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THE IMPORTANCE OF BEING A WOMAN: A HISTORICAL  
COMPARISON OF FEMALE POLITICAL INVOLVEMENT IN  
EARLY NATIVE AMERICA AND THE U.S.

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*“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”<sup>1</sup>*

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<sup>1</sup> U.S. CONST. amend. XIX.

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## I. INTRODUCTION

Congress passed the Nineteenth Amendment to the U.S. Constitution on June 4th, 1919.<sup>2</sup> On August 18th, 1920, the amendment was ratified, guaranteeing women throughout the nation the right to vote.<sup>3</sup> This was a landmark achievement, made possible by the unyielding efforts of courageous women from the time of the nation's founding. Today, women have exercised their constitutional right to vote in federal and state elections for roughly one hundred years, and the nation is much different in terms of attitudes toward biological sex in the political arena.

For example, women have exercised their voting rights in greater number than men for decades. In each presidential election since 1964, the number of female voters has exceeded that of male voters.<sup>4</sup> Women make up over half of the U.S. population,<sup>5</sup> and their increased visibility is apparent not only in terms of voter turnout, but also with respect to political office. There are currently three women on the U.S. Supreme Court, and four women in Cabinet and Cabinet-level positions.<sup>6</sup> There are now 126 women in Congress, making up

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<sup>2</sup> *19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=63> (last visited Dec. 3, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Gender Differences in Voter Turnout*, CTR. FOR AM. WOMEN & POL. (Sept. 16, 2019), <https://cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Current Numbers*, CTR. FOR AM. WOMEN & POL., <https://cawp.rutgers.edu/current-numbers> (last visited Dec. 3, 2020).

23.6% of the total members of the U.S. Senate and House of Representatives.<sup>7</sup> Indeed, the number of women in positions of political power does not accurately represent their numbers within the U.S. population. Nevertheless, this is a significant achievement. When one considers the fact that there were no female Congresswomen until the election of Hattie Caraway to the U.S. Senate in 1932,<sup>8</sup> it is evident that women have made great strides in the past eighty-eight years. In that time, the number of women in the Senate grew from one to twenty-five.<sup>9</sup>

Despite these successes, women still do not receive equal treatment. Women who run for political office are criticized based on stereotypes attributed to their sex.<sup>10</sup> Much of the population retains the antiquated assumption that the primary role of women is to serve as mothers.<sup>11</sup> In campaign discussions, voters pose questions concerning a female political candidate's role as a mother.<sup>12</sup> For candidates who are mothers, voters question their ability to handle the demands of motherhood in addition to their role as a politician.<sup>13</sup> In contrast, women who are not mothers and have never married are considered incapable of understanding the "concerns of families."<sup>14</sup> This is an immensely difficult obstacle to overcome, and yet men do not face

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<sup>7</sup> *Id.*

<sup>8</sup> *Caraway, Hattie Wyatt*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, [https://history.house.gov/People/Listing/C/CARAWAY,-Hattie-Wyatt-\(C000138\)/](https://history.house.gov/People/Listing/C/CARAWAY,-Hattie-Wyatt-(C000138)/) (last visited Dec. 3, 2020).

<sup>9</sup> *Current Numbers*, *supra* note 6.

<sup>10</sup> This Note will use the term "sex" rather than "gender" so as to prevent the prevalence of using one term whilst truly referring to the other. *Sex* is a biological trait; a circumstance of birth that is predetermined. See Krista Conger, *Of Mice, Men and Women: Making Research More Inclusive*, 34 STAN. MED. (SPECIAL REP.: SEX, GENDER, & MED.) 6, 6–10 (2017), <https://stanmed.stanford.edu/content/dam/sm/stanmed/documents/2017spring.pdf>. In contrast, *gender* "is socially, culturally, and personally defined." *Id.* Gender refers to how one perceives themselves in society, and how they are perceived in their interactions with others. *Id.* Although the two terms often align with one another, that is not always the case. *Id.* The notion that gender and sex are one in the same perpetuates the notion that gender is inherently masculine or feminine. See *id.*

<sup>11</sup> *Modern Family: How Women Candidates Can Talk About Politics, Parenting, and Their Personal Lives*, BARBARA LEE FAM. FOUND. 1, 1 (Mar. 22, 2017), [https://www.barbaraleefoundation.org/wp-content/uploads/BL\\_Memo\\_Final-3.22.17.pdf](https://www.barbaraleefoundation.org/wp-content/uploads/BL_Memo_Final-3.22.17.pdf) [hereinafter *Modern Family*].

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

this same burden.<sup>15</sup> When men are critiqued regarding their ability to juggle family, life, and political office, they are able to bounce back.<sup>16</sup> Women, on the other hand, face tremendous difficulty in overcoming such critique.<sup>17</sup> The political contributions of women are measured and valued largely upon the concept of motherhood—a phenomenon that has persisted in American society for centuries.<sup>18</sup> This Note addresses the evolution of female political participation over time, analyzing the similarities and differences in the obstacles that women have faced since the days of the American Revolution to the present. However, the most powerful component of this Note is found in its comparison of the political involvement of women in the U.S. and in Native American society. Both Native American and U.S. society value women's contribution to the home. Unfortunately, U.S. society fails to understand that women's voices and unique perspectives would make our political system stronger and more diverse—a concept that has been integral to Native American society for centuries.<sup>19</sup> There is not one clear way to determine how American society might move forward to integrate women more fully into American politics. However, observation of early Native American society's "system of checks and balances"<sup>20</sup> between the sexes suggests some possibilities.

Part II of this Note discusses the theory of "Republican Motherhood," and the concept of separate spheres. At the time of the nation's founding, society viewed women's political contribution as tied intimately to the domestic realm of child-rearing and the home. This served as the primary limitation upon their ability to participate in

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<sup>15</sup> See Natalie Mihalek, *For Women Candidates, that 'Extra' Question: 'What About the Kids?'*, PITTSBURGH POST-GAZETTE (Mar. 18, 2018, 12:00 AM), <https://www.post-gazette.com/opinion/Op-Ed/2018/03/18/For-women-candidates-that-extra-question-What-about-the-kids/stories/201803310027>.

<sup>16</sup> *Modern Family*, *supra* note 11, at 2.

<sup>17</sup> This phenomenon is referred to in employment law as a "double bind." In other words, women who act more like men (not mothers) are considered too "masculine" and women who act "feminine" (are mothers) are considered weak. The term *double bind* refers to the socio-legal constructs prevalent in the U.S. today which "limit women's opportunities to simultaneously pursue careers and families equal to their male counterparts." Michele Goodwin, *Assisted Reproductive Technology & the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER, RACE & JUST. 1, 52 (2005).

<sup>18</sup> See *Modern Family*, *supra* note 11.

<sup>19</sup> Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019 *passim* (1990).

<sup>20</sup> *Id.* at 1043.

matters of politics. However, as the nation grew, so too did methods of hindering women from achieving political equality. Part III of this Note explores methods of Constitutional interpretation and patriarchal common law practices which prevented women from voting. Once the U.S. Constitution was ratified, the nation began to define the standards and practices by which its system of government would operate. This process reflected the inconsistencies regarding the principles of patriarchal common law practices and the definition of citizenship. Accordingly, the courts developed different definitions of citizenship for men and women such that they did not conflict with common law concepts.

Part IV of this Note primarily concerns the efforts of the Woman's Suffrage Movement and the struggles the court system posed for women in obtaining the right to vote. Part IV contains an analysis of the current status of U.S. female political representation. Part V of this Note consists of three subparts. The first subpart will discuss the sociopolitical framework of Native American society in terms of how political power was divided between men and women. The second subpart will compare and contrast the place of women in Native American society with that of women in the U.S. from the founding era to today. The egalitarian viewpoints of certain Native American societies provide insight as to how the U.S. can move toward greater sex equality. The third subpart will utilize those comparisons to create a proposal for future change. Part VI consists of a brief conclusion, highlighting the recurring themes observed through the study of female participation in politics and calling for greater effort to achieve a more comprehensive vision of equality in the U.S.

## II. REPUBLICAN MOTHERHOOD AND THE "SEPARATE SPHERES" DOCTRINE

### A. *Women in the Pre-Revolutionary Era*

Even before the American Revolution, colonial society in America differentiated between the proper places of men and women, dividing their roles into "separate spheres."<sup>21</sup> Women were not meant to venture into the public realm of politics, an area reserved exclusively for

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<sup>21</sup> Samantha Ricci, *Rethinking Women & the Constitution: An Historical Argument for Recognizing Constitutional Flexibility with Regards to Women in the New Republic*, 16 WM. & MARY J. WOMEN & L. 205, 208 (2009).

men.<sup>22</sup> Instead, women were meant to remain within the private, domestic sphere.<sup>23</sup> These ideas were inspired by classical philosophers such as Aristotle, who taught that "politics was the affair of men" and women occupied a lesser domain within society, serving the public through their contributions to the home.<sup>24</sup> The American Revolution forever altered Western society and set the trajectory of the nation's future. The foundation of the political structure of the nation was created during this time, and critically important issues were debated, such as what "citizenship" meant, and what individuals were to be considered citizens.<sup>25</sup> However, these discussions took place without the presence of women.<sup>26</sup> Retaining previous patriarchal notions of the proper place of men and women, political discussion was an area reserved for men only.

### *B. The Role of Women in the U.S. Constitution*

The founding fathers grappled with what the proper role of women in the new nation should look like.<sup>27</sup> Indeed, women played an important role during the war. They were expected to demonstrate their political allegiance and loyalty, and to provide support to the male soldiers in the form of food, shelter, medical care, and supplies.<sup>28</sup> Some women also contributed to the war effort by serving as spies.<sup>29</sup> In light of their admirable support in the fight for independence, it was necessary to determine how women would continue to support the nation moving forward. The notion of "coverture," a concept of British common-law commonly accepted in American society, informed this discussion.<sup>30</sup>

The theory of coverture referred to the idea that, upon marriage, a woman's legal identity was subsumed by that of her husband.<sup>31</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 7 (1980).

<sup>25</sup> *Id.*

<sup>26</sup> See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281 (1991).

<sup>27</sup> See KERBER, *supra* note 24, at 9–12.

<sup>28</sup> *Id.* at 8–9.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.*

<sup>31</sup> Ricci, *supra* note 21, at 212.

When a woman married, her husband obtained control of her property.<sup>32</sup> Given that only citizens who exercised independent control over property were thought to be capable of free will, the resulting observation appeared to mean that married women had no political identity of their own.<sup>33</sup> Coverture served as a legal handicap for women. This common law concept not only prevented married women from acquiring property in their own name, but it also prevented them from devising land by will, suing or being sued without inclusion of their husband in the action, and receiving income earned during the marriage.<sup>34</sup> In fact, although the proper role of women was thought to reside within the domestic sphere, even in that realm women did not possess sole authority. Instead, men were seen as the heads of the household, and women were to obey their commands.<sup>35</sup>

This idea of the apolitical nature of women contrasts with their role during the American Revolution. During that era, women were certainly valued citizens, aiding in the war effort through their acts of loyalty to the Revolutionary cause.<sup>36</sup> In doing so, they ventured outside of their traditional place within the private sphere of society and into the male-dominated public sphere.<sup>37</sup> Thus, after the Revolution, the proper role of women in the new society of the Republic had to be established.

### C. Enlightenment Influences

The ideas of Enlightenment philosophers such as Montesquieu, Gibbons, and Rousseau influenced the founding fathers in establishing the foundation of the political and social structure of the Republic.<sup>38</sup> Jean Jacques Rousseau's writings in particular reflected his belief in the inferiority of women.<sup>39</sup> Indeed, Rousseau proposed that women were inferior to men as an inevitable condition of nature and were innately less capable of intellectual thought.<sup>40</sup> It is no wonder then

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<sup>32</sup> KERBER, *supra* note 24, at 9.

<sup>33</sup> *Id.*

<sup>34</sup> Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2142 (2019).

<sup>35</sup> Ricci, *supra* note 21.

<sup>36</sup> KERBER, *supra* note 24, at 8–9.

<sup>37</sup> Ricci, *supra* note 21, at 216.

<sup>38</sup> KERBER, *supra* note 24, at 10–11.

<sup>39</sup> See Eric Engle, *Law and Literature: Story-Telling and Norms in Rousseau's Emile*, 18 BUFF. J. GENDER L. & SOC. POL'Y 1, 3 (2010); see also KERBER, *supra* note 24, at 23–26.

