Revising Constitutions: Race and Sex Discrimination in Jury Service, 1868-1979

Dissertation

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By

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Abstract

This dissertation examines the relationship between the Reconstruction-era civil rights revolution and the rights revolution of the 1960s and 1970s by tracing the history of sex and race discrimination in jury service policy and the social activism it prompted. It argues that the federal government created a bifurcated policy that simultaneously condemned race discrimination and condoned sex discrimination during Reconstruction, and that initial policy had a controlling effect on the development of twentieth-century jury service campaigns. While dividing civil rights activists’ campaigns for defendants’ and jury rights from white feminists’ struggle for equal civic obligations, the policy also removed black women from the forefront of either campaign. Not until the 1960s did women of color emerge as central to both of these campaigns, focusing on equal civic membership and the achievement of equitable justice. Relying on activists’ papers, organizational records, and court cases, this project merges the legal and political narrative with a history of social to reveal the complex and mutually shaping relationship between policy and social activism. This dissertation reveals the distinctive, yet interwoven paths of white women, black women, and black men toward a more complete attainment of citizenship rights and more equitable access to justice.
Dedication

To Oliver
Acknowledgments

During a recent conversation with a professor at Ohio State, I realized why I had avoided writing the acknowledgments for my dissertation earlier. He found the process of thanking everyone for their part in the creation of the project to be a wonderful and enjoyable exercise. Quite selfishly, I must admit that instead I feel a sense of sadness. I am a historian unsettled by change. I know that my relationships with my advisor and many other mentors will indelibly change and that my proximity to the wonderful community of scholars in the Department of History at OSU will also change. I will miss being a part of this vibrant community of scholars, colleagues, and friends—one full of people, who inspired, challenged, and supported me.

My off-beat interest in jury composition only became a meaningful historical analysis because of the guidance of my dissertation advisor, Paula Baker. Her dedication, sense of humor, and sheer brilliance make her an unparalleled mentor. She has simultaneously expressed faith in my capabilities and challenged me to improve. Above all else, I will miss hearing her reassurances, sage advice, and fantastic stories over coffee.

During my graduate studies, I have also been lucky enough to work with Susan M. Hartmann. Her high expectations, generous feedback, and kindness have left their mark on this project and pushed me to become a better scholar. Leigh Ann Wheeler, my thesis advisor at Bowling Green State University, encouraged my earliest undertakings on this project and urged me to approach my questions broadly and boldly. I admire her strength, determination, and warmth more than she knows. My undergraduate mentor, Mary Kaiser, sparked my interest in U.S. women’s history, helped me continue my academic pursuits, and remains a source of support. Donald G. Nieman and David Stebenne have helped me navigate the world of legal and constitutional history, and I am especially grateful for their suggestions directed at making this project appeal to a larger audience.

Many others at Ohio State have contributed to this project and have assisted in my academic career successful. In my first class at OSU, I witnessed a model teacher, Kevin Boyle, who taught me the importance of storytelling. Donna Guy pushed me to compare women’s experiences across the globe, and her enthusiasm was infectious. David Staley, Scott Levi, Judy Wu, and Birgitte Soland extended opportunities that assisted with my
professionalization. Others shared insights on my work and helped me grow as a historian at OSU, and I give my deepest thanks to Manse Blackford, Bill Childs, Stephanie Smith, and Kate Haulman. I am also indebted to several staff members, including Joby Abernathy, Jim Bach, Gail Summerhill, Chris Burton, Chris Aldridge, and Rich Ugland. Each of them made the everyday negotiation of department and university operations easier and made the sense of community within Dulles Hall brighter.

My research benefited substantially from the generous resources of several awards and institutions. The Department of History at Ohio State provided invaluable support throughout this process. In addition to teaching opportunities and financial backing, the Department presented me with the Genevieve Brown Gist Research Award in Women’s History twice, allowing me to fund several research projects. I have also received support from the College of Humanities Small Grants Program, which allowed me to attend conferences. The Women’s Studies Department and Coca-Cola Critical Difference Research Grant offered me resources to finance necessary archival research.

I am thankful for the archivists, librarians and research staff who assisted me in the tedious, but rewarding process of accessing historical records and secondary materials. At the Library of Congress, both Bonnie B. Coles and Patrick Kerwin provided me with access to invaluable manuscript collections, suggested additional materials for me to reference, and helped me before, during, and after my trip to Washington, D.C. Amy Hague, the Curator of Manuscripts at the Sophia Smith Collections at Smith College offered her expertise and made the process of retrieving numerous collections seem effortless. The staff, most notably Sarah Dunbar Hambleton, at the Schlesinger Library also proved to be indispensible, and I am grateful for all of their help. Finally, David Lincove, professor and librarian at Ohio State, generously offered support from the earliest stages of my project.

My work has benefited from the thoughtful insights and comments of numerous colleagues met through my participation at conferences. Alison Parker and Carol Faulkner offered encouragement and keen advice on my work, and they allowed me the opportunity to present my work at the Gender and Race in American History Conference at the University of Rochester. There, Victoria Wolcott, Deborah Gray White, and Michelle Mitchell, among many others, contributed to my progress. I have also benefited from the comments of Liette Gidlow, Eileen McDonagh, and Susanna Lee who offered suggestions at particularly important points of my progress. I am indebted to the work of Martha Jones, Barbara Savage, and others in the Black Women’s Intellectual and Cultural
History Collective, who allowed me to present at their conference and encouraged me to continue my work.

I have also been fortunate enough to establish meaningful friendships with several graduate students during my time at Ohio State. Jessica Pliley, Audra Jennings, Angela Ryan, and Mindy Farmer introduced me to the women’s history program and continue to offer support and advice. Lawrence Bowdish, Hunter Price, Octavian Robinson, Greg Kupsky, Brian Feltman, Matt Foulds, and Anna Peterson have commiserated with me over the stress of this process and helped me celebrate the highs it offers.

Two of my closest friends have stood by me throughout this process, and I am certain I would not have survived it without their unyielding support. Sheila Jones encouraged me through my masters’ work at BGSU. She continues to read my work and offer sage advice. Her friendship has meant more to me than she knows. Lindsey Patterson has become my greatest source of strength in the past four years; she has seen me at my lowest, stood by my side during trying times, and always required me to commemorate each milestone. Without Lindsey and Sheila, graduate school would have been a lonely place.

My family remains an unswerving source of love and support. My parents, Carol and Bradd, stressed the importance of education, offered me opportunities to learn, and encouraged me to follow my heart. I certainly would not have had the luxury of this academic path without all that they have done for me. My sister, Charlotte remains a close and trusted ally and one of my biggest supporters. I still hope one day that I will become the writer that she is. My in-laws, Sonny and Lois, have also provided great encouragement throughout this long process, and I appreciate their interest in my path.

Steven, my husband, has taken this long road with me. He always believed in me and selflessly helped me through every stage. He read every draft, listened to every presentation, celebrated every achievement, and softened every fall. I cannot imagine this journey without his love and support. Our son, Oliver, had offered me new joy and radically shaped my priorities. Though he is only two years old, he has influenced my life in ways I could not have predicted. He has become my true inspiration.
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Fields of Study

Major Field: History
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Introduction: Revising Constitutions

As of 1965, three states—Alabama, Mississippi, and South Carolina—excluded women from juries. In the same year, feminist and civil rights lawyers for the American Civil Liberties Union found a case to challenge sex and race-based exclusivity of the Alabama jury system. With the assistance of a local group of African-American men and women, the ACLU carried out its project, Operation Southern Justice. They filed a class action lawsuit against the jury commissioners and against the State of Alabama.\(^1\) In it, these activists challenged a county justice system that relied on all-white, all-male juries with women excluded by state statute and black men excluded through local practice. DorothyKenyon and Pauli Murray, white and black feminist lawyers working for the ACLU, used *White v. Crook*, to highlight the position of black women in the justice system—a strategic way to emphasize the interplay between race and sex discrimination and to align women’s equal protection claims with the Fourteenth Amendment rights guaranteed to black men.\(^2\)

In 1966, the District Court deemed that the court procedures of Lowndes County, Alabama restricted jurors to a “small number” of white men by “systematically” excluding black men and black and white women by practice or statute. Mirroring the

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\(^1\) “U.S. Urges Court to Void Ban on Women Jurors in Alabama,” *New York Times*, 30 December 1965, p. 11. The activism came in response to recent trials that featured all-white, all-male juries acquitting segregationists accused of murdering civil rights workers

arguments made by Kenyon and Murray, the Court found that the limitation of the Fourteenth Amendment to race discrimination cases “reflect[ed] a misconception of the function of the Constitution.” Declaring that “jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex,” the District Court challenged the long-standing justification for women’s absence—female privilege.\(^3\) The promotion of equal civic engagement was the cornerstone of equitable citizenship. Yet, the state decided not to appeal the decision. The Supreme Court would not hear a jury case about both race and sex discrimination for another six years, and even then, the decision it rendered would be far more restrained.\(^4\)

Historically, race and gender mutually shaped the meanings of citizenship—legally, politically, and socially—for Americans. Social constructions of citizenship evolved alongside the negotiation of gender norms, racial meanings, and their application to ideas of social belonging, civic participation or access, and citizens’ rights and responsibilities. Understanding how policies of exclusion and inclusion have changed over U.S. history provides a glimpse at the connections among policy, social activism, and lived experiences of women and minorities. The consideration of both race and gender not only acknowledges the overlapping and interrelated quality of these identities but also demonstrates how different rationales for exclusion produce discrete policy options and distinct challenges for those clamoring for inclusion.

Race and sex discrimination in jury service qualification and selection excluded black men and women of all races for most of U.S. history. The rationales for excluding

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\(^4\) The Supreme Court decided *Alexander v. Louisiana* in 1972.
women and blacks differed substantially throughout debates over inclusion and the meanings of citizenship since the Reconstruction era. While black men’s absence from juries in the post-Reconstruction period followed the trend of disfranchisement and segregation, female privilege and family responsibilities often appeared as justification for excusing women from the duties of citizenship and full civic membership. Black men faced a legal fiction in achieving full citizenship: they had federalized jury service rights secured during Reconstruction that went unrealized for much of the twentieth-century. As a result, black men as defendants and civil rights activists claimed these rights through the appeals of criminal trials—ones with all-white juries that placed black men lives in jeopardy. In contrast, policymakers believed that white women’s roles as wives and mothers demanded more seemingly benign policies to secure gender distinctions and roles by excusing women from service. Furthermore, the number of white female defendants, especially those facing the death penalty, paled in comparison to black men, distancing the claims of women’s activists from well-received arguments for defendants’ rights and removing high stakes costs of exclusion. Therefore, white women campaigned for jury service primarily through legislative channels and gained access to juries gradually on a state-by-state basis predominantly in the first-half of the twentieth century. Black women found themselves hampered by the urgency of protecting black male defendants, a priority that prevented the easy establishment of relationships with white women activists (many of whom were uninterested in or opposed to expanding their cause to black women). Their status as doubly disadvantaged made their struggle incongruous with both black men’s litigation strategy and white women’s lobbying and educational tactics.
Examining jury service offers a particularly illuminating window to understand citizenship, its rights and obligations, and its impact on women and racial minorities. Alexis de Tocqueville believed that “the jury system really places control of society in the hands of the people, or of that class [of citizens allowed to serve].”\(^5\) As Ignacio M. Garcia argued, “jury duty represented the ultimate sign of citizenship.”\(^6\) Unlike suffrage, jurors’ civic participation is more public and lengthier than voters’. As a result, it is a more obvious marker of social equality. Jury service is a civic obligation. Jurors, vetted for competency and impartiality, wield more authority than voters by standing in direct judgment of other citizens and by claiming authority (with state endorsement) over judicial outcomes—even matters of life or death. One vote certainly makes a greater impact on a jury than in an election. By the 1940s, the Supreme Court concluded the obligation of (some) citizens to participate in the process coincided not only with the defendants’ rights to a trial by a jury of peers but also with the guarantee that juries were representative of the community (or at least part of it) and selected without discrimination.\(^7\) As the central component of the American justice system, the jury has the ability to respond to injustice, punish violence, and protect the innocent. It is an essential function of citizenship.

Jury service, because of its function as both a right and an obligation, offers a complicated view into the attainment of full citizenship for women and racial minorities.

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\(^7\) The ideas that juries need to be “representative” or made up of a “cross-section of the community,” stemmed from Supreme Court decisions of the 1940s. See *Smith v. Texas* (1940) for the first example of this type of understanding of the appropriate composition of juries.
It reveals how sex and race discrimination worked to reinforce one another, while each still operated with divergent rationales for different treatment. Furthermore, the implications of exclusion differed for black men, black women, and white women. Black men as defendants claimed rights to fair, impartial juries successfully in numerous Supreme Court cases. White women, many believed, should be spared the “burden” of jury service; their exemption in fact was a privilege. Assumptions about women’s social roles played a prominent part in the rationale for excluding women (and later making service for women voluntary), while requiring men to serve. Black women, having to fight both forms of discrimination, receded for the most part from these campaigns and discussions of jury service obligations. For them and for white women, jury service was rarely viewed as a right before the 1960s.

Because of its century-long development, jury discrimination policy also offers insights into the relationship between the rights revolution of the 1860s and 1870s and the rights revolution of the 1960s and 1970s. The unfulfilled promise of the first rights revolution for black men and the obstacles the first rights revolution created for women made jury service a demand for both groups throughout the twentieth century. The Supreme Court, lower courts, rights organizations, and policymakers continually confronted questions about juror qualifications and jury composition from the 1870s through the 1970s, making an exceptional case for investigating the relationship between these two transformational moments in U.S. history. Such an investigation reveals the limitations of civil rights policies and litigation, and it underscores the lasting legacies of federal policies—explicit and implicit.
This project traces the legal and policy history of race and sex discrimination in jury service and its relationship to feminist and civil rights campaigns for equal jury obligations between 1868 and 1979. The first rights revolution of the 1860s and 1870s shaped—and in many ways limited—the development of twentieth-century feminist and civil rights activism and the emergence of the second rights revolution of the 1960s and 1970s. The first rights revolution, including the adoption and subsequent interpretation of the Reconstruction Amendments, impaired the development of the second revolution by setting white women and black men at cross-purposes and by making doubly-disadvantaged black women unable to find effective, comprehensive support from either campaign. By the 1880s, black men’s citizenship and constitutional rights became federalized, while jurists and policymakers simultaneously reaffirmed women’s second-class citizenship and legitimized a female “privilege.” This bifurcated policy that denounced race discrimination and endorsed sex discrimination extended beyond the Nineteenth Amendment and continued to influence interpretations of the Fourteenth Amendment until the second rights revolution of the 1960s and 1970s.

The underlying policy of the first rights revolution caused feminist and civil rights campaigns to organize separately, undermining the development of organizations that emphasized the interlocking nature of race and sex discrimination and obscuring the plight of black women. Federal policy and legal interpretation divided twentieth-century campaigns by making the objectives and the most effective tactics of feminists different from those of civil rights activists. Only after the federal government and its agencies began tackling discrimination in jury service in the late-1950s and 1960s (at the behest of both white women and women of color) did the two separate avenues of activism merge.
The increasing emphasis placed on an individual-rights strategy infused in the second rights revolution, however, also made jury service composition a convenient strategy for white male defendants by the 1970s. This dissertation reveals how policy, law, and constitutional interpretation shaped twentieth-century social movements, provided a framework for the second rights revolution, and influenced the meaning of citizenship and the experiences of civic membership.

An investigation of Americans’ changing conceptions of the jury system and the civic role of juror provides for an in-depth understanding of American institutional development and the implications of those changes for citizens and the procurement of justice. The jury trial has always 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, compulsory participation in the judicial process through jury service. In 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.”


The jury system might sustain its republican
import, because power resides in the people rather than the government; however, the
state’s tradition of excluding individuals based on race or sex undermined the democratic
potential and promise of the jury system for most of U.S. history.

By using citizenship as a central category of analysis, this dissertation bridges
legal and political history with the lived experiences of social history. It adds to the
historiography on citizenship by considering how gendered and racialized notions
influenced civic membership and how the legal system and rights organizations
perpetuated or challenged those notions over time. This dissertation illustrates how race
and gender imbue the policymaking process at all levels—including debates,
construction, implementation, and interpretation. It hinges upon understanding the varied
rationales – or “imaginations” – underpinning both of these discriminations and
informing the construction of “classes” of citizenship.9 These “imagined” understandings
of race, gender, and citizenship have real consequences for the implementation of policy,
the construction of juries, and the procurement of justice.

This project expands on the important scholarship that addresses the attainment of
rights or obligations of citizenship by marginalized groups. These works view citizenship
as a process.10 Citizenship can be a tool of both exclusion and inclusion. Often,
individuals can find themselves in a murky in-between status—integrated and
participating in some functions but ostracized in other areas. Law, policy, and their
implementation often restrict or define the citizenry, while the language of citizenship

9 Alice Kessler-Harris, In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in
Twentieth-Century America, Oxford: Oxford University Press, 2001; Kessler-Harris argues that
policymakers in the mid-twentieth century had a gendered imagination that shaped economic policies in
ways that discriminated against women. She modifies T.H. Marshall’s original categories to include
economic citizenship.
(and its rights and obligations) and re-conceptualizations of the ideal citizen can serve as a useful tool for marginalized groups seeking access or inclusion. This work illuminates the complex negotiation between policy and activism to reveal how citizenship remains exclusionary but achievable for many. In other words, this work attempts to see citizenship, as T.H. Marshall explained it, as “an image of an ideal citizenship against which achievements can be measured and towards which aspirations can be directed.”

Michael B. Katz reaffirms this concept with a discussion of the two visions of citizenship – pre-existing status or achievable condition. Arguing that U.S. citizenship has become increasingly “achievable” over the twentieth century, he also interjects the gendered and racialized nature of legal exclusions from citizenship as well as the debates over federalism that often complicated those struggles for inclusion. Ultimately, he concludes that “contest over citizenship lie at the core of American history.” While much of my project focuses on the twentieth century development of “attainable citizenship” for women and blacks, it complicates Katz’s interpretation by noting the undeniable influence of the Reconstruction period in the transformation of citizenship and the arguments groups used to fight for these rights. This project explains why the

12 In some ways, Alexander Keyssar makes a similar argument pertaining to voting rights. He claims that over the nineteenth and twentieth centuries the U.S. has undergone periods of expansion and constriction of voting rights, yet the outcome has been the development of an increasingly democratic nation. I would argue that jury service obligations, though different, have undergone a similar development towards becoming increasingly democratic obligation. See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States, Basic Books, 2009. Moreover, I would agree with Linda Kerber’s argument that women have tended to gain access to obligations of citizenship slowly. Linder Kerber, No Constitutional Right to Be Ladies: Women and the Obligation of Citizenship, Hill and Wang, 1998.
14 Other scholars have noted the impact of Reconstruction Amendments on women’s rights. My project shows how the Amendments and Reconstruction policies impacted individuals’ experiences based on both
federalization of black men’s rights to serve on juries (despite state interference in the actual attainment of those rights) produced a different historical trajectory than women’s (more diverse) struggle to become eligible, state-by-state. The legal “attainment” of citizenship rights by one group can hinder the acquisition of those same rights by another group. Additionally, “attainment” of those rights can be only partially realized; black men’s exclusion through practice negated the “attainment” of constitutional guarantees, and exemptions or voluntary service granted women only limited access to juries.

This history also engages the current scholarship on social belonging and civic membership as important components of the lived experience of citizens.15 My project supports the argument that the extension and exercise of rights and obligations of citizenship provides both a perception of equality and a sense of civic community. Engaging with the scholarship of Barbara Welke and Gretchen Ritter, this dissertation recognizes the role of U.S. policy in shaping civic participation, determining appropriate exemptions from it, and recognizing citizenship claims unevenly throughout its existence.16

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16 Gretchen Ritter, Constitution as Social Design; Barbara Welke, Law and the Borders of Belonging in the Long Nineteenth Century, Cambridge University Press, 2010. Welke uses the phrase “borders of belonging” to denote the relationship between legal personhood and citizenship. Like her work, I am interested in the relationship between law and lived experience of women and racial minorities.
Some historians view the second rights revolution pessimistically—as a failed opportunity, an unfinished transformation, or a late realization of past rights. Certainly, the second revolution did not end race or sex discrimination entirely, and most of its successes or partial successes focused on the creation of procedural equality (securing political and legal equal treatment) rather than substantive equality (achieving social or economic equity). Despite these results, the second revolution produced meaningful changes—making ideas of citizenship more inclusive and transforming the accessibility of justice for women of all races and black men. The culmination of social activism and policy creation ushered in a new era of antidiscrimination policy that fits in the liberal individual rights tradition.\footnote{See Hugh Davis Graham, \textit{Civil Rights Era: Origins and Development of National Policy}, Oxford University Press, 1990.}

in women’s citizenship status in the twentieth century. Unlike this project, neither use
jury service to understand the relationship between legal categories of race and sex, the
late-nineteenth and twentieth-century activism of feminists and civil rights organizations,
or the relationship between the first and second rights revolutions.

Several works on jury discrimination examine one locale or one court case, and
these works often offer insight into local campaigns and specific cases.\textsuperscript{19} While most of
this scholarship consists of article-length investigations into a particular locale, two
recent monographs examine race discrimination in the jury system by focusing on a
particular locale and its related case history. Christopher Waldrep offers insight into the
grassroots campaign for jury access in Mississippi at the turn of the twentieth century,
focusing on the short series of Supreme Court cases reaffirming constitutional protections
of African American men. Ignacio C. Garcia’s work demonstrates the plight of Mexican
Americans in the Texas jury system, centering on the 1954 \textit{Hernandez v. Texas} case. A
surge of scholarship on juries in international contexts has appeared over recently,
providing a contrast for the democraticization of juries in the U.S. This growing
literature, particularly the scholarship focused on the U.S. system, provides a great

University of America, 1993); Rick Ewig, “Wyoming Scrapbook: Wyoming Women as Jurors,” \textit{Annals of
of Women’s Rights Activism in Texas, 1890-1975,” Ph.D Diss., (North Texas State University, 1982);
Debra Lynne Northart, “The League of Women Voters in Mississippi: The Civil Rights Years, 1954-1964,”
Ph.D Diss., (University of Mississippi, August 1997); Rebecca Davis, “Overcoming the ‘Defect of Sex’: Geor
Georgiana Women’s Fight for Access to Jury Service,” \textit{Georgia Historical Quarterly} 91 (Spring 2007): 49-69; Joshua Goe
Goeschel, “State v. Lowe: The Supreme Court of Nebraska Correctly Determines Gender
Discrimination During Jury Selection Constitutes an Equal Protection Violation Not Subject to Harmless
resource for tracking change in local practice or policy in particular moments, and my work can help contextualize them in the larger narrative of jury democraticization.  

This project also contributes to a growing literature on African-American women’s intellectual history. Black women fit uncomfortably somewhere between the legacy of slavery and the remnants of the law of coverture. This project traces the diverse paths of civil rights activists and feminists geared toward erasing discrimination based on race or sex—stemming from slavery or coverture—and the “weird world,” as Pauli Murray described it, that appears as those two traditions overlapped in the legal system. Others scholars have investigated the legal analogies drawn between race and sex over the twentieth century. This project allows for a long view of the positive and negative associations made by policymakers, feminists, and civil rights activists and the consequences of those analogies on citizenship and jury obligations. Not only were the analogies used by social activists focused on achieving more equitable or inclusive policies but also these analogies challenged the sharp contrasts between race and sex discrimination that had surfaced in federal policy, its discussion, and court cases ever since the adoption of the Fourteenth Amendment. Comparisons drawn between race and sex differences did sometimes injure the rights claims of women, not black men.


Relying on understandings of intersectionality, this dissertation reveals the messy relationship negotiated among interest groups, policymakers, jurists, and ordinary citizens vying for different outcomes and adhering to different racialized and gendered conceptions of citizenship, justice, and society. Intersectionality—used as a lens through which to investigate the experiences of individuals by recognizing the multi-faceted nature of their identities—was an approach employed by black feminists, including Pauli Murray, to combat race and sex discrimination simultaneously. This project employs this approach to highlight the myriad ways in which race and gender mutually reinforce notions of civic fitness. This project not only examines the experiences and status of black women arising from the interconnected nature of categories of race and sex, but it also focuses on the congruity between racialized practices and gendered policies rooted in the legacy of slavery and the law of coverture. Arguments about race discrimination in jury service occasionally reinforced patriarchal conceptions of jury obligations. On the other hand, simultaneous claims for chivalrous justice for white women that required juries be lily-white.

This project also recognizes the inconsistent application and enforcement of law and its impact on lived experience. As Eileen Boris explained, “when historians move from legislation and case law to social history, the law appears an imperfect instrument to adjudicate the complexity of experience and identity.”

By contextualizing the social history of feminist and civil rights activism in a legal and political history framework that follows changes in federal policy, this dissertation reveals not only the problems with

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legal categories of identity but the perpetuation of those categories in social reform efforts. Litigation efforts referenced the lengthy history of precedents that isolate race and sex discrimination as two separate entities—a practice that continued to imagine blacks as men and women as white for much of the twentieth century.

This dissertation contributes to the growing scholarship on women’s political, constitutional, and activist histories.\(^{24}\) It addresses the literature on feminist organizations and the gendered meanings of citizenship after the Nineteenth Amendment secured women’s voting rights.\(^{25}\) My research challenges historical interpretations that contend feminists’ ideological divide inhibited meaningful change or prevented strategic collaboration among national women’s groups between 1920 and the 1960s.\(^{26}\)


Cott and others have argued, ideological and tactical differences among women’s organizations—most notably the NWP and the LWV—existed.27 Still, feminist activists from those organizations agreed that women needed to have mandatory obligations to serve on juries, and they even worked together to achieve that goal by lobbying for the same state legislation or supporting the same court cases. Indeed, jury service represented one of the few issues flexible enough for both social feminists and egalitarian feminists to embrace within dissimilar visions for women’s inclusion.28 Feminists were willing to overlook ideological differences about the nature of women’s equality in order to accomplish more practical, policy goals—and did so with some success.

Recent work on civil rights and feminist movements questions the appropriate periodization of the movements and the origins of activism.29 My project complements the historiographic trend towards expanding the narrative arc of the long civil rights

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27 Nancy Cott, *The Grounding of Modern Feminism*; Yale University Press, 1989; Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship*, University of California Press, 1998; In her work Brenner finds that women’s organizations all found import in the development of an independent citizenship for married women, though they divided over how to best realize that goal. Likewise, jury service was another universally accepted goal of women’s organizations across the ideological divide, and even more telling, some of the tactics found support by both sides of the feminist debate.


29 Jacqueline Dowd Hall best outlines the call for a revision of the civil rights movement narrative; see Jacqueline Dowd Hall, “The Long Civil Rights Movement and the Political Uses of the Past,” *Journal of American History* 91(2005):1233-1263; Other scholars have followed this literature of pushing the boundaries of the civil rights movement or at least investigating civil rights activism before Brown. Additionally, women’s historians have questioned the reliance on wave analogies to describe feminist movements for a while; however, more work over the last decade appears to be centering on finding feminist activism between the suffrage movement and the women’s rights movement or calling for a refashioning of the narrative of U.S. feminism; See Nancy Hewitt, ed. *No Permanent Waves: Recasting Histories of U.S. Feminism*, Rutgers University Press, 2010.
movement, which highlights black activism before the traditional 1950s periodization.\textsuperscript{30} Jury service was a critical issue for African Americans in the South. The NAACP’s litigation strategy revealed a network of lawyers working to protect black defendants from being persecuted in courtrooms in a period predating the conventional narrative of the modern civil rights movement. This activism coincided with the anti-lynching campaigns—both trying to defend black men from state-sanctioned injustice and violence. These findings enhance the existing literature on the mutual reinforcement of ideologies of sex and race by indicating how these ideologies simultaneously influenced the perception and construction of foundational institutions in the American criminal justice system and with significant—even deadly—implications for citizens.

Over the past decade, feminist scholars have also questioned conventional periodizations of women’s rights movements. Many have grown increasingly critical of wave analogies, finding they obscure important facets of feminist activism.\textsuperscript{31} Certainly, my work highlights a continuity in feminist activism that mostly takes place “between the waves” of the traditional narrative. As Susan Hartmann demonstrated, post-1945 feminist activism grew within male-dominated, liberal institutions like the ACLU.\textsuperscript{32} Furthermore, her work emphasizes the need to reconsider the relationship between feminism and civil rights activism in this postwar period, revealing the important position of black women in this narrative. My work builds on this framework. It follows policies that remained


\textsuperscript{31} Hewitt, \textit{No Permanent Waves}, 2010.

\textsuperscript{32} Hartmann, \textit{The Other Feminists}, 1998.
central to feminist causes throughout the twentieth century and indicates that feminists cooperated and re-envisioned their arguments and strategies between the rights revolutions. Additionally, this dissertation emphasizes how policy shapes the development of social movements and helps define their objectives, alliances, and strategies.

