From 1865 to 1920, the United States underwent significant constitutional change, forging the legal framework in which race and sex classifications became integral parts of the Constitution and its interpretation. By analyzing congressional debates, Supreme Court decisions, and contemporaneous legal journal articles, this thesis investigates the implications of the Fourteenth and Nineteenth Amendments for women’s jury service rights and obligations. How and why did the federal government legitimize women’s exclusion from juries while simultaneously opposing racial discrimination in jury service selection? This thesis argues that the Fourteenth Amendment, the congressional debate concerning it, and the Court interpretations of it made sex and race antagonistic legal categories, as illustrated in discussions about jury service. In these jury service debates and policies, legislators and jurists relied on notions of gender difference to justify sex discrimination in jury selection as acceptable, benign, and necessary. In addition, the Reconstruction Amendments and their legacy focused the women’s rights movement on attaining suffrage, shaped the scope and language of the Nineteenth Amendment, and limited its effects on women's jury service eligibility.
To my parents, Bradd and Carol, my sister, Charlotte, and my husband, Steven
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INTRODUCTION

Since the founding of the United States, the jury trial has been a central component of the American judicial system. This reliance on the jury for legal and social justice stemmed from the nation’s foundational democratic ideals, such as equality and liberty, and republican principles, including self-governance and representation. The citizen’s relationship to government involved potential participation in the judicial process through jury service. Through determining what qualifications a citizen needed in order to perform jury service, state and federal governments restricted the actual ways in which the jury system promoted the democratic ideals it claimed to protect. Alexis de Tocqueville recognized both the limits and potential of the jury, arguing that it “can be aristocratic or democratic, according to the class from which jurors are taken; but it always preserves a republican character, in that it places the real direction of society in the hands of the governed or in a portion of them, and not in those who govern.”¹ The jury system might sustain its republican import, because the power resides in the people rather than the government; however, the state’s ability to exclude certain people has undermined the democratic potential and promise of the jury system.

Jury service as a measure of citizenship is a civic obligation in a democratic society, but it is also a right among equals. In other words, voting and jury service create rights for those who are allowed to contribute, but they are also duties of responsible citizens.² This dichotomy


² Linda Kerber argues that jury service is an obligation, not a right. She claims that “in the liberal tradition, rights are implicitly paired with obligation” (xxi). The right to a jury trial is paired with the obligation to serve on a jury. While her argument is convincing in some ways, it does not emphasize the equal or “peer” status afforded to potential jurors. Rather, it stresses the degree to which obligations and rights are compulsory and how those obligations coincide with gender discrimination. See Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998): xx-xxii.
reverberated in the speeches and writings of those involved in the debates over jury service during the late-nineteenth and twentieth centuries. For those who wished to expand the qualifications to admit new groups, jury service was usually considered a right, an indication of equal citizenship, but for others who wanted to restrict or limit participation, jury service was seen as an obligation, duty, or privilege. Due to these various debates over jury service eligibility and participation, juries have, like other forms of political participation, become more democratic as new groups of citizens have been included over the course of American history.  

The scholarly study of juries and jury service rights and obligations spans three large disciplines – history, political science, and law – and contributes to Constitutional history, legal history, political history, race and gender history, studies of citizenship, and American political thought. Moreover, researching juries provides one means of examining the changes in U.S. democratic institutions and their effects on the citizenry. Studying jury service permits the investigation of how political rights and obligations and meanings of citizenship have changed over time. Additionally, scholarship on jury service contributes to the abundant scholarship on the franchise. By not focusing solely on suffrage, this work provides a deeper investigation of the implications of the Fourteenth, Fifteenth, and Nineteenth Amendments on women’s citizenship and political status. Because constitutional amendments ended race and sex discrimination in voting qualifications, scholarship on jury service can explore and analyze the alternate methods by which various groups of citizens became eligible to participate in government institutions. This project attempts to bridge the scholarship on sex discrimination in jury service with scholarship on race discrimination in jury service, ultimately using the history

\[\text{3 Alexander Keyssar argues that the U.S. has become more democratic over the course of its history through periods of expansion and contraction of qualified voters. For a comprehensive history of voting rights in the United States; See Alexander Keyssar, } \textit{The Right to Vote: The Contested History of Democracy in the United States} \text{(New York: Basic Books, 2000).}\]
of African American men’s jury participation and eligibility in contrast with that of women to understand the social movements, their trajectories, differing justifications for discrimination, and the legacy of the Fourteenth Amendment. Although it will address changes in African American men’s jury service obligations and rights to provide a contrasting example, the primary focus of this research will be on how and why women were excluded from juries during the late-nineteenth and early-twentieth centuries. 4

Surprisingly, little scholarship has investigated women and jury service. Many of the central legal texts on the nature and effectiveness of the American jury system, including studies by Harry Kalven, Jr. and Hans Zeisel; Marcus Gleisser; Valerie P. Hans and Neil Vidmar; and Randolph N. Jonakait, do not discuss of the inclusion and exclusion of certain groups from juries throughout American history. 5 In 1966, Kalven and Zeisel produced a comprehensive study of the jury system that declared its effectiveness by comparing jury verdicts to the judges’ theoretical decisions; however, they ignored the historical exclusion of certain groups. 6 In his


1968 work, Gleisser argued that juries neither provide justice nor represent a community, because jurors are selected for, not in spite of, their individual traits, such as sex. Likewise in 1986, Hans and Vidmar concluded that juries still fail to represent the community, but that jury selection has become more democratic over the course of American history, citing women’s inclusion as one example. While earlier works criticized the effectiveness of the jury, Jonakait’s book, published in 2003, argues that juries are a valuable part of the American judicial system because they legitimize the judicial process, connecting society with the justice system.

By using another standard to examine the effectiveness of the jury system, this thesis offers a historical perspective on the exclusion and inclusion of members of American society based on sex and race as well as the implications of exclusion and inclusion of certain groups within society.

Beginning in the 1960s and 1970s, jury service was only one of many topics included in broader discussions on women’s rights, women and the law, and women’s history. These discussions of women’s eligibility for jury service and the brief legal history of women’s exclusion and inclusion supported arguments that historically women had not had equal rights, obligations, and citizenship compared to men and that the second-wave feminist movement succeeded in making legal and political gains for women. As such, scholarship throughout the

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1970s and the early 1980s discussed women’s jury service as an example of sex discrimination and as an achievement made by the second women’s movement. To complement this scholarship, this project will provide a context for understanding women’s inclusion on juries during the second-wave feminist movement by explaining why and how the federal government excluded women from juries.

A few other articles or chapters written in the late 1970s and 1980s addressed particular judicial systems in order to investigate sexism by court officials and attorneys in the jury selection process, but these works lack an historical perspective on the exclusion of women from juries that this thesis will provide. Sociologist Adeline Gordon Levine and criminal justice scholar Claudine Schweb-Koren’s 1978 article uncovers sex discrimination against women jurors by the judicial officials through a specific case study outlining the under-representation of women on juries in a particular county.11 Similarly, sociologist, Anne Rankin Mahoney offers brief legal histories of women’s exclusion from and eventual inclusion on juries, but her primary focus remains on identifying sexism in the selection process.12 These scholars blame underlying gender stereotypes for sex discrimination on juries. Likewise, in 1986, legal scholar Carol Weisbrod wrote “Images of a Woman Juror,” which provided a more historical investigation into how popular depictions of women impacted women’s exemption from or the likelihood of

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women serving on juries. While these works suggest, in part, the justifications for excluding women from juries in the latter part of the twentieth century, this project shows the transference of gender stereotypes into legitimized legal policy and practice in the late-nineteenth and early twentieth centuries.

Beginning in the 1990s and contributing to a new trend in political history, scholars began to concentrate on the larger implications of jury service eligibility for citizenship. In 1994, legal and rhetoric scholar Marianne Constable investigated the legal and cultural foundations for the English “mixed jury” of foreigners and citizens to understand the legacy of inclusion and exclusion and the modern jury. Following this study of citizenship, historian Linda Kerber dedicated a chapter in No Constitutional Right to Be Ladies to the Supreme Court case, Hoyt v. Florida, arguing that women’s citizenship has been constrained, because historically they have not had the same obligations as male citizens. Political scientist Gretchen Ritter has also focused on juries to understand the impact of the Nineteenth Amendment on women’s citizenship. Also discussing changes in women’s citizenship, this

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thesis complements these earlier undertakings by investigating the intersection of race and sex in policy and institutional debates in order to understanding women’s constitutional and citizenship history.

Recently, scholarly focus has shifted from women’s to gender history, incorporating analysis of the impacts of exclusion and inclusion for both men and women. In 1999, legal scholar Christina Rodriguez contended that women jurors in the Washington territory in the 1870s and 1880s impacted men just as much as women. These women changed the etiquette and atmosphere of the judicial system, ultimately changing the court environment to one that was more moderate and refined.¹⁸ Linguist and English professor, Chng Huang Hoon, also examines emphasizes the importance of gender in studying jury service laws and their impact on society and legal institutions. She researches language and gender in law and the impacts of it on marginalized groups.¹⁹ Both of these scholars balance their statements about changes in women’s positions with analysis about the impacts of those changes on men and society in general. Likewise, this thesis bridges the male-dominated government institutions and gendered political language with their effects on women, the law, and social movements.

In addition, women’s history has also become more integrated with political history, as scholars have employed it to understand political movements and methods of pressure politics. Following works on the success of the suffrage movement’s political organization, such as Sarah


Hunter Graham’s *Woman Suffrage and the New Democracy* and political historian Michael McGerr’s “Political Style and Women’s Power, 1830-1930,” legal historian, Richard F. Hamm argued that women’s struggle for jury service obligations illustrated a new use of the courts and political maneuvering. By addressing jury service rather than suffrage, this thesis escapes the well-traveled historiography on the Nineteenth Amendment to provide a fresh perspective on the impact of that amendment on women’s civic participation and U.S. political history. Moreover, this project suggests that the Reconstruction Amendments impacted the ways in which women pressed for political reform.

This project uses jury service to examine the impact of the Fourteenth Amendment on women’s citizenship after the Nineteenth Amendment, in contrast to the citizenship of black men after the Reconstruction era. Understanding how the woman suffrage movement and Nineteenth Amendment were, in part, responses to the Fourteenth Amendment and its ensuing precedents helps us understand why women’s rights activists took a different path, sometimes colliding with African American men in pursuit of political rights and obligations. The Fourteenth, Fifteenth, and Nineteenth Amendments all include sections about suffrage. By focusing on jury service instead of voting, this thesis will provide fresh perspective on the suffrage campaign from outside the suffrage movement and analyze the constitutional implications of the Fourteenth Amendment on women’s and African American men’s citizenship beyond voting rights.

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This thesis also illuminates how and why the federal government treated women and African American men differently in the protection of their rights and obligations to serve as jurors over the late-nineteenth and early twentieth centuries. How have the Fourteenth Amendment, Reconstruction debates and legislation, and Supreme Court decisions treated black men differently than women in terms of jury service eligibility and participation, and with what constitutional and legal implications? Additionally, why have race discrimination and sex discrimination been designated distinctive rationales and justifications, and why, therefore, have they been transcribed into law differently?

The translation of socially-constructed gender prescriptions and expectations into the Fourteenth Amendment and the subsequent precedents set by the courts, especially by the Supreme Court, undermined the potential for the Nineteenth Amendment to extend jury service obligations to women. The Nineteenth Amendment failed to reconcile fully and sufficiently the gender discrimination instituted by the doctrine of separate spheres, the Fourteenth Amendment, and the judicial interpretations of it. The legacy of these Supreme Court precedents constrained the women’s rights movement in ways that made changing the status quo and petitioning the government a difficult and tediously slow process.

The first chapter addresses the divergent paths of the movement for racial equality and the women’s rights movement of the late-nineteenth century, arguing that the Fourteenth Amendment, especially its second section, created classes of citizenship based on sex rather than

race, allowing African American men, but not women, to access juries more easily than women. Furthermore, the incorporation of the word *male* into the Constitution in the second section of the Fourteenth Amendment explicitly legitimized state restrictions on woman suffrage, inciting a woman suffrage movement that focused narrowly on the right to vote, instead of a broader movement to secure gender equality, including eligibility for jury service. Finally, this particular amendment and the Congressional debates that followed it pitted black men’s political rights and obligations, namely those to jury service, against women’s.

Following the examination of the Fourteenth Amendment and the debates surrounding it, the second chapter answers another set of questions. What measures did Congress and the Supreme Court take to make African American men jurors, and how did those policies and precedents affect the eligibility of women? This chapter argues that the Supreme Court ruled that racial discrimination in jury service qualification or selection was unconstitutional, while simultaneously legitimizing and institutionalizing sex discrimination in jury service eligibility. Justices viewed the underlying rationales for sex discrimination and for racial discrimination as distinct, sustaining the appropriateness of sex discrimination as naturally stemming from gender difference. This basis for discrimination emerged from a cultural context that embraced an ideology of separate spheres and the cult of true womanhood, defining women’s relationships to men and to government.

Finally, the third chapter explores the ways in which the Fourteenth Amendment, through its constitutional interpretation, its subsequent precedents, and its effect on the women’s rights movement, limited the ability for the Nineteenth Amendment to change the legal and political status of women beyond enfranchisement. More specifically, even with the ratification of the Nineteenth Amendment, Congress and the Court did not support jury service for women, as they
had for black men during Reconstruction. The government’s continued disapproval of women jurors coincided with the dissolution of the suffrage movement after 1920, producing women’s organizations with various objectives and strategies. One of the goals of some women was the integration of the Equal Rights Amendment (ERA) into the U.S. Constitution – an amendment that would have broadly impacted the legal protections afforded to women against sex discrimination in ways that the Fourteenth Amendment protected black men from race discrimination, including extension of jury service rights. The legacy of the Fourteenth Amendment and the legal precedents it inspired, the limited and narrow scope of the Nineteenth Amendment, and divisive debate over the ERA in the 1920s prevented women from becoming jurors until the second-half of the twentieth century.
CHAPTER I: THE FOURTEENTH AMENDMENT: ITS DIVERGENT INTENTIONS AND IMPLICATIONS

Of all the amendments to the U.S. Constitution, the Fourteenth Amendment produced the most dramatic and lasting results for ending racial, and later sex, discrimination. 1 Ironically, this same amendment substantially widened the divide between the women’s rights movement and the movement to secure racial equality. 2 Indeed the Fourteenth Amendment aided only African American males in their fight against racial discrimination in the jury selection process and actually impaired the women’s rights movement’s pursuit of citizenship rights and obligations, especially regarding the vote and jury service. 3 Historians and political scientists have long recognized the negative impact of the Fourteenth Amendment on the women’s rights movement in its attempt to secure full political rights through litigation. Most scholarship about the Fourteenth Amendment’s impact on women’s citizenship primarily focuses on voting rights without addressing other forms of civic participation. Enhancing this scholarship by focusing on jury service, this chapter argues that the adoption of the Fourteenth Amendment, the

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1 The Fourteenth Amendment does not become an effective tool for women’s rights activists and organizations until the 1970s. Also, in this chapter and elsewhere, I use the term sex discrimination instead of gender discrimination for two main reasons. First, I want to use a term that reflects the predominant thought of policymakers and jurists of this historical period, namely that differences between the sexes are biological, rather than at least partially being socially and legally constructed, promoted, and expected. Secondly, since late-nineteenth and early-twentieth centuries, law and legal decisions about sex discrimination have been written in terms of biological sex (male or female) rather than using the more fluid gender categories, these chapters discuss sex discrimination in the same ways.


