Jury Service and Women's Citizenship before and after the Nineteenth Amendment

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The Nineteenth Amendment to the Constitution had surprisingly little impact on women's citizenship or the American constitutional order.[1] For seventy-two years, from 1848 until the passage of the Nineteenth Amendment in 1920, suffrage was the central demand of the woman rights movement in the United States. Women demanded the right to vote in the nineteenth

1. The constitutional order of the United States refers to the role of the Constitution, constitutional discourse, and constitutional law in structuring the polity both institutionally and socially. The Constitution begins with the words, "We, the People." It is a phrase that both assumes and creates a national political community. It is for this new community, in its desire to form "a more perfect union," that a national government is erected. In its details, the Constitution is an institutional design for a federal government. But it is also more than that. It is the creation of a national political community and a statement about the relationship between the government and the people. That relationship is most obvious and apparent in the Preface, the Bill of Rights, the Reconstruction Amendments, and the other suffrage amendments. But it is present throughout the Constitution. Citizenship, then, to the extent that it speaks to the reciprocal relationship between the people and the government, is at the heart of this constitutional order. It follows that changes in the structure and character of American citizenship would be central to the development of the constitutional order. Robert Cover, "Nomos and Narrative," in *Narrative, Violence and the Law: The Essays of Robert Cover,* ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), 95–172; William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991).

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century because they believed it would make them first class citizens with all the rights and privileges of other first class citizens. Both normatively and instrumentally, the suffragists believed that voting would secure equal citizenship for women by raising their civic status and allowing them to assert their political interests. Yet in many ways women were more politically efficacious in the years just prior to the passage of the Nineteenth Amendment than they were afterward.[2] Further, their ability to claim rights from the courts and legislatures, on the basis of their new status as voting citizens, was limited.

Why suffrage failed to transform women's citizenship remains a puzzle. Most studies in political science deal with the impact of the Nineteenth Amendment within the arena of electoral politics.[3] These studies find that it took decades for women to be fully incorporated into the electoral system and that they did not exhibit an independent voice in electoral politics until quite recently. Historians have also addressed the way that the passage of the Nineteenth Amendment affected the woman rights movement in the 1920s and 1930s.[4] Most conclude that the success of the suffrage campaign resulted in division and disorganization among women's rights activists. But few have considered the impact of the Nineteenth Amendment from a legal or constitutional perspective, particularly with regard to citizenship.[5] Among

2. Gretchen Ritter, "Gender and Citizenship after the Nineteenth Amendment," *Polity* 32 (2000): 301–31.

3. Kristi Andersen, *After Suffrage: Women in Partisan and Electoral Politics before the New Deal* (Chicago: University of Chicago Press, 1996); Walter Dean Burnham, "Theory and Voting Research," *Current Crisis in American Politics* (New York: Oxford University Press, 1982), 58–89; Sara Hunter Graham, *Woman Suffrage and the New Democracy* (New Haven: Yale University Press, 1996); Anna Harvey, *Votes without Leverage: Women in American Electoral Politics, 1920–1970* (New York: Cambridge University Press, 1998); and Judith Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge: Harvard University Press, 1991).

4. Nancy Cott, "Marriage and Women's Citizenship in the United States, 1830–1934," *American Historical Review* 3 (1998): 1440–73; William Chafe, *The American Woman: Her Changing Social, Economic and Political Roles, 1920–1970* (New York: Oxford University Press, 1972); J. Stanley Lemons, *The Woman Citizen: Social Feminism in the 1920s* (Urbana: University of Illinois Press, 1973); William L. O'Neill, *Everyone Was Brave* (Chicago: Quadrangle Books, 1971).

5. For exceptions, see Jennifer Brown, "The Nineteenth Amendment and Women's Equality," *Yale Law Review* 102 (1993): 2175; Ritter, "Gender and Citizenship"; and Reva Siegel, "Collective Memory and the Nineteenth Amendment: Reasoning about the 'Woman Question' in the Discourse of Sex Discrimination," in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999). For a fuller discussion of Brown, who looks at the post-suffrage jury service campaign as a way of gauging the impact of the Nineteenth Amendment, see Part 3 of this article. Ritter, "Gender and Citizenship," provides a general overview of the Nineteenth Amendment but addresses itself less to the constitutional questions considered here.

the small group of authors who have addressed this question, Reva Siegel offers the most substantial contribution to understanding the Nineteenth Amendment's impact on women's citizenship from a constitutional perspective.[6] Like the view expressed in this article, Siegel, too, sees the Nineteenth Amendment as a "missed constitutional opportunity" that was afforded little significance beyond the franchise. In explaining this, Siegel focuses on contemporary acounts of gender relations and differences as "natural" rather than historical. In contrast, the emphasis here is on nineteenth-century interpretations of the Reconstruction Amendments that limited the potential impact of the Nineteenth Amendment.

To better understand the limited impact of the Nineteenth Amendment it is helpful to look at the nineteenth- and early twentieth-century campaigns for women's jury service. After suffrage was granted, woman rights activists claimed that their new position as voting citizens entitled them to other rights, such as serving on juries. Their arguments paralleled those of an earlier generation of suffragists who claimed in the 1870s that the Reconstruction Amendments to the Constitution entitled women to all of the rights and privileges of citizenship, including jury service and voting. In both of these campaigns, rights advocates articulated their understanding of the relationship between voting and jury service within the broader context of citizenship. Thus, tracing the connections between the campaign for jury service and the campaign for suffrage reveals a great deal about the changing structure of women's citizenship.

Constitutionally and historically, jury service raised broader questions about the structure of American citizenship. In the United States, jury service is historically tied to voting. In most states, a common qualification for jury service was the status of elector—that is, a citizen with the right to vote. This also fit with the nineteenth-century woman rights movement's conception of citizenship. As equal voting citizens, women would obtain all of the rights and privileges of other first class citizens, including the right to serve on a jury. After voting, this was the most significant right or duty that citizens commonly filled. Jury service was democracy in action—it was direct governance by the citizens. Women's exclusion from this role suggested that, even with the vote, they had yet to obtain the status of equal citizens. In the nineteenth century, woman rights activists hoped to build on Supreme Court rulings regarding jury service and civic status for African American men in light of the Fourteenth and Fifteenth Amendments. After the Nineteenth Amendment passed, many former suffragists argued that women were automatically eligible to serve on juries. Yet the state courts typically disagreed.

6. Siegel, "Collective Memory."

This article considers the relationship between jury service and women's citizenship before and after the Nineteenth Amendment. One objective is to understand the impact of the Nineteenth Amendment on women's citizenship. What the debate over women's jury service reveals is that the Nineteenth Amendment did little to displace the constitutional structure of citizenship founded on the Reconstruction Amendments. That structure of citizenship separated political from civil rights, gave narrow influence to political rights status, and failed to apply equal protection analysis to women. So while the Nineteenth Amendment did help to lessen the distinctiveness of men's and women's citizenship, and gave women some recognition as public persons, it did not create equal citizenship for men and women. In a series of cases about women's jury eligibility after suffrage, numerous state courts ruled that the Nineteenth Amendment applied only to voting. The Nineteenth Amendment did have some normative influence on lawmakers and other government officials who were inclined to grant women new civil and political rights in light of their new status as voters. But even here, the influence was greater in the years leading up to the adoption of the national amendment in anticipation of women's suffrage than it was in the decade following the amendment's passage. The debate over women's jury service reveals the incomplete, partialized character of women's citizenship after the Nineteenth Amendment.[7]

There were two ways in which the Nineteenth Amendment might have transformed women's citizenship. The first possibility was more doctrinal, the second more political. Doctrinally, the courts might have found that within the larger structure of the Constitution, the Nineteenth Amendment had a broad impact that went beyond the question of the vote. For the most part, that did not occur.[8] Politically, the adoption of the Nineteenth Amendment might have signaled a broader public commitment to gender equality in law and politics. Certainly there was some normative impact that trans-

7. The concept of equal citizenship may be addressed at three levels. At the broadest level, equal citizenship pertains to civic status. All of those considered as "full" or "first class" citizens may be thought of as holding the same high civic status. The second conception of equal citizenship is more specifically rights focused and holds that any differences in the rights afforded to citizens constitute unequal citizenship. Finally, a third conception of equal citizenship examines not only rights and status but also the duties and obligations of citizens. Ritter, "Gender and Citizenship."

8. The great exception is the decision of *Adkins v. Children's Hospital,* 261 U.S. 525 (1923). Under that ruling, women were loosely incorporated into the *Lochner* regime (which refers to *Lochner v. New York,* 198 U.S. 45 [1905]) of freedom of contract—that is, they were given the same negative liberty granted to men. For more on this decision, see Joan Zimmerman, "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital,* 1905–1923," *Journal of American History* 78 (1991): 188–226.

lated into related legal and institutional reforms, but here, too, the effect was fairly limited. Neither through the courts nor through popular political channels were woman rights activists able to secure full citizenship with the Nineteenth Amendment. What the jury service campaign reveals is that the judicial failure of suffrage to provide equal citizenship was due to the existence of a constitutional structure that devalued political rights like voting. That structure was developed partly in reaction to the efforts of earlier rights advocates to claim full citizenship (including voting and jury service) under the Reconstruction Amendments.

This essay also considers the relationship between jury service and women's citizenship more generally. Here I argue that the debates over jury service illuminate the connections between the civil and political rights of citizenship. Jury service may be regarded as either a political right, that is, as a form of democratic participation in the exercise of law and justice, or as a civil right—as a matter of individual protection against state authority. Woman rights activists of the nineteenth century understood this dual character of jury service, and thought of political and civil rights as intimately connected, with political rights providing a mandate for broader claims of civil rights. But by the early twentieth century, rights activists began to conceive of civil and political rights more discretely, and the character of jury service began to be cast more narrowly as a civil right. This shift occurred partly in response to the narrow and discrete interpretation of citizenship rights (including jury service) by the Supreme Court in the late nineteenth century.