This research enhances our understanding of the broadening claims for individual rights over the twentieth century. In the 1960s and 1970s, the adoption of antidiscrimination policies came despite the absence of wide-based grass-roots mobilization for jury service access. The Supreme Court decision to make sex discrimination in jury qualification and selection unconstitutional in 1975 and 1979 followed a process that John D. Skrentny outlined, namely that the government extended rights to groups viewed as somewhat “analogous” to blacks and promoted a “minority-rights-oriented liberalism.” In fact, the 1975 and 1979 Supreme Court cases featured white male defendants, who argued against the exclusion of women from juries. Thus, while social activism influenced policy changes, legal strategies themselves also played substantial roles in framing the social activism by shaping what arguments and organizations would have been most effective. This process encouraged feminist activists to challenging gender inequity in jury service access by advocating cases on behalf of unlikely beneficiaries: white male defendants.

33 John D. Skrentny, *The Minority Rights Revolution*, Belknap Press of Harvard University Press, 2004; Hugh Davis Graham makes a similar argument, but he indicates that women and blacks were active participants in the social activism related to civil rights legislation. He instead claims that other racial minorities and marginalized groups (like the disabled) had rights extended to them through top-down legislative inclusion under the “umbrella” of nondiscrimination. Also see, Graham, *Civil Rights Era*. 
The six chapters of this dissertation consider how constitutional and legal interpretation and policy shaped the constitution of the jury system and the conception of citizenship for women and racial minorities. The first chapter, “Without Motive of Oppression," reveals that congressional and judicial discussions of race and sex surfaced in relation to one another in the first rights revolution, ultimately creating an overarching legal framework that denounced race discrimination and protected sex discrimination. As legal journals and state court cases indicate, this position went largely unchallenged by the adoption of the Nineteenth Amendment in 1920. This initial policy created the framework in which twentieth-century jury campaigns developed and operated, presenting a controlling policy not dismantled until the second rights revolution.

The second, third, and fourth chapters examine the development of civil rights and feminist campaigns for jury access in the early-twentieth century, revealing how the formation of each related directly to the Reconstruction-era policy. These chapters trace a particular civic organization’s campaign, litigation efforts, and constitutional arguments to reveal the relationship between this activism and changes in policy or practice. The second chapter, “The Case for Women Jurors,” presents the lobbying and litigation campaigns of the National Woman’s Party in post-suffrage era of the 1920s and 1930s, showing that jury service became a preeminent concern of equal rights feminists in this era—one they were willing to coordinate with other feminist groups to secure. The third chapter, “Pursued and Persecuted by Powerful Enemies,” argues that the 1930s litigation campaign of the National Association for the Advancement of Colored People failed to achieve meaningful inclusion for black men on juries in the South (despite favorable decisions made by the Supreme Court) and also rearticulated gendered conceptions of
juries and citizenship. The fourth chapter, “A Sordid Burden Which He Preferred to Withhold,” focuses on the work of the League of Women Voters to create informed female citizens by instituting jury schools—a nod to recognizing gender difference as a need for practical inclusion on juries. Each of these chapters addresses how the feminists and civil rights activists followed a notably separate path largely because of the legal framework in which each group demanded inclusion. Furthermore, the glaring absence of black women from these campaigns reveals part of the legacy of the first rights revolution.

The fifth and sixth chapters explain the transformation of conceptions of jury service in the post-1945 era. “Truly Representative of the Community?,” examines the 1940s and 1950s Supreme Court cases that created a new, or better articulated, understanding of the proper composition of juries—a more democratic, though still contested, view of the institution—that subsequently appeared in litigation and congressional policy during the second rights revolution. The contrast between the white female defendant in Ballard and black male defendants in the NAACP cases demonstrates the different citizenship status of each group, the various sustained methods of exclusion, and the reaction of the federal government to balancing civil rights with federalism. Black men always were defendants in the race cases, but women’s exclusion became an argument employed by both a white woman and white men to appeal their case and hope for a better outcome. The final chapter, “Confronting the ‘Weird World of All-White, All-Male Juries,’” argues that the Supreme Court lagged behind Congress and state governments in embracing a more democratic view of jury access. In the late-1950s and early 1960s, as Congress and federal agencies adopted more inclusive policies aimed
at eliminating sex and race discrimination in jury procedure, the Supreme Court continued to cling to older rationales for women’s exclusion, despite feminists’ attempts to analogize race and sex discrimination in juries. Black women—for a fleeting moment in the 1960s, mostly under the guidance of Pauli Murray—merged calls for ending race and sex discrimination in jury procedures and statutes. This re-centering of the issue around black women helped to pull together formerly disparate exclusionary practices. The Court reconsidered its position on the outright exemption of women from service on after black women began challenging both race and sex discrimination. Yet, the final changes by the Supreme Court to eliminate sex-based exemptions from jury service came from cases with white male defendants. This pattern shows not only the ACLU’s tactic of challenging gender distinction in the laws by using men petitioners but also how white men became the beneficiaries of rights claims in the second revolution—a development that made “representative” jury arguments widely available to defendants and assisted in the process of democratizing juries.

American society, policy, and institutions have been shaped by gendered and racialized conceptions of citizenship. Different treatment of individuals based on their sex and race has the perpetuated a divided citizenry with groups having various degrees of social equality, civic membership, and citizenship status. For black men, black women, and white women, policies determining full qualifications for jury service had enormous consequences on their access to just trials, on their protection from violence, and on their claim to full citizenship status. While citizens regardless of their sex or race gained full jury service obligations in the 1960s and 1970s, race and sex discrimination continued in practice with lawyers using preemptory strikes to eliminate women or minorities from
juries. Gendered assumptions still influence jury policy, as the adoption of new laws suggests that motherhood remains in tension with the duties of citizenship. Understanding the history of jury service policy and its implications will provide a greater awareness of the weaknesses of contemporary practices and policies and their effects on attainment of social—as well as criminal—justice.
Chapter 1: “Without Motive of Oppression”: The Relationship Between Race and Sex Discrimination in Jury Service Policy, 1868-1929

In the wake of the Civil War, the Reconstruction Congress passed legislation aimed at substantially changing the political position of blacks within American society. In turn, the Supreme Court interpreted how those laws would be appropriately applied to life in the South. In Congress and in Court, discussion of black men’s citizenship rights, including jury service, virtually always intermingled with discussions of the meaning of citizenship of women—often presumed white. Through these comparisons and contrasts, federal policymakers and jurists developed new—but divergent—understandings of the categories of race and sex and their relationship to citizens’ obligations to serve on juries. The jury service policy that emerged simultaneously federalized black men’s right to juries selected without racial discrimination and condoned states’ exclusion of women from juries. This policy had lasting implications for the strategies, arguments, and trajectories of feminist and antiracist campaigns for access to juries in the twentieth century. It established a comparison that ultimately failed both groups for much of the twentieth century. The policy disadvantaged women and limited the impact of the Nineteenth Amendment on women’s citizenship status, while its denunciation of race discrimination created an illusion of legal rights and equal citizenship not mirrored in the everyday experiences of African Americans.

In the debates over Reconstruction legislation and in subsequent Supreme Court cases, legislators and justices consistently linked notions of race discrimination with their understanding of the differential treatment of women citizens. Policymakers forged a comparison that had lasting consequences for black men and all women in their pursuit of
equal access to juries. Race discrimination and sex discrimination became foils for one another. Women’s second-class status without the political obligations or authority attached to citizenship became the point of reference for incorporating the freed, black population into the citizenry. Those opposed to black men voting or serving on juries used women’s position as an example of citizens without access to the democratic institutions of society. While those in favor of black voters and jurors might have also supported women’s equal citizenship, most reaffirmed women’s subordinate status by explaining the appropriateness of treating women differently and emphasizing the need to empower black men to secure their freedom. This set of comparisons forged first by Congressmen and later endorsed by the Supreme Court largely ignored the existence of individuals excluded by both categories, namely black women. While disagreeing about black men’s rights, these policymakers drew an explicit comparison between black men and all women, legitimizing sex discrimination as benign gender difference.

This chapter demonstrates that policy—formed in the context of contemporary racial and gendered norms—provided an initial structure that shaped the development of social movements, the strategies of social activists, and the development of new policy options. Policymakers and jurists relied on analogies between race and sex to formulate

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34 Legislators, with the exception of Senator Oliver Morton (R-IN), did not explicitly discuss black women’s situation. These men most likely imagined the category of women they discussed to be white, often discussing them in terms of familial relationships. Despite this conceptualization of women as white, these policymakers certainly meant for the category to include all women, because of their understanding of sex as a biological fact that would have grouped black women with white women in terms of these policies.

35 Alice Kessler-Harris, *In Pursuit of Equality: Women, Men, and the Quest for Economic Citizenship in 20th-Century America*, Oxford University Press, 2003; Like Kessler-Harris’s work, this chapter focuses on the “gendered habits of mind” that “framed discussions of what was possible and shaped the boundaries of the politically plausible,” 5-6.
their understanding of citizenship. These men employed these analogies sometimes to the benefit of black men but almost always to the detriment of women.

These nineteenth century debates and court decisions about jury service also reveal the disparate applications of the equal protection of the law doctrine. Black men secured their Fourteenth Amendment rights to equal protection of the laws with the federalization of their jury service rights. Women did not enjoy the same protection of the law—and therefore citizenship—as men with respect to access to juries. The doctrine of the equal protection of the laws guaranteed to citizens differed based on the citizen’s gender; however, jurists’ perceptions of sex discrimination being appropriate or benign left it outside the scope of the Fourteenth Amendment and with their decisions, allowed states to foster it under the shield of federalism. All the while, federal prohibition of race discrimination created a legal fiction of constitutional protection without black men realizing their rights for most of the twentieth century. This bifurcated system did not end either race or sex discrimination; instead it created different mechanisms for states to use to exclude on the basis of either category.

This chapter first analyzes the congressional debates of the Reconstruction-era, finding that race-sex analogies in jury service policy emerged to the detriment of women’s rights. Subsequent Supreme Court decisions confirmed the federal government’s divergent treatment of sex and race discrimination through interpretations of both congressional policy and the Reconstruction Amendments. Finally, jurists and activists of the early-twentieth century questioned what impact the Nineteenth Amendment might have on women’s eligibility for jury service, recognizing the ease with which the amendment could be narrowly interpreted. These political and legal
developments reveal how the bifurcated federal policy toward race and sex
discrimination that emerged during Reconstruction defined citizenship for black men and
white and black women. Citizenship remained gendered in prescription, racialized in
practice, and conscribed for all women and black men.

In her analysis of late-twentieth-century feminist activism, legal scholar Serena
Mayeri contends that women’s rights advocates have sometimes found forging
comparisons between their position and the position of blacks in society useful.36 She
briefly asserts that Republicans during Reconstruction refused to accept any analogy
drawn between black men’s voting rights and white women’s suffrage, and as a result,
women’s organizations adopted racist and nativist arguments compromising any potential
for collaboration with activists for racial equality in the following decades.37 While it is
true that most policymakers and jurists did not view the situations of these groups as
uniformly analogous, they did consistently discuss race discrimination as it related or
compared to the differential treatment of women. The outcome of their comparisons and
understanding of citizenship prevented the formation of effective and constructive
analogies between sex and race discrimination by activists until the 1960s and 1970s. It
also resulted in the marginalization of black women’s unique plight and the obscuration
of black women’s position in the citizenry.

36 Mayeri, “Common Fate,” 1046. Moreover, she illustrates that sometimes the race-sex analogies helped
civil rights initiatives, reversing the traditional direction of women’s claims following demands for racial
equality.
37 Ibid, 1053.
With its ratification in 1868, the Fourteenth Amendment defined national citizenship without reference to race or sex and guaranteed to citizens certain protections and privileges. As historian Linda Kerber argued, this 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. Yet, introducing gendered language into the Constitution in its second section, the Fourteenth Amendment overtly created gendered classes of U.S. citizenship by mandating 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 Constitution, in its 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 attempted to segregate the male public, political roles from women’s private, domestic ones.

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38 Fourteenth Amendment: Section I “All persons born of citizens of 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 of representation therein shall be reduced in the proportion which the number of such male citizens bear to the whole number of male citizens twenty-one years of age in such State.”


Many of 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 all political rights and obligations. 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 order to shape state voter qualifications, however, the second section of the Fourteenth Amendment was intended to penalize state governments for prohibiting African-American men from voting, though it was never imposed on states. Many congressmen believed, that by becoming voters, black men would also became jurors in most states, since historically jury rosters often came from lists of qualified voters. This outcome, however, was not a foregone conclusion when Congress passed the Fourteenth Amendment.

In fact, after its ratification, congressmen continued to debate the meaning and scope of the amendment as well as additional measures necessary to secure African-American rights, including jury service rights. In response to Democrats who worried about the potential for the Fourteenth Amendment to extend political rights to African Americans, some Republicans, such as Representative James F. Wilson of Iowa, “repeatedly stressed that the language of the Fourteenth Amendment did not provide

Happersett,” in ed. Donald G. Nieman, The Constitution, Law, and American Life: Critical Aspects of the Nineteenth-Century Experience (Athens: The University of Georgia Press, 1992):52-66:53. Women’s rights advocates attempted to achieve voting rights under the Fourteenth Amendment, particularly in the 1875 Supreme Court case Minor v. Happersett, but they were unsuccessful. The Supreme Court did address issues of sex discrimination under the Fourteenth Amendment in the late nineteenth century, though none of those decision dealt specifically with jury obligations.

Ritter, “Jury Service and Women’s Citizenship,”; Amar, “Jury Service as Political Participation,” 224-229; Amar distinguishes political rights from civil rights, claiming that rights to vote, jury service, and hold office are political rights not necessarily guaranteed by the Fourteenth Amendment.

Ritter, “Jury Service and Women’s Citizenship,”
African Americans with political rights.” Some congressmen attempted to expose the absurdity of concluding that jury service was 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, Democratic Senator Allen G. 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.

This correlation drawn with 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. It indicates that as meanings of citizenship became redefined in this period, policymakers began to dissociate voting rights (like those encouraged by the second section of the Fourteenth Amendment) from jury service obligations.

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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 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.
Still, many policymakers recognized that jury service rights were necessary to secure and protect black men in the South. Congressional Republicans argued in favor of black men serving on juries as early as 1865, but legislation reflecting that position did not pass until 1875.\textsuperscript{45} Within this ten-year period, black men in southern states had already begun serving on juries, despite the slow adoption of explicit congressional policy. 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.\textsuperscript{46}

Many Reconstruction-era policymakers understood that the incorporation of black men into the American jury system provided blacks with increased legal protection, a larger probability for achieving justice, and a new status of equality. Especially 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

\textsuperscript{45} While the Supreme Court did rule most of the sections of the Civil Rights Act of 1875, including the sections on public accommodations, unconstitutional, it upheld the fourth section of the act, which required states to allow otherwise qualified black men to serve on juries.

“guaranteed that black convicts would be executed more frequently and receive longer prison terms than whites found guilty of comparable crimes.”47 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 affected their community and its welfare by undermining systems that were previously under white control. Furthermore, having the power to determine another citizen’s fate also underscored the new political and legal equality black men enjoyed.48

The federal government participated in securing legal rights to jury obligations for black men during Reconstruction. 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.49 Republicans realized, however, that additional measures could more firmly secure black men’s access. Thus, Senator Charles Sumner (R-MA) introduced a bill that banned racial discrimination in jury selection, which became the precursor to the Civil Rights Act of 1875.50 The jury service section of this legislation prohibited race discrimination in jury service, stating “that no citizen possessing all other

48 Nieman, Promises to Keep, 69, 73; Eric Foner, Reconstruction, 1988.
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 him up to five thousand dollars. Federal policy proposed to prohibit race discrimination in both the state statutes and the jury selection process.

During debates over this legislation, policymakers drew connections and pointed out contradictions between the status of women in the polity and the proposed expansion of the political rights and responsibilities of African-American men. For instance, the radical Republican Senator Oliver Morton (R-IN) challenged his adversary, Democratic Senator Allen G. Thurman (D-OH), who used women’s exclusion from jury service as justification for denying it to black men. “But my friend,” Morton exclaimed, “chivalrous and bold as he is in defending the doctrine of inequality, falls back under the protection of the women.” The room broke into laughter. Morton continued to prod Thurman; “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?’” Morton persisted, highlighting the analogy drawn between sex and race discrimination by stating Thurman’s “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

52 Senator Oliver Morton is from Indiana, and Senator Allen G. Thurman is from Ohio.
of the colored race any right to participate in the courts of justice.” In a unique remark—one of only a select few that referenced black women, Morton renounced race-sex analogies drawn by policymakers who were unwilling to extend black men’s citizenship rights. This discourse revealed that some legislators used women’s status as second-class citizens to warrant the exclusion of black men from full citizenship. Other legislators that supported black men’s rights either denounced women’s second-class status or attempted to rebuff the use of any race-sex analogy.

Congressmen opposed to the federalization of jury service rights tended to fuse discussions of sex and race more fervently than those supportive of black rights. Opponents drew connections between women’s status and black men’s status to argue that the policy was unnecessary, counterproductive, and even ridiculous. For instance, Allen G. Thurman responded to Oliver Morton’s discussion of the Fourteenth Amendment’s impact on blacks’ rights, stating “I am in favor of giving the white women of this country as much protection of the laws as I give the colored man, and I am not in favor of giving him any more protection of the laws than I give to my wife, my sister, and my daughter.” 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 in understandings of race and sex. His focus on white women through the illustration of his

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female family members inadvertently underscores the dissimilarities between white women’s and black men’s positions in society, and unlike Morton’s statement, the omission of black women’s position entirely. The equation of sex and race in this way prevented deeper interrogation of the distinct rationales for discrimination or the divergent relationships between white men and white women or African-Americans.

Like Thurman, Senator Matthew Hale Carpenter (R-WI), a leading constitutional expert and lawyer, used women’s limited political status to argue against federal protection of African-American men’s jury obligations. Supporting women’s rights generally and arguing cases such as Bradwell v. Illinois (1872) before the Supreme Court, Carpenter believed that the jury service section of Charles Sumner’s proposed bill was unconstitutional. He thought it intervened in states’ rights to determine juror qualifications, and he requested that Sumner amend the proposal. Once Sumner refused

55 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 did not grant black men the right to serve on juries. According to him, if it had, it would also “confer upon every woman a right to be a juror; it would confer upon every minor a right to be juror. 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.

56 Matthew Hale Carpenter, later, became the lawyer for Virginia Minor and took her case, Minor v. Happersett to the Supreme Court. See Minor v. Happersett, 88 U.S. 162 (1875). In this case, he argues that the Fourteenth Amendment did provide women with political rights as citizens, namely the right to vote.

57 While Carpenter’s activities as a lawyer in support of women’s rights and other major cases has been documented, historians have not recently examined his biography in a way that makes contextualizing his constitutional thought, particularly in relation to women’s rights and Reconstruction legislation, easily accessible. For a chronicle of many of his experiences, see Frank Abial Flower, Life of Matthew Hale Carpenter: A View of the Honors and Achievements that, in the American Republic, are the Fruits of Well-Directed Ambition, 3rd ed. Madison, Wisconsin: D. Atwood, 1884. For a more recent biography, see E. Bruce Thompson, Matthew Hale Carpenter: Webster of the West, Madison: State Historical Society of Wisconsin, 1954.

58 Carpenter also argued against the provisions that required cemeteries and churches to integrate. See Flower, 383, 419.
to change his position, Carpenter “opposed the measure with considerable force.”

Carpenter was familiar with the strategies of those opposed to extending black men’s rights. In fact, he had previously admonished those tactics, stating “it is fashionable . . . to heap contumely upon women who demand to be allowed their political rights. Ridicule is the chief weapon employed” against women’s rights advocates. Nonetheless, recognizing the power of these associations between race and sex discrimination, Carpenter folded in arguments about women in an effort to defeat the bill, despite his sympathy for women’s rights otherwise.

Carpenter found it politically expedient to question 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.” Drawing a direct comparison between black rights and women’s citizenship, Carpenter asserted that if the Fourteenth Amendment did, in fact, guarantee black men jury eligibility, then this 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 all kinds of citizens, including women and black men. Carpenter also alluded to images of motherhood, coupling women (probably those imagined to be white) with children in the private sphere by describing “babes at the breast.” Women, because of their duties as mothers and wives, have no place on juries. This version of

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59 Flower, 383.
60 Flower, 506-507; In fact, he criticized the courts and the Senate for their toleration of the judge’s directed verdict which usurped the all-male jury verdict in Susan B. Anthony’s New York trial.
womanhood illustrates how often the realities of black women’s lives failed to penetrate these policymakers’ “gendered imagination” or their arguments about “all” women.\textsuperscript{62} While this representation of women as a white, homogenous, protected, and domestic group undercut arguments for female jurors, it ironically highlighted the incongruity between justifications for racial discrimination and sex discrimination in jury service. Black men did not occupy the same roles as white women, and white women were not in need of the same protections as black men. However, many congressmen, including Carpenter, failed to articulate those differences.

Congressmen Thurman and Carpenter were not the only ones to introduce a discussion of sex discrimination into conversation about black men’s jury service rights and obligations. Even Morton and Senator John Sherman (R-OH), two progressive legislators, did not believe that the Fourteenth Amendment allowed women to participate on juries—but highlighted how black men’s position differed from white women’s and necessitated their inclusion on juries. While Morton and Sherman were more accepting of arguments for giving women—or 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. However, he made his position in favor of women’s voting rights and jury service eligibility clear, arguing that he would only vote against these policy changes because he believed “human society” to

\textsuperscript{62} Kessler-Harris, \textit{In Pursuit of Equity}, 2001; Here, Kessler-Harris argues that policymakers in the mid-twentieth century had a gendered imagination that informed economic policy, creating the differential and unequal treatment of women. I employ this argument here in a slightly different way, arguing that most of these late-nineteenth century policymakers’ gendered imaginations essentialized women as white caregivers and mothers.
be “organized as it is on the basis of the family” and these changes would “introduce such disturbing elements into the family circle, which is even of higher obligation than the obligation of Government.”

Understanding that the addition of women’s rights to the bill would lead to its defeat, 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 him, women’s family roles justified excluding them from political participation on the assumption that political activity would disrupt their work in the private sphere. 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.

Like Sherman, Morton distinguished sex discrimination from racial discrimination, especially with regard to political rights, emphasizing sex discrimination as acceptable, benign, and even necessary and racial discrimination as intolerable, damaging, and avoidable. According to Morton, racial discrimination and gender difference were not congruous. Like Sherman, Morton believed that men—black and white—needed to serve on juries and would protect women’s interests as well. Only Morton included a specific mention of black women’s exclusion, emphasizing the need for black men to protect the entire African-American community. Likewise, implicit in Sherman’s statement was the notion that the separate spheres were balanced between women’s maintenance of domestic affairs and men’s participation in public ones.

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Morton and Sherman believed 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. 

Like these lawmakers, the Supreme Court justices commented on sex and the notion of women jurors in nearly every opinion in the four cases about race discrimination in jury service heard between 1879 and 1881. In these cases, the Court ruled that race discrimination violated the defendants’ constitutional rights and potentially prevented the black defendant from obtaining a fair trial. 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. 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 Virginia v. Rives (1880), Justice William Strong commented on the meaning of the Reconstruction Amendments for the black population, stating that their purpose “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.” In these decisions, the Supreme Court reasoned that black men were protected by federal legislation and constitutional amendments to have the right and

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64 Morton explicitly noted black women’s particular situation due to the intersection of gender and racial discriminations, saying “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.


66 Virginia v. Rives, 100 U.S. 313 (1880).
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 opinions, concurrences, and dissents in these four cases, the
justices explicitly noted that states excluded women from juries. In the majority
opinion in *Strauder v. West Virginia* (1879), the Supreme Court 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.”

The Court supported Congress’s attempts to end state-sponsored race discrimination,
while it reaffirmed Congress’s position that otherwise prioritized states’ power to set
qualifications for jurors, in general, even if that meant supporting women’s continued
exclusion. One of the most adamant opponents of racial discrimination, Justice John
Marshall Harlan made a similar argument in the majority decision in *Neal v. Delaware*
(1881), stating that “a State, consistently with the purposes for which that [Fourteenth]
 amendment was adopted, may confine the selection of jurors to males,” but to deny black
men jury service eligibility on the basis of race “is a discrimination against the former
inconsistent with the [Fourteenth] amendment.” Not only did the Court endorse the

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67 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.

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


70 *Neal v. Delaware*, 103 U.S. 370 (1881).
exclusion of women from juries by state law and custom, it also limited the Fourteenth Amendment, including the equal protection clause, to guarding people against racial discrimination.

Likewise, in the *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 blacks 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].”

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 the concurrences and dissents in these cases drew upon comparisons of race and sex. Justice Stephen Johnson Field and those joining his decisions incorporated women into the opinions in order to illustrate that not all citizens were expected to enjoy every political responsibility or right. For justices such as Field, the exclusion of women from juries but not from the citizenry exemplified how black men should be treated in regard to jury eligibility. Justice Field used the exclusion of women to exemplify how the equal protection and the privileges and immunities clauses of the Fourteenth Amendment did not make the exclusion of blacks from juries unconstitutional. For example, Field argued in his concurrence in *Virginia v. Rives* (1880) that it appears as though “the

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71 Virginia v. Rives, 100 U.S.313 (1880).
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.” He continued, “Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws?” Field explicitly legitimized sex discrimination in order to show that African Americans were not constitutionally protected against racial discrimination in jury selection. Field used the equal protection clause to divide jury service obligations from citizenship, using women’s second-class status as the primary example. 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. He showed that this interpretation of Fourteenth Amendment could not coexist logically with one that viewed the exclusion of women from juries as not in violation of the equal protection clause. Field maintained that, “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.” In this way, he highlighted the inconsistencies of the Court in determining what—exclusion based on race or exclusion based on sex—did or did not constitute an unconstitutional form of discrimination.

In his dissent in Ex parte Virginia (1880), Field also compared women’s rights with black men’s rights, again arguing that black men were not denied equal protection of the laws because of their exclusion from juries. He used the exclusion of women, which justices and most policymakers viewed acceptable and justified, to demonstrate that

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72 Virginia v. Rives, 100 U.S. 313 (1880). Field was joined in this opinion by Justice Nathan Clifford.

73 Ibid.
excluding women or black men from juries 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.”74 Furthermore, Field more broadly asserted that “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.”75 For Field, jury service was not a right inherent to citizenship but a privilege or obligation performed by qualified citizens. This distinction underpinned his justification for women and black men’s exclusion and the reinforcement of classes of citizenship dependent on factors of individual identity. Field addressed and affirmed the appropriateness of the exclusion of women from juries, despite their citizenship status and the adoption of the Fourteenth Amendment, and undermined the constitutional justification for allowing black men to participate on juries.

While the justices and congressmen divided over the constitutionality of race discrimination in jury service, the majority of them agreed on the acceptability, necessity, and constitutionality of excluding women from juries. The Court recognized having a racially-mixed jury might better protect a black defendant; however, it also expanded its dicta beyond the constitutional questions presented in these cases to explicitly legitimize

74 Ex parte Virginia, 100 U.S. 339 (1880). Again, Field was joined by Justice Clifford in this opinion.
75 Ibid.
the exclusion of women from juries without any mention of how female jurors might
better protect female defendants, or as present in these cases, female victims.76 And,
policymakers and jurists essentially ignored the consequences of excluding black
women—who experienced both race and sex discrimination and whose position in
society would have further complicated these discussions. The Court held that states
retained the authority to the qualifications for jurors, and it asserted that sex was an
appropriate category upon which to discriminate.77 By legitimizing the state’s overt
limitation of jurors to men, the Court maintained a strong connection between
masculinity and political authority. Therefore, the Court reiterated its position on racial
discrimination in jury selection, while simultaneously legitimizing sex discrimination in
jury eligibility.

As the federal policy on race and sex discrimination in jury service emerged,
women clamored for or against the expansion of women’s citizenship rights and
obligations. Unlike black men who argued for jury service among rights in the late-
nineteenth and early-twentieth centuries, women’s rights advocates sharpened their focus
on the right to vote to attack the policies that legitimized states’ exclusion of women from
the polls. The reaction of most women’s organizations to the Fourteenth and Fifteenth
Amendments, namely 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 immediate goals to suffrage, even as they

76 Taylor Strauder was charged with killing his wife, and William Neal was charged with the rape of a
white woman, Margaret E. Gosser.
77 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).
strengthened their political abilities and tactics. The suffrage movement became a strong and well-organized movement, wielding political power, eventually securing the vote for women in 1920.

The policy outlined during Reconstruction had not only affected women’s demands but also limited the impact that a constitutional amendment securing woman’s suffrage would have on reshaping the gendered meaning of citizenship. During their campaigns, suffragists and antisuffragists both considered the question of how the woman suffrage amendment could change women’s political and citizenship status. Most antisuffragists argued that suffrage would result in women’s requisite service on juries in order to persuade others that women’s roles in the private sphere would unravel with the onset of woman suffrage. They articulated in some ways, a more fantastic story of how onerous jury service would be for women and their families. One antisuffragist illustrated the typical doomsday predictions, stating that for women “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 families it would amount to an intolerable burden.”