3 Voting and jury service can be considered both rights and obligations. Political participation is a right among equals and an obligation of citizenship. In other words, voting and jury service create equality for those who are allowed to contribute, but they are also duties of responsible citizens. This dichotomy reverberates in the speech and writings of those involved in the debate over jury service. For those who wish to expand the qualifications to new groups, jury service is usually considered a right, designating equality, but for others who want to restrict or limit participation, jury service is seen as an obligation, duty, or privilege.
establishment of precedents based on it, and the congressional debates over Reconstruction legislation assisted African American men and frustrated women in their attempts to gain access to juries. While political scientist Gretchen Ritter also addresses the subject of jury service and gender, she centers her work on the Nineteenth Amendment and its impact on women’s citizenship. She maintains that Court precedent based on Fourteenth Amendment claims hurt the woman’s rights movement and limited the effect of the Nineteenth Amendment; however, her work does not address the effects of the Reconstruction Amendments on the methods and arguments of the women’s rights movement. Furthermore, unlike Ritter’s scholarship, this chapter supplements discussion of legal doctrine with analysis on legislative debates, congressional policy, and contemporary cultural values to determine more precisely why government legitimized women’s exclusion from juries. Policymakers institutionalized the social gender norms that supported sex discrimination as a natural result of gender difference, yet they removed racial discrimination and attempted to rectify it through the Reconstruction Amendments. 4

In its second section, which included the word male, the Fourteenth Amendment became the first constitutional language to condone sex as a category for discrimination. Because women’s legal claims were all based on the first section of the Fourteenth Amendment, Ritter excludes any discussion of section two of the Fourteenth Amendment, failing to signify the importance of the policymakers’ addition of the word male to the Constitution. Because the Fourteenth Amendment explicitly permitted government-sponsored sex discrimination while attempting to eradicate government-sponsored racial discrimination, women faced new obstacles

4 Keyssar, The Right to Vote, 177-179; Hoff, Law, Gender, and Injustice, 139-147; Kerber, No Constitutional Right to Be Ladies, xx-xxi; Ritter, “Jury Service and Woman’s Citizenship before and after the Nineteenth Amendment,” [journal online].
to achieving citizenship rights and obligations, and therefore, activists revised their agenda to combat the newly instituted discrimination even as African American men enjoyed additional constitutional protection. Thus, the Fourteenth Amendment raised the hope that African American men would achieve political rights, yet it became an impediment to women’s rights by condemning race and condoning sex discrimination.⁵

Furthermore, this amendment and subsequent interpretations of it changed the focus and undermined the unity of the women’s rights movement, limiting the ways women could pressure the United States government for rights. Because the Fourteenth Amendment blatantly institutionalized classes of citizenship based on sex, and the Fifteenth Amendment omitted sex as a constitutionally protected category, they frustrated the wide-ranging efforts of the women’s rights movement, prompting women’s rights activists to channel their attention and resources into a suffrage campaign. In response to these amendments, the women’s rights movement funneled all of its efforts into enfranchising women, transforming the women’s rights movement into a narrower suffrage movement and spawning an array of single-issue pressure groups.⁶ This chapter argues that through the framing and adoption of the Fourteenth Amendment and the debates over jury service legislation, congressmen pitted race discrimination against sex discrimination to the disadvantage of women’s rights, ultimately leading to a severance between the broad movement for racial equality and the narrow woman suffrage movement.

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⁵ Keyssar, *The Right to Vote*, 177-179; Ritter, “Jury Service and Woman’s Citizenship before and after the Nineteenth Amendment,” [journal online].

⁶ Graham, *Woman Suffrage and the New Democracy*, xi, xii, 44.
Women’s Rights and Abolitionist Movements Make Demands

In the early part of the nineteenth century, an abolitionist movement organized. Anti-Slavery societies sprang up throughout the North in the 1830s and 1840s. These reform societies organized conventions, spoke against the institution of slavery, and funneled grassroots support into congressional petitions. Abolitionist organizations held conventions where both men and women delivered speeches and served as delegates. Through their participation in this movement, some of these women began to dissolve the rigid lines between private and public life while developing skills for creating an effective social movement. These women and others became vocal about reform regarding issues of liberty, rights, and equality. Some women endorsed the abolition of slavery as well as the extension of citizenship, education, and political rights to African Americans. As women petitioned legislatures for reforms, their “efforts . . . to transform public opinion reflected their own recognition that they were entitled to enter the larger political conversation and thus to make demands on those in power.” Having stepped outside of the traditional bounds of womanhood through their speaking and activism, these women began to fight entrenched gender expectations to access the male-dominated public sphere.

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8 Ibid, 48-49.


10 For a discussion of women’s activism and the restrictions that popular notions of womanhood placed on them, see Paula Baker, “The Domestication of Politics: Women and American Political Society: 1780-1920,” *American Historical Review* 89 (June 1984): 620-647. In this article, she contends that the abolition movement informed women about how to form a women’s rights movement. Also, see Ginzberg, *Untidy Orgins*, 26. She argues that “by speaking up [women] entered a conversation long under way, undermining its comfortable assumptions and shifting the ground on which men would defend their own exclusive claim to full membership in the nation.”
The abolitionist movement was the “political birthplace of feminism in the United States.” Within abolitionist societies, women were sometimes treated differently than men. For example, at the 1840 World Anti-Slavery Convention, Lucretia Mott, a delegate from Pennsylvania, and Elizabeth Cady Stanton were prevented from participating in the event and segregated from the main floor by a curtain. In response to the treatment of women within the abolition movement and within society at-large, Mott and Stanton organized the first Women’s Rights Convention in Seneca Falls, New York in 1848. At this convention and others that followed, women demanded political rights, individual liberties, and social equality. Incorporating some of the same language and ideas that the abolitionist movement invoked, these women found some abolitionists supportive of their cause, but women began organizing their own separate efforts to change the political, legal, and social position of women. Along with attempting to change the effect of marriage on women’s rights, they sought access to higher education, prestigious professions, the vote, and juries. However, according to historian Lori D. Ginzburg, in the period before the Civil War, “politicians insisted that women’s equal rights were dangerous, immoral, and unthinkable.” Having failed to achieve its objectives, this early women’s movement became more organized throughout the 1850s, and after the Civil War, these women’s rights activists resumed their movement, adapting it to make the most of the civil rights


13 Ibid.


revolution touched off by emancipation and Reconstruction. After the Civil War ended, Susan B. Anthony, Elizabeth Cady Stanton, and other women’s rights advocates attempted to influence policymakers as they discussed and debated Reconstruction policies, including the Fourteenth Amendment. These women hoped to win political rights and achieve social reform at the same time that Congress expanded the rights of African American men.

**The Construction and Scope of the Fourteenth Amendment**

The 1857 Supreme Court decision in *Dred Scott v. Sandford* inspired the creation and adoption of the Fourteenth Amendment. In his infamous opinion, Chief Justice Roger B. Taney held that African Americans had no constitutional rights, denying “them status not only as citizens but as persons.” The Constitution, according to the Supreme Court, now supported the institution of slavery and affirmed the legal inequality of African Americans, slave or free, within the United States. Because of this ruling, Congress had to address the relationship between former slaves and the national government, which it did in the Fourteenth Amendment by creating a national citizenship.

The Thirty-Ninth Congress convened on December 4, 1865 with the Confederacy defeated and slavery destroyed by Union emancipation policies and the realities of war. The

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17 Hoff, *Law, Gender, and Injustice*, 139-142.


Republican Party had more than a two-thirds majority in both the House and the Senate, leaving the Democratic Party with little political influence in either chamber. Republicans, Thaddeus Stevens, a representative from Pennsylvania, and Charles Sumner, a senator from Massachusetts, both promoted federal legislation and constitutional amendments to protect the freedom of African Americans. In December 1865, a joint congressional committee convened to hold hearings on the former slaves’ situation in the South and to draft what would become the Fourteenth Amendment. Some congressmen, unwilling to guarantee voting rights to black men, prevented the creation of a more specific amendment but agreed to support general language that extended citizenship to African Americans. The Senate passed the Fourteenth Amendment on June 8, 1866, and the House adopted the Senate’s version five days later.

The Fourteenth Amendment defined national citizenship and guaranteed to citizens certain protections and privileges. Composed primarily by Republican Representative John A.

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21 Baer, Equality Under the Constitution, 77.

22 Howard N. Meyer, The Amendment that Refused to Die: Equality and Justice Deferred, The History of the Fourteenth Amendment, rev. ed. (New York: Madison Books, 2000): 51-60. While Meyer presents an informative account of the process of creating the Fourteenth Amendment, he fails to confront the expectations or intentions of the framers. Instead, he claims that the Fourteenth Amendment was one effort by Congress to expand “legal protection for the rights of all Americans” (71). He does not specifically address its effect on women until a later and segregated discussion of the Nineteenth Amendment; Maltz, The Fourteenth Amendment and the Law of the Constitution, 113 Stover, “The Origins of the Suffrage Clause of the Fourteenth Amendment”, 72-77; Joseph B. James, The Framing of the Fourteenth Amendment (Urbana: University of Illinois Press, 1956): 13.

23 Fourteenth Amendment: Section I “All person born of naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Section II “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis
Bingham of Ohio, the first section of the amendment defined citizenship broadly, without reference to race or sex. It also extended equal protection and privileges to all citizens, apparently including African Americans and women. This section created a basis for equality among U.S. citizens. As historian Linda Kerber has stated, the first section is what made the Fourteenth Amendment seem “to provide an opportunity” for eliminating differential treatment on the basis of race, and potentially sex.

However, in its second section, the Fourteenth Amendment created classes of U.S. citizenship by separating men out as political beings and implicitly inscribing in the Constitution the concept of separate spheres. This section mandated that the representation of the states in the U.S. Congress be reduced according to the number of otherwise qualified male citizens from whom the franchise was withheld. By tying voting rights to male citizens, the Fourteenth Amendment acknowledged and implicitly condoned the differential treatment of its female citizens. Through the adoption of this amendment, the federal government legitimized the gender norms already present in state law which segregated the male public, political sphere from women’s private, domestic sphere.

Both Bingham and Senator Matthew W. Carpenter of Wisconsin wrote reports on the issue of federalism with regard to the potential impact of the Fourteenth Amendment on state power, arguing “that section 2 of the amendment implicitly recognized the continued authority of

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\text{of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.}
\]


the states over voter qualifications.” Yet this section encouraged states to allow African American men to vote by threatening to decrease state congressional representation in proportion to the otherwise qualified male citizens who were denied the vote. While attempting to direct the actions of the states, the federal government still invested the state governments with the right to determine who had political rights.

In addition to determining the qualifications of voters, states set qualifications for jury service. Earl Maltz, a distinguished professor of law, argues that “during the Reconstruction era, the ability to serve on a jury was viewed as a species of political right, and the struggle over political rights in the late nineteenth century focused primarily on the right to vote.” Jury service rosters were traditionally taken from the list of qualified voters within each locale; therefore, excluding women from voting also prevented them from participating on juries.

As the American public discussed the Fourteenth Amendment during the process of ratification, newspapers included editorials and columns about its potential effects. In early March 1868, in the Bossier (La.) Banner, an anonymous writer warned, “if you don’t want Negro jurors, go to the polls and vote against the new constitution.” The potential changes the Fourteenth Amendment could induce were still unclear; however, allowing African American men onto juries was one change that caused concern for some Americans.

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With the adoption of the Reconstruction Amendments, Congress provided African Americans with federally enforced constitutional protections against racial discrimination, while legitimizing state policies that discriminate based on sex.\textsuperscript{31} Historian Sandra VanBurkleo maintains that the Reconstruction Amendments provided for the “transmutation of the federal government into an instrument of liberation for oppressed classes, [which] suggested that it might be mobilized on woman’s behalf.”\textsuperscript{32} However, the Fourteenth Amendment segregated the political rights and obligations of men and women, and the Fifteenth Amendment secured voting rights for African American men but denied them to women. While the Reconstruction Amendments established means by which citizens could argue for equal treatment, Congress and the ratifying state governments simultaneously established that differential treatment and political segregation of women was acceptable, perpetuating socially conventional gender norms.\textsuperscript{33}

**Who Can Be a Juror? : Congressional Interpretations of the Fourteenth Amendment**\textsuperscript{34}

The vagueness of the first section of the Fourteenth Amendment gave the judicial system more flexibility to interpret “due process of law,” “equal protection of the laws,” and “privileges and immunities.” Despite these ambiguities, the specific line drawn between male and female

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\textsuperscript{31} Fifteenth Amendment: Section I: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” Section II: “The Congress shall have power to enforce this article by appropriate legislation.”

\textsuperscript{32} Sandra VanBurkleo, *Belonging to the World: Women’s Rights and American Constitutional Culture* (New York: Oxford University Press, 2001): 178. She continues by arguing that the adoption of the Nineteenth Amendment underscores this progressive and protective nature of the federal government; however, the Reconstruction Amendments, especially the Fourteenth Amendment, constrained the overall impact of the Nineteenth Amendment’s ability to change the status of women.

\textsuperscript{33} Norma Basch “Reconstructing Female Citizenship,” 53.

\textsuperscript{34} According to Earl M. Maltz, few scholars of constitutional history of the Reconstruction have addressed racial discrimination in the jury selection process. Maltz does this task to illuminate the intentions of the framers of the Reconstruction Amendments.
citizens in the second section created classes of citizenship, in which men held different duties and rights than women.\textsuperscript{35} This division severely constricted the ways women would be able to argue for rights, including jury service, under the Fourteenth Amendment.\textsuperscript{36}

The framers and policymakers of the Reconstruction era did not intend for the protections and privileges guaranteed to citizens by the first section of the Fourteenth Amendment to include political and civil rights and obligations.\textsuperscript{37} The federal government did not guarantee the rights and obligations of voting or jury service; rather, individual state governments regulated these forms of civic participation. In response to Democrats who worried about the potential for the Fourteenth Amendment to extend political rights to African Americans, Republicans, including Representative James F. Wilson of Iowa, “repeatedly stressed that the language of the Fourteenth Amendment did not provide African Americans with political rights.”\textsuperscript{38} Because of this common understanding of the first section, many legislators believed another section of the amendment needed to secure voting rights for black men.\textsuperscript{39}


\textsuperscript{36} Morais, “Sex Discrimination and the Fourteenth Amendment,” 1155-1160. Here, Morais argues that the framers of the Fourteenth Amendment were keenly aware of the women’s rights advocates push for suffrage and their opposition to the introduction of the word male into the Constitution. She contends that these framers understood that the Fourteenth Amendment would be used to argue against sex discrimination. While these contentions may be true, Morais’s vision of the Fourteenth Amendment as paving the way for sexual equality is flawed, because she reads the history backward, assuming that the 1970s Court decisions were inevitable, and she underplaying the extent to which the Fourteenth Amendment and its subsequent court opinions curbed the efforts of the women’s rights movement. The Fourteenth Amendment reinforced stereotypical gender norms and all of the Court cases that challenged sex discrimination under the Fourteenth Amendment before the adoption of the Nineteenth Amendment further supported differential treatment based on sex.

\textsuperscript{37} Ritter, “Jury Service and Women’s Citizenship before and after the Nineteenth Amendment,” [journal online]; Amar, “Jury Service as Political Participation Akin to Voting,” 224-229.

\textsuperscript{38} Maltz, \textit{The Fourteenth Amendment and the Law of the Constitution}, 123.

The second section of the Fourteenth Amendment rewarded state governments for allowing African American men to vote. Therefore, by becoming voters, African American men also became jurors in most states. 40 This outcome, however, was not a foregone conclusion at the time of the writing and debating of the Fourteenth Amendment. In fact, after ratification of the Fourteenth Amendment, congressmen continued to debate the meaning and scope of the amendment as well as additional measures necessary to secure African American rights. Before the Supreme Court ruled on racial discrimination in jury service cases in the 1880s, many policymakers argued, during the 1860s and 1870s, that the federal government needed to prevent racial discrimination in jury service qualifications and selection, leading to further federal reform against racial discrimination and blacks serving on juries across the South. Most notably, in the debate over the Civil Rights Act of 1875, jury service for African American men became a central issue for discussion. 41 Some U.S. congressmen, including Oliver Morton, a Republican senator from Indiana, and John Sherman, a Republican senator from Ohio, believed that the Fourteenth Amendment did expand jury service rights and obligations to African American men. 42

Congressmen who did not believe that the Fourteenth Amendment extended jury service rights and obligations to black men related the position of African American men to that of women with respect to citizenship rights. By binding discussions of racial equality to those of

40 Ritter, “Jury Service and Women’s Citizenship before and after the Nineteenth Amendment,” [journal online].


sexual equality, Senator Carpenter acknowledged and condoned women’s political inequality to men and used the limitations on women’s citizenship to justify racial discrimination in jury service. During these debates, he questioned the effect of citizenship on the acquisition of rights and obligations, claiming that even though “women and infants are citizens of the United States,” they are both “excluded from serving as jurors in every State in the Union.” Moreover, he stressed the absurdity of black men claiming jury service rights and obligations under the Fourteenth Amendment, arguing that “no one pretends or claims that, in consequence of such ineligibility, they are deprived of life, liberty, or property, or of the equal protection of the laws.” Drawing a direct comparison between black rights and women’s citizenship, Carpenter asserted that if the “provisions of the fourteenth amendment require that colored persons should be eligible to serve as jurors in State courts is correct, then this bill [Civil Rights Bill] ought to be so amended as to provide that women and babes at the breast should be so eligible.”

