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The Nineteenth Amendment and Dobbs

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THE NINETEENTH AMENDMENT AND *DOBBS*

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There was a surge in legal scholarship around the Nineteenth Amendment to the United States Constitution—the Woman Suffrage Amendment—leading up to its centennial in August 2020. But this scholarly interest around the Nineteenth peaked two years before the U.S. Supreme Court's historic decision in Dobbs v. Jackson Women's Health Organization *in June 2022. This paper revisits the Nineteenth Amendment in light of the Court's decision in* Dobbs*. It argues that the Nineteenth should be understood as a ban on sex discrimination that extends beyond the right to vote. The Amendment expands the scope of women's citizenship as a matter of federal constitutional law by prohibiting legislation which denies or abridges a woman's right to self-govern. And it situates the power to enforce this prohibition in Congress—not state legislatures—as a matter of federalism.*

The paper traces the historical understanding of voting as self-government, and self-government as the means by which a citizen operationalizes self-determination. Suffragists understood self-government to include self-ownership and voluntary motherhood. A feminist constitutionalism would incorporate the Nineteenth's capacious, seventy-two-year history into a robust reading of the Amendment. Such a reading provides support to courts that choose to invalidate legislation denying or abridging not only political but also reproductive self-determination. Although such a reading is unlikely to be embraced by the current Supreme Court's conservative majority, it should be introduced into judicial discourse for use by future courts in reasoning around women's reproductive liberty.

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INTRODUCTION

In September 2019, the Center for Constitutional Law convened a pivotal symposium, *The 19th Amendment at 100: From the Vote to Gender Equality*.[1] That symposium included some of the nation's leading scholars of feminist and constitutional history around the Nineteenth Amendment to the United States Constitution—the federal woman suffrage amendment. It was a foundational and generative gathering and the ideas shared were central to much of the innovative scholarship subsequently produced during 2020—the Amendment's centennial year. But that symposium predated the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[2] in June 2022. In that decision, the Supreme Court repealed a previously recognized constitutional right—the right to abortion—for the first time in its history.[3]

While feminist scholars had long warned the constitutional right to reproductive self-determination established by *Roe v. Wade*[4] and reaffirmed in *Planned Parenthood v. Casey*[5] was at risk, those warnings were often met with skepticism. But the skeptics were wrong, and we are

1. Symposium, *The 19th Amendment at 100: From the Vote to Gender Equality*, 11 CONLAWNOW 53–112 (2020). The Center has held several subsequent symposia, including the 2022 Con Law Scholars Forum *The Future of Reproductive Rights*, that have dealt directly with the *Dobbs* decision and its profound implications for American women and pregnant people. *See* Symposium, *The Future of Reproductive Rights*, 14 CONLAWNOW 1–149 (2023).

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

3. *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CENTER FOR REPRODUCTIVE RIGHTS (June 24, 2022), https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/.

4. Roe v. Wade, 410 U.S. 113 (1973).

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

now firmly in a post-*Dobbs* world. Much like nineteenth-century women's rights activists strategizing about constitutional theory vis a vis suffrage and citizenship, feminist scholars are searching for constitutional paths forward in the wake of the Court's decision in *Dobbs*. This paper revisits the idea of advocating for a more expansive understanding of the Nineteenth Amendment—an idea explored in much of the scholarship generated during its centennial. And it applies that idea to the question of whether the Nineteenth Amendment has something to say about reproductive self-determination. It explores whether such self-determination is constitutionally protected against state action that abridges or denies it on account of sex. Finally, the paper considers whether the Nineteenth Amendment, standing on its own, is a potential tool to restore the constitutional right whose very existence was denied and stripped of its constitutional protection in *Dobbs*.

This paper embraces a capacious and holistic reading of the Nineteenth Amendment that considers text, history, and structure. Such a reading reflects a feminist constitutionalism that aims to interpret constitutions in a way that does the least harm to women and that most enhances their status as full citizens in the constitutional order.[6] This kind of reading of the Nineteenth Amendment assumes its status as a pivotal amendment in establishing the status of women in that order. It teaches us that the federal constitution and Congress have the primary role in protecting what many believe is still a fundamental constitutional right.[7]

The paper proceeds in three parts. Part I revisits the argument that the Nineteenth Amendment should be understood as more than the narrow right to cast a ballot. Rather, it should be understood as a profoundly significant constitutional move by the American people to eliminate a monosexual democracy in which half the population was virtually

6. I use "women" in this paper in an inclusive way to include all those who identify as women.

7. While this paper uses the word "restore," it could use "recognize" instead. If one believes that *Dobbs* was wrongly decided and that women still have a constitutional right to reproductive liberty, "recognizing" that continuing right better reflects that position. For example, even in the wake of *Minor v. Happersett*, 88 U.S. 162 (1875), in which the Supreme Court refused to recognize a woman's right to vote under the federal constitution, the National Woman Suffrage Association (NWSA) continued to adhere to the position that women had that right by virtue of being citizens under the Fourteenth Amendment. As May Wright Sewall, Chair of NWSA, testified to the Senate Select Committee on Woman Suffrage, "I say the recognition of our political equality, because I believe the equality already exists. I believe it waits simply for your recognition; that were the Constitution now justly construed, and the word "citizens," as used in your Constitution, justly applied it would include the women of this country. So I ask for the recognition of an equality that we already possess." May Wright Sewall, Testimony, Senate Committee on Woman Suffrage (1884), *reprinted in* NWSA, Congressional Action at 17, Annual Meeting Report (1884), https://www.loc.gov/resource/rbnawsa.n8341/?sp=155&st=text.

represented by the other half.[8] Ratification represented a profound shift in power from the states to the federal government. In ratifying the amendment, the American people signaled that they did not trust the states to ensure full citizenship for women. This move put the protection of women's fundamental right to vote in the hands of the federal constitution and Congress. It took it away from state legislatures, making federal law supreme as a matter of federalism.