In this context, women’s rights advocates responded either by promoting a suffrage-only reasoning or arguing that jury service obligations would benefit women, not burden them. While most suffragists believed and hoped that achieving voting rights would open the door to legal and political equality for women, some thought it was

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78 Michael McGerr, “Political Style and Women’s Power, 1830-1930,” Journal of American History 77 (December 1990): 864-885; 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.

expedient to distance their plea for voting rights from the more controversial issue of
women’s eligibility for jury service. These activists understood the potential difficulties
that mandatory jury obligations would have on many women who worked in the home,
and they suggested that exemptions would likely be made for women who needed them.
For example, discussion of how a suffrage amendment 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. 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 drawn solely from lists of eligible voters. “Volunteer firemen of
seven-years standing, members of the National Guard, and lawyers are exempt from jury
service, yet they vote,” she noted. Ida Husted Harper, a well-known suffragist,
reaffirmed this sentiment in her letter to the New York Times, stating that anti-suffrage

80 See J. Stanley Lemons, The Woman Citizen: Social Feminism in the 1920s (Chicago: University of
Illinois Press, 1973), 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 Nancy E. McGlen and Karen
O’Connor, Women’s Rights: The Struggle for Equality in the Nineteenth and Twentieth Centuries (New
81 Mary Brown Sumner Boyd, Must Women Voters Serve on Juries?, National Woman Suffrage Publishing
Co., 1915, History of Women papers, Schlesinger Library, Radcliffe College, reel 943, no. 8536.
82 Helen McCullouch Phye, “Women and Privilege: Pro-Suffragist Thinks Whole Anti-Suffrage Line of
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.

Following the demands of earlier women’s rights advocates, some suffragists underscored the need for women jurors, though making their arguments secondary to achieving voting rights. 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 were peers of other women, and men peers of other men. In an early twentieth-century address to the Michigan Constitutional Convention, Catharine McCulloch likewise 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 “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.”

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,” 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 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 decide against Mrs. Wright, they resolve that they will hide the evidence, ultimately imposing their own system of justice. This short story illuminates the problems with a justice system that excluded 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. 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 of these women’s activists promoted the idea that women should serve on juries because of the need for women’s perspective in trials. Some suffragists went further by promoting maternalistic and difference-centered rationales, arguing that the

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87 Lemons, The Woman Citizen, 71-72.
judicial system needed women because of their elevated honesty and moral sensibilities.\textsuperscript{89} For instance, one newspaper article, “Women Juries for Liquor Cases,” claimed that “public-spirited women will help to purify and protect this bulwark [the Eighteenth Amendment and Volstead Act] of safety and security.”\textsuperscript{90} 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{91} However, many of these arguments helped to reify gender differences that ultimately worked against women.

Others believed that essentialist arguments for woman suffrage undercut the movement for women’s jury service. Maternalistic and moralistic arguments touting women’s distinctive 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.”\textsuperscript{92} 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

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\textsuperscript{90} 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. Rebecca Edwards, \textit{Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era}, New York: Oxford University Press, 1997, 4.
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service duties, more than voting rights (as noted by antisuffragists), impinged upon women’s familial responsibilities.\textsuperscript{93}

The onset of woman suffrage in states and the potential adoption of a federal amendment provoked both suffragists and antisuffragists to question the impact of voting rights on women’s obligation to serve on juries and comment on the implications of their inclusion for society, the criminal justice system, and women themselves. Most of the times both suffragists and antisuffragists saw women’s political status as grounded in notions of gender difference—whether they supported the changes to that status or not. Because of the strict focus of activists on woman suffrage and the federal policies justifying sex discrimination in jury service, women attained access to juries through a piecemeal, gradual process at local and state levels throughout the twentieth century.

Only a handful of the sixteen states that adopted woman suffrage laws before the Nineteenth Amendment also allowed women to serve on juries.\textsuperscript{94} However, even 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. Relying on the courts to exclude women from juries, the state legislatures would have had to adopt specific legislation to overrule legal precedents excluding women from juries.\textsuperscript{95}


\textsuperscript{94} Kerber, \textit{No Constitutional Right to Be Ladies,} 137. 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. Nevada only allowed unmarried women without children to serve on certain juries.

\textsuperscript{95} Kerber, \textit{No Constitutional Right to be Ladies,} 137.
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. 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 Idaho had made jury service for women compulsory.\textsuperscript{97}

In 1911, for instance, after California passed an Equal Suffrage Amendment to 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{98} 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.\textsuperscript{99}

Unlike California, in 1918, 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

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\textsuperscript{97} Ibid.
\textsuperscript{99} Kerber, \textit{No Constitutional Right to Be Ladies}, 137.
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equality of citizenship, especially 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.100

While a few states—like Michigan and Nevada—extended voting rights and jury obligations to women before a federal amendment required it, most state courts were unwilling to allow women into the courtroom as jurors. 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.101 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

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100 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.

101 Ritter, “Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment.” 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.
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. Other states required legal battles to decide whether the Nineteenth Amendment required including women on juries.\(^{102}\) Legal scholar Jennifer K. Brown explains that state and district courts could have viewed the Nineteenth 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.”\(^ {103}\) 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.\(^ {104}\) 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

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104 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 funnelling 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.
made jurors when they became voters because of the Nineteenth Amendment. Either way, the varied outcomes of women’s suffrage on women’s citizenship status reveals how sex discrimination continued to temper women’s acquisition of full citizenship and how women experienced citizenship differently across different state borders in the early twentieth century.

Contemporary legal journals and law review articles provide a way to uncover the various positions and the rationale for continuing to exclude women from juries outside of judges’ rulings. Around 1920, legal scholars and lawyers also began asking or explaining how the Fourteenth Amendment and/or the Nineteenth Amendment affected 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.” Law reviews distinguished the racial discrimination that required black men to serve on juries from the requisite, and good-natured, need to treat women differently. One 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 being tried by a jury of her

\[\text{105} \text{ As Gretchen Ritter has argued, earlier Court precedents defining the scope of the Fourteenth Amendment, continued to frustrate women’s efforts to enjoy the full range of citizenship rights – including the right to sit on juries—even after the adoption of a federal woman suffrage amendment. Ritter, The Constitution as Social Design, 2006; Ritter, “Women’s Citizenship Before and After the Nineteenth Amendment.”}\]

\[\text{106} \text{ Ibid.}\]

admir ing infer iors." 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.109

The number of state court cases about the Nineteenth Amendment’s impact on the status of women as jurors and the questions raised by women’s new status in the electorate 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, in a document entitled, “Compilation and Digest of the Laws of the Various States Relating to Jury Service for Women” listed several of the states’ laws on women’s jury service, noting any changes brought on by the establishment of women’s

108 “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.
voting rights.\textsuperscript{111} In this chart, 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.\textsuperscript{112} This compilation of jury service laws indicates that after the adoption of the Nineteenth Amendment the status of women as jurors was uncertain. As women became eligible to serve on juries, some states required that women actively register for jury service, and others gave women automatic exemptions from serving.\textsuperscript{113}

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 seven passed additional legislation to allow for women’s jury service.\textsuperscript{114} Overall, however, in the 1920s, the movement for women’s jury service began mobilizing in several states and through several women’s organizations.\textsuperscript{115} The success of the movement for suffrage and the following regrouping of women’s organizations reduced the speed with which women’s rights advocates could advance the political status of women. Because of the limited outcome of the Nineteenth Amendment for women’s citizenship, campaigns for women’s

\textsuperscript{111} William E. Hannan, \textit{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.

\textsuperscript{112} Ibid.

\textsuperscript{113} Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 370-372.

\textsuperscript{114} Ritter, “Jury Service and Woman’s Citizenship before and after the Nineteenth Amendment,” [journal online].

\textsuperscript{115} Ritter, “Gender and Citizenship After the Nineteenth Amendment,” 368-369.
jury service continued to fight for access over the following decades. Activism for women’s jury service persisted throughout the early part of the twentieth century with most of its victories occurring between the 1930s and the 1950s; however, its success was limited to state-level changes, not national policy.

With the articulation of a national citizenship, Congressmen initiated the formation of comparisons between white women’s and black men’s jury service rights or obligations as part of their status of citizenship. The Supreme Court followed suit. Those in favor of black men’s jury service rights dismissed parallels between race discrimination and sex equality, emphasizing gender difference as natural and necessary as opposed to the intolerable, immoral racism of black men’s exclusion. Those against including black men on juries relied on comparisons between white women and black men to showcase the ability to divorce citizenship from political and civil rights, such as jury service. Whether for or against improving black men’s position, all the legislators and jurists legitimized sex discrimination in jury service as benign gender difference. The comparisons and contrasts between race and sex failed to account for the complicated differences in rationales for exclusion of both women and blacks, and it ignored the existence of individuals excluded based on both categories, namely black

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116 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.”

117 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. 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, Virginia, Kentucky, Rhode Island, Maryland, South Carolina, and Mississippi, in 1922.
women. The consistent consideration of race conjunction with sex contributed to the legitimization of sex discrimination as a benign and necessary factor, while obfuscating black men’s and both white and black women’s different needs for protection and representation in the criminal justice system. Consequently, the Fourteenth Amendment, lawmakers and jurists’ interpretations of it, and its impact on the trajectory of women’s activism in the late-nineteenth and early twentieth centuries limited the effectiveness of the only constitutional measure to remedy sex discrimination. 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.

These Reconstruction debates, their comparisons of racial discrimination to sex discrimination, and the policy outcomes had staying power that lasted throughout the twentieth century. While African-American men fought to have states recognize and implement their legal right to serve on juries, women had their status as potential jurors examined on a state-by-state basis, often resulting in limited eligibility or special exemptions for women throughout the first half of the twentieth century. Over a century after the Supreme Court decisions that guaranteed black men’s right to serve on juries, the Court continued to hear separate cases about race and sex discrimination in jury service policy – often reaffirming the mirage of legal protection extended to black men and confirming the “benign” necessity of sex discrimination.

The National Woman’s Party was a relatively small, militant women’s rights organization formed in the battle for women’s suffrage and devoted to achieving equality for women by advocating for women to be treated the same as men under the law. The NWP reached its largest membership during its campaign for women’s voting rights, with rosters swelling to only about 60,000 nationwide.\textsuperscript{118} Like other women’s organizations of the day, the NWP was a federally-structured organization, consisting of several state branches and a national office.\textsuperscript{119}

After the ratification of the Nineteenth Amendment, the National Woman’s Party (NWP) continued its efforts to secure equal rights for women. In addition to pursuing an Equal Rights Amendment, the NWP engaged in discussions of women’s jury service and lobbied state legislatures for women’s equal access to juries. Part of the NWP’s campaign for women’ jury service included supporting litigation in New York, Maryland, Virginia, and Massachusetts in the 1930s.\textsuperscript{120} The NWP, along with the League of Women Voters, first supported and publicized a 1931 case—\textit{Welosky v. the Commonwealth of...}

\textsuperscript{119} Ibid.
Massachusetts. In this case, the NWP would formulate their litigation strategy—which centered on comparing women’s status with black men’s constitutional rights.

The NWP strategy mirrored some aspects of the cases of the NAACP discussed in the following chapter. Historian Richard Hamm noted that the use of a white male lawyer—an individual whose identity does not match the identity of the defendant—to make arguments on behalf of a female defendant is one way the Welosky case mirrored the NAACP cases before the 1930s. However, with Charles Houston and Thurgood Marshall, among others, arguing the 1930s jury cases, the parallel between this NWP case and the NAACP cases concerning jury service falls short. Just as the NAACP began organizing its jury service campaign and attaining reviews from the Supreme Court, the NWP pushed for rulings on the constitutionality of excluding women from juries. However, unlike the NAACP cases of the 1930, the Supreme Court declined to hear arguments about that constitutional question. The Court recognized the immanency of questions of race discrimination for the lives of black defendants, while finding white women’s claims for inclusion as citizens less serious. Additionally, while gender remained an ever-present, but implicit component of the jury service cases of the NAACP, the Welosky case contained explicit analogies drawn between race discrimination and sex discrimination, especially with reference to case law.

Ironically, the NWP, compared to other women’s organizations such as the League of Women Voters, would draw more explicit comparisons between race discrimination and sex discrimination in the court cases they supported, despite the organization’s

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121 Hamm, 104.
historic distance from the movement for racial equality. Contemporaries noted the
discrimination and coldness with which the NWP treated black women.\textsuperscript{123} The NWP
intentionally distanced itself from civil rights activists, yet in these cases used the
constitutional protections afforded to those groups as the preeminent basis of their
strategy. Those analogies—constructed by the defense—presented an opening for the
Court and prosecution to introduce gendered assumptions in ways that signified the
different rationale underpinning sex discrimination from that supporting race
discrimination.

Like the League of Women Voters, the NWP and its state offices pushed for
legislation to end women’s exclusion from juries in various states. Although, the League
and the NWP disagreed about the ERA, this history of campaigns for jury service
inclusion indicates that the League and the NWP were not as divided on women’s rights
as earlier accounts suggest. They both used similar tactics and pursued similar, though
not identical, policies. Their paths even merged without conflict in some instances.

In August 1921, the National Woman’s Party (NWP) drafted proposals for a
federal amendment to the Constitution that outlined “service as jurors” as one of the
enumerated rights and obligations (or a “liability”) that women—married or not—should
hold equally with men.\textsuperscript{124} Between 1921 and 1971, proposed constitutional amendments
generated by the NWP included versions that detailed jury service as a right “that could


\textsuperscript{124} NWP Papers, 1913-1974; Reel 116, Series III, Legal Papers, 1914-1971, Part F: Drafts of Equal Rights Amendment, 1921-1971
not be denied or abridged on account of sex.” All of these versions advocated that women serve on juries with the same obligations as men, regardless of marital status or caretaking duties. All of the later versions of the amendment (beginning in 1943) avoided the outlining of particular rights and duties, opting for a more general statement of equality under the laws. However, in every early draft (primarily from the early 1920s) that pointed out particular protections against sex discrimination, jury service was always listed.\textsuperscript{125}

Between 1921 and 1926, the National Women Party’s Legal Status Department and Woman’s Research Foundation, under the leadership of Burnita Shelton Matthews, compiled detailed listings of the statutory discrimination against women for each state.\textsuperscript{126} Each of these hundred-plus page reports included copies of jury service law in each state, focused on provisions that excluded or exempted women from service. Additionally, in 1922, the NWP cataloged the various state statutes concerning women’s qualification for jury service in a brief report, ending it with a summary listing of states with women on juries separately and without women jurors in another report.\textsuperscript{127}

In these reports, the NWP not only included statutory and state constitutional language concerning women’s eligibility but also briefly discussed state court cases related to women’s jury service. After the Nineteenth Amendment’s ratification, women’s jury service became an issue in state legislatures and state courts in several states almost immediately. For instance, in Rhode Island, the state legislature revised its juror

\textsuperscript{125} NWP Papers, 1913-1974; Reel 116, Series III, Legal Papers, 1914-1971, Part F: Drafts of Equal Rights Amendment, 1921-1971
\textsuperscript{127} “Eligibility of Women for Jury Service in the United States,” 1922, Reports No. 8 and No. 9, NWP Papers, 1913-1972, Reel 119, Series III, Part J, No. 9.
qualifications to specify that jurors needed to be “male persons” after the adoption of the federal woman suffrage amendment. Also, a 1921 court decision in Harper v. State of Texas invalidated an indictment against a male defendant issued by a jury consisting of ten men and two women, since the law stated that a jury of twelve men was necessary in this situation. In 1924 in Texas, a male defendant appealed his case because women were excluded from his panel, but the court responded that this question had already been addressed in the earlier decision. Pennsylvania’s courts witnessed similar trials with male defendants arguing that women either should have been included or excluded from the respective trials in the early 1920s. The Pennsylvania Supreme Court in 1923 reasoned that because the “appellant is a man” and the jurors were men, the defendant “was not aggrieved by the fact that members of the other sex were not included among the electors whose names were placed in the jury wheel.” The Court then cited other state court cases with similar premises, arguing that “a man has no standing to complain that his constitutional rights have been violated when women were improperly deprived of their right to serve as jurors.”

Armed with these studies of women’s status in each state, the NWP encouraged state legislatures to eliminate sex discrimination against women through both broad legislation on women’s equality and issue-centered policies. In the 1920s the Legal Research Department suggested five contemporary types of legislation from different states as examples that might be modeled by other states. It included copies of two states’ legislation. The Colorado legislation called for “women to have the same rights,

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129 Ibid.
privileges, and immunities under the laws” of the state as men, while the Wisconsin model made a similar demand but stipulated two exceptions: the need for protective legislation and the appropriateness of excusing women from jury service upon their request. More like the legislation suggested by the League of Women Voters, Georgia’s NWP, however, provided bills for each remedy in the fight for equal rights for women, rather than using a single “declaration of equality” like the Colorado NWP. Massachusetts offered one bill that declared the principle of equal rights for women and also pinpointed the particular changes sought by the initiative. The NWP endorsed the use of whichever of these methods best suited the legislative systems of individual states. It left the decision up to its State Committees—regardless of whether it made open-ended statements of women’s equality, whether it outlined potential exceptions for equal treatment under the law (including jury service), or whether it enumerated the various legal changes women sought. The Legal Research Department wanted “to furnish each State Committee with a survey of the disabilities of women in their state” and to assist in the drafting of bills “to remove said disabilities.”

130 These model bills—and in particular the shorter ones of Colorado and Wisconsin—could provide, according to the NWP, templates for many of these proposed policies to be adopted by several states.

The Legal Research Department collected and constructed models of state legislation that addressed specific rights for women, including equal obligations for jury service. For example, it copied the Minnesota statute that provided for the removal of

“any and all sex qualification” for jury service. The Department also found useful the proposed legislation of Alabama and Arizona that would have equalized qualifications and eligibility of men and women for jury service and would have offered men and women identical exemptions from service. Other versions filed with the Department included a Connecticut League of Woman Voters’ submission to its state legislature that became law in 1937, requiring women to have mandatory jury obligations with exemptions for nurses, women caring for ill family members, or women with two or more children under the age of sixteen. Additionally the Legal Research Department included an example of potential amendments to state constitutions, like that of Georgia, which revised its language to add “after the word ‘men’ . . . the words ‘and women’” to provide women with the obligations and exemptions to serve on juries as men.

During the 1920s, the NWP composed model equal rights legislation for states, and virtually all of them addressed jury service obligations for women. In fact, the Legal Research Department drafted over 600 pieces of legislation in the 1920s and saw half of them passed by state legislatures. In the summer of 1921, a draft equal rights bill that included equal obligation and exemption from juries surfaced in Louisiana—a state that would become one of the last states to mandate women’s service on juries. Illinois women’s rights advocates also crafted jury service legislation, after the Illinois Supreme Court ruled in 1925 that the constitutional description of eligible jurors as “legal voters” did not include women. The Maine state legislature passed a law to make women eligible

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131 Ibid.
132 Ibid.
133 This amendment never became part of Georgia’s state constitution, and women in Georgia did not begin to serve on juries until the 1950s.
134 Pardo, “Historical Sketch of NWP,” 2. Other issues addressed in these policies included divorce rights, guardianship rights, contract powers, civil liability, custody rights to children, and property rights.
for jury service on an equal basis with men in the wake of the Nineteenth Amendment. To revise the list of exemptions to accommodate these new eligible jurors, the legislature in Maine added “nurses” to the list of exempted professions, following the existing exemption for surgeons.\(^{135}\) Maryland entertained legislation that would make married women’s legal residence (for purposes of voting, jury service, and other political rights) determined on the same grounds as unmarried women. Additionally, Maryland considered a law that made citizens of the state qualified for jury service “regardless of sex.”\(^{136}\) Women in Maryland would not serve on juries until 1947; in Illinois, juries excluded women until 1939, and Louisiana required women to register for service until 1975. Even though the NWP’s state-by-state campaign rendered few victories, women campaigned for equal jury obligations immediately following realizing suffrage rights and pursued equal citizenship doggedly for most of the twentieth century.

Emphasizing women’s fitness for jury service, the National Woman’s Party presented several arguments in favor of state legislation to equalize women’s jury service obligations. NWP members believed that women were “capable” jurors in both criminal and civil court. They believed that women were “fair and accurate” in evaluation of evidence, noting that judges in states where women were eligible supported their inclusion. They argued that women could easily be called, many were willing to serve, and that the common concerns related to women’s jury service were “largely imaginary.”\(^{137}\) In one particular report, the NWP listed these arguments in support of its

\(^{136}\) Ibid.
recommendation that the New York state legislature pass a mandatory jury service bill to make women eligible to serve. This report included some of the same tactics used by the League of Women Voters, namely the use of judges’ and lawyers’ testimonials about the abilities of women jurors. U.S. Webb, Attorney General of California, urged, “take it from me that a jury of women is worth gambling on. Tell your statesmen to be good sports and give them a chance at the legal bats. They can do no worse, anyway.” At the 1941 Eastern Regional Conference of the NWP, the delegates from several states resolved to “urge” the Maryland “Legislative Council” to consider the Jury Service Bill and present it to the state legislature during the next session, prefacing this request with the articulation of their conviction that “women and men are equally fitted by native ability and training to serve our juries.” Unlike the League of Women Voters, the NWP appeared to believe that women did not need specialized training or education before being capable of serving on juries.

While the NWP’s campaign for state legislation might not have been as intricate as the LWV’s operation, it, often in conjunction with other organizations’ efforts, was successful at getting state legislation passed in Maine and Rhode Island. Additionally, the work of the NWP indicated that women’s organizations, divided over the ERA, might have a policy issue around which to rally. The NWP and the LWV, alongside other organizations, supported state legislation to provide women with access to juries, but both the LWV and the NWP also joined forces behind a litigation strategy in Massachusetts.

139 Minutes of the Eastern Regional Conference of the National Woman’s Party, October 25, 1941, in NWP Papers, 1913-1972, Series II, Part L, No. 2A
In the early 1920s, the Massachusetts Superior Court was one of several state courts to decide whether or not the Nineteenth Amendment changed women’s eligibility to serve on juries. Chief Justice Arthur P. Rugg believed that the Massachusetts jury qualification statute used the word “person” only to refer to men. Rugg, expecting the issue of women’s jury qualification to come before the Court after the adoption of the Nineteenth Amendment and a renewal of the state jury statute by the Massachusetts legislature, expressed his position to the other members of the Court. He announced that he believed women were not intended to serve on juries at the time of the adoption of the state constitution. Therefore, he urged the Court to continue excluding women from juries despite women’s recent change in status and the statute’s gender-neutral wording. This early position of the Court came under fire in the campaigns of women’s rights advocates, including the National Woman’s Party. Burnita Shelton Matthews and Mary Moss Wellborn had drafted legislation for Massachusetts, hoping the state legislature would recognize women as qualified for jury service. Again, in 1931, the case, Welosky v. Commonwealth of Massachusetts also united women’s organizations in a litigation strategy to gain for women access to juries.

About a decade later in Massachusetts, a jury of twelve men convicted Genevieve Welosky of possession of alcohol with the intent to distribute it. Three police officers entered Welosky’s residence when her thirteen-year-old son answered the door on July 5, 1930. Unbeknownst to Welosky, her second-floor apartment had been under surveillance for two weeks; police claimed to have watched men “known by them to be drinking men”

140 Rogers, “Finish the Fight,” 7.
141 Pardo, 43.
enter her place sober and leave “under the influence of intoxicating liquor,” sometimes drinking from a bottle stowed in a pocket.¹⁴² In Welosky’s kitchen, the police said that they found a pail containing a few quarts of liquid that smelled like alcohol. Welosky tried to dispose of that substance, spilling some on herself and an officer. Welosky’s son, Sigmund, testified that he had been helping his mother around the house when the officers called. He claimed his mother denied selling whiskey when asked by the police and that the pail contained vinegar he had gotten from the “A. & P.”¹⁴³

In the judge’s remarks to the jury at the end of the trial, he noted: “You come here from the various walks of life.” Extolling the range of jurors’ perspectives, the judge urged them to “use the same good judgment, general knowledge, and experience in deciding questions here the same as you would do in your every-day business affairs.” Not only equating juror deliberations with business decisions, he continued by reminding the jurors to analyze the evidence and then ask whether “there would be in the minds of men of reason and judgment a doubt as to whether this woman did commit the offense.” If “there was in the minds of such men a feeling of moral certainty and an abiding conviction that she did commit the offense,” then the state had met its burden in the case. The judge also informed the jury about the circumstances under which married women could be legally responsible for committing a crime. He referred to the “doctrine of law” that stipulated any crime committed by a woman in the presence of her husband may be presumed to have been coerced by her husband. However, he explained, that a married

¹⁴² Commonwealth v. Genevieve Welosky, Defendant’s Substitute Bill of Exceptions,” Superior Court Massachusetts, 1930, NWP Papers, Reel 141 Series V, p. 2
¹⁴³ Ibid.
woman could be found guilty of crimes committed in her husband’s presence “if the jury is satisfied that she did it of her own free will.”  

Both Richard Hamm and Alan Rogers have written articles focused on the Welosky case, but they see the role of the National Woman’s Party in the case in exceedingly different ways. Hamm and Rogers offer conflicting ideas of the extent of involvement of the NWP in the Welosky case. Hamm argues that the NWP, while not achieving their objective of getting women on Massachusetts juries, succeeded in a new strategy of pro-bono lawyering that provided publicity for the issue and the opportunity for change. In contrast, other than mentioning that some opponents of women jurors grouped women fighting for equal jury service obligations with the more controversial NWP members calling for an equal rights amendment, Rogers relegates his discussion of the NWP—including its connection to the Welosky case—to a footnote, commenting that George Roewer, the defense attorney for Welosky, “was in contact with the National Women’s [sic] Party.”  

Hamm shows, in fact, that Roewer contacted the Massachusetts NWP, explaining the promise of the case. The Massachusetts branch, “with the guarded support of the National Woman’s Party,” decided to take up the case as part of their strategy to get women’s jury service.  

Counter to general understandings of feminism after 1920, feminists could put aside ideological divisions to collaborate on shared objectives—most notably equal jury service obligations. Hamm believes that the NWP worked alongside and “often cooperated” with other women’s groups that “shared [their] goals,” including the

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144 Commonwealth v. Genevieve Welosky, Defendant’s Substitute Bill of Exceptions,” Superior Court Massachusetts, 1930, NWP Papers, Reel 141 Series V, p. 10.
145 Rogers, “Finish the Fight,” n30.
146 Hamm, 104.
objective of equal access to juries in various states.\textsuperscript{147} The feminist movement of the 1930s, while divided over the issue of the ERA, could collaborate in some meaningful ways over the issue of jury service for women.

In the appeal to the Massachusetts Superior Court, Welosky’s defense attorney, George Roewer, challenged the jury selection process on the grounds that the exclusion of women from the jury violated Welosky’s Fourteenth, Fifteenth, and Nineteenth Amendment rights.\textsuperscript{148} The argument Roewer presented was three-fold. First, the jury had not been “impartially drawn by lot from the whole body of citizens” of the county, excluding “all adult females . . . fit and competent to serve as jurors.” Next, the defense claimed that the jury was not selected from a listing of all eligible voters, but instead jurors were selected from a list containing less than one-third of the “whole adult citizenship” of the county. Finally, Roewer argued that some otherwise eligible jurors were “illegally and without authority of law struck off [the list] and omitted from the lot of persons of her sex,” creating a “packed jury” of men.\textsuperscript{149}

In response to the defense, District Attorney William J. Foley maintained that Welosky’s claim to “a legal right to be tried by a jury drawn from all citizens, male and female, qualified to vote” in Massachusetts failed to address the position of the

\textsuperscript{147} Hamm, 99,102. Rogers, 13. Rogers argues that “a sharp division within the pro-jury service ranks weakened their campaign” to get legislation passed in the Massachusetts state legislature. He pits the “moderate League of Women Voters . . . committed to achieving specific reforms” against the “radical National Woman’s Party [that] eschewed incremental reforms and raise the banner for an equal rights amendment. This division between the tactics of these two groups, Rogers contends, gave the opponents of women’s jury service a way to weaken the campaign.

\textsuperscript{148} Richard Hamm, 103; Hamm notes that Welosky’s defense put most emphasize on the argument that drew connections between the Nineteenth Amendment and the Fifteenth Amendment. In particular, Hamm argues that the NWP and Welosky defense was interested in having a decision like \textit{Neal v. Delaware} (1881) to establish women’s right to jury service as related to women’s status as voters.

\textsuperscript{149} Commonwealth v. Genevieve Welosky, Defendant’s Substitute Bill of Exceptions,” Superior Court Massachusetts, 1930, NWP Papers, Reel 141 Series V, p. 14.
Massachusetts Court on women’s eligibility as stated in an 1921 opinion and subsequent state courts across the nation. The Massachusetts Court, alongside other state courts, understood “jury service for citizens is a matter of duty and not of right.” Foley continued by asserting that jury service, precisely because it was duty imparted by states on particular citizens, was not guaranteed to all citizens by the Fourteenth Amendment. He claimed that “duties are imposed and are entrusted by the state only to those having qualified for their performance,” implying that women had not yet earned such a responsibility and might not perform as well as men in executing such an office. Foley argued for a narrow reading of the Nineteenth Amendment, one that severed the traditional ties between jury service and voting rights.