Carpenter and other congressmen closely associated women with children to stress the ridiculousness of populating juries with women and black men. Interestingly, Carpenter alluded to images of motherhood, coupling women with children in the private sphere by describing “babes at the breast.” While this stereotypic representation of women undercut arguments for female jurors, it ironically highlighted the incongruity between justifications for racial discrimination and sex discrimination in jury service, because black men did not occupy the same roles or fulfill the same duties as women.

Allen G. Thurman, a Democratic senator from Ohio, also responded to Morton’s discussion of the Fourteenth Amendment’s impact on blacks’ rights, stating “I am in favor of

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Thurman believed that neither white women nor black men had any need to serve on juries or vote. In his response to the potential impact of the Fourteenth Amendment on racial equality, Thurman exposed contemporary differences between race and sex. While the “colored man” could be, and often was, segregated from the white world, women were integrated into white families and white society – performing roles such as wife, sister, and mother. Unlike women, black men did not have to uphold a separate sphere or tenets of “true womanhood,” but they did have a limited citizenship status which made comparing and contrasting their situation with that of women more explicable.

Some congressmen attempted to expose the absurdity of including jury service as a “privilege or immunity” protected by the Fourteenth Amendment by pointing out that women and children were also citizens but excluded from juries. For example, Thurman, argued that the Fourteenth Amendment did not extend jury service to African American men, claiming that the first sentence of the first section of the Fourteenth Amendment

confers upon them [African American men] no right to sit as jurors; and if it did it would confer upon every woman a right to be a juror; it would confer upon every minor a right to be juror. The mere fact that a person born within the United States or here naturalized become citizens of the United States and of the State wherein they reside, confers no right to be selected or act as jurors.  


45 Congress, Senate, Senator Matthew H. Carpenter of Wisconsin speaking on the Civil Rights Bill of 1875, 43rd Cong. 2nd sess., Congressional Record, (4 February 1875): 1011 reprinted in The Reconstruction Amendments’ Debates, 731. Likewise, Carpenter expounded on the notion of the woman juror, exclaiming that, “The right to serve in the jury-box strikes me as a political right like that of serving on the bench. It is not inherent in a citizen. If it was, a woman would have as much right to serve in the jury-box as a man. A woman is as much a citizen as a man, and always has been under this Government… the political right to serve as a juror, seem to me to fall into the same
This correlation drawn between women and minors indicated not only the degree to which women were separated from men within the legal tradition but also the extent to which congressmen accepted sex discrimination as the natural order of things.

Thurman and Carpenter were not the only congressman to introduce women into the discussion of the extension of rights to African Americans. Even Morton and Sherman, two progressive legislators who participated in debates over African American men’s jury service obligations, did not believe that the Fourteenth Amendment allowed women to participate on juries. While Morton and Sherman were more accepting of arguments for giving women – at least women without familial responsibilities – political rights, neither advocated for women’s rights in these debates. Because of the pressing importance of securing black rights and the unpopularity of women’s rights, Sherman wanted to leave the discussion of women’s rights alone rather than incorporate it into a larger discussion on political rights and citizenship. He toed the line, stating

I do not desire to prolong my remarks by entering into a discussion of women’s rights. I can only say that I never could give any good reason, satisfactory to my own conscience, why a woman should not be allowed to vote or why she should not be allowed to hold office, or have the right to sit upon a jury, except that I would not vote to give them these rights, because I do not think it is best for human society, organized as it is on the basis of the family, to introduce such disturbing elements into the family circle, which is even of higher obligation than the obligation of Government.46

class and belong to those political rights as to which the States always have discriminated and may still discriminate.” See Congress, Senate, Senator Matthew H. Carpenter of Wisconsin speaking on the Amnesty Bill (Civil Rights Amendment), 42nd Cong. 2nd sess., Congressional Globe (5 February 1872): 821, reprinted in The Reconstruction Amendments’ Debates, 609.

Sherman attempted to separate the discussion of women’s rights from the discussion of racial equality by providing a distinct family-focused rationale for excluding women from political rights, obligations, and offices. According to Sherman, women’s family roles justified excluding them from political participation on the assumption that political activity would disrupt their work in the private sphere. Moreover, he placed the importance of family over politics, suggesting that women’s exclusion from polls, political office, and juries was excusable, because their positions as wives, mothers, and daughters were morally imperative. Sherman’s suggestion that the separate sphere women inhabited was the only justifiable reason for their exclusion from jury service insinuated that he saw no reasonable justification for excluding potential jurors on the basis of race.

Both Morton and Sherman separated sex discrimination from racial discrimination, especially with regard to political rights, treating sex discrimination as acceptable, benign, and even necessary and racial discrimination as intolerable, damaging, and avoidable. Moreover, they agreed that the Fourteenth Amendment’s purpose was not to provide women with rights or equality. Morton explained,

But my friend [Senator Thurman], chivalrous and bold as he is in defending the doctrine of inequality, falls back under the protection of the women. [Laughter] He gets behind the ladies. That has always been the tactics. When they propose to deny a whole race, men and women, all civil and political rights, they will go and get behind a woman, and say ‘do women vote; do women sit on juries?’

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47 This quote continues: “His proposition is that because the law denies to women of all races, black and white, the right to sit on juries, therefore you have the right to deny both men and women of the colored race any right to participate in the courts of justice; and he makes that argument. It only requires that proposition to be stated in order that it may be decided. I am one of those who believe in the right of women to vote, and I have always believed in that; but because that right has been withheld from them, no argument can be made on that ground. But leaving that entirely out of view, if women are not allowed to sit upon juries and decide upon their rights of life, of liberty, and of property; but in this case that right is to be taken away from a whole race. White women are tried by white men, but colored women are to be tried by white men also and not by colored men.” Congress, Senate, Senator Oliver Morton of Indiana speaking on the Civil Rights Bill of 1875, 43rd Cong. 2nd sess., Congressional Record, (26 February 1875): 1795 reprinted in The Reconstruction Amendments’ Debates, 734.
According to Sherman, racial discrimination and gender *difference* were not congruous. Implicit in his statement is the notion that the separate spheres were balanced between women’s maintenance of domestic affairs and men’s participation in public ones. He believed that women’s male counterparts – fathers, brothers, husbands, and sons, would adequately represent both black and white women but that black men needed political rights to participate equally in the public sphere.

The Reconstruction Amendments were designed to protect African American men as “male citizens.” However, they also fortified the legality of sex discrimination with regard to political rights and duties by institutionalizing and praising gender norms that segregated the private from the public sphere. Thus, this amendment explicitly divorced citizenship from political responsibility displayed through public participation in voting or jury service, among others. Moreover, debates over the Fourteenth Amendment indicated that women’s equality became pitted against equality for blacks. Congressmen in favor protecting the rights and obligations of African Americans disregarded the advancement of women’s rights to strengthen support for their primary cause, and congressmen who opposed racial equality promoted a connection between changing African Americans’ status and changing women’s status to discourage the adoption of Reconstruction legislation. By legally institutionalizing sex discrimination and creating tension between the rights of blacks and women, the Reconstruction-era Congress created the circumstances which split the equal rights movement, further legitimized legal inequality for women, and made it harder for women to gain access to juries.

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The Reaction of the Woman’s Rights Movement to the Fourteenth and Fifteenth Amendments

A prominent scholar of the Fourteenth Amendment, William E. Nelson, incorrectly asserts that “Congress . . . was quite uniform in refusing to address questions of women’s rights in Reconstruction legislation.”\textsuperscript{49} Congress did confront the question of women’s rights in two ways. First, by introducing the word \textit{male} into the Constitution through the Fourteenth Amendment and excluding \textit{sex} from the Fifteenth Amendment, Congressmen deliberately limited the application of these constitutional amendments to women’s rights. In addition, by ignoring the persistent requests of women’s rights advocates, Congress created a policy in which sex became an acceptable and appropriate category for discrimination.\textsuperscript{50}

The adoption of the Fourteenth and Fifteenth Amendments shaped the post-war reorganization of the woman’s rights movement. By having the term \textit{male} in its second section, the Fourteenth Amendment incorporated gendered language into the Constitution, ultimately creating classes of citizenship. Additionally, the Fifteenth Amendment explicitly extended voting rights to black men while implicitly condoning sex discrimination in voting qualifications. The sex discrimination legitimized by the Fourteenth Amendment and left uncorrected by the Fifteenth Amendment shifted the women’s rights movement from one concerned broadly with women’s rights to one increasingly centered on suffrage. Incensed by the continued, legitimized, and blatant exclusion of women from the polls, women’s rights activists campaigned for their enfranchisement. Narrowly focusing on this particular goal, suffragists believed, would bring women political equality, because they assumed incorporation into the polity as voters would


empower them to change their situation from within the political system. Historian Norma Basch contends that the American political culture’s “heightened emphasis on the ballot was not lost on women’s rights activists, who after 1865 began to refer to themselves collectively as ‘the woman suffrage movement.’”\(^{51}\) In funneling its efforts into the narrow goal of gaining suffrage, the women’s movement discontinued its earlier campaign for other political, legal, and social changes, including the right to serve on juries.\(^{52}\)

Women’s rights activists sought to expand their access to political institutions and confirm their social equality alongside African American men during the Reconstruction debates. These advocates, including Susan B. Anthony and Elizabeth Cady Stanton, hoped that the Fourteenth Amendment would provide an opportunity to advance their cause and protect their rights. However, since the Fourteenth Amendment’s second section equipped only African American men with voting rights, several women’s rights advocates fought against the amendment’s adoption, while others supported the amendment but lamented its explicit exclusion of them.\(^{53}\) During the debates over the Fifteenth Amendment, Anthony and other advocates again believed that women could benefit from congressional action, but for the second time, they were angered by the limited scope of the amendment. The adoption of these two amendments severed the women’s rights movement from the movement for racial equality, pitting women against African Americans in their struggle for constitutional rights. Illustrating the developing antagonism between these movements, some of the suffragists revised their arguments for women’s voting rights, arguing “publicly” that they “deserved the vote not

\(^{51}\) Norma Basch “Reconstructing Female Citizenship,” 53.

\(^{52}\) Hoff, *Law, Gender, and Injustice*, 140-149; Graham, *Woman Suffrage and the New Democracy*, xi, xii, 44.

because of their gender but because of their race.” Historian Glenda Elizabeth Gilmore believes that women suffragists “deliberately forced an artificial separation between race and gender” to make woman suffrage more appealing to a white majority. While women used the division to advance their cause, policymakers and jurists used the legal classifications of sex and race antagonistically, therefore initiating the separation and creating tension between the two movements.

These two amendments also created a fissure between the two camps of women activists – those who supported the amendments despite their singular focus on race and those who rejected the amendments because of their failure to support women’s rights. Two separate organizations with the goal of extending the vote to women formed partially in response. Elizabeth Cady Stanton and Susan B. Anthony’s National Woman Suffrage Association fought against the limited scope of the Fourteenth and Fifteenth Amendments and lobbied Congress to allow women to vote. The American Woman Suffrage Association, directed by Lucy Stone and

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54 Grace Elizabeth Hale, *Making Whiteness: The Culture of Segregation in the South, 1890-1940* (New York: Vintage Books, 1998:107-108. Hale also argues that black women felt the fallout of this divide between sex and race issues, often deciding to place their race over their sex and removing themselves from what becomes a mostly white woman suffrage movement.

55 Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (Chapel Hill: University of North Carolina Press, 1996): 49-50, 204. Likewise, Gilmore argues that black women worked with white women in some social reform movements in the late-nineteenth century, but these ties were short-lived. She maintains that “African Americans and whites used the term ‘interracial cooperation’ to signify working across racial lines to solve common problems. Black women undertook interracial cooperation without illusions of sisterhood because they believed racial progress depended on it as long as whites controlled southern institutions. In addition, she contends that white women saw black women as a detraction from their arguments for voting rights, stating that “to win their fight, North Carolina’s white suffragists deliberately forced an artificial separation between race and gender.”

56 Estelle B. Freedman, *No Turning Back*, 79; Foner, *Reconstruction*, 447-448; Edwards, *Angels in the Machinery*, 57, 148-149. Edwards argues that these groups severed because the women in them had disagreed about issues beyond suffrage that informed their opinions about why women needed the vote. Moreover, Edwards contends that “women’s political work after 1896 was less defined by region but more sharply bounded by divisions of class and race.”
Julia Ward Howe, supported the adoption of the Fourteenth and Fifteenth Amendments and pursued a state-by-state approach to woman suffrage policy.\textsuperscript{57}

By both altering the message of late-nineteenth-century women activists and splintering the overall movement for women’s suffrage into two competing organizations, the Fourteenth Amendment’s effect on the first wave of feminism in the United States was substantial and enduring. The quest for a woman suffrage amendment consumed the time of women’s rights leaders at the expense of their earlier, more wide-ranging policy goals, including jury service. Because they believed that voting rights were essential to win other rights and obligations, such as jury participation, they only demanded voting rights and were rewarded by the adoption of the Nineteenth Amendment eliminating sex discrimination in voting qualification but leaving government-sponsored discrimination elsewhere untouched.

\textbf{The Legacy of the Fourteenth Amendment on Women’s Rights}

The framers and interpreters of the Fourteenth Amendment fashioned Reconstruction policy with the hope of assimilating and protecting the newly freed African American male population. Along with the progressive aspects of the Reconstruction Amendments, these policymakers institutionalized and legalized sex discrimination, especially with regard to rights and obligations of voting and jury service. Through the process of condoning and integrating gender difference into the Constitution, Congressional Republicans not only further legitimized government-sponsored differential treatment based on sex but also made it a standard by which other actions and policy initiatives would be judged. Examining the groups who have jury service rights and obligations illustrates the type of sex discrimination perpetuated by the institutionalization of social and cultural norms into constitutional amendments and public

\textsuperscript{57} Keyssar, \textit{The Right to Vote}, 184-188; Foner, \textit{Reconstruction}, 473.
policy. In these ways, the Fourteenth Amendment created a legacy of excusing sex
discrimination as conventional, benign, acceptable, and even appropriate.

Besides condoning and promoting sex discrimination, the Fourteenth Amendment shaped
the path of women activists in the second half of the nineteenth century by creating a specific
policy against which to arrange and launch a movement. By offering a specific point to refute –
namely disfranchisement – women focused their energies on achieving this particular goal at the
expense of other objectives, including jury service participation. Moreover, the Fourteenth
Amendment created acrimony within the women’s rights movement which further fractured their
ability to debate or discuss issues other than the right to vote.

This unique legacy of the Fourteenth Amendment partially determined how women
would fight for their rights, and it simultaneously restricted the strategies women could employ
to achieve those goals. Women, like black men, fought for rights through the judicial system,
arguing that the Fourteenth Amendment provided them with constitutional protection against
discrimination. However, like congressional debates and policy, the Supreme Court used the
Fourteenth Amendment to denounced racial discrimination in jury selection while justifying sex
discrimination.
During the 1860s and 1870s, Congress adopted Reconstruction Amendments and legislation to secure former slaves, but not women, constitutional protections, citizenship status, and political rights and obligations. Similarly, over the late-nineteenth century, the Supreme Court reviewed cases which required the interpretation of the Fourteenth Amendment and Reconstruction-era civil rights legislation, ultimately generating new understandings of the scope and impact of the Fourteenth Amendment on both race and sex discrimination. Throughout these debates and decisions about jury service eligibility for black men, policymakers viewed race and sex as separate categories; for them, ending discrimination on the basis of either category required its own rationale and implications. In addition, sex was often used as a category for comparison, in order to inform arguments about racial discrimination in jury service selection and qualification.

