

How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure

Jack M. Balkin[†]

Copyright © 2005 Jack M. Balkin

I. INTRODUCTION: TWO STRATEGIES FOR SOCIAL MOVEMENT SUCCESS

“In truth, I am as distressed as the Court is,” Justice Antonin Scalia wrote in his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ “about the ‘political pressure’ directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions.” “How upsetting it is,” he continued, “that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.”²

Scalia’s understanding of the judicial role is a familiar one. Social movements may protest long and loud for recognition of their constitutional claims, but judges are not supposed to heed them. Rather, they are supposed to follow the law, as best they can determine what the law is. As Chief Justice Rehnquist once explained, although judges are clearly as influenced by public opinion as anyone else living in the world, they are not supposed directly to respond to the claims of social movements.³

Nevertheless, constitutional law does change in response to social movement protest. Some of this change has occurred through Article V amendment. The Eighteenth Amendment, which ushered in Prohibition, and the Nineteenth, which gave women the right to vote, were the culmination of years of social movement activism. But by far the greater part of constitutional change has occurred through constitutional interpretation by Article III judges. Article III, not Article V, has been the great vehicle of constitutional development, and the work of Article III judges cannot be viewed in isolation from social movement

[†] Knight Professor of Constitutional Law and the First Amendment, Yale Law School. An earlier version of this Article was presented as the Donohue Lecture in March 2005. My thanks to Bruce Ackerman, Ellen Carol Dubois, Mark Graber, Sandy Levinson, Gretchen Ritter, and Reva Siegel for their comments on previous drafts.

1. 505 U.S. 833 (1992).

2. *Id.* at 999-1000.

3. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 752, 768-69 (1986).

politics. Jacksonianism, abolitionism, the labor movement, the second wave of American feminism, the Civil Rights movement, the gay rights movement, and the New Right, to name only a few examples, have profoundly shaped judicial interpretations of the American Constitution. Perhaps more to the point, these social movements have helped determine who becomes a judge or Justice and hence whose views of the Constitution become part of positive law. Justice Scalia may well dismiss the claims of the abortion protesters outside his window, but he sits on the Supreme Court in large part because of the success of the conservative social movements of the 1970's and 1980's which helped put the Republican Party in power.

This essay explores how social movements change—and fail to change—the positive law of the U.S. Constitution. That question is related, but not identical, to the question of how social movements succeed or fail in general. The reasons for social movement success or failure are legion—they include the group's ability to organize, its pursuit of litigation and legislative strategies, the rise and fall of the country's economic fortunes, and often most profoundly, war and the aftermath of war. My goal in this paper is slightly different. I am interested in how and why constitutional claims made by social movements get taken up or ignored by the judges who shape the positive law of the Constitution.

Social movements engage in what Sanford Levinson has called protestant constitutional interpretation.⁴ They do not accept the existing interpretations of judges as authoritative. Instead, they offer their own interpretations of what the Constitution means, whether or not those claims have been taken seriously by courts. Nevertheless, over time, many of those views have become part of constitutional doctrine, after being filtered, reshaped, and recharacterized by judges and legal professionals. Thus, the question of how social movements shape constitutional law is the question of how protestant constitutional interpretation is taken up by courts and made part of positive law. In large part social movements do this by changing the background expectations and understandings of the public at large and of judges and lawyers. They reshape constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation, what is a thinkable legal argument and what is constitutionally “off the wall.”⁵

If social movements do in fact change legal interpretations over time, does that mean that judges have some sort of duty within our constitutional system

4. SANFORD LEVINSON, CONSTITUTIONAL FAITH 23-30 (1988) (distinguishing between “protestant” and “catholic” conceptions of authority to interpret Constitution).

5. Jack M. Balkin, *Respect Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 527 (2004) [hereinafter Balkin, *Respect Worthy*]. See also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA 2* (2005)(manuscript on file with Suffolk Law Review) (arguing that conflicts between social movements and their opponents alter popular constitutional understandings which in turn become embodied in constitutional law).

to listen to and take seriously the constitutional claims of social movements? Social movements claim to represent the will of the people and their understanding of the country's higher law. Because the Constitution belongs to "We the People of the United States," the argument would run, judges have an obligation to attend to their evolving understandings, take seriously their constitutional claims and incorporate them into existing law. But as the quote from Justice Scalia suggests, the notion that judges have a duty to listen to social movements does not mesh well with most judges' understanding of their role. That is particularly true with respect to claims that the judge thinks are wrong or foolhardy. As Rehnquist puts it, "No [federal] judge can conscientiously say in so many words, 'I gave you my best judgment when I decided that the Constitution meant thus and so, but since the public overwhelmingly disagrees with my interpretation of the Constitution, I will therefore change my mind.'"⁶

Indeed, the notion that judges are not supposed to take instruction from social movements—or "factions," as they might have been called by the founding generation—seems to be one of the basic assumptions of American constitutionalism. Alexander Hamilton, writing in Federalist 78, argued that the very notion of an independent judiciary is designed "to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves."⁷

Moreover, even if judges were to listen to the claims of social movements, there are any number of social movements putting forward their views of the Constitution at any period in American history, and they often push in opposite directions. Indeed, social movements often give rise to counter-mobilizations equally convinced that their interpretation of the Constitution is the correct one. Pro-choice adherents are opposed by pro-life activists; the NRA's Second Amendment views are opposed by the constitutional understandings of gun control advocates; religious conservatives who avidly seek to alter the relationship between church and state are eagerly opposed by liberal secularists. Which, if any, of these movements are courts to heed as the authentic voice of the American people? To listen to one is, almost by definition, not to listen to the others.

Nevertheless, we know that social movements do influence constitutional interpretation, just as we know that the Supreme Court responds to shifts in the dominant national political coalition and to long-term changes in public opinion.⁸ The explanation for how social movements affect constitutional

6. Rehnquist, *supra* note 3, at 752.

7. THE FEDERALIST NO. 78 (Alexander Hamilton).

8. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country"); ROBERT G. MCCLOSKEY & SANFORD LEVINSON, THE AMERICAN

interpretation must lie elsewhere, and it must be an explanation that is consistent with judges' understanding of themselves as jurists relatively isolated from direct political pressure, with no obligation to heed constitutional claims they disagree with, no matter how fervently these claims may be asserted.

There are two key mechanisms through which social movements influence constitutional interpretation. The first path is through the party system. The second path is through altering public opinion, and particularly elite public opinion. Obviously these two strategies overlap in practice— success in altering public opinion can reshape the views and the constituencies of political parties and give social movements greater influence within them; conversely, gaining influence over a political party gives a social movement enormous advantages in reshaping public opinion generally. But the two strategies work in slightly different ways, and so, as an analytic matter, it is useful to describe them separately.

A. *Social Movements and Political Parties*

Under the first strategy, social movements influence constitutional interpretation because they influence the two major political parties, which, in turn control the system of judicial appointments. Through their influence on everyday politics, social movements can influence Presidential appointments to the judiciary, which at the margin, increase the chances that the movement's constitutional claims will receive a sympathetic ear. This form of influence is a special case of a theory of constitutional change that Sanford Levinson and I have proposed. We argue that much constitutional change occurs because of "partisan entrenchment" in the judiciary;⁹ political parties appoint new jurists to the federal courts who share roughly similar views on matters that are particularly important to the party. Stocking the judiciary with jurists of roughly similar ideological views can produce, over time, significant changes in constitutional doctrine. Not all Presidents have engaged in strategies of partisan entrenchment; nevertheless, Presidents who seek deliberately to change constitutional doctrine through the appointments process often succeed in doing so. President Roosevelt's appointments to the Supreme Court remade judicial doctrines of economic due process and federalism, in order to uphold significant features of his New Deal agenda. In the second half of the nineteenth century the Republican Party's judicial appointments promoted that

SUPREME COURT 208–09 (2d ed. 1994) ("It is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand"). For a review of the recent political science literature on judicial decisionmaking and popular opinion, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 80–132 (1999); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2601–13 (2003).

9. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1064–75 (2001).

party's favored policies of economic nationalism.¹⁰

The actual mechanisms of partisan entrenchment may be quite complicated in practice for any number of reasons. American political parties are not always ideologically cohesive and their views may shift over time.¹¹ In addition, judicial appointments serve many different goals, including rewarding political allies and returning political favors, as well as shoring up political support among important constituencies, like regional or ethnic constituencies. Nevertheless, Presidents also appoint judges because of their expected judicial philosophy and ideology. Moreover, securing support among important constituencies—like African Americans or religious conservatives—may often overlap with ideology. When social movements become important to the major political parties, they influence the sort of people who are appointed to the judiciary, making it easier for the social movement's constitutional claims to be taken seriously.¹²

Indeed, even if social movements are not particularly large or influential, they can nevertheless benefit from judicial appointments made to please larger or more powerful social movements and political constituencies. In practice, political and judicial ideologies range over a broad number of interconnected issues. Jurists who strongly support black civil rights at a particular point in history may be predictably more sympathetic to a wide variety of egalitarian claims raised by other social movements, like those of advocates for women, gays, or the disabled, or other causes associated with liberal political groups, like the environmental movement. For example, when the second wave of American feminism began to press its claims before the Supreme Court in the 1970's, they were often supported by liberal holdovers from the Warren Court who were appointed for quite different reasons—to support black civil rights and national regulatory power. Conversely, jurists supported by religious conservatives may, at least at the margins, be more hospitable to a wide variety of conservative constitutional claims that do not bear directly on religious issues. In this way, the political tides of the appointments process can lift a number of ideological boats.

This first mechanism of constitutional change suggests that social and

10. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002).

11. Balkin & Levinson, *supra* note 9, at 1069. An example is the contemporary Republican Party, which is more ideologically cohesive than it was in the late 1960's and early 1970's.

12. Social movements can also influence judicial selection through influencing the party that does not hold the Presidency. In general, when the President and Senate are controlled by different parties, successful judicial nominations tend to be more ideologically moderate than when the two are controlled by the same party. For example, when the Republican Party controlled the Presidency and the Senate in 1986, President Reagan was able to appoint Antonin Scalia as an Associate Justice with virtually no opposition. When the Democrats gained control of the Senate the next year, various social movement groups in the Democratic Party helped the Democrats turn back the nomination of Robert Bork, and forced the Reagan Administration to nominate the more moderate Anthony Kennedy.

political movements eventually influence judicial interpretations not because judges change their minds in response to movement protest but because older judges are gradually replaced with newer ones that share elements of the movement's basic outlook and ideology. T.S. Kuhn once noted that scientific revolutions often occur not because scientists change their minds but because older scientists die off and are replaced by younger scientists with a different perspective.¹³ In the same way, older judges and Justices eventually give way to successors with views of the Constitution more hospitable to the claims of social movements. This mechanism of constitutional change does not directly challenge judges' understanding of themselves as faithful interpreters of the law who define their roles in opposition to popular pressure and political expediency (although judges may view other jurists who disagree with them in that way). Judges and Justices can faithfully report that their decisions were not influenced by social movement protest. Instead, social movement protest shapes the issues and positions of the major political parties, which, in turn, leads to the appointment of judges who sincerely believe that the best interpretation of the Constitution is one that happens to be sympathetic with social movement claims. If Justice Scalia believes that *Roe v. Wade*¹⁴ should be overturned, he may nevertheless insist with complete sincerity that it is not because anti-abortion protesters have pressured him. Rather, opponents of abortion in the 1970s and 1980s had sufficient clout in the Republican Party that a person with roughly his views was appointed to the federal bench.