Further, I contend that the idea of jurors as peers suggests very different ways of thinking about what women bring to their duties as citizens. For women, jury service raises the issue of what it means to be a peer (as in, "a jury of one's peers")—whether this is a formal legal status, or something deeper and more substantive, that speaks to the way that women bring their lived experiences to the exercise of their civic duties. Further, jury service is a more substantial commitment, in terms of time and effort, to citizenship—a commitment that brings people more fully into the workings of the state and more intimately into contact with other citizens. As such, it raises questions about whether women's public duties affect their ability to meet their private obligations in the domestic realm. In contrast to men, women in the nineteenth and early twentieth century were never seen as fully public, and public realm activities such as jury service were sometimes thought to impinge on their private identities and activities as women.[9] Citizenship, particularly in connection to the performance of substantial civic duties such as jury service, is regarded as a public identity. Gender intersects with civic identity differently for men and women.

9. Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995).

This essay is organized into three sections. Part 1 examines the nineteenth-century debate over jury service in relation to women's citizenship. Part 2 considers the campaign for jury service following the passage of the Nineteenth Amendment. Part 3 concludes with some thoughts about what the struggle for the vote and jury service teaches us about the nature of the women's citizenship in recent years.

I. Jury Service and Citizenship: The Nineteenth-Century Debate

> [W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.[10]

What is the relationship between jury service and citizenship? The common law tradition of trial by jury is meant to serve as a guarantee of liberty against abusive exercises of governmental authority. Yet, not only do juries help to protect individual liberty, they also serve as an institution of self-government in which citizens apply the law to members of the community. As part of the Bill of Rights, the Constitution guarantees all criminal defendants a right to trial by an impartial jury under the Sixth Amendment. The right of citizens to serve on juries has been considered most prominently under the Fourteenth Amendment's Equal Protection Clause. In addition to concern about the rights of defendants and the rights of potential jurors, the concept of a "jury of one's peers" connects jurors to defendants around the issue of civic status. What determines who a defendant's peers are? Must they have the same civic status and political rights? Should they belong to the same community as the defendant and have a shared sense of justice? Should race or gender matter in determining who one's peers are? In all these respects—regarding the rights of defendants, the rights of potential jurors, and the concept of jurors as peers—jury service is connected to citizenship.

In the late nineteenth century, jurisprudence concerning the Constitution's Reconstruction Amendments explored this connection. The Thirteenth, Fourteenth, and Fifteenth Amendments (passed just after the Civil War) abolished slavery, established the terms of national citizenship, and provided that the right to vote would not be determined on the basis of race or previous condition of servitude (slavery). After these amendments were passed, there were competing views regarding their scope and meaning. It was left to the Supreme Court to make a judicial determination of the meaning. What was the scope of national citizenship and to whom did it

10. *Powers v. Ohio,* 499 US 407 (1991).

apply? How did a history of subjugation or civic exclusion affect the rights granted to different groups of citizens? As the court sought to answer these questions, they dealt, among other matters, with jury service and voting and their relationship to citizenship.

This was the constitutional context within which the woman rights movement made claims for women's right to vote and serve on juries. According to the state and federal courts, there were at least four reasons why women were ineligible to serve on juries. The most direct constraint was the common law tradition that made women ineligible for jury service. In Blackstone's *Commentaries,* a jury is defined as consisting of "twelve free and lawful men, *liberos et legales homines.*"[11] The text goes on to state that "Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus.*"[12] Their sex constituted a defect that barred women from jury service. Secondly, setting aside this direct prohibition, most women were not regarded as persons before the law under the rules of coverture. This denial of legal personhood for married women left them without many civil or political rights. A third, more narrow and more readily overcome, constraint concerned women's electoral status. Most states defined the pool of eligible jurors as electors. Thus, until women could vote, they could not serve on juries. Finally, some states had specific statutory or constitutional provisions that explicitly limited the class of eligible jurors to men.

Yet the woman rights movement offered its own interpretation of the Reconstruction Amendments and jury service as they related to women's citizenship. First, on the basis of the Fourteenth Amendment, rights advocates argued that women were entitled to vote and serve on juries as privileges of citizenship. Second, activist women of this period built their arguments about the Fourteenth Amendment upon the foundation of an earlier argument they had developed about the role of jurors as peers, contending that women defendants were entitled to have women jurors as their peers. Finally, as the suffrage movement met with some success in the late nineteenth century, suffragists stressed the connection between electoral status and jury service. This dialogue about jury service and citizenship within the Supreme Court and the woman rights movement reveals sharply contrasting visions of national citizenship, its privileges and immunities, and the role of political rights in civic life.

11. Sir William Blackstone, *Commentaries on the Laws of England* (New York: Garland, 1978), 3: 352.

12. Blackstone, *Commentaries,* 3: 362.

A. Equal Citizenship and the Fourteenth Amendment

After the Civil War, woman rights advocates claimed both the right to vote and the right to serve on juries as protected rights of citizenship under the Fourteenth Amendment. Adopted in 1868, the Fourteenth Amendment defined national citizenship and provided for the protection of the privileges and immunities of citizens. Further, the amendment declared that no state could deny equal protection of the laws to any persons in its jurisdiction. Finally, the amendment prohibited the states from denying "life, liberty or property without due process of law." The campaign for a broad interpretation of the Fourteenth Amendment and the assertion of citizenship rights under it was referred to as the New Departure.[13] Advocates of the New Departure argued that once women were recognized as people and citizens under the Constitution, then they were entitled to all of the rights and privileges of citizenship, including the right to vote. Further, voting was regarded as a foundational right that provided a necessary guarantee for the other rights of citizenship. In asserting their rights as citizens under these amendments, women across the country tried to vote. This lead to several significant court cases, where the importance of jury service as a right of citizenship also came into focus.[14]

The New Departure campaign began shortly after the adoption of the Fourteenth Amendment. Attorney Francis Minor, along with his wife, rights activist Virginia Minor, are credited with first seeing the significance of the amendment for women's citizenship. At the behest of the Minors, a suffrage convention in St. Louis in 1869 proclaimed, "*Whereas,* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside; be it *Resolved,* 1. That the immunities and privileges of American citizenship, however defined, are national in character and paramount to all State authority."[15] As this statement indicates, at stake in the New Departure was not just the character of women's citizenship and their right to vote and serve on juries, but the character of the American constitutional order.

Though it did not succeed, the New Departure contributed to a broader

13. Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joselyn Gage, eds., *History of Woman Suffrage,* vol. 2 (New York: Arno, 1969); Linda Kerber, "'Ourselves and Our Daughters Forever': Women and the Constitution, 1787–1876," in *One Woman, One Vote,* ed. Marjorie Spruill Wheeler (Troutdale, Ore.: NewSage Press, 1995), 21–36; Ellen Carol DuBois, "Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage and the Constitution," *Journal of American History* 74 (1987): 836–62, and "Taking the Law into Our Own Hands: *Bradwell, Minor,* and Suffrage Militance in the 1870s," in *One Woman, One Vote,* 81–98.

14. Stanton, Anthony, and Gage, *History of Woman Suffrage,* 2: chap. 25.

15. Ibid., 408.

debate about the nature of national citizenship under the Reconstruction Amendments. In 1871, Victoria Woodhull sent a memorial to Congress asking for a declaratory statement of women's rights under the amendments. The Judiciary Committee of the House of Representatives debated the memorial and decided against it, declaring that, while women were citizens, voting was not a privilege of national citizenship. However, in the minority report, several members of the committee presented a different view that confirmed the analysis behind the New Departure.

> This [Fourteenth] Amendment, after declaring who are citizens of the United States and thus fixing but one grade of citizenship, which assures to all citizens alike all the privileges, immunities and rights which accrue to that condition, goes on in the same section and prohibits these privileges and immunities from abridgement by the states. Whatever these "privileges and immunities" are, they attach to the female citizen equally with the male. . . . We claim that by the very nature of our Government, the right of suffrage is a fundamental right of citizenship.[16]

This alternative interpretation of the Reconstruction Amendments contained several elements. First, there is an assertion of the supremacy of national citizenship. Second, there is a unified view of citizenship as involving only "one grade." Third, women are included in the various clauses of the Fourteenth Amendment in their status as persons, their membership in "We, the People," and their standing as citizens. Finally, suffrage is claimed as a fundamental and historic right of citizenship.

As part of the strategy of claiming citizenship rights under the New Departure, woman rights activists around the country attempted to vote. Among them was Susan B. Anthony and several other women who went to their local polling places in upstate New York in 1872 and convinced the local election officials to allow them to cast ballots. Anthony was then prosecuted under a federal civil rights law for casting an illegal ballot. In speeches she gave around the region before her trial in 1873, Anthony discussed women's citizenship. She noted that the New York State constitution stated that "No member of this state shall be disenfranchised, unless by the law of the land or the judgment of his peers." She then asserted that "'The law of the land,' is the United States Constitution; and there is no provision in that document that can be fairly construed into permission to the States to deprive any class of their citizens of the right to vote. . . . Nor has 'the judgment of their peers' been pronounced against women exercising their right to vote. No disenfranchised person is allowed to be judge or juror—and none but disenfranchised persons can be women's peers."[17]

16. Ibid., 468, 470.
17. Ibid., 634.

Later in this speech, Anthony spoke again about the link between jury service and voting, calling these "the two fundamental privileges on which rest all the others."[18] But even here there is a hierarchy of importance, as she says that voting is "*the one* [privilege] *without which all the others are nothing.*"[19] Ironically, at her trial, Anthony was not allowed to testify and the jury was not allowed to judge her. Instead, they were directed by the judge to deliver a verdict of guilty.