Foley also contended that the Fourteenth and Fifteenth Amendments, as considered in relevant case law, “have no application to the case at Bar,” primarily because the “Court in those cases was considering the freedom, citizenship, civil rights, and voting privileges guaranteed to the colored race by these particular amendments.” Foley commented on an implicit comparison made by the defense’s reliance on earlier court decisions that dealt with race discrimination by underlining the inadequacies of such an analogy. According to Foley, Court decisions about race discrimination “were made under conditions entirely different from those presented on the case at the Bar.” Furthermore, he concluded that women’s rights activists should pursue avenues other

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150 In 1921, Massachusetts dealt with the question of women jurors, ultimately deciding their exclusion was legal, constitutional, and pragmatic. See 237 Mass. 591 (1921).
152 Commonwealth v. Genevieve Welosky, Defendant’s Substitute Bill of Exceptions,” Superior Court Massachusetts, 1930, NWP Papers, Reel 141 Series V, p.7; the cases mentioned included Strauder, Neal, and ex parte Virginia.
153 Ibid.
than litigation to get women on juries, acknowledging the activism behind this case. Suggesting referendum or influencing state legislators, the prosecutor found that “the great multitude of the Womanhood of Massachusetts, rather than a few who set themselves up as representing all women citizens, can then express for themselves whether they want jury duty, entailing as it does very poor conveniences for women in crowded courthouses unfit for their accommodation; and being compelled to hear evidence on certain kinds of cases, the nature of which a woman would naturally shrink from listening to.”

In May 1931, Welosky’s defense presented its brief to the Massachusetts Supreme Court. In it, Welosky questioned the constitutionality of the petit jury that tried her case, asking if it was “a legal jury.” The challenge presented to the jury selection process hinged on the argument that otherwise “qualified women voters were excluded” from the panel only because of their sex. Noting the importance of having women on the jury, the defense stated that “the defendant—a woman—insists that the jury should have been drawn from the whole body of qualified voters, composed of both men and women in their respective representative districts.” Roewer argued that other state courts found that women were eligible for service because of the Nineteenth Amendment. He argued that Massachusetts had re-enacted its jury service statute six months after the legislature had approved the Nineteenth Amendment, which meant that the state legislature had

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154 Ibid., 8
156 Ibid., 9.
considered the fact that women might become qualified to vote, and therefore might be included in the citizens obligated to serve on juries.\(^{157}\)

Welosky’s defense also responded to the prosecution’s call to limit the application of the Fourteenth Amendment to issues of race. The defense challenged the prosecution’s assertion that the Fourteenth Amendment and subsequent precedents concerning jury service, such as *Strauder* and *Neal*, indicated the narrow application of the Fourteenth Amendment to issues of race or color. Citing *Buchanan v. Warley*, the defense claimed that the Supreme Court had already noted that while the purpose of the Fourteenth Amendment was “to protect persons of color,” its protections against state discrimination should be guaranteed to all citizens.\(^{158}\) Additionally, referencing many other cases, the defense brief argued that no legal reason existed to require that the Court to view the amendment as applying only to a particular group, especially since the language of the amendment was general enough to include women. In fact, Welosky asked whether the jury selection process violated principles of the Fourteenth Amendment or the Civil Rights Act of 1875. In these final two questions, Welosky analogized women’s exclusion from juries with the Reconstruction-era constitutional protections afforded black men to fairly selected juries.\(^{159}\)

Welosky’s defense asserted that her Fourteenth Amendment guarantees to due process of law and to the equal protection of the law were violated “because the list from which were drawn the jurors who sat in judgment upon her, did not contain the names of all PERSONS entitled to vote, by reason of the exclusion there from of persons of her

\(^{157}\) Ibid., 10
\(^{158}\) Ibid., 15.
\(^{159}\) Ibid., 2
own sex.” Referencing Ex parte Virginia and Strauder, Roewer explicitly compared Welosky’s situation with that of black defendants suffering from race discrimination in jury selection. The defendant’s brief noted that “any State action that denies this immunity to a colored man is in conflict with the Constitution.”

In addition to the Fourteenth Amendment claims, Roewer also referred to the Civil Rights Act of 1875, a Reconstruction-era policy aimed at the newly freed African-American population, in her case against sex discrimination in jury selection. Drawing the parallel between black men’s situation and her own rights, Welosky’s defense claimed that “the extension of the suffrage to women was the last step in the process of liberating that sex from a previous condition of servitude”—an allusion to the change in societal position of the black population during Reconstruction. Roewer reasoned that “women are now the ‘peers’ of men,” as “they have been liberated from their political servitude.”

With this feminist perspective, Welosky’s defense summed up its arguments, maintaining the exclusion of women from the jury violated the defendants’ Fourteenth and Nineteenth Amendment rights. The defense argued that other state courts had decided that the Nineteenth Amendment had been sufficient to make women eligible for jury duty. Citing several cases, the defendant claimed that “a broad interpretation of our [Massachusetts’s] own Jury Statute, after the passage of the Nineteenth Amendment,

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160 Ibid., 24.
161 Ibid., 25.
162 Ibid., 25.
163 Ibid., 27.
164 Ibid., 2
would lead the Court to conclude that women were eligible for jury service.”\textsuperscript{165} The exclusion of women, for the defense, was illogical. According to the defense, any other view of the Nineteenth Amendment’s impact on women’s eligible was an “interpretation of the law [that] takes us into the realm of unreality.”\textsuperscript{166} Roewer argued that the law must change with society, and “to determine today the legal rights and obligations of women on the basis of the common law which developed during a predominantly agricultural era when women occupied an outstanding inferior economic and political position, furnishes us with a foundation of intellectual quicksand.”\textsuperscript{167} Welosky’s case supposed that “under the common law women were in a condition of servitude,” and that the Nineteenth Amendment fundamentally changed women’s position, and therefore eligibility for jury service.

The Massachusetts League of Women Voters supported Welosky’s claims by filing a brief as amicus curiae in May 1931. The brief, written by the Massachusetts League Attorney, Greta C. Coleman, explicitly noted the dual nature of the question of women’s eligibility for jury service in this case. First, the League questioned the exclusion of women voters from jury lists under the Massachusetts jury statute. Second, it posited “whether to force a woman charged with a criminal offense to be tried by a jury chosen from a list from which members of her own sex were excluded is to deny her the equal protection of the laws under the Fourteenth Amendment . . . and is in violation of the Constitution of Massachusetts.”\textsuperscript{168} Arguing directly against the Court’s previous

\textsuperscript{165} Ibid., 21-22.  
\textsuperscript{166} Ibid., 28.  
\textsuperscript{167} Ibid.  
determination that women were not eligible under Massachusetts law, Coleman contended that that earlier opinion was “of no judicial effect,” and was “noting more than the opinion of the justices as individuals.”\textsuperscript{169} She maintained that women became eligible for jury service as soon as women were allowed to vote. Citing the Supreme Court decision in \textit{Neal v. Delaware}, the League compared the situation of women, as qualified electors but not jurors, to the situation of black men, granted voting rights but excluded from juries.\textsuperscript{170} Ultimately, Coleman reasoned that women were made eligible for jury service once they gained voting rights, analogizing their situation with that of black men. She asserted that “the all-important element which was always preserved was the fundamental principle that all the electorate be eligible for jury service.”\textsuperscript{171} Coleman noted that when freedmen became eligible voters, the Supreme Court also made them eligible for jury service. In this way, she likened sex discrimination in the \textit{Welosky} case with the race discrimination deemed unconstitutional in previous Supreme Court decisions. The League’s brief mentioned “when slaves were admitted to the electorate in States the laws of which were similar to Massachusetts, they not only were liable to serve as jurors, but could not be prevented from so serving.”\textsuperscript{172} Women, according to the Coleman, should be protected from sex discrimination in jury service statutes in ways similar to the legal protections already afforded to black men. Additionally, she argued that since Massachusetts ratified the Nineteenth Amendment and four months later readopted the jury statute without making changes to it, the legislature accepted the

\begin{enumerate}
\item[Ibid., 2.]
\item[Ibid., 5.]
\item[Ibid., 5.]
\item[Ibid.]
\end{enumerate}
statute that made all qualified voters eligible for jury service while knowing women might be included in the electorate.\textsuperscript{173}

The second part of the League’s argument mirrored the strategy adopted by the NAACP. Coleman claimed that the female defendant was denied the equal protection of the laws under the Fourteenth Amendment, because she was tried and convicted by a jury selected by a process that excluded women. Citing the four late-nineteenth century cases on race discrimination in jury selection, the League’s brief analogized the situation of black men after the Fifteenth Amendment’s adoption with that of women after the ratification of the Nineteenth Amendment. Furthermore, Coleman claimed that “to exclude all women from jury service solely because of sex is arbitrary and due to prejudice, since women have now been freed from their former condition of political servitude.”\textsuperscript{174} While comparing the legality of excluding women from juries with that of excluding black men, the League also addressed notions of gender difference adopted by the Supreme Court in other cases, such as \textit{Muller} and \textit{Akins}. Deeming that “physical difference between men and women” was not “a reasonable” argument in this situation, the brief acknowledged the potential need to excuse some women—“for the safety, morals, health, and general welfare of the community”—from jury duty. Yet, Coleman positively denied the appropriateness of excluding all women from service.\textsuperscript{175} She argued that “the jury trial guaranteed by the Constitution of Massachusetts is not of a static nature,” but rather changed after the \textit{Strauder} decision and should change again after the changes brought to women’s political and legal status in society after the Nineteenth

\textsuperscript{173} Ibid., 26.
\textsuperscript{174} Ibid., 32.
\textsuperscript{175} Ibid., 33.
Amendment.\textsuperscript{176} “Other women are the peers or equals of the defendant,” Welosky, the brief noted. According to the League, women jurors “have her viewpoint and would be inclined to be more sympathetic and more intelligent about her problems.” The League believed that to try Welosky without women jurors, with their special vantage point, would “injure” the defendant. Coleman also tried to illustrate the situation, speculating that “no one would claim that should a law be enacted making women alone liable for jury service, thus denying men the privilege of participating equally with women in the administration of justice, it would not be considered a serious injury to a male litigant and a denial to him of the equal protection of the laws.” By turning the question around, the League demonstrated how Welosky—a female defendant—might have faced a jury selected unfairly because of its exclusion of women because of their sex.

The Massachusetts Superior Court ruled that state law did not allow for women to serve and the exclusion of women from juries did not violate the defendant’s constitutional rights. The particular statute explicating the qualification for jurors deemed that “a person qualified to vote for representatives to the general court shall be liable to serve as a juror,” but the Court found that the category “person” did not include women.\textsuperscript{177} Chief Justice Rugg explained that “no intention to include women [in the meaning of person in the statute] can be deduced from the omission of the word male.” Rugg insisted, the Nineteenth Amendment did not alter the meaning of the original statute; it only provided that women not be excluded from the electorate.

\textsuperscript{176} Ibid., 34.
\textsuperscript{177} Commonwealth v. Welosky, 177 N.E. 656 (Mass. 1931)
In response to Welosky’s argument that her Fourteenth Amendment rights had been violated, Rugg offered a short discussion of the Reconstruction Supreme Court cases concerning race discrimination in jury service policy. He concluded that “giving to those four decisions the widest scope, they all rest expressly upon the purpose and effect of the Thirteenth, Fourteenth, and Fifteenth Amendments with respect to a race, up to that time enslaved in several of the States but thereby created citizens, made freemen and clothed with full civil and political rights.” Women’s situation “was utterly different,” since “women had not been enslaved,” argued Rugg. He continued by claiming that women were citizens, had been “clothed with large property and civil rights,” and had “long been generally recognized in this country as the equal of man intellectually, morally, and socially.” Because of these differences and the array of opportunities opened to women before gained federal protection of their voting rights, Rugg believed that the transformation in women’s status was not similar to that of black men’s during Reconstruction.\textsuperscript{178} Opponents to women’s jury service echoed opponents of black rights during Reconstruction debates, claiming gender difference was not discrimination. Proponents of women’s jury service did not, however, echo these earlier debates; they emphasized parallel situations between race and sex in legal discrimination.

After the Massachusetts Superior Court ruled against Welosky, the NWP faced the decision of whether to appeal the case to the U.S. Supreme Court. Burnita Matthews recommended abandoning the case, since the appeal would be too costly and unlikely beneficial to the cause.\textsuperscript{179} Roewer, the defense attorney, also wondered if an appeal was

\textsuperscript{178} Welosky v. Massachusetts, 276 Mass. 177, N. E. 656, 1931.
\textsuperscript{179} Hamm, 105.
winnable.\textsuperscript{180} However, the NWP saw value in supporting an appeal, finding it to be an opportunity to maintain ties with other organizations and keep the issue of women’s jury service in the public eye.\textsuperscript{181} The NWP, hoping to publicize the issue, committed to appealing the Welosky case, but as Hamm has argued, it spearheaded a strategy to fund the appeal with the assistance of other women’s groups and to get “free legal talent from within the organization or through donated time.”\textsuperscript{182} Gail Laughlin, a lawyer and member of the Maine branch, undertook the appeal of the Welosky case.\textsuperscript{183}

In October 1931, the defense petitioned the U.S. Supreme Court for a writ of certiorari. The petition claimed that the petit jury in the \textit{Welosky} case “was drawn from a body of persons from which was excluded, regardless of fitness, every person of the defendant’s sex, solely because of their sex, so that by no possibility could any woman sit upon the jury.”\textsuperscript{184} The defense insisted that “compelling [the] defendant—a woman—to submit to a trial” without the potential for women jurors to serve because sex discrimination excluded all women from the pool was unconstitutional, denying to her the constitutional protections provided by the Fourteenth and the Nineteenth Amendments.\textsuperscript{185}

Previous court decisions on race discrimination in jury service provided the foundation for the defense’s arguments. The defense maintained that women’s situation

\textsuperscript{180} Ibid., 105.  
\textsuperscript{181} Ibid., 105.  
\textsuperscript{182} Ibid., 107.  
\textsuperscript{183} Ibid., 108; Hamm explains that Roewer wanted a fee for his service, and two other members of the NWP who usually provided legal services for the organization—Burnita Matthews and Rebekah Greathouse—refused to take on the case.  
\textsuperscript{184} Writ of Certiorari, Welosky v. Commonwealth (1931); NWP Papers, 1913-1947, Reel 122, Series III: Legal Papers, 1914-1971,  
\textsuperscript{185} Ibid.
after the adoption of the Nineteenth Amendment should be considered as comparable to
the black man’s after the ratification of the Fourteenth and Fifteenth Amendments.
Women, like African American men, “had been freed from political subjection.” 186
However, the Supreme Court denied their writ and ended the hope that the highest court
in the land might make a ruling about the constitutionality of excluding women from
juries. 187

After the case, in 1931, Alma Lutz, Chairman of the Literature Committee of the
NWP, penned a leaflet entitled “The Case for Women Jurors.” In this pamphlet, she
presented several arguments for women’s jury service, including ones stipulating the
benefits of their service to society and female defendants and ones that emphasized the
perpetuation of women’s inferior status through their exclusion. She asserted that the
twenty-seven states that then barred women from juries did so not because of the
examples of women jurors from other states but because of “indifference and
conservatism.” Lutz also provided many of the same arguments as the League of Women
Voters promoted—about women’s rationality, the educational value of service for
women, and their attentiveness in trial situations. Additionally, like the League, Lutz used
quotations from lawyers and jurists in states where women served, sometimes including
the same individuals’ endorsements that can be found in League materials. 188

The NWP became involved, although to a lesser extent than it had in the Welosky
case, in two other court cases involving white female defendants and all-male juries in
the 1930s. The first one, the 1932 Fortescue-Massie trial, only allowed the NWP to

186 Ibid.
187 The U.S. Supreme Court denied certiorari in Welosky, 284 U.S. 684 (1932).
Reel 149, Series V: Printed Material, ERA Pamphlets
briefly associate with the case and draw attention to the plight of women defendants before the defendants decided to break ties with the NWP and put their fate in the hands of Clarence Darrow and his associates. The case involved the alleged gang-rape of Thalia Massie, the wife of a Navy officer, by four black men, tried and released after the jury failed to reach a decision. Shortly after, Massie’s mother, Grace Fortescue, the Navy officer and two other men captured one of the men acquitted of the crime, forced him to confess, and then murdered him. The NWP hoped to use the murder case to drum up support for women jurors, but only after suggesting that the defendant challenge the exclusion of women from the jury pool and providing generic arguments about women’s jury service rights, Fortescue decided not to have the NWP intervene in the case.

The second case—the 1935 Virginia trial of Edith Maxwell—also promised to provide publicity for the issue of women’s jury service through the spectacle of the trial of a woman for the murder of her father. President of the Virginia branch of the National Woman’s Party, Elsie Graff, wrote to Alice Paul recommending that the NWP assist the defense. Since Virginia had refused to ratify the Nineteenth Amendment and explicitly limited jury service to men, this case provided the NWP with new and direct arguments to make about the constitutionality of women’s exclusion from juries. Richard Hamm noted the particularly strategic timing of the Maxwell case, since it appeared in the wake of the Supreme Court decision in the jury service case in Powell v. Alabama which relied on the Fourteenth Amendment to rule against race discrimination in jury selection.

189 Hamm, 111.
190 Ibid.
191 Ibid., 113.
Gail Laughlin joined the case, relying on the same arguments the NWP advanced in the *Welosky* case about the Fourteenth Amendment’s equal protection of the laws. Maxwell was granted a second trial in 1936, after the Supreme Court of Appeals of Virginia found the first trial did not have “insufficient” evidence to support a conviction of first-degree murder. 192 So, in the second trial, the NWP included arguments about the exclusion of women from juries and denial to Maxwell a jury of her peers. 193 At the end of this trial, Maxwell was convicted of second-degree murder by an all-male jury. While Maxwell and her defense worked on her appeal, they decided to disengage the defense from the NWP. The NWP, while not officially part of the defense, continued to use their case in publicizing the issue of women’s jury service. 194

Even years after the litigation strategies in *Welosky* and *Maxwell* failed, the NWP still found comparisons between race discrimination and sex discrimination persuasive and useful. Additionally, in the 1940s, the NWP also began to use black women to exemplify the varied position of women in relation to the law. In November 1949, Helen Elizabeth Brown, member of the Baltimore bar and National Woman’s Party, delivered a speech to the Lawyers Civic Association of Maryland. This talk concerned the rights and duties of women under the U.S. Constitution. Jury service for women was one topic Brown discussed at length. She combined her discussion of sex discrimination in jury eligibility with her discussion of race discrimination. Brown noted, “it is unconstitutional to try a Negro man with a jury from which Negro men have been excluded; it is not unconstitutional to try a woman, black or white, with a jury from which women have

193 Hamm, 115.
194 Ibid., 116.
been excluded.” ¹⁹⁵ She punctuated her point, stating “To exclude men from jury service would be to deny them a trial by a jury of their peers and the equal protection of the laws; excluding women from jury service is no such violation of the Constitution.” ¹⁹⁶ Brown mentioned the Strauder ruling that the exclusion of black men from the panel because of their race was unconstitutional, and contrasted it with the Massachusetts Supreme Court decision years later that ruled women could not serve as jurors. She again emphasized that “colored men were declared eligible for jury service, but women of any race were not.” ¹⁹⁷ She contended that the U.S. Supreme Court “placed its stamp of approval” on this discrimination by refusing to hear an appeal. ¹⁹⁸

The NWP lobbied in state legislatures for both “blanket legislation” and specific policies that would have made women eligible for jury service in the 1920s. By the 1930s, the NWP, mostly because of its priorities, dwindling membership, and restricted funds, began to limit severely its activity in state legislatures. Instead, the NWP focused on the promotion of the ERA and federal and international policies to secure women’s legal, economic, and social equality with men. This shift did not mean that the NWP abandoned its efforts to get women on juries. Rather, it adopted a litigation strategy that focused primarily on assisting white female defendants convicted of crimes by all-male juries. After achieving publicity for the issue but no real change for women’s position, the NWP remained dedicated to jury service as an issue of equality, folding arguments for

¹⁹⁶ Ibid.
¹⁹⁷ Ibid.
¹⁹⁸ Ibid.

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women jurors into arguments supporting the ERA. For instance, in a NWP pamphlet from August 1972, the organization listed answers to popular questions about the implications of a federal Equal Rights Amendment. Jury service was one issue covered by this booklet. The NWP explained that the ERA “would make all women eligible for jury duty on the same basis as a man, and they would be ‘relieved’ on the same basis as a man, and not simply because they were a woman.”

The NWP used two strategies in their campaign for women’s jury service obligations: lobbying state-by-state and assisting in the litigation of trials with white female defendants. While neither of these efforts produced many avenues for women to access juries, these feminists refined arguments supporting women’s full citizenship and established some common ground with social feminists. Like the League, the NWP believed women needed equal and compulsory jury obligations in order to attain an equitable civic status and full citizenship. To a lesser extent, these women stressed the position of white female defendants facing all-male juries—juries without their peers. This litigation strategy not only failed but also hardly materialized, reflecting the most practical and numerous appeals for equal service opportunities were those made in state legislatures. The NWP and League pursued legislative goals much more forcefully in the 1920s, 1930s, and 1940s, unlike the NAACP and the campaign for black men’s service which primarily relied on litigating on behalf of black male defendants and invoking federal guarantees.

Chapter 3: “Pursued and Persecuted by Powerful Enemies”: The NAACP’s Struggle to Eliminate Racial Discrimination in Jury Service in the Mid-Twentieth Century

On October 29, 1919, five black men were indicted by a grand jury in Phillips County, Arkansas for murder in the first degree of a white man, Clinton Lee. Frank Moore, Ed Hicks, J.E. Knox, Paul Hall, and Ed Coleman were arrested for a crime that happened the night after a violent local outbreak, remembered as the Elaine Massacre. These men and other black sharecroppers had organized the Progressive Farmers and Household Union of America (PFHUA) in spring 1919 in an effort to “champion the moral, material, political and intellectual interest of our [the union members’] race.” By fall, the PFHUA decided to sue their landlords, causing white society, especially planters, to see the group as upsetting the status quo by challenging the system. The violent conflict began when a group of black sharecroppers, along with some of their

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200 Seven other black defendants were also arrested subsequent to these riots and were also represented by Scipio Jones and eventually released from jail; these five defendants, however, presented their arguments in front of the Supreme Court in Moore v. Dempsey, a case that continued to affirm the legal protections against race discrimination in the criminal justice system.

201 Nan Elizabeth Woodruff, American Congo: The African-American Freedom Struggle in the Delta, Harvard University Press, 2003, 82-83; For, a legal history that seems to be the work on Moore v. Dempsey. Richard C. Cortner, A Mob Intent on Death, 1988; for other works on the Elaine Riots, see Jeannie M. Whayne, “‘I Have Been Through Fire’: Black Agricultural Extension Agents and the Politics of Negotiation,” In African American Life in the Rural South, 1900-1950, ed. Douglas Hunt, Columbia: University of Missouri Press, 2003; and lastly, the controversial recent work, Grif Stockley, Blood in Their Eyes: Elaine Race Massacres of 1919, University of Arkansas Press, 2004. From what I can gather at this point, the records from this event, mainly from Army officials or the NAACP, contain contradictory explanations and accounts of the happenings in Pine County. Historians have not agreed completely on the narrative, even disputing the number of deaths that occurred. Most seems to indicate the underlying reason for the riot was economic (sharecroppers banding together), and that the riots were triggered by shots fired outside a black church. Pine City had more black residents than white residents, so after the outbreak of violence; the Governor sent troops to quash the fighting.
wives and children, decided to meet in a church. Threats from the angry white community prompted the use of armed guards outside the church. Numbers for each side grew after initial crossfire. By October 1, 1919, between six hundred and one-thousand white community members joined the fight. That day several black men and three white men were killed, including Clinton Lee. In response to a perceived “insurrection,” the Arkansas Governor, Charles H. Brough, requested military assistance, and by the next morning, he “personally escorted” almost six hundred federal troops to Elaine. Once they arrived, all whites and blacks were ordered to disarm, and white women and children were transported outside the city by train for their own protection. Military orders stated that troops should shoot any black man refusing to disarm or surrender on sight. Fighting continued and by the end of the massacre, hundreds African Americans in Elaine had lost their lives and some whites continued the violence by firing at dead black bodies, dragging them through the streets, and even taking body parts as souvenirs. This deadly confrontation, fueled by economic gains of black men that challenged the white power structure in Arkansas, revealed the extremity of racial tensions and the willingness of whites to use violence and the legal system to reinforce white supremacy.202

The violence and racism, however, did not end with the massacre. In fact, these events, according to the trial’s defense, had provoked “excitement” throughout the white community and produced “feelings against blacks, including the defendants, [that were]

202 The original trial actually included twelve men; later appeals separated these men into two groups, who argued against their convictions on different grounds. The group I refer to here is sometimes called the “Moore” group and was the group that got a Supreme Court decision. Nan Elizabeth Woodruff, American Congo: The African-American Freedom Struggle in the Delta, Harvard University Press, 2003, 82-87; Robert Whitaker, On the Laps of Gods: The Red Summer of 1919 and the Struggle for Justice that Remade the Union, New York: Crown Publishers, 2008, 125; Whitaker estimates that 200 to 300 African-Americans died during this conflict, though estimates have been made as high as 857.
bitter, active, and persistent." The day after the conflict, white police officers took some 200 African-Americans into custody. While jailed, these black men faced torture in efforts to retrieve admissions of guilt or testimony against others and had no access to legal or community assistance for their defense. Among these men were both the five defendants and the black witnesses that testified against them. An all-white, all-male jury took between three and six minutes to convict the five defendants, and on November 5, 1919, the court sentenced these men to the electric chair.

The NAACP assisted these men with the appeals process. The defense, led by African-American lawyer Scipio Jones and underwritten by the NAACP, argued that their clients’ Fourteenth Amendment rights had been violated because the police coerced witness testimony against these five defendants and “no white jury being fairly disposed, would have the courage to acquit them” because of a mob mentality that pervaded the county. The defense took the testimony of several of the black men who testified against the defendants, finding that these witnesses made statements after police severally whipped them, shocked them, affronted them with “strangling drugs,” placed them in nooses, or constantly threatened them with death. With this testimony and evidence of racist jury selection practices, the defense hoped to demonstrate the racial bias in the justice system’s operations and its chilling implications for their clients. Eventually, the Supreme Court ruled in this case, Moore v. Dempsey (1923) that, as Justice Oliver Wendell Holmes articulated, the “whole proceeding” was

204 Meier and Rudwick, “Attorneys Black and White,” 925.
205 Ibid., According to the court record, it had been 30 years since a black man served on a jury in a county where the population of blacks exceeds that of whites by a ratio of 5 to 1. They collected the names of all of the jury commissioners that served between 1905 and 1919 to call to testify.
a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong; neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.\footnote{Moore v. Dempsey 261 U.S. 86 (1923).}

The Supreme Court emphasized how the mob scene distorted the ability of these defendants to get a fair trial, not because the jury was unfairly selected, but because the whole process prevented anything other than a guilty verdict.

\textit{Moore v. Dempsey} illuminates not only the variety of arguments—including those about all-white juries—black defendants used in the early twentieth century but also reveals the violence and injustice of the Southern criminal justice system in the period. It demonstrates the horror and urgency of black men’s predicament, starkly contrasting with the experiences of white women in the justice system. Black men (much more frequently than black women) entered the courts in the Jim Crow South as defendants, witnesses, and occasionally lawyers—but never as judges and almost never as jurors. Having a jury trial—as opposed to mob violence—offered African Americans the pretense of equality, while the justice system itself ensured a conviction. Black men needed badly to realize the full enforcement of the rights and protections federalized during Reconstruction, including the right to juries constructed without racial discrimination. Unlike white women who gradually gained legal rights state-by-state that corresponded to access (though erratic) to jury service, black men constantly fought to have their constitutional rights to serve on juries and have juries constructed without racial discrimination recognized and enforced at local levels in the first half of the twentieth century.
In part, the federalization of black men’s rights and the piecemeal process by which women gained these rights stemmed from the pervading gendered notions of criminality. In these cases, despite the frequent appearance of female victims or witnesses, court officials and lawyers presumed these crimes were committed by men. Additionally, all defendants in these cases were men, obscuring some of the potential implications of tolerating sex discrimination in jury selection. The question of sex discrimination never appeared. To the limited extent that women’s exclusion from juries was discussed at all, it was merely to point out the state statutes that qualified individuals for jury service, which sometimes limited potential jurors to men. Because arguments against race discrimination were not coupled with those against sex discrimination, these cases had little impact on the position of black women in accessing the jury box.

