative history of an Article V amendment might not control its subsequent adjudicated meaning (*cf. infra* text at note 215); and because, as she repeatedly reminded her readers, the amendment's enforcement clause would give Congress new powers to enact laws regulating the family. See, e.g., Evelyn Pitschke, *The Effect of Section 2*, 10 PHYLLIS SCHLAFLY REP. 3 (Nov. 1976) ("ERA's Section 2

ERA would give enormous power to the Federal courts to decide the definitions of the words in ERA, "sex" and "equality of rights." It is irresponsible to leave it to the courts to decide such sensitive, emotional and important issues as whether or not the language applies to abortion or homosexual rights.<sup>215</sup>

In retrospect, the debate has an Alice-in-Wonderland quality about it, as Schlafly offers a more robust reading of the feminist movement's claims than the movement itself felt able publicly to own.<sup>216</sup>

Consider the question of abortion under the ERA. Pursuit of the ERA led feminists to avoid arguing, as a matter of law, that reproductive rights had anything to do with equality. When constitutional categories were in flux in the first years after *Griswold*,<sup>217</sup> and the legal system was first beginning to recognize criminal abortion laws as inflicting constitutionally cognizable injuries on women,<sup>218</sup> feminists had talked about abortion as a right of liberty, self-ownership, wealth equality, and sex equality, in protest actions such as the Strike for Equality<sup>219</sup> and in briefs.<sup>220</sup> But as movement

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is an outright grant of power to the Federal Government, allowing it to exercise more control over our personal lives. Section 2 allows state legislatures to hand over to Congress the power to pass all laws relating to the sexes and the relationship between the sexes."); Phyllis Schlafly, *The Tremendous Powers of ERA's Section 2*, 15 PHYLLIS SCHLAFLY REP. 3 (Dec. 1981).

215. See Schlafly, *supra* note 192.

216. Cf. Phyllis Schlafly, *The Hypocrisy of ERA Proponents*, 8 PHYLLIS SCHLAFLY REP. 12, at 3 (July 1975):

When ERA proponents are speaking before women's clubs that are reasonably strait-laced and proper, they deny that ERA will grant homosexuals all the rights that now belong to husbands and wives, and profess horror that anyone would use "scare tactics" by mentioning this subject. But when ERA proponents speak before lawyers or respond under cross-examination at state hearings, ERA proponents must admit that ERA will legalize homosexual marriages and give homosexuals and lesbians all the rights of husbands and wives such as the right to file joint income tax returns, to adopt children, to teach in the schools, etc.

217. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (identifying a constitutional right to privacy protecting the use of contraceptives).

218. See Nancy Stearns, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 2 (1988-1989) (observing that until litigation of *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969), "courts had only considered whether abortion laws violated the rights of those performing abortions, not whether they violated the rights of women denied abortions.").

219. See *supra* text accompanying note 140 (strike demands).

220. See Brief of Amici Curiae Human Rights for Women, Inc. at 11-12, *United States v. Vuitch*, 402 U.S. 62 (1971) (No. 84) (arguing that the statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment in that it restricts their opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted, and also arguing that the abortion statute violates the Thirteenth Amendment, on grounds that "[t]here is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later"); Brief of Amici Curiae Joint Washington Office for Social Concern et al. at 10-11, *Vuitch* (No. 84) (arguing that the abortion statute discriminates against women in violation of their right to equal protection); see also Brief for Plaintiffs, *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969) (No. 69 Civ. 4469) (attacking New York abortion laws under a Fourteenth Amendment Due Process claim, and asserting that abortion laws are "both a result and symbol of the

leaders began to focus on pursuit of the ERA, many began to assert that the sex classifications the ERA prohibited did not include laws regulating "unique physical characteristics"—even as movement lawyers continued cautiously to talk about abortion as an equality right,<sup>221</sup> and to assert that

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unequal treatment of women that exists in this society"), cited in DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION* RAP 218 (1971).

Then-attorney Nancy Stearns offered an especially sophisticated rendering of a sex equality claim under the Nineteenth Amendment:

[T]he Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. The Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice. The abortion laws, in their real practical effects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment.

First Amended Complaint at 6-7, *Women of Rhode Island v. Israel*, No. 4605 (D.R.I. June 22, 1971) [hereinafter *Women of Rhode Island Complaint*], cited in Post & Siegel, *Legislative Constitutionalism*, *supra* note 13, at 1991 n.145; see also LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 26 (1969) (earlier published in ST. LOUIS U. L.J. (1967)):

The sex-discriminatory aspects of criminal abortion laws are not as readily apparent as in some other rules of criminal law. . . .

But sex discrimination is nevertheless inherent in the criminal abortion laws. . . . Though in many cases the desire to have the pregnant woman aborted is shared by her husband or lover . . . the criminal abortion laws have not caused those males to lose their lives.

The criminal abortion laws are another instance of legal rules that do not by their terms discriminate between the sexes, but whose practical effects fall much more heavily upon women than upon men. . . . [T]he principle of legal equality of the sexes is an additional reason for extending the circumstances under which therapeutic abortions should be legally justified.

221. See Mary Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U. L. REV. 281, 313 (1970-1971):

A criminal abortion statute is an example of a law which is limited on its face to the reproductive function. As such, it does not involve a direct question of denial of equality but of denial of other human rights beyond the scope of this article. It may be noted, however, that the abortion issue is not unrelated to the equality issue because the same underlying bases for court decisions denying equality of the sexes (women as reproductive instruments of the state, as dangerous to morality, and properly under the control of men) are implicit in the abortion laws.

Movement briefs in the first abortion cases invoked a variety of textual grounds to advance sex-equality challenges to criminal abortion statutes. See *supra* note 220. And in *Roe v. Wade* Nancy Stearns of the Center for Constitutional Rights submitted an amicus brief challenging the Georgia and Texas abortion statutes in sex equality terms on Fourteenth Amendment, due process, equal protection, and Eighth Amendment grounds. There she argued, with respect to the due process claim, that "restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife." See Brief of Amici Curiae New Women Lawyers et al. at 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). She further argued, with respect to the equal protection claim, that "laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives," *id.* at 32, and she contended, with respect to the Eighth Amendment claim, that

[s]uch punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person . . . [and] great physical hardship and emotional damage "disproportionate" to the "crime" of participating equally in sexual activity with a man . . . but is punishment for her "status" as a woman and a potential child-bearer.

discrimination on the basis of pregnancy was discrimination on the basis of sex in claims advanced under the Fourteenth Amendment's Equal Protection Clause<sup>222</sup> and under the federal employment discrimination statute which Congress had enacted based in part on the Fourteenth Amendment's enforcement clause.<sup>223</sup> As countermobilization against ERA and *Roe* converged, leadership of the women's movement struggled to defend ERA and *Roe* by separating them, over time engaging in ever more strenuous efforts of self-censorship.

While Schlafly first associated abortion with the ERA by emphasizing they were both goals of "women's liberation," about two years after *Roe*, New Right activists began to argue that the ERA itself would protect the abortion right.<sup>224</sup> Thereafter Schlafly was absolutely insistent in arguing the point. To refute her, ERA proponents could argue that ERA did not constrain laws that regulated unique physical characteristics—a claim they

*Id.* at 42.

222. During this same period, movement lawyers were arguing that discrimination on the basis of pregnancy was discrimination on the basis of sex under the Fourteenth Amendment and other sources of law. *See supra* notes 169-172 and accompanying text.

223. The Court initially applied to the employment discrimination statute its reasoning about pregnancy under the Fourteenth Amendment. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976) ("The Court of Appeals was therefore wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII. . . . *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."). When the Court concluded that the federal employment discrimination statute did not recognize discrimination on the basis of pregnancy as discrimination on the basis of sex, the women's movement urged Congress to amend it, which it did. The Pregnancy Discrimination Act provided:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000). The section also provided an abortion savings clause:

This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

*Id.*; see also *To Amend Title VII of the Civil Rights Act of 1964 To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 5 (1977) [hereinafter *Title VII Hearings*] (statement of Sen. Javits) ("I personally regret very much that the ERA has not been enacted. I think it is a shocking thing that we have not yet ratified this amendment. But legislation like this is one way in which, to some extent, to make up for the fact that we have not ratified the ERA.").