The liberal interpretation of the Constitution that Anthony hoped for was one in which voting, jury duty, and professional licensing were all among the privileges and immunities of national citizenship. Some advocates of the New Departure also made equality claims opposing discrimination against women as a class. Another creative constitutional argument was that marriage was a form of servitude, and therefore women were entitled to Fifteenth Amendment suffrage protection as well. These rationales found some support in congressional discussions and some lower court opinions, but this was clearly a minority view.[20] Historically, the Reconstruction Amendments were intended as both a general framework for American national citizenship and a specific remedy to the history of racial subjugation in the United States. Woman rights advocates tried to build on the first aspect of the amendments, while the courts and most members of Congress focused more on the second objective. In a series of cases, the Supreme Court ruled that women's rights as citizens had not been violated.[21] In its opinions in *Bradwell* and *Minor,* the Court did not substantially address the equal protection concerns raised by Anthony and others. Instead, they offered a narrow interpretation of the privileges and immunities clause that did not include professional licensing or the right to vote.

The *Strauder* case was important for its recognition of the right to serve on juries under the Fourteenth Amendment. In *Strauder,* the Supreme Court found a West Virginia statute barring African Americans from jury service to be unconstitutional. "The very idea of a jury is a body of men composed of peers or equals of the person whose rights it is summoned to determine;

18. Ibid., 637.

19. Ibid., 638, emphasis in original.

20. Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75 (1988): 471–500. See also the dissenting opinions in the *Slaughter-House Cases,* 83 U.S. 36 (1873), which provide an alternative basis for applying the privileges and immunities clause of the Fourteenth Amendment. In addition, *The History of Woman Suffrage* volume that discusses the New Departure also mentions three lower court judges whose opinions were more consistent with the views offered by rights advocates. See Stanton, Anthony, and Gage, *History of Woman Suffrage,* 2: 507.

21. *Bradwell v. Illinois,* 83 U.S. 130 (1872); *Minor v. Happersett,* 88 U.S. 162 (1874); and *Strauder v. West Virginia,* 100 U.S. 303 (1879).

that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. . . ."[22] Denying African Americans the right to sit on juries would serve to place "practically a brand upon them, affixed by law, an assertion of their inferiority" that would result in unequal civic status.[23] Jury service was treated as a civil right[24]—the Court stated that the purpose of the Fourteenth Amendment was to grant the freedmen "all the civil rights that the superior race enjoy."[25] It was also treated as a right that reflected a broader civic status. The Court wrote that the Fourteenth Amendment created a right to "exemption from legal discriminations, implying inferiority in civil society."[26] Although the opinion was framed doctrinally as an equal protection matter, the Court referred repeatedly to jury service as a right or an immunity and stressed its interest in protecting the citizenship status of the freedmen. Yet the opinion went on to assert that other characteristics—like age and sex—were acceptable criteria for jury qualification. According to the court, the Fourteenth Amendment was intended to protect the citizenship of African Americans and to prevent racial discrimination, not gender discrimination.

From these cases came the beginnings of a national framework for citizenship. It was a framework that stressed the distinction between civil and political rights and made political rights secondary. Further, in their rulings, the federal courts narrowed the meaning of the privileges and immunities clause (the clause that speaks most directly and generally to the rights of citizens) and asserted that the progressive power of the equal protection clause applied only to African Americans. On what were these interpretations based? The Court used history (that is, the intentions of Congress in passing the amendments) and doctrine (prior court cases that discussed the privileges and immunities clause present in Article IV of the Constitution) to justify its findings. But it is clear both from the dissenting opinions in these and related cases, as well as in congressional reports on the amendments, that other interpretations were possible, if less likely.[27] Further, I contend (as the opinion in *Strauder* makes plain) that the narrow reading of citizenship offered here was partly provoked by the New Departure itself and the political desire of the judiciary to ensure that these amendments

22. *Strauder,* 308.

23. Ibid.

24. Jury service is also implicitly treated by the court as a political right. At one point in the opinion the court asks what would happen if whites were excluded from jury service by a majority black population—"thus denying to them the privilege of participating equally with the the blacks in the administration of justice" (*Strauder,* 308). Here, jury service is framed as a right of participation.

25. *Strauder,* 306.

26. Ibid., 308.

27. See Justice Field's dissent in the *Slaughter-House Cases,* 48.

were not used to reorder gender relations even as they were to be used to reorder race relations.

This emerging framework for national citizenship articulated by the Supreme Court also influenced the state and territorial courts in their treatment of women's claims for voting and jury service as rights of citizenship. In an early pair of cases from the 1880s, the territorial government of Washington considered the consequences of women's suffrage for the right to serve on juries. After suffrage was established for women in Washington, in *Rosencrantz v. Territory,* the supreme court of Washington Territory upheld women's right to sit on juries.[28] But just three years later (after a change in personnel), the same court reversed this decision.[29] The latter opinion is interesting for several reasons, the most relevant here being its treatment of women's citizenship rights under the Fourteenth Amendment. The court opinion approvingly cited Justice Bradley's concurrence in *Bradwell v. Illinois.* The Court found that women were citizens and entitled to the rights thereof, but that professional licensing (Myra Bradwell had applied for admission to the bar in Illinois) was not a privilege or immunity of citizenship. In his concurrence, Justice Bradley discussed the particular restrictions on women's citizenship.

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . So firmly fixed was this idea in the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.[30]

In their comment on this case, the Washington court in *Harland* concluded: "Thus we see that the Fourteenth Amendment, which certainly spreads its protecting shield over females, because females are citizens, is yet not strong enough to overcome the implied limitations of prior law and custom with which it was brought into association when it was adopted."[31] For this court, it seemed that for women to obtain all available rights and duties of citizenship and to gain standing as civic persons, more than the Fourteenth Amendment or a grant of suffrage by the territory was required. Rather, women would continue to be governed by "prior law and custom,"

28. *Rosencrantz v. Territory,* 5 PAC 305 (1884).

29. *Harland v. Territory,* 13 PAC 453 (1887).

30. Katharine T. Bartlett, *Gender and Law: Theory, Doctrine, Commentary* (Boston: Little, Brown, 1993), 58–60.

31. *Harland,* 456

particularly the common law tradition that granted women "no legal existence separate from her husband." Thus, the court found, women could be excluded from jury service.

The state courts also addressed the question of whether the privileges and immunities of citizenship included jury service. There were three ways of understanding jury service in relation to citizenship—as a right (or privilege), as a grant, or as a duty. The New Departure view was that jury service was a right of citizenship. The second view was that jury service was a grant to some citizens and not a natural right inherent in citizenship. This was the view that the court applied to both suffrage and (to a lesser extent) jury service in the late nineteenth century. The third view saw jury service as something required of citizens as a duty—like paying taxes or serving in the military—rather than a legal right citizens might seek to employ or protect. Some state courts acknowledged the ambiguous status of jury service by calling it a "privilege or duty," while others sought to deny jury service to women by terming it a duty and not a privilege of citizenship. However it was conceived, eligibility for jury service was a significant marker of political standing.[32]

To the extent that the Supreme Court had in mind women's claims to the rights of citizenship when they narrowly interpreted the privileges and immunities clause of the Fourteenth Amendment in the 1870s, then the rights movement helped to shape the post–Civil War constitutional order, albeit in a conservative and narrowing direction.[33] In this more conservative constitutional order, emerging from intrepretations of the Reconstruction Amendments, political rights were secondary.[34] Further, the framework that grew out of the Reconstruction Amendments allowed for a hierarchy

32. Indeed, it may be the case that the duties of citizenship matter more for raising one's political status then the rights of citizenship in the United States. For instance, consider the treatment of veterans as a privileged political status, or the distinction often made in political campaigns and legislative debates between taxpaying and nontaxpaying citizens as indicators of the importance of duties to political status. Such a distinction might help us to understand the current "gays-in-the-military" debate as a claim to duties that would raise a citizen's political status, and the movement toward welfare reform as an effort to lower the political status of nontaxpaying citizens. For a further discussion of the relationship between the duties and rights of citizenship, see Linda Kerber, *"No Constitutional Right to Be Ladies": Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).

33. Joan Hoff, *Law, Gender and Injustice* (New York: New York University Press, 1991), chap. 5; Stanley, "Conjugal Bonds"; Stanton, Anthony, and Gage, *History of Woman Suffrage,* 2: chaps. 22–25; DuBois, "Outgrowing the Compact"; Kerber, "'Ourselves and Our Daughters'"; Catherine Holland, *The Body Politic* (New York: Routledge, 2001).

34. The Fifteenth Amendment was especially pertinent in this regard. See Vikram David Amar, "Jury Service as Political Participation Akin to Voting," *Cornell Law Review* 80 (1995): 203.

of political standing in which women were not granted the same civil or political rights (including jury rights) as other citizens. This was partially done through the Court's refusal to apply the Equal Protection Clause to women. Finally, this framework incorporated an older conception of women's citizenship grounded in coverture in which women had no presence within the public realm. This structure made the campaign for a suffrage amendment necessary, and ultimately helped to limit the impact of the Nineteenth Amendment on women's citizenship.

B. Jurors as Peers

Both the *Strauder* opinion and Susan Anthony's views connected jury service to citizenship through the concept of a peer. Marianne Constable's analysis of the mixed jury helps to clarify this.[35] In premodern England, a mixed jury was invoked in cases when two different communities, and two different senses of justice, were at issue. According to Constable, the mixed jury embodied "a principle of personal law" in which persons were judged according to the standards of their communities.[36] Since the members of different communities understood the customs and principles of justice within their communities, community standards were brought to bear through jury selection. In cases involving a native and either an alien or a member of another group with its own customs and beliefs (such as Jews or merchants), juries were selected with equal membership from both communities.

Constable contrasts this with modern day ideals about juries. In modern practice, a "jury of one's peers" is a jury of six or twelve individuals with the same formal legal status as one's self. Under modern legal doctrine, concerns about jury service are concerns about exclusion rather than inclusion. Thus, our understanding of juries as an aspect of citizenship has been reduced, as has our sense of community and how communities participate in justice. The "other" that we are concerned with today, is a racialized or gendered other, since racial and gender differences speak to differences in interests (rather than differences among communities and their sense of justice) in the American political order.[37]

This reduced "otherness" in contemporary legal doctrine points out an interesting conundrum for the lawyers and judges seeking to apply the Fourteenth Amendment's equal protection clause. Constable frames the issue this way: "How is one to identify parts of the population without differentiating between what are formally recognized only as equals?"[38]

35. Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge.* (Chicago: University of Chicago Press, 1994).