The legal categories of race and sex shaped understandings of the qualifications for certain rights of citizenship and the policies that allowed individuals to serve as jurors. The divergent rationales for discrimination and the distinct policies affecting those excluded from juries by those legal categories, namely race and sex, created a situation that made arguing for inclusion easier for black men and white women, who could focus on a singular form of discrimination. These policies and the distance between these groups in everyday life also deterred black men and white women from joining together to fight for equal access to juries. Black women and their position in society, consequently, were largely absent from the arguments and cases pursued in the first half of the twentieth century.
The NAACP became the predominant national organization to litigate cases concerning race discrimination in jury service qualification and selection, beginning with this 1923 case and continuing throughout the twentieth century.\textsuperscript{207} Despite the best efforts of the NAACP, black defendants continued to argue against race discrimination in jury selection, because the Supreme Court decisions that bolstered black men’s constitutional rights to juries constructed without race discrimination failed to prevent the racist practices that kept black men from serving on juries. This chapter centers on the activism and the argumentation of the NAACP in these 1930s jury service cases, all of which involved black defendants seeking protection from racially discriminatory practices in jury selection. In a significant shift in the racial makeup of NAACP lawyers from white to black attorneys, Charles Houston and Thurgood Marshall spearheaded the major campaign for jury service, making many significant and successful appeals to the Supreme Court. The Fourteenth Amendment was the foundation for the arguments made in these cases, where black men often had been convicted of rape or murder and sentenced to death by all-white (petit and grand) juries. Although the litigation process relied heavily on the expertise of lawyers and the institutional backing of a national organization, the records indicate that the national and local branches of the NAACP, alongside family and friends of the defendants, worked to achieve justice for individual defendants.

\textsuperscript{207} The NAACP assisted in the late-twentieth century Supreme Court case,\textit{ Batson v. Kentucky} (1986), which dealt with the question of race discrimination in the use of preemptive strikes against prospective jurors.
Manfred Berg has argued that unlike the “bold sense of grand expectations” of the movement for racial equality in the 1960s, “the prevailing mood among racial reformers in the early twentieth century was largely defensive.”\textsuperscript{208} The preeminent reform organization, the NAACP, focused on achieving racial equality during a period when African Americans, particularly in the South, faced discrimination, segregation, and outright violence. As Berg suggests, the NAACP’s focus on defendant’s rights and its litigation strategy were means of protecting the black community, especially black men, against the injustices of a racist criminal justice system.\textsuperscript{209} Despite the Supreme Court’s support of ending race discrimination in jury selection, the lack of enforcement of these rulings indicate the limited impact these cases had on ordinary citizens. However, to characterize this campaign as simply ineffective or defensive would miss the import and legacy of the struggle, the bravery behind the activism, and the growing institutionalization of the NAACP under black leadership. These cases publicized the injustices of racial discrimination and educated the public about the promise (and lack thereof) of constitutional protections available to African Americans.\textsuperscript{210}

The legal arm of the NAACP first made arguments about racial discrimination in jury selection processes before the Supreme Court in the 1923 Moore v. Dempsey case. These arguments were secondary to the claims about protecting black defendants’ rights to due process from a trial permeated by the overwhelming outraged white community. Ten years after this case, Charles Houston would litigate Crawford v. Commonwealth of


\textsuperscript{209} Ibid., 71; Berg argues that the NAACP found the legal system to be the best place to reform, since, especially in the South, the black community had extremely limited ability to mobilize politically en masse or to open protest without fear of violence.

\textsuperscript{210} Ibid., 69. He notes these are two of the positive implications to come out of the early period.
Virginia, which centered on the jury question, marking the beginning of a lengthy and more intense endeavor by the NAACP to protect black defendants from all-white juries in the South.211

The NAACP argued for ending race discrimination without engaging the question of sex discrimination and the position of women in the justice system, primarily because all of the defendants they assisted were men. In fact, the NAACP mentioned the prospect of black women serving on juries only in one 1937 memorandum about how black women could make themselves available and eligible to serve on juries in New York.212 Despite the lack of NAACP activism for them to gain access to juries, women participated in these trials in a variety of ways. Their involvement indicated that the implications of sex discrimination in jury selection had real effects on the justice system for them as well. First, family and community members, including women, supported black defendants by networking with the NAACP’s local and national chapters to find assistance for causes directly related to their everyday lives. Furthermore, the NAACP also reached out to female activists in their campaign for equal jury service for black men. Charles Houston, in a letter to several NAACP members across the South, asked for information on the frequency of blacks serving on juries in local communities. Seventeen of the numerous letters he sent were addressed to women affiliated with the NAACP.213 Additionally, the NAACP relied on the testimony of black women in several cases,

211 The NAACP had opportunities to litigate these questions outside of the South. For example, in 1936, Herman Mitzell requested assistance with his trial in New York, arguing that race discrimination in jury service policy had infringed on his constitutional rights. However, Houston told him the NAACP was unable to help because the “staff [was] working on southern cases.” See NAACP Papers, Part 8, Series A, Reel 16, Fr 00247.
212 NAACP Papers, Part 8, Series A, Memorandum, 18 October 1937.
213 NAACP Papers, Part 8, Series A, Reel 15, 505-510; Additionally, the vast majority of these women were married (noted by the use of the title, Mrs.)
hoping that these women would provide information about the victims, defendants, or situation surrounding the alleged crime. Finally, most of these cases revolved around a crime against women—generally white women, which showcases the assumptions made (or manufactured) about violent black men and vulnerable or victimized white women. In these cases, women were present and active participants, even if their roles were somewhat peripheral to the arguments of the case and the decision-making of the jury.

Additionally, the promotion of jury service as a key issue for the NAACP’s national campaign for racial equality correlated with the rise in black leadership in the organization itself and with the guidance of Charles Houston. The NAACP, which began in 1909 as an interracial organization, always had black leaders; however, by the early 1930s, more black activists populated the organization’s higher ranks. More importantly for these cases, half of the members of NAACP legal committee were black by 1932. Charles Houston was instrumental in promoting the NAACP’s reliance on black lawyers for the NAACP. The NAACP could rely more on black lawyers because more African-Americans became lawyers. By 1925, black lawyers created a separate American Bar Association, and by the 1930s, the civil rights movement depended on the services of most of the 1,175 black lawyers in the country. This shift to having African-American lawyers argue these Southern cases helped to raise questions about race discrimination in jury selection. White lawyers representing black defendants in the South often failed to present objections about the racial composition of these juries after indictments surfaced.

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215 Berg, 85.
presenting a problem for rectifying the discrimination.\textsuperscript{217} Once the NAACP relied more on African-American lawyers instead of white lawyers, arguments against race discrimination in jury selection became more common.

The NAACP also developed strict criteria for taking on defendants in this campaign for jury service. First, the “man” had to be innocent.\textsuperscript{218} The case also had to center on an injustice based on race or color. Finally, the case had to be able to set a precedent that would help African Americans nationally.\textsuperscript{219} These standards became the guide by which the NAACP selected cases to assist in order to build on favorable precedents established by the Supreme Court in the late-nineteenth and early-twentieth centuries.

The NAACP’s campaign for African-American jury service rights relied on the efforts and built on the arguments of earlier Supreme Court decisions not only from Reconstruction but also from the turn of the century. After Reconstruction and with the rise of Jim Crow, state governments reestablished white control over the Southern judicial system in part by keeping black men off juries.\textsuperscript{220} Legal scholar, Benno Schmidt describes how individuals challenged the “lily-white character” of this Southern system

\textsuperscript{217} Tushnet, \textit{Making Civil Rights Law}, 57-8; It should be noted that the legal network of the NAACP, particularly in the South, was somewhat limited in the 1930s and 1940s. Lawyers often looked to the NAACP for financing, but they faced severe challenges and violence by defending black men in the courts. Black attorneys faced even more hardship than their white counterparts. For example, Tushnet describes that Leon Ransom, a NAACP advocate, referred to the NAACP contact in South Carolina as “the lawyer in South Carolina.”
\textsuperscript{218} Letter from Marshall to Tolbert, 27 November 1939, NAACP papers, Part 8, Series A, Reel 16, Frame 310. In correspondence between Special Council Thurgood Marshall and South Carolina defense lawyer Joseph A. Tolbert over the 1939 case of Jerry Owens (a black teenager convicted of raping a white woman), Marshall explained how the organization came to its decision in cases like these. Though this case failed to gain the endorsement of the NAACP, its records illuminate the three criteria the NAACP used to decide which cases to support financially.
\textsuperscript{219} Ibid.
during the Progressive Era through appeals to the Supreme Court. Yet, from 1900 through the 1920s, the Supreme Court was less responsive to the challenges of racial discrimination in jury selection than the Courts of either the Reconstruction era or the 1930s. The Supreme Court heard three cases on jury discrimination in 1896 and one in 1898, all of which involved black defendants convicted of murder. Deciding unanimously in all of these cases, the Court ruled in favor of the state, deciding that the constitutional rights of the defendant had not been abridged and no overt discrimination proven.

Despite these refusals to remedy the exclusion of black men from Southern juries, the Court did not wholly ignore challenges to racial discrimination in jury selection at the turn of the century.

The Supreme Court confronted the constitutionality of exclusion of black men from juries because of the activism of those pushing for racial equality. Black activists in the early twentieth century, including Booker T. Washington, Albert B. Hart, and Gilbert T. Stephenson, noted the dire situation that the racism of the Southern judicial system and the virtually total absence of black jurors produced for many black men. Wilford H. Smith, a Mississippi lawyer and advocate for racial equality, understood and condemned these racist practices, becoming, perhaps, the most outspoken advocate for ending racial discrimination in jury service policy. In his contribution to Booker T. Washington’s 1903 work, The Negro Problem, Smith outlined the various racially discriminatory practices

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221 Ibid., 1406.
222 For further discussion of these cases, Gibson v. Mississippi 162 U.S. 565 (1896); Smith v. Mississippi 162 U.S. 592 (1896); Murray v. Louisiana 163 U.S. 101 (1896); and Williams v. Mississippi 170 U.S. 213 (1898); see Schmidt, 1462-1470.
223 Schmidt, “Juries, Jurisdiction, and Race Discrimination,” 1406-1407. Schmidt briefly discusses the comments of black activists of the period about juries in the South, but interestingly, he does not include Wilford H. Smith in this discussion.
plaguing the criminal justice system and emphasized the brutal consequences of them on
the black community. He explained the importance of the Reconstruction Amendments,
below their narrow interpretation by the Supreme Court and circumvention by some
states. In the Southern justice system, he asserted, blacks were “denied all voice, except
as parties and witnesses, and here and there a negro lawyer is permitted to appear.”224
African Americans could occupy relatively powerless or passive positions in the
courtroom, not ones that decided the fates of others. Smith contended that Southern states
removed black men from grand and petit juries (among other institutions), because of
concerns that social equality would follow equal access.225 Arguing that representation on
juries was more “serious” than exclusion in other areas, he expounded: “One vote on the
grand jury might prevent an indictment, and save the disgrace and the risk of public trial;
while one vote on the petit jury might save a life or a term of imprisonment, for an
innocent person pursued and persecuted by powerful enemies.”226 Smith added that jury
commissioners excluded blacks from jury panels, despite the laws against it.227 Southern
juries virtually always ignored the testimony of blacks in favor of that of whites, and
Southern jurors “have been heard to admit that they would be socially ostracized if they
brought in a verdict upon colored testimony along, in opposition to white testimony.”228

Wilford H. Smith acted on his conviction to achieve equality for black
defendants by bringing two jury service cases to the Supreme Court. In 1900, he won the
appeal for his client in *Carter v. Texas*, arguing that the exclusion of black men from the

225 Ibid. 135.
226 Ibid., 136.
227 Ibid., 143.
228 Ibid., 144-145.
grand and petit juries was unconstitutional. In this case, the black defendant Seth Carter was on trial for the murder of his recently divorced lover, a black woman named Bertha Brantley. The defense motioned to quash the indictment on grounds that otherwise qualified African-American men, which made up one quarter of the population of the city and county of Galveston, were intentionally left off of the list of prospective jurors because of their race or color. The lower court denied the motion without allowing the defense to produce witnesses or evidence for the accusation of race discrimination in the jury process. Eventually, the Supreme Court reviewed the case, deciding that the court had failed to allow the correct procedure for allowing the presentation of evidence and “whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment.” Here, the Court noted the danger of race discrimination in jury selection for black defendants, not simply its unconstitutionality regardless of the race of the defendant. Additionally, the Court ignored the lower court’s argument that racial discrimination had no bearing on the trial since both the defendant and the victim were black. Intriguingly, this argument presumed that race discrimination in jury selection only had an impact on cases where the race of the defendant and the victim were different. This argument was not expanded to address the lack of women on the jury in a trial with a female victim and male defendant, most likely for two reasons:

230 Record of Transcript, Carter v. Texas, (177 U.S. 442), 1900.  
231 Ibid.
the structure of the court system made defendant’s rights the issue for these appeals, and those involved in the trial did not see sex discrimination in the same way they viewed race discrimination.

In 1904, Wilford H. Smith again presented arguments about race discrimination in jury selection on behalf of a black defendant, Dan Rogers. He contended that a recently revised section of the Alabama constitution disfranchised more than 75,000 African-Americans statewide and as a result disqualified them from jury service, infringing on his ability to have a fair trial with a grand or petit jury selected without racial discrimination. Having been charged with and convicted of murder and given a life sentence, Rogers appealed to the Supreme Court to rectify the violations to his Fourteenth Amendment right to equal protection of the laws. In a brief decision, the Supreme Court reaffirmed its earlier decision in *Carter*, applied it to this case, and reversed the lower court’s decision.232

Neither of these cases, according to Schmidt, signified a change in the Supreme Court’s narrowly construed arguments about the burden of proof needed by defendants to prove discrimination.233 The defense had to show explicit acts of discrimination by state officials in the process of selecting jurors. Other cases heard by the Supreme Court before the 1930s about race discrimination in jury selection continued a “theme of deference to state court fact-finding” and failed to make gains for black defendants from the South.234

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232 Not every jury service case that went before the Supreme Court in the early twentieth century was decided in favor of the black defendant. The evidence had to persuade the Court that discrimination had occurred (often through the use of testimony and demographic statistics) and not simply that the fact that no black men were on the jury meant that they were discriminated against in the process.
233 Schmidt, 1471.
234 Schmidt, 1471-1472; The cases referred to here are Martin v. Texas 200 U.S. 316 (1909) and Thomas v. Texas 212 U.S. 278 (1909).
In both *Carter* and *Rogers*, the Court ruled against the state because of procedural issues that prevented the defense from pursuing arguments against race discrimination in jury selection. In *Carter*, the Court found it unacceptable that the state prohibited the defense from calling witnesses to testify about the exclusion of blacks from juries. The short decision in *Rogers* contended that the state could not throw out the defense’s motion to quash the indictment because of race discrimination in the selection of the grand jury by calling it “prolix,” or superfluous and irrelevant.235 Outside of the *Carter* and *Rogers* decisions, the Supreme Court resisted reversing state court decisions for black defendants, arguing that the juries that indicted or convicted them excluded blacks from serving. The NAACP, particularly in the 1930s, recognized the severity and longevity of the problem of race discrimination in jury selection and the need for activism to combat it. The Court itself became more attuned to the arguments made by the defendants against the states.

The early-to-mid 1930s marked a shift in the makeup of the NAACP’s national legal circle from one consisting of primarily white lawyers to one that predominately featured African-American lawyers, most notably Charles Houston and, later, Thurgood Marshall.236 In fact, Charles Houston believed *Crawford v. Commonwealth of Virginia* (1933) would be especially important not only because it raised the issue of race discrimination in jury selection but also because it would be the first NAACP case to be brought by an all-black defense team.237 In this case, George Crawford faced accusations of murdering of two white women, though the state pursued only one of those charges in

235 Schmidt, 1470-1471.
his trial. Houston had at first successfully argued to prevent the extradition of George Crawford from Massachusetts because of the systematic exclusion of black jurors on the grand jury in Virginia that indicted him for the murder of a wealthy, white woman. He ignored the ACLU’s suggestion that a white woman lawyer should assist in the defense and that the ACLU should become involved to “offset the prejudices against the NAACP as an organization of colored people.”

Houston decided that black men would provide the defense on behalf of the NAACP in this case, regardless of the potential fallout from the community or jury because of their race or sex.

Before the trial in Virginia, Houston, along with Crawford’s local trial attorneys Butler R. Wilson and J. Weston Allen, hoped to prevent his extradition from Massachusetts, arguing against the systematic exclusion of black jurors on the grand jury in Virginia that indicted him. Wilson asserted that he wanted evidence that blacks had been excluded from juries in Virginia for decades and hoped he “could depend on the citizens of standing (colored men) to testify to the custom.”

In a letter to Walter White, Houston asked “would an intelligent Negro (the type of man whom the Judge stated he selected for his grand juries from the white list) have permitted the authorities to load the crime on Crawford,” considering the state of the evidence against him. Houston indicated the existence of an association between jurors and male citizens.

Houston’s arguments against extradition of Crawford hinged on the presence of race discrimination on Virginia juries. He, with Edward P. Lovett, investigated the
situation in Virginia, producing an affidavit confirming the existence of race discrimination in its jury system. In his correspondence to White, Houston revealed his hope that this extradition case might transform the jury system of the South, noting “it strikes me more and more that here is something big if properly handled in Boston.”

He explained that if this case set precedent, the South would be unable to extradite black men from the North without ending race discrimination in jury selection. Houston’s affidavit revealed that the court officials in Virginia knew that only white men appeared on juries. Those officials attributed the practice to custom and insisted that black defendants had not complained about the justice they received at the hands of these juries. The affidavit also revealed that these officials kept two racially-segregated lists of tax payers, drawing jurors only from the white list. The defense saw initial success with the decision of the trial judge to prevent extradition. Immediately following this portion of the trial a black man was selected to serve in a trial and a Virginia clerk of court announced the addition of twenty black men to the jury list. The NAACP reported that black jurors had been added in four southern states and that a white man had been fined for refusing to serve alongside a black man in Virginia. However, the appellate court reversed the favorable decision and the Supreme Court refused to hear the

241 Houston to White, 10 March 1933, NAACP microfilm, Part 8, Series A, Reel 6, 486.
242 Ibid.
244 “Colored Man is Seated on Jury for First Time,” Star, 12 June 1933, in NAACP microfilm, Part 8, Series A, Reel 6, 753.
245 Walter White to the Branches, RE Crawford Case, 20 October 1933, in NAACP microfilm, Part 8, Series A, Reel 6, 916; “Stay Granted Crawford Pending Appeal to Supreme Court, 17 July 1933, in NAACP microfilm, Part 8, Series A, Reel 6, 863.
case. When the final attempt to stop Crawford’s extradition failed, he returned to Virginia to stand trial.

In the fall of 1933, the NAACP all-black defense team began preparing to defend Crawford against charges of murdering Agnes Ilsley.\(^\text{246}\) After Crawford was extradited to Virginia, Houston argued before the state court that blacks were not on the lists of potential grand jurors, provided evidence that several qualified blacks lived in the area, and claimed that the system that allowed for the exclusion of blacks from the grand jury violated his client’s constitutional right to equal protection of the laws under the Fourteenth Amendment. The Circuit Court in Loudoun County (VA) overruled the defense’s motion, finding that since the jury commissioner did not deliberately consider race when making the lists his actions did not constitute racial discrimination.\(^\text{247}\) The indictment against Crawford stood; and the trial began with the \textit{voir dire} of the petit jury.

The underlying racial elements of this case first surfaced in the \textit{voir dire} of the petit jury. Leon Ransom, for the defense, questioned the pool of potential jurors, “May I ask you gentlemen whether. . . you believe you could give the evidence in this case, in which a Negro is charged with the crime of murder against a white woman, the same impartial treatment as if the situation were reversed.”\(^\text{248}\) None of the men responded, indicating that they believed themselves to be impartial. Additionally, the defense probed whether potential jurors belonged to any racist organizations, such as the Ku Klux Klan

\(^\text{246}\) Crawford faced trial for the murder of one woman, though another woman was found dead in the same place at the same time, and Crawford could have faced charges for that murder as well, though he did not during this trial. In fact, he declined an appeal after conviction because he worried that he might be tried for the second crime and sentenced to death; Along with Houston, Leon A. Ransom, Edward P. Lovett, and James G. Tyson comprised the defense team.


or whether they would favor the testimony of whites over blacks. Ransom asked these men whether they would trust the testimony of a white person over that of a black person. These first interactions between the defense and the jury showed the disadvantaged position of the defense because of race discrimination in the jury selection. The defense lawyers felt they had to ask these racially-charged questions to the prospective jurors in order to protect the defendant from discrimination and, perhaps, to highlight the increased possibility for unequal treatment of a black defendant by an all-white jury.

The defense, the prosecution, and the judge returned to discussions of race throughout the case. The defense interjected a discussion of race to probe the impartiality of the system and to question the fairness of the trial for the defendant. The prosecution used race to feign impartiality while constantly drawing attention to the blackness of the defendant and the whiteness of the victim. Additionally, Judge James L. McLemore opened the case by stating that he had “no doubt” that the defense, implicitly noting their race, would “be treated exactly like the white people” in this courtroom “if they conduct themselves properly.” The judge noted the hardships the defense council faced from the community and the potential for their inequitable treatment by the courts generally. Referencing a newspaper article that discussed the case, McLemore warned that “any man or set of men or any of those who undertake to form public sentiment are doing a distinct disservice to the community when they attempt to raise the question of race

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249 Ibid., 93.
250 Ibid., 102.
hatred or race feeling in the conduct of this case.”\(^{251}\) Yet, he also said that he could not “imagine the good people of this county giving themselves over to any sort of incendiary remarks or statements that would bring disrespect upon the county and shame and disgrace upon its name,” calling for them to remember that this case was “simply the trial of a man for murder to determine whether he is guilty, the same as in any other case of murder.”\(^{252}\) Only these statements indicate that it was not like a case involving a white defendant; the judge believed he needed to make these remarks for this trial of a black man.

The opening statement of the prosecutor vividly described the criminal offense, illuminating both gendered and racialized understandings of the event.\(^{253}\) John Galleher, Commonwealth Attorney for Loudoun County, described the brutal death of “a most charming lady” in their “quiet little town.” He explained that her blood-covered body lay face-up with her arms extended over her head and “nude from her breast down.” Her skull and chest were beaten, and the coroner found under her fingernails “Negro skin and Negro hair”—which one doctor, Oscar B. Hunter, later described as “two little crinkly hairs” that were “not the same structure as [the victim] Mrs. Ilsley’s hair.”\(^{254}\) After being questioned further about the skin cells he discovered under the fingernails, Hunter explained that the pigment is the only difference between white men’s and black men’s skin, but one can “look at it and immediately differentiate the skin of a white man from that of a colored man.” He continued by creating a dehumanizing comparison between

\(^{251}\) Black lawyers in the South, especially those fighting cases for the NAACP or racial equality, faced violence during their activities, sometimes requiring protection from white community members; NAACP papers, Crawford, 101.

\(^{252}\) Ibid.

\(^{253}\) Charles Houston waived his opening statement.

\(^{254}\) Papers, Series 8, Part A, Reel 17, Transcript of Record Crawford, 145.
black skin and animal hide: “You probably might have some difficulty if you had a black animal,” though failing to follow up with more discussion other than that this understanding becomes “too technical to go into here.”255 Finally, Hunter was asked repeatedly about how he collected the material, studied it, and determined whether it came from one of only two options—“a white man or a black man.” He said with certainty, “It was a black man.” During his cross-examination, Hunter modified his earlier statements about race, claiming that the skin was that of someone from a “dark-skinned race” that could potentially include the “Indian.” He continued by saying that the skin he found was not that of “a very black man but a moderately dark-skinned individual,” and made comparisons to others in the courtroom to demonstrate the shade of skin to which he was referring. Of course, according to the doctor and prosecution, the color of the perpetrator was scientifically proven through tests, but the sex of the perpetrator was an assumption made without question by all involved in the proceeding.

Also revealing contemporary understandings of gender stereotypes, the coroner was questioned and cross-examined about the placement of the bodies, the injuries that caused the death, and the general occurrence of events. Houston asked him if there was a “sex element” to the crime, and he answered “I understand not.” Houston asked the coroner to describe the physicality of the “ladies.” He described them by height, weight, and age, and additionally, mentioned one of them to be “fair” and both to be “healthy” or “apparently healthy.”256 Interestingly, even though the testimony in the trial centered on women, their bodies, and the looming question of sexual impropriety or assault

255 Ibid.
256 NAACP Papers, Series 8, Part A, Reel 17, Transcript of Record Crawford, 129.
(strengthened by the universally accepted assumption that the perpetrator was male), no statement presented questioned the absence of women from the trial process. Instead, the proceedings positioned women as passive victims needing protection not through participation but through state intervention. Those in the courtroom believed that the perpetrator must have been a man, even though they questioned whether sexual violence occurred or not. The women were voiceless victims, described in detail as submissive entities, whose only hope at justice was through the prosecution of the defendant. The all-male jury had a duty to ensure that crimes like this one, especially man against women, did not happen without consequence. The court became a paternalistic arm shielding women from (possible or potential) sexual violence.

Similarly, the justice system most often positioned black men in passive roles—those of witnesses and defendants. Even when black men served as lawyers, they did not wield the same control as a judge or jury. Yet, unlike women, black men in the courtroom stereotypically faced persecution, not protection—being viewed as threatening or criminal. Houston articulated the importance of pursuing cases of racial discrimination at the end of this case, stating that African Americans “can only hope to rise by convincing you [the judge and white community] that we are entitled to and are able to share in your institutions without endangering them.” He continued by stating that he realized that the community had to be behind such a transformation and that he did “not expect to see things completely changed overnight.” After less than three hours, the jury convicted George Crawford of murder, sentencing him to life in prison rather than to death.

257 NAACP Papers, Series 8, Part A, Reel 17
Houston and others believed the defense saved Crawford from a death sentence.\textsuperscript{258} Because of this outcome, Crawford decided not to appeal and risk being tried of the murder of a second woman and sentenced to death. Houston and the rest of the defense respected and understood Crawford’s decision; however, others questioned whether the decision not to appeal would hurt the fight for constitutional protections regarding the jury question. For Crawford, the decision was a success, but it also revealed the compromised position black men faced in the judicial system, and the continued need for activism to secure the constitutional protections in actuality that had already legally been granted to them. The NAACP, especially Houston, noted that the fight was far from over, and that the NAACP would continue to make efforts to protect black defendants from unconstitutionally selected juries.\textsuperscript{259}

Ironically, however, the NAACP was not the leading organization in the first landmark Supreme Court case to involve the question of race discrimination in jury service policy since Reconstruction. In 1935, one of the famous Scottsboro cases, \textit{Norris v. Alabama}, became perhaps the best known jury service case of the 1930s. The International Labor Defense, a leftist workers’ organization that strove for racial equality and equity, competed with the NAACP and other organizations not only for black activists and lawyers but also for the position of defending the eight black boys convicted and sentenced to death for the rape of two white women in Alabama. The NAACP divided internally over how to interact and whether or not to support the ILD in this important case. Some NAACP members refused to work alongside the more radical

\textsuperscript{258} McNeil, \textit{Groundwork}, 94.  
\textsuperscript{259} McNeil, \textit{Groundwork}, 100-103.
organization, because they were concerned about associating the NAACP with Communists or leftist radicals. Others in the NAACP, especially Charles Houston, supported the ILD’s efforts, particularly hoping that the Scottsboro boys would be redeemed through appeal and the corrupt and racist practices of the Southern criminal justice system, including its jury selection process, would be exposed.\textsuperscript{260}

This case marked the shift of the Supreme Court’s position from deferring to states’ authority to one more concerned with protecting the constitutional rights of African-American men to juries constructed without racial discrimination.\textsuperscript{261} The Alabama State Supreme Court ruled that no reversible errors threatened the defendant’s constitutional rights during the trial and that the defense failed to prove that the omission of names of blacks from the jury rolls demonstrated that race discrimination had occurred in the process. The US Supreme Court reversed that decision, emphasizing the sufficiency of “the evidence that, for a generation or longer, no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that . . . their names would normally appear on the preliminary list of male citizens of requisite age, but that no names of negroes were placed on the jury roll.”\textsuperscript{262} This decision bolstered the ability for black defendants to prove the existence of race discrimination in jury selection. Additionally, the Court noted that several black men in the county met the qualifications for jury service, including “men of intelligence,” college graduates, businessmen, property owners, and heads of households.\textsuperscript{263} Here, the Supreme Court

\textsuperscript{260} Ibid., 107-122.
\textsuperscript{261} Schmidt explained the lull in Supreme Court activism on the jury issue between Reconstruction and the mid-1930s.
\textsuperscript{262} Norris v. Alabama (294 U.S. 587) 1935.
\textsuperscript{263} Ibid.
strengthened and reaffirmed its commitment to the principles underlying the 1880 *Neal v. Delaware* case, which prohibited discrimination by public officials in the selection process. According to the Court, the simple assertion of the state officials that race or color was not a factor in their selection of petit or grand jurors or in their construction of the jury roll did not hold up against the testimony and evidence of the absence of black jurors presented by the defense.264

In the wake of the *Norris* victory, the NAACP brought its own jury service case before the Supreme Court—the first Supreme Court case on jury service for the organization in the 1930s and the first appeal to the Supreme Court made by a defense counsel comprised solely of African-American lawyers. Charles Houston appealed *Hollins v. Oklahoma* (1935) to the Supreme Court on behalf of Jess Hollins, a black defendant convicted of the rape of a seventeen-year-old white girl, Alta McCollum.265 Sentenced to death by electrocution, Hollins relied on his defense to appeal to the Supreme Court to save his life.266

Before the Houston took up the appeal, Hollins’ local white attorney E.P. Hill pointed to the race discrimination that inhibited Hollins from equal participation in the Southern criminal justice system. Hill argued that mob violence and the local context prohibited him from getting a fair trial. Because Hollins was black “and the crime [was] alleged to have been committed upon a white woman, and that naturally great feeling and

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264 Houston was much more supportive of the ILD than most in the NAACP, though individuals’ opinions ranged widely. He even provided legal assistance to some of the defense lawyers at one particular juncture in the trial. He felt bad he could not do more.

