Bringing the Nineteenth Amendment Home

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Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 **Yale L.J.F.** 450 (2020).

The Nineteenth Amendment promised to transform the Constitution as it did the content of equal citizenship. It has, however, done neither. Instead, as Reva Siegel explains in *The Nineteenth Amendment and the Democratization of the Family*, we narrowly understand "the Nineteenth Amendment as a rule prohibiting government from discriminating on the basis of sex in determining who can vote." (P. 451.) This, Siegel compellingly argues, is an impoverishment of what the Nineteenth Amendment was meant to accomplish, and a depletion in how we define equality. The Nineteenth Amendment wrought change to the Constitution "not simply by adding voters, but by democratizing the family so that women could represent themselves in government." (P. 451.) The quest for the vote, according to Siegel, was fundamentally a quest to restructure women's role within the family.

It may come as no surprise that women's participation in the polity – by eliminating the concept of virtual representation by the husband and head of the household – directly challenged traditional family roles. But lost to history is how the right to vote further implicated structural questions about voluntary motherhood, equal remuneration, and the valuation of work performed both within and outside of the household. We no longer recognize access to contraceptives, or joint property in marriage, as essential to the franchise. Nor do we incorporate the family into the constitutional framework of the Nineteenth Amendment. As such, "the history this Essay explores," Siegel writes, "has played little role in shaping our law." (P. 454.) Siegel addresses this erasure by reconstructing the debate over equal citizenship that the suffrage campaign began and examining the various ways recovering this forgotten history can impact our interpretation of the Constitution. In revealing exactly how the Nineteenth Amendment failed to resolve the problem of women's access to full citizenship, Siegel shows us that it still could.

Siegel details various examples of arguments raised by suffragists in the era immediately following the Nineteenth Amendment's passage to establish how diminished our conversations surrounding equality have become. Take Crystal Eastman, a graduate of New York University Law School, a companion of Charlotte Perkins Gilman in Greenwich Village's radical feminist Heterodoxy Club, and a leader of the women's movement post-ratification. Eastman's goal was, simply, "[t]o bend gender outside and inside the family." (P. 468.) To those ends, she proposed challenging not only sex-based exclusions from professional life, but also distending gender roles so that "'[i]t must be womanly as well as manly to earn your own living'" as "'it must be manly as well as womanly to know how to cook and sew and clean and take care of yourself.'" (P. 469.) Eastman lamented the reality that "'breadwinning wives had not yet developed home-making husbands.'" (P. 469.)

Eastman understood that a woman's position as a mother was central to her plea for equality, as it was to her ability to participate at work. In particular, she argued that women should have the ability to elect motherhood and to control the size of their families, conditions which were "'as elementary and essential as 'equal pay.'" (P. 469.) If a woman decided to raise children, then she should receive remuneration from the government, in recognition of the public service she was providing. (P. 470.) Eastman conceptualized the family as a public institution that warranted public support. Distributing the responsibilities of being a wife and a mother beyond the figure of a single individual was the only way to

guarantee economic independence and gender equality.

The vision of the family that triumphed was, however, strictly private, with the wife and mother at its helm; it would remain divorced from the polity, the public, and any constitutional understandings of equality. This was so despite the continuation of the debates into the 1970s, which took shape in the Strike for Equality, organized fifty years after the Nineteenth Amendment's ratification. The strikers believed that the quest for equal citizenship went beyond votes and "required transformation of the conditions in which women bear and rear children." (P. 475.) In addition to the Equal Rights Amendment, and equal opportunities in jobs and education, they sought full access to abortion and free around-the-clock daycare centers. (P. 475.) Siegel reminds us that there was *national consensus* on this final point, and childcare legislation in the form of the Comprehensive Child Development Act was enacted by Congress – not once, but twice. It was, however, vetoed by the President – first by Nixon in 1971 and then by Ford in 1976. (P. 477.) The government's refusal to provide childcare ensured that support would remain housed within existing family structures.

The standard narrative surrounding the passage of Nineteenth Amendment is currently stuck in the tenor of "an attitudinal account," which tells the story of having successfully overcome prejudice. (P. 456.) Siegel argues that the Amendment's passage should also be understood as a tale of "*institutional design*." (P. 456.) In opening the franchise, the government authorized individuals to represent themselves, "emancipating some persons from the control of others, as it recognized slaves, servants, and wives as independent in the eyes of the law." (P. 456.) Siegel turns to the Fifteenth Amendment, and the Reconstruction Amendments more generally, to both guide and implement this institutional interpretation. If we were to read the Nineteenth Amendment's political history into its text the way we read the history of slavery and segregation into the Fifteenth Amendment, then the family would clearly emerge as "a locus of law, struggle, and power, having a constitutional history like all other important institutions of our constitutional republic." (P. 457.) On a more granular level, cases involving pregnancy, contraception, and employment would be refracted through an analysis of whether the legal rule "preserve[s] the principle of men's household headship" or instead "reorganize[s] family relations on the principles of women's co-headship, equality, and independence." (P. 485.) Reframing the Nineteenth Amendment as a question of institutional design would create dynamic synergies that could reorient the whole of equal protection law.

Siegel's proposed reading continues the analogy between race and sex that was successfully adopted by Pauli Murray, Dorothy Kenyon, and, eventually, Ruth Bader Ginsburg: "Just as the constitutional disestablishment of slavery and segregation orients race-discrimination law, so too can disestablishment of male household headship—intersectionally understood – orient sex-discrimination law." (P. 484.) The institutional dimension of the Nineteenth Amendment ensures that race and sex also intersect. Rather than paper over existing distinctions, Siegel notes that suffragists split, both along and within racial lines, on whether to support a Fifteenth Amendment that did not include the right to vote for women. (P. 461-62.) Most egregiously, the Nineteenth Amendment failed to enfranchise all women. (P. 457.) Addressing such intersectional differences reveals the varied barriers to even forming a family in the first instance: "while controlling the timing of conception promises independence for many, there are many who focus on freedom from coercive sterilization, and yet others who focus on equal parental recognition and access to the means of family formation." (P. 487.)[1] Ultimately, paying heed to intersecting inequalities is the only way for *all* women to participate fully in public life.

The staying power of the piece, what makes it veritably haunting, is showing exactly how what we exclude, what we fail to see, has the capacity to constrain and truncate discourse in ways that prevent any critical analysis from taking place. Family law scholars are accustomed to statements about what is obvious, natural, or otherwise self-evident.[2] We must therefore be carefully attuned to where assertions about the way things are disguise contested opinions about how they should be.[3] The specific danger

Siegel alerts us to lies in not seeing what they once were, so that we remain blind to what they could yet become.

1. Important coalitions nonetheless emerged – Siegel writes about the work of Frances Watkins Harper, a leading feminist and abolitionist, who crafted "intraracial and inter-racial alliances" and whose project of "home protection" encompassed issues spanning sexual abuse to lynching. (P. 465.) For a review centrally addressing the role Native, African-American, Asian, and Latina women played in the history of voting rights in America see Ann E. Tweedy, Uncovering the Little-Known History of Suffragists of Color, JOTWELL (March 25, 2021) (reviewing Cathleen D. Cahill, **Recasting the Vote: How Women of Color Transformed the Suffrage Movement** (2020)).
2. "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).
3. Reva Siegel has consistently led the way – she has dismantled the doctrine of marital privacy to expose how it perpetuates marital prerogative, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2119 (1996); she has denuded the language of love to identify how it conceals a law steeped in status relations, Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127, 2211 (1994); she has detailed how reasoning about "real" differences masks judgments about the proper social roles the sexes ought to occupy, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 265 (1992).

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