224. See Phyllis Schlafly, *ERA's Assist to Abortion*, 8 PHYLLIS SCHLAFLY REP. § 2, at 2 (Dec. 1974) (citing authorities dated November 1974). *Cf.* SCHLAFLY, *supra* note 193 (citing letters dated in January 1975).

maintained, with some equivocation.<sup>225</sup> But maintaining solidarity on this point became increasingly difficult as Congress and the states enacted restrictions on the use of public funds for abortion, and lawyers brought suit challenging them. NOW persuaded lawyers challenging the federal restrictions in *Harris v. McRae* not to assert a sex discrimination claim under the Equal Protection Clause; but once the federal government prevailed in that case, NOW could not constrain state ACLU chapters challenging abortion funding restrictions from making sex discrimination claims under state ERAs—claims that the ERA's opponents immediately pounced upon as demonstrating the ERA's true colors.<sup>226</sup>

Over time, the movement's ability to constrain its advocates from advancing equality-based objections to abortion restrictions weakened, especially as the ERA's prospects for ratification waned. In 1983, when ERA hearings after the ERA extension lapsed, proponents openly expressed am-

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225. See *Stepping Down from the Pedestal Won't Hurt Too Much: Answers to Operation Wake Up Scare Stories, Part IV*, NEW WOMEN'S TIMES, July 15-Aug. 15, 1975, at 3 ("The ERA is concerned with equal opportunities, access and rights for men and women in those areas where both are capable of functioning. Only women have babies and therefore only women can have abortions. There is no sex discrimination in either matter."). By contrast, the California ERA commission hedged the question, saying only that the ERA would recognize the right to privacy. See ANNE K. BINGAMAN, CAL. COMM'N ON THE STATUS OF WOMEN'S EQUAL RIGHTS AMENDMENT PROJECT, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 33-34 (1975) ("The authors of the Yale article, as well as the proponents of the Amendment in Congress, recognize the right of privacy doctrine recently developed by the Supreme Court as a major qualification to the Amendment. . . . Although to date the right of privacy has only been applied in cases involving contraception and abortion, those cases are relevant to an analysis of the reach of the right of privacy under the Equal Rights Amendment . . .").

226. Once Congress and the states prohibited use of public funds for abortion, lawyers had incentives to challenge the restrictions on sex discrimination grounds, under the Fourteenth Amendment's Equal Protection Clause and state ERAs. Mansbridge recounts the advocacy conflicts feminist lawyers faced:

If the ERA had not been before the states, these lawyers could have proceeded without external hindrance in trying to persuade the Court of their interpretation of the Fourteenth Amendment's equal protection clause. But with the ERA before the states, and with state legislators asking more and more often about the substantive effects of the ERA, the lawyers had to be careful not to frighten potential legislative proponents by suggesting that the equal protection clause—in theory a weaker protection than the ERA—could be linked substantively to abortion. Those feminist lawyers who believed that the ERA added little to the equal protection clause in any case wanted to press ahead with the equal protection analysis, ignoring the political consequences for the ERA. However, in Washington, against some resistance, [NOW President] Eleanor Smeal persuaded the feminist lawyers in the federal abortion funding case not to make this argument. In this way Smeal hoped to keep the ERA and abortion funding separate.

Smeal was less successful in the states. Here, local legal organizations made their own autonomous decisions and based their arguments for abortion funding not only on the potentially dangerous equal protection clause but also, in some states, on the state equal rights amendments.

MANSBRIDGE, *supra* note 15, at 124-25. For Schlafly's report on funding litigation under the state ERAs, see Schlafly, *supra* note 214, at 3; Phyllis Schlafly, *Court Proves ERA-Abortion Connection*, EAGLE FORUM NEWSLETTER (Eagle Forum, Washington D.C.), Apr. 1984, at 1. For another account of this struggle see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985-87 (1984).

bivalence about whether the ERA reached laws restricting abortion<sup>227</sup>—moving ever closer to conceding Schlafly's point. In 1984, Sylvia Law published an article entitled *Rethinking Sex and the Constitution*<sup>228</sup> in which she implicitly called upon ERA proponents to rethink the advocacy bargain and to assert the claim that laws regulating reproduction were sex-based state action. "Since 1973, literally hundreds of legal challenges to restrictive abortion laws have been brought," Law observed, "and only a very few of the cases have argued that the restrictions violated sex equality norms," noting, "[t]he national ACLU's Reproductive Freedom Project discouraged sex discrimination claims in cases challenging restrictions on reproductive freedom."<sup>229</sup> The following year, Ruth Ginsburg published *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade* in which she suggested that *Roe*'s reception would have been less contentious if the opinion first recognizing an abortion right had reached less widely and had justified the right on sex equality grounds.<sup>230</sup> (A year later, the Connecticut Supreme Court cited Law's article in ruling that the state's restriction on funding abortions violated the state's ERA.<sup>231</sup>) As practices in contention changed, and the Court and the Congress shifted ground, a growing number of feminist lawyers were no longer sufficiently interested in the ERA bargain to self-censor. Feminists

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227. In 1983 hearings to reintroduce the ERA once its extension lapsed, supporting witnesses hedged on ERA's applicability to abortion, with Anne Freedman, one of Emerson's co-authors for the ERA's unofficial legislative history, testifying equivocally about the relationship of ERA and abortion, suggesting that the ERA would not have a "practical effect" on abortion because such matters were covered by privacy doctrine under the existing Constitution:

I believe the issue of abortion is not germane to congressional consideration of the ERA, which should be promptly adopted on its own merits and should not be used as an occasion for a debate about the merits of the Supreme Court's decisions concerning the constitutional right of privacy.

... I just do not think [the merits of the Supreme Court's decision about privacy] should be debated in the context of the ERA because the ERA does not have a practical effect, in my opinion, on constitutional decisionmaking about abortion.

The reason that the ERA will not have a practical impact on judicial decisionmaking concerning abortion rights is because of the Supreme Court's well demonstrated commitment to an alternative form of constitutional analysis, the constitutional right of privacy.

*The Impact of the Equal Rights Amendment Part 1: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Judiciary Comm., 98th Cong., 1st & 2nd Sess. 451 (1983) (statement of Prof. Anne Freedman); cf. BERRY, supra note 15, at 84 ("To argue that the abortion issue was irrelevant because abortion was already legal was no answer to those who hoped the Supreme Court would one day outlaw it and who thought pro-choice was a code word for women wanting to escape the biological functions that made them women, in order to be like men.").*

228. Law, *supra* note 226.

229. *Id.* at 985 n.114.

230. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382-83 (1985) ("Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention. Professor Karst's commentary is indicative of the perspective not developed in the High Court's opinion; he solidly linked abortion prohibitions with discrimination against women.").

231. Quoted *infra* note 282.

once again began to argue that laws discriminated on the basis of sex if they imposed sex-role typing on pregnant women—including laws that excluded pregnant women from citizenship activities or compelled pregnant women to become mothers.

A similar dynamic shaped arguments about the ERA's application to questions of same-sex marriage. While some proponents suggested or even argued that the ERA would prohibit restrictions on same-sex marriage,<sup>232</sup> as we have seen, Emerson and others renounced the connection.<sup>233</sup> ERA proponents never offered a clear answer as to why the ERA's nondiscrimination principle would allow laws that prohibited same-sex marriage when the principle was supposed to prohibit, absolutely and without exception, laws that employed sex classifications in marriage and elsewhere.<sup>234</sup> In 1972, a *Yale Law Journal* note pointed this out, making a sustained case for the right to same-sex marriage under the federal ERA: "With no relevant or countervailing interests to place against the rule of 'absolute equality of treatment,' the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples."<sup>235</sup> Schlafly immediately republished the relevant pages of the article in full.<sup>236</sup>

232. See Rita E. Hauser, Address at the Annual Meeting of the American Bar Association (Aug. 10, 1970), in *Symposia: Edited Proceedings of the Annual Meeting Program of the Section of Individuals Rights and Responsibilities*, 1 HUMAN RIGHTS 54, 62 (1970-1971) ("I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes."); S.T. Perkins & A.J. Silverstein, Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-88 (1972-1973).

233. See 118 CONG. REC. 9317 (Mar. 21, 1972) (statement of Sen. Bayh) ("All [the ERA] says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman . . . [T]he equal rights amendment does not prohibit a State from saying it shall be against the law of the State for any citizens therein to participate in a homosexual act—period."); Mary Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U. L. REV. 281, 313 (1970-1971) (reasoning similarly and observing that "[a]ny challenge to legal distinctions as between heterosexuals and homosexuals would have to be brought under the fourteenth amendment").

In the 1970 NOW convention, Friedan helped defeat a resolution defending lesbian rights. Author Rita Mae Brown, who publicly objected to bias against homosexuals in NOW, and others were excluded from the organization. Lesbian Feminist Liberation speaker Jean O'Leary described lesbians in the movement as often "forced to remain closeted . . . by our own sisters" while they struggled for "free abortions when we cannot even have legal sex, equal pay for equal work when we cannot keep our jobs, child care centers when we cannot even keep our children, equal sharing of household chores, when we cannot even live together." *Lesbian Feminism: The Building of a New Society*, THE LESBIAN FEMINIST, Oct. 1973, at 3.