<sup>40</sup> Engle, *supra* note 39, at 5–6.

that, reflecting on these ideals, the founding fathers expressed similar beliefs about the role of women in the world of politics. Still, women found ways to engage in political activity.<sup>41</sup> As one method, the wives of powerful men advised their husbands on matters of politics and the formation of the nation's structure.<sup>42</sup> John Adams, a man of immense political influence, relied on his wife to keep him informed of local politics, and "he expected her to keep his fences mended."<sup>43</sup> Indeed, Abigail Adams remarked in one letter to her husband that he had made her a "politician" in allowing her to be involved in communications regarding his political dealings.<sup>44</sup>

Still, during this time the women who were privileged enough in status to speak with greater freedom were ridiculed for their efforts.<sup>45</sup> Abigail Adams was also a proponent of feminism,<sup>46</sup> and prior to the creation of the Declaration of Independence, she wrote a letter to her husband imploring him to, "[r]emember the [l]adies" when he and the other men gathered to write the document.<sup>47</sup> She went so far as to declare that they would start a "rebel[l]ion" if special care was not taken to address women in the Declaration, articulating that they would "not hold [themselves] bound by any [l]aws" that did not grant them a "voice" or "[r]epresentation."<sup>48</sup> In response, Mr. Adams stated that he could not help "but laugh" and assured his wife that the social order would remain.<sup>49</sup> He stated that they "kn[e]w better than to repeal [their] masculine systems."<sup>50</sup>

#### *D. Republican Mothers*

It is clear that male society was not willing to extend women the same ability as men to participate in the political realm of society. Still, their actions of support during the American Revolutionary War indicated that women did serve some role in furthering the political

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<sup>41</sup> Ricci, *supra* note 21, at 216.

<sup>42</sup> KERBER, *supra* note 24, at 82.

<sup>43</sup> *Id.*

<sup>44</sup> Letter from Abigail Adams to John Adams (July 5, 1780) (on file with author).

<sup>45</sup> Ricci, *supra* note 21, at 216–17.

<sup>46</sup> *Id.* at 217.

<sup>47</sup> Letter from Abigail Adams to John Adams (Mar. 31, 1776) (on file with author).

<sup>48</sup> *Id.*

<sup>49</sup> Letter from John Adams to Abigail Adams (Apr. 14, 1776) (on file with author).

<sup>50</sup> *Id.*

stability and growth of the new nation, albeit a lesser position than did men according to their own patriarchal beliefs. However, the question remained as to what that proper role of women should be. The concept of "Republican Motherhood," a term coined by historian Linda Kerber, developed as an answer to this dilemma.<sup>51</sup> Women strove to forge a method in which they could have some influence upon the political realm without upsetting the established social order.<sup>52</sup> They carved out such a place for themselves through the idea of Republican Motherhood. According to this theory, Republican mothers incorporated political principles into their domestic lives, utilizing their intimate relationship to the home as a means of fostering political values into the minds of their husbands, children, and other family members.<sup>53</sup> Women occupied a special place within the home, capable of instilling values within those closest to them.<sup>54</sup> Republican mothers were not to make any political decisions, as that would constitute a divergence from the concept of separate spheres.<sup>55</sup> Instead, women began to exercise a lesser form of political participation within the home. Republican mothers were to educate their sons about proper civic virtues and to ensure that their husbands acted in accordance with such values.<sup>56</sup>

The concept of Republican Motherhood "integrate[d] domesticity and politics."<sup>57</sup> This theory served as one of the first forays into political participation for women in the nation's history.<sup>58</sup> However, moving forward, it also served as a method to limit women's ability to participate politically based on her role as a mother, a tradition that has continued to the present.<sup>59</sup> Women have been subject to disadvantages in society, and in the realm of politics, due to their "capacity for and role in childbearing."<sup>60</sup> Today, female politicians face difficulty getting elected to office based on such antiquated notions

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<sup>51</sup> KERBER, *supra* note 24, at 11.

<sup>52</sup> *Id.* at 11–12.

<sup>53</sup> *Id.*

<sup>54</sup> Linda Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 AM. Q. (SPECIAL ISSUE) 187, 202 (1976).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 203.

<sup>58</sup> *See id.*

<sup>59</sup> *See* MacKinnon, *supra* note 26, at 1308–09.

<sup>60</sup> *Id.* at 1308.

that women are best suited to the domestic sphere and have no place in the male-dominated world of politics.<sup>61</sup> This demonstrates a critical point—while women used motherhood to obtain a political voice, such reliance has also served to inhibit them from progressing further in the realm of politics.

### III. WOMEN'S CITIZENSHIP AND THE BARRIERS TO LEGAL EQUALITY

#### A. *Defining Female Citizenship in the Founding Era*

During the Constitutional Convention, which occurred from May 25th, 1787, to September 17th, 1787, the founding fathers met to create the document that would serve as the backbone of our democracy—the United States Constitution.<sup>62</sup> One of the foundational principles guiding the creation of the U.S. Constitution is found in the Declaration of Independence's assertion that "all *men* are created equal."<sup>63</sup> Despite the importance of this momentous period in history, however, the attendees of these discussions did not accurately reflect the makeup of the American public.<sup>64</sup> No women were permitted to participate in the discussion of, or the creation of, the Declaration of Independence, nor of the U.S. Constitution.<sup>65</sup> The lack of any female presence at these proceedings suggests that the Founding Fathers did not consider women as equal to men, but rather as inferior beings. Indeed, while women were prevented from exercising the right to vote for over two hundred years subsequent to the signing of the U.S. Constitution, men did not face such challenges.<sup>66</sup>

Men and men alone participated in the creation of the Constitution,<sup>67</sup> and an examination of its contents makes this fact all too clear. Women were never explicitly mentioned, and the male pronoun

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<sup>61</sup> See *Modern Family*, *supra* note 11, at 1–2.

<sup>62</sup> *Constitution FAQs*, NAT'L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/constitution-faqs> (last visited Dec. 3, 2020).

<sup>63</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

<sup>64</sup> See MacKinnon, *supra* note 26, at 1281–82.

<sup>65</sup> *Id.* at 1281.

<sup>66</sup> *Id.* at 1283. When the terms "women" and "men" are used in this Note, they are in reference to non-minority persons. It is beyond the scope of this Note to address the additional barriers posed to persons of color in obtaining the right to vote.

<sup>67</sup> SIBYL A. SCHWARZENBACH, ON CIVIC FRIENDSHIP: INCLUDING WOMEN IN THE STATE 177 (2009).

appears thirty times within the document.<sup>68</sup> It is important to note that, although the Constitution did not prohibit women from voting, it also did not grant this right to men specifically.<sup>69</sup> It was left to the States to determine their own standards of voter eligibility.<sup>70</sup>

For their part, the drafters of the New Jersey State Constitution in 1776 drafted a suffrage clause which defined eligible voters as "all inhabitants of this Colony of full age"<sup>71</sup> and did not include a masculine modifier.<sup>72</sup> Given that the traditional view in the era of the Republic was that women were not members of the public sphere of politics, it is possible that the members of the state constitutional convention merely did not find it necessary to include such a modifier. Similarly, the Founding Fathers used the word "person" instead of "man" in various parts of the Constitution.<sup>73</sup> The principle that women were not participants of the political world was so ingrained in early American society that it was beyond the contemplation of these men to consider that women may seek to become involved in politics in the future.<sup>74</sup>

### B. *Women's Ownership of Property—the Feme Covert Conundrum*

Regardless of the reality that, at this time, women were not meant to participate in the male-dominated field of politics, the fact remained that "women<sup>75</sup> were citizens of the nation."<sup>76</sup> As such, women

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<sup>68</sup> *Id.*

<sup>69</sup> Ricci, *supra* note 21, at 221.

<sup>70</sup> *Id.*; see also U.S. CONST. amend. X.

<sup>71</sup> N.J. CONST. of 1776, art. IV.

<sup>72</sup> Mary Beth Norton, *The Constitutional Status of Women in 1787*, 6 L. & INEQ. 7, 13 (1988).

<sup>73</sup> *Id.* at 14. The word "person" appears forty-nine times throughout the Constitution. See generally U.S. CONST. However, the pronoun "he" appears fifty times in the document, illustrating that gender did play a role in the Founding Fathers's conception of which individuals were to participate in the politics of the nation. *Id.*

<sup>74</sup> Norton, *supra* note 72, at 14–15.

<sup>75</sup> Only non-slave women, however, were considered U.S. citizens at this time. See MacKinnon, *supra* note 26, at 1282.

<sup>76</sup> Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805*, 97 AM. HIST. REV. 349, 351 (1992) [hereinafter Kerber, *Paradox*]. For a discussion of the argument posed by woman suffragists in the 1870s on the inequality of paying taxes without representation in the government, see

were subject to the nation's laws, were capable of being naturalized, and—for single adult women—were subject to taxation.<sup>77</sup> However, at the same time, the continued acceptance of the common law doctrine of coverture contrasted with this view of women as national citizens.<sup>78</sup>

Coverture was a structure of English common law adopted by early American decision-makers.<sup>79</sup> According to William Blackstone's Commentaries on the Laws of England, the very being or legal existence of the woman is suspended during marriage.<sup>80</sup> Under the legal concept of coverture, "a married woman was a *feme covert*."<sup>81</sup> This meant that married women had no independent legal existence of their own—their identities were integrated into that of their husbands.<sup>82</sup> Thus, these two concepts of a woman's place in the political structure of the nation conflicted. For certain purposes, women were considered national citizens, bound to abide by its laws.<sup>83</sup> However, married women were not considered legal persons and were unable to enjoy the same rights as their husbands—the right to vote, to acquire property in their own name,<sup>84</sup> or to sue.<sup>85</sup>

However, a critically important distinction lies in the difference between "control" and "ownership" of property. As previously illustrated, once a woman married, she relinquished control of any property she owned to her husband, and could not acquire property in her own name.<sup>86</sup> Her husband could only exercise control of her property,<sup>87</sup> and when a woman acquired real estate by bequest, it remained within her family line.<sup>88</sup> This situation posed an issue in

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Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265 (1994).

<sup>77</sup> Kerber, *Paradox*, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> Ricci, *supra* note 21, at 212.

<sup>80</sup> *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*421, \*430).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Kerber, *Paradox*, *supra* note 76.

<sup>84</sup> SCHWARZENBACH, *supra* note 67.

<sup>85</sup> Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1382 (2000).

<sup>86</sup> SCHWARZENBACH, *supra* note 67.

<sup>87</sup> Ricci, *supra* note 21, at 225.

<sup>88</sup> Kerber, *Paradox*, *supra* note 76, at 356.

the 1805 case of *Martin v. Commonwealth*, notable for its discussion of *feme covert*<sup>89</sup> property ownership and its implications for the state citizenship of such persons.<sup>90</sup>

### C. *Martin v. Commonwealth: The Rights of the Feme Covert*

In *Martin*, the Supreme Judicial Court of Massachusetts faced a challenge to notions that the common law doctrine of coverture conflicted with the citizenship status of women.<sup>91</sup> At issue in that case were the actions of Anna and William Martin, the then deceased parents of the plaintiff, James Martin.<sup>92</sup> William Martin, born in England, married Anna Gordon sometime before 1752, a woman who came from a family of great wealth.<sup>93</sup> William had been an officer in the Royal Regiment of the Artillery since 1742, and he was stationed in the colonies during the Seven Years' War.<sup>94</sup> When the Revolutionary War began, William and Anna Martin fled the city of Boston and traveled to Halifax, New York, a British-occupied city.<sup>95</sup> William and Anna, ardent supporters of the Loyalist cause, never returned to the Commonwealth<sup>96</sup> and traveled to England in 1783.<sup>97</sup>

Whatever funds William possessed at that time he had largely obtained through his marriage to Anna Gordon.<sup>98</sup> When the two married, under the law of coverture, her property became subject to his control.<sup>99</sup> Upon the death of Anna's father, James Gordon, Anna inherited one third of his estate, while the other two thirds went to her brother.<sup>100</sup> The property was divided three years later, at which

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<sup>89</sup> A feme covert is a married woman. *Feme Covert*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/feme%20covert> (last visited Dec. 3, 2020).

<sup>90</sup> 1 Mass. 347, 347 (1805).

<sup>91</sup> Kerber, *Paradox*, *supra* note 76, at 355.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Martin*, 1 Mass. at 347–48.