265 Hollins v. Oklahoma, Transcript of Record, 8; In 1932, the Court of Appeals in Oklahoma granted Hollins a new trial, finding that he had been intimidated by a mob and could not voluntarily waive his constitutional rights. This trial was his second trial.

prejudice existed at the time, and still exists in Creek County, Oklahoma, where this cause [was] pending, to such an extent that he cannot secure a fair and impartial trial guaranteed to him. The District Court granted his request for a change of venue, moving Hollins to another county in Oklahoma.

The local black newspaper editor and Oklahoma NAACP Branch President, Roscoe Dunjee publically defended Hollins and coordinated with the NAACP’s local white lawyers and national office in the trial’s appeal in order to illuminate the racial inequalities black men faced in the justice system, especially in trials with white women victims. Dunjee believed that “Jess Hollins happened to have an illicit relationship with a white girl who grew angry with him,” but he was not guilty of rape. He noted the inequitable standards by which a white man and a black woman caught in an affair face only misdemeanors. “Before judge, jury, and sheriff, a horrible crime has been committed when a Negro man is found even to be associating with a white girl,” Dunjee said, “while great derision and laughter are vented when the same immoral relationship is exposed between a white man and a colored girl.” Not only does Dunjee use “girl” to describe adult women in an effort, possibly, to reduce their culpability in these scenarios, but he also characterized this case as “the fight of the NAACP. . . to insure for black men the same type of justice in the courts as is meted out to other citizens.” Furthermore,

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267 Hollins, Transcript, 12.
268 “Jess Hollins Granted Stay 30 Hours Before Execution,” in NAACP microfilm, Part 8, Series A, Reel 9, 313-314. Houston secured the stay in August 1932, and the NAACP defended Hollins thereafter. At this point, the ILD left the defense. Hollins first trial, with defense by the ILD, was voided because of its questionable nature, having taken place in a jail without defense council. See, “Hollins’ Death Sentence to US Supreme Court,” New York Age, 3 March 1934, in NAACP microfilm, Part 8, Series A, Reel 9, 287.
270 Ibid.
271 Ibid.
Dunjee argued in the *Black Dispatch* that the trial showed really “progress and the growth of manhood spirit,” underscoring the importance of this trial and discrediting the black rapist myth as a victory for black men.\(^{272}\)

In the 1934 trial, E.P. Hill and another NAACP-affiliated, white lawyer, R.N. Redwine. They worked to insulate their client from the racial double-standard that presumed black men culpable in rape cases with white women victims.\(^{273}\) In *voir dire*, Hill asked each potential juror two questions: whether he could give a black defendant the same consideration he would give a white defendant in this case and whether the notion that a black man allegedly assaulted a white woman would cloud the ability for him to render an impartial verdict. To both of these questions, each juror responded that race would not play a role in his decision-making.\(^{274}\) Finally, the defense also maintained that since no black jurors were called for service and the victim of the crime was a white woman, Hollins could not have an impartial trial.

At trial, the defense used demographics of the county and the testimony of white and black male residents to show that black men had been excluded from the jury. Hill argued that “more than one-fourth of the inhabitants and more than one-fourth of the legal electors of Okmulgee County are persons of color or African descent, known as negroes, and are qualified jurors” but excluded from service on the basis of race or color by the commissioners of the county. In presenting evidence of this discrimination, Hill

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\(^{273}\) Smith supposed that “between 1935 and 1944, the number of black lawyers in Oklahoma declined, perhaps because of the continued exclusion of blacks from juries.”; He also mentioned that he found no record of a black woman being admitted to the Oklahoma bar before 1945; See J. Clay Smith, *Emancipation: The Making of the Black Lawyer, 1844-1944*, University of Pennsylvania Press, 1999, 510-511.

\(^{274}\) Hollins v. Oklahoma, Transcript of Record, 120-148.
first called the trial judge, Mark L. Bozarth, to the stand, asking him how many black jurors he had seen in his courtroom or known about in other courtrooms and how jury commissioners select jurors. Bozarth admitted that he had never had a black man serve as a juror in his courtroom and could not recall any others serving; moreover, he admitted that he relied on jury commissioners to select jurors from tax rolls. Hill then moved on to question the sheriff, John Lenox, who admitted he had never called a black man for service. He reasoned that none had been called, because “we had better qualified jurors in the ones I summoned.” He explained that by “better qualified” he meant they had “a higher sense of citizenship—not talking about color, just talking about special fitness.” Hill also relied on the testimony of two black men, a newspaper editor and an attorney, from the area about the absence of black jurors. The black attorney responded to one of the prosecution’s questions by estimating that only about a fifth of the black voters registered in the area were women, implying that more than enough black men could qualify for jury duty. All of this testimony provided the defense with the grounds for appeal. It illustrates the effort to show black men as qualified and rightful recipients of full citizenship and white officials’ refusal to extend full citizenship to black men.

In his argument for the state, County Attorney Sebe Christian constructed a narrative that highlighted the race of the defendant and the victim. He explained that he wanted the jury to know that the prosecution of Hollins was not “because he is a negro and the girl he assaulted, a white girl.” He followed up this point by indicating that “rape is rape, whether committed by a negro man upon a negro woman, or upon a white

275 Ibid., 43-45.
276 Ibid, 47.
277 Ibid., 74.
Christian mentioned that the race of the woman did not matter in rape cases, but failed to mention that the race of the defendant would not matter in these cases either. He also appealed to the conventional stereotypes in his narrative, stating “When he [Hollins] held that little girl with brute strength . . . [he] raped her not one time not two times, but three times.”

Finally, Christian also presented a lengthy oration about how McCollum did not have consensual sex, claiming that the use of force, her screams, and the lack of witness testimony to deny it proved that the rape “stands unimpeached and undenied.”

Christian also appealed to the jury as men. He flattered the jury, claiming the men were model jurors and complimenting them on the quality of their service. He proclaimed, “You are all intelligent men, reasonable men.” Emphasizing the need to protect the fragile female victim, Christian appealed to the jurors’ masculinity and urged them to meet their civic obligation:

If you bring in a verdict, as American citizens, with the sting of truth on your lips, and the gleam of manhood in your eyes, that a man, white or black, can’t do these things, and expect to get any sympathy from juries in this county, you can retire to your homes with contentment and peace of mind, before God, that under your oath as jurors, you had the intelligence to see your duty, and the manhood to do your duty.

He focused on the sense of “manhood” and duty to protect this woman and other white women from the violent acts of men through the state-sanctioned, legitimate process of rendering a jury verdict. The alternative to a conviction with a death sentence, Christian believed, was the possibility the defendant might escape, be freed, or killed by those

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278 Ibid., 309-311.
279 Ibid., 314.
280 Ibid., 316.
281 Ibid., 309.
282 Ibid., 319.
outside the justice system. According to his statement, the legal system could defend innocent white women, promote the citizenship of white men (through their service on juries), and legitimately (at least in appearance) punish black men—in other words, sustain and reproduce conventional race and gender hierarchies.

The closing statements for the prosecution also illuminated the wide impact race and gendered assumptions had on shaping this trial. While Christian mentioned race several times in his opening remarks, Sam Cunningham, the assistant county attorney of Creek County, also made similar claims in the state’s closing remarks. He did so in ways that were seemingly to discourage jurors from using race as a factor in the case—all the while reminding them of it. Yet, near the end of his closing, he interjected, “but you know the laws of this state don’t permit whites and blacks to marry or intermarry. There is too much difference in nationality there, too much difference. They are of African descent, [sic] we are Caucasians, and the law says we shall not cohabit.”283 Cunningham emphasized the “differences” between the races, confirmed the appropriateness of race segregation, and the importance of legal restrictions on the relationships, especially romantic or sexual ones, between blacks and whites. Additionally, in his closing, he promoted the idea of the defenseless, young white woman who needed protection from this man and his brutal attack. He argued:

“Listen, my fellow citizens! A woman’s virtue is the most precious thing on earth to her. Rob her of that, you rob her of the most precious thing God Almighty gave her—rob her of that, and these ravishers of woman’s virtue, will follow her like dogs after a hot bitch, and you know it. What would you feel like doing, if it was a white man, meeting an innocent girl—what would you feel like doing? You might give him the death

283 Ibid., 326.
penalty, if it is one of the cases you feel like doing it, all right. This is a white girl over there. . . she was as pure as any woman in Oklahoma.\textsuperscript{284}

He insisted on the quality of her reputation, and stressed her “purity” as a factor in recognizing that a crime was committed against her. Also, in response to the testimony of black men and a black woman for the defense, Cunningham showcased the supposed damage the \textit{white} victim endured: “that her good name has been dragged in the mire. . . that she has been accused of associating with negroes, drunk, sprawled out on a nigger dance floor.”\textsuperscript{285} Dismissing the testimony of African Americans in the case, he emphasized the added harm to her reputation done by the defense, which insisted that she willingly associated with blacks.

The defense argued that the exclusion of black men from juries and highly racialized remarks by Christian and Cunningham prevented Hollins from obtaining a fair trial. With the State Supreme Court ruling that the defense failed to meet its burden of proof, the defense, now headed by Charles Houston and backed by the NAACP, filed an appeal with the Supreme Court in 1934. In this appeal, Houston explained that the jury commissioners excluded any qualified black men from serving and accused the state of making “repeated inflammatory appeals to race prejudice” despite the defense’s objections.\textsuperscript{286} He stated that proof of exclusion had been made by the defense, including a notation of the demographics of the area: Okmulgee County was 17% black, contained 800 or 900 black voters, of whom about only one-fifth were women (and therefore not

\textsuperscript{284} Ibid., 326.
\textsuperscript{285} Ibid., 328.
\textsuperscript{286} Charles Houston, et. al. “Petition for the Writ of Certiorari to the Supreme Court of the State of Oklahoma and Brief in Support Thereof, in Hollins v. Oklahoma 295 U.S. 394 (1935), Supreme Court October Term, 1934, No. 686, 2.
eligible for jury service).287 Furthermore, Houston cited the prosecution’s statements as appealing to racial prejudice. He noted Christian’s plea: “I am not asking for the death penalty because he is a Negro, and the girl a white girl. Those are just circumstances for you to consider,” and his discussion of “defenseless little white girls” like “your girls or mine, or our wives” who might be “assaulted by some Negro or white man, taken in the woods, at the point of a gun, and raped and ravished and torn”288 Although Houston did not discuss the gendered elements apparent in these statements, the prosecution’s closing arguments relied on emphasizing interracial, sexualized encounters to promote the need to protect stereotypically-represented white women from black men, with the intention of reinforcing racist presumptions about black men and the consequence of reinforcing the patriarchal role of the legal system, especially the white male jury, to protect white women.

For Hollins, however, the success of his Supreme Court appeal was quickly tempered by the outcome of his third trial. The Court decided this case by issuing a per curiam decision, reversing the decision of the appellate court and noting the defendant’s Fourteenth Amendment rights had been violated.289 Hollins was entitled to a new trial—one free of racial discrimination in the selection of its juries. In 1936, another all-white jury in Oklahoma convicted him, sentencing him to life in prison. He remained imprisoned until his death in 1950. Perhaps, not wanting to chance a death sentence, Hollins did not appeal. The NAACP campaign successfully set a precedent but failed to

287 Ibid., 12.
288 Ibid., 15.
289 A per curiam decision is one that is issued by the Court as a whole and are unsigned. This decision referred to the precedents set in Neal v. Delaware (1880) and one of the Scottsboro decisions, Norris v. Alabama (1935).
change the circumstances for Hollins. He got a new trial but still faced an all-white jury in a racially-charged atmosphere. The precedent itself would not be enough to ensure fair trials or discrimination-free jury decisions.\textsuperscript{290} States could circumvent real changes to the system by adding the names a few blacks to jury lists and either rarely calling them, using preemptory strikes to remove them, or intimating them to keep them from serving.\textsuperscript{291}

After Houston made his appeal to the Supreme Court in \textit{Hollins}, he continued his campaign for jury service obligations by researching how often the legal obligations for black men to serve (as confirmed by the Supreme Court decisions) were realized at state and local levels. From February through April 1937, the NAACP collected data on the rate of black men serving on juries, particularly in the South, drawn from the responses of men and women in charge of numerous NAACP branches, lawyers, and newspapers across twenty-three states. In tracking these numbers, Houston would be able to gain insight into the effect of the Supreme Court decisions in \textit{Norris} and \textit{Hollins} on the legal realities of black men in the criminal justice system.\textsuperscript{292}

Houston received relatively few responses, and they varied widely. Many offered one or two instances in which a black man served or was called to serve (but dismissed) in at least one locale, often on petit or grand juries. Very few reported instances where black men served on coroner’s juries. The vast majority of the responses recognized the discrimination against black men in the jury selection, though specifying various degrees of discrimination. Lawyers from locales in some states, such as Delaware, reported never having known about a black juror serving before or during 1935 or 1936. A few claimed

\textsuperscript{290} Cummins, ""Lily-White' Juries on Trial,"" 166-186.
\textsuperscript{292} NAACP Papers, Part 8, Series A, Reel 15.
that racial discrimination was not apparent. For instance, West Virginia lawyer, Harry J. Capehart, explained that “there is no discrimination in Negroes serving on juries anywhere in this section of West Virginia,” finding sometimes that as many blacks served on a jury as whites.293

The results of this survey uncovered the expansive national network the NAACP employed in its campaign for jury service (and its less than perfect coordination). Men and women—both inside and outside the legal profession—across the South aided the national office by providing information, resources, and support. However, this network relied on the initiative of those local branches to respond, illustrating the sometimes fragmented participation and, perhaps, the lack of immediacy felt about the issue of jury service by those not directly invested in the trial of a black defendant.

More importantly, the results of the survey, piecemeal as they were, revealed the overwhelming amount of discrimination African Americans faced on juries across the South (as well as in a few other locales). Most likely, almost every black defendant tried in a Southern courtroom would have had his constitutional right to a jury selected without racial discrimination abridged. The survey emphasized how much experience depended on locale. Blacks in certain sections of states faced more or less discrimination than those in other areas of the same state. So, while this survey highlighted the immense need for action to get blacks on juries, it also underscored the complicated nature of launching a campaign against a practice with so much local difference in policy and practice.

Not long after the Hollins case and his survey of black jurors across the South, Houston found another jury service case for the NAACP to support. In this case, Hale v.

293 Ibid.
Kentucky, the jury convicted a nineteen year old, “illiterate, destitute” black defendant, John Hale, of murdering a forty year old, white man, T.R. Toon. 294 An all-white grand jury indicted Hale, and an all-white petit jury convicted him and sentenced him to death.

The events surrounding this crime were unusual, although like the earlier NAACP cases in Hollins and Crawford, shaped by contemporary notions of race and gender hierarchies. The police found Toon, dazed and bleeding, hunched over in the front seat of a car. The stabbing occurred shortly after Toon had allegedly called out to a black woman from his car, “Hello, girlie. Let’s go riding,” and “accosted” two other black women on the street. 295 After one of the black women, Eugenia, told John Hale about the white man who called out to her from a car, Hale stated he had seen the car of this man “who has been stopping colored women and asking them to get in his car.” Hale admitted to confronting Toon, insisting that he “quit stopping these colored women,” but maintained that he did not hurt him. 296

Unlike cases where black men were accused of raping white women, this trial pitted Hale against a white man in order to protect black women. The potential sexual connotations of the white man enticing black women into his car did not have the same power in court. Toon, the white man, was the victim here, and the prosecution questioned whether he actually harassed these black women. More surprisingly, however, while the defense did offer testimony of the women Toon allegedly “accosted,” they too were careful not to place too much emphasis on the situation as it pertained to race and sex stereotypes or the position of black women in society.

295 Transcript, Hale, 61; Petition, Hale, 9.
Instead, the defense focused on the state’s violation of the defendant’s constitutional guarantee to equal protection of the laws by arguing against the race discrimination they believed to be apparent in the selection of jurors. Relying on the testimony and evidence presented in the original 1936 trial, Charles Houston appealed the case to the Supreme Court, hoping reaffirmation of the constitutional protection that guaranteed that black men could not be disqualified from jury service based on race or color. In 1938, the NAACP lawyers, including Houston, Leon Ransom, and Thurgood Marshall, argued that Hale’s constitutional rights to equal protection of the laws under the Fourteenth Amendment had been violated by the McCracken County’s exclusion of qualified blacks from the jury pool. They showed that McCracken County had 48,000 people of which approximately 8,000 were black. Of that population, 6,000 whites and 700 blacks were qualified for jury service, though blacks virtually never became jurors in the previous fifty years.\(^{297}\) Statements of sheriffs and jury commissioners serving in the county between 1906 and 1936 bolstered the defense by confirming that no black men had served on a jury in the county over those thirty years.\(^{298}\) Furthermore, the defense argued that no potential juror disqualified from serving for statutory reasons was black, showing that blacks were left out of the process intentionally and entirely.

From the start of trial, the prosecution did little to rebut the arguments made by the defense concerning the presence of race discrimination in jury selection. The prosecution stipulated to the testimony about the lack of black men serving on juries over the previous three decades. The prosecution failed to produce any evidence contradicting

\(^{297}\) Certiorari, Hale, 2; The defense stipulated that allegedly only blacks served on a special jury in 1921 that was summoned to try an African American. However, the names of these jurors were not a part of the regular jury list and were not selected in the regular fashion.

\(^{298}\) Petition, Hale, 14.
the defense’s position. Even though the defense’s arguments went unanswered, the Court of Appeals affirmed the decision, citing, in part, a technicality in the Clerk of Court’s filing of the motion to set aside the indictment. More importantly, and similar to the appellate court decision in the *Hollins* case, the Court of Appeals reasoned that the defense had not proven that “all qualified Negroes were excluded from the jury panel *solely* because of their race or color.”

Despite earlier jury service cases reversed by the Supreme Court, it agreed to hear this case on appeal in 1938. In a per curiam decision, it decided that the evidence offered by the defense, because it was not countered by the State, “sufficed to show a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color.” Citing earlier decisions in *Neal, Carter, and Norris*, the Court reversed the decision, claiming that the jury selection process violated Hale’s Fourteenth Amendment right to equal protection of the laws.  

*Hale* showed not only that the *Norris* and *Hollins* cases would not be sufficient to change the actual experience of black men in the courtrooms of the South. Defendants could effectively make these arguments about the unconstitutionality of race discrimination, facing very little response from the prosecution and little resistance from state courts. Overall, Southern prosecutors seemed unconcerned that these decisions might significantly alter their courtroom procedures. So, the NAACP would continue the campaign to secure juries constructed without race discrimination.

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299 *Hale v. Kentucky* (1938)
300 Ibid.
301 The NAACP was asked to participate in another jury case that made it before the Supreme Court in 1939. Thurgood Marshall declined to work on *Pierre v. Louisiana*, noting that he believed it did not have a good chance of making it to the Supreme Court and delivering a useful, new precedent on racial equality.
The NAACP in the 1930s became a major player in the campaign to secure jury service obligations for black—a necessary venture for making the criminal justice system, particularly in the South, a fair institution for black defendants. Particularly under the guidance of Houston and with the aid of Thurgood Marshall, the NAACP Legal Committee supported several cases, some of which made it to the Supreme Court. They refined arguments about how defendant’s Fourteenth Amendment right to equal protection of the laws had been violated through race discrimination in jury policy. Demographic evidence, testimony, and evidence of a history of discrimination became the backbone for most of these cases. Though the Supreme Court began to reaffirm the constitutional rights to a jury constructed without race discrimination, the continued resolve of the NAACP to push these cases to the Supreme Court indicates the importance of the issue and the continued need to legitimize these rights because of their lack of enforcement.

Though equal obligations to jury service regardless of race or color came from Reconstruction-era policy, these 1930s cases continued to reaffirm African-American men’s constitutional rights to jury free of racial discrimination and revived the Supreme Court’s commitment to securing black rights to jury service obligations. In contrast, women could not count on the Supreme Court to mandate that they serve on juries under the same obligations as men, nor did all women believe they should have equal obligations. Women had to delegitimize, at least in part, notions of gender difference that underpinned the sexually discriminatory policies impeding their access to the jury before gaining legal access to serve, even though, as most of these cases show, women played substantial (though peripheral) roles in these trials. White women were the (alleged)
victims in many of these cases. Black women supported the black defendants outside the courtroom and testified in the trials. Yet in these cases, the defense focused on race discrimination, even when noting sex discrimination existed. In fact, gendered assumptions and sexual stereotypes often reinforced notions of racial difference or the importance of racial segregation (as emphasized through sexual relationships between men and women of different races).

Just as the NAACP resisted opening up questions of sex discrimination in jury policy, women’s organizations centered on sex discrimination but avoided race discrimination in their campaigns to access juries. As the following two chapters will illustrate, neither the National Woman’s Party nor the League of Women Voters, two women’s rights organizations, joined with the NAACP in efforts to end discrimination. In fact, the NWP distanced itself from the NAACP, and, at times, its leaders explicitly denounced black women’s equality. The League of Woman Voters was more receptive to NAACP outreach, though it did little to follow through with any real commitment to inclusiveness, activism for racial equality, or reform.302

302 Berg, 33-35.
Chapter 4: “A Sordid Burden Which He Preferred to Withhold”: The League of Women Voters’ State Campaigns for Compulsory Jury Service Obligations for Women

A voice rose from the crowd, “But who will get my supper if my wife serves on a jury?” The concerned, potentially hungry husband asked this question to Catherine Waugh McCulloch, a pioneer woman lawyer and recognizable suffragist. McCulloch was also a national leader of the League of Women Voters and one of many members of the League of Women Voters campaigning for women jury service obligations in Illinois in the 1920s and 1930s. During these campaigns, she gave speeches and addressed the public’s concerns about women jurors, all the while appealing to men and women to support state jury bills. In response to this particular question, she suggested a practical solution: “Take a dollar of the five your wife earns as a jury woman and buy yourself a meal.”

Catherine Waugh McCulloch chaired the League’s Committee on Uniform Laws Concerning Women, which was the first League committee to oversee jury service legislation in the early 1920s. During her tenure, McCulloch wrote an article about women’s jury service for a 1921 edition of the Woman Citizen. In it, she not only offered a general history of the jury trial and common selection procedures but also explained how the Nineteenth Amendment alone was insufficient to provide women with jury service obligations.

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obligations in most states. Echoing the demands of civil rights activists to end race
discrimination in jury service, McCullogh argued that female defendants needed women
jurors. Unlike the black activists, however, she foregrounded the connection between
women’s access to jury service and their realization of a more complete citizenship.
McCullogh adamantly opposed making jury service for women optional—a common
alternative policy option—calling that notion “absurd!” She believed that “jury service
should no more be optional than is the payment of taxes or army service.” Finally,
McCullogh stated that “no longer should women coax men for justice,” but “by the
power of their ballot,” women should “demand jury service for women,” especially since
“injured women need women jurors.”

McCullogh’s role and writings showcase the marriage between the National League’s vision and guidance and the State Leagues’
action and adaptability.

While Illinois League women briefly tasted success between November 1930 and
May 1931, when the State Supreme Court declared women’s exclusion from juries
unconstitutional, their campaign for jury obligations for women lasted nearly two
decades. A continuous local campaign fused together women’s organizations in a
common fight for access to juries. This feminist movement found substantial opposition
throughout its efforts. Even by 1939 when women jury bills passed in the state, one
legislator “declared his opposition” to the jury bills “on the grounds that women were
asking for the privilege of serving on juries and it was no privilege at all but a sordid

304 Catherine Waugh McCulloch, “Women Jurors” Woman Citizen, October 2, 1920, in Records of the
burden which he preferred to withhold." Finding the preeminent argument against women jurors to be that “a woman’s place is in the home,” League members constructed arguments based in a maternalistic framework that made women’s activities in the community directly connected to and inextricably interwoven with their domestic duties. Women’s more moderate claims to be “fit” citizens with unique qualities and their admonishment of special privileges excusing them from service contrasts with the claims made by black defendants made vulnerable by an unjust system.

The Illinois situation provides a unique case to illustrate the potential complications of having a women’s organization promoting the education of the citizenry—and particularly that of women—while fighting for women’s obligation to service as equals with men. For the League women, proclaiming women’s equality with men without need for special exemptions and emphasizing women’s need for education and encouragement became simultaneous objectives in Illinois. This aspect of the League’s campaign—the perceived need for women’s instruction—separated the League’s approach from the NWP’s emphasis on women’s inherent equality. It also reveals contrasts with the strategy of black men in the NAACP, who regularly produced black men to demonstrate the availability of individuals “fit” for service. This tension between the League’s pursuit of equal citizenship duties for women (despite their presumed gender difference) and its strategy to prepare women for jury service through instruction inherently colored the League’s dealings with the jury service issue.

Ultimately, this tension led to the 1942 Supreme Court decision in \textit{Glasser v. United}

\begin{footnotesize}
306 Ibid.
\end{footnotesize}
States, which found the practice of stocking jury lists only with women who attended League jury schools unconstitutional.

Despite the peculiarities of the situation with the Illinois League women’s education programs concerning jury service, their activism offers insight into the many League campaigns to make women eligible jurors. Unlike the NAACP campaign to eliminate race discrimination in juries to protect the lives of African-American men, these female activists promoted women’s jury service as an avenue to improve the justice system and the status of women, more generally. Like the activism of the National Woman’s Party, the various jury service movements undertaken by state and local Leagues began soon after the passage of the Nineteenth Amendment in 1920 and continued into the 1960s. While the individuals and a few of the tactics varied, League women often shared information and materials across state lines, via the National League of Women Voters, which kept tabs on the status of all of the states. The numerous local Leagues also had a mutual outlook on the issue—namely that women had an obligation to serve on juries as a consequence of their citizenship, that jury service for women should be compulsory and not permissive, and that women should receive these rights through state legislation focused on the issue. League members agreed that efforts must be made to make the public, and in particular women, responsible and educated citizens—a goal that made their work on women’s jury service extend beyond the achievement of local legislation and an objective that mirrored the organization’s overall approach to promoting good government and responsible civic engagement. This activism provides a glimpse into the strategies and coordination of women’s organizations into a feminist
movement focused on jury service campaigning during a period where the women’s movement has been typically denoted as fractured, ineffective, and unfocused.  

The National League of Women Voters adopted women’s jury service as a central issue in the decades following the achievement of woman suffrage in 1920. In the April 15, 1926 edition of a League publication, The Ballot-Box Review, one headline read: “Legislature Grants Jury Service for Men.” In contrast to the deeply solemn claims made by civil rights activists, women campaigning for jury service integrated humor into their demands for equality, highlighting the significant distance between the perceived implications of race discrimination and sex discrimination. This spoof paper covering the National League’s efforts contained an article that illustrated the absurdity League members saw in excluding women from juries. The article turned the woman-juror issue on its head, that reporting the “stormy debate” ended with men gaining the right to serve. The arguments listed in favor of such action, however, sounded familiar: “Men and women are equal but not identical;” juries should be representative of the wider community; and “men jurors are needed in cases involving men and boys.” The article also pointed out that juries convened for not much longer than “the average poker party or golf game.” A judge offered his recommendation for the change, noting that the public should show confidence in its men and not worry that “the chance contact with a few special cases for a limited period will besmirch the manhood or enfeeble the mentality of our men.” While most League materials on women’s jury service do not satire women’s situation, many do involve some humor. League members, however, took the issue itself

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307 This chapter contributes to the work scholars have done on feminism in the “doldrums.” See Cott, Rupp, Cobble, Hartmann, and Meyerowitz for prominent examples in this literature. My work complements the historiography, by indicating the cooperation of women’s groups on the issue of women’s jury service, despite deep ideological divide and the fracturing over support for an Equal Rights Amendment.
quite seriously, believing that women needed equal obligations to serve. So, the National League prompted many state and local Leagues to campaign for jury service legislation throughout much of the first half of the twentieth century.\textsuperscript{308}

Not long after women became eligible voters in 1920, the League of Women Voters began funneling energy into the process of training woman citizens in their rights and duties. In the early 1920s, those efforts included ones focused on understanding jury service laws in each state and ones that attempted to make women eligible for service.\textsuperscript{309} Mrs. George Gellhorn, Vice Chairman of the League’s Department of Organization and Citizenship Training in 1921, wrote about these efforts. She found that League members organized in every state “from coast to coast, from the lakes to the gulf” and that these state and local leagues had memberships numbered in the thousands. The League, she believed, had “but one ultimate object—to vivify political experience for women” for the benefit of the public and the nation. Most importantly, however, Gellhorn found that “citizenship schools have been the slogan for every state as it organized,” and she hoped that every state would eventually build such a program.\textsuperscript{310}

Unlike their position in some other policy issues (like protective legislation or the Equal Rights Amendment), members of the League of Women Voters believed that women should have equal and the same obligations to serve on juries. League women


thought that the best method to achieve this form of equality was through legislation “secured in each state measure by measure, each one based on careful study of existing law,” and not through “blanket legislation.” As Maud Wood Park described the policy of the League of Women Voters in 1922, the strategy assumed by the League was “that of a doctor, who first diagnoses his patients’ ailments and then prescribes the specific treatment required by each one.” She proclaimed a need to study the states’ policies regarding women and work at the state level to address women’s inequality. Additionally, some local Leagues coordinated with other women’s organizations, occasionally including the National Woman’s Party, to support women’s jury service bills.