234. Sometimes proponents invoked the unique physical characteristics limitation on sex classifications. Sometimes they argued that law had only to impose the same restrictions on men and on women to satisfy the Amendment's nondiscrimination principle—a claim that was inconsistent with other claims about ERA's principle. Sometimes they simply asserted that ERA had nothing to do with restrictions on homosexual conduct. Every one of these claims had deep vulnerabilities.

235. Perkins & Silverstein, *supra* note 232, at 583-88.

236. Phyllis Schlafly, *ERA and Homosexual "Marriages"*, 8 PHYLLIS SCHLAFLY REP. § 2 (Sept. 1974).

During the ERA campaign, it was Freund, Ervin, and Schlafly—not Friedan, Eastwood or Murray (a closeted sexual pioneer<sup>237</sup>)—who argued that the ERA would require states to allow same-sex couples to marry. As Schlafly gloated in *The Power of Positive Woman*: “It is precisely ‘on account of sex’ that a state now denies a marriage license to a man and a man, or to a woman and a woman. A homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination ‘on account of sex.’”<sup>238</sup> The fact that the Washington Supreme Court denied this claim under the state’s ERA<sup>239</sup> did nothing to appease opponents; if anything, the argument escalated, in prevalence and in passion, in the ensuing years, serving as a rallying cry for those who convened to protest the 1977 International Women’s Year conference convened in Houston. As Schlafly and others called feminists lesbians—reporting the Houston convention in an article entitled *IWY: A Front for Radicals and Lesbians*<sup>240</sup> and following the convention with a report entitled *Houston Proves Radicals and Lesbians Run IWY*<sup>241</sup>—ERA advocates struggled with the question of whether, how, and how publicly to support the rights of sexual minorities. At the Houston conference, the women’s movement adopted Plank Eleven calling for the ratification of the ERA. Plank Eleven was accompanied by commentary explaining “What ERA will not do”:

ERA will NOT change or weaken family structure. . . .

ERA will NOT require the States to permit homosexual marriage. The amendment is concerned with discrimination based on gender and has nothing to do with sexual behavior or with relationships between people of the same sex. . . .

ERA will NOT have any impact on abortion laws. The U.S. Supreme Court decisions on abortion were made under present constitutional provisions addressed to privacy issues and based on the 1st, 9th, and 14th amendments.<sup>242</sup>

The ERA’s proponents were in a quandary. Just as the Conference attempted to dissociate abortion and the ERA while expressing support for the Court’s reproductive freedom decisions,<sup>243</sup> so, too, did the Conference

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237. See Rosenberg, *supra* note 120.

238. SCHLAFLY, *supra* note 193, at 90.

239. *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974).

240. See Phyllis Schlafly, *IWY: A Front for Radicals and Lesbians*, 11 PHYLLIS SCHLAFLY REP. § 2, at 1 (Aug. 1977); see also Phyllis Schlafly, *Houston Proves Radicals and Lesbians Run IWY*, 11 PHYLLIS SCHLAFLY REP. (Dec. 1977) [hereinafter *Houston Proves*].

241. See Schlafly, *Houston Proves*, *supra* note 240.

242. See National Commission on the Observance of International Women’s Year, *The Spirit of Houston: The First National Women’s Conference, An Official Report to the President, The Congress and the People of the United States* 51 (1978).

243. See *id.*; see also *id.* at 83 (reproducing Plank Twenty-One which affirms support for “Supreme Court decisions which guarantee reproductive freedom to women”).

attempt to dissociate the ERA and “homosexual marriage,” while adopting another plank calling for legislation to “eliminate discrimination on the basis of sexual and affectional preference.”<sup>244</sup> ERA historian Mary Berry recalled anxieties of the moment: “As the ERA proponents gathered at the federally financed 1977 International Women’s Year Conference in Houston and endorsed homosexual rights and other controversial resolutions on national television, they helped to make the case for ERA opponents. Instead of giving ammunition to the opponents they needed to demphasize the divisive issues.”<sup>245</sup>

To understate the point, not all agreed. In 1988, with demise of the ERA bargain, Sylvia Law wrote an article entitled *Homosexuality and the Social Meaning of Gender* in which she argued that legal prohibitions on same-sex relationships can best be understood as “preserving traditional concepts of masculinity and femininity” that injure “everyone who seeks freedom to experience the full range of human emotions, behavior and relationships without gender-defined constraints.”<sup>246</sup> (Five years later, the Hawaii Supreme Court moved to strike the prohibition on same-sex marriage under the state ERA.<sup>247</sup>)

In sum, it is painfully plain that, throughout the 1970s and into the 1980s, opponents of the ERA had enormous leverage over the ways that proponents of the ERA expressed and litigated the meaning of discrimination “on account of sex.”<sup>248</sup> Opponents’ proven ability to block ratification in southern and western states acted as a kind of regional check,<sup>249</sup> constraining the ways that feminist lawyers talked about meaning of sex equality so long as ERA was still a live issue. By degrees, the constraint relaxed; but it was not until the century’s end that NOW President Kim Gandy was willing to embrace the unholy trinity, calling anew for the ERA’s ratification and declaring:

Not only must an equality amendment provide protection against sex discrimination in the economic realm, but . . . it must also prohibit discrimination based on pregnancy and sexual orientation, and must protect the millions of women whose reproductive rights are being increasingly narrowed and denied. A new equal rights

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244. *Id.* at 89; *see also id.* at 165-66 (discussing the adoption of the plank opposing discrimination on the basis of sexual orientation).

245. BERRY, *supra* note 15, at 68.

246. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188, 232.

247. *See infra* note 281 (discussing *Baehr v. Lewin* and other state ERA same-sex marriage cases).

248. Jane Mansbridge, *Whatever Happened to the ERA?*, in WOMEN AND THE U.S. CONSTITUTION: HISTORY, INTERPRETATION AND PRACTICE (Sibyl Schwarzenbach ed., 2004) (observing that ERA supporters were cautious in public discussions of women’s rights claims during the pendency of the ERA campaign).

249. *Cf.* LUCAS POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) (analyzing regional resistances to the jurisprudence of the Warren Court).

amendment must guarantee a woman's right to privacy and bodily integrity.<sup>250</sup>

### C. *The De Facto ERA*

To this point, analysis has focused on the ability of ERA's opponents' to shape the way its proponents defined sex equality under the ERA. But if opponents of the ERA wielded immense disciplinary power over the feminist movement's equality claims during the pendency of the ERA campaign—leading feminists to define discrimination on account of sex in terms that seemingly excluded laws regulating rape, pregnancy, abortion or sexuality—ERA proponents also exerted immense disciplinary power over the way that defenders of family values expressed their opposition to the ERA. The feminist movement's claims on the equal citizenship principle were sufficiently compelling to the American public that ERA's opponents were constrained to affirm them, in order to oppose the ERA without sounding like they opposed women's claim to be equal citizens, as feminists gave that claim meaning in the 1970s. In short, those who opposed the ERA to protect the family were no more able to deny women's status as equal citizens than those who supported the ERA were able to embrace a vision of equality that called into question women's fulfillment in men and motherhood.

Just as proponents' efforts to persuade the public to ratify the ERA led proponents implicitly to incorporate some of their opponents' most powerful arguments against the ERA, so, too, did opponents' efforts to persuade the public to reject the ERA led opponents implicitly to incorporate some of proponents' most powerful arguments for the ERA. Opponents repeatedly expressed fealty to the constitutional understanding that the equal citizenship principle protected women. They made this argument both explicitly and implicitly as they repeatedly argued that the ERA threatened harm with no commensurate benefit; women did not need an Article V amendment in order to get recognition of their rights as equal citizens, when those rights either were or could be protected through other sources of law. Thus Senator Ervin regularly bracketed his arguments against the ERA with the claim that there were other ways to secure protection against sex discriminatory practices warranting relief: "I honestly believe that the equal protection clause, properly interpreted, is sufficient to abolish all unfair legal discriminations made against women by State law."<sup>251</sup>

The argument that the ERA was superfluous was echoed by the ERA's other prestigious opponents. Many argued that Congress could

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250. Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J. 52 (August 1999); see also Mansbridge, *supra* note 248 (discussing NOW's shift of position on the ERA and its commitment to support an ERA only if it is understood to speak to questions that were excluded from its reach in the 1970s).