36. Constable, *The Law of the Other,* 2.

37. Ibid., chap. 2.

38. Ibid., 41.

Thus, our justice system faces a Foucauldian problematic of producing the identity of difference it then seeks to regulate.[39] Difference becomes a check-off box on application forms, or a category on one's birth certificate or driver's license. It is an officially ascribed factor of an individual's identity. Presumably such an identity stands for more—it stands for lived experience and community membership. But in the administration of justice such links become tenuous and the categories take on their own meanings.

Thus, Constable contrasts two notions of justice represented in different ideals about juries. Under the system of the mixed jury, the defendant's peers were members of his or her community whose practical understanding of justice and everyday experiences were similar to that of the defendant. In contrast, the modern notion of jurors as peers is generally taken as persons who share the same formal political status as the defendant. For United States citizens, this means a jury composed of other citizens. In the first view, social difference provides positively to a jury's substantive understandings of justice. In the second view, social difference is problematic and can contribute to bias in the practice of law. Thus, even an all-white, all-male jury is treated in terms of difference—to the extent that it differs from an ideal jury that represents the racial and gender composition of society. The perfect modern jury is a jury that is socially neutral with no substantive preconceptions that might interfere with its determination of the facts.[40]

The more substantive notion of jurors as peers represented in the mixed jury recalls another (now defunct) English common law institution—the matrons' jury. Although women were generally barred from jury service, there were some special instances in which their participation was not just allowed but demanded, in which case a matrons' jury was formed. If a woman convicted of a crime and sentenced to capital punishment claimed she was pregnant, then a jury of twelve matrons was called to determine this. If the woman was found to be pregnant, then the death sentence was delayed until after the child was born. Matrons' juries represented a transition from the personal law concept associated with the mixed jury and the positive law philosophy of the modern jury.[41]

Women were called upon to serve on a matrons' jury because of their knowledge as women. Even more specifically, these were juries of matrons rather than maids, since married women and mothers would presumably recognize from their own experiences the physiognomy of pregnancy. Since the matrons' jury called for the positive inclusion of women for their shared practical knowledge, it resembled the mixed jury. Yet there were differences

39. Michel Foucault, *The History of Sexuality,* vol. 1 (New York: Vintage Books, 1990).
40. Constable, *The Law of the Other,* chap. 3.
41. Blackstone, *Commentaries,* 4: 394–95

as well. Matrons were not called upon to offer justice, but to establish the facts. Even in this role, the women jurors were supervised by an equal number of male jurors who were present during the physical examination of the convicted. (This suggests some doubt about how women might perform this role and what conclusions they would offer without the supervision of men.) The role of matrons' juries was a quite limited one that did not allow for a woman's knowledge of other women to be reflected in their judgment of the crime. Under the early common law, English juries offered verdicts that "spoke the truth" ("ver-dict" is derived from the Latin, "speaks the truth"). They determined not only the facts but, more broadly, what was just.[42] Modern juries are charged merely with establishing the facts of a case. It is left to the courts to apply the law.

Despite the limitations of the matrons' jury, its history is suggestive. There is some record of the use of matrons' juries in the American colonies.[43] Indeed, there may have been instances on either side of the Atlantic where a women's jury was called upon to do more than establish pregnancy. In the late 1600s, a women's jury was impaneled in Virginia to hear "a case involving the morals of a young woman."[44] Four hundred years later, an English court called a women's jury together "for a case involving manslaughter of a baby."[45] As these examples illustrate, women's substantive knowledge was enlisted to consider crimes against women or women specific crimes such as infanticide. This suggests a notion of peers as not just those with the same formal legal standing but also those sharing common experiences and insights into social conditions. These commonalties might provide the basis for shared political interests and a shared sense of justice.

The woman rights movement in the middle and latter part of the nineteenth century stressed that American women were denied the right to a trial by a jury of their peers. Even the demand for the vote was a demand that women be made the political peers of men. At the 1854 Woman Rights Convention in Albany, New York, it was resolved, "That women are human beings whose rights correspond with their duties; . . . and that men who deny women to be their peers, and who shut them out from exercising a fair share of power in the body politics, are arrogant usurpers. . . ."[46] Women's natural rights as human beings entitled them to a political status as

42. Constable, *The Law of the Other,* 2.

43. Carol Weisbrod, "Images of the Woman Juror," *Harvard Women's Law Journal* 9 (1986): 60, n. 3.

44. Grace Elizabeth Woodall Taylor, "Jury Service for Women," *University of Florida Law Review* 12 (1959): 225

45. Weisbrod "Images of the Woman Juror," 60, n. 2.

46. Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, *History of Woman Suffrage,* vol. 1 (New York: Fowler and Wells, 1881), 594.

men's peers. Two years earlier at the Syracuse National Woman Rights Convention, Reverend Antoinette L. Brown addressed the issue of peerage specifically in relation to the law. "The law is wholly masculine; it is created and executed by man. . . . The law then could give us no representation as woman, and therefore no impartial justice even if the present lawmakers were honestly intent upon this; for we can be represented only by our peers. . . . Common justice demands that a part of the law-makers and law executors should be of her own sex."[47] As the legal subjects of men, women had no representation within the civic realm. For there to be justice, women should be represented at bar, bench, and jury box by their legal equals—by other women. When the territorial government of Wyoming gave women the right to vote and made them eligible for jury service in 1869, the *New Orleans Times* commented that women "cannot sit as the peers of men without setting at defiance all the laws of delicacy and propriety."[48] This southern newspaper was concerned that a change in women's political status, making them men's peers, would result in a change in their "feminine nature." While for many women activists in the 1850s, the demand for women jurors was a demand for justice by their peers (a group that did not then include men), others recognized that making women jurors changed their status to make them the peers of men.

There were two different conceptions of women as peers in the debate over women's rights and jury service in the nineteenth century. The first, represented in the preceding discussion, was concerned with peerage as a legal status. Antoinette Brown and Susan B. Anthony each denied that women were able to receive justice since they were not the peers, but the legal inferiors, of the men who populated the courtroom. One remedy for this was to recognize this difference in status and provide women with a jury of their legal peers. As Elizabeth Cady Stanton said in a plea to the New York State legislature in the 1850s, "The noble cannot make laws for the peasant; the slaveholder for the slave; neither can man make and execute just laws for woman, because in each case, the one in power fails to apply the immutable principles of right to any grade but his own."[49] If women were to remain a separate grade, then they deserved their own justice. Likewise, if women *were* men's equals then they could not be excluded from the jury box. In either case—whether women formed a separate grade requiring the inclusion of women on juries, or as an equal grade that did

47. Ibid., 594–95.

48. Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, *History of Woman Suffrage,* vol. 3 (Rochester, N.Y.: Susan B. Anthony, 1887), 735; see also Cristina M. Rodriguez, "Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old Boys' Network in Nineteenth-Century America" *Yale Law Journal* 108 (1999): 1805–44.

49. Stanton, Anthony, and Gage, *History of Woman Suffrage,* 1: 597.

not permit their exclusion from juries—peerage was regarded in the first instance as a formal legal status.

The second concept of women as peers referred not to their legal status but to their social knowledge. Again, from Stanton's testimonial to the New York State legislature, "Shall the frenzied mother, who, to save herself and her child from exposure and disgrace, ended the life that had just begun, be dragged before such a tribunal [a judge and jury of men] to answer for her crime? How can he judge of the agonies of soul that impelled her to such an outrage of maternal instincts? . . . Shall laws which come from the logical brain of man take cognizance of violence done to the moral and affectional nature which predominates, as is said, in woman?"[50] In this passage, Stanton suggests that the experience of women make them better prepared to understand the nature of certain crimes, such as infanticide. Further, she contends that women jurors are more likely to appreciate the prior implicit crime against the accused woman and to hold to account the man who left her pregnant and without aid. Stanton also gestures (ironically, perhaps, with the words "as is said") to essential gender differences that make a woman better equipped to understand another woman. Whether it be due to commonalties in experience or in nature, women were needed on juries to determine the crimes of other women and the injuries done to women.

Not only does their knowledge make women better positioned to determine the facts in crimes that involve other women, it also renders them better able to apply justice. In their comment on women's jury service in Wyoming in 1870, the *Cincinnati Gazette* wrote, "How can men justly judge a woman? They cannot have the knowledge . . . requisite to the judgment of motives and temptations. . . . Furthermore, many of the crimes of men are against women. How can men appreciate their injury? . . . How can justice be expected from those who instinctively combine to preserve their privilege to abuse women?"[51] Understanding the circumstances under which women were likely to commit crimes or the damage done when men committed crimes against women, women were better positioned to offer justice in their determinations of guilt and influence on sentencing.

The woman rights movement of the nineteenth century sought to defend the right of women citizens to a jury of their peers. For these women activists the term "peer" reflected both their concern with women's legal and political status and their desire to have the benefit of other women's experiences and social outlooks in the courtroom. In both these respects we see a fuller sense of citizenship being developed and offered in the early fight to make women eligible for jury service. Implicit in the conception of peer

50. Ibid., 597–98.

51. Stanton, Anthony, and Gage, *History of Woman Suffrage,* 3: 738.

as a legal status is a critique of the institution of American citizenship as something tolerant of social inequalities. An institution that allowed women to be excluded from the rights and privileges that men held in civil society was one tolerant of hierarchy in the political order. Further, while women demanded equal status with men, they expected to bring to the performance of their citizenship the benefits of women's particular social experience and knowledge. For this reason, women ought to be positively included in the community of citizens.