Part II reviews the historical record to establish that the women who engineered this major shift in power from the states to the federal government understood ratification of the Nineteenth to guarantee more than just the right to cast a ballot. They understood the Nineteenth to guarantee what they called self-government—and thus self-determination—to women as full members of the polity. They understood self-determination to include reproductive autonomy which they couched in terms of self-ownership and voluntary motherhood.

Finally, Part III reiterates that the Nineteenth is the only provision of our federal constitution to explicitly prohibit sex discrimination. The constitutional message sent by the American people in ratifying the Nineteenth was that principles like *uniformity of access* to a fundamental right was the priority as a matter of federalism. And that constitutional directive about uniformity of access to fundamental rights must be heard today in arguing that *Dobbs* was not correctly decided when it put regulation of abortion back in the hands of state legislatures.

I. THE NINETEENTH AMENDMENT'S FEDERALISM MANDATE

There has been significant post-*Dobbs* scholarship about the flaws in its "history and tradition test" as a touchstone for finding an unenumerated constitutional right.[9] Those scholars have correctly identified the

8. *See* Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions,* 39 U.C. DAVIS L. REV. 1119, 1142 (2006) (noting that French parity advocates used the term "monosexual democracy" to characterize the dominantly male composition of the political class.) Similarly, nineteenth-century women's rights activist Elizabeth Cady Stanton argued that "[t]he disfranchisement of one-half the people . . . mak[es] our government an oligarchy of males, instead of a republic of the people. . . ." Elizabeth Cady Stanton, Testimony, Senate Select Committee on Woman Suffrage (1884), *reprinted in* NWSA, Congressional Action at 66, Annual Meeting Report (1884).

9. *See, e.g.*, Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171 (2024). The majority opinion in *Dobbs* stated:

> We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply

problematic nature of that aspect of the majority opinion. But this paper focuses on another problematic part of the opinion—that state legislatures are the proper decisionmakers about reproductive self-determination as a matter of federalism, rather than the U.S. Constitution or Congress.

Such states' rights reasoning would be familiar to nineteenth-century women's rights activists. It maps directly onto the women's rights/woman suffrage debates culminating in the Nineteenth Amendment's ratification in 1920. It's as though in writing the majority opinion in *Dobbs,* Justice Alito was animated by the ghost of Baltimore attorney William Marbury, Jr. in *Leser v. Garnett.*[10] In that case, Marbury argued that the Nineteenth should be invalidated because it contravened the sovereignty of the states by constraining their ability to exclude women from the electorate solely on account of their sex.[11] This theory was rejected by the U.S. Supreme Court in 1922 when the Court validated this major shift in power away from the states to the national government in *Leser*.

In terms of its approach to issues around federalism, the majority opinion in *Dobbs* is strikingly similar to the arguments made against the federal woman suffrage amendment in Congressional debates. Note the following remarks by Representative Moon of Tennessee when opposing a federal woman suffrage amendment on the floor of the House of Representatives in 1918:

> If women must have suffrage, let them have it by the acts of their neighbors and friends and fellow citizens of the states in which they live. If a State is not willing to give it to them let them abide the hour until it is willing, for in no other way can local self-government exist. . . . This is the people's Government and they have a right to control it.[12]

Compare that rhetoric to the language used in the majority opinion in *Dobbs* as a justification for repealing a previously recognized constitutional right:

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the

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> rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." The right to abortion does not fall within this category.

Dobbs, 597 U.S. at 231.

10. 285 U.S. 130 (1922).

11. The text of Nineteenth Amendment reads as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIX, §§ 1, 2.

12. 56 CONG. REC. 766 (Jan. 10, 1918) (debating H.R.J. Res. 200, 56 CONG. REC. 770 (1918) (Joint resolution for amendment to Constitution to provide for woman suffrage)).

> limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."... Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[13]

Alternatively, those in favor of a federal woman suffrage amendment in 1918, like Representative Kelley of Pennsylvania, emphasized how such an important right had to be protected uniformly by the national constitution:

> But still worse, the women voters in equal-suffrage States have no protection at all when they change their residence into other States. An amendment to the National Constitution, the recognition that America is a Nation and not a collection of States, is essential if there is to be "Equal rights to all, special privileges to none."[14]

In a very similar vein, the *Dobbs* dissenters make the point that:

> And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here.... However divisive, a right is not at the people's mercy.[15]

The People *did* speak in 1920 and what they said is they did not trust the states to protect the full citizenship of women. By ratifying the Nineteenth, they made it clear that such power should be taken away from the states and put in the hands of the federal constitution and Congress. A reading of the Nineteenth Amendment in historical context clearly teaches us that the People *made* that decision by ratifying the Amendment.

A map of the states that granted women full suffrage rights prior to ratification of the Nineteenth demonstrates the kind of patchwork approach that the American people rejected when it ratified the Nineteenth. They deemed the most important right in terms of full and equal citizenship—the right to vote or self-government—to be deserving of "the honor of national protection."[16] And note that the pattern of states

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13. *Dobbs*, 597 U.S. at 232, 256 (majority opinion).

14. 56 CONG. REC. 769 (1918) (debating joint resolution for amendment to Constitution to provide for woman suffrage).

15. *Dobbs*, 597 U.S. at 389 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (alteration in original).