B. Appeals to the Values of National Elites

Social movements have a second path of influence. Using all of the methods of social suasion and social protest, they can attempt to reshape national popular opinion and particularly the opinions of national elites. They can do this by challenging existing social meanings and by contesting the legitimacy (or illegitimacy) of particular practices and institutions.¹⁵ The Supreme Court is a multimember body that tends, over time, to work in tandem with the dominant national political coalition. This means that, over time, the Court's decisions tend to reflect the center of national public opinion, and particularly the opinions of national elites. Where popular and elite opinion diverge, the Supreme Court tends to reflect the values of elites, because federal judges, and especially Supreme Court Justices, are drawn from relatively affluent, educated legal elites. Although these elites may differ on a wide range of economic and social policies, they often share many common assumptions.

The appeal to elite values is probably the best explanation of the result in

13. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 18-19 (2d ed. 1970).

14. 410 U.S. 113 (1973).

15. Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1558 (2004) [hereinafter Balkin, *What Brown Teaches Us*].

Griswold v. Connecticut,¹⁶ which recognized a constitutional right to reproductive privacy. The doctors and public health advocates who promoted contraceptive rights in the thirty years leading up to the decision in *Griswold* were not a particularly important constituency in either the Democratic or Republican parties. Rather, the movement for reproductive rights successfully appealed to changing social norms produced by the sexual revolution, and to the elite values of federal judges and Supreme Court Justices that reflected these changing social norms.

Similarly, the appeal to elite values may also be the best explanation of the later decision in *Roe v. Wade*,¹⁷ which built on *Griswold*. The abortion reform movement cut across traditional party lines. Richard Nixon appointed four relatively conservative Justices to the Supreme Court between 1969 and 1971. Three of these Justices (Chief Justice Warren Burger, Justice Lewis F. Powell, and Justice Harry A. Blackmun) joined in the opinion in *Roe*, along with four liberal holdovers from the Warren Court. Elites in both parties believed in abortion reform, and the Court, reflecting this elite consensus, moved in the same direction; much faster, in fact, than state legislatures did.

Griswold and *Roe* suggest that social movements can sometimes gain a receptive audience on the bench not through exercising influence in political parties but through nonpartisan appeals to the values, beliefs, and assumptions of national elites. A social movement gains a sympathetic ear not through partisan entrenchment but through elite socialization. Justice Scalia ruefully commented on this feature constitutional change in his dissent in *Romer v. Evans*,¹⁸ noting that “[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”¹⁹ Scalia argued that American legal education encourages progressive attitudes on homosexuality that (in his view) were out of step with the rest of the country. In fact, elite opinion and national public opinion generally move together, but at different speeds. Sometimes one is just a bit ahead of (or just a bit behind) the other.

Appeals to national elite values try to change constitutional doctrine by changing the minds of sitting judges, while the strategy of partisan entrenchment tries to change the judges. Elite values, like popular opinion generally, often shift over time in response to social movement contestation, and judges, who remain members of these elites, may alter their views accordingly. Nevertheless, just as in the case of successful partisan entrenchment, individual judges do not normally understand these shifts as

16. 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. 517 U.S. 620 (1996).

19. *Id.* at 652. I am indebted to Mark Graber for this point.

responses to political pressure or as giving in to the direct influence of social movements or party politics. Rather, when judges respond to appeals to elite values, they tend to see themselves as reacting appropriately and wisely to long term societal trends. They are simply accepting changed circumstances. Once again *Griswold* and *Roe* are useful examples. Judges of both parties who supported contraceptive rights could see themselves as having responded reasonably to new factual predicates in a changed and different world: they could ascribe those differences to cultural changes like the sexual revolution and technological changes like the invention of the birth control pill. If politicians and social movements were pushing for contraceptive reform, that was simply because they too understood how the world had changed; but judges were not changing their minds *because* of that political pressure. Conversely, those politicians who disagreed—and thus were out of step with elite values—were unenlightened, short sighted, or lacked a proper sense of historical change. No doubt many judges and Justices of both parties who have come to support constitutional protection for homosexual rights view themselves in a similar fashion. They do not see themselves as knuckling under to the “homosexual agenda,” but rather as recognizing the fact of changed circumstances. Sexual mores in this country have changed, the medical profession no longer views homosexuality as a disease or mental disorder, and judges need to be cognizant of these facts in their interpretations of the Constitution.²⁰

Instead of using politics to replace judges with ones more sympathetic to the social movement’s cause, appeals to popular opinion and elite values work with judges already on the bench. They build on the common views of the social group from which judges are drawn, views that elites do not generally see as themselves the product of everyday politics. Yet although judgments based on changed factual circumstances may seem relatively isolated from everyday political contestation, in fact they are not. Social movement politics play a crucial role in getting both popular and elite opinion to view the world differently and to acknowledge changes as salient and important. The latter task—making change salient—is particularly significant. Factual predicates that might arguably influence interpretation of constitutional norms are changing all the time. Yet not all of these changes are widely recognized, or, if recognized, acknowledged as morally and politically relevant. Moreover, factual changes in the social world, even if recognized, might be interpreted and evaluated in any number of ways. For example, new circumstances might counsel the importance of keeping constitutional doctrines in line with

20. Many constitutional scholars have tried to theorize this phenomenon “from the inside,” *i.e.*, by trying to explain why it is legitimate from the internal perspective for judges to take changing factual circumstances into account in interpreting the Constitution or statutes. See *e.g.*, William N. Eskridge, Jr., *DYNAMIC STATUTORY INTERPRETATION* (1994); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395 (1995).

contemporary realities; or they might demand that judges hold fast to existing interpretations ever more firmly in light of the myriad temptations to surrender them in the face of technological, economic, and social change. Recognition that homosexuality is increasingly accepted socially might lead judges to revise their opinion of the groups protected by the Equal Protection Clause or the liberties protected by the Due Process Clause.²¹ Conversely, it might lead judges to insist that the political process is perfectly capable of protecting homosexuals and that judicial innovation is both dangerous and unwise.²²

Thus, when social movements successfully appeal to changes in the social world, they not only shift perceptions of facts but also reshape the values, assumptions, and social meanings that are used to interpret and frame those facts. Social movements promote constitutional change by shaping the public's (and especially political elites') experience of salience and relevance, through tutoring their common sense about how the world has changed, what that change means, and what should be done about it. When a social movement is truly successful, judges will see their changed conception of the social world not as the forbidden imposition of personal values on an unwilling public but as the application of simple common sense.

Nevertheless, appealing to the elite values of the judiciary is quite risky unless those values are also generally supported in national public opinion. Although national public opinion and elite opinion often move in the same general direction, they can also differ in important respects. Because judges tend to be selected from well-educated elites in American society, these elites will occasionally have views that are somewhat different from those of national public opinion. In addition, popular opinion may be polarized, or strongly differentiated by region, in ways that national elite opinion is not. For example, although national elite opinion was in favor of ending state-enforced racial segregation by the early 1950's, the white majority in the South proved strongly opposed.

Hence when judges enforce the values of national elites in constitutional interpretation, they are open to the charge that their work is out of touch with democratic politics. This leaves them vulnerable to populist reprisals.²³ Opponents of particular judicial decisions can work through the political branches and the political party system to undermine or overturn judicial interpretations. Indeed, these opponents can employ the first social movement strategy, using their influence within political parties to appoint new judges and Justices whose views more closely match their own. For example, *Roe v. Wade*

21. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

22. See *id.* at 603-04 (Scalia, J., dissenting) (noting success of homosexuals in promoting their agenda and arguing question of homosexual rights should be left to democratic process).

23. See Balkin, *What Brown Teaches Us*, *supra* note 15, at 1559-60.

energized new conservative social movements that portrayed the Supreme Court as a symbol of liberal elitism and judicial usurpation of democracy. Eventually, cultural and religious conservatives found a home in the Republican Party, and the issue of abortion rights became strongly partisan. By 1980, the Republican Party officially endorsed overturning the decision. The Democratic Party, in turn, became increasingly pro-choice. Within a decade of the decision in *Roe*, the issue of abortion reform, which had appealed to elites across party lines, had been transformed into to one of the most bitterly contested issues between the two major political parties.²⁴

Thus, although social movements may succeed in pushing their constitutional claims through nonpartisan appeals to elite values, such victories may not prove lasting unless the social movement subsequently gains sustained popular support. Without such support, political entrepreneurs in one party or the other can attack judicial enforcement of those elite values through a series of populist appeals. Social movements that rely primarily on elite values invite counter-mobilizations from other social movements that push their agenda through the party system. To be truly successful, a social movement must win over both elite and popular opinion. When it does so, it will find allies both within political parties and the courts. In this sense, the second strategy and the first strategy for social movement success eventually merge: to win the battle over constitutional interpretation in the long run, social movements must win the battle for public opinion generally. Conversely, without sustained support by national elites backed up by significant segments of popular opinion, social movements should expect only modest help from the federal judiciary.

C. *The New Departure: A Case Study*

To develop this thesis, I'd like to consider a important episode in American constitutional history well known to scholars of women's history, but little represented in contemporary constitutional theory, or for that matter in contemporary constitutional law casebooks—the New Departure. The New Departure refers to the legal strategy pursued by the advocates for woman suffrage from approximately 1869 through 1875.²⁵ During this period,

24. On backlash effects in the context of race, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (describing backlash effects arising from *Brown v. Board of Education*); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 95-97 (2000) (noting backlash effects of Court's criminal procedure decisions); Michael J. Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 75-150 (1994) (arguing one of Brown's greatest effects was crystallizing southern white resistance against changes in racial status quo). See generally Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). On the dialectic between mobilization and counter-mobilizations in the struggles over sex equality, see Siegel, *supra* note 5.

25. On the history of the New Departure, see Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1364-75 (1995); Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 486-90 (2002); Reva B. Siegel, *She the People*:

suffragists led by Elizabeth Cady Stanton and Susan B. Anthony attempted to secure women's right to vote through judicial interpretations of the Fourteenth Amendment, rather than through the passage of a Sixteenth Amendment under Article V. Once the Supreme Court decisively rejected the suffragist argument in *Minor v. Happersett*²⁶ in 1875,²⁷ the Stanton/Anthony wing of the movement returned to the pursuit of a federal constitutional amendment, which would take another forty-five years.

In some ways, the story of the New Departure is the reverse of the story of the second wave of American feminism in the 1960s and 1970s. There advocates of sex equality secured an Equal Rights Amendment (ERA) from Congress in 1972, but during the subsequent unsuccessful struggle for ratification they gained constitutional protection of women's rights through judicial constructions of the Fourteenth Amendment. In fact, success in persuading courts to change their interpretations of the Fourteenth Amendment was probably one of several factors that led to the ultimate failure of the ERA.²⁸

The New Departure is a crucial episode in the development of arguments for women's constitutional rights and an important event in the transformation and demise of Reconstruction. It also shows how social movements affect (or fail to affect) the dominant interpretations of the Constitution by courts and other political actors.