C. Voting, Citizenship, and Jury Service

Is jury service, like voting, part of the political rights of citizenship? Woman rights advocates were not successful in claiming the right to vote and serve on juries under the Fourteenth Amendment. They had more success in claiming that electoral status entitled them to the other rights and privileges of citizenship. Some states and territories that granted women suffrage in the late nineteenth century also allowed them to serve on juries.[52] The basis for this argument was both general and narrow. At the general level, jury service could be regarded as a political right of citizenship, like voting and office holding. As Vikram David Amar argues, such a view was developed in connection with the Fifteenth Amendment, which guaranteed African Americans equal voting rights.[53] Some of the authors and interpreters of the Fifteenth Amendment claimed that the possession of the vote necessarily implied the possession of these other political rights of citizenship. Or, in a creative interpretation, some women claimed that marriage was like slavery, so the Fifteenth Amendment ("The right of citizens . . . to vote shall not be denied . . . on account of . . . previous condition of servitude") also applied to women, at least if they were or had been married. The more narrow view was that voting status was an explicit qualification for jury service in many states, so that the extension of the suffrage to a new group of citizens made them eligible for jury service. In any case, the treatment of African American men under the Fifteenth Amendment in the late nineteenth century set important precedents for how courts interpreted the Nineteenth Amendment decades later.

The Founders regarded juries to be both a necessary protection against governmental encroachments upon liberty and a form of republican self-government. As Alexander Hamilton wrote in *The Federalist,* No. 83, "The friends and adversaries of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: or if there is any

52. Rodriguez, "Clearing the Smoke-Filled Room."
53. Amar, "Jury Service as Political Participation."

difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."[54] The view that jury service was a form of political participation that educated citizens for other forms such as voting was articulated by Tocqueville. "[The jury] should be regarded as a free school which is always open and in which each juror learns his rights, . . . and is given practical lessons in the law. . . . I think that the main reason for the . . . political good sense of the Americans is their long experience with juries in civil cases."[55] The jury box was a place where Americans learned the virtues of self-governance.

Amar regards jury service as part of a plenary political right that includes the right to vote and hold office. He contends that this plenary right is constitutionally grounded in the four voting amendments to the constitution (the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth). He writes, "jury service, like voting and office holding, was conceived of as a political right, as distinguished from a civil right, and political rights were excluded from the coverage of the Fourteenth Amendment. Instead the Constitution speaks to the exclusion of groups from jury service most directly through the voting amendments. . . ."[56] Why is jury service a political right like voting? Jurors vote on whether to convict. Jurors apply the law, thereby governing the society. In the process, they often go beyond a finding of fact to offer their own sense of what is just. Therefore, they make normative choices as a community of citizens. In this regard, the role of a juror is the role of a citizen (and not merely a person) who actively participates in the governing process.

For woman rights advocates, jury service and suffrage were not just civic activities but also markers of civic status. The role of voter and juror served not only to distinguish between citizens and noncitizens, but also between those citizens who had political rights and those without them. Further, in contrast to T. H. Marshall, who saw civil rights as the foundation of citizenship, woman rights advocates saw voting as the preeminent right of citizenship from which other rights followed.[57] By securing for women the right to vote they were more likely to be recognized as first class citizens and accorded other political and civil rights, including the right to serve on juries. If their elevation to the status of elector did not enable women

54. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Times-Mirror, 1961), 424.

55. Quoted in Amar, "Jury Service as Political Participation," 221.

56. Ibid., 204.

57. T. H. Marshall, "Citizenship and Social Class," *Class, Citizenship and Social Development* (Garden City, N.Y.: Doubleday), 71–134.

to hold office and serve on juries, then it appeared to many that they were still being denied the position of first class citizens.

Prior to the Nineteenth Amendment, some courts found the link between electoral status and jury service persuasive as narrowly construed, particularly with regard to African American men. The key case for this position was *Neal v. Delaware.*[58] The court found that African Americans were now entitled to vote by the Fifteenth Amendment. "Therefore, a statute confining the selection of jurors to persons possessing the qualifications of electors is enlarged in its operation so as to embrace all those who . . . are entitled to vote."[59] Once the Fifteenth Amendment made African Americans qualified electors, they became eligible to serve on juries. Yet while the Fifteenth Amendment provided the constitutional basis for this decision, it was the Fourteenth Amendment that gave the court's opinion its normative thrust. The court wrote, "The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty, and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national Constitution."[60] The extension of citizenship to African Americans after the Civil War secured for them a claim for equal civil rights. Despite its immediate effect of allowing jury service on the basis of electoral eligibility, the ruling in *Neal* (contrary to Amar and the woman rights movement) is indicative of the remoteness of political rights to citizenship. Only when specified by statute did electoral status provide for broader rights claims.

The debate over whether electoral status qualified citizens for jury service raises several issues about the political and civil rights of citizenship. First, is jury service a political or civil right? It is both, but despite the efforts of the woman rights movement to cast it as a political right, the Supreme Court saw it primarily as a civil right that was only narrowly related to voting. Second, what is the relationship between civil and political rights? Do civil or political rights provide the foundation on which other rights follow? Here again, both possibilities were historically present, but the claim for a plenary political right failed to win a judicial mandate in the late nineteenth century. Finally, do particular rights have a larger normative effect on one's civic status or citizenship? Does voting create a status of civic equality that entitles one to broader recognition by the courts and legislatures? As Part 2 demonstrates, the answer to this last question depends on the movements making such claims and the political context, as well as on doctrinal understandings of the role of particular rights within

58. *Neal v. Delaware,* 103 U.S. 370 (1880).
59. Ibid., 370.
60. Ibid., 389.

the larger structure of citizenship. The courts in the late nineteenth century granted only a narrowly construed relationship between the right to vote and serve on juries. They neither recognized the existence of a plenary political right of the sort Amar imagines, nor allowed for voting as a determinative right from which other rights followed. But earlier and later, the courts saw jury service and its relationship to suffrage differently.

This section has discussed the nineteenth-century debate over jury service for women as it relates to women's citizenship. In concluding, it may be useful to reflect on what the struggle for jury service tells us about women's citizenship before the Nineteenth Amendment and whether jury service should be conceived of as a political right. The framework for citizenship set by the Reconstruction Amendments to the Constitution made the struggle for political rights more difficult and allowed a hierarchy of civic standing to remain in place. Further, the discussion of jurors as peers illuminates how the struggle for rights was also a struggle for civic status and suggests ways in which the movement imagined that women would substantively contribute to the body politic as citizens. Finally, the effort to make women eligible for jury service was deeply influenced by the effort to obtain suffrage for women both conceptually and politically.

Is jury service a political right of citizenship? Yes, but the realization of that right depends on the political and historical context. It may be, for instance, that in the early national period jury service was conceived of, politically enacted, and judicially defined as a political right. Yet within the context of the late nineteenth century, the political conception of jury service had diminished. While jury service continued to be seen as a valuable safeguard of liberty and as a marker of civic status (as in *Strauder*), it was no longer very strongly regarded as a form of democratic participation like voting. This says as much about the constitutional framework of citizenship at that time as it does about juries and jury service per se. When the terms of citizenship changed yet again in the early twentieth century as women received the right to vote, whether jury service was a political right and its overall relationship to citizenship was once more called into question. That is the subject of the next section.

We learn from the nineteenth-century debate over jury service not only about women's citizenship but also about the political order of citizenship more generally. The many parallels drawn between the situation of women and of African Americans was at times beneficial to women in their arguments for equal citizenship and at times limiting. Both the Fourteenth Amendment and *Strauder* demonstrate this ambiguity. The occasion for establishing the constitutional definition of national citizenship and the protection of the privileges and immunities guaranteed within it was one

of racial politics at the settlement of the Civil War. In that sense, American citizenship is forever imprinted with matters of race.[61] A broad interpretation of the Fourteenth Amendment, such as the one claimed by the advocates of the New Departure, might have anchored women's claims to full citizenship status on similar moorings. But that was not to be, given the Supreme Court's narrow interpretations of what national citizenship meant (privileges and immunities) and who had it (that the equal protection clause did not apply to women). Similarly, in *Strauder* the Supreme Court articulated a broadened ideal of democratic citizenship and linked it to the social standing of an oppressed group. Yet the *Strauder* court refused the opportunity to extend this view to women, thereby preserving the tiered gender hierarchy of social standing within American national citizenship. It is not surprising, then, that from the end of the Civil War until the passage of the Nineteenth Amendment and beyond, white activist women and black activist men found themselves articulating race- and gender-exclusive notions of citizenship.[62] They were simply repeating the language that the Supreme Court had already spoken to them.

II. Jury Eligibility and the Nineteenth Amendment

We're voters all, we would be free
Maryland, my Maryland;
To fullest meed of liberty,
Maryland, my Maryland;
We seek the right denied for years
To sit as jurors and as peers,
Forget your Mid-Victorian fears,
Maryland, my Maryland.[63]

Examining the debate over jury eligibility for women clarifies the consequences of the Nineteenth Amendment for women's citizenship in ways that an examination of women's electoral politics does not. In particular, it shows that the narrow and compartmentalized understanding of citizenship that was elaborated by the courts in the late nineteenth century continued to inform public and judicial understandings of women's political status after 1920. Court rulings from the 1870s and 1880s articulated a view of women's citizenship under the Fourteenth Amendment as providing only limited rights. Further, the common law understanding of women (partic-

61. Holland, *The Body Politic.*

62. DuBois, "Outgrowing the Compact."

63. Florence Elizabeth Kennard, "Maryland Women Demand Jury Service," *Equal Rights* (March 7, 1931).

ularly married women) as lacking civic personalities was partially incorporated under the Fourteenth Amendment. The jury eligibility debates of the 1920s reveal that the Nineteenth Amendment only partially altered this conception of women's citizenship.

