No. 23-477

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JONATHAN THOMAS SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL., RESPONDENTS

and

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL., RESPONDENTS IN SUPPORT OF PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE PROFESSOR CHRISTOPHER R. GREEN SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. *Craig v. Boren*'s Adoption of Intermediate Scrutiny Has Six Fatal Problems. 2

A. *Craig* Misstates What "Previous Cases Establish" 2

B. Contrary to *Craig* and *Murgia*, Republicans Repeatedly Paired Gender and Age in 1866. 3

C. The Tiers of Scrutiny Replace One Difficult Question with Seven 3

D. Intermediate Scrutiny Itself is an "Overbroad Generalization" 4

E. The Tiers of Scrutiny Arbitrarily Treat Widespread Practice as Sometimes Good and Sometimes Bad 5

F. The Gulf Between Rational-Basis Review and Intermediate Scrutiny Is Too Big 6

TABLE OF CONTENTS—Continued

Page

II. Intermediate Scrutiny Should Be Replaced with Equal Citizenship 9

A. Equal Citizenship, Not Equal Protection, is the Historical Key to Fourteenth Amendment Equality 9

B. Equal Citizenship Was Central at Seneca Falls in 1848 11

C. Attorney General Bates Insisted in 1862 on Female Citizenship..... 12

D. Republicans in Congress in 1866 Repeatedly Stressed Women's Entitlement to Civil Rights..... 13

E. Congress Provided for "Diseases Peculiar to Women" in 1866..... 18

F. Freedmen's Rights and Women's Rights Were Repeatedly Compared During the 1866 Campaign..... 18

G. Pennsylvania Ratifiers Recognized Women's Rights as Citizens..... 19

H. Bradley Did Not Reject Women's Entitlement as Citizens, But Read the Fourteenth Amendment to Ban "Hostile and Discriminating Legislation" 20

I. Republican Platforms of 1872 and 1876 Associated Women's Rights with Citizenship..... 21

TABLE OF CONTENTS—Continued

Page

J. Early Women's Voting Rights Disputes Reject Voting Rights as Civil Rights, Not Women Citizens' Entitlement to Civil Rights 22

K. The Nineteenth Amendment Did Not Change the Fourteenth Amendment 24

L. The Only Petitioner-Side Amici Who Address Fourteenth Amendment History Support a Shift to Citizenship..... 27

III. The Fourteenth Amendment Requires Good-Faith Promotion of All Citizens' Interests, Sometimes Against Citizens' Own Wishes 28

A. *Corfield* and Alcohol-Regulation Cases Approve Paternalism in Promoting Citizens' Genuine Interests 28

B. Justice Ginsburg and the Court's Insistence that Inherent Sex Differences Remain Cause for "Celebration" Fits Reconstruction History 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Children's Hospital,
261 U.S. 525 (1923) 26

Alexander v. South Carolina NAACP,
144 S.Ct. 1221 (2024) 1

Bartemeyer v. Iowa,
85 U.S. 129 (1874) 29

Beer Co. v. Massachusetts,
97 U.S. 25 (1878) 29

Bostock v. Clayton County,
590 U.S. 644 (2020) 8

Bradwell v. Illinois,
83 U.S. 130 (1873) 20, 22, 23, 27, 30

Brown v. Board of Education,
347 U.S. 483 (1954) 9

Butcher's Union v. Crescent City Co.,
111 U.S. 746 (1884) 10

Civil Rights Cases,
109 U.S. 3 (1883) 11

Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 4

Coleman v. Court of Appeals of Maryland,
566 U.S. 30 (2012) 6

TABLE OF AUTHORITIES—Continued

Page

Corfield v. Coryell,
6 F.Cas. 546 (C.C. E.D. Pa. 1825)..... 28, 29, 30

Craig v. Boren,
429 U.S. 190 (1976)..... 1-4, 6-8, 10, 11, 25, 27

Dandridge v. Williams,
397 U.S. 471 (1970)..... 4

Dobbs v. Jackson Women's Health Organization,
597 U.S. 215 (2022)..... 6, 7, 10, 28

Duren v. Missouri,
439 U.S. 357 (1979)..... 32

Everard's Breweries v. Day,
265 U.S. 545 (1924)..... 29

Ex Parte Smith,
38 Cal. 702 (1869) 30

F.S. Royster Guano Co. v. Virginia,
253 U.S. 412 (1920)..... 3

Frontiero v. Richardson,
411 U.S. 677 (1973)..... 7, 32

Geduldig v. Aeillo,
417 U.S. 484 (1974)..... 6, 7, 8

Gundy v. United States,
588 U.S. 128 (2019)..... 10

Haaland v. Brackeen,
599 U.S. 255 (2023)..... 1

TABLE OF AUTHORITIES—Continued

Page

Heller v. Doe,
509 U.S. 312 (1993) 5

L.W. by and throughWilliams v. Skrmetti,
83 F.4th 460 (6th Cir. 2023) 7, 8

License Cases,
46 U.S. 504 (1847) 29

Lyng v. Castillo,
477 U.S. 635 (1986) 5

Marbury v. Madison,
5 U.S. 137 (1803) 10

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 3

McDonald v. Chicago,
561 U.S. 742 (2010) 1, 10

Minor v. Happersett,
88 U.S. 162 (1875) 22, 23, 24

Mississippi University of Women v. Hogan,
458 U.S. 718 (1982) 7

Mugler v. Kansas,
123 U.S. 623 (1887) 29

Plessy v. Ferguson,
163 U.S. 537 (1896) 9

Plyler v. Doe,
457 U.S. 202 (1982) 4

TABLE OF AUTHORITIES—Continued

Page

Romer v. Evans,
517 U.S. 620 (1996) 9

Rostker v. Goldberg,
453 U.S. 57 (1981) 4

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973) 4, 6

Slaughterhouse Cases,
83 U.S. 36 (1873) 20, 22-24, 29, 31

Students for Fair Admissions v. Harvard,
600 U.S. 181 (2023) 9

United States v. Vaello Madero,
596 U.S. 159 (2022) 1, 10

United States v. Virginia,
518 U.S. 515 (1996) 4, 7, 9, 31

Vacco v. Quill,
521 U.S. 793 (1997) 5

Vidal v. Elster,
602 U.S. 286 (2024) 4

Vorchheimer v. School District of Philadelphia,
532 F.2d 880 (3d Cir. 1976) 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Act of June 1, 1866, 14 Stat. 55 18