The New Departure failed, I shall argue, because suffragists were unable to make use of either the two strategies outlined above. The second strategy was not available because there was no popular or elite consensus in favor of woman suffrage in the early 1870's. Indeed, suffragists would not win the battle for popular and elite opinion for many decades. By the time they did so, around World War I, they were able to obtain a constitutional amendment. Most of my discussion, however, will focus on why the suffragists were unable to employ the first strategy for social movement success—working through the party system to shape the federal judiciary. Although suffragists had considerable influence within the Republican Party immediately following the Civil War, they were unable to sustain that influence to get judges appointed who were sympathetic to their cause, in large part because they lacked the very right they sought—the right to vote.

One might object that suffragist constitutional arguments failed because their

the Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 968-75 (2002) [hereinafter Siegel, *She the People*]. See generally Ellen Carol Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987) [hereinafter Dubois, *Outgrowing the Compact*]; Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456 (2001).

26. 88 U.S. 162 (1875).

27. *Id.* at 164.

28. On the history of the failed ratification of the ERA, see generally JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

interpretations of the Constitution were simply unreasonable as a matter of law. However, as I shall argue, equally controversial and contestable interpretations of the Fourteenth Amendment were adopted by the Supreme Court around the same time that it rejected suffragist arguments; those interpretations, in turn, reflected far more powerful political forces. The notion of what constitutional interpretations are deemed reasonable and which are “off-the-wall” at a given point in time is not wholly exogenous to the political culture. Rather, one of the key achievements of successful social movements is to use social suasion and political influence to move “off-the-wall” arguments about the meaning of the Constitution into the realm of the reasonable and plausible. The New Departure failed because it was unable to do this.

It is often said that the Constitution exists to protect politically powerless groups from mistreatment by the political process. But if the failure of the New Departure teaches us anything, it is that social movements are most likely to influence subsequent judicial interpretation not when they are politically powerless, but when they are most politically powerful and influential within the party system.

II. A SHORT HISTORY OF THE NEW DEPARTURE

In a very abbreviated fashion, this is the political and legal story of the New Departure. Following the Civil War, the twenty year-old movement for woman suffrage, which had strong links to the abolitionist movement, believed that it had a golden opportunity to press the case for constitutional guarantees of women’s right to vote. Both Elizabeth Cady Stanton and Susan B. Anthony had worked energetically for the passage of the Thirteenth Amendment abolishing slavery, and both had reason to believe that the members of the now dominant Republican Party would reward their efforts. They hoped that the Republicans would support a movement for universal rights, and in particular, universal suffrage, that would include both women and newly freed slaves.

The suffragists were bitterly disappointed by the language of the new Fourteenth Amendment. Section 2 stated that if states denied male inhabitants (i.e. black men) the right to vote, the state’s representation in the House would be proportionally reduced. Thus, far from supporting women’s rights, the Fourteenth Amendment’s section 2 for the first time enshrined the word “male” in the U.S. Constitution. Then, in February 1869, the Republicans added insult to injury by sending to the states a Fifteenth Amendment that guaranteed black suffrage but said nothing about women. Republican party leaders told the suffragists that black suffrage was a priority and that woman suffrage would have to be delayed.

The Fourteenth and Fifteenth Amendments produced a split in the women’s movement. More moderate suffragists, like Lucy Stone, decided to support the two Amendments, assuming that if they cooperated with the Republican

leadership they would eventually get their amendment. More radical suffragists, like Stanton and Anthony, broke away from the main suffragist political organization, the American Woman Suffrage Association (AWSA), and formed a new group, the National Woman Suffrage Association (NWSA).²⁹ The NWSA sought not only immediate guarantees of women's right to vote but also a host of other institutional and legal reforms in employment, marriage, and family law designed to promote gender equality.³⁰ The NWSA opposed both the Fourteenth and Fifteenth Amendments. During 1869, while the Fifteenth Amendment was before the states, the NWSA pushed for a Sixteenth Amendment guaranteeing woman suffrage.

Then, in October of 1869, at a woman's rights convention in St. Louis, Missouri, a local couple, Virginia Minor and Francis Minor, offered a different legal and political strategy. A new constitutional amendment was unnecessary, the Minors argued. The Fourteenth Amendment and other provisions of the Constitution already guaranteed women the right to vote. Women simply had to organize politically to take rights that they already possessed.³¹

The Minors' argument creatively embellished on antebellum abolitionist arguments that asserted that slavery was unconstitutional before the Thirteenth Amendment.³² These arguments relied on the Privileges and Immunities Clause of Article IV, section 2, the Guaranty Clause of Article IV, section 4, and the Bill of Attainder provisions in Article I. Suffragists combined these arguments with new arguments based on section 1 of the Fourteenth Amendment, which states that "all persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside," and which secures the privileges and immunities of citizens of the United States against state interference.

The Minors' argument went as follows. The basis of constitutional authority in the United States was popular sovereignty by its citizens. This is clear from the Preamble to the Constitution and from the history and structure of American government and the American constitutional system. The sovereignty of citizens implied the right to vote, for without the vote, citizens could not truly be said to rule the country. Women were citizens of the United States even before the Civil War; the Fourteenth Amendment merely reaffirmed this. All citizens of the United States were entitled to the privileges and immunities of citizenship. They were entitled to the privileges and

29. See ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869* 163-64 (1978); ELEANOR FLEXNER & ELLEN FITZPATRICK, *CENTURY OF A STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 145 (Enlarged Ed. 1996).

30. See ROGERS SMITH, *CIVIC IDEALS* 315 (1997); Winkler, *supra* note 25, at 1474.

31. See 2 *HISTORY OF WOMAN SUFFRAGE* 409-11 (Elizabeth Cady Stanton et al. eds., 1882) [hereinafter 2 HWS] (reprinting Minor's speech).

32. See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848*, 265-71 (1977); Lobel, *supra* note 25, at 1358-64; Winkler, *supra* note 25, at 1468-69.

immunities of citizens of the several states by Article IV, section 2, of the antebellum Constitution, and they were entitled to the privileges and immunities of national citizenship by section 1 of the Fourteenth Amendment. In describing the suffragist argument, it is important to recognize that the legal distinction between the privileges of *state* citizenship in Article IV and the privileges of *national* citizenship in section 1 of the Fourteenth Amendment was not made entirely clear until the 1873 decision in *The Slaughter-House Cases*,³³ and the Minors themselves did not make such a distinction. Dicta by Justice Bushrod Washington in the 1823 case of *Corfield v. Coryell*³⁴ stated that voting was one of the privileges and immunities of citizenship under Article IV, section 2. The key language the suffragists relied on was the following:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, *the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised*. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble to the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different

33. 83 U.S. 36, 74 (1872). “Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, . . . only the former . . . are placed by this clause [of the Fourteenth Amendment] under the protection of the Federal Constitution.” *Id.* at 74.

34. 6 F. Cas. 546 (E.D. Pa. 1823).

states of the Union."³⁵

Note that Washington's dictum actually cuts in both directions. While the suffragists could point to the inclusion of the franchise in the list of fundamental rights, opponents could point to the fact that the states could regulate the franchise, by excluding, for example, minors, felons, and people who lacked certain levels of property ownership. Moreover, if the suffragists were correct that voting was a right under Article IV, section 2, why wouldn't citizens of one state have the right to vote in another state? Nevertheless, Washington's assertion that the franchise was one of the privileges and immunities of citizens made particular sense to the suffragists because they believed that there were deep structural connections between the suffrage and the popular sovereignty of the citizenry. Once people were made citizens, they became part of We the People who were sovereign. Therefore they had the right to play their role as sovereigns through the franchise.

In sum, the suffragist argument followed a four step progression: (1) Women were citizens. (2) Citizens enjoyed the privileges and immunities of citizenship, guaranteed by Article IV and the Fourteenth Amendment. The privileges and immunities of citizenship were national in character and paramount over state authority to the contrary. (3) The right to vote was one of those privileges and immunities because without it the United States would not be a country dedicated to popular sovereignty and governed by its citizens. Therefore (4) women had the right to vote.

The Minors' argument was not made up out of whole cloth. Following the Civil War and the abolition of slavery, many abolitionists argued for the principle of universal suffrage, on the grounds that the right to vote was either an inalienable natural right of citizens, or a right necessary to the protection of all other rights.³⁶ The Minors rephrased this argument in terms of the post-1868 Constitution.

The leaders of the NWSA quickly understood that the Minors' argument made the path to woman suffrage much easier. Instead of garnering the approval of two thirds of each house of Congress and three quarters of the state legislatures under Article V, suffragists only had to secure judicial recognition of the argument. In the alternative, Congress could pass a civil rights law or even a simple declaration of women's rights to vote under its powers under Section Five of the Fourteenth Amendment.³⁷ Following the October 1869 convention, the Minors' argument became the new position of the NWSA.³⁸ The "New Departure" in the quest for women's rights was born.

35. *Id.* at 551-52 (emphasis added).

36. See Dubois, *Outgrowing the Compact*, *supra* note 25, at 845-48.

37. See Winkler, *supra* note 25, at 1477-78.

38. See 2 HWS, *supra* note 31, at 411.

The NWSA organized along a number of different fronts. In 1870 and 1871, suffragists pushed for Congressional recognition of women's right to vote. As a result of the 1868 and 1870 elections, Republicans still controlled both houses of Congress by healthy majorities. Moreover, the suffragists had social and political connections to the progressive forces in the Republican party. In January 1870, Elizabeth Cady Stanton, Susan B. Anthony, and other suffragists appeared before a Senate Committee to testify in favor of Congressional legislation granting women the right to vote in the District of Columbia, akin to similar legislation for blacks passed in 1866.³⁹ Stanton repeated the Minors' arguments, and then offered a few of her own, which also had their roots in antebellum abolitionist constitutional argument. Stanton claimed that the denial of woman suffrage violated the Guaranty Clause of Article IV section 4, because states could not have a republican form of government if half of their citizens were disenfranchised.⁴⁰ She also argued that denial of suffrage rights was a bill of attainder prohibited under Article I section 9 and Article I section 10. Disenfranchisement punished women for their status as women, just as abolitionists had argued that slavery was a bill of attainder for slaves.⁴¹

Victoria Woodhull, who was notorious for her advocacy of free love, joined the suffragists' cause and argued that the Fifteenth Amendment actually supported the right of woman suffrage.⁴² The Fifteenth Amendment stated that the right to vote could not be denied based on race or color. Women, she pointed out, had color too: "All people included in the term race have the right to vote, unless otherwise prohibited."⁴³ In essence, Woodhull argued that the Fifteenth Amendment should be read as affirming and guaranteeing a national right to vote regardless of color, rather than the way that most people read it, as merely a prohibition on the states from denying the vote on the basis of color. Her interpretation was premised on the notion that all citizens were part of the sovereign people, and therefore had the right to participate in rulership through voting. Like many other suffragists, Woodhull invoked the Revolutionary War slogan that there should be no taxation without representation. Because women were taxed, they had a right to participate in decisions about government: "by what ethics," she argued, "does any free government impose taxes on women without giving them a voice upon the subject or a participation in the public declaration as to how and by whom these taxes shall be applied for common

39. IDA HUSTED HARPER, 1 LIFE AND WORK OF SUSAN B. ANTHONY 338-39 (1898); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 99 (1977); 2 HWS, *supra* note 31, at 411-16.