251. *Equal Rights 1970*, *supra* note 113, at 4 (statement of Sen. Ervin).

redress the problem through its power to regulate commerce or to enforce the Fourteenth Amendment. At the same time they observed that the Court also had power to strike the most egregious of practices under the Fourteenth Amendment's equal protection clause. Testifying against the ERA, Professor Paul Freund observed:

It remains, then, to suggest alternative approaches [to equal rights]. A great deal can be done through the regular legislative process in Congress . . . Moreover, a few significant decisions of the Supreme Court in well-chosen cases under the 14th amendment would have a highly salutary effect. . . . Finally—and this may seem to some to be a radical suggestion—Congress can exercise its enforcement power under the 14th amendment to identify and displace State laws that in its judgment work an unreasonable discrimination based on sex. This would be done on the analogy of the 18-year-old voting legislation.<sup>252</sup>

. . . [I]n my view, though perhaps not in yours, Senator [Ervin], Congress has the power under the 14th amendment to deal with discriminatory state laws in the field of family relationships as they have exercised it in the field of voting rights.<sup>253</sup>

At other junctures, opponents simply argued, as Ervin had, that courts were authorized to protect women against invidious discrimination by the terms of the Fourteenth Amendment itself.<sup>254</sup>

As overwhelming majorities of the Congress expressed their enthusiastic support for the ERA, those seeking to build a persuasive case against the ERA came to endorse, as a preferable alternative, the prospect of the Court applying the Equal Protection Clause to questions of sex discrimination.<sup>255</sup> Senator Ervin's dissent from Congress' decision to send the ERA to the states included Ervin's otherwise anomalous expression of approval of *Reed v. Reed*,<sup>256</sup> which held for the first time ever that a law drawing distinctions in the family roles of men and women was irrational and denied women the equal protection of the laws:

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252. *Id.* at 79-80 (statement of Paul A. Freund).

253. *Id.* at 85.

254. *Id.* at 87-88 (statement of Philip B. Kurland) ("It is contended that in light of the newly expanded meaning of the equal protection clause of the 14th amendment, there is no need for further constitutional provision to protect women against invidious discrimination. And it is clear that, to the extent the proposed amendment authorizes legislation by Congress and the States, no addition is needed. Section 5 of the 14th amendment plus the commerce clause gives the Congress an almost unlimited reach in commanding equality between the sexes. There are no inhibitions on State legislatures that would prevent them from doing the same except for the concept of preemption by either Federal legislation or the commerce clause.").

255. See *Equal Rights*, *supra* note 173, at 69 (testimony of Sen. Ervin) (recounting that when Senator Ervin is asked, "Senator Ervin, I would gather that your interpretation of the equal protection clause and the 14th amendment would obviate the necessity for any constitutional amendment and that if there is any additional necessity for legislation it could be carried out through the legislative route of the Congress without the need for a constitutional amendment," Senator Ervin answers "Yes.").

256. 404 U.S. 71 (1971).

To be sure the Equal Protection Clause may not satisfy the extreme demands of a few advocates of the Equal Rights Amendment who would convert men and women into beings not only equal but alike. . . . It cannot be gainsaid, however, that the Equal Protection Clause, properly interpreted, nullifies every state law lacking a rational basis which seeks to make rights and responsibilities turn upon sex. . . . The best example of the Supreme Court's willingness to use the 14th Amendment to strike down laws which discriminate against women, thus rendering the ERA unnecessary, is the case of *Reed v. Reed*.<sup>257</sup>

By the time that Schlafly wrote *The Power of the Positive Woman* in 1977, the Court had moved beyond *Reed*'s case for rational basis scrutiny and divided in *Frontiero*<sup>258</sup> about whether to embrace strict scrutiny of sex-based state action; in 1976, in *Craig v. Boren*,<sup>259</sup> the Court decided instead that sex-based state action was subject to intermediate scrutiny under the Equal Protection Clause. Schlafly, like Ervin, treated the growing body of equal protection sex discrimination cases as more reasonable than the "gender-free" jurisprudence of the ERA. By selective discussion of the case law, Schlafly endeavored to guide, rather than to attack, the Court:

The Positive Woman rejects the "gender-free" approach. She knows that there are many differences between male and female and that we are entitled to have our laws, regulations, schools, and courts reflect these differences and allow for reasonable differences in treatment and separations of activities that reasonable men and women want.

The Positive Woman also rejects the argument that sex discrimination should be treated the same as race discrimination. There is vastly more difference between a man and a woman than there is between a black and a white, and it is nonsense to adopt a legal and bureaucratic attitude that pretends that those differences do not exist. Even the United States Supreme Court has, in relevant and recent cases, upheld "reasonable" sex-based differences of treatment by legislatures and by the military.<sup>260</sup>

Schlafly's presentation of the case law was selective, to say the least. She said nothing about the Court's decision in *Frontiero* to invalidate a law that offered different dependent benefits to male and female members of the armed services on the assumption that the sexes had different obligations of family support; nor did she mention the ringing language of regime

257. 118 CONG. REC. 9559-60 (Mar. 22, 1972) (minority views of Mr. Ervin).

258. 411 U.S. 677 (1973); see *supra* note 143.

259. 429 U.S. 190 (1976).

260. SCHLAFLY, *supra* note 193, at 22-23 (citing *Kahn v. Shevin*, 416 U.S. 351 (1974) as "[upholding] Florida's property tax exemption for widows only" and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) as "[upholding] a United States Navy rule that permitted female officers to remain four years longer than male officers in a given rank before being subject to mandatory discharge").

change in Justice Brennan's plurality opinion in *Frontiero*, which fused the race analogy and Congress' decision to send the ERA to the states into a rationale for applying strict scrutiny to sex-based state action under the Fifth Amendment's "equal protection clause." Schafly also omitted mention of the Court's decision in *Craig* to adopt a standard of review that enjoined sex-based state action premised on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" "as loose-fitting characterizations incapable of supporting state statutory schemes that were premised on their accuracy."<sup>261</sup> Ervin and Schafly would have been extremely unlikely to accept this body of cases, and might well have vigorously attacked them, had they not been engaged in an effort to persuade the American public to reject the ERA. Their forbearance in attacking the new sex discrimination cases might well be the analogue of feminists' defining a sex classification so as to exclude laws regulating reproduction and other "unique physical characteristics" from the reach of the proposed ERA.

In fact, if one looks at the ways the ERA's opponents accommodated concerns of the ERA's proponents and the ERA's proponents accommodated concerns of the ERA's opponents, one can see how the quest to persuade the American public about the Constitution's meaning can structure dispute without resolving it. The quest to win public confidence and to capture sites of norm articulation disciplines change agents, leading them to internalize elements of counterarguments and to other implicit forms of convergence and compromise. It supplies opponents in constitutional controversies incentive to reckon with the normative logic and popular appeal of opposing claims, rendering such claims intelligible as the expression of a contending, if despised, constitutional understanding. It structures a semantic field in which the Court can pronounce the Constitution's meaning.

In arguing that the ERA was unneeded, its opponents often asserted that the Court could and would construe the Constitution to protect women as equal citizens, as the women's movement had begun to interpret that principle in the 1960s. And beginning in 1971, the Court interpreted the Constitution on that understanding. The de facto ERA includes *Reed*, *Frontiero*, *Craig*, and the 1970s equal protection cases that invalidate sex-based family law as reflecting "the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life."<sup>262</sup> It

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261. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976).

262. There are a range of such cases. For example, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), the Court invalidated the "mother's insurance benefit" provision of the Social Security Act, 42 U.S.C. § 402(g), which provided benefits to widows (but not widowers) having minor children in their care. Writing for the majority, Justice Brennan identified the provision as reflecting an "archaic and overbroad generalization not tolerated under the Constitution . . . namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly

is this line of sex discrimination cases that earn the equal protection case law its reputation as a *de facto* ERA—as securing through Article III the constitutional changes the women’s movement sought through Article V.