16. See testimony of Black abolitionist and suffragist Mary Ann Shadd Cary submitted to the House Judiciary Committee in 1872. Mary Ann Shadd Cary, The Rights of Women (Jan. 1872), https://recoveringdemocracyarchives.umd.edu/rda-unit/speech-to-judiciary-committee-re-the-rights-of-women/.

that denied women that fundamental right looks strikingly similar to the pattern of states that have put abortion bans into place since *Dobbs*. We have seen this story before when it comes to protecting an unenumerated right for women.[17]

That patchwork was deemed unacceptable by the American people in ratifying the Nineteenth Amendment. That is what its inclusion in the federal constitution means. This right was so important that it merited uniformity of access and could no longer be left to individual state legislatures. Consider the signs held by suffragist protestors in 1917 that said, "How Long Must Women Wait for Liberty?" Those women understood suffrage as much broader than simply casting a ballot. They saw it as tantamount to the right to self-govern which in turn was a means of self-determination. Suffrage was the hallmark and the apex right of a full citizen—the right that protects all other rights and which secures individual autonomy and liberty. In other words, this was the original public meaning of the Nineteenth Amendment for those women constitution makers who engineered its ratification. "[T]heir definition of liberty was more personal than that of the Founders. Liberal women supported civil rights, but the feminist positions that roused the most passion tended to be the claims for bodily control. . . ."[18]

The text of the Amendment itself consists of two parts, both of which make clear this shift in power from the states to the national government. The first section represents a constraint on the states (and Congress). It deprives them of their power to make sex an eligibility criterion for voting. It is the only explicit ban on sex discrimination in the U.S. Constitution. The second section is a grant of authority to Congress to enforce this ban. Note that there was an attempt to amend Section 2 as it was being debated that would have given states co-equal authority to enact legislation.[19] This was seen as an effort to water down the enforcement power of Congress. That effort was rejected—reinforcing the idea that this amendment was

17. While the text of the Nineteenth uses the term "right to vote" there is no textual provision of the federal constitution that secures such a right. The U.S. Supreme Court has recognized an implicit right to vote and characterized it as a fundamental right in some cases. Thus, this paper refers to the right to vote as an unenumerated right in the federal constitution. *See generally* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008) ("For over forty years, the Supreme Court has fostered confusion surrounding the right to vote by creating two lines of election law cases. In one breath the Court calls the right to vote fundamental and applies strict scrutiny review. In another, the Court fails to recognize the right as fundamental and uses a lower level of scrutiny.").

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

19. PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 49–50 (2020).

meant to shift power to the federal government to protect women's rights.[20]

Read together—especially in light of this history—these two sections send a clear message that the federal constitution and Congress are supreme in this arena.[21] The power had shifted to the national government because the People thought the right was too important to leave to individual state legislatures and uniformity of access was essential. Remember the words of Representative Kelly in 1918, "An amendment to the National Constitution, the recognition that America is a Nation and not a collection of States, is essential if there is to be 'Equal rights to all, special privileges to none.'"[22]

The text of the Amendment provides that, "the right of citizens of the United States to vote shall not be denied or abridged." A narrow reading of that text might be that it simply protects the right to go into the polling booth and mark a ballot. But consider how nineteenth-century women's rights activists conceived of the ballot:

> If men are born with the right to life, liberty, and happiness, they are also born with the right to give expression as to how and in what manner life, liberty and happiness are to be maintained; and in this Nation, which professes to rest upon the consent of the governed, this expression is given through the ballot. Consequently, the expression of a freeman's will is as God-given as his right to be free.[23]

And Elizabeth Cady Stanton, who viewed the right to self-govern as a natural right that preceded constitutions, linked the ballot to self-government:

> Now, the right of Suffrage in a republic means self-government, and self-government means education, development, self-reliance, independence, courage in the hour of danger. . . . [T]he right of Suffrage is the primary school in which the citizen learns how to use the ballot as

20. *Id.*

21. Note that the Nineteenth Amendment does not confer a right to vote. It is a prohibition on states and the federal government about eligibility to vote. Black and Brown women were de facto disenfranchised—in essence having their right to vote erased or eroded, with eligibility barriers like poll taxes and literacy tests. MONOPOLI, *supra* note 19, at 44–47.

22. 56 CONG. REC. 769 (Jan. 10, 1918) (debating joint resolution for amendment to Constitution to provide for woman suffrage).

23. Mary Haggart, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 41, Annual Meeting Report (1884).

> a weapon of defense, it is the open sesame to the land of freedom and equality. The ballot is the scepter of power in the hand of every citizen.[24]

In the decade after its ratification, some courts read the Nineteenth Amendment broadly to reflect equality of contractual, political, and civil rights, including additional jury service and public officeholding.[25] If we read its provisions holistically, in light of not only its text, but also its long, seventy-two-year history and its structural message about federalism, we can interpret the Amendment's understanding of the right to vote as co-extensive with the right to full citizenship. And voting secured the self-government essential to self-determination, which women's rights activists then and now would argue includes both political and reproductive self-determination. At the very least, the Nineteenth tells us that women's fundamental rights should be protected by the federal constitution and the federal government against state or Congressional action that would deny or abridge them solely on account of sex.

II. AN EXPANSIVE INTERPRETATION OF THE NINETEENTH AMENDMENT

A review of the historical record establishes that, in fact, the Nineteenth was viewed as protective of much more than the right to simply cast a ballot. It is difficult for courts and the public to embrace this expansive view because "we have been deprived of a feminist constitutional history. Women as constitution-makers have been excluded from our constitutional memory."[26] This section provides a small part of that historical record to support an understanding that the Nineteenth Amendment has significant potential in restoring women's rights that have been eroded or erased.

A. Judicial Decisions and the Scope of Women's Citizenship

There were several courts that embraced expansive or thick interpretations of the Nineteenth Amendment in the wake of its ratification. The first was *Adkins v. Children's Hospital*[27] in 1923. Justice Sutherland invoked the Nineteenth in dicta as a rationale for striking down protective legislation providing for a minimum wage for women in the District of Columbia. Sutherland argued that the Nineteenth should be

24. Elizabeth Cady Stanton, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 64, Annual Meeting Report (1884).

25. MONOPOLI, *supra* note 19, at 89–126.

26. Paula A. Monopoli, *Situating* Dobbs, 14 CONLAWNOW 45, 48 (2023).

27. 261 U.S. 525 (1923).

read in an emancipatory way that was salient for how the court interpreted the Fifth Amendment. Sutherland found a liberty of contract right in that amendment as a matter of substantive due process. In extending that liberty to women by invalidating the minimum wage legislation, Sutherland argued that women no longer needed protection because the Nineteenth Amendment was the constitutional embodiment of their contractual, political, and civil equality. The majority opinion in *Adkins* read:

> In view of the great—not to say revolutionary—changes which have taken place since [*Muller*] in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now almost, if not quite, come to the vanishing point.[28]

However, *Adkins* was one of the few federal cases interpreting the Nineteenth Amendment after its ratification. Because there was no enforcement legislation to come out of Congress pursuant to Section 2 of the Nineteenth, there were no provisions for elevating cases from state to federal court. As a result, there was little federal judicial discourse about what the Nineteenth meant.[29] This was in stark contrast to the discursive impact of the enforcement acts enacted pursuant to the Fourteenth and Fifteenth Amendments. There was judicial discussion across state supreme courts that had an interstate court dialogue in which those courts frequently referenced each other.[30] Some adopted a narrow reading of the Nineteenth, but others adopted an expansive interpretation and construction. One of those was the Maine Supreme Court which read the amendment to go beyond voting to include public office holding in *In re Opinion of the Justices*:

> This controlling effect of the federal amendment as the supreme law of the land upon the Constitution of a state was clearly stated in *Neal v. Delaware*. . . .
>
> Therefore, under the present Constitution and laws, there should be no conflict between the majority and minority opinions. Both should reach

28. *Id.* at 525, 553. *See also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

29. MONOPOLI, *supra* note 19, at 43.

30. *Id.* at 94 ("One of the most interesting features of this body of cases is that the judges often refer to the other state courts, deciding similar cases, during the decade after ratification. This interstate, high court dialogue indicates that divining the meaning of the Nineteenth Amendment was a significant part of state court jurisprudence, during the ten years after ratification.").

> the same conclusion, because suffrage now is coextensive with citizenship, so far as sex is concerned.[31]

The next part explores the ideas of the nineteenth-century women's rights movement about what the ballot meant in terms of republican government. It also examines how those women conceived of liberty and self-government as encompassing personal liberty as much as political liberty. This understanding—distinct in many ways from the understanding of the men who held formal political power—has been erased from our constitutional memory.

B. Voting as Self-Government

The nineteenth-century women's rights movement, which began before the Civil War, was initially focused on dismantling the legal regime of coverture.[32] As Tracy Thomas explains, suffrage was deemed a radical demand and there was controversy around its inclusion in the Declaration of Sentiments published by those who gathered at Seneca Falls in 1848.[33] But after the Civil War, suffrage began to play a more central role in the movement that culminated in ratification of a federal woman suffrage amendment in 1920. After the Civil War, suffragists testified repeatedly in front of Congressional Committees. Elizabeth Cady Stanton made clear their understanding of the right to vote:

> The right of suffrage is simply the right to govern one's self. . . . Those only who are capable of appreciating this dignity, can measure the extent to which women are defrauded. . . .[34]

Stanton's testimony reminds us that the suffragists were well-versed in political theory around republicanism. The intellectual discourse of the nineteenth-century women's rights movement often focused on the consent of the governed:

> The basic idea of a republic is the right of self-government, the right of every citizen to choose his own representatives, and to have a voice in the laws under which he lives. And as this right can be secured only by the exercise of the right of Suffrage the ballot, in the hand of every

31. 113 A. 614, 615–16 (Maine 1921).

32. For a warning from Elizabeth Cady Stanton about this narrowing of the movement to the ballot, see TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 16 (2016).

33. *See id.* at 8.

34. Elizabeth Cady Stanton, Self-Government (1884), *reprinted in* NWSA, Congressional Action at 62, Annual Report (1884).

> qualified citizen constitutes the true political status of the people in a republic.[35]

Suffragist and abolitionist Mary Ann Shadd Cary evoked the connections back to the Founders and their arguments for representation when breaking from the British monarchy:

> Taxed, and governed in other respects, without their consent, [women] respectfully demand, that the principles of the founders of the government may not be disregarded in their case; but, as there are laws by which they are tried, with penalties attached thereto, that they may be invested with the right to vote as do men, that thus as in all Republics indeed, they may in future, be governed by their own consent.[36]

The movement also linked its understanding that suffrage meant self-government to its nexus with self-ownership. As early as 1855, women's rights activist and abolitionist Lucy Stone articulated how significant the right to bodily autonomy was in the movement to abolish the legal regime of coverture and to secure woman suffrage. She emphasized how it was bound up with other rights—one not being valuable without the other.

> It is clear to me, that . . . All our little skirmishing for better law, and the right to vote, will yet be swallowed up in the real question, viz: Has woman a right to herself? It is very little to me to have the right to vote, to own property, &c. if I may not keep my body, and its uses in my absolute right.[37]

This nexus with bodily autonomy was even more acute for Black suffragists like Shadd Cary who had been active in the abolition movement. In their writing and speeches, they reminded white suffragists of the deep connection between women, slavery, and bodily autonomy.[38] As Reva Siegel notes:

> Suffragists objected to the way the law of marriage structured the social relations in which women conceived and raised children, depriving women of "self-ownership" in sex and motherhood. . . . These challenges to the law of marriage grew out of and intersected with

35. *Id.*

36. Shadd Cary, *supra* note 16.

37. Letter from Lucy Stone to Antoinette Blackwell (July 11, 1855), in Blackwell Family Papers: Lucy Stone Papers, Library of Congress, https://www.loc.gov/resource/mss12880.mss12880-063_0230_0239/?sp=9&st=image.

38. MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 87–90 (2020).

> challenges to the law of slavery: marriage and slavery each gave men property rights in persons . . . .[39]

Elizabeth Clark explains that the contribution of nineteenth-century feminism to liberalism "was to reinforce and greatly expand the individual's zone of privacy—to widen the definition of rights beyond the rights of the individual in his civil status to include the rights of the individual in her private capacity."[40] This emphasis on the personal aspect of what liberty meant vis a vis citizenship was connected to the "great Protestant principle of freedom of conscience the same way [Elizabeth Cady Stanton] looked on the principle of liberty in the Constitution."[41] Stanton saw suffrage as a natural right that preceded constitutions.[42] And, "in Stanton's view, all rights sprang from self-ownership." This view was widely held by women activists of the time,[43] as was the idea that "[i]ndividual freedom and self-government, citizenship and suffrage, are synonymous."[44]

Stanton's approach "fused the personal and the political in a way that expanded the scope of citizenship considerably. . . ."[45] The upshot was that nineteenth-century feminism "transfigured its eighteenth-century parent" in that it shifted the focus from an independent civil self and "political demands on the right to vote, represent, legislate . . ." to a view of natural rights that more clearly included women's lived experience, including "the physical conditions of life."[46] As a result, "[by] the end of the nineteenth-century there was a consensus . . . that the liberal individual, male or female, was autonomous in personal life as well [as in the public sphere] and that rights extended to privacy of the body, freedom from physical coercion."[47] While the "explicit natural rights language of bodily ownership peaked in the 1870s" in political debate, the idea of autonomy remained a theme of Stanton's intellectual thought for the rest

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39. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 464–65 (2020).

40. Clark, *supra* note 18, at 906.

41. *Id.* at 915.

42. *Id.* at 915 n.42 (citing Stanton, Suffrage as a Natural Right 2 (1894)).

43. *Id.* at 906 n.4 (noting "that, although [Stanton's] ideas were always more developed and usually more radical than her co-workers in the NWSA, there were large areas of agreement, and Stanton's opinions in their own right were highly influential even where there was disagreement. Stanton did serve repeatedly as president and officer of the NWSA; her views were not so far outside the mainstream as to alienate large numbers of the group's voting constituency, at least as long as the NWSA remained a separate organization.").

44. *Id.* at 932 (citing Stanton, Suffrage as a Natural Right 8 (1894)).

45. *Id.*

46. *Id.* at 934.

47. *Id.* at 940.

of her career.[48] She believed that the protection of self-ownership remained "the ultimate goal of any form of government or social arrangement."[49]

The centrality of bodily autonomy to the definition of liberty before, during, and after the Civil War should be just as relevant to the Supreme Court's reasoning around a constitutional right to reproductive liberty as nineteenth-century statutes prohibiting abortion.[50] "The emphasis on freedom or enslavement of the body, and the issues that sprang from that focus, were feminists' contribution to nineteenth-century American liberalism. . . ."[51] Yet the majority's reasoning in *Dobbs* is devoid of this history and connection. But in a very recent Pennsylvania Supreme Court decision, Justice Christine Donohue connected this idea of bodily integrity or self-ownership to the essential right of equal citizens to self-determination:

> Whether or not to give birth is likely the most personal and consequential decision imaginable in the human experience. Any self-determination is dependent on the right to make that decision.[52]

Similarly, courts should read the Nineteenth Amendment capaciously in a way that links voting to self-government, and self-government to self-determination. The *Dobbs* dissent makes the point that the majority's opinion ignores the profound significance that the decision to give birth has for women, and their right to self-determination:

> As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command.[53]

This conceptual connection between suffrage, self-government, bodily autonomy, and liberty is a part of the history underpinning the

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48. *Id.* at 940–41.

49. *Id.* at 941.

50. *See* THOMAS, *supra* note 32, at 177, for the role of the American Medical Association and its anti-competitive motives to lobby for statutes that criminalized abortion, a history that Justice Alito fails to acknowledge in *Dobbs*.

51. Clark, *supra* note 18, at 905.

52. Allegheny Reprod. Health v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 906 (Pa. 2024) (Donohue, J., Part III.E.2.b. of the opinion, written by Justice Donohue and joined by a plurality).

53. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 386–87 (2022) (dissent).

Nineteenth Amendment and it should inform our understanding of its meaning.[54]

C. From Political to Reproductive Self-Determination

Read holistically in light of its text, history, and structure, the Nineteenth Amendment is informed by calls for reproductive self-determination that were a central part of the concerns of the activists who engineered its ratification over seventy-two years. Reva Siegel has argued that voting rights *are* reproductive rights and that we should read the Fourteenth and Nineteenth Amendments together.[55] I endorse such a synthetic reading of the two amendments:

> If Americans recounted the story of We the People in ways that treated women's quest to vote as central [] our constitutional tradition would include claims for self-ownership and voluntary motherhood at the root of the Reconstruction Amendments and the very heart of freedom and equality—not at their periphery.[56]

These claims for voluntary motherhood were deeply connected to the quest for the ballot and the reproductive self-determination suffragists thought the vote would ensure:

> In the 1870s, suffragists regularly asserted claims for [] voluntary motherhood (which would have abolished a husband's right to consortium and recognized a wife's right to choose when to engage in sexual relations with her husband). In supporting voluntary motherhood, movement leaders claimed for women the right "to decide when she shall become a mother, how often & under what circumstances" and attacked the law of marriage "which makes obligatory the rendering of marital rights and compulsory maternity."[57]

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54. For the centrality of suffragism and self-government to American political development in the nineteenth century, especially debates around the Reconstruction Amendments, see Leslie Butler, CONSISTENT DEMOCRACY: THE "WOMAN QUESTION" AND SELF-GOVERNMENT IN NINETEENTH-CENTURY AMERICA 117–49 (2023). "The precise relationship between citizenship and voting had rarely been addressed at the national level prior to 1865. For the next decade it loomed as one of the largest questions the country faced. Whether to invest women with the ballot and make them partners in the collective project of American self-government became an all-important consideration." *Id.* at 117.

55. Siegel, *She the People*, *supra* note 28, at 949.

56. Siegel, *The Nineteenth Amendment*, *supra* note 39, at 481.

57. *Id.* at 463–64 (citing Sarah M. Grimke, *Marriage (1852-1857)*, *in* THE FEMALE EXPERIENCE: AN AMERICAN DOCUMENTARY 89, 91 (Gerda Lerner ed., 1977) and quoting Paulina Wright Davis, Address to a Convention of the National Woman Suffrage Association Convention (1871)).