<sup>96</sup> Howard Gillman et al., *The Early National Era – Equality/Gender*, 2 AM. CONSTITUTIONALISM: RTS. & LIBERTIES 1, 1 (2013), [https://globaloup.com/us/companion.websites/fdscontent/uscompanion/us/static/companion.websites/9780199751358/instructor/chapter\\_4/martinvcommonwealth.pdf](https://globaloup.com/us/companion.websites/fdscontent/uscompanion/us/static/companion.websites/9780199751358/instructor/chapter_4/martinvcommonwealth.pdf).

<sup>97</sup> Kerber, *Paradox*, *supra* note 76, at 356.

<sup>98</sup> *Id.*

<sup>99</sup> Ricci, *supra* note 21, at 225.

<sup>100</sup> Kerber, *Paradox*, *supra* note 76, at 356.

time Anna received 844 acres of land spanning across portions of New Hampshire and Massachusetts.<sup>101</sup> Interestingly, as a matter of common practice at this time, when a married woman inherited property, she retained ownership.<sup>102</sup> "Real estate that came to [Anna Martin] by bequest was set off to her directly, thus keeping it in the Gordon line."<sup>103</sup> This meant that William could only exercise control over the property during his lifetime. At his death, the remainder interest in the land would descend to Anna and her heirs.<sup>104</sup>

Under the Massachusetts Confiscation Act of 1779,<sup>105</sup> also known as the "absentee act,"<sup>106</sup> a state official could confiscate the property of those who left the state during the Revolution in support of the Loyalists.<sup>107</sup> When William and Anna Martin fled Massachusetts to join the British, they relinquished this property to the state.<sup>108</sup> Thus, in 1781, Massachusetts and New Jersey confiscated the land that they had owned there.<sup>109</sup>

Twenty years later in 1801, their son James sued to retain this property once more as the heir of Anna Martin.<sup>110</sup> Because Anna had fled the state, Massachusetts argued that the property should not be returned to her estate<sup>111</sup> under the "absentee act."<sup>112</sup> However, James Martin attempted to use the doctrine of coverture to assert that the Confiscation Act did not apply to this property, because Anna Martin was subordinate to the will of her husband.<sup>113</sup> As head of the family, the husband decided where he and his wife would live.<sup>114</sup> In other words, a wife was duty-bound to abide by her husband's wishes. Thus, if he chose to change their marital domicile or residence, it

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<sup>101</sup> *Id.*

<sup>102</sup> Ricci, *supra* note 21, at 225.

<sup>103</sup> Kerber, *Paradox*, *supra* note 76, at 356.

<sup>104</sup> *Id.* at 356–57.

<sup>105</sup> *Id.* at 357.

<sup>106</sup> *Martin v. Commonwealth*, 1 Mass. 347, 347 (1805).

<sup>107</sup> *Id.* at 348–49.

<sup>108</sup> Kerber, *Paradox*, *supra* note 76, at 357.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 362.

<sup>112</sup> *Martin v. Commonwealth*, 1 Mass. 347, 347 (1805).

<sup>113</sup> Ricci, *supra* note 21, at 225.

<sup>114</sup> Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 416 (2013).

was his wife's obligation to follow him. Marital status, for women, superseded their state citizenship status.<sup>115</sup>

In his opening statements, George Blake, attorney for James Martin,<sup>116</sup> considered the implications of the text of the Confiscation statute.<sup>117</sup> The Act applied to each "inhabitant" and "member" of the state.<sup>118</sup> Blake distinguished between those two classifications, finding that a married woman, or *feme covert*, is an "inhabitant" of the state by nature of her residence within its jurisdiction.<sup>119</sup> In contrast, Blake argued that a *feme covert* is not a "member" of the state, as she had no more connection to it than "any alien."<sup>120</sup> Because the two terms were used alongside one another, the legislature must have intended that they had different meanings.<sup>121</sup> Thus, Blake suggested that members of the state were different than inhabitants, and members possessed greater relation to the state than did inhabitants.<sup>122</sup> Members of the state were, to Blake, more akin to citizens than inhabitants. Further, Blake suggested that the statute was inapplicable to Anna Martin's property. He explained that, traditionally, confiscation statutes were affiliated with treasonous acts and violations of an oath of allegiance.<sup>123</sup> Anna Martin had taken no oath of allegiance,<sup>124</sup> and thus she was not a part of the class of individuals the statute was meant to address.

The Supreme Judicial Court of Massachusetts agreed with Blake, and in its opinion articulated the court's view of female citizenship in the age of the Republic. Justice Sedgewick explained that the intention of the statute was not to punish a *feme covert* for actions she performed in conjunction with her husband.<sup>125</sup> Because a married woman is "so under the control of her husband, that she acts merely

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<sup>115</sup> *Id.* at 415.

<sup>116</sup> Kerber, *Paradox*, *supra* note 76, at 362.

<sup>117</sup> *Id.* at 369.

<sup>118</sup> Act of May 1, 1779, ch. 49, 1778–79 Mass. Acts § 1, 968, 968 (providing for the confiscation of the estates of certain persons commonly called absentees), <https://archives.lib.state.ma.us/handle/2452/117153>.

<sup>119</sup> Kerber, *Paradox*, *supra* note 76, at 369.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

as his instrument," she cannot be found guilty for his actions.<sup>126</sup> In leaving the state with her husband, a *feme covert* "did not deprive the [state] of her personal services; she had none to render . . . ."<sup>127</sup> Under Justice Sedgwick's view, the statute did not apply to a *feme covert* such as Anna Martin, and her property should not be confiscated by the state merely because of her refusal to disobey her husband.<sup>128</sup> The Supreme Judicial Court of Massachusetts thus ruled in favor of James Martin, as the heir of Anna Martin, holding that the Confiscation statute was inapplicable to property owned by a *feme covert* in her own name.<sup>129</sup>

This case illustrates the difficulty that courts faced throughout the U.S. at this time regarding the citizenship status of women. Women were recognized as citizens for certain purposes, such as the fact that they were counted as "persons . . . for purposes of apportionment."<sup>130</sup> Yet, it is equally apparent that at the same time, they were not truly citizens at the same level as men. According to Justice Sedgwick in *Martin*, the laws of the state applied differently to men than to married women.<sup>131</sup> Responsibility for the actions of a *feme covert* were imposed upon her husband. Similarly, her actions became his, and vice versa. Because a *feme covert* offered nothing to the state, she did not violate its laws for her disloyal actions.<sup>132</sup> This reasoning suggests that while women were citizens in the sense that they counted as "inhabitants" and "persons," they were nevertheless second-class citizens as compared to men. Women were not subject to all national and state laws, as *Martin* makes clear.<sup>133</sup> Further, they were not afforded the same rights of citizenship guaranteed to men.

Although the right to vote is one of the most notable of those privileges denied to women, other rights too were beyond their reach. Women faced even greater difficulty when seeking to exercise a right that challenged the separate spheres concept. Rights that extended beyond the bounds of the separate, female "sphere" of marriage, motherhood, and domesticity posed a threat to tradition. The courts

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<sup>126</sup> Gillman et al., *supra* note 96, at 2.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 3.

<sup>129</sup> Ricci, *supra* note 21, at 226.

<sup>130</sup> MacKinnon, *supra* note 26, at 1282.

<sup>131</sup> See Gillman et al., *supra* note 96, at 2.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

responded accordingly, taking measures to ensure that the legal system maintained the patriarchal social order. Just as tradition is important to society, it is also critically important within the legal system. The doctrine of *stare decisis*, or "to stand by things decided,"<sup>134</sup> illustrates the legal system's dedication to upholding the stability of previously established principles. Thus, when women sought to venture into the male "sphere," the courts sought to maintain the traditional roles of men and women through the legal system. For example, in *Bradwell v. Illinois*, the U.S. Supreme Court found that a state had the ability to deny a woman the right to obtain a professional license.<sup>135</sup>

#### D. *Bradwell v. Illinois: The Privileges and Immunities of Citizenship*

The plaintiff in *Bradwell* was a married woman who sought admission for a license to practice law in the state of Illinois.<sup>136</sup> Along with the application Mrs. Bradwell submitted to the Supreme Court of Illinois, she included an affidavit which stated that she was a U.S. citizen born in Vermont.<sup>137</sup> It further stated that she had been a Vermont citizen in the past, yet she had resided in Chicago, Illinois, for "many years"<sup>138</sup> and sought the ability to engage in the practice of law as a means of obtaining a livelihood.<sup>139</sup> Mrs. Bradwell also included the requisite certificate from a lower court demonstrating that she was of "good character" and had passed the requisite examination to show that she was qualified to practice law.<sup>140</sup> Mrs. Bradwell indicated that she was entitled to this license under the Privileges

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<sup>134</sup> *Stare decisis* is a Latin phrase referring to the doctrine of precedent. "In practice, the Supreme Court will usually defer to its previous decisions even if the soundness of the decision is in doubt." Timothy Oyen, *Stare Decisis*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) (last updated Mar. 2017)

<sup>135</sup> 83 U.S. 130, 137, 139 (1872).

<sup>136</sup> *Id.* at 140 (Bradley, J., concurring).

<sup>137</sup> *Id.* at 130 (majority opinion).

<sup>138</sup> *Id.* at 138.

<sup>139</sup> *Id.* at 140 (Bradley, J., concurring).

<sup>140</sup> *Id.* at 130.

and Immunities Clause of Article IV of the U.S. Constitution,<sup>141</sup> and the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>142</sup>

In response, the Illinois Supreme Court denied her application.<sup>143</sup> According to the court, as to any situations not addressed within the statute, it was within their discretion to establish the rules by which an individual would be granted a professional license to practice law.<sup>144</sup> However, their discretion was limited such that the court was to endeavor not to admit anyone to practice law who had not been intended by the legislature to do so.<sup>145</sup> The court found that the statute was not intended to include women as among those persons eligible to receive a law license.<sup>146</sup> The statute was enacted at a time when the state had adopted English common law, and female lawyers did not exist in England at that time.<sup>147</sup> Thus, because the court found that the legislature could not have intended to allow women to practice law, it was within its rightful discretion to deny Mrs. Bradwell a license.<sup>148</sup>

Mrs. Bradwell appealed to the U.S. Supreme Court, which ultimately ruled in favor of the state of Illinois.<sup>149</sup> The Court held that the Privileges and Immunities Clause of Article IV did not apply "to a citizen of the State whose laws are complained of."<sup>150</sup> If, as the plaintiff argued, she was a citizen of the state of Illinois, that provision of the Constitution extended her "no protection against its courts or its legislation."<sup>151</sup> Rather, that provision "only guarantees privileges and immunities to citizens of other States, in that State."<sup>152</sup> In other words, a State has the ability to define for itself what the

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<sup>141</sup> *Id.* at 138; U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each state shall be entitled to the Privileges and Immunities of the Citizens of the Several States.").

<sup>142</sup> *Bradwell*, 83 U.S. at 138; U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

<sup>143</sup> *Bradwell*, 83 U.S. at 140 (Bradley, J. concurring).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 131–32.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 132.

<sup>148</sup> *Id.* at 132–33.

<sup>149</sup> *Id.* at 139.

<sup>150</sup> *Id.* at 138.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 133.

privileges and immunities of its citizens should be.<sup>153</sup> As Mrs. Bradwell was denied a license to practice law under the laws of Illinois, a state in which she was a citizen at the time of the suit, she could find no protection under the Privileges and Immunities Clause of the Fourth Article of the Constitution.<sup>154</sup> However, Mrs. Bradwell also argued that the state's decision constituted a denial of her right to the privileges and immunities guaranteed by the Fourteenth Amendment.<sup>155</sup>

Mrs. Bradwell's attorney argued that "there are certain privileges and immunities" to which all U.S. citizens are entitled, and that no state could deny a person duly qualified admission to practice law within that state.<sup>156</sup> The Court agreed with Mrs. Bradwell's counsel that there are privileges and immunities guaranteed all U.S. citizens which no state could deny.<sup>157</sup> However, the Court found that the right to practice law was not one of those privileges and immunities of national citizenship.<sup>158</sup>

In a concurring opinion, Justice Bradley maintained that women, as citizens, were not entitled to "engage in any and every profession, occupation, or employment in civil life" under the Fourteenth Amendment's Privileges or Immunities Clause.<sup>159</sup> He further suggested that, as both a matter of nature and of civil law, there existed explicit differences in the "spheres" of men and women.<sup>160</sup> Justice Bradley suggested that, because women belonged to the domestic realm, the idea that a woman should seek a career independently from her husband and venture outside of her socially acceptable role was both reprehensible and contrary to common law.<sup>161</sup> Further, due to the "delicacy" belonging to the female sex, women were not suited to "many of the occupations of civil life."<sup>162</sup> Although he recognized that not all women are married, and thus not subject to its legal constraints, Justice Bradley argued that such women were "exceptions to

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<sup>153</sup> *Id.* at 142 (Bradley, J., concurring).