Rule 37.6 1

LEGISLATIVE DEBATES

Cong. Globe, 39th Cong. 1st Sess. (1866) 11, 14-17, 28

Cong. Globe, 40th Cong. 2nd Sess. (1868) 17-18

PENNSYLVANIA APPENDIX TO THE LEGISLATIVE RECORD (1867) 19

U.S. House of Representatives, 41st Cong. 3rd Sess., Report No. 22 (1871) 22

U.S. Senate, 42nd Cong. 2nd Sess., Report No. 21 (1872) 23

NEWSPAPERS

CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN 18

THE REVOLUTION 31-32

ARTICLES

Calabresi & Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) 25

TABLE OF AUTHORITIES—Continued

Page

Green, *Citizenship and Solicitude*, 47 HARV. J. L. & PUB. POL'Y 465 (2024) 1, 27

Green, *Equal Citizenship Yes, Intermediate Scrutiny No*, https://ssrn.com/paper=4958163 1

Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006) 21

Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008) 11

Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) 21

BOOKS, TREATISES, AND OTHER MATERIALS

Edward Bates, Citizenship, 10 Op. Att'y Gen. 382 (1862) 12-13

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 10

1 STANTON, ANTHONY, AND GAGE, HISTORY OF WOMAN SUFFRAGE (1881) 11, 12

Republican Party Platform of 1872 21

Republican Party Platform of 1876 21

INTEREST OF AMICUS[1]

Amicus is a widely-published scholar of Reconstruction, especially the Fourteenth Amendment's guarantees of the rights of citizenship. In addition to his other scholarship on the original meaning of the Fourteenth Amendment, he has addressed the Fourteenth Amendment issue in this case in a new article, *Equal Citizenship Yes, Intermediate Scrutiny No*, available at https://ssrn.com/paper=4958163, and the obligations that citizenship imposes on states in *Citizenship and Solicitude*, 47 HARV. J. L. & PUB. POL'Y 465 (2024). Justices on this Court have repeatedly found his work helpful. See *McDonald v. Chicago*, 561 U.S. 742, 859 n.2 (2010) (Stevens, J., dissenting); *United States v. Vaello Madero*, 596 U.S. 159, 170, 176, 178 n.4 (2022) (Thomas, J., concurring); *Haaland v. Brackeen*, 599 U.S. 255, 322-24 (2023) (Gorsuch, J., concurring); *Alexander v. South Carolina NAACP*, 144 S.Ct. 1221, 1260 (2024) (Thomas, J., concurring).

SUMMARY OF ARGUMENT

Craig v. Boren claims that "previous cases establish that classifications by gender must serve important objectives and must be substantially related to achievement of those objectives." 429 U.S. 190, 197 (1976). This statement and the three-sizes-fit-all tiers-of-scrutiny framework it has engendered (a) mischaracterize "previous cases," (b) contradict

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[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no one other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

how age and gender were paired in 1866, (c) replace one difficult concept with seven, (d) constitute an overbroad generalization, (e) arbitrarily treat widespread practice as sometimes positive and sometimes negative, and (f) make too much turn on what count as "classifications by gender." This Court should replace intermediate scrutiny with an approach rooted in what the Fourteenth Amendment's text expressed during Reconstruction: the duty of the government to promote all similarly-situated citizens' interests equally. Such equal citizenship requires neither inattention to physical differences between the sexes nor freedom from good-faith paternalism promoting the general good of all citizens.

ARGUMENT

I. *Craig v. Boren*'s Adoption of Intermediate Scrutiny Has Six Fatal Problems.

A. *Craig* Misstates What "Previous Cases Establish."

Before *Craig*, 429 U.S. 190, 197 (1976), did "previous cases establish that classifications by gender must serve important objectives and must be substantially related to achievement of those objectives"? No. The private plaintiffs themselves note that *Craig* itself, not earlier cases, "established" its framework, Brief of Respondents in Support of Petitioner at 20, and note the very different history of the Court's approval of sex discrimination "[b]efore adopting heightened scrutiny in *Craig*," *id.* at 21. The Solicitor General replaces the phrase "previous cases establish" with a description of what the Court "announced." Petitioner's Brief at 20.

B. Contrary to *Craig* and *Murgia*, Republicans Repeatedly Paired Gender and Age in 1866.

As explained below, Republicans in 1866 repeatedly rebutted Democratic charges that the Fourteenth Amendment would lead to black voting by noting that women and children were citizens entitled to civil rights but not voters. This comparison would make no sense if gender and age discrimination were treated radically differently under the Fourteenth Amendment, as the Court said in *Craig* and the rational-basis age-discrimination case a few months before, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

C. The Tiers of Scrutiny Replace One Difficult Question with Seven.

Before the rise of the tiers of scrutiny, the Court focused in equality cases on a single difficult issue: whether a particular classification was arbitrary. A "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Rather than asking about the arbitrariness of a *particular* law, the tiers of scrutiny instead lump kinds of distinctions into three buckets. Which bucket to use is one difficult question, and each of the six new labels—"narrowly tailored," "compelling," "substantial," "important," "rational," and "legitimate"—is another. As Justice Kavanaugh noted in a recent First Amendment argument, "[M]aybe this is a flaw in intermediate scrutiny more

generally. I don't really know what that means other than is it reasonable. What's difference? … I know the formulations.… [T]hrowing the term 'intermediate scrutiny' around does nothing for me." *Vidal v. Elster*, 602 U.S. 286 (2024), oral argument at 72-73. Others have noted the same problem. *See Craig*, 429 U.S. at 220-21 (Rehnquist, J., dissenting) ("substantial" and "important" are "diaphanous and elastic"); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451 n.2 (1985) (Stevens, J., and Burger, C.J., endorsing this criticism).