Even without a synthetic reading of the two amendments, the Nineteenth Amendment standing alone makes it clear that the federal constitution and Congress are where the ultimate protection of women's fundamental rights to be free from discrimination as a class on account of their sex should reside as a matter of constitutional doctrine. The question is, can we persuade courts that, despite prior narrow understandings of the text of the Nineteenth Amendment, that the Amendment should be read more capaciously?

For years, Pauli Murray asserted that the U.S. Constitution spoke to sex discrimination *despite* the Supreme Court's refusal to recognize that it did.[58] Similarly, no court has read the Nineteenth Amendment as broadly as proposed in this paper. Yet, we can still make a plausible argument that the Nineteenth is the only provision of our federal constitution that explicitly prohibits sex discrimination by the government in the exercise of an unenumerated fundamental right. Uniformity of access to a central attribute of full citizenship—suffrage—was deemed essential and could only be achieved by shifting control to the federal government. That shift was achieved through a self-executing provision banning sex discrimination by the states (and Congress) and by giving Congress alone the power to legislate to enforce that self-executing constitutional protection.

In another flawed piece of reasoning, the *Dobbs* majority rejects the idea that pregnancy discrimination is sex-discrimination. However, in the recent Pennsylvania Supreme Court cited above, the majority opinion describes why pregnancy should be considered sex discrimination:

> [R]eproductive functions, by definition, have historically been the primary basis for the distinction between men and women, i.e., physical characteristics that make one a member of the sex.... [E]quality of rights can[not] be denied or abridged based on a physical characteristic that makes a person a member of the male or female sex.[59]

The majority opinion in *Dobbs* cites *Geduldig v. Aiello* for the proposition that the Supreme Court has previously held that pregnancy discrimination is not sex discrimination.[60] But scholars have argued that several Supreme Court cases decided after *Geduldig* did leave open the

58. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

59. Allegheny Reproductive Health v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 876 (Pa. 2024) (Donohue, J., Part III.D.2.c. of the opinion).

60. 417 U.S. 484 (1974).

possibility that pregnancy discrimination is sex discrimination if it is grounded in stereotypes:

> Where the Burger Court first imagined pregnancy as a "real difference" that was typically not subject to the sex stereotyping enjoined in equal protection cases, the Rehnquist Court applied the core principles of the sex-discrimination cases to pregnancy. *Virginia* and *Hibbs* provide a framework for applying equal protection antistereotyping principles to laws regulating pregnancy.[61]

It is notable as a matter of feminist constitutionalism that the dissent in *Dobbs* makes the link between reproductive self-determination and citizenship in the state:

> Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. That expectation helps define a woman as an "equal citizen[]," with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government.[62]

So, if we read the Nineteenth holistically to prohibit states from abridging or denying the right to reproductive self-determination, then it teaches us something about which level of government should protect that right—the federal constitution and Congress and not the states. That is why *Dobbs* is fundamentally wrong about sending the regulation of abortion back to the state legislatures "to let the People decide." The People *did* decide one-hundred years ago. They spoke and said that the right to self-govern and self-determination, which is the essential attribute of a full citizen, lay in the hands of the federal constitution and Congress—not the states. Read this way, the Nineteenth is a powerful tool in pushing back on the reasoning in *Dobbs*.

III. VIEWING *DOBBS* IN LIGHT OF THE NINETEENTH

The U.S. Supreme Court recently reiterated this idea that uniformity is a driving force in deciding how to interpret which level of government should control constitutional decisionmaking as a matter of federalism. In *Trump v. Anderson*, it said:

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61. Reva B. Siegel, *The Pregnant Citizen, From Suffrage to the Present*, 108 GEO. L.J. 167, 211 (2020).

62. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 408–09 (2022) (Breyer, J., dissenting) (alteration in original).

> The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. . . . Nothing in the Constitution requires that we endure such chaos . . . .[63]

A recent amicus brief by Rachel Rebouché, David Cohen, and Greer Donley in another case before the Supreme Court this term, makes a similar point about the chaos that has resulted since *Dobbs*. They carefully documented how sending reproductive self-determination back to the states has created such chaos and endangered the lives of pregnant people. Their brief makes clear that uniformity is critical around an issue which implicates multiple constitutional rights and doctrines:

> In short order, the *Dobbs* ruling has ushered in an era of unprecedented legal and doctrinal chaos, precipitating a fury of disorienting legal battles across the country. The *Dobbs* framework has created destabilizing conflicts between federal and state authorities, as in the current case, and between and among states. These conflicts are proliferating because of the Pandora's box of constitutional questions *Dobbs* opened, implicating travel, federalism, extraterritorial jurisdiction, preemption, and federal executive power.[64]

It is a compelling argument and one that could be strengthened by reading the Nineteenth Amendment as a mandate about federalism and protecting women's fundamental rights—a message that has been overlooked in our Constitution for more than one-hundred years. In 1920, a patchwork of access to women's fundamental rights was unacceptable in a constitutional democracy where certain rights were beyond the tyranny of the majority. The American people understood and acted on the reality that uniformity of access could only be ensured by removing that power from the states. They ratified the Nineteenth Amendment.

By revisiting the origins of the Nineteenth, embedded in the intellectual traditions of nineteenth-century women's rights activists, we can remind courts of the focus on *centralized* government as essential to protecting women. Many nineteenth-century suffragists embraced this view and explained in Congressional testimony why they needed a federal woman suffrage amendment. They were tired of an exhausting individual state strategy and the defeats they had suffered despite enormous effort:

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63. Trump v. Anderson, 601 U.S. 100, 116–17 (2024).

64. Brief of Amici Curiae Professor David S. Cohen, Professor Greer Donley, and Dean Rachel Rebouché at 4, Moyle v. United States, Nos. 23-726, 23-727, 144 S. Ct. 2015 (2024), *dismissed as improvidently granted*.