The National League of Women Voters and several state Leagues adopted jury service as a central issue shortly after gaining voting rights. By 1921, only four states (Minnesota, New Jersey, North Dakota, and Oregon) had successfully obtained jury service bills. Despite numerous League campaigns, no other state passed similar legislation until Rhode Island’s permissive law passed and Washington D.C. also began allowing women to serve in 1927. In fact, Rhode Island became the first and only state success story of these 1927 campaigns, with news of its victory making international

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312 Maud Wood Park to State President, February 25, 1922, in Papers of Maud Wood Park, Box 9, National League of Women Voters Correspondence, 1929-1922.
313 Clipping from Tulsa, Oklahoma World, March 1929, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress)
feminist news circles.\textsuperscript{315} Between 1920 and 1929, the National League estimated that League-supported jury bills had been defeated in state legislatures “no less than thirty times.”\textsuperscript{316} In five states— Pennsylvania, Iowa, Kentucky, Minnesota, and New Jersey—the League protested against legislatures’ attempts to weaken jury service laws. The state Leagues in New Jersey and Kentucky, however, were not successful. The National League supposed that “probably on no other measure” had “state Leagues sustained such repeated defeats as on this one,” despite its “simple,” underlying “proposition” that women “should share the responsibilities and privileges that ordinarily attach to voting citizenship.”\textsuperscript{317} Yet, the National League revived its commitment, noting it was “not daunted” by the task, and had “a firm and determined resolution” to pursue the issue in 1929.\textsuperscript{318} That determination continued on for three more decades and was rewarded with successful legislation in several additional states, including New York, Texas, Massachusetts, Mississippi, South Dakota, and Illinois by the 1950s.

At the 1926 annual meeting of the Committee on the Legal Status of Women of the National League of Women Voters in St. Louis, Miss Ester A. Dunshee, Chairman of the Committee, stated “that the recommendation of the National League had been to stress three things,” one of which was jury service.\textsuperscript{319} She announced that the “reports on

\begin{enumerate}
\item These states included Connecticut, Idaho, Illinois, Massachusetts, Missouri, Nebraska, New York, South Dakota, Vermont, and Virginia.
\item Ibid.
\item Minutes of the Annual Meeting of the Committee on the Legal Status of Women of the National League of Women Voters, St. Louis, MO, April 15, 1926, in Records of the League of Women Voters, Part II,
jury service showed no real accomplishment” with only three states having considered legislation. By 1927, advisors to the Committee on the Legal Status of Women agreed that “the national committee might well undertake to push an interest in jury service uniformly throughout the country,” finding it to be “the best point of attack in the Legal Status program.”

One way the Legal Committee suggested that states work on jury service issues was to mention it and include a pamphlet published by the National LWV in the welcome materials for new state chairman. The 1924 pamphlet written by Jennie Loitman Barron, a member of the Massachusetts Bar, contained information on the status of women jurors and presented arguments in favor of women’s service. Her article was “an attempt to show the advisability of admitting women to jury service,” to address common concerns, and to provide testimonials in support of the proposition. The National Committee also sent a questionnaire to state chapters in 1927. The respondents to the questionnaire included nineteen states—all of which listed jury service as one of the current projects and many of them noting that jury service was either their priority or only current project.

Biennial File, 1924-1926, Box 102, Committee on the Legal Status of Women of State, (Library of Congress).
321 Julia Margaret Hicks to Miss Consuelo Northrup of Vermont, March 16, 1927, Hicks to Miss Anna McKay of Louisiana, January 24, 1927, Hicks to Mrs. Harry S. Coe of Connecticut, January 24, 1927, and Hicks to Miss Stella Akin of Georgia, February 26, 1927, in Records of the League of Women Voters, Part II, Biennial File, 1924-1926, Box 102, Committee on the Legal Status of Women of State, (Library of Congress).
323 Ibid.
324 Questionnaire on Women Jurors, Committee on Legal Status of Women of the National League of Women Voters, May 1927, in Records of the League of Women Voters, Part II, Biennial File, 1924-1926,
In February 1928, Julia Margaret Hicks, the Secretary of the Legal Status Committee, asked the Attorney General of each state that had laws allowing for women jurors, asking them to send the language of their jury service qualification laws so the National League could compile the results. In 1928, the National League published a lengthy booklet written and compiled by Hicks. It contained information about related court decisions on the legality of women jurors serving and a chart of the relevant statutes from each state. In addition, the National Committee responded to several requests from state and local members for materials or information about women’s jury service, often sending materials, pamphlets, and other advice. So, between 1926 and 1928, the National Office had begun coordinating, studying, and promoting jury service campaigns and laws.

Minnesota replied to the National League’s 1927 survey effort with a report submitted in February 1927. Julia Margaret Hicks, Secretary for the National Legal Status Committee, admitted her “astonishment” at the intricacy of this report, asking “by the way what kind of magic do you manufacture in Minnesota,” when she saw that almost ninety percent of the state’s 84 counties had responded to the local League’s call. The extensive report that followed found that women served in forty-four counties and

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Box 102, Committee on the Legal Status of Women of State, (Library of Congress). Also, see contents of State Jury Service Folder in Records of the League of Women Voters, Part II, Biennial File, 1924-1926, Box 102, Committee on the Legal Status of Women of State, (Library of Congress).


327 One can find examples of these letters dating back to the mid-to-late 1920s in the Records of the League of Women Voters, Part II, Biennial File, 1924-1926, Box 102, Committee on the Legal Status of Women of State, (Library of Congress).
twenty-two others had no women jurors to date. The report detailed how many women served in petit and grand juries in each county in 1926 and gave the reason for not having women serve at all in counties without numbers to report.  

Not only did state leagues provide the National Office with information, but they sometimes asked for the National League’s assistance in procuring information. The Connecticut League sought the help of the National Committee on the Status of Women in their jury service campaign. In December 1927, the State Chairman for the Committee in Connecticut asked that the National Office request statements from jurors and judges from across the nation about their opinions on women jurors. Having stated her frustration with a lack of responses to her inquiries, the Connecticut chairman felt “sure that if the National League could bring its prestige to bear, we might get good statements” about women jurors. With those testimonials, the Connecticut League would bolster their campaign by producing “one story a month on women as jurors” for the local papers.

Facilitating the exchange of information between state leagues, the National League collected information that was useful to multiple campaigns. For instance, Dorothy M. Rehfeld, a member of the South Dakota League of Women Voters, responded to the request made by the National Office on behalf of the Connecticut League, explaining that because of women’s ineligibility in the state, she could not

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provide testimonials about their service or experience. She explained that the League fought for compulsory jury service legislation for women to no avail. However, Rehfeld enclosed copies of blank campaign petitions used by League women in South Dakota to indicate the number of women who wanted to serve on juries and supported legislation to make service mandatory. She indicated that she hoped that other Leagues might find the play written by the South Dakota League useful in their own campaigns and sent it along with the letter.\textsuperscript{330} These materials would later become part of a packet put together by the National League to aid state Leagues in their campaigning efforts.

Despite active campaigns in other states, including Connecticut, the 1927 campaign brought about change in only Rhode Island and Washington D. C. By January 1929, the League’s Committee on the Legal Status of Women revisited the status of women in various states and compiled “a report of League support” for jury service measures. This report listed the states that already had women jurors with League support, such as Minnesota, New Jersey, North Dakota, Oregon, and Maine. Others states with active legislative campaigns followed: Alabama, Arizona, Connecticut, Idaho, Illinois, Massachusetts, Missouri, Montana, Nebraska, among others, had failed to get women juror bills through the legislature. The report also noted which states (Iowa, Kentucky, Minnesota, New Jersey, and Pennsylvania) had League women opposing measures to make jury service optional for women or give women special exemptions. Furthermore, the National League kept tabs on the activism of State Leagues regarding jury service, typing notes about the issue present in each state and the past years’

\textsuperscript{330} Dorothy M. Rehfeld to Dr. S. P. Breckinridge, January 10, 1929, in Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress). The petition can also be found with the letter.
activities for League women.\textsuperscript{331} The Committee on the Status of Women found through this research that jury service was the second most often noted project on the agenda of state leagues in 1929.\textsuperscript{332} The National League report claimed that this campaign was an extension of the “old suffrage effort,” though “on a smaller scale.” Additionally, the League found that “the campaign is one of education, as much as of legislation.”\textsuperscript{333}

Rooted in that belief, the Committee on the Legal Status of Women assembled informational packets that contained “material concerning jury service for women” in 1929. These envelopes included a table of contents, noting materials came from both State Leagues and the National League. Massachusetts, Montana, New York, and South Dakota provided listings of answers to common questions, petition forms, and even a play to help other State Leagues with their campaigns. The packet also contained the National League’s compilation of state laws and status of women jurors as well as the two prominent treatises on women’s jury service written by Julia Margaret Hicks and Jennie Loitman Barron.\textsuperscript{334} These materials became accessible to many state and local branches of the League for their campaigns to get women on juries.

Between 1920 and the 1960s, local and state chapters of the League of Women Voters actively campaigned for state legislation that would provide compulsory

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\textsuperscript{333} Ibid.
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obligations for women to serve on juries. Beginning in the 1920s, the League occasionally supported particular federal legislation on jury service, but its primary effort was to support state campaigns by gathering and sharing of information and strategy about the local efforts. Some states quickly allowed women to serve on juries after the Nineteenth Amendment. Others required state Supreme Court decisions or state legislation to make women eligible. Mirroring its commitment to racial discrimination, the Southern region was the slowest at adopting laws that would extend the obligation of jury service to women. By 1930, a chain of eleven southern and southwestern states, starting with Virginia and ending with Arizona (and most of which had failed to ratify the Nineteenth Amendment) refused to allow women to have equal obligations to serve on juries. Some states outside of the South also excluded women from juries for decades after the Nineteenth Amendment secured women’s suffrage, prompting lengthy campaigns supported the by the League. With Texas and Massachusetts leagues achieving their goals in the mid-1950s, most state organization of these campaigns ended. By 1961, only leagues in Mississippi and South Carolina continued to fight for women’s

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335 While my research does not offer insights into every branch league, it appears as though several state and local chapters dealt with the issues of women’s jury service or instructing citizens about the operation and function of the jury system. Moreover, this research shows that different locales became interested in the issue at various points in time over the course of these decades. For instance, the League of Women Voters of Texas became invested in this topic in 1936; see RE: Jury Service for Women in Texas, September 10, 1956, in League of Women Voters Records, III Subject Files, Box III: 697 (Library of Congress).


equal access.\textsuperscript{338} However, even after their success, several local or state chapters continued to value the education of the citizenry, especially women, on the jury system. Pamphlets, classes, and meetings dedicated to the instruction of citizens in this civic duty remained part of the Leagues’ agendas in the years after women’s inclusion on juries.\textsuperscript{339} The League remained an active part of women’s struggle for jury service obligations and access in a variety of states for much of the first half of the twentieth century.

Lobbying became an effective tactic of League women. Utah women got state legislation to make jury service obligations for women on the same terms as men in 1929. The Utah League President, Annie Fitzgerald, surmised that the legislation passed despite opposition largely because the League “had some of our women at the Capitol working

\textsuperscript{338} Mrs. Mabelle M. Long, Organization Secretary to Mrs. Robert Westheimer (LWV of Cincinnati), April 18, 1961, in League of Women Voters Records, IV Subject Files, Box IV: 374, Jury Service 1954-1974, Folder 5: Jury Service Correspondence and Pamphlets (Library of Congress).

for it every few days during all the six weeks from the time it was introduced until it was finally passed.” These women stressed that “many women who have had training in club work could more easily leave their activities than could men of equal intelligence and training” and that “jury service would give some education in citizenship to certain types of women who need to develop a more public spirited point of view.” Unlike civil rights activists focus on the dire consequences of race discrimination for black defendants and the African-American community, the Utah League found ways of underlining the benefit that women’s eligibility would have for the system, for society, and for women jurors themselves.

Lobbying did not always work. The Virginia League of Women Voters began supporting jury service legislation as early as 1922. By 1928, the League believed they made headway with their campaign, especially with the support from the four women legislators—three of whom were League members. However, the Executive Secretary of the League wrote to the National Office, explaining that while these four women supported the issue, three of them voted against the League-recommended legislation, because voting for it “probably would have jeopardized their chances for coming back to the Legislature.”

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340 Mrs. Fitzgerald to Miss Sherwin, excerpt from letter, March 18, 1929, Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress).
343 Ida Thompson to Anne Williams Wheaton, January 2, 1929, Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress).
Another tactic used by leagues was the production of humorous and engaging pieces to publicize the issue and educate the community about the issue. For example the 1929 South Dakota League’s play, “Ladies of the Jury,” displayed a debate over women’s jury service legislation in the state. Characters included a senator and author of the bill, “a sleepy member,” a “woman legislator,” the state league president, and three committee members—one opposed, one in favor, and one undecided. Other people “interested in the hearing” also made the cast, including “timid women,” a family from Washington D.C., and a former antisuffragist, Mr. Lawrence. Interjecting information with humor, the senator proposing the change noted that “today in 21 states and Alaska, women are rendering this service and the earth still revolves upon its axis.” The skit provided a comical, explanatory, and informative format for answering common questions about women’s jury service, promoting the League’s version of legislation, and entertaining the public while educating them. New York attempted a similar project. Campaign leader Maragret Blackett wrote a “30 minute skit” called “Women Jurors for New York?” in June 1936. In this play, seven women convened at a sewing meeting in a living room to discuss women’s jury service. Mona, the “hostess,” was a “calm person” only “mildly interested” in the issue, but her guests included women with opinions ranging from well-informed and League members to those who were “flippant” and

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345 For South Dakota, however, the play and the petition signed by women wanting to serve on juries were not enough to persuade members of the South Dakota House of Representatives to support the bill in 1929. Instead, legislators opposed to the changes manipulated the bill, making it what one League member called, “merely a joke.” The newly-amended legislation would have allowed women to serve only if they actively registered their names Mrs. Feige to South Dakota League of Women Voters, March 11, 1929, Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress).
“indifferent,” to a “sentimental” woman “opposed to women jurors.”346 The skit presented a history of women jurors in the United States, challenged common arguments against women jurors, and described basic procedure related to jury service.

State leagues also invested in the production of educational materials and resources to inform the public about women’s jury service and to address the fears this issue raised for the community. After the defeat of state bill for women’s jury service, the South Dakota League women distributed a flyer, “Shall Women Serve on Juries in South Dakota?” to argue their case. The flyer listed reasons why women would help the jury system, why they were qualified to serve, and why they should not be given special exemptions.347 The New York League also produced this type of resource.348 In November 1935, after years of failed attempts to get legislation in New York, Margaret Blackett, a League member, composed a guide, “Ask Me Another” to answer common questions about the potential fallout from allowing women to serve on juries in New York.349 In 1954, the Texas League published a pamphlet, entitled “Well, Honestly, A Few Words in Answer to Critics of the Idea that Jury Service Is for All Citizens in Texas,” addressed common contemporary concerns about women jurors and became a

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348 Likewise, the New York League of Women Voters campaigned for jury service obligations, though perhaps harder than any other branch of the organization. The New York campaign started early, beginning around 1920, and faced repeated defeats in the state legislature. “Women Jurors,” Dorothy Kenyon and Helen Potter, Hanson, New York League of Women Voters, November 1926, in Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress); the pamphlet claimed that the NY League began campaigning seven years prior to the publication date, making the movement start in 1919.
model for Leagues from other states fighting similar battles.350 Promoted statewide by a State Chairman for the league, Mrs. Horton Wayne Smith, “Well Honestly” assured voters that women jurors would not be forced to neglect their children, be hurt from hearing sordid testimony, be required to stay overnight in the same room as male jurors, be too emotional to effectively judge a case, or be resistant to the duty of having to serve.351 The League relied both on contrasting the status of Texas women with the many other states that allowed women to serve and on using information from the League studies of the implications of women’s service in other states.352 Horton recommended that the pamphlet be circulated to “every woman’s organization” and to large businesses and associations.

Women in the local leagues not only produced informational materials but also engaged in sophisticated campaigns to publicize the issue and support legislation. Publicity—through radio, television, print, and paraphernalia—became a key focus for many branch organizations. For instance, in Brownsville, Texas in the 1950s, members spoke to 22 other organizations, presented their message over the radio and on television,


distributed over 3,000 brochures, and wore “Vote for Jury Service” ribbons. Texas League leader Mrs. Horton Wayne Smith urged local Leagues to plan “Buggy” Parades close to the election, hoping the event would garner a great deal of attention for the issue. Massachusetts League also publicized the issue effectively, and Mrs. Ruth M. Lurie, a member of the Massachusetts League, noted the League had received quite a bit of press (“though not as much as it deserves”). She attributed the success to changes in the makeup of the legislature, “careful” planning and organizing of the League, impressive publicity on radio and other media, a worthwhile hearing on the subject attended by politicians and League members, and great attendance in the Senate gallery by League members (noting that the Judiciary Committee “with wry kind of humor, regularly scheduled hearings on Jury Service for Women for St. Valentine’s Day!”).

Some Texas chapters of the League organized “kits for community action,” which armed various local women with information about women’s jury service and prepared them to campaign for women’s inclusion. The kit suggested numerous ways of publicizing the issue locally through print, television, and radio journalists. For a television spot, these instructions recommended a clip of three people—one “well-dressed, intelligent-looking woman,” one man in a striped suit . . . heavily made up to look ‘thuggy’ and holding a . . . barred window,” and finally “a zany creature cutting out

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paper dolls (be CAREFUL here—good taste dictates that this character must be funny, so that there will be no connotation of mental illness).” This grouping would stand in for the three “main categories of citizens”—women, convicts, and “insane”—who were ineligible to serve on juries in Texas.\(^{357}\) These kits also offered ideas about types of new stories and editorials that could make the women’s jury service a noteworthy issue and contained scripts for radio advertisements.\(^{358}\) Speech outlines and useful quotations supporting women jurors also filled the pages of the community action kit.\(^{359}\) These campaigning tools offered women resources to begin publicizing the issues locally.

Women in the state leagues did not end their discussion of or dedication to the issue of jury service once their states made women eligible to serve as jurors. Many state Leagues campaigned to make obligations mandatory, encouraged and prepared women to serve as jurors, and promoted women’s service through positive assessments and surveys. The first goal for some state Leagues was to continue to fight for compulsory service in states where women were eligible but allowed special exemptions. For instance, in the 1930s, the Vermont League of Women Voters lobbied for amendments to make jury


\(^{358}\) “Jury Service for Women: A Kit for Community Action to Secure a FAVORABLE VOTE on the Constitutional Amendments Ballot, November 2, 1954” Prepared by the League of Women Voters of Texas, in League of Women Voters Records, III Subject Files, Box III: 697(Library of Congress). This portion of the kit presents options for stories including “More Jurors Needed,” “Jury Duty for All Citizens,” “Can We Improve Our Jury System?” and “Mexican Women Jurors”—an attempt to show the U.S. as behind other countries since Mexico had recently allowed women to serve on juries.

service mandatory for women. Flyers, such as “Jury Service for Women—Objections Overruled!!” presented the League’s case about women’s jury service.360

After gaining access for women, some Leagues campaigned to encourage women’s active participation and to push for the widespread inclusion of women. In 1958, ten years after women became eligible for jury duty, the League of Women Voters of Laconia (New Hampshire) encouraging women to “indicate their willingness to serve” through a written statement as the law in New Hampshire required.361 The bulletin followed a drive to increase the number of women eligible to serve on juries and reminded women to send “a note or postcard to one’s Town clerk” or leave their signature at his office to make themselves available for jury duty.362 Even as late as 1965, the New Hampshire League surveyed local leagues throughout the state to discern the number of women who had signed up to serve on juries, since women’s service was not mandatory. The research project was to answer how many women had signed up by 1964, if their registration for service was permanent, if any women had been drawn or served on panels, and what reasons effectively got women and men excused from service.363 Likewise, the League of Women Voters of South Carolina promoted the issue of women’s active registration for jury duty shortly after state legislation passed making women’s voluntary service on juries legal in the 1960s. The state president sent copies of

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362 Ibid.
a “sample” letter to the editor to the South Carolina’s local league presidents, urging them to write their local newspapers to “vigorously oppose any legislation which would put jury for women on a voluntary basis.”

Leagues worked to promote a positive assessment of women juror’s service and to endorse their inclusion. Questions about the reactions of judges, lawyers and women jurors to the process and the quality of service that women provided emerged as important new avenues for research by local leagues. Rebecca Thurman Berstein, Chairman of the Legal Status of Women Committee in Maine, maintained that the League could “do a great deal in educating our women so that when the call does come they will not shirk the responsibility,” finding that otherwise, “many women are timid,” “fear the courtrooms,” and have “mistaken ideas of modesty.” Berstein urged the leaders of the National League of Women Voters to realize that “the League can help make good and more women jurors.” The League would boost the public recognition of the political work of women and their ability to sustain the duties required of them based on equal treatment. In 1930 the North Dakota League of Women Voters conducted a similar campaign, producing a survey about the quality of service done by women jurors and

364 Keller H. Bumgardner, State President, to Local League Presidents, LWV South Carolina, June 1, 1968, in League of Women Voters Records, IV Subject Files, Box IV: 374, Jury Service 1954-1974, Folder 5: Jury Service Correspondence and Pamphlets (Library of Congress).
concluding that women almost always served when called and were just as good as men jurors, if not often better. The League offered the results of the survey to the National Office to both give the North Dakota League some press as well as to “help other states where they have not as yet and seem to have difficulty in getting jury service for women.” In 1955, the Baltimore City League produced a nationwide survey of grand jury systems, asking state branches of the League to return questionnaires filled out by State Attorney Generals. Fifteen states failed to respond, but thirty-three others and Washington, D.C. returned the survey, offering enough information for the League to compile into a guide. After compiling the results, the Baltimore City League shared it with various local organizations and sent a copy to the National League of Women Voters’ Office. Though the implications of these activities varied, several states continued to promote women’s jury service after achieving access.

367 Mrs. J. A. Poppler to Miss Harrison, January 9, 1930, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress). Also see, Executive Secretary to Mrs. J. A. Poppler, January 15, 1930, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress).


369 One less successful attempt to educate the public occurred in West Virginia in 1955. After getting legislation to allow women to serve on juries, the Martinsburg’s (West Virginia) Provisional League of Women Voters held a meeting to discuss jury service, hoping to address many women on the subject. However, this meeting only drew about twelve people other than the panelists and turned into more of a question and answer period than a presentation. Though much less successful than the League hoped, the meeting got media coverage. “Panelists for Woman Jury Discussion” and “Outstanding Discussion Jury Service for Women from Panel,” (West Virginia) c. May 6, 1955, in League of Women Voters Records, III Subject Files, Box III: 697 (Library of Congress).
Even after women in various states gained access to juries, League continued jury campaigns, refocusing their efforts on instructing women, and sometimes the public-at-large, about citizenship duties and the working of the court. For instance, the Ohio State University College of Agriculture and the Ohio League of Women Voters collaborated in March 1929 to produce a “Fact Sheet” about “Women Jurors in Ohio.” This listing of questions and answers contained very little about women jurors, except to explain women’s eligibility. Instead, the paper offered instructional information about the jury system and courtroom procedures in Ohio. In 1950, the Massachusetts League printed a similar pamphlet, “Jury Service for Women: Your Right and Your Job” after women in the state became eligible for jury duty with the objective of informing women in this new civic duty. This brochure explained how the Massachusetts jury system worked and gave general information about what jurors could expect when called to serve. In South Carolina, one of the last states to allow women to serve on juries, the local League there printed, “Who Me?: Serve on a Jury!!,” a pamphlet describing the inner workings of the jury system of the state. The pamphlet indicated that women could claim special exemption (along with other groups), but explained that any citizen meeting certain criteria was qualified to serve. Around 1961, the League of Women Voters of Odessa (Texas) published a guide to jury duty to help educate the citizenry at large about their

371 However, unlike the vast majority of League materials on jury service, the “fact sheet” included one question about race, asking whether “race or color [should] act as disqualifications for one desiring to become a juror,” and answering “No,” while offering the legal penalties associated with excluding nonwhites on jury lists or panels. Dorothy E. Karl and Eva Epstein Shaw, “Women Jurors in Ohio—Fact Sheets,” March 1929, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress).


civic duty. These pamphlets and guides focused not only on arguing about the capacity for women to serve but also offered advice and instructions for women to better serve on juries.

League branches from several states and locales produced jury classes or jury schools to instruct women and the public at-large on the inner-workings of the jury system and the duties of the juror. Often these schools coincided with the qualification of women to serve on juries within the state. Texas, Utah, Ohio, New York, Massachusetts, and Illinois all produced some form of jury school following their state’s inclusion of women on juries. In 1929, League women in Athens, Ohio agreed that mock trials and educational sessions about jury service might also help newly eligible women jurors. Perhaps more importantly, these women appeared to be legitimizing the role of juror for women through their instruction—making women appear “trained” and therefore ready

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375 “Voters’ League Offers Class to Train Woman Jurors,” newspaper clipping, sent to National Office by Mrs. Fitzgerald of Utah, c. January 1930; Mrs. Ruth M. Lurie, a member of the Massachusetts League, noted that the League planned a “‘school’ for training women jurors” for July 1950, after legislation became effective. Ruth M. Lurie to Mrs. Staugh, July 18, 1949, in League of Women Voters Records, III Subject Files, Box III: 697/Library of Congress. Planning ahead, the Massachusetts League arranged to have a jury school in July 1950 to coincide with the effective date for women jurors provided by pending legislation. Ruth M. Lurie to Mrs. Staugh, July 18, 1949, in League of Women Voters Records, III Subject Files, Box III: 697/Library of Congress. For another sixty-five people, the Tyler League, like other Texas Leagues, conducted a “School for Jurors,” which consisted of a mock trial with performances by judges, lawyers, and officers from the community. Tyler League of Women Voters, Mrs. J.R. Montgomery and Mrs. W.C. Pratt, RE: Possible national publicity for the LWV of Texas, c. 1954 in League of Women Voters Records, III Subject Files, Box III: 697/Library of Congress. The League of Lake Jackson, Texas also put on a “School for Jurors.” See, League of Women Voters of Lake Jackson, Texas, n.d., c. 1954 in League of Women Voters Records, III Subject Files, Box III: 697/Library of Congress. After legislation allowed women to serve in Texas in 1954, the Texas League also sought to educate women about jury service. The Tyler League put on a skit called “Dos and Don’ts of Jury Service” in front of over two-hundred people, including members from other women’s organizations, such as the American Association of University Women and the Women’s Republican Club. Tyler League of Women Voters, Mrs. J.R. Montgomery and Mrs. W.C. Pratt, RE: Possible national publicity for the LWV of Texas, c. 1954 in League of Women Voters Records, III Subject Files, Box III: 697/Library of Congress.
for the position. In a note attached to a newspaper clipping about the event, one member explained that her League organized a mock court after women had been made eligible for duty. She asserted that League members, including herself, “were worried for fear women would refuse to serve or make unintelligent jurors so we planned a mock trial.”

The note also mentioned that the trial was “one of the biggest events ever held in this town [Athens],” and the local news reported that “every available seat was taken and more than 200 persons stood during the mock trial.” Likewise, two years after women gained access to juries in New York, the state League continued efforts to educate women about jury duty. In 1937, a branch of the New York League sent out fictional subpoenas addressed to “Mr. and Mrs. Brooklynite” calling them to attend a mock court. The subpoena, signed by Jane Doe, Chairman of the School for Women Jurors, claimed that anyone unable to attend would be “liable for a fine of Hours of Regret each day of your life for missing a new, interesting and instructive experience.” Like other jury schools, this one would rely on a true judge to preside and would be held in a court room at a law school in the evening.