<sup>154</sup> *Id.* at 133 (majority opinion).

<sup>155</sup> *Id.* at 138.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 139.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 140 (Bradley, J., concurring).

<sup>160</sup> *Id.* at 141.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

the general rule.<sup>163</sup> Because the commonly accepted principle dictated that a woman's utmost calling was to fulfill her duties as a wife and mother, the law must be based upon such prevalent and time-honored notions.<sup>164</sup> Thus, Justice Bradley found that Illinois did not err in exercising its police power to deny women the right to obtain a professional license based on its conclusions that women were unfit to practice law.<sup>165</sup>

As a result of the decision in *Bradwell*, the legal system yet again grappled with how to define female citizenship alongside sex-based assumptions about women's fitness to participate in the political world. As more women sought to challenge these barriers and participate in politics, the fight to obtain the right to vote grew stronger. The notion of separate spheres was a part of society, an idea to which both men and women subscribed. However, some women became increasingly dissatisfied with their inability to fully participate in politics.<sup>166</sup> By 1848, this frustration culminated in a concerted effort known as the Woman's Suffrage Movement, initiating a struggle to obtain equality for women under the law, including the right to vote.<sup>167</sup>

#### IV. THE WOMAN'S SUFFRAGE MOVEMENT

##### A. *Married Women's Property Acts*

From the beginning of the nation's history, the concept of Republican Motherhood remained the primary method through which women could exercise a form of political activity.<sup>168</sup> Through their influence upon their husbands and children, women occupied a special place in society, affording them the unique opportunity to guide their husbands' own actions in politics.<sup>169</sup> As nurturers and caregivers of the nation's future citizens, women instilled moral and political values within those who would grow to become our nation's physicians,

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 142.

<sup>166</sup> See generally Ricci, *supra* note 21, at 219.

<sup>167</sup> Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 108 (1994).

<sup>168</sup> See Ricci, *supra* note 21, at 230-231.

<sup>169</sup> *Id.* at 231.

attorneys, and political leaders. Thus, some Republican mothers fought against the suffragist cause, fearful that they would lose their niche role in society.<sup>170</sup>

Nevertheless, women ultimately grew tired of their unequal treatment and began to fight against laws that denied them the rights enjoyed by male society by mere circumstance of their sex.<sup>171</sup> However, rather than focus on obtaining the right to vote as their primary objective, women first worked to dismantle the system of sex-based assumptions in the law.<sup>172</sup> Without a legal foundation for their exclusion from the vote, their argument would be even stronger. For example, abolitionist and women's rights advocate Sarah Grimké sought to dismantle the separate spheres system.<sup>173</sup> Grimké argued that the concept merely reinforced the subjugation of women and prevented their political and overall societal advancement.<sup>174</sup>

Consistent with that view, women's rights activists sought first to attack other areas of the law before addressing the vote directly. Women such as Elizabeth Cady Stanton sought to reverse the discrimination women faced in terms of property ownership in a direct challenge to the common law doctrine of coverture.<sup>175</sup> Stanton argued that property rights were critically important to women's "political enfranchisement."<sup>176</sup> To Stanton, the doctrine of coverture reinforced the concept that women were inferior beings, without legal identities independent from their husbands.<sup>177</sup> The ability to own property, in a sense, symbolized the status of citizenship. Coverture "denied [] women [] legal rights" in addition to manipulating their societal position.<sup>178</sup> Thus, property rights became the avenue through which women obtained other rights for their sex.<sup>179</sup>

<sup>170</sup> *Id.* at 232.

<sup>171</sup> *Id.*

<sup>172</sup> See Lind, *supra* note 167.

<sup>173</sup> Sarah Grimké Argues for Women's Rights, TEACH US HIST., <http://www.teachushistory.org/second-great-awakening-age-reform/resources/sarah-grimke-argues-womens-rights> (last visited Dec. 3, 2020).

<sup>174</sup> *Id.*

<sup>175</sup> See TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 40–41 (2016).

<sup>176</sup> *Id.* at 41.

<sup>177</sup> *Id.* at 40.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 41.

Throughout the 1830s, states across the nation passed Married Women's Property Acts, which granted married women the ability to own property in their own name.<sup>180</sup> For example, in April of 1848, New York passed a statute which provided that property acquired by a woman prior to marriage remained her sole property.<sup>181</sup> Many states followed suit in passing similar laws to establish a woman's ownership of property separate from her husband.<sup>182</sup> By the end of the Civil War in 1865, twenty-nine states had passed their own versions of a Married Woman's Property Act.<sup>183</sup>

### B. *Seneca Falls and the Declaration of Sentiments*

Having made progress toward obtaining legal equality in the realm of property ownership, the importance of seeking the right to vote grew more important to the Woman's Suffrage Movement.<sup>184</sup> Throughout the nation's history, the right to vote has been associated with recognition of personhood, and of citizenship.<sup>185</sup> In selectively denying women the right to vote, the legal system effectively characterized women as inferior to men. Access to voting provides an individual with the ability to engage in public discourse, and have influence upon the laws that will impact their lives.<sup>186</sup> Their needs and interests could not be represented if they were not able to vote.

Women faced an entire system of laws maintaining their subjugation to the domestic realm. The nation's laws were developed "almost entirely for the exclusive benefit of men, and with a design to oppress women, by depriving them of all control over their property."<sup>187</sup> To achieve equality within the law and society required reform in many areas, including property ownership and divorce. Without the ability to present their concerns in the political realm, i.e., without political enfranchisement, women had no voice in the laws that would affect them. Thus, the right to vote was crucial to their recognition

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<sup>180</sup> *Id.* at 46.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> J. Susan C. Del Pesco, *Quieting the Sentiments*, 37 DEL. LAW. 8, 8–9 (2019).

<sup>184</sup> Lind, *supra* note 167, at 113.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 114–15.

<sup>187</sup> SARAH M. GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES, AND THE CONDITION OF WOMAN: ADDRESSED TO MARY S. PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY 81 (Boston, Issac Knapp 1838).

as full citizens, and not merely second-class citizens. Further, political enfranchisement opened the door to their ability to dismantle the patriarchal legal and societal system which that had oppressed them.

The movement to obtain women's suffrage began in earnest when the first women's rights convention was held in Seneca Falls, New York.<sup>188</sup> At this July 1848 convention, the 300 attendees adopted Resolutions expressing their resentment of the treatment of women under the laws of the United States.<sup>189</sup> In addition, those present<sup>190</sup> adopted a "Declaration of Sentiments" mirroring the language of the Declaration of Independence.<sup>191</sup> This Declaration of Sentiments expressed the inadequacies of the original document, illustrating its failure to protect the rights and liberties of all U.S. citizens with equal measure.<sup>192</sup> Notably, one of the first statements contained in the declaration reads as follows: "[w]e hold these truths to be self-evident; that all men *and women* are created equal."<sup>193</sup> In re-writing these famous words, the convention's attendees sought to demonstrate that the failure to include the female demonstrative in the original declaration, while including the male pronoun, had produced deep inequalities in the political and social systems of the nation. The lack of attention paid to women in the Declaration of Independence reflects the beliefs and ensuing practices of male decision-makers in preventing women from accessing the same rights of citizenship.

The Declaration of Sentiments sets forth the history of the male establishment of "absolute tyranny" upon women in the United States.<sup>194</sup> For example, it articulates the examples of male injustices exhibited toward women:

He has never permitted her to exercise her inalienable right to franchise.  
He has compelled her to submit to laws, in the formation of which she

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<sup>188</sup> Ricci, *supra* note 21, at 232–33.

<sup>189</sup> See *Signatures to the "Declaration of Sentiments"*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/sis/resources/historical-documents/declaration-sentiments.html> (last updated Aug. 27, 2019).

<sup>190</sup> Three hundred individuals of both sexes attended the Seneca Falls Convention. One hundred of those present, sixty-eight women and thirty-two men, signed the Declaration of Sentiments. *Id.*

<sup>191</sup> Ricci, *supra* note 21, at 232–33.

<sup>192</sup> See *id.*

<sup>193</sup> *Declaration of Sentiments*, NAT'L PARK SERV., <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm> (last updated Feb. 26, 2015) (emphasis added).

<sup>194</sup> *Id.*

had no voice. He has withheld from her rights which are given to the most ignorant and degraded men – both natives and foreigners. Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.<sup>195</sup>

Utilizing the very rhetoric and principles espoused by the Founding Fathers in the days of the Republic, the Declaration of Sentiments indicated the key argument of the women's rights movement.<sup>196</sup> This document articulated precisely the inconsistencies between the principles of equality under the law contained in the Declaration of Independence and the practical effect of their application thereafter.<sup>197</sup> No longer were women content to operate within the domestic realm to which they had been relegated. From that point forward, greater numbers of women made visible effort to challenge the laws which prevented their entrance into the political world.<sup>198</sup>

### C. *The Post-Civil War Women's Rights Movement*

Following the Civil War, Congress passed a series of amendments to the Constitution, known as the "Reconstruction Amendments."<sup>199</sup> Although these amendments were primarily intended to establish equality for the recently freed African Americans, women's rights activists saw this as an opportunity to establish female equality as well.<sup>200</sup> The Fifteenth Amendment, passed by Congress in 1869 and ratified in 1870,<sup>201</sup> guaranteed the right to vote for Black Americans by preventing discrimination on the basis of race, color, or previous servitude.<sup>202</sup> However, because the amendment made no mention of

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<sup>195</sup> *Id.*

<sup>196</sup> See Ricci, *supra* note 21, at 232–33.

<sup>197</sup> See *id.*

<sup>198</sup> See *id.* at 233–35.

<sup>199</sup> See *The Reconstruction Amendments*, NAT'L CONST. CTR., <https://constitution-center.org/learn/educational-resources/historical-documents/the-reconstruction-amendments> (last visited Dec. 3, 2020).

<sup>200</sup> Note that these amendments effectively applied to black men only, as women still did not have the right to vote and were not afforded the same privileges of U.S. citizenship that men were. See Kimberly A. Hamlin, *The Nineteenth Amendment: The Fourth Reconstruction Amendment?*, 11 CONLAWNOW 103, 103–05 (2020).

<sup>201</sup> *The Reconstruction Amendments*, *supra* note 199.

<sup>202</sup> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous servitude." U.S. CONST. amend. XV, § 1.

sex, the right to vote was still beyond the reach of women.<sup>203</sup> In the late 1860s, in response to the passage of the Fifteenth Amendment, Elizabeth Cady Stanton drafted a proposed Sixteenth Amendment to the Constitution.<sup>204</sup> In 1869, Representative George Julian proposed the amendment to Congress, yet his proposal was not successful.<sup>205</sup> The proposed amendment was critically important within the frame of the struggle for women's suffrage, as it formed the backbone of what would ultimately become the Nineteenth Amendment, otherwise known as the Susan B. Anthony Amendment.<sup>206</sup>

Tensions rose within the ranks of the women's rights activists, following the ratification of the Reconstruction Amendments, due to discontent over their failure to persuade Congress to include women.<sup>207</sup> This was not the only point of contention—the women also disagreed on areas such as marriage, socialism, religion, and birth control within the framework of the woman's rights movement.<sup>208</sup> As a result, the movement split, and women such as Elizabeth Cady Stanton and Susan B. Anthony formed the more radical wing, known as the National Woman's Suffrage Association ("NWSA").<sup>209</sup> In the early 1870s, the leaders of the NWSA joined with Victoria Woodhull, Virginia Minor, and her husband Francis Minor to adopt a new strategy known as the "New Departure."<sup>210</sup> Proponents of the New Departure argued that "because women were citizens, women were already franchised under the Fourteenth and Fifteenth Amendments."<sup>211</sup> Rather than rely on men to grant them the right to vote, women began to take on the matter for themselves. To experiment with this strategy, some members of the NWSA voted in the 1872 elections in Rochester, New York, and fourteen women, including Susan B. Anthony, were arrested.<sup>212</sup>

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<sup>203</sup> See Hamlin, *supra* note 200, at 104.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See Lind, *supra* note 167, at 167–68.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 167.