The result of separating these categories was that race and sex were held in tension with one another, rather than used together to expand rights for women and black men. In congressional debates over Reconstruction legislation about jury service, policymakers used women to illustrate how the Fourteenth Amendment did or did not allow black men to serve on juries, but not one congressman actively sought to include women on juries. Finally, the Court justices in their decisions and dissents almost always incorporated a discussion of sex into their opinions on racial discrimination in jury service cases. In the late-nineteenth century, for policymakers, race and sex became foils for one another with results that were generally detrimental to women’s rights claims.
Reconstruction Politics and Congressional Policies: African Americans and Jury Service

Andrew Johnson tried to lessen the effectiveness of Reconstruction legislation’s impact on the status of the black population by allowing southern policies, such as the black codes, to reverse some of the effects of emancipation. At the convening of the Thirty-Ninth Congress in December of 1865, this lenient policy was opposed by congressmen who denounced Johnson’s policy and decided to form a Reconstruction program aimed at protecting the black population’s newfound freedom.¹

In addition to the protections guaranteed to black men in the Fourteenth Amendment, Congress explicitly wanted black men to serve as jurors.² On December 4, 1865, Charles Sumner, a Massachusetts senator, proposed that Congress consider a bill that, if enacted would require “in the courts of the United States in any State whereof” all grand juries would “consist one-half of the persons of African descent who shall possess the other qualifications” for jury service and that “when the matter relates to an injury inflicted by a person of African descent upon a person of not such descent, or visa versa,” all petit juries “shall . . . consist one half of persons of African descent possessing now the other qualifications required by law.”³ In addition, this bill authorized the dismissal of any juror who discriminated against blacks.⁴

¹ Nieman, Promises to Keep, 61-62.

² Congressional support for the Freedman’s Bureau also translated into increased protection of blacks from judicial injustice by transferring jurisdiction over certain court cases and hearings involving African Americans to bureau courts. However, these cases did not directly empower black men through making them jurors. See Nieman, Promises to Keep, 63.


⁴ Ibid.
Although Congress rejected this bill without much debate, Sumner and other Congressmen began considering jury service vital to black men’s freedom.\(^5\)

In 1867, Congress considered legislation that would have allowed black men to serve on juries in Washington D.C. While a majority of senators approved of this bill, others, such as Democratic Senator Thomas A. Hendericks from Indiana, argued against it. Hendericks exclaimed,

> I am opposed to this policy which subjugates the white race to the colored race. Now, this bill proposes not only that negroes shall be allowed to hold office, and I suppose any office in the District of Columbia, but that they shall be allowed to sit upon the juries. Of course it will follow that they may be judges. The spectacle will then be presented of negro courts to try cases. It is not in accordance with my taste, and I think not in accordance with the taste of the people I have the honor in part to represent.\(^6\)

The discussion of this piece of legislation revealed that some federal policymakers’ viewed jury service as distinct from voting rights.\(^7\) Hendericks accepted black men’s right to vote, but opposed their inclusion on juries, especially in Washington D.C., where blacks constituted a substantial percentage of the population. Furthermore, Hendericks overtly equated fairness, honesty, and integrity with upholding the views of a white majority, even at the expense of the often-victimized racial minority. Despite arguments made by Democrats against the bill,

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\(^{5}\) Congress, Senate, Senator Trumbull of speaking for the Committee on the Judiciary, S. J., 39\(^{\text{th}}\) Cong., 1\(^{\text{st}}\) sess., Congressional Record, 40, (7 July 1866): 625; Congress, Senate, Senator Clark of motioned for consideration of S. 34, 39\(^{\text{th}}\) Cong., 1\(^{\text{st}}\) sess., Congressional Record (22 January 1866): 96.


\(^{7}\) Maltz, The Fourteenth Amendment and the Law of the Constitution, 123.
Republican congressmen passed it, making African American men eligible for jury service in Washington D.C.\textsuperscript{8}

Attempting to broaden the federal protection against racial discrimination in jury selection, Charles Sumner introduced another bill in 1869, but it was not debated in the Senate until 1871. This legislation, which was the precursor to the Civil Rights Act of 1875, banned racial discrimination in jury selection. A separate section of the bill made racial discrimination in certain public and private institutions, including churches, schools, public transportation, and hotels, illegal. While the issue of social equality and integration of public spaces sustained heated debates over congressional authority to legislate private business and define the scope and meaning of the Fourteenth Amendment, the issue of racially mixed juries was less controversial. Most advocates for the adoption of this legislation contended that the act covered institutions that were either governmental or highly regulated by the government and that it did not interfere with private institutions.\textsuperscript{9} After five years of debate, Congress enacted the Civil Rights Act of 1875.\textsuperscript{10} This act differed from the original bill proposed by Senator Sumner, because it eliminated the controversial provision for desegregating schools, churches, and cemeteries.\textsuperscript{11} Left intact, the jury service section included in this legislation prohibited race discrimination in jury service, stating “that no citizen possessing all other qualifications . . . prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State,


on account of race, color, or previous condition of servitude.” Also, this act penalized “any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen” because of his race by charging the court official with a misdemeanor and fining them up to five thousand dollars.12

While Southern Democrats opposed the Civil Rights Act of 1875, Republicans argued in favor of it. For example, John Roy Lynch, a black representative from Mississippi, spoke in favor of this legislation, explaining why equal rights for blacks needed to be protected and promoted. Lynch exclaimed that because of his race, he was “treated not as an American citizen, but as a brute.”13 In addition, Lynch specifically endorsed the jury service section of the bill, explaining that the South’s judicial system discriminated against blacks, “virtually” rendering the black man guilty “before he enters the court-house, and the verdict of the jury substantially rendered before it is impaneled.”14 Through congressional debate over the scope of the Fourteenth Amendment and practical pleas for equal treatment of black men in the judicial system, the Civil Rights Bill was modified and adopted.

Ultimately, the legislation passed through Congress because of underlying Republican support for the initiative. Congressional Republicans argued in favor of black men serving on juries as early as 1865, but they pass legislation reflecting that position in 1875. Within this ten-year period of Congressional Reconstruction, black men in southern states had already begun serving on juries, despite the slow adoption of congressional policy.


14 Ibid.
Black Jurors in the Reconstruction and “Redemption” Periods

After the abolition of slavery and the ratification of the Fourteenth Amendment, African Americans sought a wide range of legal protections and political rights, including jury service rights and duties. For instance, through the formation of Union leagues, blacks condemned racial discrimination in jury qualifications or selection. Consequently, in the late 1860s and 1870s, hundreds of black men began serving as jurors in many southern states after the adoption of new state constitutions by Republican legislatures that offered black men new political and legal equality.15

The incorporation of black men into the American jury system provided blacks with increased legal protection, larger probability for achieving justice, and a new status of equality. In a time of rampant racism, African Americans needed to be represented on juries, especially in the South, to ensure fair outcomes in trials involving black defendants or black victims. For instance, historian Donald G. Nieman argues that the black codes, which were harsh legislative restrictions placed on blacks’ freedom in the Reconstruction South, practically “guaranteed that black convicts would be executed more frequently and receive longer prison terms than whites found guilty of comparable crimes.”16 Moreover, black victims of racially motivated crimes longed for a justice system that would subject white perpetrators to the judgment of juries that included black men. Ending racial discrimination in jury selection allowed for the judicial system to provide a more impartial justice. Black jurors decided verdicts that directly impacted their community and its welfare by undermining systems that were previously under white


16 Nieman, Promises to Keep, 61.
control. Furthermore, having the power to determine another citizen’s fate also underscored the new political and legal equality black men enjoyed.\textsuperscript{17}

Reconstruction-era legislation conferred citizenship and civil rights on African Americans, but it failed to secure equal treatment and justice in actual practice. Especially after Democrats regained power in the 1870s, state and local governments circumvented many of the federal regulations and constitutional amendments that offered black Americans political and legal equality. The extension of political rights and legal equality to black men had consistently generated strong, often violent opposition from Southern Democrats and white supremacists. Once they regained political power, white southerners intimidated and harassed black men to prevent them from participating in political and legal institutions, including in courtrooms as jurors.\textsuperscript{18}

When white southerners restricted black men’s access to juries through custom, violence, and intimidation, black men defended their rights, using the “political and legal avenues opened to them during Reconstruction.”\textsuperscript{19} Because redemption limited their electoral power, litigation became the operative avenue for black men to assert constitutional protection against racial discrimination in the jury qualification or selection processes. In 1880 and 1881, the U.S. Supreme Court considered a series of cases brought by African Americans challenging racial discrimination in jury statutes and selections, claiming it violated the Fourteenth and Sixth Amendments as well as the Civil Rights Act of 1875. The Court and its interpretations in the 1880s continued to depict racial discrimination in jury service qualifications and selection as

\textsuperscript{17} Nieman, \textit{Promises to Keep}, 69, 73; Foner, \textit{Reconstruction}, 121-123, 204, 363.


\textsuperscript{19} Nieman, \textit{Promises to Keep}, 81, 92, 105-107.
unconstitutional. In doing so, however, it endorsed the exclusion of women from juries, reinforcing differential treatment of women citizens.

The Supreme Court and Racial Discrimination in Jury Selection and Qualification

After the Civil War and Reconstruction era, the United States government underwent a series of constitutional innovations and interpretations that called into question theories of federalism, as it did issues of citizenship and political rights. In the late 1870s and early 1880s, an overwhelmingly Republican Supreme Court decided cases involving federally enacted Reconstruction policy and constitutional amendments, including four cases about racial discrimination in jury service selection and qualification. The Waite Court provided the analysis that expanded and limited the federal government’s power over the states. According to constitutional historian Michael Les Benedict, the Supreme Court served as an “umpire of the federal system,” preventing either the states or the federal government to wield an inordinate amount of power.  

The Court allowed Congress to assert some power in an effort to protect the rights and citizenship of African Americans; however, the limits placed on this power resulted from the reliance on a tradition of federalism that held the national government’s power in tension with state power. These concerns over federalism shaped the types of policies the Republican Court was willing to support, curbing its willingness to have the federal government intervene in private actions and in law enforcement.

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21 Benedict, “Preserving Federalism,” 40-41; Nieman, Promises to Keep, 82-85, 89; Schmidt, “Juries, Jurisdiction, and Race Discrimination,” 1414-1415, 1441-1450. Schmidt examines the role of Justice Field, who dissented in many of the jury service cases, in upholding the tenets of federalism.
Benedict argues that the Waite Court “reached surprisingly liberal conclusions about congressional power” as a result of the Reconstruction Amendments.\textsuperscript{22} While the Supreme Court of the 1870s and 1880s resisted the implication of social equality between blacks and whites, most of the justices were committed to the notion of a civil equality for all men. Though it refused to extend the protections of the Fourteenth Amendment to encompass broader applications, including private or individual actions, the Waite Court upheld decisions that prevented state-sponsored discrimination against black men, in jury service cases for example, arguing that it violated the equal protection and privileges and immunities clauses of the Fourteenth Amendment.\textsuperscript{23}

One way in which the Supreme Court continued to protect the rights and citizenship of African American men was through its interpretation of Reconstruction legislation and the Fourteenth Amendment, specifically the equal protection clause, in jury service cases.\textsuperscript{24} In the early 1880s, the Supreme Court heard four cases about race discrimination in jury service. In three of the four cases, the Supreme Court ruled in favor of the black defendant, declaring race discrimination in the qualifications for or selection of juries unconstitutional.\textsuperscript{25} In each of these

\begin{itemize}
\item \textsuperscript{22} Benedict, “Preserving Federalism,” 41.
\item \textsuperscript{23} Benedict, “Preserving Federalism,” 60-62; Schmidt, “Juries, Jurisdiction, and Race Discrimination,” 1402-1403. Here, Schmidt argues more generally that the Waite Court, while not pushing social equality for African Americans, did more than the Fuller Court to protect the constitutional rights of blacks. He argues that in the 1910s and 1920s, the Supreme Court failed to ensure that black men had the ability to serve on juries in the South, and that this lack of protection overshadowed any other areas in which the Court may have helped black men; Maltz, \textit{The Fourteenth Amendment and the Law of the Constitution}, 120-121.
\item \textsuperscript{25} Strauder v. West Virginia, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881).
\end{itemize}
cases, the Waite Court protected black men from race discrimination, but refused to require racially mixed juries for black defendants.

The first case questioning race discrimination in jury selection, *Strauder v. West Virginia*, was decided in 1880. Charles Devens and George O. Davenport, the lawyers for the plaintiff, appealed the case to the Court, arguing against the constitutionality of a West Virginia statute that prohibited non-white citizens of the state from becoming jurors. These lawyers argued that Taylor Strauder, a black man on trial for murdering his wife, was denied equal protection of the laws guaranteed by the Fourteenth Amendment and a jury of his peers guaranteed by the Sixth Amendment. Furthermore, they claimed that race discrimination in the selection of jurors prohibited Strauder from obtaining a fair trial, because a jury selected with racially discriminatory practices would regard a black defendant unsympathetically. These arguments compelled the Supreme Court to decide seven-to-two in favor of Strauder and to hold state-sanctioned race discrimination in jury selection was unconstitutional. Justice William Strong upheld the right to a jury selected without racial discrimination, citing the *Slaughter House Cases*, in which the Court discussed the Reconstruction Amendments, the framers’ intent in drafting and ratifying the Fourteenth Amendment, and Blackstone’s *Commentaries*’ rationale for the jury of peers. Furthermore, he ensured that the Court’s ruling would not ultimately undermine the authority of a state to decide the parameters for selecting jurors, except to bar them from discriminating by race or color.

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28 Ibid.
In 1880, Justice Strong offered another decision about African American men’s exclusion from juries by state statute, but this time he determined that a jury for a black defendant did not have to be racially mixed to be constitutional. *Virginia v. Rives* was brought to the Supreme Court after a federal judge, Alexander Rives, issued a writ of habeas corpus for the two black defendants, Burwell and Lee Reynolds, who argued that an all-white jury unfairly convicted them of murdering a white man. They argued that Virginia’s practice of keeping black men off juries denied the defendants a jury at least partially composed of black men, depriving them of a fair trial in violation of the Fourteenth Amendment’s equal protection clause. In short, these defendants insisted that they were entitled to a racially mixed jury, but the Supreme Court disagreed.\(^{29}\)

In the same year, the Supreme Court heard another case about African American men’s exclusion from juries in Virginia. In *Ex parte Virginia*, the Court reviewed a case about J.D. Coles, a judge charged with and convicted of a misdemeanor for violating the fourth section of the Civil Rights Act of 1875. This section prohibited state officials from discriminating against black men because of race, color, or previous condition of servitude in selecting jurors. Coles, the official responsible for selecting jurors for the county court of Pittsylvania, excluded all black men from both petit and grand juries, therefore violating this federal provision. James G. Field, Attorney General of Virginia, and William J. Robinson, lawyers for Judge Cole, questioned the constitutionality of the fourth section of the Civil Rights Act of 1875. They claimed that

Congress did not have the authority to author such legislation under the Thirteenth and Fourteenth Amendments.\(^{30}\)

In writing for the Court, Justice Strong cited the Thirteenth and Fourteenth Amendments and the court precedent in *Strauder* to sustain the constitutionality of the fourth section of the Civil Rights Act of 1875. Again, the Court explained its position on the purpose and scope of the Reconstruction Amendments, maintaining that “one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.”\(^{31}\) Thus, in *Ex parte Virginia*, the Court supported the congressional efforts to adopt legislation that encouraged or demanded an end to state-sponsored racial discrimination.\(^{32}\)

In 1881, the Supreme Court heard another case, *Neal v. Delaware*, which centered on the issue of racial discrimination in jury selection. In another seven-to-two decision, the Court ruled that the state’s practice of excluding otherwise qualified individuals from jury duty on the basis of race was unconstitutional. In this instance, the question before the Court was about the systematic practice of judicial officials to exclude black men from juries rather than a law that explicitly excluded them on account of race. Charles Devens and Anthony Higgins, William Neal’s lawyers, argued that this practice denied Neal the Fourteenth Amendment’s equal protection of the laws and the Fifteenth Amendment’s protection against racial discrimination in voting qualifications. The state of Delaware based its list of potential jurors on those eligible to


\(^{31}\) Ex parte Virginia, 100 U.S. 339 (1880).

vote within the state, and the voting requirements stipulated that voters be white. Found in the Delaware state constitution, which was adopted in 1831, these voter and jury service requirements had not been changed formally since the adoption of the Fifteenth Amendment. However, the state’s lawyers argued that no discrimination existed in the law itself, rather that jury selection was left up to the judgment of officials.33

Writing for the Court, Justice John Marshall Harlan presented his opinion in favor of Neal, arguing that regardless of whether discrimination was the result of customary practice or statute it was unconstitutional. He cited the Reconstruction Amendments and the Supremacy Clause to the Constitution, as well as grounding the decision in the precedents set by the Court in *Strauder v. West Virginia, Virginia v. Rives*, and *Ex parte Virginia*. In doing this, Harlan conceded that a defendant could not demand a racially mixed jury; however, he insisted that the jury selection process not exclude jurors on the basis of race. Following *Strauder* and *Ex Parte Virginia*, the *Neal* decision indicated that the Supreme Court remained firm in its commitment to prohibiting race discrimination by the state in all facets in the process of jury selection.34

**The Court’s Understanding of Constitutional Jury Qualifications: The Impact of the First Jury Cases on Race and Sex Discrimination**

Most of these Supreme Court cases centered on the appeal of a black defendant convicted by an all-white jury in a system that discriminated in the process of jury selection. Also each Court decision held that the defendant’s Fourteenth Amendment guarantee of equal protection had been violated. In these cases, the Supreme Court ruled in favor of ending the discrimination

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34 Neal v. Delaware, 103 U.S. 370 (1881).
on the basis of race and understood these cases in terms of both the defendant’s rights and rights against racial discrimination. In *Strauder, Rives,* and *Neal,* black defendants as well as those excluded from jury service because of their race were hurt by a discriminatory system.\(^{35}\) According to Earl M. Maltz, these jury service cases represented the “Supreme Court’s most powerful indictment of state-imposed racial discrimination” of this era.\(^{36}\) Moreover, the Court, in *Strauder,* abandoned the popular conception that the privileges and immunities clause of the first section of the Fourteenth Amendment did not encompass political rights, at least for African American men.\(^{37}\)

The Court ruled that race discrimination prevented the jury from representing the community and potentially preventing the black defendant from obtaining a fair trial. In reaffirming the rights and obligations of black men, the justices continued to stress the legal and civic equality of the races. For example in the *Rives* decision, Justice Strong commented on the impact of the Reconstruction Amendments for the black population, stating “the plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.”\(^{38}\) According to these decisions, the Supreme Court reasoned that African American men were protected by federal legislation and

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\(^{35}\) *Strauder v. West Virginia,* 100 U.S. 303 (1880); *Virginia v. Rives,* 100 U.S. 313 (1880); *Neal v. Delaware,* 103 U.S. 370 (1881).

