

DOMESTIC DISORDERS: SUFFRAGE AND NEW YORK'S CONSTITUTIONAL CONVENTION OF 1867

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I first want to thank Tracy Thomas. Eight years ago we gathered at the University of Akron School of Law for the “New Faces of Women’s Legal History Conference,” and I have enjoyed being part of her many projects to create, propagate, and publicize women’s legal history.¹ What I love about her forthcoming book is how it positions Elizabeth Cady Stanton as a profound and original legal thinker and intellectual,² and it parallels my own work on later women legal activists and thinkers such as Florence Kelley and Sophonisba Breckinridge.³ We know that the field of legal history is still intellectually segregated, and we bang on the doors of the legal history cannon hoping that the historical figures that we study will be admitted to the pantheon of jurisprudential history. What I also deeply appreciate about Tracy’s book is its dialogue with authors who do not fully account for the real and material injuries of coverture as coverture functioned as both a material lived harm and an injury to dignity—what one of my colleagues calls a dignity taking.⁴ Lisa’s work on the myth of Seneca Falls is also a tour de force in showing how messy and on the ground the campaign for women rights

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1. See, e.g., Tracy A. Thomas, *The New Face of Women's Legal History: Introduction to the Symposium*, 41 AKRON L. REV. 695 (2008); TRACEY JEAN BOISSEAU & TRACY THOMAS, EDs., *FEMINIST LEGAL HISTORY: ESSAYS ON WOMAN AND THE LAW* (2011).

2. TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* (forthcoming 2016).

3. See FELICE BATLAN, *WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863-1945* (2015); Felice Batlan, *Florence Kelley and the Battle Against Laissez-Faire Constitutionalism*, (Dec. 1, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721725.

4. BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* (2014); Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Pushing Beyond Constitutional Takings to Examine the Other Side of the Takings Spectrum*, LAW & SOC. INQ. (forthcoming 2016).

was during the long nineteenth century.⁵ Like Lisa, my own work asks how and why history is written and what becomes masked in the process.

In both Tracy and Lisa's work we also see the crucial relationship between federalism and first wave feminists' endless attempts to dismantle the structure of legal patriarchy. Indeed women's fight for equality should be understood and taught as part of the history of federalism. As Tracy accounts, whether women could hold property or their own wages, seek a divorce, or even custody of children was dependent on state law.

Here, I will be discussing New York State's Constitutional Convention of 1867. I argue that it is (at least in part) the outcome of this convention and the antagonisms that it created, which further propelled Elizabeth Cady Stanton and Susan Anthony to become aligned with the White Supremacist George Train. It also shows the absolute mess of pursuing suffrage on a state by state basis and how legislators themselves equated the voting of African American men with women's suffrage. I am just beginning this project and hope to be in conversation with both the body of scholarship about Reconstruction in the North and a second body of scholarship on women's history.⁶

During the long summer of 1867, we might imagine that the Greeley household was anything but peaceful. Horace Greeley, owner of the *New York Tribune*, abolitionist, and Republican politician, was Chairman of the Committee of Suffrage at the 1867 New York State Constitutional Convention in Albany. Elizabeth Cady Stanton had long known the Greeleys and the *Tribune* had supported women's suffrage before the war. The Committee was charged with making a recommendation on the issue of African American male suffrage and women's suffrage. Where the Committee reported favorably on the former, it steadfastly rejected women's suffrage. As Greeley sat on the floor of the Albany convention, a petition from Mrs. Greeley was delivered in favor of women's suffrage. As it was read out loud, laughter erupted throughout the hall. During the course of the convention, petitions in support of women's suffrage continued to arrive, disrupting talks of canals, taxes, and ordinary convention business.⁷

5. LISA TETRAULT, *THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848-1898* (2014).

6. See, e.g., DAVID QUIGLEY, *SECOND FOUNDING: NEW YORK CITY, RECONSTRUCTION, AND THE MAKING OF AMERICAN DEMOCRACY* (2005).

7. See, e.g., *Proceedings and Debates of the Constitutional Convention of the State of New York, Held in 1867 and 1868, in the City of Albany*, vol. 2. (New York: Albany), 1868, 157-158.