<sup>210</sup> Hamlin, *supra* note 200, at 104–05.

<sup>211</sup> *Id.*

<sup>212</sup> See *id.*; see also Annie Laurie Gaylor, *Susan B. Anthony Arrested for Voting 135 Years Ago*, PROGRESSIVE (Nov. 13, 2007), <https://progressive.org/op-eds/susan-b-anthony-arrested-voting-135-years-ago/>.

Susan B. Anthony was indicted in the U.S. District Court for the Western District of New York on May 31, 1870.<sup>213</sup> She was charged with knowingly voting without having a lawful right to vote in violation of the 19th section of the Act of May 31st, 1870.<sup>214</sup> Anthony argued that she did not violate the law, because she had the right to vote under the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>215</sup> Further, Anthony argued that the New York law violated the Fourteenth Amendment by limiting the right to vote to men alone.<sup>216</sup> The court was unpersuaded by this argument, holding that "[t]he right of voting, or the privilege of voting, is a right or a privilege arising under the constitution of the state, and not under the Constitution of the United States."<sup>217</sup> Consistent with the recently decided *Slaughter-House Cases*,<sup>218</sup> the court held that the right of citizens of the state are not protected by the Fourteenth Amendment.<sup>219</sup> Because the court found that the right to vote was not a fundamental right, it did not receive the protections of the Fourteenth Amendment.<sup>220</sup> Thus, New York and other states were permitted to impose voting restrictions limiting the class of those eligible to vote based on citizenship status, sex, age, and residence.<sup>221</sup> This rationale mimicked that found in *Bradwell v. Illinois*, in which the Supreme Court held that Illinois could refuse to grant Myra Bradwell a license to practice law based on her status as female, because the right to pursue a profession was not a privilege or immunity of national citizenship.<sup>222</sup> This same reasoning reigned supreme in Anthony's case.<sup>223</sup> In the end, Anthony was found guilty and ordered to pay a fine of \$100 and court costs.<sup>224</sup>

The New Departure activists did not admit defeat, but instead continued to attempt to vote in elections. Their goal was to take their

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<sup>213</sup> United States v. Anthony, 24 F. Cas. 829, 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* at 829–30.

<sup>216</sup> *Id.* at 829.

<sup>217</sup> *Id.* at 830.

<sup>218</sup> 83 U.S. 36 (1872).

<sup>219</sup> *Anthony*, 24 F. Cas. at 830.

<sup>220</sup> *See id.*

<sup>221</sup> *Id.*

<sup>222</sup> 83 U.S. 130, 142 (1872) (Bradley, J., concurring).

<sup>223</sup> *See generally Anthony*, 24 F. Cas. at 831.

<sup>224</sup> *Id.* at 833.

cases to court when they were denied, hoping to ultimately obtain a decision by the Supreme Court recognizing women's right to vote as protected by the Fourteenth Amendment.<sup>225</sup> In furtherance of that objective, Virginia Minor attempted to register to vote in Missouri in 1872, but she was refused based on a state law restricting the right to vote to males.<sup>226</sup> Minor's efforts to achieve legal recognition of women's right to vote in the Constitution were also unsuccessful.<sup>227</sup> The Supreme Court held that, although "women have always been citizens the same as men,"<sup>228</sup> the Constitution does not affirmatively grant voting rights to anyone.<sup>229</sup> In so holding, the Court precluded the possibility of asserting that the Constitution, as amended and understood at that time, granted women voting rights. Once more, suffragists were left to lobby Congress for a constitutional amendment to achieve their goal of political enfranchisement.<sup>230</sup>

The struggle to obtain the vote persisted, but victory remained beyond reach for another forty-eight years. The strategies utilized by suffragists retained a fluidity, changing based on the response received and the viewpoints of the female and male advocates. For example, following the Civil War, some suffragists returned to the separate spheres rhetoric as a means of gaining public support for their cause.<sup>231</sup> To these women, the domestic sphere was more comfortable to them.<sup>232</sup> They utilized their connection to the private sphere and guiding influence within the home to demonstrate how their vote could be an asset.<sup>233</sup> Under this theory, granting women the right to vote would not require any deviation from their role as wives and mothers, "but would allow them to better carry out these roles by supporting legislation that would increase civic virtues and protect home and hearth."<sup>234</sup>

Thus, women at this time returned to the Republican Motherhood ideology of the days of the Revolution as a means of furthering

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<sup>225</sup> See Del Pesco, *supra* note 183, at 9.

<sup>226</sup> See *Minor v. Happersett*, 88 U.S. 162, 163–165 (1874).

<sup>227</sup> See *id.* at 178.

<sup>228</sup> *Id.* at 169.

<sup>229</sup> *Id.* at 178.

<sup>230</sup> See Lind, *supra* note 167, at 178–79.

<sup>231</sup> *Id.* at 177.

<sup>232</sup> *Id.*

<sup>233</sup> See *id.*

<sup>234</sup> *Id.*

their goals. These women again used their place within the home to persuade others that their contributions to politics related to their ability to influence men. Of course, not all women agreed with this tactic. Indeed, this option had its own disadvantages. For one, the Republican Motherhood concept had been in place for nearly a century, and it clearly had not served fruitfully. Second, this merely perpetuated the notion that connected women to the domestic sphere, thereby diminishing their ability to venture outside of that realm in the future.

#### *D. 20th Century Militancy in the Women's Rights Movement*

The Woman's Suffrage Movement fractured once more prior to the ratification of the Nineteenth Amendment. During the twentieth century, this movement was primarily driven by two groups: (1) The National American Woman's Suffrage Association ("NAWSA"),<sup>235</sup> led in part by Susan B. Anthony; and (2) the National Woman's Party ("NWP"), led by Alice Paul.<sup>236</sup> During this time, the movement utilized a "two-pronged approach."<sup>237</sup> Simultaneously, suffragists both sought to persuade state legislatures to enact woman's suffrage legislation, and lobbied for a federal amendment.<sup>238</sup> This served to diversify and increase their chances of success, but it also publicized their efforts. Women worked toward gaining greater public awareness of the cause, and over time, public support.<sup>239</sup> Exposure on the state and federal level only furthered their influence.

From 1913 up to the ratification of the Nineteenth Amendment, leading suffragists in the Woman's Suffrage Movement pursued a militant approach, inspired by the work of the Women's Social and Political Union led by Emmeline Pankhurst in England.<sup>240</sup> Under the leadership of courageous women such as Alice Paul, within just seven

<sup>235</sup> See, e.g., *id.* at 183–84.

<sup>236</sup> Del Pesco, *supra* note 183, at 9.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, LIBR. CONGRESS: AM. MEMORY 1–5, 9 <https://www.loc.gov/static/collections/women-of-protest/images/tactics.pdf> (last visited Dec. 3, 2020) (providing examples of the tactics that American Suffragettes used to raise public awareness).

<sup>240</sup> Lynda Dodd, *Sisterhood of Struggle Leadership and Strategy in the Campaign for the Nineteenth Amendment*, in *FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW* 189, 190 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011).

years, over 26 million women gained the right to vote in the U.S.<sup>241</sup> In 1913, the women's movement was experiencing a stagnant period.<sup>242</sup> NAWSA's conservative, or "educative," approach geared toward lobbying at the state level became frustrating to many in the movement.<sup>243</sup> In response, Alice Paul and other women formed the Congressional Union ("CU").<sup>244</sup> The CU's strategy centered on obtaining a federal constitutional amendment, an approach that had not been pursued since the days of Susan B. Anthony and Elizabeth Cady Stanton in the latter half of the nineteenth century.<sup>245</sup> NAWSA's methods worked within the existing patriarchal system, utilizing separate spheres ideology and notions of women's unique ability to influence men's political decisions.<sup>246</sup> In contrast, the CU inserted themselves into the equation. The CU's approach challenged traditional viewpoints of women's proper roles. Rather than "begging for the ballot," these women "exercise[d] the power they had, forcing the government to pay attention."<sup>247</sup>

Paul and other militant activists sought to obtain public support through "grand processions and rallies."<sup>248</sup> Their so-called "passionate politics" included staging parades, lobbying President Woodrow Wilson and Congress, holding meetings, speaking tours, pickets, and more.<sup>249</sup> Their goal was to flood the national press with awareness of their objective—to obtain a federal amendment.<sup>250</sup> With greater press coverage, Paul hoped to inspire other suffragists, to garner greater public support, and to send a message to the White House.<sup>251</sup> Paul accomplished just that with the 1913 Woman's Suffrage Parade along Pennsylvania Avenue in Washington, D.C.<sup>252</sup> A riot broke out just one hour after the parade began, and the event was reported extensively in the newspapers.<sup>253</sup> The *Washington Post* and the *New York Times* expressed admiration for the parade and the efforts of the women

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<sup>241</sup> *Id.* at 189.

<sup>242</sup> *Id.* at 190.

<sup>243</sup> NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 53 (1987).

<sup>244</sup> *Id.* at 54.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Dodd, *supra* note 240.

<sup>249</sup> *Id.* at 190–92.

<sup>250</sup> *Id.* at 191.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

who organized the event, yet also criticized the D.C. police for their "fail[ure] to maintain order."<sup>254</sup>

Their efforts grew more forceful during World War I. The suffragists became incensed with the President for refusing to support their cause during his first term in office, especially in light of women's integral support of the war effort.<sup>255</sup> Paul and other suffragists, now organized as the NWP,<sup>256</sup> picketed the White House in protest of this injustice.<sup>257</sup> They sought to highlight the hypocrisy of President Wilson's support of the fight for democracy abroad whilst ignoring the democratic rights of women in the U.S.<sup>258</sup> By consistently picketing the White House, the ultimate goal of the NWP was to force President Wilson to focus on woman's suffrage.<sup>259</sup> Suffragists were warned by the D.C. police that if they continued such tactics they would be jailed.<sup>260</sup> The suffragists were unpersuaded by these threats, and indeed they went to prison for their actions.<sup>261</sup> While in prison, suffragists engaged in hunger strikes as a means of protest, and were cruelly force-fed.<sup>262</sup> The negative press coverage that President Wilson received when the newspapers reported the treatment of suffragists in custody led him to change his stance, ultimately providing his support for a woman's suffrage amendment.<sup>263</sup> President Wilson grounded his support in the idea that, because women had shared in the same struggle and hardships of the war, they should be able to enjoy the same privileges of democracy.<sup>264</sup>

The Susan B. Anthony Bill passed both houses of Congress on June 4, 1919, and after ratification by three-fourths of the states,<sup>265</sup>

<sup>254</sup> *Id.*

<sup>255</sup> Del Pesco, *supra* note 183, at 9; Dodd, *supra* note 240, at 196.

<sup>256</sup> In 1916, the Congressional Union formed the Woman's Party, and in 1917 the two organizations merged to form the National Woman's Party. See *Our Story*, NAT'L WOMEN'S PARTY, <https://www.nationalwomensparty.org/our-story> (last visited Dec. 3, 2020).

<sup>257</sup> Dodd, *supra* note 240, at 196.

<sup>258</sup> *Id.* at 197.

<sup>259</sup> *Id.* at 196–97.

<sup>260</sup> *Id.* at 197.

<sup>261</sup> *Id.*

<sup>262</sup> Del Pesco, *supra* note 183, at 9.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> For more information on the formal amendment process, see Article Five of the U.S. Constitution:

the Nineteenth Amendment became part of the U.S. Constitution on August 26, 1920.<sup>266</sup> Finally, over 100 years after the nation was founded, persons of each sex could have a voice in politics. The right to vote gave women the representation and avenue by which to make their concerns known and affect change. The Woman's Suffrage Movement was a long and difficult struggle, yet a remarkable achievement, "result[ing] in the enfranchisement of more persons than any other law reform in American history."<sup>267</sup>

To ultimately accomplish this goal, in the twentieth century, suffragists fought against the separate spheres ideal. They broke with tradition in a number of ways. First, they emerged from the domestic sphere and into the public. This strategy showed not only that women were capable of participating in politics, but that they were determined to find a way to do so, even at the risk of their own health and safety. Second, these women challenged the perception that women were inherently apolitical, delicate, soft-spoken, and subordinate. The militant wing of the movement showed the public and political leaders that women were strong and determined—willing to picket the White House, to go to jail, to engage in hunger strikes and more, all to achieve their goal. However, obtaining the right to vote did not end their struggle for equality.