Jennifer Brown has examined the jury eligibility cases of the 1910s and 1920s as a reflection on women's political status after suffrage.[64] She argues that the state courts vacillated between an "incremental" and an "emancipatory" view of the Nineteenth Amendment: either the amendment solely addressed women's right to vote or more broadly treated their status as equal citizens. Brown's essay offers useful insights into the 1920s movement for jury service. However, my interpretation differs from Brown's in two respects. First, rather than regard women's citizenship in holistic terms as equal or as different from men's citizenship (or as progressing from difference toward equality), the argument here conceives of women's citizenship as partialized and historically contingent. Women citizens were regarded as "equal" in some areas and not others. Further, the trend toward rights was not clearly progressive—there were historical examples of reversals.[65] In this regard, Brown's dichotomy between an incremental and emancipatory approach belies the more complex nature of women's citizenship in this period. Second, Brown writes on the effort to let "women into the Constitution," as if they were not there before the Nineteenth Amendment.[66] This implies a belief in the liberal, egalitarian soul of the Constitution that I do not fully share. Instead, I share the view of Rogers Smith, Catherine Holland, and others that the Constitution has been historically tolerant and inclusive of unequal, ascriptive statuses—such as the status of slaves until the Thirteenth Amendment, or the status of women until (and after) the Nineteenth Amendment.[67] Thus, my differences

64. J. Brown, "The Nineteenth Amendment."

65. Examples of reversals include the early national period when women were more thoroughly excluded from the public realm and stripped of political rights (Kerber, "'Ourselves and Our Daughters'"); the late nineteenth century when women were denied citizenship status when they married foreign nationals (a status they previously retained) (Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780–1920," *American Historical Review* 89 (1984): 620–47); and the late 1940s, when citizenship rights became more attached to predominantly male veteran's status (Gretchen Ritter, "Of War and Virtue: Gender, Citizenship and Veterans' Benefits After WW II," *Contemporary Social Research* 20 [2002]: 201–26). See also Uday Mehta, "Liberal Strategies of Exclusion," *Politics & Society* 18 (1990): 428; Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); and Ritter, "Gender and Citizenship."

66. J. Brown, "The Nineteenth Amendment," 2204.

67. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997); Holland, *The Body Politic;* Kerber, *"No Constitutional Right;"* and Hoff, *Law, Gender and Injustice.*

concern Brown's assumptions about the overall nature of women's citizenship and the American political order.

A. The Campaign for Women's Jury Service

After women obtained the suffrage, women political activists sought to broaden their claims for equal citizenship to other areas. This campaign involved efforts to reform laws governing the civic status and rights of married women and make women eligible for jury service. In both cases, woman rights activists argued that women's new status as first class citizens provided them with the basis for claiming equal rights in all areas. With regard to jury service, activists argued both that suffrage made women directly eligible for jury service as electors and that the normative influence of the Nineteenth Amendment was such that women should be treated equally.

Although the women's movement of the 1920s fractured in the aftermath of the Nineteenth Amendment, all the rights activists supported the jury service campaign. As jury service activist Burnita Shelton Matthews commented in 1929, "If there is one subject which all the woman's organizations are agreed upon, it is, probably, jury service for women."[68] Around the time that the Nineteenth Amendment was passed, fourteen states granted women the right to serve on juries. In half of these states, women were found to be automatically eligible for jury service once they became electors. In the other seven, new laws were passed that made women eligible to serve on juries. Yet despite vigorous campaigns by the League of Women Voters, the National Women's Party, and many other groups, during the rest of the decade, only one new state and the District of Columbia were added to the list of jurisdictions where women served on juries. By the middle of the 1920s it was increasingly evident that the courts and legislatures were resistant to further extensions of women's rights in this area.[69]

Part of this resistance may have reflected the movement's growing ambivalence over how to pursue civic equality in the wake of the *Adkins* decision. In 1923, the Supreme Court ruled in *Adkins v. Children's Hospital* that a law setting minimum wages for women was unconstitutional.[70] The Court found that with the advent of the Nineteenth Amendment, women's civic status had changed, and so had the government's ability to regulate the conditions under which they labored. Coming just three years after women were granted the right to vote, the *Adkins* decision threatened to

68. Burnita Shelton Matthews, "The Woman Juror," *Equal Rights* (Jan. 19, 1929).

69. Louise M. Young, *In the Public Interest: The League of Women Voters, 1920–1970* (Westport, Conn.: Greenwood Press, 1989), 56; Lemons, *The Woman Citizen,* 68–73.

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

end the exception for women under the *Lochner* freedom of contract regime, at least in the case of minimum wage laws. Discussing the earlier ruling that created this exemption, the Court wrote of *Muller v. Oregon:* "The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength."[71] Nature and law made women weak and dependent upon men. But law, at least, was subject to change. "But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* Case has continued 'with diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point."[72] Here, the Nineteenth Amendment was presented as the culmination of a set of changes in women's "contractual, political, and civil status." That was precisely what the advocates of the Nineteenth Amendment from the time of Elizabeth Cady Stanton and Susan B. Anthony onward had hoped for. The irony was that this view was being used to justify a negative freedom for women—freedom *from* state assistance. A further irony was that this was the only occasion on which the Court granted the Nineteenth Amendment such broad influence. Generally, the federal courts viewed the amendment quite narrowly, as applying only to the right to vote.[73]

What were *Adkins*'s implications for the jury service debate? The opinion may be read as signaling a further erosion of the common law regime that governed women's civic standing in the nineteenth century.[74] Yet, whether the rules of domestic relations were being truly vanquished or merely refashioned as privacy is open to question.[75] At the very least, *Adkins* contributes to the complex view of women's citizenship in the 1920s. Women were being recognized as public realm beings with civic standing, but the costs of this recognition were quite apparent to the friends of working women who fought to retain protective legislation and therefore op-

71. Ibid., 552–53.

72. Ibid.

73. Ritter, "Gender and Citizenship."

74. Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2001).

75. Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives's Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127–2211.

posed the Equal Rights Amendment being championed by the National Women's Party.[76] Ambivalence about equality, especially with regard to civil rights, and civic duties that impinged upon domestic duties, grew in response to *Adkins.* This made arguments about the costs of jury service as a civic duty more effective.

The arguments for jury service echoed those made by the nineteenth-century woman rights proponents. In particular, there was an emphasis on the role of women jurors as the legal and social peers of women defendants and on the role of juries as a bulwark of liberty. But there was also a new stress on the political circumstances of recently enfranchised women. The 1920s campaigners continued to express an aspiration for full citizenship in light of their suffrage status. They were also sometimes despairing about the limited impact of the Nineteenth Amendment on their civic standing. Further, they asserted that jury service was a civic duty they were obligated to perform—a duty that better equipped them for the performance of their other civic duties. Finally, since jury service was a more substantial and intimate form of civic participation, it provoked discussions of whether sex differences mattered to the performance of citizenship.

Like the earlier generation of rights activists, the new cohort of jury service proponents stressed the importance of juries in a democratic system and the need for women jurors as peers. Within the structure of citizenship, jury service was regarded as a fundamental civil right, necessary for the protection of other rights; "the right of trial by a jury of one's peers is more important than any other guaranty of liberty."[77] Further, as citizens, women were entitled to a jury of their peers—a jury that included other women. As Catherine Waugh McCulloch explained, "In cases where women are interested parties, women would have greater protection if they were wronged if there were other women on the jury."[78] As citizens and as women, women were entitled to service on juries and to have a jury of their peers.

In their reflections on women's civic standing after the Nineteenth Amendment, woman rights activists were alternately aspiring and despairing. The National Woman Party's Declaration of Principles stated "Women shall no longer be deprived of their right of trial by a jury of their peers, but jury service shall be open to women as to men."[79] Given their position as electors, women were entitled to be and act in the public realm—just as they did in business and politics. As Rabbi Edward L. Israel, testifying in favor of a women's jury service bill in Maryland stated, "We have to face

76. Zimmerman, "The Jurisprudence of Equality."

77. Catherine Waugh McCulloch, "Trial by Jury," *The Woman Citizen* (Oct. 2, 1920), 488–91, 493, 495.

78. McCulloch, "Trial by Jury," 488.

79. Mrs. Stephen Pell, *Equal Rights* (Nov. 14, 1931).

the fact that women are a part of our life as never before, they are in our business life, our political life, our professional life."[80] Yet after a decade of suffrage, the exclusion of women from the jury box was seen as a sign of their continued civic inequality. As one activist wrote in 1930, "The legal status of women is still not equal to that of men, however, it has been said that 'women are now the peers of men politically.'"[81]

Following the passage of the Nineteenth Amendment, woman rights activists of the 1920s focused on women's performance of citizenship. It was argued that women must not just enjoy the privileges of citizenship, but should also share in its duties. Helen Sherry of the State Federation of Republican Women testified before the state legislature in Maryland—"now that women have the vote, [they] are ready to assume the burdens as well as the benefits of citizenship."[82] Jury service was seen as contributing to the civic education of women citizens. Judge Robert Marx of Cincinnati commented in 1925, "Since women vote their service upon the jury is a broadening experience to them and increases their capacity for civic usefulness. While this is not immediately a contribution to the improvement of the jury system, it is an advantage to the body politic. . . ."[83] The hope and expectation was that the right to vote had made women first class citizens. For this to be the case, they must be allowed to serve on juries. "Since the adoption of woman suffrage, women have arrived, so to speak, and are demanding the why and wherefore of their exclusion from jury service."[84] Armed with new rights and ready to perform their civic duties, women wondered why they were still denied full citizenship.

Unlike their predecessors, the last generation of suffragists had moved away from natural rights arguments to stress women's inherent differences from men and to use this as an argument for suffrage. A similar position was taken with regard to juries. Women's service was needed on juries to ensure that justice would be served, especially in cases involving women or children as defendants or plaintiffs. Judge John Walsh wrote of women jurors, "I have found them less inclined to give way to impulses or emotions, if you prefer to call it such, than many of our male jurors, and this condition stands out most prominently in the criminal cases which involve the morals or chastity of a child under the age of consent in our State, whereas in such cases I have found men to be moved by sentiment

80. Kennard, "Maryland Women Demand Jury Service."

81. Burnita Shelton Matthews, "The Status of Women as Jurors," *Equal Rights* (May 24, 1930), 124.

82. Kennard, "Maryland Women Demand Jury Service."

83. Elizabeth Sheridan, "Women and Jury Service," *American Bar Association Journal* 11 (1925): 795.

84. Matthews, "The Woman Juror."

and resentment rather than the facts and the law in the case."[85] It was the differences between male and female citizens that warranted the participation of women in jury service.