Contemporaries viewed the convention as a disaster. It drew to a close only after nine months in which the delegates were unable to agree upon almost anything, from who should have the vote, to the per diem stipend, to whether the windows should be opened, to the legality of the convention itself.⁸ It even began in the wake of a cold blooded murder. L. Harris Hiscock was an assembly man from Syracuse and a convention delegate. As he left his Albany hotel and headed to the opening proceedings of the convention, George Cole, his dear friend, shot him at point blank range. Cole defended his actions as an honor murder claiming that Hiscock had seduced his wife and perhaps attempted to rape her while Cole was fighting with the Union army.⁹

The Greeley and Hiscock matters are related. Both highlight an issue that haunted the convention—what was the relationship between the domestic sphere and the properly ordered state? Greeley's household appeared patently disordered as his wife seemed to usurp male privilege and exercise an agency that subverted Greeley's status as a household head who exercised control over his family. Cole's act of murder was an attempt to reestablish his right to his wife's body and to his role as family protector. These stories function as metaphor for the larger issue at the convention of African American male and women's suffrage. When discussing suffrage, the delegates did so using a discourse of manhood and the proper ordering of the household. For them, the state's political order was intimately linked to domestic order and within this equation stood the very question of what it meant to be a man and a citizen. The political and domestic economy were thus mapped on to each other. Moreover, delegates continually confronted the question of whether voting was a civil, political, or social right and their decisions would have long-lasting implications.

A little background is necessary. The 1777 New York Constitution provided that any man could vote for the lower house of the legislative assembly if he possessed a \$50 freehold, rented a \$5 tenement, or had been a freeman in Albany in 1777 or New York City in 1775. To vote for senator or governor required a \$250 freehold. In practice, public officials allowed their friends and acquaintances of good character to vote regardless of the property qualification. Although *prima facie* racially neutral, in reality the qualification bore more heavily upon

171, 178, 196; *The Constitutional Convention*, NY TIMES, July 18, 1867, 1.

8. See, e.g., *Constitutional Convention*, NY TIMES, Nov. 19, 1867, 1.

9. *Emotional Insanity as a Defense for Crime*, NY TIMES, Sept. 6, 1908. See also HEDRICK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 220-21 (2000).

African American men who may not have been freemen in those years, did not own property, and were not friendly with election officials.

Historians dub the 1820s the age of Jacksonian Democracy, as state after state instituted universal white male suffrage. Although this is rightly celebrated, often neglected is the manner in which African American male suffrage actually contracted during the period. New York State stands as a perfect example. In 1821, New York held a constitutional convention for the primary purpose of enlarging the franchise. The result was the elimination of the property qualification for white men. African American men, however, now had to possess a \$250 freehold on which they paid taxes to qualify to vote. Interestingly, the provision also stated that an African American male, unless qualified to vote, could not be directly taxed.

Such provision disenfranchised all but a small number of African American men. In 1825, only 298 African-American men in a total population of 29,701 possessed the requisite freehold. The role of taxation here is complicated. On the one hand, if we think of taxation as an obligation of citizenship, most African American men were entirely excluded—not worthy of even being taxed and therefore constructed as standing outside the community. On the other hand, women were taxed but could not claim suffrage rights. Twice, first in 1846 and later in 1860, New York held popular referendums to remove the property qualification for African American men. Despite the active campaigns that African American men's organizations launched, both referendums suffered resounding defeats at the polls.¹⁰

At least one of the reasons that the 1867 convention had been called was to eliminate this property qualification. Why the Republican administration led by Governor Reuben Fenton wanted to do this appears to be some combination of principles and politics. Eleven thousand new African American voters, who it was assumed would vote Republican, could have boosted the Republican Party to victory as the state was often evenly split between Democrats and Republicans. Furthermore, some argued that, for emancipation and Union victory truly to take hold in the South, African American male suffrage was crucial. Others argued that New York should provide a model for southern states. Finally a minority believed in the importance of equal political rights for men. But what about women?