But there is a less noticed, and perhaps somewhat darker side to the *de facto* ERA. While many of the ERA’s opponents argued against the amendment in terms that seemed to accommodate some of their adversaries’ most publicly persuasive claims, many proponents were similarly accommodating: at different points, ERA advocates defined the amendment’s prohibition on discrimination “on account of sex” in ways that appeared to exclude matters concerning pregnancy, abortion, rape, and sexuality. The *de facto* ERA also tracks these points of points of convergence in the arguments of the ERA’s proponents and opponents fairly closely. In addition to *Reed*, *Frontiero*, and *Craig*, the *de facto* ERA includes *Baker v. Nelson*, a little known, though increasingly cited, case decided in 1972, almost a year after *Reed*, in which the Supreme Court dismissed, for want of a substantial federal question, a Minnesota Supreme Court decision holding that a state law defining marriage as the union of a man and a woman did not violate the Equal Protection Clause.<sup>263</sup> The *de facto* ERA

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contribute to their families’ support.” *Weinberger*, 420 U.S. at 643 (citations and internal quotations omitted). The law was unconstitutional both as it presumed women’s wages were not necessary for family support and as it denied women wage-earners the ability to provide for their family’s support that was granted to similarly situated male workers. In this way, the sex-based regulatory regime helped validate and entrench the very social assumptions on which it was premised. In *Califano v. Goldfarb*, 430 U.S. 199 (1977), the Court struck down another Social Security provision under which a widow was entitled to survivors’ benefits based on her deceased husband’s coverage regardless of dependency, but only a widower who received at least half of his support from his deceased wife was entitled to benefits. Justice Brennan wrote for a plurality of the Court:

The only conceivable justification for writing the presumption of wives’ dependency into the statute is the assumption, not verified by the Government . . . but based simply on “archaic and overbroad” generalizations, that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes. We held in *Frontiero*, and again in *Wiesenfeld*, and therefore hold again here, that such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.

*Id.* at 217. In *Califano v. Westcott*, 443 U.S. 76, 89 (1979), the Court invalidated yet another Social Security policy, this one granting AFDC benefits to the children of unemployed fathers but not unemployed mothers. The Court reasoned that it was “part of the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.” *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980), struck down a Missouri law automatically entitling widows of men who died in work-related accidents to death benefits, while requiring widowers of women who perished in such accidents to prove that they were incapacitated or actually dependent on the wife’s earnings. In *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), the Justices unanimously invalidated a Louisiana statute granting a husband, as “head and master” of the family, the unilateral right to dispose of property jointly owned with his wife without her consent.

263. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). For an account of the early history of litigation challenging marriage restrictions, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 48-59 (1996). Several courts have treated the Supreme Court’s ruling as precedent, including the Supreme Court of California in its decision invalidating

includes *Geduldig v. Aiello*,<sup>264</sup> which upheld a comprehensive disability insurance program for state employees that excluded coverage for pregnancy, on the grounds that laws governing pregnancy are not sex-based state action within the meaning of the Fourteenth Amendment's Equal Protection Clause; California's brief twice invoked the ERA's legislative history to explain the unique physical characteristics approach to defining a sex classification,<sup>265</sup> which the Court incorporated into its interpretation of the Fourteenth Amendment when it observed: "While it is true that only women can become pregnant it does not follow that every legislative classification is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics."<sup>266</sup> The de facto ERA also includes *Michael M. v. Superior Court of Sonoma County*,<sup>267</sup> which upheld a sex-based statutory rape law under a "rational basis"-like version of intermediate scrutiny that drew on traditions of reasoning about rape under the ERA emphasizing physical differences between the sexes.<sup>268</sup> And the

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marriage licenses the mayor of San Francisco issued to same-sex couples in violation of state law. See *Lockyer v. City & County of San Francisco*, 17 Cal. Rptr. 3d 225, 278-79 (Cal. 2004). The California court reasoned that the dismissal was still binding precedent because "[t]he United States Supreme Court has not expressly overruled *Baker v. Nelson* . . . nor do any of its later decisions contain doctrinal developments that are necessarily incompatible with that decision." *Id.* at 279; see also *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304 (M.D. Fla. 2005); *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. App. 2005).

264. 417 U.S. 484 (1974).

265. The brief argued: "Even the most outspoken advocates of political and economic rights of women, who have supported the proposed Equal Rights Amendment to the United States Constitution, have recognized that equality does not mean sameness." Brief for Appellees at 22, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185750 (Feb. 9, 1974). It continued by emphasizing: "The legislative history of the proposed Equal Rights Amendment is consistent" and quoted the Senate Report recommending the ERA's ratification, which explained:

[T]he original resolution does not require that women must be treated in all respects the same as men. Equality does not mean sameness. As a result, time original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative.

*Id.* at 23 (quoting S. REP. NO. 92-689, at 12) (emphasis omitted). Other briefs invoked the ERA's legislative history as well. See Brief for General Electric Company as Amicus Curiae at 31-38, *Geduldig v. Aiello* 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185755 (Feb. 11, 1974) (containing a seven page discussion of the unique physical characteristic principle in the ERA's legislative history); *id.* at 38 ("In sum, the legislative history underlying the ERA teaches that . . . where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful.").

266. *Id.* at 496 n.20.

267. 450 U.S. 464 (1981).

268. Compare 118 CONG. REC. 9536 (Mar. 22, 1972) (statement of Sen. Bayh) ("Rape laws, under this analysis, are perfectly constitutional, for both the group which is protected; namely, women, and the group which can be punished; namely, men, have unique physical characteristics which are directly related to the crime, to the act for which an individual is punished. With respect to statutory rape, the

de facto ERA includes *Rostker v. Goldberg*,<sup>269</sup> which upheld a sex-based draft registration law, and, implicitly, sex-based restrictions on combat.<sup>270</sup>

This body of case law was decided by the Supreme Court during the decade in which the ERA was debated. After 1983 hearings on the ERA's reintroduction which foundered in disagreement over whether the ERA would have savings-clause provisions stipulating that it would have no impact on abortion and gay rights,<sup>271</sup> there were signs that the declining prospect of ratifying an ERA might destabilize the uneasy lines of accommodation that the ratification campaign had produced. We have seen that, with demise of the ERA's prospects for ratification, some feminist lawyers had begun to call for a new approach to abortion rights. There were corresponding developments among those who had opposed the amendment.

In 1987 the Reagan Administration sent to the Senate a Supreme Court nominee known for his acid criticism of the Court's privacy and sex discrimination jurisprudence. Robert Bork had with regularity publicly questioned *Griswold*, *Roe*, and the Court's decision to apply the Equal Protection Clause to questions outside race. Bork's expressed skepticism about the constitutional foundations of sex discrimination and privacy case law drew fire during his confirmation hearings and played a crucial role in the Senate's refusal to confirm him to the Supreme Court.<sup>272</sup>

The Judiciary Committee's post-hearing report noted that "One of the more troubling aspects of Judge Bork's philosophy of equality under the Constitution is his application of the general language of the [Equal Protection] Clause to discrimination on the basis of gender." The report

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same analysis can be drawn. I suggest most respectfully. Only men can physically commit the crime of statutory rape and only women can physically be the victims of the crime."), and EQUAL RIGHTS FOR MEN AND WOMEN, S. REP. NO. 92-689, at 16 (1972) ("The general principles discussed above will govern the application of the Equal Rights Amendment to all fields of law. . . . But the Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men."), with *Michael M. v. Superior Court*, 450 U.S. at 471-72 (opinion of Rehnquist, J.) ("We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.").

269. 453 U.S. 57 (1981).

270. For the proponents' agonized struggle over how to position ERA with respect to the draft and especially the combat exclusion, see MANSBRIDGE, *supra* note 15, at 60-89.

271. *Equal Rights Amendment: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.J. Res. 1*, 98th Cong., 1st Sess. (1983).

272. Peter Milius, *What Do Women Want?: More and More the Question is at the Center of Our Politics*, WASH. POST, Sept. 14, 1988, at 23 ("The [equal protection] clause has been construed by the courts to forbid almost any distinction in the society on the basis of race. Women's groups want it construed the same way as to sex. Bork was unwilling to say it should be, and no position cost him more.").

highlighted the fact that Bork switched his position on the Clause's application during the hearings:

Prior to the hearings, Bork engaged in a sustained critique of applying the Equal Protection Clause to women. . . . As recently as June 10, 1987, less than a month before his nomination, Judge Bork reiterated his view . . . During his testimony, Judge Bork publicly stated for the first time that he now believes that the equal protection clause should be extended beyond race and ethnicity, and should apply to classifications based on gender. . . . Judge Bork's rationale for his change in position was that the Equal Protection Clause should be interpreted according to evolving standards and social mores about the role of women. . . . A comparison of Judge Bork's pre-hearing views and his hearing testimony is striking. . . . The standard articulated by Judge Bork during his testimony seems unmoored from his basic methodology.<sup>273</sup>

Judge Bork's nomination seemed to signal that in the 1980s the White House was willing to unsettle the ERA bargain and challenge the legitimacy of sex discrimination law, much as it was then challenging Warren and Burger court jurisprudence in matters of race, religion, crime, abortion, and states' rights.<sup>274</sup> But on the eve of the

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273. S. EXEC. REP. NO. 100-7, at 45-46, 50 (1987). Even with Bork's change-of-heart, the Committee criticized him for supporting mere rational basis review in the application of the Clause:

Judge Bork's "Reasonable Basis" Standard Does Not Provide Women With Adequate Protection and Is Not the Standard Used by Justice Stevens.