B. The Courts and Legislatures Respond

Evident in the discussion above is an aching sense among the post-suffrage rights activists that the goal of obtaining equal citizenship for women had yet to be achieved, despite the Nineteenth Amendment. It seemed that the courts and legislatures conceived of the Nineteenth Amendment as having established a public realm presence for women, but they were only granted a limited perch there. Doctrinally, this view expressed itself in terms of the narrow impact accorded to the Nineteenth Amendment with regard to other citizenship rights for women. Further, there was still a conception of women's citizenship (fostered by some in the women's movement itself) as remaining partly rooted in women's private realm obligations. As a result, the majority of states that made women eligible for jury service provided them with exemptions for childcare. Finally, the jury service debate brings out the complexity of the argument within the women's movement and among the public at large over what equality really was and whether women should have it.

Were women public persons and first class citizens after the adoption of the Nineteenth Amendment? Burnita Shelton Matthews, a leading legal thinker and activist for women's jury service, believed the courts were historically ambivalent about whether women were persons. She wrote a series of articles on women's jury service in *Equal Rights* in 1929 and 1930. In the first article, Matthews reviewed the *Strauder* case. There, according to Matthews, the court ruled that barring African American men from jury service "would brand them as an inferior class of citizens." This doctrine should also apply to women since "the Constitution guarantees that protection to persons and not merely to negroes." Yet the doctrine was not applied because of "the curious ability which judges of the male persuasion have manifested to regard women as persons at one time and not as persons at another."[86]

That ambivalence, it seemed, persisted a decade after the Nineteenth Amendment was adopted. In considering the influence of the Nineteenth Amendment on women's jury service, the Massachusetts Supreme Court was faced with a statute that listed all qualified voters as eligible jurors.[87]

85. John E. Walsh, "Justice Served by Women Jurors," *Equal Rights* (Feb. 5, 1927).
86. Matthews, "The Woman Juror."
87. *Commonwealth v. Welosky,* 177 NE 656 (1931).

But in finding that this law did not include women, the court wrote that "the Nineteenth Amendment to the Federal Constitution conferred the suffrage on an entirely new class of human beings. . . . It added to qualified voters those who did not fall within the meaning of the word 'person' in the jury statutes." With the Nineteenth Amendment, women became persons before the law in a way they had not been before. Yet the legacy of their legal nonpersonhood remained. As the Massachusetts judges summarized, "The change in the legal status of women wrought by the Nineteenth Amendment was radical, drastic and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication." In other words, women were now legal persons—beings within the public realm. But the extent of their public presence was assumed to be limited to the area of the suffrage.

Around the country, state courts were asked to interpret the impact of suffrage on women's other citizenship rights and duties. Their rulings varied. There were three different views regarding the effect of suffrage on women's eligibility for jury service. The first, and most common, was the view that the Nineteenth Amendment had no effect on women's jury eligibility. Some courts reasoned that the common law restriction on women's jury service still held. Typical was the ruling of the New Jersey Court of Appeals that stated that "This constitutional guaranty as to the right to jury trial has been held to be trial by jury at common law. A common-law jury consisted of 'twelve free and lawful men.'"[88] Thus, suffrage did not make women eligible for jury service. Reasoning from a different perspective, a New York court reiterated the traditional conservative view of the citizenship rights found in the Fourteenth Amendment. The New York court denied that women's new suffrage status made a difference, since "jury service was not a matter of right, either civil or political, but a matter of duty," and concluded that "women were not entitled as citizens to act as jurors."[89] In any event, several state courts agreed that while the Nineteenth Amendment made women eligible to vote, it did not overcome prior legal limitations on their jury service.[90]

Second, some courts acknowledged women's status as electors under the Nineteenth Amendment, but suggested that this did not make them automatically eligible to serve on juries. There were several state courts that considered whether the laws on jury eligibility described eligible voters in terms that implied just one sex. That was the approach taken in Idaho, Illinois, and Massachusetts.[91] More sympathetic courts found that women's

88. *State v. James,* 16 ALR 1141 (1921), at 1144.

89. *In re Grilli,* 179 N.Y.S. 795 (1920) at 797; see also *Harper v. State,* 234 SW 909 (1921).

90. See also *In re Opinion of the Justices,* 130 NER 685 (1921).

91. Idaho (*State v. Kelley,* 229 P. 659 [1924]), Illinois (*People ex rel. Fyfe v. Barnett,* 150 N.E. 290 [1925]), and Massachusetts (*Commonwealth v. Welosky,* 177 N.E. 656 [1931]).

new status as electors was permissive, making them eligible for legislative entitlement to serve on juries. The Massachusetts high court virtually called upon the state's General Court to pass a law making women eligible for jury service.[92]

Finally, under the third view women automatically became eligible for jury service when they became electors. This last view gave the greatest weight to elector as a civic status that commanded other privileges and duties. Several courts linked voting status to jury service by way of *Neal v. Delaware.* Since *Neal* made African Americans eligible for jury service in their status as electors under the Fifteenth Amendment, it would seem that the Nineteenth Amendment would do precisely the same for women. That, indeed, was the conclusion that the courts came to in four of the five cases where *Neal* was considered. Only the Massachusetts court found differently. Beginning with Nevada, and going through Michigan, Iowa, and Indiana, the other four courts concluded that *Neal v. Delaware* had recognized suffrage as a political status to which privileges and duties might be attached.[93] This was stated most clearly in *People v. Barltz,*

> What was the purpose and object of the people in adopting the constitutional amendment, striking out the word 'male' from the Constitution? . . . We think there can be but one answer to this question, and that is that the purpose was to put women on the same footing as men with reference to the elective franchise. . . . The moment a woman became an elector under the constitutional amendment she was entitled to perform jury duty, if she was possessed of the same qualifications that men possessed for that duty. In other words, she was placed in that class of citizens and electors, from which class jurors were, under the statute, to be selected.[94]

The Nineteenth Amendment, like the Fifteenth before it, placed women in a new citizenship class—the class of citizen electors. It was from this class that jurors in most states were drawn. In this narrow and direct way, states were willing to grant the Nineteenth Amendment impact, though they did not go as far as the Supreme Court had in *Neal* and use the suffrage amendment to bring women more firmly within the ambit of the Fourteenth Amendment.

Yet there was a stronger version of the third view, which appears in *Parus v. District Court.* Here, jury service is presented as a political right of citizenship like voting or holding office.

92. *In re Opinion of the Justices,* 685.

93. *In re Opinion of the Justices; Parus v. District Court,* 174 PAC 706 (Nevada 1918); *People v. Barltz,* 180 NW 423 (Michigan 1920); *State v. Walker,* 185 NW 619 (Iowa 1921); and *Palmer v. State,* 150 NE 917 (Indiana 1926).

94. *Barltz,* 425. It appears that the reference to male in the constitution refers to section 2 of the Fourteenth Amendment.

> Can we reasonably say that although woman, on whom has been conferred the right of electorship, the right to enjoy public office, the right to own and control property, and on whom has been imposed the burden of taxation in a common equality with men, is nevertheless deprived of the privilege of sitting as a member of an inquistorial body, the power, scope of inquiry, and significance of which affects every department of life in which she, as a citizen and elector, is interested and of which she is a component part?[95]

Not only does jury service appear here as a political right, it is also part of a recognition of women's newly won status as public realm beings as active citizens and property owners. But the language of the *Parus* ruling is quite unusual. More typical were court rulings that denied a wider impact to the Nineteenth Amendment or that asserted the continuing significance of maternalist conceptions of women's place.[96]

In many of the states that granted women's eligibility for jury service, they were provided with automatic exemptions, so that a woman had to affirmatively register her willingness to serve on a jury before she was added to the list of prospective jurors. Needless to say, in such states, the proportion of women jurors was very low. Other states provided that any woman who requested an exemption be excused, while still others allowed women who had young children or other dependent family members to be excused. Such policies reflected not only a reluctance to allow women to serve on juries (generally, it was the opponents of women's jury service who insisted on exemptions), but also the continued presumption that women's identities were more firmly rooted in the private than in the public realm. Either the obligations of motherhood were thought greater than the obligations of citizenship, or the duties of motherhood were taken to be women's contribution as citizens. One popular ditty that expressed the public's discomfort with women's jury service in this period went—"Baby, baby, don't get in a fury, Mama gone to serve on the jury." Although there was some debate regarding how extensive the exemptions for women jurors should be, in the decades after the Nineteenth Amendment there was general agreement on the superior virtues of the motherhood role.

Since the woman rights advocates of the early twentieth century had themselves often invoked maternalist arguments in their discussions of women's potential contribution to the public realm, it seems no surprise that the courts concurred with them. While the early woman rights movement relied more heavily on individual natural rights arguments, by the turn of the century activist women were more inclined to resort to the ideology of domesticity. According to the latter view women were indeed different,

95. *Parus,* 708.

96. Sheridan, "Women and Jury Service."

and in many ways better (more virtuous, moral, and cooperative) than men. Further, women's identities were firmly rooted in the private realm of home and family. Their virtues as citizens, then, were the virtues of good mothers. The public behavior of female citizens was expected to be an extension of their private identities. The antisuffragists, and later opponents of women's jury service, argued against conferring upon women any citizen duties seen as an impediment to the fulfillment of their private obligations.[97]

The debate over equality after the Nineteenth Amendment was illuminated by the division among jury service proponents over whether women jurors differed in any predictable way from men. Most believed women did differ, and feminist often used this argument to claim that women jurors would provide a different sense of justice that would be a particular benefit to women and children. The popular and political journals of the 1920s contain many discussions of the differences between male and female jurors, with several concluding that a mixed jury offered the greatest assurance of justice. Indeed, the state legislature of Oregon passed a law in 1921 instituting a mixed jury by mandating that in criminal cases involving a minor half of the jury must be women.[98] This law faced practical difficulties that prevented its effective enactment, particularly because Oregon also provided for broad exemptions of women from jury service, which created a shortage of women in the venire. Both the law and the exemption policy reflect particular conceptions of women as citizens.