Months before the convention began, the question arose as to who

10. QUIGLEY, *supra* note 5, at 54-55; Erika Wood & Liz Budnitz, Brennan Center for Justice, *Jim Crow in New York*, at http://brennan.3cdn.net/50080b21f7f0197339_z7m6i20ud.pdf.

would have the right to vote for delegates. Radical Republicans argued that African American males should have such rights, and a smaller group insisted that both women and African Americans should be allowed to vote for delegates. Needless to say neither African American men nor women were allowed to vote for convention delegates. An attempted bid by Frederick Douglass to be even nominated as a Republican delegate was decisively rejected by the Republican Party. The question of who could vote for delegates went to the incredible inequity of only white men deciding whether the franchise would be expanded.

In the assembly chamber in Albany, on the afternoon of January 23, 1867, Elizabeth Cady Stanton then fifty-two years old with her trademark crown of white curls and swathed in yards of dark silk, stood and addressed a packed assembly. Stanton by this time was nationally recognized as one of the leaders of the women's rights movement.¹¹ Although there is no record of Stanton's inner thoughts as she addressed the New York assembly on that January day, we can assume that she felt quite comfortable. As Tracy's work makes so clear, Stanton had spoken in front of the New York legislature multiple times including advocating for women's property rights and the end of coverture.¹²

Stanton began with the basic argument that women were taxed without representation and compared this with African American men who were not taxed since they were denied the franchise.¹³ She also demonstrated the absurdity of a classification that assumed all African Americans were male by relating the story of a wealthy African American woman who paid substantial taxes yet still was prevented from voting. In other words, this woman was classified as a woman for purposes of taxation and suffrage but she was equally African American. Through these examples, Stanton demonstrated that New York's suffrage rules were inconsistent as well as over- and under-inclusive. Most importantly she repeatedly viewed African American male suffrage and woman's suffrage as inherently linked.

Stanton was already familiar with the argument that women's suffrage would destroy the home. Citing the example of New Jersey where women and African American males voted until 1806 (at which time they were disenfranchised), she replied, perhaps somewhat tongue and cheek: "Did the men of that period become mere satellites of the

11. Elizabeth Cady Stanton, "Address in Favor of Universal Suffrage, for the Election of Delegates to the Constitutional Convention," Jan. 23, 1867.

12. Thomas, *supra* note 2, chap. 2.

13. *Id.*

dinner-pot, the wash-tub, or the spinning wheel? Were they dwarfed and crippled? Did the children spring Minerva-like, from the brains of their fathers?"¹⁴ In this statement, we can observe some of the fears that anti-suffragists possessed and expounded. Anti-suffragists raised the question of how the vote would affect women's domestic role. If the very nature of the vote was public and political, would it woo women away from the domestic sphere, which was conceptualized as private and apolitical? Could the vote make women into men and men into women? What would it mean for the power dynamics between a husband and wife if they were to disagree publicly over political questions as the Greeleys did?

As the convention proper proceeded, the question of universal suffrage was raised repeatedly and some of the leading suffrage activists such as Lucy Stone spoke at the convention. The painful splits that would affect the women's suffrage movement had not yet become fully inscribed. Universal suffrage was still a possibility. Yet when Greeley's Committee reported on the issue, it recommended against women's suffrage. The report reads in part: "We are satisfied that public sentiment does not demand and would not sustain such an innovation so revolutionary and sweeping, so openly at war with a distribution of duties and functions between the sexes as venerable and pervading as government itself, and involving transformations so radical in social and domestic life."¹⁵ Women's suffrage was understood as not simply a political right but one that would have implications in the very ordering of every-day domestic life, and indeed the social hierarchies upon which society was built. On the convention floor, the legal reforms that women had achieved such as the married women's property acts, which Tracy's book discusses in length, came under question as perhaps a mistake. One delegate asserted that such acts destroyed the eloquence of the common law and brought in foreign legal elements such as the Napoleonic code and Louisiana's civil law, indicating that women's rights were not quite right for real Americans. Others argued that New York citizens were on a dangerous slippery slope; first came the married women's property acts, women's suffrage would be next, and then women would have ambitions to be jurors, attend law school, work on stock exchanges, and run for elective office. This would injure women themselves, the family, and ultimately the state. From where did this right to women's suffrage arise some asked and then answered, certainly not nature as women's

14. *Id.* at 16.