. . . Putting aside his apparent change in views, his position that the Equal Protection Clause covers women does not go to the heart of the debate over the Court's role in reducing gender discrimination. The central debate concerns the standard of equal protection that should apply in such cases. . . . the pertinent question is thus whether Judge Bork's currently expressed position would adequately protect women from such discrimination. For several reasons, the committee believes that it would not.

*Id.* at 46-47; see generally *id.* at 135, 229-34, 306, 309; *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. On the Judiciary*, 100th Cong. 233.

274. In this period, the Reagan Justice Department was publicly critical of the line of cases applying heightened scrutiny to sex discriminatory state action. Attorney General Edwin Meese's assistant Terry Eastland urged that "a jurisprudence of original intention" would have prevented the Court from holding that the Equal Protection Clause of the Fourteenth Amendment required elevated scrutiny for classifications based upon sex. See Terry Eastland, *Proper Interpretation of the Constitution*, N.Y. TIMES, January 9, 1985, at A23. "Needless to say, the Framers of that Amendment did not contemplate sexual equality," and a decision to the contrary "could not have been grounded in any recognizable jurisprudence of original intention, and could only have reflected the Justices' own moral beliefs." See *id.*; OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 78 (Feb. 19, 1988) ("Although the states may be free to create classes entitled to special protection if the classification does not violate a constitutional prohibition, the federal courts are not. Therefore, whatever the efficacy of the existing suspect classes recognized by the Supreme Court—and with the exception of racial equality, which under the Fourteenth Amendment is entitled to special scrutiny, the constitutional rationale of these classes is tenuous at best—attorneys should avoid making arguments, and should attack argument advanced by opposing counsel, for creating new suspect classes not found in the Constitution.").

hearings, the Justice Department apparently decided that it was politically infeasible for a nominee who hoped to win the American people's confidence to assert that the Constitution allowed government to discriminate against women.<sup>275</sup> Bork's confirmation hearings seemed to establish, not simply that women's groups would passionately defend the sex discrimination cases, but also that few would step forward to join Bork in repudiating the cases, and, further that, in the Reagan Justice Department's view, the American public would not trust the constitutional judgment of a Supreme Court nominee who did.<sup>276</sup> The Bork confirmation hearings demonstrated that long running dispute about whether to amend the Constitution's text had changed public understandings of the Constitution's text. In this way, the Bork hearings made the sex discrimination cases more firmly law.<sup>277</sup>

As *Brown* and the de facto ERA illustrate, in the fullness of time, utopian constitutional claims can ripen into constitutional orthodoxy—constitutional understandings so deeply entrenched as to put in doubt the interpretive authority of those who question them. But the meaning of these commitments is not immune from contest. As *Brown* was canonized,<sup>278</sup> social movement contest in turn sought to control *Brown*'s meaning.<sup>279</sup> The ERA debate established that the Constitution prohibits government from discriminating against women and identified paradigmatic referents of this principle. Yet, understandings of this constitutional

275. Cf. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 251-60 (1989) (discussing the Justice Department's role in managing Bork's testimony on equal protection and sex discrimination).

276. For an account of the evolving treatment of sex equality issues in the confirmation process, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 632 (2005) ("Up until 1970, women were invisible in the hearings. In the 1980s, however, conflict about constitutional guarantees of the equal protection of women became a central aspect of debate about the propriety of the confirmation of nominees"); see also *id.* at 634 ("While many factors contributed to Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment, his opposition to the Equal Rights Amendment, and his narrow construction of statutory rights for women played an important part.").

277. Archibald Cox, *The Supreme Court, 1966 Term-Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966) ("A Supreme Court decision reversing the conviction of the sit-in demonstrators upon the ground that the fourteenth amendment required the keepers of places of public accommodation to serve Negroes without discrimination or segregation could never have commanded the same degree of assent as the equal public accommodations title of the Civil Rights Act of 1964 . . . . In this sense, the principle of *Brown v. Board of Education* became more firmly law after its incorporation into title VI of the Civil Rights Act of 1964.")

278. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000).

279. Siegel, *supra* note 4.

commitment continue to develop in history as contending movements seek to control its meaning.<sup>280</sup>

Struggle over the ERA forged an understanding of a “sex classification” in the crucible of Article V debate, so matters of reproduction and sexuality were excluded from the reach of the sex discrimination concept. But this core concept of sex discrimination law is still in contest, evolving in litigation. Today, it is an open question whether state ERAs prohibiting discrimination “on account of sex” will be construed to invalidate laws restricting marriage to a union of a man and a woman.<sup>281</sup>

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280. For example, various groups allied in the traditional family values movement have recently issued a declaration of principles that attacks some of the main premises of the sex discrimination cases. This statement, entitled “The Natural Family: A Manifesto,” and the constellation of conservative groups endorsing it are discussed in Reva B. Siegel, 2006 *Baum Lecture: Enforcing Sex Roles in South Dakota: An Equality Analysis of Abortion Restrictions*, 2007 U. ILL. LAW. REV. (forthcoming).

281. The first same-sex marriage case arose under a state ERA. The Hawaii Supreme Court was on its way to interpreting the state’s ERA to prohibit restrictions on the marriage of same-sex couples, when its interpretation of the state’s ERA was blocked by an amendment to the state constitution that defined marriage as the union of a man and a woman. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (interpreting Hawaii’s ERA prohibiting discrimination “because of sex” to require strict scrutiny of Hawaii’s marriage statute limiting marriages to union of a man and a woman); *Baehr v. Miiike*, 1996 WL 694235 (Haw. Cir. Ct.) (striking Hawaii marriage statute limiting marriages to union of a man and a woman) (superseded by constitutional amendment). In response to *Baehr*, Florida amended its proposed ERA to make clear that it would not be construed to authorize same-sex unions. *See Frandsen v. County of Brevard*, 800 So. 2d 757, 759 n.4 (Fla. Dist. Ct. App. 2001) (discussing state ERA in the context of an indecent exposure statute); *id.* (observing that state ERA was amended after *Baehr v. Lewin* to make clear that its framers did not intend the ERA to invalidate laws restricting marriage to a union of a man and a woman).

Washington was first to face and, in a lengthy opinion to repudiate, the claim that a state ERA gave same-sex couples the right to marry. *See Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974) (holding that Washington ERA did not prohibit law restricting marriage to union of a man and a woman). The *Singer* decision is now under attack, and several courts have expressed doubt about its continuing validity. *See, e.g., Castle v. State*, 2004 WL 1985215 (Wash. Super. Ct. 2004) (“[T]he community, and its values, has substantially changed from the time the *Singer* court offered their rationale. Although the *Singer* case cries out for reexamination by a higher court, this trial court is not that higher court.”). The Washington Supreme Court is now hearing argument in a case involving a claim that the State’s ERA prohibits state law restricting marriage to a union of a man and a woman. The Washington State Supreme Court heard oral argument in March, 2005 in *Andersen v. Sims*, and an opinion is pending. *Andersen v. Kings County*, 2004 WL 1738447 (Wash Superior Ct. 2004) (recognizing same-sex marriage right).

A trial court in Maryland has recently ruled that the bar on same-sex unions violates the state’s ERA. *See Deane v. Conaway*, 2006 WL 148145, at \*7 (Md. Cir. Ct. 2006) (“There is no apparent compelling state interest in a statutory prohibition of same-sex marriage discriminating, on the basis of sex, against those individuals whose gender is identical to their intended spouses. Indeed, this Court is unable to even find that the prohibition of same-sex marriage rationally relates to a legitimate state interest.”). A lower court in California has similarly construed its state constitution. *See Marriage Cases*, 2005 WL 583129, at \*8-\*10 (Cal. Super. Ct. 2005). The sex discrimination argument against the bar on same-sex unions has also appeared in concurrences and dissents. *See Baker v. State*, 744 A.2d 864 (Vt. 1999) (Johnson, J., concurring) (invalidating sex-based definition of marriage as sex-based discrimination):

There is no doubt that, historically, the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society. . . .