\(^{36}\) Maltz, *The Fourteenth Amendment and the Law of the Constitution,* 121; Schmidt, “Juries, Jurisdiction, and Race Discrimination,” 1414. Here, Schmidt makes a similar argument about the importance of *Strauder* within all successful Reconstruction litigation.


\(^{38}\) *Virginia v. Rives,* 100 U.S. 313 (1880).
constitutional amendments to have the right and obligation to serve on juries and be protected from juries assembled through racially discriminatory policy or practice.

The other side of these seemingly progressive decisions was their acknowledgement, acceptance, and, perhaps, promotion of gender discrimination in jury selection. In nearly all of the majority opinions, concurrences, and dissents, in these four jury service cases, the justices explicitly noted that states excluded women from juries. In the majority opinion in *Strauder*, the Supreme Court reinforced and explicitly legitimized the state’s authority to discriminate on the basis of sex in the jury selection process by maintaining that a state “may confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.” Historian Linda Kerber notes that of the list of acceptable qualifications for jurors offered by the Supreme Court, sex is the only condition for eligibility that was, like race, immutable. Despite resolute and inescapable condition of sex and race, the Court was willing to stretch the limits of federalism by allowing the federal government to end state-sponsored race discrimination, while it reaffirmed the states’ power to set qualifications for jurors, in general. One of the most adamant opponents of racial discrimination, Justice Harlan made a similar argument in the majority decision in *Neal*, stating that

While a State, consistently with the purposes for which that [Fourteenth] amendment was adopted, may confine the selection of jurors to males . . . a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens, of participating, as jurors, in the administration of justice, is a

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39 Neither the short, one-line dissent in *Strauder* nor the majority opinion in *Ex parte Virginia* mentions women’s exclusion from juries. The *Rives* opinion reiterates the *Strauder* decision, regarding state control over the qualifications so long as they do not exclude on the basis of race, but it does not specifically mention women.

40 *Strauder* v. West Virginia, 100 U.S. 303 (1880).

discrimination against the former inconsistent with the [Fourteenth] amendment.\textsuperscript{42} Not only did the Court endorse the exclusion of women from juries by state law and custom, it also limited the Fourteenth Amendment to protecting people against racial discrimination.

Likewise, in the \textit{Rives} decision, Justice Strong indicated that the Court did not view differential treatment of women based on their sex as “discrimination” in the same way it saw the differential treatment of black as discriminatory. He claimed that Virginia’s jury qualification laws made “no distinction against [black men] because of their color, nor any discrimination at all . . . The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who were entitled to vote and hold office under the Constitution and the laws thereof, are made liable to serve as jorors [sic].”\textsuperscript{43} By legitimizing the exclusion of women from jury service, the Court differentiated between discriminatory and differential treatment, making women’s exclusion not a discriminatory act, but a rational choice.

Even Justice Field and other Supreme Court Justices who dissented in these cases, arguing that the Constitution did not require the states to make black men eligible for jury service, incorporated women into their decisions in order to illustrate that not all citizens were expected to enjoy every political responsibility or right. For these justices, the exclusion of women from juries but not from the citizenry exemplified how black men should be treated in regard to jury eligibility. In these cases, Justice Field used excluding women as an example of why the equal protection and the privileges and immunities clauses of the Fourteenth Amendment did not make excluding blacks from juries unconstitutional. For example, Field argued in his concurrence in \textit{Rives} that

\textsuperscript{42} Neal v. Delaware, 103 U.S. 370 (1881).

\textsuperscript{43} Virginia v. Rives, 100 U.S.313 (1880).
it would seem that in his [a district judge’s] judgment the presence of persons of the colored race on the jury is essential to secure to them the "equal protection of the laws;" but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws?44

Field explicitly legitimized sex discrimination in order to show that African Americans were not constitutionally protected from racial discrimination in jury selection. He also used this analysis in his dissent in the *Neal* decision and in his dissent in *Ex parte Virginia*, with which Justice Clifford concurred. In *Neal*, Field held that,

> What, then, is meant by this provision, ‘Equal protection of the laws’? All persons within the jurisdiction of the State, whether citizens or foreigners, male or female, old or young, and embraced in its comprehensive terms. If to give equal protection to them requires that persons of the classes to which they severally belong shall have the privilege or be subject to the duty -- whichever it may be -- of acting as jurors in the courts in cases affecting their interests, the mandate of the Constitution will produce a most extraordinary change in the administration of the laws of the States.45

Perhaps rightly, Field contended that the Court’s ruling that race discrimination in these jury service cases was unconstitutional would necessitate a more expansive reading of the equal protection clause, namely one that viewed the exclusion of women from juries as sex discrimination and therefore in violation of the equal protection clause. In this way, Field highlighted the inconsistencies of the majority Court in determining what – exclusion based on race or exclusion based on sex – did or did not constitute an unconstitutional form of discrimination. Moreover, he maintained that,

44 Virginia v. Rives, 100 U.S. 313 (1880).

45 Neal v. Delaware, 103 U.S. 370 (1881).
No one can truly affirm that women . . . though excluded from acting as jurors, are not as equally protected by the laws of the State as those who are allowed or required to serve in that capacity.\textsuperscript{46}

In \textit{Ex parte Virginia}, Field continued to argue that African American men were not denied equal protection of the laws because of their exclusion from juries. He used the exclusion of women, which justices and policymakers viewed acceptable and justified, to demonstrate that limiting the prospects for jury service based on race or based on sex were parallel situations and both constitutional. Further illustrating the discrepancy between condemning race discrimination and condoning sex discrimination, he stated that, “no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests.”\textsuperscript{47} Furthermore, in this case, Field more broadly asserted that jury service is not a right and obligation of citizenship, insisting that “but the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors.”\textsuperscript{48} In these ways, Field specifically addressed and legitimized the exclusion of women, despite their citizenship status and the adoption of the Fourteenth Amendment, from juries in order to undermine the constitutional justification for allowing black men to participate on juries.

While the justices’ decisions divided over the constitutionality of race discrimination, the entire Court agreed on the acceptability, necessity, and constitutionality of excluding women from juries. In addition to Justice Field and the other dissenters, even those who insisted on

\textsuperscript{46} Ibid.

\textsuperscript{47} Ex parte Virginia, 100 U.S. 339 (1880).

\textsuperscript{48} Ibid.
including African American men in the jury system accepted and promoted the exclusion of women, arguing that male juries could represent the community. Moreover, according to the Court, verdicts could be determined appropriately and justly by an all-male jury, even in cases with a female defendant or victim. Indeed, in two of these four jury service cases, the defendants were charged with committing violent crimes against women. William Neal had been convicted of the rape of a white woman, Margaret E. Gosser, and Taylor Strauder was on trial for murdering his wife. In both of these cases, the Court barely referenced the alleged crimes or their victims. Ironically, the Court ruled that a defendant’s rights were violated if members of his race were excluded from the jury based on their race, but upheld the exclusion of women from juries despite the fact that women were victims in these cases. While the Court recognized that a racially mixed jury might better protect a black defendant, it did not appreciate that women jurors might better protect female defendants, or as in these cases, female victims.

Unlike the claim that African Americans were an inferior, inherently unequal racial group, women encountered oppression through social conventions centering on “difference” that segregated male and female roles and responsibilities into public and private spheres, in ways that prevented mainstream society from considering women a necessary part of the ‘community’ of peers. In jury selection, the rationale for exclusion on the basis of race differed from the justification for exclusion on the basis of gender. With the end of slavery and the incorporation of the black population into American society, many Reconstruction-era policymakers and justices found race an unacceptable characteristic upon which to discriminate. If American society refused to extend constitutional protection, rights, and obligations to African Americans, race discrimination would perpetuate inequity and inequality without any “reasonable” justification. According to many of the same policymakers and justices, women were inherently
and vastly dissimilar from men in their natural roles, responsibilities, and capacities. Discrimination on the basis of gender was justifiable for these federal authorities because of these perceived differences.\textsuperscript{49} In these jury service decisions, the Court held that states retained the authority of setting the qualifications for jurors, and more specifically, the opinion explicitly asserted that sex was an appropriate category upon which to discriminate.\textsuperscript{50} By legitimizing the state’s overt limitation of jurors to men, the Court maintained a strong connection between masculinity and political authority, and therefore reiterated its position on racial discrimination in jury selection, while providing a justification and legitimization for gender discrimination in jury service.

\textbf{Justifications of Sex Distinctions in Late-Nineteenth-Century Supreme Court Cases}

Why did legislators and jurists assume that it was appropriate to exclude women from jury service even though policymakers considered women citizens? Clearly congressmen and justices believed that certain distinctions were appropriate and did not create invidious discrimination. However, in the jury discrimination cases they did not explain why. To understand the cultural assumptions that informed the Court’s reasoning, we must look at other cases that raised questions of women’s citizenship rights.\textsuperscript{51}

\textsuperscript{49} These cases include Bradwell v. Illinois, 83 U.S. 130 (1873), Minor v. Happersett, 88 U.S.162 (1875), Muller v. Oregon, 208 U.S. 412 (1908), Rosencrantz v.Territory of Washington, 5 P. 305 (1884), and Harland v. Territory of Washington, 13 P. 453 (1887).

\textsuperscript{50} Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Neal v. Delaware, 103 U.S. 370 (1881).

\textsuperscript{51} While the Supreme Court did not hear any cases about sex discrimination in jury service, district courts in the Washington Territory heard two cases, Rosencrantz v. Territory of Washington, 5 P. 305 (1884) and Harland v. Territory of Washington, 13 P. 453 (1887). The 1884 case made married women eligible for jury service, but the 1887 ruling reversed the precedent in Rosencrantz, stating that women would be excluded from juries because of gender difference.
In the 1870s, women’s rights advocates believed that the Reconstruction Amendments, interpreted by the judiciary, could be used to expand the rights of women, alongside African American men, by prohibiting the government from discriminating on the basis of sex. Women’s rights advocates argued that the “equal protection” and “privileges and immunities” clauses of the Fourteenth Amendment guaranteed them various rights, and they sought legal decisions confirming their position. In 1873 and 1875, the Supreme Court heard these claims of sex discrimination in *Bradwell v. Illinois* and *Minor v. Happersett*, ultimately limiting the application of the Fourteenth Amendment to women’s rights. Unlike the Court decisions on race discrimination in jury service, the Court ruled that sex discrimination was constitutional and, therefore, legitimized, legalized, and institutionalized it.

The first major decision in which the Supreme Court articulated the need to treat women differently than men was its 1873 decision, *Bradwell v. Illinois*. Myra Bradwell, a female teacher and legal journal editor living in Chicago, wanted to practice law and applied for admission to the bar in 1869. After failing to achieve admittance to the bar through the Illinois judicial system, Bradwell appealed her case to the federal courts in 1870. Bradwell argued that

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52 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]. Ritter’s analysis indicates, perhaps, why women’s legal situation was different than African American men. Ritter’s findings suggest that the laws of coverture that directly impacted women did not apply to black men, allowing them more legal autonomy after their emancipation. These legal traditions slowed the ability for women to change their position in society compared to the newly freed male slave population. Furthermore, white women’s integration, rather than the segregation of African American men, into the society and families of power-holding policymakers makes a movement for women’s jury service a challenge to contemporary social convention in ways in which black rights did not. Finally, Court and contemporary understandings of sex discrimination as legitimized by gender difference compounded the reasons for deeming women ineligible for jury service.

53 Basch, “Reconstitutions: History, Gender, and the Fourteenth Amendment,” 171-172; Basch, “Reconstructing Female Citizenship.” 53. However, Basch stresses the hopefulness found by women’s rights advocates in the first section of the Fourteenth Amendment, and she even allows it to upstage the notion that the second section of the Fourteenth Amendment was a setback for the women’s rights campaign.


she was denied the Fourteenth Amendment’s guarantee of the privileges and immunities of citizenship as a U. S. citizen because the state of Illinois rejected her application for a license to practice law strictly on the basis of her sex. In his thirteen-page brief, Bradwell’s counsel and American Woman Suffrage Association member, Matthew Hale Carpenter, argued that this clause of the Fourteenth Amendment extended to Bradwell the right to practice law. The core of Carpenter’s argument before the Court in *Bradwell* was whether state-sponsored sex discrimination in employment qualifications was constitutional. Furthermore, Carpenter extended his argument to show the parallels between African Americans’ constitutional protections and the women’s rights movement’s platform. Addressing the Supreme Court, he argued that

> If the legislature may . . . declare that no female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.’ And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.\(^\text{56}\)

By drawing these parallels, Carpenter advanced the attempt by women’s rights advocates to use the Reconstruction Amendments for their benefit as well as their effort to make sex discrimination as unjustifiable as race discrimination.\(^\text{57}\)

In response to this question, Justice Samuel F. Miller, writing the brief opinion for the Court, argued in favor of the lower court’s decision in *Bradwell*. In this case, the Illinois

\(^{56}\) Bradwell v. Illinois, 83 U.S. 130 (1873).

\(^{57}\) Basch contends that during Reconstruction, the constitutional amendments adopted placed women and blacks on similar paths to eliminate discrimination but also placed them in tension with one another. See Basch, “Reconstructing Female Citizenship,” 52-53.
Supreme Court ruled that “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.” Not only did the Illinois Court hold that the laws of the state prevented Bradwell from becoming a licensed attorney but also that a Supreme Power deemed women and men different and sharp distinctions in their social roles, therefore, acceptable. While adopting this lower court’s ruling of the case and not explicitly stating a position against some or all of its contents, Miller’s opinion narrowly centered on the idea that licenses to practice law were not part of the privileges and immunities of citizenship guaranteed by the Fourteenth Amendment, rather than on a gendered discussion of the appropriate roles of women. Moreover, uninfluenced by Carpenter’s argument about the similarities between the situations of black men and women, Miller closely associated the Fourteenth Amendment with protecting the black population against racial discrimination, rather than protecting women from sex discrimination.

In addition, the concurrence of Justices Joseph P. Bradley, Noah Haynes Swayne, and Stephen J. Field provided the justification for discriminating on the basis of sex and illustrated the social conventions that influenced the decision. Resembling the Illinois Court decision, Bradley’s concurrence claimed that “the civil law, as well as nature herself, has always

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58 Bradwell v. Illinois, 83 U.S.130 (1873).
recognized a wide difference in the respective spheres and destinies of man and woman.”