15. *Documents of the Convention of the State of New York, 1867-68, v.1, 6-7 (1868).*

true nature was to be in the home.¹⁶

With women's suffrage essentially a dead letter, attention turned to African American male suffrage. Yet as can be seen from the debates, African American and women's suffrage remained knotted together.¹⁷ Proponents of African American male suffrage argued for it on a number of grounds. Some claimed that voting itself was an inalienable right of the individual and that the Declaration of Independence proclaimed all men as created equal.¹⁸ Opponents responded that suffrage was a political privilege constructed by society as evidenced by the fact that women were individuals but could not vote. Thus where the Radical Republicans were willing to separate the question of African American male suffrage and women's suffrage, opponents were not.¹⁹

In response to Democrats' opposition, some Radical Republicans narrowed their argument and claimed that voting was an inherent right not of the individual but of "manhood."²⁰ But who possessed such requisite manhood? Some argued that African American men inherently possessed manhood. Others argued that African American men had demonstrated their manhood by fighting for the Union. Having proved their manhood on the battlefield, they now were entitled to the ballot, which was the very essence of manhood.²¹ Yet Democrats countered even this argument by citing the role that women performed for the Union as nurses on the battlefield. In part, anti-suffragists were now using the very arguments that were raised by suffragists, as to why women were entitled to vote, to defeat African American male suffrage.²²

As the convention continued, the tensions in the definition of manhood, who could claim it and what it meant, was debated with fetish like attention. Indeed the very concept of manhood seemed to be falling apart.²³ Repeatedly, delegates claimed that political equality for African American men would lead to social equality. Social equality was a code word for African American men (and it was always men) having sex – and children—with white women.²⁴ If at least part of the definition of manhood was based upon access to and control of white women, would

16. See, e.g., *Proceedings and Debates*, *supra* note 7, at 429-44.

17. *Documents of the Convention*, *supra* note 15, at 4-11.

18. *Id.* at 4.

19. *Proceedings and Debate*, *supra* note 7, at 241-20.

20. *Id.* at 272.

21. *Id.* at 270-22.

22. *Id.* at 256-60.

23. *Id.* at 213, 241-26.

24. *Proceedings and Debate*, *supra* note 7, at 213, 241-56.

African American men's admission to manhood result in sexual access to white women thereby defeating white manhood? Moreover, as some implied, if women were given the vote, manhood itself would unravel as manly women unmade manhood. Only white women firmly ensconced within the home could confer true manhood.²⁵

Other delegates attempted to pull apart the question of political and social equality, arguing that political equality was a question for the legislature and that social relations were supervised by the man in his home. Indeed, the dominant role of a man over his household was divine, and women's suffrage would destroy the home's perfect ordering depriving children of their mothers and husbands of their wives.²⁶ In part, the power of the white man to supervise his home was one of the focal points of the debate regarding African American male suffrage and women's suffrage. Suffrage in each case threatened white male control of wives and daughters, who they feared would abandon domestic tasks, challenge the power of their husbands and fathers, and marry or engage in illicit affairs with newly empowered African American men. Like the South following the Civil War, New York legislatures embraced this trope of the over-sexed black man who could not be entrusted with the vote. Indeed the very debate regarding African American male suffrage came to map earlier pro-slavery arguments about the capacity, intelligence, and loyalty of African Americans which would continue well into the civil rights era. Finally, through debates about the exclusion of women and African Americans from suffrage, the vote came to be understood as simply a privilege and not a right.²⁷ Such a privilege could thus lawfully be denied and restricted.

Horace Greeley, following the convention, reasserted his public power. According to Stanton, although the *Tribune* often had published articles favoring women's rights, it ceased to do so. In the end, New York's white male voters rejected removal of the property qualification for African American men and it was only with the adoption of the Fifteenth Amendment in 1870 that it was eliminated.. Those fighting for women's suffrage moved on to the state of Kansas and the halls of Congress. Stanton and Anthony's speeches increasingly took on strains of white supremacy as they argued that educated white women were more qualified to vote than African American men. Yet as the 1867 proceedings demonstrate, African American male suffrage and women's

25. *Id.* at 429-44.

26. *Id.* at 429-36.

27. *Id.* at 436-40.

suffrage were still deeply linked.