D. Intermediate Scrutiny Itself is an "Overbroad Generalization."

This Court's intermediate-scrutiny cases have repeatedly condemned "overbroad generalizations." See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996). But the idea of intermediate scrutiny *itself* is an overbroad generalization. The same justification is required—"substantial" relation to something "important"—for both young-women-only 3.2 beer consumption and young-men-only draft registration. Compare *Craig* with *Rostker v. Goldberg*, 453 U.S. 57 (1981). But the gender-prejudice-related harms of those two rules are obviously very different. Grouping all gender-based distinctions together in the same bucket is not a reasonable way to combat discrimination. Justice Marshall complained repeatedly that the tiers of scrutiny were too rigid. See *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 460 (1985) (dissent); *Plyler v. Doe*, 457 U.S. 202, 230-231 (1982) (concurrence); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99 (1973) (dissent); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (dissent). He was right. Put another

way, suits will not be very well tailored if they come only in small, medium, and large. Intermediate scrutiny cannot withstand the very demand it makes of states.

E. The Tiers of Scrutiny Arbitrarily Treat Widespread Practice as Sometimes Good and Sometimes Bad.

The Court noted in *Heller v. Doe*, 509 U.S. 312, 326-27 (1993), "That the law has long treated the classes as distinct … suggests that there is a commonsense distinction between the mentally retarded and the mentally ill." The Court noted in *Vacco v. Quill*, 521 U.S. 793, 800 (1997), upholding a distinction between withdrawing life support and assisting suicide, that the fact that the distinction is "widely recognized and endorsed" by "our legal traditions" was a strong reason to uphold it. What "[t]he law has long used" was presumed constitutional. *Id.* at 802. The Court treated a distinction being "longstanding and rational" as two sides of the same coin. *Id.* at 808. The *Heller*/*Vacco* approach to the lessons of history would doom *Craig*. There are similar commonsense distinctions between men and women, and between those comfortable with their biological sex and those who are not. The existence of "states across the country" doing what Tennessee has done, which Petitioner's Brief at 30 uses as an argument for heightened scrutiny, would under *Heller* and *Vacco* instead make the Court *more* deferential.

Widespread practice as a positive factor in *Vacco* and *Heller* contrasts with other cases treating it as a reason for *more* suspicion. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (fact that "[a]s a historical

matter, they have not been subject to discrimination" is reason for less scrutiny); *San Antonio ISD v. Rodriguez*, 411 U.S. 1, 28 (1973) (strict scrutiny reserved for groups with a "history of purposeful unequal treatment"). The Court can, of course, ultimately distinguish good from bad practices if it filters those practices so that only widespread *unconstitutional* distinction-drawing makes a distinction suspect. But that bakes the conclusion into the premises; it is no way to justify heightened scrutiny in the first place. If we formalistically look only at the existence of widespread practice as such, the difference between good and bad practices becomes itself arbitrary. *Deploying* an arbitrary distinction that way is not a good way to *fight* arbitrary distinctions.

F. The Gulf Between Rational-Basis Review and Intermediate Scrutiny Is Too Big.

Craig raises the stakes immensely, and implausibly, for the threshold question: what counts as "classification by gender"? Biologically-rooted and symmetric distinctions are two classic difficult cases. *Geduldig v. Aeillo*, 417 U.S. 484, 496-97 n.20 (1974), decided that the failure of a state health insurer to cover pregnancy, a "objectively identifiable physical condition with unique characteristics," raised no issue of sex discrimination. Thirty-eight years later, in *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 57 (2012), Justices Ginsburg, Breyer, Sotomayor, and Kagan all called for *Geduldig* to be overruled because it was "egregiously wrong," though the majority did not reply. In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236

(2022), the Court reaffirmed *Geduldig* in rebutting an antidiscrimination attack on abortion regulation. This time it was the dissenters who did not respond to the majority's use of *Geduldig*, even though all three had called for its overruling ten years before. The Sixth Circuit relied on *Geduldig* and *Dobbs* as one of its bases for applying only rational-basis review. *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 481 (6th Cir. 2023).

The Court's long-time agnosticism about symmetric gender distinctions poses another fraught question of which level of scrutiny to apply. The Third Circuit in *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 886 (3rd Cir. 1976), affirmed by equally divided Court, 430 U.S. 703 (1977), upheld separate academic high schools for boys and girls because "equal opportunity was extended to each sex." This Court granted review but split 4-4, with then-Justice Rehnquist, a dissenter from *Craig* and the lone dissenter from *Frontiero v. Richardson*, 411 U.S. 677 (1973), recused. Five years later, the Court again reserved the *Vorchheimer* issue in *Mississippi University of Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982), noting that the lack of any male-only equivalent to MUW meant that the *Vorchheimer* issue was not posed. The Court did the same in *United States v. Virginia*, 518 U.S. 515, 534 n.7 (1996), because of the uniqueness of the Virginia Military Institute, and the issue remains undecided today. The Sixth Circuit's second reason not to apply intermediate scrutiny was essentially the ground used by the Third Circuit in *Vorchheimer*: that symmetric distinctions, such as in separate men's and women's prisons or in separate restrooms for

men and women, are not properly subject to heightened scrutiny. *L.W.*, 83 F.4th at 484.

We lack satisfying answers to the rational-basis-or-intermediate-scrutiny question in *Geduldig* and *Vorchheimer* because the question itself is ill-framed. If the Court were a legislature, we could interpret the Court's ipse dixits in *Craig* or later cases as if they were statutes, perhaps comparing the meaning expressed by "discrimination because of sex" in 1964 with that expressed by "classifications by gender" in 1976 and applying precedents like *Bostock v. Clayton County*, 590 U.S. 644 (2020). But *Craig* is not a statute; it purports to restate pre-existing law. Because that pre-existing law does not actually exist, there is no answer to which level of scrutiny "really" applies in close cases. Also, as explained below, the text of the Equal Protection Clause is of no help, because it is limited to equality in "protection of the laws."