40. 2 HWS, *supra* note 31, at 412.

41. *Id.* The argument is slightly different, because the abolitionist argument was not merely that slavery punished by reason of birth status but also that the slave was being punished for the status of his or her parents. In the case of women, only the first argument applied—women were punished by accident of their birth.

42. 2 HWS, *supra* note 31, at 444.

43. *Id.*

use?”⁴⁴

Finally, Woodhull, Anthony and several other suffragists made perhaps the most radical argument of all. They pointed out that the Fifteenth Amendment prohibited denial of the vote on the basis of “previous condition of servitude.” Women, Woodhull pointed out, “have from time immemorial groaned under what is properly termed in the Constitution ‘previous condition of servitude.’”⁴⁵ Women had been subject to the restrictions of coverture, denied the rights of political participation, and been prevented from pursuing their own ambitions in life. They were held in slavery by their fathers, brothers, and husbands.⁴⁶ To accept this argument for woman suffrage, of course, one would have to buy into the suffragists’ critique of existing family law and see the equation between existing law and the slavery that had been recently abolished by the Thirteenth Amendment. Most male politicians of that period thought that simply giving women the right to vote was revolutionary; they were even less inclined to view the entire system of male-female relations as akin to slavery. Although Stanton and other suffragists received a respectful hearing from Congress, and even testified before the Senate in 1872, the push for Congressional legislation went nowhere. On January 30th, 1871, the House Judiciary Committee issued a report, written by John Bingham, a key framer of the Fourteenth Amendment, rejecting the arguments of the New Departure.⁴⁷

Another blow to the New Departure came on April 14th, 1873 with the Supreme Court’s decisions in *The Slaughter-House Cases*,⁴⁸ and *Bradwell v Illinois*,⁴⁹ which were handed down on the same day.⁵⁰ The 5-4 decision in *The Slaughter-House Cases* undermined the arguments of the New Departure on three important grounds. First, it held that the primary purpose of the Fourteenth Amendment was to protect the rights of blacks. Second, it sharply distinguished between state citizenship and national citizenship, and between the privileges and immunities of state citizenship under Article IV, section 2 and the privileges and immunities of national citizenship under section 1 of the Fourteenth Amendment. This undermined the suffragists’ argument connecting the two. Third, it narrowly confined the scope of the privileges and immunities of national citizenship.

44. *Id.* at 445.

45. *Id.* at 444.

46. See 2 HWS, *supra* note 31, at 642-44 (reprinting Susan B. Anthony’s 1872 speech before her trial).

47. *Id.* at 461-64. Following testimony by Stanton and Anthony for a suffrage memorial in 1872, the Senate also produced a report rejecting suffragist claims. S. REP. NO. 1 (1872). This report was authored by Senator Matthew Hale Carpenter, who was also Myra Bradwell’s counsel in *Bradwell v. Illinois*. Winkler, *supra* note 25, at 1504, 1504 n.270.

48. 83 U.S. 36 (1873).

49. 83 U.S. 130 (1873).

50. *Slaughter-House* was announced on April 14, 1873. ALMANAC OF AMERICAN HISTORY 324 (Arthur M. Schlesinger, Jr. ed. 1993). *Bradwell* was announced immediately beforehand. Winkler, *supra* note 25, at 1504-05.

In *Bradwell v. Illinois*, women's rights advocate and *Chicago Legal Times* editor Myra Bradwell challenged Illinois's refusal to admit her to the state bar because she was a woman. Using the reasoning in *Slaughter-House*, the Supreme Court rejected her argument that Illinois violated the Privileges or Immunities Clause of the Fourteenth Amendment. The right to practice law, Justice Miller wrote, "in no sense depends on citizenship of the United States."⁵¹ Only Chief Justice Chase, who had been a prominent abolitionist lawyer in the 1850's, dissented without opinion. Perhaps the unkindest cut of all came from Justice Bradley, who wrote a concurring opinion joined by Justices Swayne and Field. All three had dissented in *Slaughter-House*, arguing that the Fourteenth Amendment protected the right of ordinary citizens to pursue a calling, invoking free labor and Jacksonian themes. Apparently, however, the same free labor ideology did not apply to women. Bradley rejected outright the notion "that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life,"⁵² and then made the famous statement for which the *Bradwell* case is known:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.⁵³

Together, *Slaughter-House* and *Bradwell* strongly signaled that the New Departure had few friends on the federal bench.

In addition to pursuing legislation, the NWSA also sent its members to vote in local elections, with the idea of creating a test case for the courts. From

51. *Bradwell*, 83 U.S. 130, 139 (1873).

52. *Id.* at 140 (Bradley, J., concurring).

53. *Id.* at 141 (Bradley, J., concurring).

1868 through 1872, many women attempted to vote. Most were turned away, and their legal challenges rejected.⁵⁴ In a few cases, however, state officials acquiesced.⁵⁵ In 1870, for example, black women went to the polls in South Carolina, encouraged by federal government agents.⁵⁶

The big test case occurred when Susan B. Anthony and several of her followers were arrested and tried for attempting to vote in the 1872 presidential election.⁵⁷ They were prosecuted under a provision of the Civil Rights Act of 1870 that made it a crime to cast a ballot if one did not have the right to do so.⁵⁸ This provision was directed at southern whites who attempted to vote more than once to nullify the votes of blacks, but was now applied to the suffragists if they sought to vote at all. Anthony was tried before Justice Ward Hunt of the U.S. Supreme Court, who was then sitting on circuit in New York. Relying on *Bradwell v. Illinois*, he rejected the defense's constitutional arguments.⁵⁹ Anthony herself was not permitted to speak; Hunt held that as a woman she was not competent to testify on her own behalf.⁶⁰ Hunt found Anthony guilty as a matter of law, arguing that even if she was mistaken about her right to vote the mistake of law was no defense. He directed the jurors to return a verdict of guilty against her, and refused to allow individual jurors to be polled, perhaps fearing a hung jury or an act of jury nullification. Finally, before he was about to pronounce the court's sentence, Hunt asked Anthony if she had anything to say in her defense.⁶¹ She launched into a vigorous attack on the constitutionality of her conviction, raising many of the legal and political arguments the suffragists had developed. Hunt repeatedly tried to silence her, without success.⁶² Finally, he sentenced her to a fine, which she adamantly refused to pay.⁶³

Because she was not imprisoned, Anthony was not able to seek review of her conviction through a writ of habeas corpus and place the suffragists' arguments before the U.S. Supreme Court.⁶⁴ That opportunity would fall to Virginia Minor herself. In October 1872, she attempted to register to vote in St. Louis. After being refused, she sued for relief and eventually her case was brought before the Supreme Court in May 1873. The State of Missouri, thinking the argument frivolous, did not even bother to present opposing

54. See Lobel, *supra* note 25, at 1367-69; Winkler, *supra* note 25, at 1492-95.

55. See Dubois, *Outgrowing the Compact*, *supra* note 25, at 853.

56. *Id.*

57. Lobel, *supra* note 25, at 1368-70.

58. 16 Stat. 140 (1870).

59. *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873).

60. 2 HWS, *supra* note 31, at 653.

61. FLEXNER & FITZPATRICK, *supra* note 29, at 167; 2 HWS *supra* note 31, at 680.

62. 2 HWS, *supra* note 31, at 687-89.

63. *Id.* at 689.

64. See Winkler, *supra* note 25, at 1507, 1513-14.

counsel.⁶⁵ The Supreme Court, however, did not render an immediate decision, but instead sat on the case for almost two years. In 1875, the Court handed down its decision in *Minor v. Happersett*,⁶⁶ unanimously rejecting Minor's arguments in an opinion by Chief Justice Waite, who had replaced Chief Justice Chase, the lone dissenter in *Bradwell v. Illinois*. The Court held that the right to vote was not one of the privileges or immunities of citizens of the United States, and pointed out that, at the time of the founding, citizenship had never been thought to include the right to vote. The Fourteenth Amendment "did not add to the privileges and immunities of a citizen," the Chief Justice wrote. "It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it."⁶⁷ Chief Justice Waite also rejected Minor's argument that denial of the franchise violated the Guaranty Clause: given that all the states except New Jersey denied the suffrage to women at the founding, "it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters."⁶⁸ Similarly, denial of woman suffrage did not conflict with the Fifth Amendment's Due Process Clause, or the Bill of Attainder Clause of Article I, section 9; otherwise all states except New Jersey would have been in violation at the founding.⁶⁹ Waite concluded by noting:

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.⁷⁰

Waite's reasoning made perfect sense according to the vision of citizenship held by many of the Fourteenth Amendment's framers. This view divided rights (and hence equality of rights) into three different categories: civil, political, and social.⁷¹ Although what fell into each category was always

65. See *Minor v. Happersett*, 88 U.S. 162, 164 (1875).

66. *Id.*

67. *Id.* at 171. The Court noted that because of section 2, the Fourteenth Amendment may have indirectly created new voters, but "it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen." *Id.*

68. *Id.* at 176.

69. *Minor*, 88 U.S. at 176.

70. *Id.* at 177-78.

71. AKHIL REED AMAR, *THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION* 216-218, 258-61, 271-74 (1998); HAROLD M. HYMAN & WILLIAM W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* 276-78, 394-402 (1982); EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND*

somewhat contested,⁷² for the most part civil equality meant equal rights to make contracts, own, lease and convey property, sue and be sued, and, according to some formulas, the rights of freedom of speech and free exercise of religion. Political equality meant having the right to vote, serve on juries, and hold political office. Social equality was far more amorphous, and concerned whether persons were considered social equals in civil society. Social equality was also a code word for miscegenation and racial intermarriage.⁷³

According to this tripartite theory, the Fourteenth Amendment guaranteed all citizens civil equality, but not political or social equality. Civil equality meant equality before the law, and this is what black men obtained when they became free. In theory, unmarried adult women also possessed civil equality; however, women surrendered almost all of their civil rights upon marriage because of the coverture rules, which were premised on the legal fiction that a wife surrendered all her rights to her husband. In any case, neither married nor unmarried women had political rights, which included the right to vote. Neither did black men, and that was why a Fifteenth Amendment, guaranteeing them the right to vote, was thought necessary.

If one accepts the tripartite theory, the result in *Minor* follows easily. But that puts the cart before the horse. As noted earlier, in the late 1860's many abolitionists believed that the end of slavery meant universal suffrage.⁷⁴ In essence, the tripartite theory of citizenship was a political compromise that sought to avoid the abolitionist claim that vote should now be freely available to all as a matter of natural right.

The proposal and ratification of the Fifteenth Amendment seemed to confirm the distinction between political and civil equality, because an additional constitutional amendment was necessary to give blacks the vote. Thus, it is not surprising that by the time the Supreme Court heard *Minor v. Happersett*, it rejected the abolitionists' universal suffrage theory. Although Waite's argument is presented as an originalist reading of the 1787 Constitution, he was really articulating the political status quo of 1875 as understood by moderate Republicans.

Perhaps equally important, Virginia Minor's reasoning would have had serious consequences for the balance between state and federal power. The suffragist theory would have nationalized the right to vote, placing it—and

CONGRESS, 1863-1869 103-06 (1990).

72. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 154 (1999) (stating "the many political and legal actors who spoke and wrote about rights using these terms did not always employ the categories in the same way").