> We come to you, gentlemen, as the most important committee of this House, and ask you to report this question to your colleagues, as it ought to be submitted through the hands of a committee representing the dignity and intelligence of American manhood, and not humiliate us by compelling its reference to the popular vote of each State, and thus inviting thirty-eight such experiences as we had in Nebraska.[65]

They sought the protection of centralized government through what would have been a Sixteenth Amendment to the Constitution:

> This brings me to the point of our coming to Congress. Some of you say, "Why not leave this matter for settlement in the different States?" [W]hen we come to Congress it is the women of all the States asking you to take such legislative action in submitting an amendment to the Constitution of the United States as shall recognize the equality of the women of the entire Nation.[66]

To the argument that many women did not seek or want the franchise, suffragists responded that, "[i]t is often said to us when all women ask for the ballot it will be granted. [] But woman's right to self-government does not depend upon the numbers that demand it, but upon precisely the same principles that man claims it for himself."[67] These women understood that the defeats they had suffered using an individual state strategy were unlikely to yield results:

> But, you say, why do you not go to your several States to secure this right? I answer, because we have neither the women nor the money to make the canvasses of the thirty-eight States . . . to educate individual man out of the old prejudice that woman was created to be his subject.

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65. Phoebe Couzins, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 38, Annual Meeting Report (1884). Of course, these appeals were replete with the racism and nativism to which the suffrage movement resorted after the Reconstruction Amendments failed to include women and added the word "male" into the U.S Constitution for the first time via the Fourteenth Amendment. Susan B. Anthony's Congressional testimony in 1884 makes that clear: "It takes all too many of us women, and too much of our hard earnings, from our homes and from the works of charity and education of our respective localities, to come up to Washington, session after session, until Congress shall have submitted the proposition, and then to go from Legislature to Legislature, urging its adoption; but when you insist that we shall beg at the feet of each and every individual voter of each and every one of the thirty-eight States, native and foreign, black and white, educated and ignorant, you doom us to incalculable hardships and sacrifices, and to most exasperating insults and humiliations." Susan B. Anthony (Vice President National Woman's Suffrage Association) Congressional Testimony, *reprinted in* NWSA, Congressional Action at 31, Annual Meeting Report (1884).

66. Abigail Scott Duniway, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 22, Annual Meeting Report (1884).

67. Caroline Gilkey Rogers, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 24, Annual Meeting Report (1884).

> Four State Legislatures have submitted the question of striking "male" from their constitution—Kansas in 1867, Michigan, 1874; Colorado, 1877; and Nebraska, 1882—and we made the best canvass of each that was or is possible for a disfranchised class outside of all political party help.[68]

The argument Justice Alito embraced in 2022 in *Dobbs*—that the state legislatures were the proper decisionmakers—was also raised when Congress was debating a potential Sixteenth Amendment in 1884. Representative Reagan of Texas, who opposed a federal suffrage amendment, argued that:

> [W]hen we attempt to overturn the social status of the world as it has existed for six-thousand years we ought to begin somewhere where we have a constitutional basis to stand upon. We had better go to the States which have a right to regulate the interests of society within their borders and see what they wish to do about this. In relation to the question of Suffrage, all who have read the Constitution or the comments upon it, know that the framers of it provided nowhere that the power to regulate Suffrage rested in the Congress of the United States. . . .[69]

One of Representative Reagan's colleagues, Representative Belford, who held the opposite position and supported woman suffrage, used sarcasm to push back on Reagan, the secessionist from Texas who had been a member of the Cabinet of the Confederacy:

> I have no doubt that this House will be gratified with the profound respect which the gentleman from Texas [Mr. Reagan] has expressed for the Constitution of the country. The last distinguished act with which he was connected was its attempted overthrow; and a man who was engaged in an enterprise of that kind can fight a class to whom his mother belonged.[70]

Much as the People's representatives were divided about what level of government was the proper authority to extend suffrage, they are still divided on the same issue when it concerns abortion. In interpreting the federal constitution in *Dobbs*, I would argue that Justice Alito actually invoked the Nineteenth Amendment, albeit by implication, in a judicial

68. Susan B. Anthony, Congressional Testimony, *reprinted in* NWSA, Congressional Action at 31, Annual Meeting Report (1884).

69. Remarks of Rep. Reagan, *reprinted in* NWSA, Congressional Action at 2, Annual Meeting Report (1884).

70. Remarks of Rep. Belford, *reprinted in* NWSA, Congressional Action at 3, Annual Meeting Report (1884).

move that dates back to *Muller v. Oregon* in 1908.[71] The *Muller* Court suggested that the state of Oregon's denial of suffrage to women might be relevant though not dispositive in deciding the constitutionality of maximum hour legislation for women but not men:[72]

> We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.[73]

In *Adkins*, decided fifteen years after *Muller*, "it is arguable that Justice Sutherland was embracing the logical extension of that language in *Muller*, i.e., that '[t]he government's special protection of women was no longer warranted since women had become full citizens and could now vote to protect their own interests.'"[74] The Court suggested that, in light of women's right to vote under the newly ratified Nineteenth Amendment, the differential treatment was no longer necessary. The *Adkins* Court reasoned that it should extend the unenumerated right of liberty of contract to women as well as men as a matter of substantive due process. A century later, in *Dobbs*, the Supreme Court returned to the idea that women's right to vote was salient in constitutional analysis:

> Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[75]

Justice Alito's reasoning seems to imply that the repeal of a previously recognized right is justified because women have the vote. This arguably puts into play the meaning and salience of the Nineteenth Amendment in the Court's constitutional decisionmaking. It makes relevant the historical context in which the federal suffrage amendment

71. Muller v. Oregon, 208 U.S. 412 (1908).
72. Monopoli, *Situating* Dobbs, *supra* note 26, at 57 (citing MONOPOLI, *supra* note 19, at 139).
73. *Muller*, 208 U.S. at 423.
74. Monopoli, *Situating* Dobbs, *supra* note 26, at 57 (citing MONOPOLI, *supra* note 19, at 139).
75. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022).

was developed and eventually ratified, implicating the ideas of the nineteenth-century woman suffrage movement.[76]