Further, the gulf between intermediate and rational-basis scrutiny allows arguments like the Solicitor General's argument that without intermediate scrutiny, a statute "is subject to no more scrutiny than run-of-the-mill economic regulations." Petitioner's Brief at 31. This argument is only possible because the tiers of scrutiny insist on putting all distinctions into one of only three buckets and treating everything in the same bucket the same way. This Court's doctrine need not be so artificially formal. Under an equal-citizenship approach, the legitimacy of pregnancy-based distinctions in cases like *Geduldig* should turn instead on how much solicitude pregnant women, as citizens, have a right to demand with respect to the expenses of pregnancy,

not whether a pregnancy-based distinction "is" a gender-based one. Likewise, whether symmetric sex distinctions in cases like *Vorchheimer* should be condemned as *Plessy*-style "separate but equal" should turn not on what counts as a "classification by gender," but on the extent to which the social meaning of gender separation is or is not analogous to the social meaning of racial separation: whether the treatment of Satchel Paige before 1948, playing baseball only in the Negro leagues, is relevantly similar to Caitlin Clark, playing basketball only in the WNBA.

II. Intermediate Scrutiny Should Be Replaced with Equal Citizenship.

A. Equal Citizenship, Not Equal Protection, is the Historical Key to General Fourteenth Equality.

This Court has long used the Equal Protection Clause rather than the rights of citizenship as the vehicle for antidiscrimination law. The rights of citizens, however, often lurk in the rhetorical background. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (deploying Justice Harlan's citizenship-themed dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)); *Brown v. Board of Education*, 347 U.S. 483, 489, 493 (1954) (noting hostility to distinctions among citizens by "the most avid proponents of the post-War Amendments" and noting connection of education and citizenship); *United States v. Virginia*, 518 U.S. 515, 532, 542 n.12 (1996) (referring repeatedly to women's "full citizenship stature"); *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 202 (2023) (touting Bingham's support for the "absolute equality of all citizens of the United

States"). Substantive due process cases have likewise repeatedly cited the discussion of the rights of citizenship in the concurrence of Justice Bradley, joined by Justices Harlan and Woods, in *Butcher's Union v. Crescent City Co.*, 111 U.S. 746, 760-66 (1884). Other cases also consider Privileges or Immunities Clause evidence in construing the Due Process Clause. *See McDonald v. Chicago*, 561 U.S. 742, 762 n.9 (2010); *Gundy v. United States*, 588 U.S. 128, 166-67 & n.68 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 240 n.22 (2022).

If references to the rights of citizenship in current Fourteenth Amendment law were promoted from their rhetorical support role and given real load-bearing work, Fourteenth Amendment equality law would become more secure, not less, because it would be placed on a proper historical footing. Even if the Court deems *Craig* worth salvaging, it should use the equal-citizenship tradition as a guardrail to keep its jurisprudence from drifting any further away than necessary from the Fourteenth Amendment's original meaning.

"Equal Protection of the Laws" was no one's antidiscrimination mantra before or during Reconstruction. This was undoubtedly because "protection of the laws" in the Anglo-American legal tradition had a limited, though important, remedial definition. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *55-*56 (1765); *Marbury v. Madison*, 5 U.S. 137, 162-63 (1803); *United States v. Vaello Madero*, 596 U.S. 159, 178 n.4 (2022) (Thomas, J., concurring). The text of the Equal Protection Clause expresses a long

tradition of seeing protection from violence as the consideration given by the state in exchange for obedience by "any person within its jurisdiction." See Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 34-43 (2008).

Demands for equality were instead put in terms of the rights of citizenship. As Senator John Conness explained, to be "regarded and treated as citizens of the United States" was to be "entitled to equal civil rights with all other citizens of the United States." Cong. Globe, 39th Cong. 1st Sess. 2891 (1866). The first Justice Harlan described a citizen as a "component part of the people for whose welfare and happiness government is ordained." *Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting). This is the notion that the Court should use to replace *Craig,* or at least to limit it. All citizens—men and women, those with gender dysphoria and those without—have the right to demand that the government allow them to pursue their happiness free of restraints unless those restraints are genuine good-faith efforts to promote all citizens' welfare, not just that of a chosen few.

B. Equal Citizenship Was Central at Seneca Falls in 1848.

The Seneca Falls Declaration, only a few pages long, is worth reading in full as part of the context of the Privileges or Immunities Clause. The main demand on behalf of American women was that "we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States." 1 STANTON, ANTHONY, AND GAGE, HISTORY OF WOMAN SUFFRAGE 71 (1881).

Many of the subsidiary Seneca Falls demands mention women's distinctive talents and abilities and their inability to use them as they would wish to. One of the declaration's complaints about mankind is that "[h]e has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life." *Id*. Other Seneca Falls complaints related to entrepreneurial liberties, complaining about men's "monopoliz[ing] nearly all the profitable employments" and closing "all the avenues to wealth and distinction." *Id*. The Seneca Falls resolutions appealed to Blackstone for the principle that "man shall pursue his own true and substantial happiness," adding, "[S]uch laws as conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature and of no validity, for this is superior in obligation to any other." *Id*. at 71-72. To be a citizen was thus to have one's "true and substantial happiness" properly regarded by the government. Another resolution sought "equal participation with men in the various trades, professions, and commerce." *Id*. at 72. Finally, another complaint is that the law of divorce is "wholly regardless of the happiness of the woman." *Id*. at 71. To be a citizen is for the state to take proper regard for one's interests.

C. Attorney General Bates Insisted in 1862 on Female Citizenship.

In 1862, an official opinion from Attorney General Edward Bates sharply disagreed with *Dred Scott*'s conclusion that African Americans could not be citizens. His argument mentioned the fact—repeated

many, many times by Republicans in coming years—that women were citizens but not voters:

> The phrase, "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation. … [T]he child in the cradle and its father in the Senate, are equally citizens of the United States… [A]s to voting or holding office, as that privilege is not essential to citizenship, so the deprivation of it by law is not a deprivation of citizenship; no more so in the case of a negro than in the case of a white woman or a child.

10 Op. Att'y Gen. 382, 388 (1862). While Bates did not elaborate much on what being "a member of the nation" entailed, the basic idea that citizens are partners with each other to promote each others' interests would be elaborated in detail by others.