73. See Emily Field Van Tassel, "Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War, 70 *CHI.-KENT L. REV.* 873, 876-77, 891 (1995).

74. Dubois, *Outgrowing the Compact*, *supra* note 25, at 845-48.

potentially a large number of other rights—squarely under the protection of the Fourteenth Amendment. By the time the Court heard *Minor v. Happersett*, it had already decided *The Slaughter-House Cases*, expressing its displeasure with the possibility that the Fourteenth Amendment would trench on traditional state regulatory prerogatives.⁷⁵ Hence Chief Justice Waite was careful to insist that the Fourteenth Amendment left the right to vote as a matter of state law.

The defeat in *Minor v. Happersett* brought an end to the New Departure. In 1878, the NWSA's strategy shifted to seeking a new constitutional amendment that would prohibit the United States or any state from denying the right to vote on the basis of sex.⁷⁶ That amendment would not be ratified until 1920, not as the Sixteenth Amendment, but as the Nineteenth.

After Susan B. Anthony's death in 1906, the suffrage movement was exhausted and dispirited. Decades of campaigning at the federal and state levels had produced repeated defeats. A younger generation of suffragists revitalized the campaign, with a more radical edge. They began a series of mass demonstrations, called suffrage parades, that drew nationwide attention.⁷⁷ In 1913, Alice Paul and Lucy Burns organized a mass protest in Washington the day before Woodrow Wilson's inauguration.⁷⁸ Borrowing tactics from British suffragists, they announced that they would fight against whichever party was in power and hold that party responsible for the failure to enact woman suffrage.⁷⁹ In 1914, Paul formed a radical wing of the suffrage movement, the Congressional Union. By 1916, women had the right to vote for President in twelve states, and sensing that an organized woman's bloc might swing a close election, the Congressional Union sponsored a National Woman's Party to campaign for pro-suffrage candidates.⁸⁰

Militant elements in the suffrage movement had succeeded in putting its claims in the forefront of the public eye, making them more difficult to ignore. Demographics also worked in the suffragists' favor. A younger generation of voters, who had lived through the early waves of progressive politics, were more tolerant of suffragist claims. New coalitions of affluent women and women laboring in industrial jobs swelled the ranks of the movement. Perhaps just as important, America's entry into World War I significantly changed the political equation. The social dislocations of the war effort drew enormous numbers of men into the armed forces and created a need to mobilize widespread public support based on President Wilson's stated goal of

75. *The Slaughter-House Cases*, 83 U.S. 36, 77-78 (1873) (arguing robust interpretation of Privileges or Immunities Clause "would constitute this court a perpetual censor upon all legislation of the States").

76. Siegel, *She the People*, *supra* note 25, at 974-75.

77. CATHERINE CLINTON, *THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY* 200-01 (1984).

78. FLEXNER & FITZPATRICK, *supra* note 29, at 256, DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION* 228 (1996).

79. FLEXNER & FITZPATRICK, *supra* note 29, at 259, KYVIG, *supra* note 78, at 229.

80. CLINTON, *supra* note 77, at 200-01.

upholding democratic values. All of this changed the interests of Washington politicians and gave the suffragists new opportunities for persuasion. As Wilson demanded that Americans “make the world safe for democracy,” suffragists reminded the public that America could use some democracy at home by giving half the population the right to vote.

The suffragists had supporters in the Republican party dating back to Reconstruction. By the 1910’s, the suffragists were picking up support among Democrats in the North and the West. The southern wing of the Democratic Party, by contrast, remained strongly opposed to suffrage because they believed it would undermine disenfranchisement of black voters.⁸¹ Liquor interests, who believed that women voters would support greater regulation, were also strongly opposed.⁸² William Jennings Bryan, the Nebraska Democrat who had led the party for years, got behind the suffrage campaign in 1914, and fought for it assiduously, especially in the West.⁸³ It also did not hurt matters that ten of the twelve states that gave women the right to vote in Presidential elections went for Wilson in 1916, despite, ironically, opposition from the militant National Woman’s Party.⁸⁴

In January 1917, suffragists began picketing the White House, demanding democracy at home as well as abroad, and gaining even more public attention.⁸⁵ Violence broke out, and beginning in June, hundreds of suffragists were arrested, and approximately one hundred were imprisoned.⁸⁶ Some suffragists responded with hunger strikes and were force fed by prison officials. The resulting public outcry made martyrs of the suffragists. By 1918, President Wilson swung his support to the suffragists and spoke out in favor of a national constitutional amendment.⁸⁷ With a Democratic President pushing for woman suffrage, and supported by a bi-partisan coalition of Republicans and Northern and Western Democrats, the suffrage amendment was submitted to the states on June 4th, 1919 and was ratified on August 18th, 1920.⁸⁸

III. SOCIAL MOVEMENTS AND POLITICAL INFLUENCE

The New Departure shows us how social movements generate new and innovative constitutional arguments. During the New Departure, the women’s movement organized its goals around a constitutional claim. It sought social

81. KYVIG, *supra* note 78, at 231, 234, 236.

82. KYVIG, *supra* note 78, at 232.

83. CLINTON, *supra* note 77, at 201; LAWRENCE W. LEVINE, DEFENDER OF THE FAITH: WILLIAM JENNINGS BRYAN: THE LAST DECADE, 1915-1925 128 (1965).

84. KYVIG, *supra* note 78 at 233; LEVINE, *supra* note 83, at 129.

85. FLEXNER & FITZPATRICK, *supra* note 29, at 275; KYVIG, *supra* note 78, at 233.

86. FLEXNER & FITZPATRICK, *supra* note 29 at 277-80.

87. Wilson had announced his support for woman suffrage at the state level as early as 1915, but did not officially support a federal amendment until January 1918. See FLEXNER & FITZPATRICK, *supra* note 29, at 271, 283.

88. KYVIG, *supra* note 78, 236-38.

change and expressed its demands in terms of constitutional principles, either through a claim of how the Constitution should be amended or how it should be properly interpreted.⁸⁹

Both arguments for amending the Constitution, and arguments for interpreting it can be phrased, and indeed, usually are phrased, in terms of changes that are necessary to make the Constitution true to its real nature, or faithful to the great traditions and principles of the country's past, including, most importantly, the principles and commitments of the founding generation. Thus, it is hardly surprising that suffragists summoned images of the American Revolution to buttress their claims. They invoked the Declaration of Independence and its themes of equality and unalienable natural rights.⁹⁰ They made abundant use of the Revolutionary slogan "no taxation without representation," and they invoked the anti-monarchical ideals behind the Revolution, arguing that limiting suffrage to males created, in Susan B. Anthony's words, "an oligarchy of sex."⁹¹

Moreover, the New Departure, like other social movements, did not create its arguments out of whole cloth. Their genuine innovations drew on a rich history of abolitionist and antislavery arguments about the Constitution, which the suffragists revised, extended, reinterpreted and turned to new political ends.⁹² Invoking these abolitionist and antislavery claims gave suffragist arguments extra persuasive force among the abolitionist and antislavery politicians who formed part of the post-war governing coalition.

The New Departure also exemplifies the different varieties of claims about constitutional norms that social movements generate. These constitutional claims range from being quite formal and lawyerly to being highly informal and not easily distinguished from general claims about justice, liberty or equality, or assertions of interest or injury. By the time of *U.S. v. Anthony*, for example, suffragists had an arsenal of lawyerly arguments about the meaning of various portions of the U.S. Constitution, backed up with case citations and historical examples. At the same time, the suffragist arguments—particularly in the earlier period when suffragists and abolitionists were promoting the idea of universal suffrage—drew on very general principles of popular sovereignty that had only limited connection to existing constitutional doctrines.

Finally, the New Departure—and the suffrage movement more generally—

89. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 321-26 (2001) [hereinafter Siegel, *Text in Contest*].

90. See 2 HWS *supra* note 31, at 630-31 (reprinting Susan B. Anthony's argument before her trial in 1872).

91. *Id.* at 635; see also Siegel, *Text in Contest*, *supra* note 89, at 336-39 (noting "As they constructed constitutional arguments to contest the justice of women's disfranchisement, suffragists repeatedly invoked the memory of the American Revolution."). See generally Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265 (1994) (describing use of taxation as metaphor in struggles for woman suffrage).

92. See Siegel, *Text in Contest*, *supra* note 89, at 325-26; *supra* note 32.

exemplifies the broad range of relationships that social movements can have with political parties. At the beginning of 1860's, the suffragists worked closely with the rising Republican Party, and helped it achieve its goal of abolishing slavery. A national political party owed them political favors and they attempted to take advantage of their social and political connections. By the mid-1870's, the suffragists had been cast into the political wilderness, where they would wander for decades, retaining some support among national politicians, but with insufficient clout to push their agenda forward. Finally, around World War I, after years of organization at state and local levels, the suffrage movement drew the support of party regulars in both national parties, and this provided the final push necessary for ratification of the Nineteenth Amendment.

What does the New Departure tell us about why social movements succeed or fail in pushing their interpretive claims into the jurisprudential mainstream? Why do some social movement arguments get adopted by courts relatively quickly, while others, like the claims of the New Departure, are abruptly cut short and languish for decades until they are finally vindicated not by judicial interpretation, but if at all, only through Article V amendment? What was it about the situation of the New Departure, and the status of its constitutional claims that led to its demise?

There are two obvious answers to this question. The first answer is that the New Departure failed because its arguments were implausible or "off-the-wall."⁹³ Given the presence of section 2 of the Fourteenth Amendment, the felt necessity of passing a Fifteenth Amendment, and the tripartite theory of citizenship, Virginia Minor's argument fit badly into the assumptions of well-trained lawyers of the day. This is to say nothing of Woodhull's and Anthony's suggestion that the Fifteenth Amendment gave women the right to vote because women existed in a condition of servitude.

At any rate, from today's standpoint the New Departure's claim that the Fourteenth Amendment guarantees women the right to vote is certainly not "off-the-wall." Even without consulting the text of Nineteenth Amendment, the Fourteenth Amendment—as currently interpreted—would guarantee women's right to vote. Classifications based on sex are suspect or quasi-suspect, and require "an exceedingly persuasive justification;"⁹⁴ the right to vote is either a fundamental right or a fundamental interest, and access to the ballot may not be subject to invidious distinctions.⁹⁵ Today we would say that denying women the right to vote is doubly suspect—it involves a suspect classification that also burdens a fundamental interest. So from the perspective

93. On the theoretical importance of the notion of what is "off-the-wall" for interpretive theory, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

94. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

95. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667-68 (1966).

of today's Constitution, the argument of the New Departure, far from being "off-the-wall," follows easily from basic postulates of the current constitutional order. In fact, from today's standpoint, the Nineteenth Amendment seems superfluous.

But of course, the Nineteenth Amendment was *not* superfluous in 1920, and indeed it is quite possible that had women not won the vote in 1920, the Supreme Court would not have created sex equality doctrines some fifty years later that make the Amendment appear superfluous today. The cumulative political effect of the suffrage campaign and the second wave of American feminism changed constitutional understandings about the meaning of the Fourteenth Amendment so that it overlaps with and produces the same practical result as the Nineteenth Amendment.