Furthermore, he emphasized man’s superiority over woman by maintaining that “man is, or should be, woman’s protector and defender.” He continued by reinforcing the traditional stereotypes of women – that they are fragile, domestic, and dependent. Not only by basing his decisions on these social constructions and norms but also by explicitly articulating the separate spheres doctrine, Bradley legitimized gender discrimination as a necessary concomitant to gender difference. Moreover, the Supreme Court institutionalized, through precedent, the legal acceptability of discrimination on the basis of sex. This first Supreme Court decision to address the issue of sex discrimination set an unfortunate precedent for those seeking to use the Fourteenth Amendment to extend the rights of women: all but one of the subsequent Supreme Court decisions in sex discrimination cases until 1971 were decided against women who countered sex discriminatory policies.

Not long after reaching its decision in Bradwell, the Supreme Court heard another case involving the constitutionality of discriminating against women under the Fourteenth Amendment in the case of Minor v. Happersett. Virginia Minor, a white female U. S. citizen, attempted to register in St. Louis County, Missouri to vote in a federal election, but Reese

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63 Ibid.
66 Gilliam, “A Professional Pioneer,” 105; For the exception, see Adkins v. Children’s Hospital 261 U.S. 525 (1923).
Happensett, an election official, denied her request because of her sex. 68 Defended by her husband and lawyer, Francis, Minor sought rectification through the judicial system, arguing the “privileges and immunities” clause of the Fourteenth Amendment guaranteed women’s right to vote. In this case, the Minors hoped the Supreme Court would hold that the first section of the Fourteenth Amendment made sex discrimination unconstitutional. 69

Reaffirming common law traditions, the Supreme Court held unanimously that state laws prohibiting women from voting were constitutional despite the adoption of the Fourteenth Amendment. 70 In his opinion, Chief Justice Morrison R. Waite declared Minor’s citizenship status unaffected by the Fourteenth Amendment. Because she was a citizen of her state and of the U.S. before the adoption of the amendment, it did not award her any new political status. Furthermore, the opinion contended that the adoption of the Fifteenth Amendment indicated that the Fourteenth Amendment was not intended to confer voting rights upon citizens. Waite claimed that the Fourteenth Amendment did not extend privileges and immunities to citizens but protected the ones citizens already had. 71 Moreover, the Court concluded that the second section of the Fourteenth Amendment confirmed that Congress did not mean to extend voting rights to women. After quoting this section of the amendment, Waite contended,

Why this [section], if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if

68 Minor v. Happensett, 88 U.S. 162 (1875); Basch, “Reconstructing Female Citizenship,” 55; Basch, “Reconstitutions: History, Gender, and the Fourteenth Amendment,” 174. Furthermore, the Court upheld the notion that choosing one’s own profession was protected under the privileges and immunities in the Slaughterhouse Cases, which were decided in the same year as Bradwell. Women, however, as a class were not granted the right to choose a profession on the same level as the butchers from Louisiana. See Nancy Levit, The Gender Line: Men, Women, and the Law (New York: New York University Press, 1998): 67.


suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone?\(^2\)

The Court used the second section of the Fourteenth Amendment to limit the political rights afforded women, just as the legislature intended by writing the word male into the U.S. Constitution. In both of these instances, the federal government divorced political rights and responsibilities from citizenship, and in effect, created gendered classes of citizenship. In Minor, the Supreme Court continued the government’s policy, which divided political rights from citizenship. Moreover, it reaffirmed the federal government’s complacency in, and perhaps promotion of, gender discrimination in state laws.\(^3\)

In these cases, justices acknowledged their differential treatment of women but excused it as a necessary and acceptable form of discrimination. These distinctions derived from the supposed primacy and urgency of the women’s sphere – women’s responsibility to maintain the home and attend to the family. According to conventional American culture, woman’s domestic duties inherently and reasonably “exempted” her from obligatory political rights, such as voting and jury service. Reconstruction legislation and court precedents deemed racial discrimination unwarranted but promoted gender discrimination as natural, tolerable, and inescapable.

\(^2\) Minor v. Happersett, 88 U.S. 162 (1875).

\(^3\) Minor v. Happersett, 88 U.S. 162 (1875); Norma Bacsh argues that stating the Minor decision made women second-class citizens misrepresents the decision’s impact on the status of women, because the decision did not change the political status of women. While her argument is partially true, I contend that the endorsement of sex discrimination made by the Supreme Court did impact women’s political status by further legitimizing and definitively strengthening the notion that women should not have the same civic rights and obligations as men. Furthermore, she argues that this decision made the second-class status of women a more pronounced constitutional dilemma. While it did highlight women’s political inequality, it also further entrenched the notion of a benign discrimination. See Baesh, “Reconstitutions: History, Gender, and the Fourteenth Amendment,” 175.
Ultimately, these policies frustrated the goal of women’s rights advocates to attain more than voting rights with the adoption of the Nineteenth Amendment.
CHAPTER III: THE NINETEENTH AMENDMENT: AN INSUFFICIENT SOLUTION

After the adoption of the Fourteenth Amendment and partially as a reaction against the addition of the word *male* to the Constitution, the women’s movement splintered into two organizations, the National Woman Suffrage Association and the American Woman Suffrage Association. These two organizations had different responses to the Fourteenth Amendment, but both organizations rallied behind the right of women to vote. With the merging of these two organizations into the National American Woman Suffrage Association in 1890, the suffrage movement’s singular focus on voting paved the way for the ratification of the Nineteenth Amendment to the Constitution.\(^1\) Despite the legal and discursive associations of jury service with voting rights, the Nineteenth Amendment did not automatically make women eligible for jury service.\(^2\)


\(^2\) Ritter explains that the Nineteenth Amendment failed to change women’s political status outside of enfranchisement, but her focus is singularly placed on some of the court decisions following the Nineteenth Amendment’s adoption. See Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]. In his article, Amar discusses the connection between jury service and voting rights. See Amar, “Jury Service as Political Participation Akin to Voting,” 204, 218, 223-224.
The reaction of most women’s organizations to the Fourteenth and Fifteenth Amendments, namely narrowly concentrating on the vote, made achieving broader changes in the political equality of the sexes, such as obligations to serve on juries, harder to attain after the Nineteenth Amendment. As historian Michael McGerr has claimed, at the turn of the twentieth century, women narrowed their set of goals to suffrage, even as they strengthened their political abilities and tactics.\(^3\) The suffrage movement became a strong and well-organized movement, wielding political power. However, this power did not extend beyond the adoption of the Nineteenth Amendment, and indeed, earlier Court precedents based on the scope of the Fourteenth Amendment, the legitimization and institutionalization of sex discrimination by Congress, and the engrained notions of separate roles, responsibilities, and spaces, for the sexes, continued to frustrate women’s efforts to enjoy the full range of citizenship rights – including the right to sit on juries.

Court interpretations of the Fourteenth Amendment prevented the Nineteenth Amendment from changing the political rights and obligations of women, beyond incorporating them into the electorate.\(^4\) By initiating the suffrage movement’s limited concentration on enfranchisement and providing the constitutional grounds upon which the Court set precedents that discriminated against women, the Fourteenth Amendment stunted the potential

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\(^3\) McGerr, “Political Style and Women’s Power, 1830-1930,” 869. McGerr argues that the suffrage movement’s political style and its sources of political power undermined the potential for the Nineteenth Amendment to change the political status of women substantially.

\(^4\) Many of these specific Court decisions are discussed in earlier chapters. The second chapter analyzes sex discrimination in Supreme Court decisions about the constitutionality of racial discrimination in jury qualification and selection.
accomplishments of first-wave feminists, yet inspired the constitutional protections some women wished to attain through the Equal Rights Amendment (ERA).  

**Antisuffragism and Women’s Jury Service**

Antisuffragists promoted a stereotypic image of suffragists as single, masculine women without “proper” homes and families, and by endorsing these stereotypes, antisuffragists used issues, such as jury service, to aggravate the suffragist’s image as unconcerned with home and family life. Often, because some believed jury service obligations would proceed from voting rights, antisuffragists identified jury service as a reason to fight against the suffrage movement. Legal scholar Carol Weisbrod illustrates this idea with “an 1870 rhyme [that] implied that sitting on juries might force women to abandon their children: ‘Baby, baby don’t get in a fury; Your mamma’s gone to sit on the jury.’” Another interesting blurb that shows how antisuffragists connected woman suffrage to jury service appeared in the *New York Times* in 1912:

> The agitators for woman suffrage fail to call the attention of their followers to the fact that with the franchise also comes the onerous duty of jury service. To sit for weeks in a stuffy courtroom, touching elbows with jurymen and witnesses from all walks and conditions of life, would seem unattractive to women, even to the mannish, childless suffragette – but to the home-loving mothers of

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5 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online].


7 Green, *Southern Strategies*, 57-58; 60; Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 372.

families it would amount to an intolerable burden that we have no right to permit to be forced upon them, ANTI-SUFFRAGE.\textsuperscript{9}

Three years later, the literature of the Massachusetts Anti-Suffrage Committee warned that women votes would mean women jurors, arguing that jury service, even more than voting, would compromise women’s family responsibilities.\textsuperscript{10} Thus, antisuffragists strengthened their arguments against woman suffrage through its association with jury service rights and obligations, insisting that while women might have time to visit the polls, time spent on a jury would detract from their motherly and wifely duties.\textsuperscript{11}

In addition, those who opposed allowing women to serve on juries also worried that the courtroom atmosphere and descriptions of criminal acts would be inappropriate for women, grounding this belief in stereotypic depictions of women as delicate and innocent. Antisuffragists believed that obscene topics and gory details of trials would distress and disturb women jurors.\textsuperscript{12} Furthermore, by associating courtrooms with masculinity, seedy characters, and the public realm, antisuffragists continued to rely on the doctrine of separate spheres to determine appropriate masculine and feminine rights and responsibilities.

Others believed that women would not want to serve on juries or be able to render a logical verdict. For example, one woman wrote into the \textit{New York Times} in 1890, stating that

\begin{itemize}
\item \textsuperscript{10} Rogers, “ ‘Finish the Fight’,” [journal online]. This phrase “votes for women means jury duty for women” was also used in a printing in North Carolina, see Kerber, \textit{No Constitutional Right to Be Ladies}, 138.
\item \textsuperscript{11} In nineteenth and early twentieth centuries, women have been seen often as integral parts of the family, but not truly independent of the family. This notion of women tied to familial obligation continued through the first part of the twentieth century. See Alice Kessler-Harris, \textit{In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in Twentieth-Century America} (New York: Oxford University Press, 2001): 3, 216-217; Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” online; Rogers, “‘Finish the Fight’,” [journal online].
\item \textsuperscript{12} McGlen and O’Connor, \textit{Women’s Rights}, 65. McGlen and O’Connor explain that jury service, unlike political office or voting, is compulsory rather than voluntary, making it more controversial an issue; ANTI-SUFFRAGE, “Street Refuse,” \textit{New York Times} p. 16.
\end{itemize}
she believed “the great majority of women would be more apt to tell innumerable white lies to escape the ordeal.” Another antisuffragist suggested that women swoon over handsome men. “Think of the possibilities for the lawyer,” this “tired juryman” exclaimed, “the good looking one especially – in an impassioned appeal to a feminine jury!” Some thought women too emotional or superficial to analyze evidence effectively. “A Mere Man” responded to the question of women serving on juries, mocking the issue. In a letter to the editor, he implied that women would be more concerned with etiquette and fashion than with important legal questions. He also insinuated that male professionals would be distracted by the presence of female jurors. He sarcastically asked,

> When the clerk of court calls, ‘Hats off!’ what will she decide to do? And if she does decide to retain a hat, what sort of hat will the occasion demand? It would be very distracting to a giddy-headed young lawyer to make a sober, analytical, logical summing up before a double phalanx of Spring hats, decorated with birds and flowers and feathers and fruit. Let us hope that Miss Webster will have a due sense of the solemnity of her new position, and in setting the fashion of the hats to be worn in the jury box will determine upon a sober simplicity.

This “Mere Man” alerted the public to predictions of how female jurors would be shallow, flighty, unfocused, and illogical, all the while disrupting the workings of the court. In addition to rendering improper verdicts, he believed that women jurors would disrupt the entire courtroom, with men unfocused by their presence. He assumed that women jurors would undermine the legitimacy of the verdict and the overall operation of the courts. By mocking women jurors,

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13 “Her Point of View,” *New York Times*, 23 November 1890, p. 10. This woman did, however, state that she believed spinsters could be useful on juries and render decisions effectively.


these antisuffragists not only made arguments that women were ill-suited to or incapable of participating on juries effectively but also interjected the idea that even seriously considering women for jury service was absurd – an occasion for humor rather than serious debate.

Others who opposed women voting connected it to jury service as a strategy for undercutting support for woman suffrage. In a 1909 letter to the New York Times signed “Tired Juryman,” the author sarcastically wrote of his change of heart about woman suffrage once he realized women would also be obligated to serve as jurors. He exclaimed, “Sound the slogan, ‘Votes for Women!’ by all means, and let man welcome the lightening of his burdens,” implying that men would benefit from women’s jury service.16 Also in 1909, Mrs. Johanna Englemann decided she would no longer support the cause of woman suffrage, after she was called for jury service in Los Angeles, California. The New York Times story about her experience explained her instant fame as well as the whirlwind debate she provoked, when suffragists pushed “her to stand firmly by her rights as a citizen and insist upon being recognized in the jury box” but antisuffragists advised her that “politics is degrading and that women’s sphere is more ennobling than sitting in the jury box.” After being summoned for jury duty, Englemann denounced the suffrage campaign, maintaining that she stopped supporting voting rights for women, because she did not want women to serve on juries.17

In the early twentieth century before the adoption of the Nineteenth Amendment, suffragists and antisuffragists connected voting with jury service, yet voting always seemed to be the focus of the debate. By comparison, jury service more often illustrated what antisuffragists saw as the absurdity of extending political rights to women, highlighting concerns about the time


required to serve, the sordid atmosphere of the courtroom, and the need for women and men to be able to reason logically.

**Suffragists’ Understanding of How Voting Rights Would Affect Women’s Jury Service**

Suffragists too considered the question of how the new amendment could change women’s political status. While many suffragists believed that the Nineteenth Amendment would open the door to legal and political equality for women, some attempted to distance their plea for voting rights from jury service.\(^\text{18}\) For example, discussion of how an amendment that secured the vote for women would impact women’s status as jurors surfaced in Mary Sumner Boyd’s “Must Women Voters Serve on Juries,” a 1915 article published by the National Woman Suffrage Publishing Company. In an effort to assuage fears, Boyd contended that not all states that allowed women to vote in 1915 also allowed women to serve as jurors. Furthermore, Boyd acknowledged that new efforts and legislation would be required to get women into jury boxes even after women attained the right to vote.\(^\text{19}\) Similarly, in a letter to the *New York Times*, a self-proclaimed suffragist argued that the vote did not necessarily mean jury service for women, claiming that jury lists were not solely drawn from lists of eligible voters. “Volunteer firemen of seven-years standing, members of the National Guard, and lawyers are exempt from jury service,

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\(^\text{18}\) See Lemons, *The Woman Citizen*, 63-73, for a discussion of the belief that the Nineteenth Amendment would change women’s citizenship rights and obligations beyond the vote. He states, “Most women assumed that winning suffrage would give them the right to hold public office and to serve on juries.” Lemons argues that women connected voting rights to jury service rights, because of their similarities in both being political participation and often referenced to each other in law. He also states that women believed that the Nineteenth Amendment would change their political status. Also see McGlen and O’Connor, *Women’s Rights*, 66-67.

yet they vote,” she noted. Ida Husted Harper reaffirmed this sentiment in her letter to the *New York Times*, stating that anti suffrage claims were false. Harper maintained that “‘women were exempt from jury service,’” just as exemptions were provided for “various classes of men, including lawyers,” who had voting rights. Other suffragists made similar claims, disconnecting jury service from voting and stressing women’s probable exemption.