D. Republicans in Congress in 1866 Repeatedly Stressed Women's Entitlement to Civil Rights.

The dominant argument through the campaign of 1866 concerned voting rights. Democrats said that citizenship would make the freedmen voters. There was something to this charge, in that statements like Seneca Falls, as well as many of the freedmen's conventions, included voting rights among the rights of citizens. But in explaining Section One of the Fourteenth Amendment, Republicans repeatedly distinguished political rights from civil rights (i.e., the rights of citizens as such). Republicans did this first by pointing to Section Two, which imposed only

a House-representation penalty on departures from universal manhood suffrage. That showed that such departures were consistent with Section One. Second, Republicans pointed to women and children, who were citizens but not voters. This argument would make no sense if women did not receive civil rights under the Fourteenth Amendment. Only because women and children *did* receive such civil rights were they a model for what the freedmen's rights would be under the Fourteenth Amendment. Jacob Howard in his very introduction of the Fourteenth Amendment to the Senate referred to "men, women, and children, all of course endowed with civil rights." Cong. Globe, 39th Cong. 1st Sess. 2766 (1866).

While the Thirty-Ninth Congress did not give freedmen the vote nationwide in the Fourteenth Amendment, they did in the defeated South in the Reconstruction Act of 1867 using Congress's *jus post bellum* powers. Section Two of the Fourteenth Amendment was also designed to encourage universal manhood suffrage. Many Democrats therefore asked—as well as many suffragettes—why Republicans did not similarly encourage the vote for women. The Republican response to this point made clear that it was indeed important to structure government in a way that would promote women's welfare. Men's natural affinity for their mothers, wives, sisters, and daughters would be enough to secure this result. The freedmen needed the vote, though, because of the relative weakness of white voters' natural affinity for them.

Senator Luke Poland put it this way:

> The right of suffrage is … to be exercised for the benefit and in the interest of the whole. The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own. … Is there any just ground upon which the southern whites can claim that they should represent the negro population, especially those lately held in slavery? Do they stand in the same relation to them that the fathers, husbands and brothers of a northern community do to their non-voting women and children, whose interests are as dear to them as their own? How opposite in theory and in fact is the relation between them. They do not regard them as having a common interest to be supported, but as a hostile element in society to be spurned and crushed.

Id. at 2962, 2963. *See also id.* at 952 (Senator Henderson explaining why women's suffrage was "unnecessary" and its denial would not "lead to a denial of the civil rights or social supremacy of women," which was not true for racial limits); *id.* at 3035 (Senator James McDougall recapitulating the Republican argument that women's "interests are best protected by father, husband, and brother" but the freedmen are the "object of … unaccountable prejudice against race"); *id.* at 380 (Democratic Representative James Brooks admitting, "I prefer

the white women of my country to the negro," using that preference as an argument for women's suffrage in favor to voting rights for freedmen, but also thereby confirming Republican claims about relative sympathies); *id.* at 448, 451 (same for Democratic Representative Aaron Harding).

Even as Democrats opposed citizenship and civil rights for the freedmen, they too explained that women, as citizens, were among those for whose benefit governments exist. Representative Andrew Jackson Rogers praised President Johnson's belief "that this Government was made for the benefit of white men and white women." *Id.* app. at 136; see also *id.* at 196. Rogers said much the same thing while discussing the Fourteenth Amendment: "[T]his Government was made for white men and white women." *Id.* at 2538. His racism should not distract us from what both he and Republicans thought obvious: government was made for women too.

Republicans repeatedly distinguished civil rights—rights to be treated properly by the government—from political rights to control or participate in the government. Non-voters such as women and children were still, however, citizens receiving civil rights. See, e.g., *id.* at 1255 (Senator Henry Wilson); *id.* at 1263 (Representative Henry Broomall). On April 4, Senator Lyman Trumbull replied to President Johnson's soon-to-be-overridden veto of the Civil Rights Act, just a few weeks before Bingham proposed the critical Fourteenth Amendment Section One language to the Joint Committee on April 21:

> Women are citizens; children are citizens; but they do not exercise the elective

> franchise by virtue of their citizenship. … But, sir, what rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.

Id. at 1757.

In early 1868, while the reconstructed South was about to ratify the Fourteenth Amdnement, Representative Broomall returned to the theme, elaborating at length on the entitlement of citizens to have their interests promoted in a republican form of government:

> [In] [a] republican form of government … the sovereign power rests in the whole people … and is exercised by their representatives chosen according to some established rule, either by all the citizens or by such portion of them as, by reason of domestic or social relations with the remainder, may be fairly considered to represent the interests of all.… To constitute the required form of government, therefore, it is necessary that every citizen may either exercise the right of suffrage himself, or have it exercised for his benefit by some one who by reason of domestic or social relations with him can be fairly said to represent his interests. In one of these

> cases he is directly represented in the government, and in the other indirectly. This indirect representation is that possessed by women, children, and all those under the legal control of others.

Cong. Globe, 40th Cong. 2nd Sess. 1956 (1868).

E. Congress Provided for "Diseases Peculiar to Women" in 1866.

Two weeks before proposing the Fourteenth Amendment, Congress authorized the Women's Hospital Association of D.C. "for the treatment of diseases peculiar to women." 14 Stat. 55 (June 1, 1866). Equal citizenship for women obviously did not require insensitivity to biological differences between men and women.

F. Freedmen's Rights and Women's Rights Were Repeatedly Compared During the 1866 Campaign.

The Cincinnati Commercial's collection, SPEECHES OF THE CAMPAIGN (1866), contains a number of speeches in which Republicans appealed to women's citizenship and entitlement to civil rights as a rebuttal to the charge that Section One included voting rights. See *id.* at 3 column 3 (Indiana governor Oliver Morton); *id.* at 14 column 5 (Speaker of the House Schuyler Colfax; *id.* at 21 column 4 (former U.S. district attorney John Hannah); *id.* at 22 column 3 (General John P.C. Shanks); *id.* at 35 column 3 (Morton again). This leading Republican trope of 1866 assumed presupposed that women, as citizens, receive civil rights, but not political rights, and that could be a model for the pre-Fifteenth-Amendment guarantee of civil rights, but not

political rights, for freedmen. Advocates of women's suffrage were disappointed, but not because Republicans' Section One guarantee of civil rights did not include women; they were disappointed because it did not include suffrage. This pattern would continue in later disputes.