This brings me to a central point: constitutional arguments are made "off-the-wall" or "on-the-wall" by political and institutional circumstances, including perhaps most importantly, the field of background legal assumptions and existing judicial doctrine in which the claims are made. What social movements and political parties do, through political and legal contestation, is move constitutional claims from (1) being "off-the-wall;" to (2) being interesting, but wrong; to (3) being plausible, but all things considered unconvincing; to (4) being plausible and possibly right; to (5) being the better argument, all things considered; and finally, to (6) being natural and completely obvious, with the contrary assertion being completely loony and "off-the-wall."⁹⁶ Social movements and political parties shape the contours of political and legal reason—they help produce what is plausible and implausible constitutionally. That does not mean that the meaning of the Constitution is infinitely distensible. To the contrary, the constitutional text and the materials of constitutional interpretation are *resources* for social movements, and successful social movements are those that make the most out of the limited resources the Constitution provides. Few resources in this world are infinite or inexhaustible; for example, water is a resource, but there is only a limited amount of water on the planet. So too the Constitution is a resource, but it is a bounded and limited resource. The constitutional text, and constitutional history, structure, and judicial and non-judicial precedents, simultaneously channel, constrain, and enable the kinds of claims social movements can make. Having fashioned the claims, it is then up to social movements to persuade others that their interpretations are sound ones. Thus, the fact that a particular claim is "off-the-wall" at a particular point in history does not mean that it must always remain so. Much depends on what resources are available in the constitutional text and constitutional tradition, and how well the social movement takes advantage of those resources.

96. Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 717-19 (2005); Jack M. Balkin, *Respect Worthy*, *supra* note 5, at 504-09.

To see this point, compare the story of the New Departure with two other changes in constitutional norms. The first is the 2002 decision in *Zelman v. Simmons-Harris*,⁹⁷ which held that giving government money to parochial schools through a system of vouchers did not violate the Establishment Clause. The second example is an important change in constitutional meaning that occurred barely a decade after the failure of the New Departure. This is the Supreme Court's 1886 decision in *Santa Clara County v. Southern Pacific Railroad*⁹⁸ in which the Court assumed without argument that corporations are persons within the meaning of the Fourteenth Amendment.⁹⁹ The advocates for this constitutional claim were not involved in a social movement like the New Departure or the New Right; they were powerful railroad and other business interests who gained prominence within the Republican Party following the Civil War.

There is no reason to think that the argument of the New Departure is significantly more "off-the-wall" than the argument that corporations are persons. As my colleague Akhil Amar has pointed out, there is something deeply distressing about the fact that an amendment designed to protect the rights of black citizens was soon interpreted to give them virtually no protection whatsoever and instead gave constitutional protection to corporations.¹⁰⁰ Moreover, given the Jacksonian and free labor ideologies of the antebellum period, one might think that the idea that corporations deserved constitutional protection at the expense of hard working ordinary citizens was more than a little perverse. After all, corporations were the symbol of special privileges for the wealthy. Whatever the constitutional consensus in the 1870's and 1880's, constitutional rights for corporations in the 1860's were arguably in some tension with the egalitarian, anti-hierarchical, free labor ethos behind the Fourteenth Amendment.

Nor is the argument that the Fourteenth Amendment gives women the right to vote inherently more "off-the-wall" than the argument recently accepted in *Zelman v. Simmons-Harris*. In *Zelman*, the Court held that a government

97. 536 U.S. 639 (2002).

98. 118 U.S. 394 (1886).

99. As described in the United States Reports, when counsel for the railroad rose to argue his case, Mr. Chief Justice Waite stated:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Id. at 394. There is some dispute about whether Waite was deciding the question as a matter of constitutional law or was simply saying that the corporation's property was protected as the property of the corporators, so that the question did not matter for purposes of the case. See Morton Horwitz, *Santa Clara Revisited: The Development of the Corporate Theory*, 88 W. VA. L. REV. 173 (arguing *Santa Clara* only beginning of long line of decisions that gradually lead to ultimate conclusion that corporations are persons).

100. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 72 (2000).

program that will predictably send hundreds of thousands of dollars to fund religious schools and virtually no non-religious schools does not violate the Establishment Clause's command that government may not fund religious activities. That argument has won out only after thirty years of social movement contestation and litigation. When the argument was first offered, at the height of judicial enforcement of separation of church and state, it did not seem particularly convincing, and indeed, the Supreme Court rejected a similar argument in the *Nyquist*¹⁰¹ case in 1973. Between 1973 and 2002, of course, a great deal changed that altered the conditions of its plausibility, including changes in political context and, most importantly, changes in surrounding Establishment Clause doctrines. Even by 2002, however, there remains a pretty obvious way of stating the claim in *Zelman* that makes it conflict with the legal principle that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."¹⁰² And certainly the four dissenters in the case believed that the voucher program violated the clearest and most central command of the Establishment Clause. Nevertheless, after *Zelman*, the argument for the constitutionality of vouchers certainly is no longer "off-the-wall"—it is the law of the land.

What distinguishes the suffragists' argument from the positions taken in *Santa Clara* and *Zelman* is not that the former by its very nature is "off-the-wall" and the latter are not. Rather, the question is what political, institutional, and ideological forces shaped the conditions of their plausibility. Many things affect what makes a legal argument plausible or "off-the-wall," but one particularly important factor is who is willing to stand up for the argument and make it consistently and persistently. It matters a great deal if social movements can find respected advocates in the legal profession, in the political branches, or within the federal judiciary. Institutional recognition and authority matter a lot in law, and "[t]he more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from the positively loony to the positively thinkable, and ultimately to something entirely consistent with 'good legal craft.'"¹⁰³

Adam Winkler offers a second explanation for the failure of the New Departure, which, to my mind, is really a variation on the first. He suggests that the New Departure failed because of the dominance of originalism as a mode of constitutional analysis during the nineteenth century.¹⁰⁴ In Winkler's view, the problem with the New Departure was that the suffragists were making arguments that flew in the face of the original understanding of the

101. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

102. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

103. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1444-45 (2001).

104. Winkler, *supra* note 25, at 1459-66, 1482-83, 1518.

Fourteenth Amendment, especially given that the suffragists raised these arguments only a few years after the amendment was ratified.¹⁰⁵ Indeed, Winkler argues that the suffragists were the true originators of the “Living Constitution” theory—the notion that constitutional principles have to be read in the light of evolving social norms and changing times.¹⁰⁶ The suffragists failed, Winkler says, because the dominant theory of constitutionalism of the time was still originalist. Living Constitutionalism would not become persuasive until the New Deal. As a result, the New Departure represents, in Winkler’s words, “A Revolution Too Soon.”¹⁰⁷ Surely Winkler is correct that the conflict with original understandings must have played an important role in the rejection of the suffragist arguments, but I do not think it can be completely dispositive. After all, Justice Miller’s opinion in the *Slaughter-House Cases*, although it makes obeisance to the intentions of the framers of the Fourteenth Amendment, is pretty much a total rewrite of the Privileges or Immunities Clause. It is hard to believe that the framers of the Fourteenth Amendment believed this clause should be reduced to a nullity. Indeed, the evidence is quite to the contrary: the Privileges or Immunities Clause, and not the Due Process or Equal Protection Clauses of Section 1 of the Fourteenth Amendment, was generally understood to do most of the work of guaranteeing basic civil rights for all American citizens. If the suffragist argument seems rather strained from the standpoint of original understandings, it is nothing compared to what Justice Miller did in *Slaughter-House*. Indeed, Justice Miller not only got away with an argument that defied the framers’ original purposes and ripped the heart out of the constitutional text, but he managed to do so only four years after the Amendment’s ratification!

In fact, the success of the New Departure’s constitutional arguments were greatly hampered by both *Slaughter-House* and *Bradwell* precisely because the Court, defying original understandings, so diminished the Privileges or Immunities Clause that it became virtually irrelevant. The plausibility of a social movement’s constitutional arguments is greatly affected by the ecology of existing judicial doctrines, and if the relevant decisions are comparatively recent, they also signal the likely degree of hospitality that social movement claims will receive before the judiciary. Thus *Slaughter-House* and *Bradwell* did make the movement’s claims much more “off-the-wall” than they had been before. But that is not because *Slaughter-House*’s interpretation of the Privileges or Immunities Clause—relied on in *Bradwell*—was particularly

105. *Id.* at 1472-73; for evidence of opposition by the framers of the Fourteenth Amendment to woman suffrage, see also Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1260-73 (2000); Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers’ Ideal of Equality*, 7 CONST. COMMENT 251, 266-80 (1990).

106. Winkler, *supra* note 25, at 1457-60, 1465-73, 1483-87, 1499-1502, 1509-12, 1522-25.

107. *Id.* at 1456.

faithful to the original understanding.¹⁰⁸ Both Reva Siegel and Gretchen Ritter have argued that the very presence of the suffragist movement and its constitutional claims had a negative influence on the federal judiciary. Because the Court was wary of the suffragist claims, it had additional incentives to dilute the force of the new amendment and Congress's powers to enforce the Privileges or Immunities Clause.¹⁰⁹

I would like to offer a third explanation for why the New Departure failed. In the process I hope to show why the suffragist argument stayed "off-the-wall" in the way that the argument in *Zelman* did not, and why the conflict with original understandings proved fatal to the suffragist cause while it did not pose a problem in either *The Slaughter-House Cases* or *Santa Clara*.

At the beginning of this essay, I noted that there were two key strategies for social movement success in changing judicial interpretations of the Constitution. The first strategy is to work within the party system to obtain appointments of new judges and Justices sympathetic to the movement's claims. The second is to try to change the minds of existing judges by winning the battle for public opinion and appealing to the elite values of the judiciary. The New Departure failed because it could not employ either of these strategies effectively.

Begin with the second strategy, which tries to change the minds of judges already on the bench by appealing to the values of national elites. Why did the suffragists not succeed in the 1870's in way that advocates for contraception and abortion succeeded in the 1960's and early 1970's? In an important sense, the New Departure did attempt just such an appeal to elite values. But in contrast to *Griswold* and *Roe*, there was no elite consensus in favor of woman suffrage that crossed party lines in the early 1870's. In fact, the New Departure's arguments for woman suffrage took positions about how the Fourteenth Amendment trumped state law that were virtually guaranteed not to appeal to a wide spectrum of political and judicial elites. The judges who were so concerned about limiting federal power in *Slaughter-House* were hardly

108. The precise result in *Bradwell*, on the other hand—that Illinois could deny a married woman admission to the bar—may well be consistent with the understandings of many of the framers of the Fourteenth Amendment, who did not believe that common law coverture rules were made unconstitutional by the new amendment. See Farnsworth, *supra* note 105, at 1283. If Illinois could deny married women basic economic rights consistent with the Amendment, it could prevent women from entering a profession where they had to regularly make contracts with clients. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring). The Court would have faced a much more difficult case if *Bradwell* had been single. However, Justice Bradley waved that problem away, arguing that all adult women either were married or should be. *Id.*

109. Siegel contends that "[g]iven the contemporary visibility of the woman suffrage cause, it is plain that the Supreme Court was already anticipating" the New Departure claim when it read the Privileges or Immunities Clause narrowly in *Slaughter-House* and *Bradwell*. Siegel, *She the People*, *supra* note 25, at 973, 974 n.74. Ritter argues that "the narrow reading of citizenship offered [in *The Slaughter-House Cases*] was partly provoked by the New Departure itself and the political desire of the judiciary to ensure that these amendments were not used to reorder gender relations even as they were to be used to reorder race relations." Ritter, *supra* note 25, at 489-90.

likely to adopt the Minors' theory; moreover, as we saw in *Bradwell*, the *Slaughter-House* dissenters, who sought a more robust interpretation of the Fourteenth Amendment, were equally opposed to the idea of using the Amendment to guarantee equal rights for women.