Women still faced inequities in a multitude of areas, including protective labor legislation, birth control and reproductive rights, and voting accessibility for African American women.<sup>268</sup> With so many

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The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

<sup>266</sup> Del Pesco, *supra* note 183, at 9.

<sup>267</sup> Lind, *supra* note 167, at 106 (citing U.S. BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE U.S.: COLONIAL TIMES TO 1957 9 ser. A34-50, 9 (1961)).

<sup>268</sup> Dodd, *supra* note 240, at 200.

areas to tackle, the Woman's Suffrage Movement splintered due to debates over where to focus their attentions first. Alice Paul and the NWP advocated for a single federal amendment to guarantee equality under the law regardless of sex.<sup>269</sup> In 1921, Paul introduced the Equal Rights Amendment<sup>270</sup> in Congress, but the legislation failed to ever receive the ratification of thirty-eight states necessary in order to become law.<sup>271</sup> The history of the Woman's Suffrage Movement illustrates the pervasive nature of sex-based discrimination within the American legal system. Even when women were granted the right to vote, they still had to tackle an entire system of laws which held them in a position of inferiority. As the past demonstrates, "equal citizenship for women [means] freedom from subordination in or within the family."<sup>272</sup> The issues that women face today—in politics, in wage inequality, in domestic violence—highlight some of the same themes that have persisted since the first days of the Republic.

### *E. The Current Status of Women in U.S. Politics*

Although some 100 years have passed since women obtained the right to vote, American society remains tied to the notion that women are not best suited to the political area. Inequality between the sexes presents itself in contemporary society "by way of women's economic disadvantage and political underrepresentation, despite the interventions of American sex discrimination law in constitutional Equal Protection jurisprudence and civil rights statutes."<sup>273</sup> While the wage gap between

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<sup>269</sup> *Id.* at 199–200.

<sup>270</sup> The wording of the ERA has been altered since it was first introduced to Congress. Its current iteration reads as follows:

Section 1: Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2: Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

See *Frequently Asked Questions*, ERA, <http://www.equalrightsamendment.org/faqs> (last visited Dec. 3, 2020).

<sup>271</sup> Del Pesco, *supra* note 183, at 10–11.

<sup>272</sup> Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002).

<sup>273</sup> Julie C. Suk, *The Constitution of Mothers: Gender Equality and Social Reproduction in the United States and the World*, 9 CONLAWNOW 23, 29 (2017).

men and women presents a significant barrier to sex equality, so too does the disparity in political representation. The U.S. ranks 94th around the globe with respect to the number of women within the national legislature.<sup>274</sup>

Determining the reason for this inequality is not overly complex: women are underrepresented politically because of the persistence of the separate spheres doctrine in terms of sex-based stereotyping. The American public views women as less capable of fulfilling the duties of political office than men. Women are characterized as "caring, collaborative, [and] community oriented" whereas men are noted for their "power-seeking, strong, [and] combative" nature.<sup>275</sup> Regardless of a woman's political experience or intellectual accomplishments, the notion persists that she is less qualified and capable than that of her male counterparts.<sup>276</sup>

Society remains tied to the idea that the central and most critically important role for women is to serve as mothers. Despite the fact that both men and women are parents to children, voters tend to "question how women can serve constituents and take care of family responsibilities at the same time."<sup>277</sup> At the same time, male candidates who are fathers are generally not questioned on their ability to simultaneously hold political office and take care of their children.<sup>278</sup> In America, it is apparent that voters are unable to sever considerations of motherhood and femininity when judging a political candidate's competency to serve. Women who are mothers are questioned about the impact of running for office upon their children, and about how they will be able to balance their family obligations alongside their duties to constituents.<sup>279</sup> On the other hand, women who are not mothers face potential criticism from those who opine

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<sup>274</sup> *Research Inventory*, POL. PARITY, <https://www.politicalparity.org/research/research-inventory/> (last visited Dec. 3, 2020).

<sup>275</sup> *Id.*

<sup>276</sup> *What Are the Biggest Problems Women Face Today?: Eleven Female Lawmakers, Journalists, and Scholars Weigh In*, POLITICO (Mar. 8, 2019), <https://www.politico.com/magazine/story/2019/03/08/women-biggest-problems-international-womens-day-225698> [hereinafter *Problems Women Face*].

<sup>277</sup> *Modern Family*, *supra* note 11.

<sup>278</sup> Mihalek, *supra* note 15.

<sup>279</sup> *Modern Family*, *supra* note 11, at 2.

that such persons are unable to understand the concerns of voters with families.<sup>280</sup>

The mere fact that women are of childbearing age impacts the way voters perceive them. During Hillary Clinton's 2016 Presidential campaign, the *New York Times* published an article which proposed that, at 67, Clinton was the "perfect age to be President."<sup>281</sup> The argument was that Clinton was a, "woman of a certain age" and as such, she was no longer burdened with the demands of motherhood and childrearing.<sup>282</sup> Further, the article suggested that women are better equipped to handle the immense stress of Presidential office at this stage of life, as post-menopausal women experience a drop in estrogen levels and are better able to focus on matters outside of raising a family.<sup>283</sup> Rather than finding Clinton duly qualified for office based on her impressive list of accomplishments in U.S. politics,<sup>284</sup> the article suggests that Clinton's decreased hormone levels and lack of child-rearing obligations are the characteristics that made her a good candidate for President. In other words, once she more closely resembled a man, the public found it easier to accept her as a potential political leader.

The *New York Times* article is problematic for multiple reasons, the first being that it suggests that women are not capable of holding political office while handling the demands of a family. However, just as troublesome is that the article proposes that women's hormones negatively impact their cognitive functioning. In other words, this rationale reinforces the stereotype of the "hormonal woman," suggesting that women are more prone to make erratic decisions based on heightened levels of emotion.<sup>285</sup> The logical inference from such

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<sup>280</sup> *Id.*

<sup>281</sup> Julie Holland, *Hillary Clinton Is the Perfect Age to Be President*, TIME (Apr. 3, 2015, 12:37 PM), <https://time.com/3763552/hillary-clinton-age-president/>.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Hillary Clinton has held many positions of power in U.S. politics. Some of the offices Clinton has held include: former First Lady of the U.S., Secretary of State under the Obama Administration, and U.S. Senator. In addition, Clinton was the first woman in U.S. history to be nominated for president by a major political party. CNN News, *Hillary Clinton Fast Facts* KBZK, <https://www.kbzk.com/cnn-national/2018/10/07/hillary-clinton-fast-facts/> (last updated Oct. 7, 2018, 9:56 AM).

<sup>285</sup> See Nicola Davis, *Martie Haselton: 'Hormones Don't Make Us Crazy or Irrational'*, GUARDIAN (Mar. 11, 2018, 6:00 AM), <https://www.theguardian.com/science/2018/mar/11/martie-haselton-hormonal-interview-evolutionary-scientist-biology-women-hormones>.

thinking is that women cannot remain sufficiently calm, restrained, and competent to undertake a political role wherein their decisions impact the lives of U.S. citizens.

Both men and women are guilty of perpetuating this stereotype. The author of the *New York Times* article discussed above was female.<sup>286</sup> Further, Cheryl Rios, a female businesswoman in Texas, argued during the 2016 election cycle that Hillary Clinton "shouldn't be president because her hormones might make her so irrational she'll start an unnecessary war."<sup>287</sup> Not only are these ideas sexist and meritless, they are not supported by science. Studies have shown that women who hold positions of leadership are less likely to take superfluous risks than are male leaders.<sup>288</sup>

Men experience hormone fluctuations as well. As part of their daily hormone cycle, male testosterone levels peak in the early morning hours, and then decrease as the day goes on.<sup>289</sup> Testosterone "is associated with increased aggression, more impulsive decision-making and some other things that can get you into a lot of trouble."<sup>290</sup> Indeed, there are numerous examples of male Presidents and politicians who have gotten into trouble due to their hormones. Bill Clinton is one notable example, as the second President in U.S. history to be impeached following the scandal surrounding his affair with his then twenty-one-year-old intern, Monica Lewinsky.<sup>291</sup> Other examples include Arnold Schwarzenegger, Mark Sanford, and John Edward—all male politicians whose affairs made national news.<sup>292</sup> However, voters do not question male candidates about the impact of hormones on their decision-making. Consider former U.S. President George W. Bush's decision to, "wage[] an unnecessary war in Iraq"—discussion of his hormones did not appear to come up in debates about the efficacy

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<sup>286</sup> See *About Dr. Holland*, JULIE HOLLAND, MD, <http://www.naturalmood.com/about.html> (last visited Dec. 3, 2020); Holland, *supra* note 281.

<sup>287</sup> Mel Robbins, *Hillary Clinton and the Clueless Hormone Argument*, CNN, <https://www.cnn.com/2015/04/20/opinions/robbins-hillary-clinton/index.html> (last updated Apr. 21, 2015, 11:36 AM).

<sup>288</sup> *Id.*

<sup>289</sup> Davis, *supra* note 285.

<sup>290</sup> *Id.*

<sup>291</sup> *President Clinton Impeached*, HISTORY, <https://www.history.com/this-day-in-history/president-clinton-impeached> (last updated Jan. 31, 2020).

<sup>292</sup> Robbins, *supra* note 287.

of that judgement.<sup>293</sup> This illustrates that women who seek to participate in political office are held to higher standards than men. However, what most of the public fail to realize is that women are actually beneficial to our political system in many ways.

When women are elected to political office, they diversify and enrich our democratic system. Women bring different ideas, opinions, and values to their decision-making when participating in legal debates, creating and enacting legislation, and shaping public policy. According to a 2012 Pew Research Center poll, "women express concern about issues such as education, healthcare, birth control, abortion, the environment, and Medicare at higher rates than men."<sup>294</sup> Thus, it is critically important that women participate in the political process by voting and running for office so that the concerns of all citizens are adequately heard. The legal and political structure of the nation can only benefit from the insight of women, especially considering that they make up an integral and numerically substantial part of the U.S. populace. It is only logical that the voices of women should be represented in equal part to their presence in the nation. Without their input in U.S. politics, the phrase "representative democracy" rings hollow. A democracy does not function as such when all citizens cannot participate equally in decision-making.

The presence of women in political office is beneficial for other reasons as well. For one, research from the Center for American Women and Politics indicates that women are motivated to run for office based on "public policy concerns [rather] than personal ambition."<sup>295</sup> Because female Congresswomen are result-oriented, it follows that they are "more likely than men to work in a bipartisan fashion."<sup>296</sup> Given the increasing polarization of the political system,<sup>297</sup> such a trait is of immense importance to the nation, now more so than ever.

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<sup>293</sup> *Id.*

<sup>294</sup> *The Status of Women in the States: 2015*, INST. FOR WOMEN'S POL'Y RES. 1 <https://statusofwomendata.org/wp-content/uploads/2015/09/PDF-of-final-Political-Participation-Chapter-9-4-15.pdf> (last visited Dec. 3, 2020) [hereinafter *Status of Women in the States*].

<sup>295</sup> KELLY DITTMAR ET AL., CTR. FOR AM. WOMEN & POLITICS, EAGLETON INST. OF POLITICS, RUTGERS UNIV., REPRESENTATION MATTERS: WOMEN IN THE U.S. CONGRESS 26 (2017), <https://cawp.rutgers.edu/sites/default/files/resources/representationmatters.pdf>.

<sup>296</sup> *Id.*

<sup>297</sup> *See, e.g., id.* at 24, 26–29.

Further, women bring their own unique perspective to a whole range of issues, not only "women's issues."<sup>298</sup> Biological sex is only one aspect of a person. Women bring other aspects of their lives into their decision-making. Race, religion, geographical location, family dynamic, and other characteristics also influence how women react to any given political issue. Women are integral parts of our society, not just as wives and mothers, but as U.S. citizens. As such, female representation in politics is critical to ensuring the strength and diversity of American democracy.