G. Pennsylvania Ratifiers Recognized Women's Rights as Citizens.

By far the most extensive recorded debate on ratification of the Fourteenth Amendment took place in Pennsylvania. The same themes are evident as in Congress and during the campaign. Democratic Representative David echoed Democrats in Congress who openly preferred the interests of white women to those of the freedmen. PENNSYLVANIA APPENDIX TO THE LEGISLATIVE RECORD 21 (1867); *see also id.* at 67 (representative G.O. Deise); *id.* at 42 (representative Jenks). Republicans like Pennsylvania senator Bigham used this attitude as had Republicans in Congress: to show that such attitudes proved why freedmen's voting rights were so much more important than women's. With respect to women, it is "no very forced construction to say that we are their representatives, connected as we are with so many sympathies with that class of our population." *Id.* at 15. But the relationship between the races in the South was more like the relationship of wolves and sheep; wolves could not be trusted to promote sheep's interests. *Id.*

H. Bradley Did Not Reject Women's Entitlement as Citizens, But Read the Fourteenth Amendment to Ban "Hostile and Discriminating Legislation."

Many of the briefs in this case cite Justice Bradley's concurring opinion on behalf of three of the four *Slaughterhouse* dissenters in *Bradwell v. Illinois*, 83 U.S. 130 (1873), as a sort of anti-precedent. See, e.g., Brief of NWLC at 4, 12, 18, 20; CAC Brief at 13, 19; Brief of Respondents in Support of Petitioner at 21. But Justice Bradley's conclusion that Illinois could bar women from practicing law was very explicitly based on factual assumptions not baked into the Fourteenth Amendment's text. He argued, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." 83 U.S. at 141. Justices Bradley, Field, and Swayne did not, of course, deny that women were citizens, nor that they were constitutionally entitled to equal civil rights with similarly-situated fellow citizens. The day before, joined by Chief Justice Chase, the same three justices properly interpreted the Fourteenth Amendment to guard "every citizen of the United States against hostile and discriminating legislation." *Slaughterhouse Cases*, 83 U.S. 36, 101 (1873) (Field, J., joined by Chase, C.J., and Bradley and Swayne, JJ., dissenting). Bradley just disagreed with Senator Matthew Carpenter, who argued for Bradwell, and with Chief Justice Salmon Chase, who dissented in *Bradwell* just as he had in *Slaughterhouse*, about which citizens were similarly situated with which fellow citizens. These factual assessments are no more binding on interpreters

than the Framers' error about North Carolina and Maryland's relative populations. See Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006); Green, "*This Constitution*": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1623 n.41 (2009).

I. Republican Platforms of 1872 and 1876 Associated Women's Rights with Citizenship.

The 1872 Republican platform put its approval of women's rights in terms of the rights of citizenship, not equal protection of the laws: "The Republican party is mindful of its obligations to the loyal women of America for their noble devotion to the cause of freedom. Their admission to wider fields of usefulness is viewed with satisfaction, and the honest demand of any class of citizens for additional rights should be treated with respectful consideration." The 1876 version used even more emphatic language hearkening back to the Privileges or Immunities Clause: "The Republican party recognizes with approval the substantial advances recently made toward the establishment of equal rights for women, by the many important amendments effected by Republican legislatures in the laws which concern the personal and property relations of wives, mothers, and widows, and by the appointment and election of women to the superintendence of education, charities, and other public trusts. The honest demands of this class of citizens for additional rights, privileges, and immunities should be treated with respectful consideration."

J. Early Women's Voting Rights Disputes Reject Voting Rights as Civil Rights, Not Women Citizens' Entitlement to Civil Rights.

Fourteenth Amendment arguments for women's suffrage were rejected by the House Judiciary Committee under John Bingham in 1871, by the Senate Judiciary Committee under Matthew Carpenter in 1872, and by *Minor v. Happersett*, 88 U.S. 162 (1875). Each of these rejections was based on the distinction between civil and political rights, *not* on women's lack of entitlement to the same civil rights as similarly-situated fellow citizens, as they would have been if that notion had been common. None of these three challenges, moreover, even mentions the Equal Protection Clause, another clue that that clause guarantees only protection from violence and the right to a remedy, not equality more generally.

Bingham relied on Bates's definition of citizenship as marking those who were "a member of the nation." U.S. House of Representatives, 41st Cong. 3rd Sess., Report No. 22, at 1. Bingham analogized the Fourteenth Amendment Privileges or Immunities Clause to the Article IV Privileges and Immunities Clause, appealing to Daniel Webster's view that that political privileges were excluded from the latter. *Id*. at 2. As with Bradley's views in *Slaughterhouse* and *Bradwell*, recounted above, Bingham did not deny that women were citizens or that the Fourteenth Amendment guarded their civil rights against hostile and discriminating legislation analogously to the way Article IV banned hostile and discriminating legislation against citizens of other

states. He and the rest of the majority of the Judiciary Committee just denied that voting was a civil right.

One week after Carpenter's oral argument on behalf of Myra Bradwell, he issued a similar report on behalf of the Senate Judiciary Committee. Carpenter relied on Section Two of the Fourteenth Amendment as well as the superfluity of the Fifteenth Amendment if the rights of citizenship as such entailed voting rights. U.S. Senate, 42nd Cong. 2nd Sess., Report No. 21, at 4-5 (1872). But he did not contradict his argument from the week before; he too of course emphatically believed in women's entitlement to equal civil rights with similarly-situated fellow citizens. In fact, Carpenter's argument in *Bradwell* included a side comment, "I concede that the right to vote is not one of those privileges." 83 U.S. at 134. For Carpenter as for Bingham—and for majorities of both the House and Senate Judiciary Committees—the distinction between civil and political rights, not women's lack of Fourteenth Amendment rights, was the reason to reject Fourteenth Amendment suffrage for women.

Finally, a unanimous Supreme Court weighed in in *Minor*. Though the Court could have simply dismissed the issue by following *Slaughterhouse*, Chief Justice Waite instead stressed that the lack of voting rights under the Fourteenth Amendment even under a robust view of citizenship such as that of the *Slaughterhouse* dissenters. Waite started with the obvious: "There is no doubt that woman may be citizens." 88 U.S. at 165. He then explained the basic obligation of the government to promote citizens' welfare: to be a citizen was to be part of "an

association of persons for the promotion of their general welfare." *Id.* at 166. Promoting women's welfare was plainly part of government's job. Like Bates and Bingham, Waite took citizenship to be "membership of a nation." *Id.* He proved at length that "women have always been considered as citizens the same as men." *Id.* at 169. Turning to what counted as the privileges or immunities of citizens, Waite did not so much as mention *Slaughterhouse*. He instead gave a long history of rights of suffrage and then repeated the same arguments that Carpenter had made from Section Two of the Fourteenth Amendment and the superfluity of the Fifteenth Amendment if political and civil rights were blurred. *Id.* at 174-75.