The suffragists were rebuffed in *Bradwell v. Illinois* and *Minor v. Happersett*, producing judicial doctrines that seemed to close the door on judicial construction in their favor for a long time. Only in the years immediately before and during World War I did a bipartisan consensus among the nation's elites emerge; by that point the suffragists had long abandoned constitutional litigation as a method of obtaining the vote in favor of constitutional amendment. Their work finally paid off in 1920, during a particularly fertile period for constitutional amendments.

Given their influence within the Republican Party, the more likely route for the suffragists was the first strategy: to overturn *Bradwell* and *Minor* they would have to work through the party system over a long period of time to obtain favorable judicial appointments. Often the success of social movement interpretations of the Constitution depends on the successful forging of lasting connections between the social movement and the national party system. The constitutional claims of social movements tend to succeed or fail to the extent that they are taken up by national political parties.¹¹⁰ To be sure, sometimes a party is nothing other than the political wing of a social movement. That describes the Republican Party of the 1860's, which included many free soilers and abolitionists. Then the fate of the social movement is clearly tied to the fate of the electoral success of the party. But more often, social movements do not form a party or take over an existing one. They compete for attention and influence with many other interests in a political party, and this greatly affects their success in shaping constitutional norms.

Social movements play an important role in developing innovative constitutional claims, but the party system plays an even more crucial role in filtering, co-opting and translating the claims of social movements, including their constitutional claims. Political parties aggregate the claims of social movements with other claims in order to build national political support. In the process, social movement claims get restated, limited, translated into more politically palatable terms, or even put on the back burner by politicians and other party operatives. Equally important, political parties control access to the system of judicial appointments.

To put it bluntly, when constitutional claims of social movements are presented before courts, it matters a great deal whether the movement's

110. In this argument, I am indebted to Bruce Ackerman's pioneering studies of American constitutional development. See BRUCE A. ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE A. ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* (1998); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1170-79 (1988); and, most especially, Bruce Ackerman, *The Broken Engine of Progressive Politics*, 9 AM. PROSPECT 34 (May 1, 1998).

representatives have friends in high places, and in particular, on the federal bench. The more friends they have, the more likely they are to win. The fewer friends they have, the more likely they are to lose. And the most likely method of getting a social movement's friends on the federal bench is through the judicial appointments process. So unless the social movement has enough clout to push its favored candidates through the appointments process, it is a matter of luck whether the jurists it encounters will be sympathetic to its highly innovative arguments. Indeed, the more innovative the arguments for change in constitutional norms, the less likely they will succeed without ideological allies in high places.

This fact tends to explain the transformation in judicial doctrine that led to *Zelman*. When the constitutionality of vouchers first came before the Supreme Court in 1973 in *Committee for Public Education v. Nyquist*,¹¹¹ it was defeated. To the Justices—many of whom were holdovers from the Warren Court—school vouchers looked suspiciously like a device for southern whites to avoid segregation. And the Court's embrace of the principle of strict separation of church and state was then at its height. After all, the opinion in *Lemon v. Kurtzman*—the *bête noir* of today's religious conservatives—was written in 1971.¹¹² Perhaps more importantly, it was written by none other than Chief Justice Warren Burger, who was supposed to provide a conservative, strict constructionist alternative to Warren Court liberalism.¹¹³

Thirty years later, things looked quite different. Many Protestant churches that had previously opposed government support for religious education—because it was associated with support for Catholic schools—now advocated government support as a means of promoting their own religious values.¹¹⁴ Whites had little need of segregation academies when they could simply move to the suburbs. The link between support for religious schools and segregation had been severed in many people's minds.¹¹⁵

Perhaps equally important, the Republican Party had changed. It had become much more conservative, increasingly dominated by right-wing politicians in the South and West. One reason for this shift is that new conservative social movements, particularly those of religious conservatives, had become important parts of the Republican coalition. They exercised an increasingly influential role in judicial appointments in the Reagan and Bush presidencies. Together, Presidents Reagan and Bush began to stock the federal judiciary with movement conservatives, some of whom were themselves

111. 413 U.S. 756 (1973).

112. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

113. Burger, White, and Rehnquist concurred in part and dissented in part in *Nyquist*.

114. See generally Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

115. Devins, *supra* note 114, at 939-40.

religious conservatives, and some of whom were sympathetic to the claims of religious conservatives. For example, many libertarian conservatives, who disagreed with religious conservatives on many issues, were likely to be sympathetic to arguments that school vouchers were constitutional, because vouchers gave parents a choice about what kinds of schools they could send their children to. Indeed, the idea of vouchers was originally promoted by libertarians like Milton Friedman. Hence both religious and libertarian conservatives could agree on the constitutionality of vouchers, albeit for different reasons.

As the political landscape turned more conservative in the 1980s, lawyers for religious conservative causes found a more hospitable environment in which to make their constitutional claims, and, to their credit, they produced important innovations in constitutional arguments.¹¹⁶ The most important innovation was the claim that funding secular but not religious practices discriminated against religion and that support for religious institutions was consistent with a principle of “neutrality” between religion and non-religion. Hence government support of religious activities not only was permissible under the Establishment Clause, it was arguably compelled in some cases by the Free Exercise Clause or the Free Speech Clause. Slowly but surely, religious conservatives began to whittle away at the Warren and Burger Court’s Establishment Clause decisions, creating a more hospitable line of precedents for themselves.

It is instructive to contrast this with the situation in the 1870s. The Fourteenth Amendment was freshly enacted, and there were no precedents creating a field of legal understandings. After *Slaughter-House* and *Bradwell*, however, the legal precedents were allied against the New Departure’s constitutional arguments. That meant that the suffragists would have to chip away at those decisions over a long period of time if they were to prevail in the judicial arena. In like fashion, when religious conservatives began litigating to change the interpretation of the Establishment Clause, they faced a number of hostile Warren and early Burger Court precedents. It would take many years—and many intervening decisions—to create a favorable legal environment to make the claims that ultimately prevailed in *Zelman*.

By the time that the *Zelman* case reached the Supreme Court, the legal landscape had changed considerably from the *Nyquist* case twenty years before. Three members of the *Zelman* majority were movement conservatives—Antonin Scalia, Clarence Thomas, and the Chief Justice, William Rehnquist,

116. A key case was *Mueller v. Allen*, 463 U.S. 388 (1983), which upheld a system of tax deductions and tax credits for parents that primarily benefited parents sending children to parochial schools. However, during the 1980’s, the doctrines of government support for parochial schools moved in several different directions, producing considerable doctrinal confusion. After Justice Thomas joined the Court in 1991, the Court began to overturn or limit separationist precedents with greater frequency. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

who had dissented in part in *Nyquist*. Two other Justices, Anthony Kennedy and Sandra Day O'Connor, although not movement conservatives in the strict sense, were by no means hostile to the claims of religious conservatives. Through steady political activism and exertion of political influence within the Republican Party, religious conservatives had been able to make the argument for government support of parochial schools constitutionally acceptable. Indeed, after *Zelman* it is not entirely clear whether states can refuse to fund parochial schools if they have a voucher program that includes private non-sectarian schools, although the Court's recent decision in *Locke v. Davey*¹¹⁷ suggests that this may still be constitutional.¹¹⁸

If we compare the story of the success of conservative religious activists to that of the New Departure, we see a number of important differences. Although the suffragists had some influence in the Republican Party in the 1860's, and were owed political favors for their support of the Thirteenth Amendment, their influence in the party soon abated. The most important reason why it abated is that women had no right to vote. As a result, they were in a completely different position from religious conservatives, who organized determinedly and whose political clout made them an important constituency for the Republicans in the 1980s and 1990s. Eventually, this political influence paid off with judicial appointments that put friendly faces on the federal bench. Ironically—or perhaps not ironically at all—women couldn't exert very much political influence on the Republicans to appoint judges who would give them the right to vote because they couldn't vote in the first place. Throughout the nineteenth century, there were a number of national politicians who supported the idea of woman suffrage, but suffragists lacked the political clout to garner majority support for their issues.¹¹⁹ Because women could not threaten politicians with defection at the polls, they could be easily ignored when a more important issue came along. The suffragists were completely right in their argument that the right to vote was the right necessary to secure all other rights,¹²⁰ although perhaps not precisely in the way that they expected.

To be sure, by 1869, the Republicans did seek to guarantee black suffrage

117. 540 U.S. 712 (2004).

118. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 246 (2004) (noting “*Davey* appears likely to mean that funding [for religious schools] is never required; *Zelman* means that if the money follows the right path, funding is never limited”).

119. For example, Henry Wilson, U. S. Grant's running mate in 1872, was a supporter of woman suffrage. REBECCA EDWARDS, *ANGELS IN THE MACHINERY: GENDER IN AMERICAN PARTY POLITICS FROM THE CIVIL WAR TO THE PROGRESSIVE ERA* 51 (1997). By 1882 both houses of Congress had select committees on Woman Suffrage. FLEXNER & FITZPATRICK, *supra* note 29, at 166. A suffrage amendment came to the Senate floor and garnered 16 votes in the Senate in 1887 (with 34 opposed and twenty six absent). *Id.* Nevertheless, woman suffrage was unable to gain majority support until the twentieth century.

120. For example, at her trial, Susan B. Anthony argued that voting is “the one [privilege] without which all the others are nothing.” 2 HWS *supra* note 31, at 638.

even though blacks lacked voting rights in large parts of the country. But there is an obvious explanation for this. The Republicans reasonably assumed that blacks would become reliable Republican voters, as indeed they turned out to be for decades to come. It was therefore well worth pushing for black suffrage even in the face of stiff opposition from the Democrats. The Republicans had no similar guarantee that women would turn out to be reliable Republican voters. Indeed, after women got the vote in 1920, they did not turn out to be particularly loyal to either party. Given the circumstances, the NWSA's influence on the Republican leadership was almost certain to recede over time.

After the Republicans rebuffed their demands for woman suffrage, Stanton and Anthony tried to forge an alliance with a few Democrats for a time.¹²¹ George Francis Train, a racist Democrat who opposed black suffrage, even helped finance Stanton and Anthony's weekly journal, *The Revolution*.¹²² But this alliance of strange bedfellows was unlikely to lead to sustained Democratic support for woman suffrage, because in many ways the Reconstruction Era Democratic Party was even less amenable to progressive egalitarian ideas than the Reconstruction Era Republicans were.¹²³ Democrats who supported the suffragists during the debates over the Fifteenth Amendment did so largely to expose Republican hypocrisy. Democrats were unlikely to crusade for woman suffrage because there was no guarantee that women would turn out to be reliable Democratic voters either.¹²⁴

The suffragists were well aware of the difficulty. Writing in 1902, Susan B. Anthony noted that if either the Democrats or the Republicans, "could have had assurance of receiving the majority of the woman's vote it would have been obtained for her long ago without effort on her part, just as the workingman's and the colored man's were secured for them."¹²⁵ Yet because women's interests divided among class, race, and region, "this has been impossible."¹²⁶

Given that women lacked the right to vote, and therefore lacked the power to influence the major parties through the ballot box, their only hope was that the radical wing of the Republican Party would remain dominant and that it would push for an amendment for woman suffrage as soon as it had achieved black

121. See 2 HWS *supra* note 31, at 320-22.

122. FLEXNER & FITZPATRICK, *supra* note 26, at 150; cf. 2 HWS *supra* note 28, at 311 (noting Frederick Douglass remarked that Republicans in Kansas opposed woman suffrage "[b]ecause of your ally, George Francis Train," who opposed suffrage for black men).