IV. CONCLUSION

There is a role for the Nineteenth Amendment in challenging the reasoning in *Dobbs*. The story of the Nineteenth Amendment is one of shifting power from the states to the federal government to protect an unenumerated right from sex discrimination. Uniformity of access was a major touchstone for that shift. And this reading strengthens the argument that *Dobbs* is wrongly decided in light of that constitutional mandate. As unlikely as it may be that the *Dobbs* majority would give consideration to the understanding of the Nineteenth embraced by nineteenth-century suffragists, there are still reasons to revisit the Nineteenth in the wake of *Dobbs*.[77]

The keynote speaker at the Akron Center for Constitutional Law's Fall 2019 symposium leading up to the centennial year around the Nineteenth was Nancy Abudu—then Deputy Legal Director and Voting Rights Director at the Southern Poverty Law Center and now a federal judge who sits on the U.S. Court of Appeals for the Eleventh Circuit.[78] After conferring with historians and legal scholars who presented papers at the symposium, Abudu amended the complaint in a voter disenfranchisement case in which she was representing two women of color, to include a Nineteenth Amendment claim.[79] In doing so, she demonstrated that putting scholarship into action through advocacy was a

76. Note that scholars have described the ratification of the Nineteenth Amendment as historic in its scope. *See* MONOPOLI, *supra* note 19, at 161 n.27 ("Akhil Amar has described this moment as, 'the single biggest democratizing event in American history'. . . . Even the most extraordinary feats of the Founding and Reconstruction eras had involved the electoral empowerment and/ or enfranchisement of hundreds of thousands, not millions." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 419 (2005), *cited in* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL'Y 235, 235 n.3 (2020).

77. Reading the Nineteenth as a mandate that the national government—not state legislatures—is the proper level of government to regulate reproductive liberty may appear risky. If the national government can regulate abortion, then why can't the national government ban it? The resolution of this concern lies in an understanding of the Nineteenth as a fulsome ban on sex discrimination. The Amendment should be read as a powerful self-executing provision that invalidates any state or federal legislation which *abridges or denies a right to self-govern on account of sex.* Congressional legislation banning abortion would arguably abridge or deny a woman's right to self-government as nineteenth-century suffragists understood that concept to include bodily autonomy.

78. Esther Schrader, *SPLC Lawyer Nancy Abudu Confirmed to 11th Circuit Court of Appeals*, SPLC May 18, 2023), https://www.splcenter.org/news/2023/05/18/nancy-abudu-confirmed-11th-circuit-court-appeals.

79. *Id. See also* Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J. L. & PUB. POL'Y 91, 97–106 (2022).

powerful way to push back on constitutional doctrine that was harmful to women and people of color. Although the claim did not prevail, it was heard by a three-judge panel that did engage in discourse around the meaning of the Nineteenth Amendment, the first time federal judges had done so in a direct way in almost one-hundred years.

This kind of strategic incorporation of an expansive view of the Nineteenth Amendment into post-*Dobbs* litigation is essential in the movement to restore women's reproductive liberty. Even if the arguments do not prevail, such litigation introduces a feminist constitutionalism into judicial discourse that may well bear fruit in the future. To do otherwise ensures that, "the misogyny and devaluation of women's agency that engendered . . . withdrawals of rights once granted will continue to hide behind very narrow conceptions of how constitutional and statutory interpretation based on original public meaning and legislative intent should operate."[80]

This paper proposes an arguably radical reading of the Nineteenth Amendment under traditional constitutional doctrine. As noted above, even if we made an argument for a thicker reading of the Nineteenth, it is unlikely that the Court's conservative majority would revisit its position that state legislatures should decide the issue of reproductive self-determination. In *Dobbs*, Justice Alito dismissed the more traditional

80. Monopoli, *Situating* Dobbs, *supra* note 26, at 59. For a recent example of the significant impact that feminist legal scholarship can have in the wake of *Dobbs*, *see* Planned Parenthood Ass'n of Utah v. State, ___P.3d___, 2024 WL 3612730 (Utah Aug. 1, 2024) in which the Utah Supreme Court upheld a preliminary injunction of the state's abortion ban. Three of the five justices on the Court are women, all of whom joined the majority in the Court's 4-1 decision. The majority cited the work of Professors Tracy Thomas and Reva Siegel in reasoning about Utah's history of abortion regulation:

> In addition, the State's evidence does not necessarily demonstrate that abortion was illegal at statehood because Utahns understood that a woman lacked the legal ability to decide whether to carry a pregnancy to full term. There is evidence suggesting that concern for the life of the mother motivated, at least in part, abortion bans. *See, e.g.*, Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 Seattle U. L. Rev. 1, 21(2012). Tracy Thomas writes that "early legislation'" (taking place around 1841) "continued to focus on medical malpractice and protection of the life and health of the mother from the consequences of abortion." *Id.* Reva Siegel writes that "[d]uring the period of the criminalization campaign, the gynecologists and obstetricians of the AMA [American Medical Association] were seeking to appropriate management of the birthing process from midwives, and to prevent women from entering the medical profession." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,* 44 Stan. L. Rev. 261, 300 (1992). The period Thomas and Siegel examine—the 1850s to the 1880s—parallels the founding of the Utah Territory and its development toward statehood.

Id. at 51–53.

Fourteenth Amendment equal protection argument in a single paragraph.[81] Nonetheless, the words of Pauli Murray, should guide us in continuing to make these more capacious arguments in our scholarship, and by encouraging advocates to make them in state and federal courts. Murray wrote her foundational article *Jane Crow and the Law* years before the U.S. Supreme Court finally extended the Fourteenth Amendment's equal protection clause to women. I am sure there were many days when colleagues said to her "but the Court has rejected that argument—give it up." Undaunted, Murray persisted and her words from 1965 give hope that if advocates keep making these arguments, they will eventually get traction:

> Although the Supreme Court has in no case found a law distinguishing on the basis of sex to be a violation of the fourteenth amendment, the amendment may nevertheless be applicable to sex discrimination. The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values.[82]

81. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022).

82. Murray & Eastwood, *supra* note 58, at 232.