K. The Nineteenth Amendment Did Not Change the Fourteenth Amendment.

Steven Calabresi and Julia Rickert have proposed that the Nineteenth Amendment's prohibition on sex discrimination in voting—"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"—should be read to also ban, categorically, any and all distinctions between men and women in civil rights. The article's precise thesis is most clarified when the two co-authors explain their slightly different takes:

> Professor Calabresi's view is that it was only in 1920, when the Nineteenth Amendment struck out the word male in Section Two of the Fourteenth Amendment, that sex discrimination became unconstitutional as to all civil rights. Ms. Rickert thinks that Section One always

> could have been legitimately read to prohibit laws discriminating on the basis of sex, but she admits that it would have been challenging to argue that all sex-discriminatory laws were arbitrary and unconstitutional while the Constitution still explicitly privileged males. But the authors completely agree that the Nineteenth Amendment, as an analogue to the Fifteenth Amendment, made sex-discriminatory laws as unconstitutional as race-discriminatory laws.

Calabresi & Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 68 n.321 (2011). The two Fourteenth-Amendment-focused briefs in this case rely on this article. See, e.g., CAC Brief at 3, 12-14; Eskridge Brief at 4.

There are several problems with using the Nineteenth Amendment as a basis for *Craig*. First off, Calabresi and Rickert's reading of Section Two of the Fourteenth Amendment is anachronistic. Suffragettes were upset about Section Two, to be sure, but not because it suggested that women were not citizens entitled to equal civil rights with similarly-situated male citizens. They were upset because Section Two (a) made plain that voting rights were not Section-One-protected civil rights, either for freedmen or for women, and (b) imposed its House-representation penalty to encourage voting rights only for men, not for women. If we distinguish civil rights from political rights the way the vast bulk of Republicans did during Reconstruction, Section Two poses no problem at all in seeing the Section One as a guarantee of civil rights for women,

albeit not a categorical condemnation of all laws that pay attention to sex differences.

Moreover, the text of the Nineteenth Amendment plainly does not itself secure civil rights as such—rights to treatment as a citizen when the government acts upon them—for women. The Nineteenth Amendment confirms that women are to be trusted with the most important duty of *active* citizenship, to be sure, and that confirmation was useful in securing, at least from 1923 to 1937, women's equal entrepreneurial liberty with men, subject to the obvious codicil that "physical differences must be recognized in appropriate cases." *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923). But the guarantee of civil rights itself has to rest elsewhere, in Section One of the Fourteenth Amendment. If the original meaning of that provision did not secure equal citizenship for women, the Nineteenth Amendment leaves that issue as it found it.

Finally, contrary to Calabresi and Rickert's claim, the Nineteenth Amendment did not strike the word "male" out of Section Two of the Fourteenth Amendment. After the Nineteenth Amendment, a literacy requirement would itself have to apply both to men and women, but if the rate of literacy were different between men and women, it would be the ratio of *men* denied the vote that would matter for the Section Two House penalty. The word "male" thus still does work.

L. The Only Petitioner-Side Amici Who Address Fourteenth Amendment History Support a Shift to Citizenship.

The only two petitioner-side amici to address Fourteenth Amendment history in any detail—the Eskridge-Calabresi group and the Constitutional Accountability Center—both present material that powerfully supports a shift to citizenship as the basis for equality doctrine. Neither the CAC nor the Eskridge-Calabresi group even *mentions* intermediate scrutiny or *Craig*, much less attempt to defend them on historical grounds.

The Eskridge-Calabresi group cites Senator Charles Sumner's argument that "the State, like an impartial parent, regards all of its offspring with an equal care." Eskridge Brief at 31. Sumner's "impartial parent" caring for all citizens fits perfectly with the duty owed by trustees with multiple beneficiaries to give "fair and impartial attention to the interests of all parties concerned" proposed as a model for Fourteenth Amendment citizenship more generally in Green, *Citizenship and Solicitude*, 47 HARV. J. L. & PUB. POL'Y 465, 495-504 (2024).

For its part, the CAC quotes Justice Ginsburg's repeated emphasis in *Virginia* on "full citizenship stature," CAC Brief at 13, explains the Nineteenth Amendment as "equal citizenship to all regardless of sex," *id.*, complains that *Bradwell v. Illinois* countenanced "second-class citizenship status" for women, *id.*, and insists on preserving "principles that safeguard equal citizenship stature for all persons regardless of sex," *id.* at 19. The CAC quotes the Chicago Tribune's statement that the proposed Section One would "put in the fundamental law the

declaration that all citizens were entitled to equal rights in this Republic" and the Cincinnati Commercial's statement that Section One would make it "impossible for any Legislature to enact special codes for one class of its citizens." *Id*. at 10.

III. The Fourteenth Amendment Requires Good-Faith Promotion of All Citizens' Interests, Sometimes Against Citizens' Own Wishes.

If the Court were to switch from intermediate scrutiny to equal citizenship, what would fair and impartial attention to all citizens' interests mean here? It would not mean deferring reflexively to citizens' assessments of their own interests, or even as aided by professionals or parents. Fourteenth Amendment citizenship is perfectly consistent with paternalism by the government.

A. *Corfield* and Alcohol-Regulation Cases Approve Paternalism in Promoting Citizens' Genuine Interests.

As this Court recognized in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 240 n.22 (2022), the leading judicial explanation of the rights of citizenship before Reconstruction was Justice Bushrod Washington's circuit court opinion in *Corfield v. Coryell*, 6 F.Cas. 546, 551-52 (C.C. E.D. Pa. 1825). Senator Howard quoted *Corfield* at length during his introduction of the Fourteenth Amendment. Cong. Globe, 39th Cong. 1st Sess. 2765 (1866). *Corfield* noted that the "right to pursue happiness and safety" is "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Corfield v. Coryell*, 6 F.Cas. 546, 551-52 (C.C. E.D. Pa. 1825).