In contrast to suffragists who attempted to dislodge the association between suffrage and jury service, others welcomed the possibility that extending voting rights to women would bring women onto juries too. One such advocate, Annie G. Porritt, the editor of National Woman Suffrage Publishing Company, wrote that most suffragists opposed all inequalities in political and legal status between the sexes, including those related to jury service. “It is strongly felt by suffragists that women ought to be tried by their peers,” she claimed even as she admitted that women were rarely charged with criminal offenses and recommended that women be granted special exemptions for familial duties. Porritt continued the practice of understanding the term peer in a gendered way; women would be peers of other women, and men peers of other men. By denying that a causal relationship existed between suffrage and jury service, suffragists “quietly folded the argument for jury service into their broader arguments for the vote.” In other words,

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suffragists continued to center on women’s voting rights, making jury service rights and obligations for women a secondary consideration.²⁴

Some women demanded jury service rights and obligations before the Nineteenth Amendment. Of course, exclusion from jury service was one of the listed grievances in the 1848 Declaration of Sentiments, penned by Elizabeth Cady Stanton, and endorsed by the early women’s rights movement. Later, as the suffrage movement gained prominence, other suffragists underscored the need for women jurors. In an early twentieth-century address to the Michigan Constitutional Convention, Catharine McCulloch petitioned for women’s jury service rights and obligations, stating that women were needed to ensure that justice was enacted fairly for female victims and defendants. She claimed that,

> With statutes as they are, the administration of law cannot be expected to be favorable to women, or even just . . . It is not possible that impartial juries should be the rule when women stand before them accused of a crime or when wronged women have asked justice against men assailants. A beautiful, elegantly dressed adventuress, accused of crime, pulling the wool over the eyes of admiring male jurors, and a shabby, friendless, ruined girl, accusing her assailant, will neither of them secure exact justice from men juries.²⁵

These concerns about achieving a just legal system by including women on juries appears as the central theme in Susan Glaspell’s 1917 short story, “A Jury of Her Peers,”²⁶ which related an investigation of the death of one John Wright. While the sheriff and police gather evidence and take testimony, the sheriff’s wife and another woman find evidence indicating that Wright

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²⁴ Rogers, “‘Finish the Fight,’” [journal online].


emotionally abused his wife and that Mrs. Wright murdered her own husband. As the women decide what to do with their discovery, the male investigators ridicule women and their work and worries, implying that they are naive and foolish. Finally because the women feel that the judicial system will unjustly decided against Mrs. Wright, they resolve that they will hide the evidence, ultimately imposing their own system of justice.\textsuperscript{27} This short story illuminates the problems with a justice system that excludes women from the fundamental decision-making body. Reliance on an all-male jury system underscored notions of gender difference and the popular belief that women could not make good jurors. Moreover, female defendants and victims had to depend only on men to attain justice, undermining the legitimacy of the courts in the eyes of women.

Some suffragists went further, arguing that the judicial system needed women because of their elevated honesty and moral sensibilities.\textsuperscript{28} For instance, one newspaper article, “Women Juries for Liquor Cases,” claims that “public-spirited women will help to purify and protect this bulwark [the Eighteenth Amendment and Volstead Act] of safety and security.”\textsuperscript{29} Making similar arguments for voting rights, some suffragists argued that that women’s jury service was desperately needed because of these differences. Women, and women alone, could guarantee that justice be served in cases dealing with women, children, or the moral reform of society.\textsuperscript{30}

Others believed that essentialist arguments for woman suffrage undercut the movement for women’s jury service. Maternalistic and moralistic arguments touting women’s distinctive


\textsuperscript{30} Historian Rebecca Edwards contended that the morality-laden political stance women’s rights activists adopted helped advance women’s goals as well as “legitimized” the politics of the progressive era. Edwards, \textit{Angels in the Machinery}, 4.
roles and gender difference sometimes undermined the practicality of allowing women the time away from families to participate on juries. As political scientist Gretchen Ritter suggested, “while the Nineteenth Amendment succeeded in giving women a civic presence, it did not fully displace the earlier ideal of [a separate] domestic citizenship.”31 In other words, the vote could be viewed as an extension of the domestic sphere into the public for the betterment of families and moral reform, but jury service duties, more than voting rights, impinged upon women’s familial responsibilities.32

### Gender Difference: The Justification for Sex Discrimination in Supreme Court Decisions

Unlike women’s rights advocates who argued that gender difference made women’s participation in politics desirable, the Supreme Court used gender difference as an excuse to discriminate on the basis of sex.33 For example, in the 1908 Supreme Court case, Muller v. Oregon, the majority opinion justified sex discrimination as a benign, reasonable response to gender difference. In this case, the question of whether or not an Oregon law that regulated the number of hours that women could work in laundries violated the due process clause of the Fourteenth Amendment came before the Court. The law limited the hours women could work per week, but men had no such restrictions on their employment. This case relied on the “Brandeis brief,” a document used in the trial that contained statistics on women workers and

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31 Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 372.


33 Some women argued in favor of protective laws that shielded women from labor regulations that governed men. However, the Court’s use of gender difference in this case underlined the Court’s position on the acceptability of differential treatment based on sex.
concluded that long workdays jeopardized women’s health and reproductive capabilities.\textsuperscript{34} While this case was not about expanding women’s political rights and obligations, it exemplified the Court’s justifications for ruling that distinctions based on sex were constitutionally acceptable and even legitimate.\textsuperscript{35}

In his opinion for the Court, Justice David J. Brewer argued that the Oregon law was constitutional despite its unequal treatment of the sexes. He contended that this law protected women, because women were physically unequal to men and therefore should not be employed in the same ways as men.\textsuperscript{36} Brewer continued to base his decisions on gender differences between men and women, writing “that woman's physical structure and the performance of maternal functions place her at a disadvantage” in the workplace compared to men.\textsuperscript{37} Furthermore, he reinforced the stereotypical notions that the roles and responsibilities of women belonged in the private sphere, arguing that motherhood and womanhood justified the differential treatment and protection of women. He reconfirmed his rationale for gender discrimination in this case by maintaining that:

\begin{quote}
The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that
\end{quote}

\textsuperscript{34} Karen O’Connor, \textit{Women’s Organizations’ Use of the Courts} (Lexington: Mass., Lexington Books, 1980): 69-71. This approximately one-hundred-page document bolstered the National Consumer League’s litigation strategy, giving their legal arguments statistical backing. This involvement by Brandeis occurred before his appointment to the Supreme Court in 1916.

\textsuperscript{35} Muller v. Oregon, 208 U.S. 412 (1908); Baer, \textit{Equality Under the Constitution}, 33-34.

\textsuperscript{36} Muller v. Oregon, 208 U.S. 412 (1908).

\textsuperscript{37} Ibid.
Brewer’s explicit acceptance of gender difference in this case helps explain why women followed a long path towards acceptance in the public and legal communities as jurors. From the passage of the Reconstruction Amendments and into the twentieth century, the Court did not hesitate to draw on and reinforce the ideology of separate spheres, gendered stereotypes, and the legitimacy of gender-based distinctions. The entrenched and gendered social conventions of the late-nineteenth and early-twentieth centuries cloaked gender discrimination in terms of social necessity, the protection of women, and the natural segregation of the sexes. The justifications for sex discrimination and willingness of the Court to sustain them became barriers to women’s jury service eligibility even after women attained voting rights.  

How Changes in State Voting Rights Affected Jury Service Rights and Obligations Before the Nineteenth Amendment

Only a handful of the sixteen states that adopted woman suffrage laws before the Nineteenth Amendment also allowed women to serve on juries, because not all states that allowed women to vote subsequently allowed women to participate on juries. However, even

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\[\text{Ibid.}\]

\[\text{While the Supreme Court had ruled that racial segregation was constitutional, using the infamous phrase, “separate but equal,” in the 1896 case, } \textit{Plessy v. Ferguson}, \text{ the Supreme Court made a distinction between state-sponsored racial discrimination, for example in jury selection, and public segregation. This distinction does not surface in relation to sex discrimination. Women can be treated differently by the government and by the public sector.}\]

\[\text{Kerber, } \textit{No Constitutional Right to Be Ladies}, 137. \text{ Kerber lists these states as follows, “Utah (1898), Washington (1911), Kansas (1913), California (1917), New Jersey (1917), and Michigan (1918).” Mahoney, “Women Jurors,” 209-210; Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]; Lemons, } \textit{The Woman Citizen}, 69. \text{ Nevada only allowed unmarried women without children to serve on certain juries.}\]
within these states, jury service eligibility did not always directly follow enfranchisement. While a few states allowed women to serve on juries, courts, in other states that allowed women to vote, used precedents to prevent women from serving on juries. In these states relying on the courts to exclude women from juries, the state legislatures would have to adopt specific legislation to overrule legal precedents excluding women from juries.\textsuperscript{41}

In 1911, for instance, after California passed an Equal Suffrage Amendment allowing women to vote under the state constitution, the question of whether women would be incorporated into the juror selection process remained open for debate. California’s Attorney General, Ulysses S. Webb, “ruled that women cannot serve as jurors” in Los Angeles, because of the common law tradition that deemed men alone were eligible for jury service.\textsuperscript{42} In this case, women would have to petition for legislative action or appeal the decision to the U.S. Supreme Court to overcome the state court’s holding. California denied women access to the jury box until the state legislature passed a bill that made women eligible for jury service in 1917. State legislators used this legislation to prevent convicted men from successfully appealing their convictions by arguing that women had unlawfully served as jurors.\textsuperscript{43}

Unlike California, in 1918, Nevada courts considered the question of whether women were made jurors by virtue of becoming voters. The Nevada Supreme Court, in \textit{Parus v. District Court}, upheld service on juries as a right or obligation extended to newly enfranchised women. Relying on the Supreme Court decision in \textit{Neal}, the Nevada Supreme Court was one of few courts that provided women with eligibility for jury service based on arguments for equality of

\textsuperscript{41} Kerber, \textit{No Constitutional Right to be Ladies}, 137.


\textsuperscript{43} Kerber, \textit{No Constitutional Right to Be Ladies}, 137.
citizenship, specifically with women newly enfranchised. The Michigan Supreme Court addressed similar questions in the 1920 case, *People v. Barltz*, in which the court examined the meaning of the word *men* to determine whether it applied to women. This opinion confirmed that women’s voting admitted them to juries in Michigan because sex was not meant to be a qualification for jury service, but, unlike *Parus*, the ruling was narrowly construed, not addressing women’s citizenship status in general.  

Of the various states that permitted women to serve on juries after allowing them to vote, many provided exemptions for women from jury service, anticipating that women would not participate on juries frequently. These states included Kansas, California, Nevada, Utah, and Colorado. A 1902 newspaper article, “Chorus Girls as Jurors,” indicated that while two women in Colorado “retorted that [serving on a jury] was precisely what they wanted to do,” the paper emphasized “the Court has always excused women from jury service when they were inadvertently drawn.” These two women asked to be jurors appeared at the Courthouse to sell raffle tickets at a time when court officials needed jurors. Often, many states that allowed women to serve on juries did not actively ask or expect them to participate. In fact, before Congress passed the Nineteenth Amendment, of the states in which women were eligible for jury service, only one state, Idaho, made jury service for women compulsory.

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44 Jennifer Brown, “The Nineteenth Amendment and Women’s Equality,” *Yale Law Journal* 102 (June 1993): 2188-2191; Lemons, *The Woman Citizen*, 69. Lemons explains that even though women could vote in Michigan in 1918, women were not eligible for jury service until 1920 (but before the adoption of the Nineteenth Amendment) when the Michigan Supreme Court ruled that with the change in Michigan’s voting qualifications, women became eligible to serve on juries.


47 Ibid.

While a few states extended voting rights and obligations to women before a federal amendment required it, most state courts were unwilling to allow women into the courtroom as a juror. Ritter argued that both state and federal courts relied upon at least three distinctive rationales to disqualify women from jury service. These included common law traditions of coverture, state restrictions on women’s right to vote, and state statutes that explicitly limited juries to male citizens. These legal traditions slowed the ability for women to change their position in society while court and contemporary understandings of sex discrimination as legitimized by gender difference compounded the reasons for deeming women ineligible for jury service.

The Impact of the Nineteenth Amendment on Women’s Jury Service

The Nineteenth Amendment was only partially successful in breaking down women’s exclusion from juries. It enfranchised women in thirty-two states, but only seven of those states automatically allowed women to participate on juries, and other states allowed legal battles to decide whether the Nineteenth Amendment required including women on juries. Legal scholar Jennifer K. Brown explains that state and district courts could have viewed the Nineteenth Amendment as more ambiguously affecting women than hurting them in the late nineteenth and early twentieth centuries.

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49 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]. While I agree with Ritter’s main reasons, my thesis stresses the effect of the Fourteenth Amendment’s sex distinction on women’s ability to use the courts effectively. The Fourteenth Amendment and the subsequent court decisions write gender difference into active policy. This writing of cultural norms into policy had a greater impact on women’s ability to claim political rights than Ritter acknowledges. Furthermore, she argues that women saw hope in adapting the Supreme Court decisions for African American men and jury service to their own ends; however, these decisions further divided women from black men by arguing that sex was a reasonable item upon which to discriminate. Instead, women’s rights activists hoped to use the Fourteenth Amendment to further their movement’s goals, but in the nineteenth century, they failed to make headway through the judicial system. Ritter does see a divide between African Americans efforts and the women’s rights advocates’ efforts, but she also sees the Fourteenth Amendment as more ambiguously affecting women than hurting them in the late nineteenth and early twentieth centuries.

50 Lemons, The Woman Citizen, 69.
Amendment as affecting women’s ability to serve on juries in two ways. First, justices could have had understood woman suffrage narrowly, as for example the “meaning attributed to the Nineteenth Amendment today – the Amendment simply gives women the right to vote.” On the other hand, the courts could have held, in what Brown calls an “emancipatory view” of the Nineteenth Amendment, that women’s access to the vote made them political equals to men and undermined the common law tradition of the covert women and women’s inferior status. After the adoption of the Nineteenth Amendment, some state courts continued to connect voting qualifications with juror qualifications, as the Supreme Court had in the late nineteenth century with regard to racial discrimination in jury qualification and selection. More often, however, courts and legislators determined that women were not made jurors when they become voters.

Gretchen Ritter explains three responses of state courts to the question of how the Nineteenth Amendment impacted women’s ability to serve on juries. She contends that “the first, and most common, was the view that the Nineteenth Amendment had no effect on women’s jury eligibility,” because of an extended reliance on common law traditions or as a result of the Fourteenth Amendment and its subsequent precedents. Other state courts ruled that in conjunction with the Neal decision on the constitutionality of excluding African American men

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52 Ibid. However, Brown contends that the original intent behind the Nineteenth Amendment was political and legal emancipation of women, and that the Courts’ views of women and their reliance on precedent curbed the actual effects of the suffrage amendment. While the intentions of the suffragists might have been political and legal emancipation of women, Brown never demonstrates that those were the intentions of the legislators, and furthermore, she seems to underplay the funneling of the women’s rights movement into a single-issue pressure group, which made voting rights the priority. Her article does however offer a useful organizational structure for understanding the two main views of the Nineteenth Amendment, and this portion of her argument would be greatly strengthened when understood in conjunction with the lasting legacy that court precedent based on the Fourteenth Amendment had on women’s equality.

53 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online].

54 Ibid. These states included New York and New Jersey.
from juries, the Nineteenth Amendment was sufficient itself to allow women to become jurors.\(^{55}\)

Still, severing the tie between jury service and voting, other courts recognized women’s new status as voters but held that this new status was inadequate by itself to mandate women’s participation on juries.\(^{56}\)

**Legal Writing on Women’s Jury Service Eligibility After the Nineteenth Amendment**

Contemporary legal journals and law review articles provide a way to uncover these various positions and the rationale for continuing to exclude women from juries outside of judges’ rulings. After 1920, legal scholars and lawyers also began asking or explaining how the Fourteenth Amendment and/or the Nineteenth Amendment impacted the ability of women to enter the jury box. In early-twentieth-century law reviews, women’s jury service was referred to not as a right but a privilege or obligation. As one scholar commented, excluding women from juries was reasonable and happened “without motive of oppression.”\(^{57}\) Law reviews distinguished the racial discrimination against African American men with regard to jury service from the requisite, and benign, need to treat women differently. One particular legal publication argued that excluding women from juries would actually benefit female defendants, asserting that “the exclusion of woman, far from being prejudicial, is, if anything beneficial to her. She may not have the right to be tried by a jury of her equals, but she has the unique privilege of

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\(^{55}\) Ibid. These states included Nevada, Michigan, Iowa, and Indiana.

\(^{56}\) Ibid. These states included Massachusetts, Idaho, and Illinois.

being tried by a jury of her admiring inferiors.”

In keeping with this general trend, a *Virginia Law Review* piece noted that “it seems that since jury service is not incidental to suffrage, and since women are peculiarly unfit for this duty, the legislature did not intend that women should subsequently be brought within the class of those eligible for jury service.”

Simultaneously, many courts failed to connect the vote with jury service, and the Supreme Court refused to hear arguments about women’s jury service rights and obligations under the Nineteenth Amendment.