When this law was challenged, the state supreme court upheld it.[99] In their opinion, the court explained why this policy was justified. "Any one who has occupied the Circuit bench and seen a poor frightened girl, a stranger to the court room, forced to detail the facts in regard to her injury or shame to a jury composed of strange men, has felt that the presence of a few mothers of children in the jury box would be more in accordance with humanity and justice."[100] The reasoning here sounds much like the reasoning in Stanton's plea to the New York State legislature in cases of infanticide. It is a woman's understanding—of children, and of the sexual wrongs done to innocent women or girls by men—that justifies a positive demand for women's inclusion on juries. Despite the high court's approval, this experiment with mixed juries was abandoned in 1923 because the state's

97. Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992); Robyn Muncy, *Creating a Female Dominion in American Reform, 1890–1935* (New York: Oxford University Press, 1991); Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca: Cornell University Press, 1995).

98. Oregon General Laws 1921, Chapter 273, Section 1520.

99. *State v. Chase,* 106 Ore. 263 (1922).

100. Ibid., 267.

exemption policy made it too difficult to secure enough women jurors. The stress on difference highlighted women's distinctive civic contributions, but it also tended to excuse them from public participation.

This section has examined the post-suffrage campaign to obtain jury service for women in order to understand the impact of the Nineteenth Amendment on women's citizenship. Analysis of the campaign shows that the Nineteenth Amendment failed to create equal citizenship for women at either the level of civic status or the rights and duties of citizenship. The national citizenship framework created in the late nineteenth century limited the impact of suffrage on citizenship. The court decisions regarding jury service reveal how reluctant state courts were to grant the Nineteenth Amendment much influence over women's rights and duties in other areas. This reluctance was consistent with a structure of citizenship in which political rights were considered secondary to civil rights, and in which women's status as persons before the law remained ambivalent. The impact of the amendment was more normative (and short term) and less constitutional. The Nineteenth Amendment did make women into civic beings, but their presence within the public realm was seen as limited and often as secondary to their obligations in the private realm. It was clear by the end of the 1920s that the feminist movement's dream of making women men's peers and first class citizens was still far from being realized.

III. Women's Citizenship: The Nineteenth Amendment and Beyond

The struggle to secure equal jury service for women went on through the 1970s. As late as 1961 the Supreme Court upheld Florida's practice of automatically exempting women from jury service.[101] Shortly after the *Hoyt* ruling, the women's liberation movement emerged. This movement had two different wings: the liberal feminists, associated particularly with the National Organization for Women; and the radical feminists, associated with the style and organizations of the New Left. The liberal feminists took up the project of more fully articulating an ideal of equal public realm citizenship for women that they sought to enshrine in the Constitution with the Equal Rights Amendment. That effort failed in the early 1980s. The radicals rejected the ideal of liberal citizenship for women and even argued that women ought to give back the vote as a statement of how little good it had brought them. Whether they sought to complete or reject the citi-

101. *Hoyt v. Florida,* 368 U.S. 57 (1961).

zenship they received from their foremothers, neither group of feminists in the 1960s and 1970s were satisfied with what they had been given.[102]

As amended by the Nineteenth Amendment, women's citizenship was at best an imperfect vehicle for their political articulation and mobilization. It did little to restructure the citizenship created after the Civil War. In the nineteenth century, the vote was regarded by many as the central right of citizenship. But despite the rhetoric of the Declaration of Independence, not all Americans were regarded as equal. Instead the community of the nation was ordered by race and by gender. That order was reflected in the distinctive terms of citizenship found among these various groups. Even as an inclusive liberal polity in the twentieth century, the terms of citizenship as defined under the Fourteenth, Fifteenth, and Nineteenth Amendments continued to speak to the differential political standing of whites and blacks, and of men and women.

Viewed through the lens of electoral politics, the historical failure of women to lay claim to the rights of citizenship after the Nineteenth Amendment remains somewhat mysterious. The continued particularities of women's citizenship are made clearer in the struggle for jury eligibility. This struggle reveals that the narrow, parsed structure of national citizenship as established under the Fourteenth Amendment remained intact. It is part of my argument here that the effort of the women's rights movement, in the post–Civil War period, to construct a progressive vision of the Reconstruction Amendments helped inspire the Supreme Court to do just the opposite. To ensure that these amendments would never be used to upend sex discrimination, the courts diminished the scope of national citizenship, downplayed the power of political rights within citizenship, and addressed the progressive power of the equal protection clause primarily to African Americans. This was the legacy left to the suffragists in the early twentieth century. The creative constitutionalism of their foremothers begat a framework of national citizenship that greatly diminished the likelihood that suffrage would ever transform women's citizenship more broadly. The rights advocates of the 1920s quickly recognized the inadequacies of what they had won and were drawn into other campaigns, including the campaign for jury service. Once women had the vote, they were supposed to be full citizens. Yet this did not occur.

The citizenship established for women under the Nineteenth Amendment carried with it all the limitations found in the judicial interpretations of the Fourteenth Amendment. It was a citizenship of limited rights, limited expectations, and broad space for state regulation of its specifics. This was a

102. Alice Echols, *Daring to Be Bad: Radical Feminism in America, 1967–1975* (Minneapolis: University of Minnesota Press, 1989).

citizenship that left women little room for the elaboration of a public, distinctly feminist politics. The alternative (and never realized) vision articulated by rights advocates was of a citizenship grounded in political rights, like voting and jury service. Instead they got a citizenship in which, at the most basic level, women were men's equals and could not be excluded from voting or, eventually, from serving on juries. But the failure to exclude did not constitute an argument for inclusion. Indeed, the political identity that women held as nonvoters prior to the Nineteenth Amendment may have provided them with a better basis for a public women's politics. Not until the 1960s would women forcefully address the terms of their citizenship again and seek to move beyond the Nineteenth Amendment.

There were striking parallels in the terms of citizenship deemed available to white women and black men (black women were most often left out of consideration by the courts, civil rights groups, and woman rights groups), but important differences as well. African American men were recognized as having broader claims for the protection of their citizenship rights, and their status as electors was recognized as a political status that implied other rights including the right to serve on juries. For women, both suffrage and jury service were deemed grants rather than rights of citizenship. Further, when women's jury eligibility was established, it was done in terms that neither recognized women as political peers in the fuller, more substantive way that many nineteenth-century activists had imagined, nor allowed for their consideration as a previously excluded political class, as had been suggested for African Americans in the *Strauder* case. Instead, women's formal standing in the public realm was regarded as secondary to their more essential private realm activities. When women were no longer formally or informally excluded, it was because of a defendant's right under the Sixth Amendment to a jury that reflected a fair cross section of the community. It was not a matter of a woman's political rights—either to a jury of her peers, or to participate in political governance through her jury service.

Indeed, another implicit alternative model of citizenship is suggested in the nineteenth-century debates over women jurors as peers. In the contemporary feminist theory literature, there is a debate over whether women's citizenship should be premised on equality or on difference. Often, the advocates of the difference position ground their claims in the maternalist attributes women are purported to share. The advocates of equality are often concerned with the ways that formal equality can be made meaningful through government social programs or adjustments in the private division of labor between men and women. On each side of this debate the positions tend to reify around competing principles of justice.[103]

103. Gisela Bock and Susan James, eds., *Beyond Equality and Difference* (New York:

In contrast, the nineteenth-century discussion of jurors as peers suggests the positive good that would result if women brought their substantive, lived experiences with them in the exercise of their public citizenship. In this model, women's maternalism and their sexuality are contextualized and problematized (for instance, in discussions of infanticide or rape) rather than elevated and celebrated. And while the expectation is that women's specific experiences will inform women's outlook, these roles are not designated as legitimating women's political role nor used to exclude women from certain political functions.

In contrast to a women's citizenship based on equality or on difference, there is a move to get beyond the one or two sizes fits all models of citizenship. This alternative demands neither sameness nor difference, but expects substantive experience to provide the basis for community justice on whatever terms that will occur. This ideal of citizenship is closer to the one elaborated by Marianne Constable in her discussion of the mixed jury and personal law.[104] It is an ideal of citizenship that views difference as socially made rather than demographically assigned and that expects community norms and practices—on juries and elsewhere—to provide the basis for politics and justice in society. The danger of this approach is that community norms could be used to impose conservative or conformist values on individuals. The promise of this approach lies in the ability of women to bring their lived experiences to their civic lives, thereby bridging the private/public distinction in the direction of public activism. This is the legacy of the long struggle for women's right to serve on juries—it clarifies the nature of women's citizenship after the Nineteenth Amendment and provides the basis for reimagining the relationship between citizenship and democracy today.

Routledge, 1992); Judith Butler and Joan Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992); Nancy Fraser and Sandra Lee Bartky, *Revaluing French Feminism* (Bloomington: Indiana University Press, 1992); Leslie Friedman Goldstein, *Feminist Jursiprudence: The Difference Debate* (Lanham, Md.: Rowman and Littlefield, 1992); Sneja Gunew and Anna Yeatman, eds., *Feminism and the Politics of Difference* (Boulder: Westview Press, 1993); Nancy Hirschmann and Christine Di Stefano, eds., *Revisioning the Political* (Boulder: Westview Press, 1996); Kathleen B. Jones, *Compassionate Authority* (New York: Routledge, 1993); Anne Phillips, *Democracy and Difference* (University Park: Pennsylvania State University Press, 1993); Lyndon Shanley and Carole Pateman, eds., *Feminist Interpretations and Political Theory* (University Park: Pennsylvania State University Press, 1991); and D. Kelly Weisborg, *Feminist Legal Theory* (Philadelphia: Temple University Press, 1993).

104. Constable, *The Law of the Other,* 147–52; and Gretchen Ritter, "Modernity, Subjectivity and Law: Reflections on Marianne Constable's *The Law of the Other,*" *Law and Social Inquiry* 27 (1997): 809–28.