To be a citizen was obviously not to be shielded from governmental paternalism.

The paradigmatic issue in which states exercised paternalistic concern for the interests of its citizens was in regulating or banning alcohol. The biggest proponents on the Court of a citizenship-focused reading of the Fourteenth Amendment—Justices Field, Bradley, and Harlan—all explained why paternalistic regulation was consistent with the equal concern for citizens' welfare that states owe their people. See *Bartemeyer v. Iowa*, 85 U.S. 129, 138 (1874) (Field, J., concurring) (explaining why his robust view of citizens' rights in *Slaughterhouse* allowed paternalistic legislation); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1878) (Bradley explaining for the Court why legislatures were required to promote citizens' genuine interests, not merely citizens' momentary views, in line with Cicero's maxim, *salus populi suprema lex*); *Mugler v. Kansas*, 123 U.S. 623, 662, 669 (1887) (Harlan explaining why a right against paternalism "does not inhere in citizenship," and that the Court would only strike down paternalistic legislation if "its real object is not to protect the community, or to promote the general well-being"). The Court has repeatedly noted that in regulating alcohol, the state may define its appropriate medical use. See *License Cases*, 46 U.S. 504, 518 (1847) (only licensed apothecaries allowed to sell alcohol for medicine); *Mugler*, 123 U.S. at 654-55 (approving licensing scheme for limiting medical sales to druggists); *Everard's Breweries v. Day*, 265 U.S. 545, 562-63 (1924) (allowing Congress to conclude categorically, without being second-guessed by individual doctors or parents, that malt liquor and beer lack any medicinal properties and thus could be

prohibited even though the Eighteenth Amendment is limited to "beverage purposes").

Even before *Bradwell*, the California Supreme Court considered a Fourteenth Amendment sex-discrimination argument in *Ex Parte Smith*, 38 Cal. 702 (1869), upholding a municipal ordinance that banned women, but not men, from visiting "any public drinking saloon, beer cellar or billiard room" after midnight. Addressing a state-constitutional provision on "pursuing and obtaining happiness"—the same language used in *Corfield*—the Court explained that for their own good, women could be kept from late-night attendance at bars:

> It is true that, in a certain sense, it may be said that the ordinance interferes with the enjoyment of life and liberty, if it be *enjoyment* to a female to be in a drinking saloon, beer cellar or billiard room, where vinous, malt or spiritous liquors are sold or given away, to be drank upon the premises after twelve o'clock at night. … In the same sense, it may interfere with the pursuit of happiness, if it be *happiness* for a female to be at the places mentioned after midnight.

Id. at 704. The Court noted that refusing to allow paternalism in such a case "would defeat the very ends and objects of the social compact." *Id*.

B. Justice Ginsburg and the Court's Insistence that Inherent Sex Differences Remain Cause for "Celebration" Fits Reconstruction History.

Justice Ginsburg wrote famously for the Court in the VMI case, " 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The difference between "celebration" and "denigration" captures well what citizenship requires. States must see all citizens as their beneficiaries and seek to promote their welfare in good faith: to celebrate their citizens for their qualities, rather than denigrate them. To be a citizen is to be be free, not from paternalism or from one's basic biological characteristics, but from "hostile and discriminating legislation" (to quote the *Slaughterhouse* dissenters) that undermines one's "true and substantial happiness" (to quote Seneca Falls).

Justice Ginsburg's VMI dictum fits well with Seneca Falls's promotion, noted above, of women's "confidence in her own powers" and "self-respect." Suffragettes' discussions of biological differences between men and women during Reconstruction are likewise striking. Elizabeth Cady Stanton, Parker Pillsbury, and Susan B. Anthony's newspaper THE REVOLUTION published essays extolling differences between men and women at the same time they advocated equal civil rights. Editorials by Stanton sought to promote "everything that can exalt,

dignify, and inspire woman," 1 THE REVOLUTION 57 (January 29, 1868), touted "the essential elements of true womanhood," *id*. at 242 (April 23, 1868), and noted that "with all, we recognize a marked difference in the sexes." 2 *id*. at 185 (September 24, 1868). The editors termed one essay "earnest and eloquent" that argued that if women were given proper liberty, "[t]he essential qualities of her mind and moral qualities would become clearly defined." 1 *id*. at 99 (February 19, 1868). The paper reprinted an essay from Auguste Comte: "The natural differences of the sexes, happily completed by their social differences, renders each one of them indispensable to the moral perfectionment of the other." *Id*. at 229 (April 16, 1868). The paper reprinted comments from the Dublin Express: "What we want is the more perfect education and intellectual development of woman, not her conversion into man." 2 *id*. at 188 (September 24, 1868).

Justice Ginsburg, of course, was steeped in the nineteenth-century women's rights literature, famously quoting the 1837 plea from Sara Grimke that men merely "take their feet off our necks," see *Frontiero v.* Richardson, 411 U.S. 677 (1973), oral argument at 20, and noting that "men and women are persons of equal dignity and they should count equally before the law but they are not the same," *Duren v. Missouri*, 439 U.S. 357 (1979), oral argument at 15.

If promoting women's self-respect is proper, Tennessee's law must be upheld. As the Solicitor General noted, see Petitioner's Brief at 33, Tennessee's law is "perfectly crafted" to serve the interests in encouraging "appreciation" and

discouraging "disdain" of one's sex. The argument that intermediate scrutiny has somehow rendered such interests illegitimate or unimportant would not have been well-received by the earliest advocates of women's equal citizenship.

CONCLUSION

As citizens, women have the right to demand that states pursue their interests as energetically as they do the interests of men. States are likewise obliged to consider the interests of citizens with gender dysphoria just as much as they do the interests of others. The evidence is abundant in this record that Tennessee has neither sought to harm those with gender dysphoria, nor been insensitive to their needs. Gender dysphoria is strongly associated with self-destructive behavior, and Tennessee has a reasonable basis for believing that cross-gender hormones for young people will only exacerbate that association. Tennessee has a good-faith belief that it will serve the general good if young people are encouraged to celebrate and appreciate, rather than disdain or denigrate, their biological sex. That belief fits the best American tradition of equal citizenship. The judgment below should be affirmed.

Respectfully submitted,

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