Similarly, several state courts have interpreted state ERAs to apply to laws regulating pregnant women, including laws that exclude abortion from publicly funded health care.<sup>282</sup> And in upholding the Family and Medical Leave Act as a valid exercise of Congress' power to enforce the Fourteenth Amendment, the Court has handed down its first equal protection decision recognizing that laws regulating pregnant women can enforce unconstitutional sex stereotypes, introducing an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aiello*.<sup>283</sup>

At stake in what counts as a "sex classification" are fundamental questions of legitimacy—about what counts as a reason and what counts as a wrong—in law and in social life. Not only the definition of sex classification but also judgments about what counts as a sex stereotype continue to evolve as they are socially contested.<sup>284</sup> Does government prohibition of same-sex marriage reflect sex-stereotyping or legitimate nondiscriminatory

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As the Legislature enacted statutes to confer rights upon married women, this Court abolished common-law doctrines arising from the common law theory that husband and wife were one person and that the wife had no independent legal existence. . . .

The question now is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today. . . .

See also *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at \*6 (Alaska Super. Ct. 1998), superseded by constitutional amendment, ALASKA CONST. art. I, § 25, as recognized in *Brause v. Alaska*, 21 P.3d 357, 358 (Alaska 2001); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 971-72 (Mass. 2003) (Greaney, J., concurring); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 385 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

282. Connecticut interpreted its ERA to apply to state action directed at pregnant women. See *Doe v. Maher*, 515 A.2d 134, 159 (Conn. 1986) (observing that "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them" and citing Sylvia Law's *Rethinking Sex and the Constitution*). In construing the state's ERA, its highest court rejected the logic of the "unique physical characteristics" exception:

Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination. "Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex."

*Id.* More recently, New Mexico decided to interpret its state ERA in light of Connecticut's reasoning. See *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 852-55 (N.M. 1998) (following *Doe* and reasoning that "classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to . . . the New Mexico Constitution [which] requires the State to provide a compelling justification for using such classifications to the disadvantage of the persons they classify").

283. 417 U.S. 484 (1974); see Siegel, "You've Come a Long Way, Baby", *supra* note 13 (showing how Chief Justice Rehnquist's understanding of sex discrimination evolved in his decades of service on the Court, and demonstrating that his opinion upholding the Family and Medical Leave Act as a valid exercise of Congress' power to enforce the Fourteenth Amendment is the first Supreme Court opinion to recognize a claim of pregnancy discrimination under the Equal Protection Clause).

284. See Siegel, "You've Come a Long Way, Baby", *supra* note 13.

reasons?<sup>285</sup> Does a refusal to promote a young mother with childcare responsibilities reflect sex-stereotyping or legitimate, nondiscriminatory reasons?<sup>286</sup> Do laws criminalizing abortion reflect sex-stereotyping or legitimate, nondiscriminatory reasons?<sup>287</sup>

285. Sandi Farrell argues that the legal system systematically restricts the meaning of discrimination on the basis of sex so as to reform but maintain heterosexual norms, a dynamic she understands as "preservation through transformation." See Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605, 699-700 (2004). A number of advocates seek an expanded interpretation of the injunction against sex discrimination, but many others question whether this is the best framework to address practices that advocates and their opponents generally understand as discrimination on the basis of sexual orientation—not sex. For differing accounts of the ways antidiscrimination law might relate sex, gender, and orientation, see Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 98 (2005); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995); Frank Valdez, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Culture*, 83 CALIF. L. REV. 1, 16 (1995).

286. In explaining why the Family and Medical Leave Act was a constitutional exercise of Congress' power to enforce the Fourteenth Amendment's equal protection clause, Chief Justice Rehnquist's opinion for the Court observed:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003); see also Back v. Hastings-on-Hudson Union Free School District, 365 F.3d 107, 121 (2d Cir. 2004) (citing *Hibbs* in support of a ruling that "at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly consider to be, themselves, gender-based."); *id.* at 120 ("[I]t takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'"); see, e.g., Lust v. Sealy, 277 F. Supp. 2d 973, 982-83 (W.D. Wisc. 2003) (in a case where plaintiff's employer denied her promotion, explaining "You have kids," court ruled that "[d]enying a woman a promotion because of a stereotypical belief about her obligation to her family is discrimination because of sex" and cited *Hibbs*). See generally Susan E. Huhta, Elizabeth S. Westfall & Joan C. Williams, *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL'Y J. 303 (2003) (describing three cases involving PDA claims where the discrimination culminated after the plaintiff had given birth); Siegel, "You've Come a Long Way, Baby", *supra* note 13; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

287. See Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 531-35 (2003); Kenneth Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. L. FORUM 137, 147-50 (2002); Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Fineman & Isabel Karpin eds., 1995) (surveying equality arguments for the abortion right in law review literature and in *Casey*); Siegel, *supra* note 280 (analysis of gender-based justifications offered for the statute banning abortions enacted in South Dakota); Siegel, "You've Come a Long Way, Baby", *supra* note 13, at 1894-

### D. *Postscript: Same-Sex Marriage Today*

The dynamics of constitutional change I have been describing recur over the course of the nation's history. It is possible to see these understandings and practices in play in the dispute over same-sex marriage now working its way through the American legal system. The story of this constitutional contest, which intersects so deeply with the *de facto* ERA, deserves—and is now receiving—its own social movement history.<sup>288</sup> I consider in a few paragraphs only the ways the same-sex marriage debate iterates features of the social movement dynamics that produced the *de facto* ERA.

For the last two decades, there has been increasing social movement activity advocating and opposing changes in the treatment of sexual minorities.<sup>289</sup> The Court's most recent decision in *Lawrence v. Texas*<sup>290</sup> prohibiting laws that criminalize same-sex sodomy because they deny respect to same-sex relationships has unleashed new waves of contest. Several state courts have gone further, interpreting state constitutions to require state governments to allow same-sex couples to marry, or, to provide same-sex couples a "civil union" status that would give them all the legal benefits of marriage without the name.<sup>291</sup>

These most recent decisions have triggered energetic mobilization supporting and opposing change in the legal status of gays and lesbians—a phase of the "culture wars" encouraged in part by Justice Scalia's *Lawrence* dissent.<sup>292</sup> After the President of the United States indicated in his State of the Union Address that he might support a constitutional amendment that would bar same-sex marriage, the mayor of San Francisco responded by announcing that city officials would allow same-sex couples to marry, even though the state had just adopted a constitutional provision

97. For opinions rewriting *Roe* as a sex equality opinion, see WHAT *Roe v. Wade* SHOULD HAVE SAID. (Jack M. Balkin ed., 2005) (opinions by Jack Balkin, Reva Siegel, and Robin West).

288. See GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004); ESKRIDGE, *supra* note 263; DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006).

289. See WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999); DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003).

290. 539 U.S. 558 (2003).

291. Recent state supreme court decisions include: *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska 1998) (finding same-sex marriage exclusion unconstitutional but remanding for further questions), *superseded by constitutional amendment*, ALASKA CONST., art. I, § 25 (amended 1998); *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (finding same-sex marriage exclusion unconstitutional but remanding for determination of additional questions), *superseded by constitutional amendment*, HAW. CONST., art. I, § 23 (amended 1998); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (recognizing a right to same-sex marriage); *Baker v. State*, 744 A.2d 864, 874-85, 888-89 (Vt. 1999) (recognizing a right to the benefits of marriage that could be redressed by state recognition of civil unions). There are numerous lower court decisions as well, upholding and denying the right of same-sex couples to marry under state law.

292. See *supra* notes 62-64.

defining marriage as a union of a man and a woman. Asserting that the state law violated the equality guarantees of the state constitution, the mayor began issuing marriage licenses to same-sex couples over Valentine's Day weekend, as the nation watched, transfixed by this new chapter in the history of Constitution-driven civil disobedience.<sup>293</sup> Couples invoked the memory of black civil rights protest as they wed: "Everybody has a right to love each other. . . . It's a civil rights issue. It's time for us to get off the back of the bus."<sup>294</sup> With other local officials beginning to follow the mayor and authorize same-sex marriage—citing the civil disobedience practiced by civil rights protesters in the American South and in South Africa as they did so<sup>295</sup>—the California Supreme Court ordered the San Francisco mayor to stop allowing same-sex couples to marry,<sup>296</sup> and President Bush announced that he was seeking an amendment to the federal constitution that would define marriage as the union of a man and a woman.<sup>297</sup>

All groups engaged in this conflict act on the understanding that they must energetically voice their constitutional vision, if they wish to live under a Constitution that reflects their values. The expectation of constitutional change is so strong that advocates of same-sex marriage act in violation of law, endeavoring through the performance of marriages to make the law as they would have it be. At the same time, opponents of same-sex marriage seek to *amend* the federal Constitution in order to *preserve* its current interpretation. Even as groups mobilize on behalf of their vision of the good, advocates understand that, to prevail, they cannot present their vision as partisan or partial. Instead they must present their vision as expressing public values, as vindicating the core commitments of the American constitutional tradition.