However, today women are "underrepresented in governments across the nation and face barriers that often make it difficult for them to exercise political power and assume positions of leadership positions in the public sphere."<sup>299</sup> Women make up only 23.6% of the U.S. Congress, 28.9% of the statewide executive, and 29.3% of the state legislature.<sup>300</sup> In part, this is because society is not comfortable with women in positions of power.<sup>301</sup> Successful women are anathema to the long-standing sex-based stereotypes so deeply rooted in our nation's history and tradition.<sup>302</sup> Similar to the days of the Republic, Americans do not view women as properly suited to political office. The same kinds of arguments supporting this concept persist—that a woman's proper role is within the home, that they are too emotional, and that they do not have the strength of character and intellectual capacity of men. Indeed, women have made great strides in the political environment nationwide. In 2020, 100 years after the ratification of the Nineteenth Amendment, a record number of women ran for President, and there are more female Congresswomen than ever before.<sup>303</sup> Despite this success, total equality has yet to be achieved, and patriarchal traditions remain in place.

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<sup>298</sup> *Id.* at 18, 20.

<sup>299</sup> *Status of Women in the States*, *supra* note 294.

<sup>300</sup> *Current Numbers*, *supra* note 6.

<sup>301</sup> See, e.g., Ashton Pitman, *Elizabeth Warren, Hillary Clinton and the Sexist Hypocrisy of the 'Likability' Media Narrative. Here We Go Again*, NBC NEWS: THINK (Jan. 5, 2019, 5:07 AM), <https://www.nbcnews.com/think/opinion/elizabeth-warren-hillary-clinton-sexist-hypocrisy-likability-media-narrative-here-ncna955021>.

<sup>302</sup> Another reason for this is economic. Men do not want to have to compete with women for positions which had for so long been reserved for the gender alone.

<sup>303</sup> *Problems Women Face*, *supra* note 276.

## V. WOMEN AND POLITICS IN NATIVE AMERICAN SOCIETY

A. *Matrilineal Societies in Early America*

A marked difference exists between the socio-economic and socio-political organization of Native American society and that of colonists settling in the Americas. The colonists who settled in various regions of what is now known as the United States encountered a people much different from themselves. Colonists brought with them to the Americas a patriarchal system dominated by strict conceptions of how men and women should behave, and how each sex fits into society politically.<sup>304</sup> Indeed, the colonists began a "legacy of . . . sexism [which] engendered and sustained a system of privileges in our society which accepts white, heterosexual male superiority as a basic norm of [civilization]."<sup>305</sup>

In contrast, in many of the Native American societies the colonists observed, men were responsible for hunting, fishing, and engaging in warfare.<sup>306</sup> The women of these societies were responsible for the care of the children, the household, and agricultural production.<sup>307</sup> Under the patriarchal structure brought to the New World by the colonists, hunting, fishing, and war were all considered a "sport" whereas agricultural labor was considered "work."<sup>308</sup> Thus, to these colonists, Indian culture was an erroneous anomaly. Women were doing all of the "work" while men merely engaged in activities of sport.<sup>309</sup>

<sup>304</sup> Williams, Jr., *supra* note 19, at 1024, 1028–33.

<sup>305</sup> *Id.* at 1021.

<sup>306</sup> *Id.* at 1030.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 1030–31.

<sup>309</sup> This idea demonstrates how the concept of the "lazy Indian" became popular in American culture:

Whites have utilized the stereotype of the lazy Indian male for many purposes, but it has primarily served to explain the traditional gendered division of labor in many North American tribal communities. . . . From their perspective as outsiders, whites generally understood life in many American Indian tribes to be comprised primarily of men engaging in hunting, fishing and warfare and women controlling the children, the household and agricultural subsistence production. To whites, what stood out in this stereotype of American Indian tribalism was the degree of control Indian women seemed to exercise over tribal crop agriculture.

*Id.* at 1030.

More pertinent to the discussion of this Note, however, is the difference in the political structure of many Native American societies in terms of the dynamic between men and women. In contrast to the patriarchal political structure of non-Natives, in many Native American societies, women held a significant degree of political power.<sup>310</sup> For example, Native American women "selected and could remove the male chiefs as political leaders of the tribe."<sup>311</sup> Women in these tribes typically "owned substantial property interests" such as the marital home, and held exclusive control over agricultural production and product distribution.<sup>312</sup> Other examples of the decision-making authority held by Native American women include the ability to initiate or withdraw from war, and to name members of the tribe.<sup>313</sup>

In the eastern woodlands of what is now the United States, Native American women "had an important voice in international affairs through marriage, adoption, and authority in decision making."<sup>314</sup> For example, in the regions of present-day North Carolina, South Carolina, and eastern Tennessee, late eighteenth century Cherokee society was governed through councils.<sup>315</sup> Both women and men were participants in these councils, through a system of shared governance.<sup>316</sup> The Cherokees typically had a "Woman's Council," consisting of female representatives from each of their seven clans, and headed by "[t]he Beloved Woman, the most prominent woman in the nation."<sup>317</sup> The Women's Council could override decisions to go to war, an area normally reserved for the male tribe members.<sup>318</sup> Along with the Iroquois Confederacy and the Huron tribes of the present-day north-eastern U.S.,<sup>319</sup> Cherokee society was matrilineal.<sup>320</sup> This meant that clan

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<sup>310</sup> *Id.* at 1033–34.

<sup>311</sup> *Id.* at 1034.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Cynthia Cumfer, *Nan-ye-hi (Nancy Ward) (c. 1730s–1824): Diplomatic Mother*, in 1 TENNESSEE WOMEN: THEIR LIVES AND TIMES 1, 1 (Sarah Wilkerson Freeman et al. eds., 2009).

<sup>315</sup> *Id.* at 2–3, 8.

<sup>316</sup> *Id.* at 3.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> See Elisabeth Tooker, *Northern Iroquoian Sociopolitical Organization*, 72 AM. ANTHROPOLOGIST 90, 90 (1970).

<sup>320</sup> Katy Simpson Smith, "I Look on You... As My Children": Persistence and Change in Cherokee Motherhood, 1750–1835, 87 N.C. HIST. REV. 403, 406 (2010).

affiliation was determined by the mother.<sup>321</sup> When a child was born, regardless of their sex, they would be a member of their mother's clan, rather than their father's clan.<sup>322</sup>

Such matrilineal societies granted women greater control in the cultural and political organization of their tribes. Iroquois law, for example, mandated that all "titles, rights and property descended through the female clan line to the exclusion of the male."<sup>323</sup> Women possessed the power to name clan members, which included the authority to name chiefs on the tribal council.<sup>324</sup> Further, although males traditionally held the position of chief, "the chieftainships were the property of the individual clans" and thus were controlled by the clan mother.<sup>325</sup> Accordingly, a chief could not pass his title on to his son, as his son would belong to his mother's clan.<sup>326</sup> Instead, when a clan's chief died, his title and position reverted back to the clan mother,<sup>327</sup> normally the eldest woman in the clan.<sup>328</sup> The clan mother typically consulted with other women in the clan before nominating his successor.<sup>329</sup> Thereafter, the other chiefs of the tribe would either accept or reject her decision.<sup>330</sup> Clan mothers also held the authority to remove a chief from his position.<sup>331</sup> When this occurred, the chief would be impeached or "dehorned," through a ceremony in which the clan mother would remove the chief's headdress, made of the horns of a deer.<sup>332</sup>

The political organization of these matrilineal Native American societies reflects "a system of gendered checks and balances" that strove to ensure "that women's voices could always be heard and respected in on all issues of tribal policy."<sup>333</sup> This can be explained in part by the spiritual beliefs held by Native American societies. For

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<sup>321</sup> *Id.* at 407.

<sup>322</sup> Williams, Jr., *supra* note 19, at 1039.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 1040.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> Tooker, *supra* note 319, at 93.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 93, 95.

<sup>331</sup> Williams, Jr., *supra* note 19, at 1040.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

example, the Cherokees believed that the universe was composed of competing forces "between war and peace, animals and humans, and men and women."<sup>334</sup> Thus, to counteract these opposing forces they strove for balance in all aspects of life.<sup>335</sup> Men and women did not dominate over one another, but rather "complemented each other."<sup>336</sup>

Native American societies did not believe in "formal equalities between the sexes as a principle of political or social organization within the tribe,"<sup>337</sup> as evidenced by their division of authority between women and men in areas such as war, agricultural production, and nomination of political leaders. However, the contributions of each sex were considered of great importance. Men hunted, fished, and engaged in warfare to protect the tribe, and women held primary authority within the community in addition to controlling agricultural production and distribution among tribe members.<sup>338</sup> Members of each sex were valued for what they did to help the tribe. Indeed, the Iroquois "valued highly the actions of individuals done for others."<sup>339</sup> This meant that women were regarded with great esteem due to the myriad of areas in which they helped their tribes and clans endure.

Women's contributions to the political structure were considerable, given that they typically served as "peacemakers"—a diplomatic role geared toward furthering the good of the tribe rather than engaging in animosity between tribes or clans.<sup>340</sup> In Cherokee society, although men typically held the position of chief, in some notable instances, women held such roles. For example, when conquistador Hernando De Soto ventured to the New World in May 1540, he and his army happened upon the town of Cofitachequi,<sup>341</sup> "one of the South's wealthiest and most storied Native Chiefdoms."<sup>342</sup> There, they

<sup>334</sup> Cumfer, *supra* note 314, at 2.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> Williams, Jr., *supra* note 19, at 1039.

<sup>338</sup> *Id.* at 1040–41.

<sup>339</sup> *Id.* at 1042.

<sup>340</sup> *Id.*

<sup>341</sup> Christina Snyder, *The Lady of Cofitachequi: Gender and Political Power Among Native Southerners*, in 2 SOUTH CAROLINA WOMEN: THEIR LIVES AND TIMES 11, 11 (Marjorie Julian Spruill et al. eds., 2009). The town of Cofitachequi, "lay at the confluence of Pine Tree Creek and the Wateree River, near present-day Camden, South Carolina." *Id.*

<sup>342</sup> *Id.*

encountered the chief, a woman known as "Lady Cofitachequi."<sup>343</sup> This illustrates that "manhood was not requisite" for chiefs in some Native American societies.<sup>344</sup> Indeed, "evidence suggests that women chiefs were more prevalent among chiefdoms in the Carolinas than elsewhere in the Northeast."<sup>345</sup>

Further, despite changes in societal organization following colonization and the influence of the patriarchal system, in modern times, Native American societies have, to some degree, restored the balance between the sexes once more. In contemporary society, Native American women are "well-represented in many tribal governments, holding elected and appointed positions of political power."<sup>346</sup> For example, Wilma Mankiller became the first woman to serve as principal chief of the Cherokee Nation in 1985.<sup>347</sup> Furthermore, in January 2009, 131 women were listed on the National Congress of American Indians tribal leader registry, leading "nearly one-quarter of the nation's 562 federally recognized tribes."<sup>348</sup>

### *B. Women in Native American vs. U.S. Politics: A Comparison*

A study of the socio-political organization of matrilineal Native American societies provides an insightful comparison to that of non-Native American Society. Much can be ascertained from Native-American political structure in terms of how women have been valued and well-respected. In contrast, from the days of the early Republic and the formation of the United States government, women have held a much lesser role. The separate spheres concept kept women from the political arena, and they were thought incapable of participating in such discussions. Women were not permitted to voice their concerns amongst male decision makers, and held influence only

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<sup>343</sup> *Id.* at 13.

<sup>344</sup> *Id.* at 14.

<sup>345</sup> *Id.* For example, female rulers held authority over the regions of Guatari and Joara, located near present-day Salisbury and Morganton, North Carolina, respectively. *Id.* at 14–15.

<sup>346</sup> Williams, Jr., *supra* note 19, at 1034.

<sup>347</sup> See *id.* at 1036; see also Ray Tyler, *Wilma Mankiller (1945–2010)*, NAT'L WOMEN'S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/wilma-mankiller> (last visited Dec. 3, 2020).

<sup>348</sup> Molly Young, *Native Women Move to the Front of Tribal Leadership*, NATIVE DAUGHTERS, <http://co.jmc.unl.edu/native Daughters/leaders/native-women-move-to-the-front-of-tribal-leadership> (last visited Dec. 3, 2020).

within the home. Further, it appears that although the responsibilities of childcare and domesticity served an important function, men in the United States treated this as a role of lesser importance.<sup>349</sup> As a result, women were treated as second-class citizens for much of U.S. history. Following the ratification of the Nineteenth Amendment, women finally obtained the right to vote and to directly participate in the political system.<sup>350</sup> However, the patriarchal tradition has remained in place even today, serving to limit women's full participation and representation in U.S. politics. There are far less women than men in positions of political office around the nation at both the state and federal level.<sup>351</sup> There has never been a female President of the U.S.,<sup>352</sup> whereas Native American tribes and nations have had numerous female leaders over the centuries,<sup>353</sup> even prior to colonization. For those women who do run for office, they face serious challenges to becoming elected due to voter concerns about how they will be able to meet the demands of childcare and serving in political office.