It is impossible to escape the conclusion that the Fourteenth Amendment limited the Nineteenth Amendment’s potential for securing women’s jury service and other rights of citizenship. The Fourteenth Amendment and court interpretations of it, most of which relied upon mainstream gender ideals, overpowered the scope and capacity of the Nineteenth Amendment to introduce women into other political institutions.

Blanche Crozier described

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58 “Constitutionality under the Fourteenth Amendment and the Proposed Nineteenth Amendment of State Laws Limiting Jury Service to Males” *Virginia Law Review* 6 (May 1920): 589-592; “Constitutional Law. Jury. Equal Protection of the Laws. Exclusion of Women from Jury Panel” *Columbia Law Review* 1 (January 1932): 134-135 reads, “The effects of racial prejudice make it far more probable that a trial by a jury composed of white men will deprive a Negro defendant of a fair hearing than that a woman will be similarly prejudiced by a trial before a jury of men.” In a 1935 law review this argument is challenged, but recognized as a predominant argument against women serving on juries or a justification for them not having to serve on juries. See Crozier, “Constitutionality of Discrimination Based on Sex,” 728.


61 Cases interpreting the Fourteenth Amendment that undercut the effectiveness of Nineteenth Amendment include, *Strauder, Ex parte Virginia, Neal, Bradwell, Minor*, and *Muller*. See Rogers, “‘Finish the Fight,'” [journal online].

the incongruity between racial discrimination and sex discrimination in jury selection and statutes in a 1935 law review article, stating that arguments for women’s jury service relied on the “primary assumption that the various assurances of the Fourteenth Amendment extend to women” which “include discriminations made or privileges denied on the sole ground of sex.” In her view, the central basis for women’s jury service claims relied on interpretations of the Fourteenth Amendment, and she considered it “too shaky a foundation for the good of the superstructure.”

Here, she also asserted that women were “unqualified” for jury service because the Constitution, as interpreted by the courts, failed to protect women from discrimination. Furthermore, the Fourteenth Amendment foiled the aspirations of women’s rights advocates who hoped for an expansive reordering of women’s legal and political status before and, especially, after the adoption of the Nineteenth Amendment.

Other state courts interpreted the Nineteenth Amendment as sufficient to make women eligible for jury service. Often, these cases pivoted on extant state qualifications for jurors that included all qualified voters without reference to gender. The *Yale Law Journal* reported on one of these cases in Pennsylvania. This article stated that “the adoption of the Nineteenth Amendment to the Federal Constitution making women electors qualified them to act as

63 Crozier, “Constitutionality of Discrimination Based on Sex,” 734-735.
64 Ibid.
65 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]; Crozier, “Constitutionality of Discrimination Based on Sex,”: 731-733. Crozier included a list of the court cases that held women, as electors after the Nineteenth Amendment, were qualified to be jurors. These cases were *State v. Walker*, 192 Iowa 823, 185 N.W. 619; *Commonwealth v. Maxwell*, 271 Pa. 378, 114 Atl. 825; *Parus v. District Court*, 42 Nev. 229, 174 Pac. 706; *People v. Bartlz*, 212 Mich. 580, 180 N.W. 423; *People v. Merhige*, 219 Mich. 95, 188 N.W. 454.
Thus, certain state courts recognized statutes equating voters with potential jurors as incorporating women into the jury.

The number of court cases about the Nineteenth Amendment’s impact on the status of women as jurors prompted the cataloging of state jury service laws and their application to women. In 1925, William E. Hannan, a librarian in the Legal Reference Section of New York State Library, wrote a document entitled, “Compilation and Digest of the Laws of the Various States Relating to Jury Service for Women” that presented in chart form, lists several of the states, the wording of the laws on women’s jury service, and the respective dates of those laws. 67 The chart contains three columns, divided by compulsory jury service, non-compulsory jury service, and forbidden jury service. Of the eighteen states included, two forbade women from serving, seven mandated compulsory jury service for at least some groups of women, eight allowed women to claim exemption because of their sex, and one required women to register for jury service. 68 This compilation of jury service laws that impact women’s ability to participate indicates that after the adoption of the Nineteenth Amendment the status of women as jurors was uncertain. Moreover, as women became eligible to serve on juries, some states required that


67 William E. Hannan, Compilation and Digest of the Laws of the Various States Relating to Jury Service for Women, New York States Library: Legislative Reference Section, February 1925. California (1921), Kentucky (1922), Maine (1921), New Jersey (1921), Ohio (1921), Pennsylvania (1921), and Nevada (1920) required women to serve as jurors. Nevada prohibits married women with children from serving but mandated that all unmarried women or married women without children serve. New Hampshire (1920) and South Carolina (1921) prohibited women from participating. Alaska (1923), Arkansas (1921), Delaware (1923), Kansas (1923), North Dakota (1921), Oregon (1921), Washington (1922), and Wisconsin (1921) all allowed women to opt-out of jury service based on their sex. Louisiana (1924) required women to register before being allowed to serve on juries.

68 Ibid.
women actively register for jury service, and others gave women automatic exemptions from serving.\textsuperscript{69}

\textbf{The Impact of the Nineteenth Amendment on the Women’s Movement}

After the Nineteenth Amendment’s ratification, the woman suffrage movement dissolved into less politically powerful women’s organizations which were often at odds with one another’s objectives, especially regarding gender equality or protective laws for women.\textsuperscript{70} Some former suffragists were surprised that the Nineteenth Amendment did not spark more changes in women’s political status and perhaps these women expected too much from the suffrage amendment or enfranchised women.\textsuperscript{71}

In the few years following the Nineteenth Amendment’s ratification, fourteen states allowed women onto juries. In seven of these states women were automatically allowed onto juries after the suffrage amendment, while the other half of these states passed additional legislation to allow for women’s jury service.\textsuperscript{72} Overall, however, in the 1920s, the movement for women’s jury service was slow moving and mildly successful.\textsuperscript{73} While many of these groups, especially the League of Women Voters and the National Woman Party, advocated women’s jury service, they could not come together because disagreements over other policy

\textsuperscript{69} Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 370-372.

\textsuperscript{70} Basch, “Reconstitutions: History, Gender, and the Fourteenth Amendment,” 172; Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 368-369; Lemons, \textit{The Woman Citizen}, 41-43, 58.


\textsuperscript{72} Ritter, “Jury Service and Woman’s Citizenship before and after the Nineteenth Amendment,” [journal online].

\textsuperscript{73} Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 368-369.
issues, most significantly the Equal Rights Amendment. The League of Women Voters sought more moderate gains for women, emphasizing civic education for informed and active citizenship, while the National Woman’s Party, a more radical and militant organization, campaigned for an all-encompassing constitutional amendment, the ERA, to end legalized sex discrimination. The success of the movement for suffrage and the following fragmentation of women’s organizations reduced the first-wave of women’s rights advocates to infighting and deflated their abilities to advance the political status of women. Because of the weakening of women’s organizations’ political power, these active campaigns for women’s jury service failed to effect much change throughout the 1920s.

Also a topic of debate for women’s groups in the 1920s, the adoption of the ERA would have created for women opportunities similar to those afforded black men by the Fourteenth Amendment. The more expansive scope and general language of the ERA, compared to the Nineteenth Amendment, would have provided women with the opportunity to challenge the foundational arguments that excluded them from the jury and Court precedents that considered sex distinctions a benign form of discrimination. As the National Woman Party exclaimed, the

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74 Ritter contends that most women’s organizations favored women’s jury service rights. She stated that “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.’” Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]. However, women would have had different reactions to exemptions granted on the basis of sex, with the members of the NWP probably more opposed to exemptions than the members of more moderate women’s organizations.

75 Rogers, “ ‘Finish the Fight,’” [journal online].

76 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online]; McGlen and Connor, Women’s Rights, 67; Kerber, No Constitutional Right to be Ladies, 139. McGlen and O’Connor contend that “In those states where women’s claims to jury service were rejected, they often faced long, protracted legislative fights. This was due, at least in part, to the demise of the strong women’s coalition and growing recognition of women’s limited political strength.” Kerber argued that by 1924 “it became clear that women did not vote as a bloc, and legislators found it less urgent to treat them as an interest group.”
ERA would have been a more comprehensive solution to women’s constitutional plight, affording women increased constitutional protection based on equality rather than difference.

Activism for women’s jury service continued throughout the early part of the twentieth century, but its success was limited to isolated states. For example, the Connecticut League of Woman Voters sought a legislative remedy for women’s exclusion from juries in every legislative session from 1921 until 1937. Within these campaigns, women argued that their right and obligation to serve as jurors stemmed from their status as citizens and voters. Law professor Vikram David Amar explains that advocates of women’s jury service emphasized the connection between voting and jury service, depended on the Nineteenth Amendment’s impact on specific state laws regulating jurors, and asserted that not allowing voters to serve on juries was “nonsensical.”

Moreover, women’s jury service advocates petitioned state legislatures to pass jury bills or more expansive “equal rights” legislation to allow women to become jurors. For example before the end of 1921, campaigns by the National Woman Party in Wisconsin and Louisiana were successful in changing laws to make women eligible for jury service. Furthermore, campaigns by the NWP for state equal rights legislation, including a specific section on equal jury service eligibility, emerged in nine states, including New York, New Jersey, Massachusetts,

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77 The National Women’s Party, especially with the help of Burnita Shelton Matthews, does petition the federal government to mandate the inclusion of women on juries in state and federal court.


79 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment,” [journal online].


81 “Women Freer in Louisiana: Many Old Discriminations Ended by the Legislature” New York Times, 3 December 1921, p.27.
Virginia, Kentucky, Rhode Island, Maryland, South Carolina, and Mississippi, in 1922. The movement for jury service was a long and tediously slow one throughout the mid-twentieth century.

The Nineteenth Amendment failed explicitly to establish women’s eligibility for jury service, and in most cases, it was insufficient to eliminate the gender-specific language in many state jury qualification statutes. In these ways, the suffrage movement failed to achieve a more comprehensive equalization of citizenship for women, and therefore, women’s organizations of the 1920s incorporated jury service rights and obligations into their agendas. However, the achievement of women’s organizations, advocating the Equal Rights Amendment or specific jury bills, stagnated during the 1920s, leaving many states with all-male jury systems.

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CONCLUSION: THE FOURTEENTH AMENDMENT, THE NINETEENTH AMENDMENT, AND BEYOND: UNDERSTANDING WOMEN’S INCLUSION ON JURIES

Through the framing of the Fourteenth Amendment, ensuing congressional legislation, and subsequent court decisions, race and sex became antagonistic, restrictive legal classifications in the late-nineteenth century. Reconstruction debates over racial discrimination and the rights and obligations of black men provoked discussion of women’s position within society and limits on their civic participation. By focusing on jury service participation and de-centering the history of woman suffrage, this thesis addresses the uses of race and sex classifications, specifically in the Fourteenth and Nineteenth Amendments, and their long-term, legal consequences. While legislators and justices attempted to eliminate racial discrimination in jury service statutes and selection, they condoned, and even overtly supported, sex discrimination. Because of their reliance on earlier precedents condoning sex discrimination, women’s rights advocates achieved little more than voting rights within the limited scope of the Nineteenth Amendment.

This thesis examines the nineteenth-century policies and court doctrines that excused, legitimized, and institutionalized sex discrimination in the jury system. Because the juxtaposition of race discrimination with sex discrimination in policies and debates buttressed black men’s rights and did so explicitly at the expense of women’s rights, the woman suffrage campaign and the movement for racial equality ran parallel but remained disconnected and even became antagonistic after the Civil War. The fissure between these two movements became a legacy of the Reconstruction era that foreshadowed the troubled relationship that developed between the civil rights and feminist movements of the 1960s and 1970s.
By investigating these early debates over the constitutionality of selecting jurors based on race or sex, historians can better understand why and how the federal government systematically excused women’s exclusion from juries until the 1970s. The separate sphere ascribed to women became more easily inscribed into legal precedent because of the Fourteenth Amendment and Court interpretations of it. Women could argue against sex discrimination under the first section of the Fourteenth Amendment, but ultimately legislators and jurists made judgments that reflected the constricted view of female citizenship expressed in the Fourteenth Amendment’s second section. Policymakers’ reliance on gender-centered justifications for excluding women from juries revealed the limitations of the Fourteenth Amendment, and later the Nineteenth Amendment, for changing women’s citizenship. Because of their failed attempts to use the Fourteenth and Nineteenth Amendment to end sex discrimination, women’s rights activists sought another constitutional remedy in the Equal Rights Amendment (ERA), which became the topic of many feminist debates throughout the twentieth century.

Debates over the ERA continued to coexist with discussions about women’s jury service throughout most of the twentieth century. For instance, when the American Civil Liberties Union litigated to end sex discrimination in law and policy in the 1960s and 1970s, it sought to eradicate distinctions based on sex in jury selection statutes by using the Fourteenth Amendment rather than endorsing the ERA. Beginning in 1961 with Hoyt v. Florida, the ACLU argued that states requiring women to seek active inclusion on jury service rosters violated the Fourteenth Amendment, but the Supreme Court disagreed. Still, in March 1963, Dorothy Kenyon, chairman of the ACLU Equality Committee, wrote a letter to the ACLU’s board of directors, in which she maintained that the Fourteenth Amendment was sufficient to end sex discrimination, rendering
the ERA unnecessary.\(^1\) In 1965, black attorney and rights activist Pauli Murray joined the ACLU in its fight against both racial and sex discrimination, contending that an expansive interpretation of the Fourteenth Amendment would resolve sex discrimination without an ERA.\(^2\) Two years earlier in a document written for the Committee on the Status of Women, Murray explained that, “in less than a century, the Fourteenth Amendment has evolved from a narrow application of fundamental law (no less fundamental to racial minorities than to women) into a living principle of universal application capable of reaching injustices and protecting individual rights not wholly contemplated in the ‘original understanding.’”\(^3\) As such, women’s legal advocates in the 1960s and 1970s revived the Fourteenth Amendment, trying to make it, for the first time, an effective tool for ending sex discrimination. Only by understanding the history of the Fourteenth Amendment, court precedents built on it, and their implications for women’s rights can historians analyze the effectiveness of using the Fourteenth Amendment in sex discrimination cases during the second-wave feminist movement.

In the 1970s, despite the failure of *Hoyt*, Pauli Murray and the ACLU, even after the creation of the Women’s Rights Project led by Ruth Bader Ginsburg, argued that differential treatment based on sex in jury service violated the equal protection clause of the Fourteenth Amendment. Eventually in the 1975 *Taylor v. Louisiana* case, Ginsburg and the ACLU convinced the Supreme Court that exclusion from juries based on sex violated the Fourteenth Amendment. The hope and determination of ACLU activists to use the Fourteenth Amendment

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2 Hartmann, *The Other Feminists*, 53-54.

3 Pauli Murray quoted in Dorothy Kenyon to American Civil Liberties Union Board of Directors, 28 March 1963, ACLU archives, University of California, Los Angeles, box 32.
remained undaunted, despite a century of Supreme Court doctrine that used the Fourteenth Amendment to legitimize sex discrimination.\(^4\)

This thesis underscores the repercussions of government involvement in promoting difference among its citizens, the implications of government policies based on those distinctions, and the unintended consequences of constitutional amendments. Legal classifications – namely of sex and race – are double-edged swords; they can provide government-sponsored authority for resolving social inequalities, legal protections for disadvantaged groups of citizens, and litigation avenues for the remedy of discriminatory acts. However, as Murray contended, classifications divide citizens into groups according to specific identities of sex and race, further categorizing people based on difference and increasing the likelihood for discrimination. Sometimes, legal classifications achieve particular democratic goals of equality or inclusion by prohibiting discrimination, but they also reinforce differences among citizens. Therefore, understanding the varied consequences of using classifications becomes increasingly necessary to understanding the history of citizenship.\(^5\)

Obviously, equality of all races and both sexes remains a democratic ideal. The policies directed at that objective will produce intended and unintended consequences as well as shape the responses of groups striving for reform. Even recently, the inclusion and exclusion of certain groups on juries continue to raise questions and require solutions. For instance, in the 1985 Baston v. Kentucky and the 1994 J.E.B. v. Alabama ex rel. T.B. cases, the Supreme Court ruled


preemptory strikes against jurors based on race or sex unconstitutional violations of the equal protection clause of the Fourteenth Amendment. Clearly, as long as race and sex persist as legal classifications, the history, the implications, and the legacies of the constitutional and legal transcriptions of race and sex into law will continue to shape understandings of citizenship, rights, obligations, and discrimination.
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