123. HARPER, *supra* note 39, at 382; Winkler, *supra* note 25, at 1478-79.

124. Suffragists did play an important role in several of the third parties that developed during the second half of the nineteenth century, including the Prohibitionist party and the Populist party. But these parties never gained control of the national government. Moreover, pursuing suffrage politics within third parties repeatedly produced fractures both within the third parties themselves and within the ranks of suffragists. EDWARDS, *supra* note 119, at 99-110. As a result, suffragists tended to alternate between support for the two major parties and a position of nonpartisanship. Both strategies proved frustrating until the beginning of the twentieth century.

125. 2 HWS, *supra* note 31, at xviii.

126. EDWARDS, *supra* note 119, at 57-58; 2 HWS *supra* note 119, at xviii.

suffrage, or that a federal judiciary staffed with radical Republicans would eventually look with favor on the suffragists' constitutional claims, reversing *Minor* in the same way that *Zelman* had eventually reversed *Nyquist*. But this hope, too, proved unavailing. The political dynamics in the period following *Bradwell* and *Minor* simply were not the same as the political dynamics following *Nyquist* that eventually led to the Court's reversal in *Zelman*. After *Nyquist*, and more importantly, after *Roe v. Wade*, religious conservatives organized and became a potent electoral force in the 1980's and 1990's. The same did not happen for women, largely again, because they lacked the right to vote in the first place in most states in the Union.

Earlier, I noted two explanations for why the New Departure strategy failed. The first is that the suffragists' constitutional claims were implausible and "off-the-wall;" the second is that they were inconsistent with an originalist approach to constitutional interpretation. Once again, it is instructive to compare the fate of the New Departure's creative interpretation of the Fourteenth Amendment with the acceptance of equally creative interpretations in *Slaughter-House* and *Santa Clara*. When we consider the political dynamics of the period we can see why Justice Miller was able to get away with what he did to the Privileges or Immunities Clause, and why the Court had little problem in assuming that corporations were persons under the meaning of the Fourteenth Amendment, even though both interpretations had little support in the original understandings of the Fourteenth Amendment.

By 1872, the Republican Party was changing. The Radicals, who had the upper hand during most of the 1860's, were losing ground. The wartime coalition of Northern or "War" Democrats, moderate Republicans, and radicals was quickly falling apart. A Northern Democrat interpretation of the Civil War, which asserted that the war was about the illegality of secession and slavery, but did not fundamentally change the nature of the country or the Constitution, was gaining currency.¹²⁷ *The Slaughter-House Cases* confirmed this view.¹²⁸ The country was slowly but surely moving away from an egalitarian constitutionalism, and toward a constitutionalism that promoted economic nationalism—the creation of national markets and the defense of the contract and property rights of capital.

Immediately after the Civil War, the Republican Party was the dominant political power in the country, and so businessmen and financiers who were not already members flocked to it.¹²⁹ In this way, the Republican Party was transformed from the party of Lincoln to the party of business interests, which

127. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 48-49 (1999).

128. *Id.* at 62-68; *see also* *United States v. Cruikshank*, 92 U.S. 542, 559 (1876) (limiting rights protected by Civil Rights Act of 1870).

129. A number of former Whigs had already become part of the Republican coalition before the Civil War after the demise of their own party.

it remains to this day. Following the ratification of the Fourteenth Amendment, radicals and abolitionists gradually lost their influence in the party leadership, which now fell to business interests who cared far less for social revolution or egalitarianism and for whom black civil rights was a secondary concern. The radical wing of the Republican Party lost influence and Republicans became increasingly enthusiastic about pro-business policies that promoted economic development and the creation of national markets.¹³⁰ Moreover, the Democratic Party was resurgent in the 1870's, regaining control of the House of Representatives in the 1874 elections, and putting additional pressure on the Republicans for moderation on civil rights.

The judicial appointments of the period reflect this transformation in the politics of the Republican Party. Grant's first successful Supreme Court appointments were William Strong and Joseph P. Bradley, two railroad lawyers.¹³¹ Two years later he appointed another railroad lawyer, Ward Hunt, who presided over Susan B. Anthony's trial. Grant replaced the abolitionist Chief Justice Samuel Chase with Morrison I. Waite, another railroad lawyer and favorite of the Vanderbilts who had no prior judicial experience and had never held national office.¹³²

Thus, between 1868 and 1875, when *Minor v. Happersett* was decided, we can see a strong shift toward jurists who would defend economic nationalism, property rights, and corporate interests, but not the constitutional arguments of Radical Republicans or abolitionists. The suffragists had few friends on the Court, and the only friend they might have had, Chief Justice Chase, died in 1873 and was replaced the next year by a lawyer closely identified with railroad interests, Morrison Waite.

Things got no better for the suffragists after *Bradwell* and *Minor*. The Republicans did not stock the federal courts with a series of radical Republicans who would eventually look with favor on suffragist constitutional claims, as Scalia, Thomas, and Rehnquist would eventually look with favor on the constitutional claims of religious conservatives. Instead, the Republicans appointed more and more lawyers who represented business interests to the federal bench. By 1886, when the Court decided *Santa Clara*, the Supreme Court was well-stocked with railroad lawyers and economic conservatives.¹³³ That was entirely predictable given the political forces that held sway in the

130. See Gillman, *supra* note 10.

131. Grant previously attempted to appoint Attorney General Ebenezer R. Hoar and former War Secretary Edwin M. Stanton, but Hoar was rejected by the Senate, and although the Senate quickly confirmed Stanton, he died before he could take office.

132. See Gillman, *supra* note 10.

133. The Supreme Court in 1886 included former railroad lawyers Bradley and Waite, Miller, a conservative Whig before the Civil War and the author of *Slaughter-House*, Field, who had become an economic conservative, Samuel Blachford, connected to New York's financial elite, Horace Gray, an economic conservative, Stanley Matthews, counsel to the financier Jay Gould, William Woods, and John Marshall Harlan.

party. The story of the women's movement in the 1880s and 1890s would not be the same as the story of religious conservatives in the 1980s and 1990s. Instead, the suffragists would have to wait many decades for a national consensus to emerge in their favor, so that they could obtain a constitutional amendment.¹³⁴

As I noted in the introduction, the story of the second wave of American feminism in the 1960s and 1970s is in some ways the mirror image of the story of the New Departure. Because of the Nineteenth Amendment, when women began to organize politically for their rights, they were a potent force to be contended with. Both major political parties—but particularly liberal Democrats and moderate elements in the Republican Party—supported the movement through legislation, including the Equal Pay Act of 1963¹³⁵ and the Civil Rights Act of 1964.¹³⁶ The Civil Rights Movement and the Rights Revolution had helped produce a cadre of (mostly male) liberal judges who would be, at the margins, more sympathetic to women's claims than those of a previous generation. On the Supreme Court itself, liberal holdovers from the Warren Court proved relatively sympathetic to the arguments of the social movement, even if the more conservative Republican appointees were less so. And as the 1970s wore on, women became an increasingly important constituency in both parties, particularly the Democratic Party. The women's movement surely did not win all of its battles, and the 1973 decision in *Roe v. Wade* helped precipitate a powerful conservative reaction, whose effects are still being felt to this day. But by almost any measure, the women's movement

134. An obvious question is why the suffragists did not revive the New Departure strategy and return to the courts once they had obtained a national consensus in their favor. There are probably three reasons. The first is that the suffrage movement had committed itself to a strategy of referendums and amendments for far too long. Second, a bipartisan consensus in favor of woman suffrage emerged only during World War I, at which point it may actually have been quicker and easier to push for an amendment than to embark on years of uncertain litigation. Unlike most periods in American history, the Progressive Era saw a number of amendments in a very short space of time. However, if the World War I push for ratification had failed, it is entirely possible that the suffragists would have returned to the courts to press their claims. Third, to win in the courts, the suffragists probably would have had to take sides on one of the most hotly contested questions of the period—the extent to which the Fourteenth Amendment limited the police power of the states. The suffragists could not appeal to an elite consensus because progressives and conservatives disagreed strongly about this question.

It is worth noting that following the ratification of the Nineteenth Amendment, the Court struck down a minimum wage law for women and children in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), on the grounds that the law violated women's liberty of contract. Justice Sutherland pointed to "the great—not to say revolutionary—changes which have taken place . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment" to justify extending *Lochner*-style freedom of contract arguments to women. *Id.* at 533. If the Nineteenth Amendment had not been ratified, and the question of women's voting rights had become entangled in the debate over *Lochner v. New York* and the doctrine of liberty of contract, it is by no means clear how the courts would have reacted to a new round of suffragist claims. Although some conservatives might have been more willing to consider suffragist arguments, progressives might have been far less eager to do so.

135. 29 U.S.C. § 206(d).

136. 42 U.S.C. § 2000e-2.

of the 1960s and 1970s succeeded in transforming the meaning of the American Constitution.¹³⁷ Its political clout was amply demonstrated when the conservative Republican Ronald Reagan—who had run against *Roe v. Wade*—nevertheless nominated the first woman Supreme Court Justice, Sandra Day O'Connor, and when President Bill Clinton nominated Ruth Bader Ginsburg, who had litigated many of the key sex equality cases of the 1970s. By the 1990s, the social movement for women's rights not only had a number of friendly faces on the federal bench, but several of those faces were women's.

IV. CONCLUSION

The New Departure is a fascinating episode in American constitutional history. It deserves to be restored to the constitutional canon for many reasons, not the least of which is the relative ignorance of most law students about the history of the long struggle for women's rights. It sheds light on the political compromises and transformations that shaped and ended Reconstruction. The New Departure also teaches us a great deal about how social movements change (or fail to change) the Constitution, and about the intricate connections between social movements, their patrons in the national political parties, and the creation of a judiciary hospitable to their claims.

When we contrast the story of the New Departure to that of more successful social movements that changed constitutional meanings, we see potentially democratic and popular elements at work in constitutional change through judicial review: constitutional norms change because public opinion changes, national political parties get behind particular ideas, and the judiciary eventually responds to this change. At the same time, the story of why the New Departure failed also shows how the exercise of judicial review can be dominated by the most powerful elements in society through their control of the political process. The standard defense of judicial review in the United States is that it acts as a check on powerful factions that seek to deny people their basic liberties and take advantage of politically powerless minorities. But as the story of the New Departure indicates, the reality is much more complicated. The best strategy for having one's rights protected and recognized by courts is to be politically strong, not weak, so that one can influence both public opinion and the composition of the federal judiciary.

137. See 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, 1984-2005 (2003) (describing how second wave of feminism altered constitutional norms).