In the 100 years since the ratification of the Nineteenth Amendment, women in the U.S. have advanced considerably into the political sphere, emerging from a prior position of legal inferiority. Women today vote in greater numbers than their male counterparts, exercising a right to which they had been denied for most of the nation's history.<sup>354</sup> However, equal political representation has yet to be achieved. Just three of the nine sitting U.S. Supreme Court Justices are female, and there are only four women in federal Cabinet and Cabinet-level positions.<sup>355</sup> In the U.S. Congress, and within the statewide executive and legislative branches of government, women hold one third or less of all positions.<sup>356</sup> And, at the local level, less than one third of city mayors are female.<sup>357</sup> Further, the U.S. has never had a female President. Despite the fact that women make up nearly half

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<sup>349</sup> See *supra* notes 21–56 and accompanying text.

<sup>350</sup> U.S. CONST. amend. XIX.

<sup>351</sup> See *Current Numbers*, *supra* note 6.

<sup>352</sup> *Research Inventory*, *supra* note 274.

<sup>353</sup> See Young, *supra* note 348.

<sup>354</sup> *Research Inventory*, *supra* note 274.

<sup>355</sup> See *Current Numbers*, *supra* note 6.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

of the U.S. population,<sup>358</sup> they are not represented in the same numbers as are men in positions of political power.

In contrast, women in Native American societies held leadership positions prior to colonization.<sup>359</sup> As a result of U.S. political and societal influences, patriarchal societal structures took hold in these societies, preventing women from serving in such roles. However, in the last few decades, the traditional egalitarian structure has returned to these groups, and more and more Native American women have emerged once more to hold positions of political power.<sup>360</sup> For Native American women, this is merely a return to a tradition in which women were well-respected and valued for their contributions to the community.

The same is not true for women in the U.S. From the colonial era to the days of the Republic, and for centuries thereafter, there has persisted in this nation a patriarchal standard in which women were thought incapable of political thought and of handling the demands of leadership. Remnants of these ideals are still present today. Women are questioned about their ability to handle the demands of marriage and child-rearing as politicians. Those who do not have such responsibilities are considered unable to understand the concerns of voters with families. This presents a "double bind" in which women are criticized for failing to adhere to traditional roles centered on motherhood and domesticity, yet are also punished for doing so when they seek to take on additional responsibilities.<sup>361</sup>

It is clear that the structure that is currently in place is not working, as women still struggle to receive equal representation in politics. However, ignoring the differences between men and women is not the correct way to alleviate this issue. Even Native American societies acknowledge that women and men are different, and thus should have their own roles in the community. The difference between Native society and the U.S. in this regard is the level of respect afforded to each sex. Native American societies viewed their women with great honor, as the caregivers and nurturers of their people.<sup>362</sup>

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<sup>358</sup> *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/LFE046218> (last visited Dec. 3, 2020).

<sup>359</sup> See Young, *supra* note 348.

<sup>360</sup> *Id.*

<sup>361</sup> See Goodwin, *supra* note 17 at 51–54.

<sup>362</sup> See Young, *supra* note 348.

Both men and women were valued for what they provided to their communities, and those who worked hard for their society were highly regarded.<sup>363</sup> Significantly, women and men had their own role in government.<sup>364</sup> They had in place a system in which men and women worked together to decide what was best for their people. Neither sex was regarded as superior, but rather as co-equal. They sought to achieve balance in all things. On the other hand, males in the U.S. have traditionally held authority over women. Although women were considered important for maintaining the home and helping to rear and guide future citizens, their role was considered inferior in comparison to males. For most of history, women in the U.S. were not represented in any form of government, and were not permitted to vote to express their concerns. It is this stigma which women in the U.S. still grapple with and must work against in order to achieve greater equality.

### *C. Achieving Equal Political Representation for Women: A Proposal*

Nineteenth-century abolitionist and woman's rights activist Sarah Grimké once stated: "I ask no favors for my sex . . . . All I ask of our brethren is that, they will take their feet from off our necks, and permit us to stand upright . . . ."<sup>365</sup> These words signify what women still fight to achieve today—the ability to emerge from a system of oppression and enjoy the same rights and privileges as all other citizens, regardless of sex. Women must be respected for who they are, and what they contribute to society. When women hold political office, they bring a unique perspective to legal issues and policy debates. The female sex constitutes half of the population.<sup>366</sup> However, women are more than their sex—they come from different geographical regions, different family structures, and different educational backgrounds. They vary in age, race, ethnicity, and religious affiliation. As a result of these differences, they have different values and concerns about various issues.

There is merit to the idea that political officials should be elected regardless of their sex. Indeed, to focus on an individual's

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<sup>363</sup> See *id.*

<sup>364</sup> See *id.*

<sup>365</sup> GRIMKÉ, *supra* note 187, at 10.

<sup>366</sup> *QuickFacts: United States*, *supra* note 358.

personal merit, experiences, and education rather than their sex would likely bring much greater diversity to our political system. The changing dynamic of gender identity and biological sex in today's society indicate that to focus on sex in choosing politicians would be both unworkable and futile in practice. As more individuals begin to identify as transgender,<sup>367</sup> meaning that they choose to identify as a different gender than their biological sex,<sup>368</sup> it becomes more difficult to create strict divisions among the populace based on definitions of "male" and "female." Thus, to analyze a political candidate's fitness to serve office based on such an increasingly abstract concept would be illogical.

Further, traditional sex-based stereotypes have eroded over time. Many women work outside the home. Indeed, they now vigorously participate in the political and legal system through campaigning for political candidates, voting, and serving the judicial system as attorneys. Greater numbers of men stay at home to take care of their children while their significant others work.<sup>369</sup> Today, there are more single fathers who take on "traditional" domestic roles to provide stability for their children and maintain their households.<sup>370</sup> Thus, both changes in gender-identity and in sex-based gender roles have made it both difficult and nonsensical to continue to use sex as a basis upon which to elect political candidates.

Despite our changing society, it is unlikely that such a drastic change would be effective. The U.S. has always valued tradition, and it is clear that the patriarchal standards upon which the nation was founded will not disappear entirely, and certainly not overnight. However, the political practices of matrilineal Native American societies indicate a possible starting point from which to grow. As previously

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<sup>367</sup> According to research conducted and gathered by the Williams Institute in 2016, 1.4 million adults identified as transgender. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, UCLA SCH. L: WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/> (last visited Dec. 3, 2020).

<sup>368</sup> GLAAD (formerly known as the Gay & Lesbian Alliance Against Defamation) defines transgender as, "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." *GLAAD Media Reference Guide - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Dec. 3, 2020).

<sup>369</sup> See Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RES. CTR., (Sept. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/>.

<sup>370</sup> *Id.*

articulated in this Note, Native Americans did not ignore the differences between men and women. Instead, they acknowledged and embraced the importance of both men and women based on their contributions to the community.<sup>371</sup> This mindset is what U.S. society should adopt in choosing its political representatives.

Women have much to contribute to legal debates concerning public policy, and their expertise can also aid in the drafting of legislation. Contrary to traditional patriarchal beliefs, the perspectives of women are useful on topics other than family life and raising children. Indeed, women also bring a unique and invaluable perspective to all other issues facing society, from climate change to U.S. military involvement, education, and healthcare. Their input on these matters is not only beneficial, but it is necessary. The representative democracy of the nation is most effective when the diversity of our society is reflected in our political leaders. To achieve this goal, U.S. citizens must begin to consider the whole candidate and their individual characteristics when choosing whom to elect to office.

Women's fight for political equality did not end in 1920 with the ratification of the Nineteenth Amendment. Neither will it end when more women hold elective office. To end the subjugation of women in the U.S., the entire system of sex-based stereotyping must be dismantled, little by little. The first step forward is to evolve from the notion that women are one thing—only wives, mothers, or caregivers. This can only happen with concerted effort to change the societal narrative toward valuation of the individual, regardless of sex.

## VI. CONCLUSION

From the time of the nation's founding, the U.S. legal system has operated to inhibit women from exercising their right to participate in the political process. For the majority of the country's existence, an entire group of citizens was prevented from voting based solely on their sex. The patriarchal standards which influenced this inferior treatment have lessened over time, but still exist today. In the days of the Republic, men and women were categorized into distinct, "separate spheres." Under this concept, men were seen as belonging to the "political" or "public" sphere, while women's talents were best suited to the "private" sphere of motherhood and domesticity. While

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<sup>371</sup> See Young, *supra* note 348.

recognizing women's status as citizens, the legal system operated to classify female citizenship as inferior to that of men.

In contrast, pre-colonial Native American society treated women quite differently. While recognizing the differences between men and women, they respected all members of society for their contribution to the growth and sustainability of the community. Women served an important role in politics, as indicated by the existence of Women's Councils. Through these political bodies, women held the ability to select tribal chiefs, and to remove them from their position when they failed to properly fulfill their leadership obligation. Further, although it was not necessarily a common occurrence, evidence shows that women served as political leaders in some Native American societies. This illustrates that Native American groups valued their people based not only on sex, but on their individual merit and qualifications. They recognized that those who contribute to society should have a voice in the political decision-making. Although Native American societies underwent a period in which women were limited in their ability to participate in tribal politics due to the influence of the patriarchal structure of the U.S. government,<sup>372</sup> in the last few decades this situation has altered. Today, more Native American women have emerged from their position of political subjugation to become leaders in their communities. This represents a return to the Native American tradition of egalitarian politics in which they viewed men and women as complementary parts of a cohesive whole of society.

However, the U.S. has no such egalitarian political tradition. Still today, women struggle to fight against patriarchal traditions which have been ingrained in the national rhetoric for centuries. In the 100 years since women in the U.S. obtained the right to vote, they are certainly more visible than ever before in the field of politics. However, the degree to which they are represented in positions of political office does not reflect their percentage in the population. Although

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<sup>372</sup> The U.S. government's disdain for the idea of women in politics extended beyond the bounds of the continent. In January 1893, Queen Liliuokalani—the last monarch of Hawaii—was overthrown by American sailors, marines, and a militia created by the "Committee of Safety." The Committee's ultimate goal was to achieve American annexation of the kingdom of Hawaii. Although there are certainly many reasons the U.S. sought to overthrow Queen Liliuokalani's kingdom, this situation can also be viewed as yet another example of America's patriarchal attitude toward women in power. See Fred L. Borch, *The Trial by Military Commission of Queen Liliuokalani*, ARMY LAW. 1, 1–2 (2014).

women constitute around one-half of the national population, they hold an estimated one-third or less of most political positions.<sup>373</sup> Further, the barriers to increasing female representation in elective office continue to reflect archaic sex-based patriarchal stereotypes. Female political candidates are judged by voters based on their ability to juggle the demands of motherhood while also fulfilling the obligations of elective office. They are thought to be less capable of serving in political roles due to sexist notions such as the idea that their hormones will cause them to make erratic and inconsistent decisions, or that their minds would be too occupied with familial obligations and childcare to think clearly about political matters.

In order to obtain greater equality in this nation, women must achieve greater representation in political office. It is not that women should be given a greater advantage over men in the election process, but that political candidates should be considered for what they will contribute to society. Similar to Native American societies, the U.S. should seek to elect individuals based on what they can bring to the position. In declining to elect more women to political positions, the concerns of a large portion of the nation are not adequately represented or advocated for in governmental decision-making. Thus, to truly achieve the ideal of a representative democracy upon which this nation was founded, women must be represented in proportion to their presence in the population. Since the ratification of the Nineteenth Amendment, 100 years have seen tremendous achievement in the political participation and representation of women. However, equality between the sexes has yet to be achieved. Perhaps one day, the words of the Declaration of Sentiments will finally ring true: that "all men and women are created equal."<sup>374</sup>

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<sup>373</sup> *QuickFacts: United States*, *supra* note 358; *Current Numbers*, *supra* note 6.

<sup>374</sup> *Declaration of Sentiments*, *supra* note 193.