Arguing subject to the public value condition, opponents of same-sex marriage thus invoke longstanding traditions of heterosexual marriage and

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293. See Rachel Gordon, *Bush Stance Led Mayor to Back Gay Marriages*, MIAMI HERALD, Feb. 16, 2004, available at 2004 WL 67040539. On civil disobedience and the consent condition, see *supra* notes 83-85 and accompanying text.

294. Simone Sebastian & Tanya Schevitz, *Marriage Mania Grips S.F. as Gays Line Up for Licenses*, S.F. CHRON., Feb. 16, 2004, at A1.

295. See Thomas Crampton, *Same-Sex Marriage: New Paltz*, N.Y. TIMES, Mar. 4, 2004, at B6 (at arraignment of Mayor of New Paltz, who performed same-sex marriage against state law, supporters played the civil rights anthem "We Shall Overcome," and held placard with a photograph of Nelson Mandela that read "All great leaders have gone to jail.").

296. Maura Dolan & Lee Romney, *High Court Halts Gay Marriages*, L.A. TIMES, Mar. 12, 2004, at A1.

297. *Bush's Remarks on Marriage Amendment*, N.Y. TIMES, Feb. 25, 2004, at A18 ("On a matter of such importance, the voice of the people must be heard. Activist courts have left the people with one recourse. If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.").

emphasize rule of law values,<sup>298</sup> while advocates of same-sex marriage invoke the historic struggles of African Americans against long-entrenched practices of racial exclusion, and celebrate the civil disobedience techniques through which the civil rights movements achieved recognition of constitutional equality principles that most Americans now venerate.<sup>299</sup> Each side claims, credibly, that it acts from the history and principles at the heart of the American constitutional tradition. The debate will no doubt continue for decades, generating legal conflict and confusion until a time arrives, if it ever does, when constitutional law and constitutional culture are in sufficiently stable relation that citizens are no longer moved to mobilize for constitutional change. In the interim, conflict rages.

Yet, even as conflict rages, one can see the outlines of community in the very practice of constitutional contestation. Citizens divided in vision are united in the struggle to shape the terms of collective life. Seemingly only one side can prevail: either marriage is the foundational social unit of a man and a woman, or it is not. Yet as the conflict progresses, it is possible to see how the quest to persuade the American public has led each party to the dispute, in a measure, to accommodate and incorporate normative views of the other. A movement of sexual dissent has increasingly come to embrace the institution of marriage as it seeks acknowledgment that its members are equal in status to others in the polity.<sup>300</sup> At the same time, the gay rights movement's success in contesting the referents of the

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298. *Id.* (President Bush objecting that "after more than two centuries of American jurisprudence and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization"); Dolan & Romney, *supra* note 296 (same-sex marriage opponent Benjamin Bull, in response to the California Supreme Court's order to halt same sex marriages, stating, "We're celebrating here, and thankful that the court has enforced the rule of law."); *id.* (quoting California state senator William "Pete" Knight's response to stay as, "I'm delighted that someone has finally taken action to stop the anarchy that is being perpetrated in San Francisco.").

299. See Wasim Ahmad, *Commentary—A Promise to Love, Honor, and Disobey*, PRESS & SUN-BULL., BINGHAMTON, Mar. 21, 2004, available at 2004 WL 60242495. ("These rogue marriages are the first step toward gay marriage winning acceptance in this country, much in the way that Rosa Parks sitting in the 'whites only' section of the bus was the first step in what became a huge, powerful movement. . . . There was a time when equal rights for black Americans were unthinkable. There will come a time when gay marriage is no longer unthinkable."); see also Don O'Brian, *Book Buzz: Four Arguments in Favor of Same-Sex Marriages*, ATLANTA-JOURNAL CONSTITUTION, March 26, 2004, at B7, available at 2004 WL 73418772 ("Marriage is more than a legal arrangement. Marriage is standing in your community. Civil unions are a seat in the back of the bus.").

300. For movement critics of this strategy, see MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81-147 (1999) (arguing that marriage is the state's most effective form of sexual discipline and control); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON 118-24 (Andrew Sullivan ed., 1997) (arguing that same-sex marriage rights would force gays to assimilate into a patriarchal system and sap the energy of the progressive movement); see also Wendy Brown, *Rights and Losses*, in STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 96-134 (1995) (discussing the perils of pursuing apparently emancipatory political goals within regulatory institutions); Urvashi Vaid, *Beyond Rights and Mainstreaming*, in VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 178-209 (1995) (arguing that sexual minorities should abandon the civil rights paradigm and strive for freedom rather than assimilation).

antidiscrimination principle has led those seeking to preserve marriage as a union between a man and a woman to demonstrate they are not motivated by animus: they have modified their proposed constitutional amendment to allow states to recognize "civil unions" conferring the legal incidents of marriage on same-sex couples.<sup>301</sup> Over time, the dispute is assuming a structure in which the Court can pronounce constitutional law, and have its pronouncement appear as an intelligible, if contestable, account of the Constitution's meaning.

## V

### TOWARDS A CONCLUSION: CONSTITUTIONAL CONTESTATION AS COMMUNITY

Constitutional mobilizations tear at the social fabric. Movements seeking constitutional voice inflame controversy, divide the nation, and threaten settled understandings and arrangements. Yet even as they do so, social movements have acted as a constructive force in the American constitutional tradition. They have sustained the normative vitality of the American constitutional order over the course of the nation's history, time and again teaching that the foundational principles of the nation require a challenge to—or defense of—longstanding understandings and practices.

The Court regularly attempts to stabilize the meaning of the Constitution by pronouncing constitutional law in terms that satisfy prevailing rules of recognition; yet, despite widespread belief that the judiciary is supreme in declaring the Constitution's meaning, citizens and public officials know how to challenge the terms on which the Court has interpreted the Constitution. Over the course of American history, groups seeking constitutional change have worked to move one branch of federal or state government to dispute questions of constitutional meaning with another, in an effort to make dissenting constitutional claims audible, and ultimately, to secure for them the force of law.

Through most, but not all, of American history, constitutional contestation that challenges authoritative pronouncements of constitutional law has worked to vitalize rather than undermine the system. This paradoxical result obtains because vigorous challenges to pronouncements of law are generally conducted by means of a complex code that preserves respect for legal authorities and rule of law values, even as overlapping understandings of authority license dispute about constitutional meaning. While many system features support dispute settlement and norm articulation, others resist closure and facilitate norm contestation. Ambiguity in the rules of recognition that constitute the American constitutional order ensures that

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301. See David Espo, *GOP Alters Marriage Bill to Allow Civil Unions*, THE COMMERCIAL APPEAL, Mar. 23, 2004, available at 2004 WL 59036491 (discussing modification of proposed constitutional amendment).

judges and other legal officials can authoritatively pronounce constitutional law—so long as the law they pronounce is grounded in the Constitution to which We the People have assented. If the constitutional law that officials pronounce diverges too far from understandings to which American citizens subscribe, a mobilized citizenry knows how to hold judges and the elected officials who appoint them to account.

Conducted on these terms, constitutional mobilizations mediate conflict about the forms of life that constitute the community. When citizens who passionately disagree about the terms of collective life can advance their contending visions as the outworking of the nation's founding commitments, they belong to a common community, despite deep disagreement about its ideal form. The practice of negotiating conflict about the terms of collective life by reference to a shared constitutional tradition creates community in the struggle over the meaning of that tradition; it forges community under conditions of normative dissensus.<sup>302</sup> It is under these conditions that citizens and government officials come to reckon with—and sometimes even partly to credit—each other's most passionately held views. The aspiration to speak for all leads agonists to take account of, and sometimes even to internalize, normative commitments that others in the community credit.

Dispute in this form is a practice of civic attachment. It allows citizens to experience law, with which they disagree, as emanating from a demos of which they are a part; it enacts citizenship as a relation of engagement among those having authority to shape a community's constitution. And, it may strengthen law precisely as it unsettles it, enabling—and, on occasion, moving—those who pronounce law to do so in deeper dialogue with the concerns and commitments of those for whom they speak.

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302. For an illustration of this dynamic in the decades of conflict over the Court's desegregation orders in *Brown*, see Siegel, *Equality Talk*, *supra* note 4, at 1546 ("Today, most Americans believe that state action classifying on the basis of race is unconstitutional—yet there remains wide-ranging disagreement about the understandings and practices this presumption implicates, and why. The presumption's capacity to sustain this form of conflicted assent would seem to be the ground of its constitutional authority. For a norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation's constitutional commitments evolves in history.").