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376 Handwritten P.S. note, unsigned, c. March 1929, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress)
377 Handwritten P.S. note, unsigned, c. March 1929, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress); “Not Guilty is Jury’s Verdict in Mock Trial,” Athens Messenger, March 8, 1929, in the Records of the League of Women Voters, III Subject Files, Box 128 (Library of Congress)
378 Subpoena, League of Women Voters, April 19, 1937, in Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress). An elaborate “Jury School Kit” assisted NY League women in organizing these events. This kit contained suggestions about planning and publicizing such an event. The “types of jury schools” outlined in the guide contain from one to seven sessions, with instructions for each becoming more elaborate as the number of sessions increased. In addition to schedules for sessions, the kit contained outlines to lead discussion on several related topics about women’s service and procedure in general. Jury School Kit, New York League of Women Voters, August 1937, in Records of League of Women Voters, III Subject Files, Box 128 (Library of Congress).
In November 1937, the New York League assessed the results of their jury school efforts from the summer, finding them to be “most successful.” A League member claimed that because of these schools, “women all over the state are coming forward to sign up for jury service.” In essence, these schools not only educated women but recruited them. Even though the New York legislature had passed a jury service law in 1937 that gave women exemptions but did not require them to actively register, commissioners still sought volunteers to place on the lists. Of course, the New York League, under the leadership of the “alert” Jane Smith Cramer, continued to press for equal service, while rallying women to volunteer.\footnote{Mrs. Baldwin to Mrs. Cook, November 3, 1937, in Records of the League of Women Voters, Box III:127, Folder: Government and Legal Status Dept. Jury Service, Legal Opinions on Jury Service, (Library of Congress); Jane Smith Cramer, “Jury Service Laws in New York, April 6 and 14, 1938, in Records of the League of Women Voters, Box III:127, Folder: Government and Legal Status Dept. Jury Service, Legal Opinions on Jury Service, (Library of Congress).}

While New York offered some of the most sophisticatedly organized campaigns for jury service followed by jury schools, the Illinois League of Women Voters also organized an impressive and lengthy campaign followed by an extensive program to educate women about jury service. These efforts offer a case study that can better illuminate the workings of the jury schools put on by the League. Discussion of these events also allow for an investigation of the unique constitutional controversy sparked by this League activism and form of feminism.

Illinois had an especially active League—one illustrates the efforts of the League to encourage women to serve as jurors. As early as 1922, the League of Women Voters of Illinois became the first women’s organization in the state to pursue jury service rights
Miss Elizabeth Perry spoke to at a national meeting of the League of Women Voters, offering the audience “Lessons from Our Legislative Experience.” She explained the uncertainty with which the League proceeded in its campaign for state legislation addressing women’s jury service, noting the League members were unaware of what potential opposition might emerge and what methods would be most effective. Illinois League women lobbied the state legislature unsuccessfully, despite their large attendance at hearings, their coordination with the Woman’s Bar Association, and their grassroots letter-writing and petition-signing campaigns.

By 1923, the Illinois League of Women Voters became one of five member organizations of the Illinois Committee for Women on Juries, chaired by Miss Esther Dunshee. Recognizing the great value in networking with other women’s organizations to attain success in fighting for women’s rights, Edith Rockwood noted that League members “learned to go outside our own League group, to seek opportunity and to take advantage of it, to deal with groups quite unlike our own and find a common basis of

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381 Minutes of the Annual Meeting of the Committee on the Legal Status of Women of the National League of Women Voters, St. Louis, MO, April 15, 1926, in Records of the League of Women Voters, Part II, Biennial File, 1924-1926, Box 102, Committee on the Legal Status of Women of State, (Library of Congress).
interest.” Referencing the League’s core value of educating citizens, Rockwood suggested that in this type of cooperation “lies the future value of the League’s educational service.”

In August, the Committee sent out a brief set of questions to more than a hundred judges and lawyers from various states. The responses garnered from this effort run the gamut. Most—some ninety percent—declared their support for women’s jury service, arguing that women made “excellent jurors,” improved the quality of the jury, or showed the same capacity as men to serve effectively. On the other hand, a few individuals such as Judge Hugh C. Cage of New Orleans responded much more negatively. Cage did not believe the matter to be one of “principle” but “a question of policy or of expediency.” After explaining Louisiana law that allowed women to serve only after they actively registered with the court, Cage lauded the law, finding that in a city of over 400,000 only three women had registered as potential jurors. He exclaimed, “Again, frankly, I would consider the woman, who voluntarily, took this grievous task upon her shoulders, a __________ FOOL.”

Another judge from Louisiana claimed that he had “no serious objection” to women jurors but asserted that he could not “understand,

384 Ibid.
386 Victor H. Simmons to Miss Esther A. Dunshee, August 7, 1926, in Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress); Additional examples of the positive responses can be found in the same folder. The ninety percent figure was reported in the newspaper article, Judges Indorse Work of Women on Trial Juries,” Special from the Monitor Bureau, March 29, 1927, in Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).
because of race conditions here, why women in the South would wish to serve on juries.”\footnote{Leven L. Hooe to Ladies of Illinois Committee for Women on Juries, September 22, 1926, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress). However, not all individuals from Louisiana to respond did so negatively. The responses from the South appear overall to be more tempered and/or negative, but they certainly not proof of a solid regional divide on the issue. Judges from Pennsylvania and Oregon, among others, also contended women should not be jurors or showed underwhelming support for women’s service.} In his cryptic statement, this judge appears to be commenting only on white women and assuming that they would be too delicate or weak to serve in a locale with a volatile race relations.

In 1927, with three bills in the Illinois State Legislature, the Committee for Women on Juries printed a pamphlet explaining the current policies concerning women’s jury service and refuting common arguments against women jurors. This pamphlet contained a brief legal history of women’s jury service policy for Illinois, copies of the pending legislation in the state, and suggestions about how to support the push for women jurors. It utilized a handful of quotes from responses to the 1926 questionnaire to rebut a listing of reasons “some oppose women on juries.”\footnote{“Shall Women Serve on Juries in Illinois?” The Illinois Committee for Women on Juries, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).}

With legislation pending in the state legislature, which was to convene in January 1929, the Illinois Committee for Women on Juries sponsored the printing of a pamphlet. “Women Are Needed on Juries in Illinois” argued that women need to serve because of their duties as citizens and to ensure justice for the community. This pamphlet also responded to common objections, gave endorsements from officials from states with
women jurors, and called for women to join the cause by sending membership dues to the Committee.\textsuperscript{390}

By 1929, Illinois became the first state to present the issue of women’s jury service to the public in a statewide referendum. Women’s organizations, including the League of Women Voters, coordinated their efforts to get a majority of votes for the two propositions on the ballot in the November 4, 1930 election.\textsuperscript{391} The campaign for jury service undertaken by several women’s organizations and supported by some men’s organizations had been active since 1921, and by 1922, Illinois club women organized a joint committee to focus on this particular issue alone. Every bill that came before the legislature before 1929 failed, but the 1929 legislation passed with the stipulated referendum that required a majority of voters to approve changes to the statutes that would make women eligible for service.\textsuperscript{392}

Not facing organized opposition, Illinois activists found the biggest challenges to be “one of education and overcoming inertia.” To combat these forces, the Committee used pamphlets, skits, a play, and pledge cards to educate and convert women to the cause.\textsuperscript{393} The strategy for the campaign was to slowly build up the publicity for the

\textsuperscript{392} Ibid.
\textsuperscript{393} Ibid.

By November 1929, Mrs. C. P. Fowler, the Chairman of the Legal Status Committee in Illinois, promoted the use of a skit, “Women on Juries: A Socratic Dialogue.” The piece directed that it should be “presented by a group of eight or ten women either seated on the platform or in the audience.” The format of the event was a series of predetermined questions answered by various League members, but “other questions may be asked and answered” too. At the end of each discussion, the audience would offer
election issue throughout the summer months, “keeping the fire hot until the eve of the election.” Speeches became an ordinary part of the campaign across the state, and remarks supporting women jurors appeared in print throughout the campaign. The Women’s Bar Association, created a “picturesque campaign,” in a similar style of older suffrage ones. Laura K. Pollak, the publicity chairman for the Illinois Committee of Women on Juries, reported that “women lawyers traveled from village to village in auto trucks, decorated with bunting, stopping in the center of towns and speaking from their trucks as platforms.” As people crowded around these spectacles, Pollak noted that advocates “talked in the rain, in stores, a tractor tent and many odd places.”

On November 20, 1929, during the Illinois League of Women Voters convention, League women held a roundtable on “the Women on Juries Referendum Campaign.” The League members first wanted all of the new members well versed in the issue, since “now every woman must be a worker” in this, their “biggest job this year.” Coordinating with the Joint Committee for Women on Juries and relying on some of their materials, their opinion of the point. Questions ranged from the retrieval of practical information on local issues, such as what the status of women jurors in Illinois counties was at present, to more abstract concepts of equality and citizenship found in questions like, “Do you think under our government established with the idea of men only being eligible for jury service that women should ever be allowed to serve in this capacity?” Other questions refuted common concerns about having women serve. League women responded to these questions, arguing that judges have found women to be effective jurors and that “women are not afraid of the facts of life nor are they ignorant of them.” They continued by expounding on how motherhood has prepared women to take on these duties, because they were “raising children in a world where things happen—hearing about them will not contaminate the women and it may make them better parents.”


394 Ibid.
395 Ibid.
396 Ibid.
some members asked for the creation of their own sub-committee to reach out to new members and “signing them up to help.” Additionally, the League decided to call a “conference of all the Women’s Organizations to discuss what we can do” to get this legislation to pass. This conference would begin the process of uniting all of the women’s organizations behind the issue and network their members together in the campaign effort. Members agreed that pledge cards would offer a quick and effective way of converting women to support and assist the cause.  

As far as wider campaigning, the League then moved to a consideration of how to drum up publicity for the issue, finding that merely relying on states to provide material inadequate to grab the attention of the public. Instead, a member exclaimed that “we must have some publicity that as local color also, in order to get it in the papers.” They decided to gather opinions of “prominent men and women” for the papers to publish, hoping for “weekly as well as daily” coverage.  

The day before the Illinois League’s 1929 convention the members listened to Judge Robert H. Day talk on “Ohio’s Experience with Women on Juries.” Day reported that women generally made good jurors and made juries function even better. He

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397 Pledge cards became a method used by the Illinois Committee for Women on Juries in the election of November 4, 1930, and suggested for use by the League in Illinois. These cards, often three by five, contained a typed sentence, stating something like “I agree to help secure a favorable vote. . . by talking for it [the proposition] in groups and with individuals.” The card had a place for a name, address, signature, and particular meeting at which the individual pledged. The card included instructions for its return to the Committee headquarters in Chicago; The example in the League Records is for supporting a State Election on November 4, 1930; See “Referendum on Adoption of Two Acts Providing for Women on Juries to be voted on at State Election November 4, 1930, Illinois Committee for Women on Juries, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).

concluded that “service on a jury makes a woman a broader-minded and better citizen.” This laudatory account of women’s jury service alleged that women cleaned up the courtroom, made the judicial system more just and representative, and vouched for their competency. The National League of Women Voters reprinted the remarks a month later, and recommended them for use in many state campaigns for jury service.399

The Illinois League also published a booklet for the oncoming election in November 1930. This pamphlet, “The Jury System in Illinois,” was designed to “provide information for the discussion Preliminary to the State-wide Vote November 4, 1939” on the issue of women jurors. In her forward, Georgia Fowler stated that this book was “printed for the women of Illinois, in order that those who have had little experience with the courts, may become familiar with the jury system as it operates in Illinois.” The booklet claimed that women were capable of jury service, because they were educated, knowledgeable about public life, and about one-fifth were employed outside the home. It argued that “women and girls” could not obtain a fair and impartial trial without women jurors and asked “how would a man feel if he had to be tried by a jury of all women?” Women would add a new perspective and “have a special contribution to make to society,” because they are equal “but not identical” to men.400 Then, the pamphlet turned to the practical workings of the court system in Illinois and the policies that guide jury

selection, offering a more informative and educational lesson on the local operations of the justice system. From qualification for jurors and possible exemptions to jurors’ fees and descriptions of the jurors’ environment, the pamphlet offered a detailed layout of what jurors in Illinois could expect after being called for duty. Additionally, it provided the detailed language of the proposed changes that would allow “legal voters of both sexes” to be put on jury lists and provided that judges appoint commissioners to advance these changes in constructing their lists. These statutory amendments offered a new exemption to “women who are pregnant and those who have the actual care of young children, the sick, infirm or aged.” These changes, however, required a statewide referendum to take effect.

The League, in their own monthly newsletter, updated members on the status of their campaign. The front cover of The Illinois Voter from October 1930 showcased the Women on Juries Propositions, showing the “Yes” column marked for both issues. Additionally, the announcements section first mentioned a forum being held by the League on the jury issue. The meeting boasted two speakers and noting a hope for large turnout which would “mean publicity and increased enthusiasm, which in turn will mean success on November 4.” Finally, this edition contained elaborate charts of individuals running for office in Illinois, specifying in the first column whether a candidate was for or against women jurors.

The local paper reported “much rejoicing” after their victory in the referendum vote at the League Office in Chicago—which also served as headquarters for the Committee for Women on Juries.\textsuperscript{403} One Committee member described the reaction there, saying it “was the scene of high elation as the victorious returns came in after the elections.”\textsuperscript{404} The proposition had an “overwhelming” show of support, but the paper questioned how quickly women will actually be able to serve on juries in the state. Many new “obstacles” seemed to delay their service, including finding a way to get names of qualified women on the list, having no provision for women bailiffs, and potential housing problems in some locales.\textsuperscript{405}

In December 1930, Illinois saw its first women jurors. A coroner’s jury, composed solely of women, served on December 3. Jane Addams served as the forewoman. Other notable club women, including officers in the Illinois Women’s Trade Union League, League of Women Voters, and National Council of Jewish Women, also served on this path-breaking jury.\textsuperscript{406} The Chicago Tribune reported on this occasion, noting that the “coroner complimented the ‘juresses’ on their unusual intelligence and aptitude in bringing out important points of the case.” These women, reportedly,

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deliberated quickly and provided “an interest and an avidity for service such as few juries of men have ever manifested.”

In January 1931, the Illinois League of Women Voters published a “Jurors’ Handbook” to educate citizens, primarily women, about the importance of jury duty and about what to expect once called to serve. The guide contained descriptions of the types of juries, the laws concerning the selection of jurors, an example summons, and court procedure related to juries.

Approximately six months after Illinois women became eligible for jury duty, the Illinois Supreme Court heard a case about the legality of women’s new eligibility and declared the law unconstitutional in May 1931. The state legislature could not delegate its powers to create law to the people of the state through referendum. The Court argued that because the General Assembly was not ready to pass the law without stipulation of a positive referendum vote, it did not make the decision but passed the responsibility for making that decision onto the electorate.

On May 2nd, Ruth Phillips, the Committee Secretary of the Illinois League of Women Voters, commented on the League women’s reactions to the court decision, stating that “yesterday we were all quite sick, but today it doesn’t seem quite as bad [sic] though of course there is no joy in going back to the General Assembly.” She urged

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women to pick up the campaign once again and began making the necessary preparations immediately. “It is not the end though and we won’t long remain defeated,” Phillips exclaimed. She explained the court decision, arguing that best plan was for activists to go back to the state legislature with another bill. League women had planned to meet to discuss new strategies for this campaign.\footnote{Excerpts from a Letter, Ruth Phillips, May 2, 1931, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).} By the end of May, Mrs. Phillips and others found they were still occasionally met “with a great deal of bitter opposition” to the idea of women’s service.\footnote{Excerpt Mrs. Phillips to Miss Rockwood, May 29, 1931, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).}

The League used testimonials from Illinois women who served on juries during their brief eligibility from November 1930 to May 1931. Less than a month after the court decision, the League began receiving “perfecting marvelous letters from women all over the state who have served.”\footnote{Excerpt Mrs. Phillips to Miss Rockwood, May 29, 1931, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).} The League, finding them useful, sought out women to describe their experiences. The responses were all positive, and most of the women offered arguments about why women should be eligible for service throughout the state. These women wrote of their personal experience statements including, I “enjoyed every minute of it;” “it was interesting;” “my experience on the jury was an interesting and profitable one;” and I “found it to be very pleasant service.” Besides commenting on their own feelings about serving, many women shared reasons they believed women needed the obligation. One stated that she did not find it burdensome, even with two children at home. Some argued that women were just as intelligent and capable as men; others claimed women were more “conscientious” than men which gave them an advantage in
these deliberations. Still others, focused on dispelling common assumptions, noting that other women who served were mothers and that women jurors “weighted the evidence carefully (not emotionally).”\textsuperscript{414} Many, however, essentialized women, finding them to have “exceptional” skills and a “natural sense of justice that seems innate in the heart of every woman.”\textsuperscript{415}

Additionally, the Illinois Committee for Women on Juries, an organization made up of several women’s organizations, and the Committee for Women on Juries of the Women’s Bar Association of Illinois publicized new proposed legislation in the state assembly in 1931 with a flyer. This leaflet explained the ineffectiveness of past legislation and reproduced statements supporting new legislation from a wide array of individuals and groups. Members of both the Democratic National Committee and Republican National Committee supported women’s jury service in the state—supporters that were not seen as likely at first but were successfully wooed by party women.\textsuperscript{416} The governor, some state judges, President of the Chicago Bar Association, the attorney general, President of the Chicago Federation of Labor, and women’s organizations of the state supported this legislation, according to this flyer.\textsuperscript{417} In fact, the circular claimed that there was “no opposition from any women’s organization” on this issue.

\textsuperscript{415} Kate F. O’Connor to Mrs. Georgia Fowler, June 17, 1931, in Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).
In 1933, the Illinois League continued campaigning for women’s jury eligibility, offering arguments in favor of women jurors. Isabel S. Simons reasserted many of the earlier arguments, finding that women should have duties as citizens, that female defendants have a right to a jury of their peers, and that average intelligent women have more time to serve as a juror in a justice system that needs better jurors.\(^{418}\) She reiterated the League’s stance that women were not too emotional, overly burdened with domestic duties, too inexperienced with public life to be effective jurors.\(^{419}\)

In July 1937, the Illinois League of Women Voters began considering “study classes” on Jury Service, despite women’s continued ineligibility. These classes would discuss the practical guidelines for service, offer arguments about why women should serve, give a history of Illinois law on the matter, offer testimony of those women who served in the window of opportunity, and list opinions from those who admire women jurors’ service.

March 3, 1939 was Women on Juries Day in Illinois. The League of Women Voters of Illinois urged members to “be sure to recognize the day in some manner.” The League suggested holding meetings, interviewing state legislators, or discussing the issue on the radio. Whatever event was planned, the League urged members to get “the widest publicity possible.”\(^{420}\) The efforts of the League and other women’s organizations were


\(^{419}\) Ibid.

not in vain. Despite continued resistance in the state legislature by a handful of men, the jury bills of 1939 became law.\textsuperscript{421}

The Illinois League of Women Voters continued to focus on jury service for women even after the passage of bills that allowed women to serve. Ellen M. Yockey, Chairman of the Department of Government and the Legal Status of Women for the Illinois League of Women Voters, suggested the first effort should be the establishment of jury schools.\textsuperscript{422} Lolita E. Bogert, President of the Illinois League of Women Voters in 1939, believed that these schools would “serve to dramatize jury service and bring it up from the low prestige to which long years of evasion have brought it, to a place consistent with its rightful dignity.” She wanted these schools to operate across the state to assist in increasing the membership of the League and raising more money for the organization.\textsuperscript{423}

The detailed suggestions for running a jury school included specifics about where, when, and how to set up these classes. The League recommended using local court houses to hold these meetings, finding appropriate speakers, such as judges and lawyers, and deciphering what hour would be good for the speaker and the place while maximizing the number of people who could attend.\textsuperscript{424} Additionally, the League urged

\textsuperscript{422} Ellen M. Yockey to League Chairman, September 1, 1939, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress).
that these schools be highly publicized in local media, especially newspapers where stories and photographs could document the event.\textsuperscript{425}

Even more detailed, the suggested programs the League offered local members outlined three plans a local might undertake. The first variation included a “field trip to a court” to observe a session.\textsuperscript{426} The second plan called for a community meeting similar to the one described in the first plan. However, this meeting would be shortened to allow for a mock trial based on a real case and presented with the assistance of a judge and attorneys. Witnesses should be League members, coached in advance by the appropriate attorney. The first part of the moot court would be selecting a jury from the audience, who would at the end of the trial render a verdict. Following this trial, the League would present instructional materials to the audience to offer them more information about the jury system in Illinois. The final plan suggested by the League would be structured as a roundtable, with League members assigned to present on certain topics. Topics to be covered included the history of jury system and women jurors in the state, Illinois jury laws, the process of selecting jurors for petit and grand juries, and the various types of juries in Illinois. In addition, according to these instructions, some time should be spent discussing juror fees, the experience of jurors inside the court room, and the deliberation process. Finally, a visit to a trial court might round out this version of a jury school.\textsuperscript{427}

\textsuperscript{425} Ibid.
\textsuperscript{427} On October 11 and October 12 1939, the Cook County League of Women Voters held a jury school. Local law school students and instructors assisted the League in running the sessions. The 10:30 session began the program with information about the history of Illinois jury service and the selection process, and the following 2:00 program included a mock trial and jury deliberations. Flyers noted that the school was “open to everyone.”Cook County League of Women Voters, Flyer for Jury Schools, 1939, Records of the League of Women Voters, Special Series III: 128, Jury Service, State Material, (Library of Congress)
To support these jury schools, Ellen M. Yockey devised a new “Handbook on Jury Service” published by the Illinois League of Women Voters in September 1939. In it, she offered the history of Illinois law and the changes that allowed women to serve, detailed information about the selection, structure, and duties of grand and petit juries, and the differences between state and federal court. This handbook appeared to be the type of material used by League women preparing for holding a school, while the League also printed “Primer for Jurors,” which was a pamphlet likely handed out to those who attended the school. This pamphlet answered general questions about qualifying for and serving on a jury.

Despite an open invitation to the public, the League’s focus was on preparing women for jury duty and ultimately, the League, because of their women’s jury service activism, became the supplier of women’s names for jury commissioners in state. As a result, these schools, women jurors, and even the League became central components of a Supreme Court case about the constitutionality of the selection process of women jurors in the state of Illinois. This case, Glasser v. United States, reached the U.S. Supreme Court in October 1941. With it, women jurors and the plausibility of teaching women to be effective jurors came under scrutiny.

This case became one of many about jury service that the Supreme Court heard during the 1940s, as it began to reconsider the constitutional standards that applied to composition of juries. The absence of women or the inclusion of particular women arose

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alongside questions about the underrepresentation of black men and members of the working-class. *Glasser v. United States* centered on questions of fairness and the need for juries to be representative of the community rather than selected from particular groups or organizations. Ironically, the Supreme Court decision rendered meant that if women had been left off of the Illinois jury in this particular case (since the legislation requiring women to serve had not been made effective by the date of the selection of the petit jury), the jury in the case would have met the Supreme Court’s requirements for juries to be “representative of the community.”
In 1940, Justice Hugo Black wrote on behalf of a majority of the Supreme Court, “It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.” This ruling in Smith v. Texas recognized the damage race discrimination in jury selection caused “not only [because it] violates our Constitution and the law enacted under it,” but also because it “is at war with our basic concepts of democratic society and representative government.” Beginning with this case and following with several rulings in the 1940s, the Supreme Court redefined the appropriate composition of juries and elaborated on their centrality to democracy and justice.

The result of this reconceived jury was a continuation of the policy that condemned race discrimination and condoned sex discrimination but that also highlighted further a gendered vision of citizenship—one in which women’s absence from juries did not make the jury system less democratic, less functional, or less representative of the wider community. The Court limited application of those democratic principles it promoted in the race cases by not finding women’s absence from juries or the exclusivity of special juries inconsistent with its re-evaluation of the appropriate composition of juries. A majority of these 1940s rulings arose in relation to the plight of black men convicted or indicted by all-white juries and the civil rights activists and lawyers that
supported their appeals. Because the Court recognized a need to protect defendants’ rights, black men explicitly become part of this imagined community of prospective jurors, even if states continued to prevent their service. White women, despite gains in obtaining access to juries some states during the 1920s and 1930s, remained largely outside of this representative community that the Court legitimized. The distinct positions of black men and white women in the criminal justice system informed this new conception of juries. Women’s claims to equal obligations as citizen were not as imminent of a concern as black men’s claims of injustice and violence in courts. The Court heard arguments about women’s access to the jury box in three 1940s cases, but it resisted expanding its vision of civic membership to require women’s equal access to juries. The primary reason for these divergent approaches to race and sex discrimination was that black defendants, social activists, and the Court regarded jury service as a right necessary to protect the black community, while the Court found few women defendants and faced less pressure from women’s organizations. This right of black men to serve on juries remained a burden the Court readily shielded women from being forced to endure.

This history of federal policy and social activism complements the scholarship on civil rights and feminism in the 1940s. World War II and the beginnings of the Cold War gave rise to new opportunities to push for racial equality for African Americans but failed to dismantle the racial or gender ideologies that made African American men’s and women’s or white women’s citizenship second-class. Gary Gerstle contends that “the state established and maintained by the government in the 1940s was far larger than conservatives in American had wanted it to be, and they tolerated it in the interest of
national security.” The Supreme Court also changed dramatically, with many of its new members sensitive to race-conscious politics and more willing to assert federal power over states in order to promote democratic practices than earlier Courts. \(^{431}\) Historian Michael Klarman argues that these Justices began “assuming a special role in protecting rights integral to the democratic process . . . and the equality rights of ‘discrete and insular’ minorities.” \(^{432}\) Certainly, in these jury decisions, the Court asserted this new role for African-American men, but women failed to gain comparably because of the Court viewed jury service as an onerous obligation and believed that women’s exemption was privilege without significant implications for women’s citizenship status or the justice imparted by the system.

Civil rights litigations supported by the NAACP continued to feature jury service as a prominent issue in the 1940s, helping to usher in a more modern conception of jury service. As the government became more attuned to calls for democratic practices, the NAACP grew stronger in its pursuit of civil rights and equality for African-Americans. As Patricia Sullivan explained, the NAACP was “primed to lead an assault on the color line and ready to advance its inclusive democratic vision in the dynamic environment of the early postwar years.” \(^{433}\) NAACP membership blossomed from 50,000 to 400,000.


\(^{431}\) Keyssar, 248; Klarman offers a useful discussion of the Court’s reconstitution under FDR and Truman, pp.193-196.

\(^{432}\) Klarman, 195.

members in the 1940s.\textsuperscript{434} This increase in civil rights activism helped several cases that challenged race discrimination in jury selection across the South.

Despite the jury campaigns of white feminists, including the National Woman’s Party and the League of Women Voters, the Court did not believe that equal jury service obligations for women were necessary or that pardoning women from service disadvantaged them in any meaningful way. In fact, the Court did not perceive women as being “a discrete and insular minority,” and therefore questions of differential treatment did not warrant the same level of scrutiny as black men.\textsuperscript{435} Instead, the Court relied on contradictory positions—one that promoted equal jury service and representativeness as a function of a healthy democracy and justice system and the other than privileged women, because of their gender roles, by condoning their absence from juries. Political scientist Gretchen Ritter finds that “one of the greatest challenges that the judiciary faced in the 1940s was over how to manage the expansion of constitutional rights principles and national citizenship while still affirming the existence of certain social roles and arrangements that contradicted liberal ideals of universalism and egalitarianism.”\textsuperscript{436} In this way, the Court maintained the bifurcated federal policy of condemning race discrimination while underwriting gender distinctions.

Examining the several race discrimination cases heard by the Supreme Court in the 1940s in contrast to the few cases dealing with women jurors, this chapter reveals

\textsuperscript{434} Gerstle, 195.
\textsuperscript{435} United States v. Carolene Products Co., 304 U.S. 144 (1938) fn 4; Footnote four reads: “Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”
\textsuperscript{436} Ritter, \textit{The Constitution}, 176.
how the Court adopted and promoted a new understanding of the constitutional composition of juries—one that required a cross-section of the community but simultaneously failed to envision women as an essential part of that public community. It also demonstrates that this new vision remained consistent in many ways with the Reconstruction-era jury service policy. Its support of black defendants’ rights to fair and impartial juries and its inability to radically challenge the Southern states’ exclusion or underrepresentation of blacks on juries continued. Most considered jury service to be duty or burden, and therefore, women’s exemption and absence represented benign privilege, a favor, and a requisite acknowledgement of gender roles. The lack of a fundamental shift in understanding women’s relationship to citizenship obligations or considering the position of black women relative to the jury also resulted in few gains for women as a result of this new emphasis on jury composition.

The Supreme Court reimagined appropriate jury composition in the first and arguably most influential jury service case of the period, the 1940 decision in *Smith v. Texas*. This case followed the stereotypic black-on-white rape narrative that typified many jury cases. In 1938, an eighteen-year-old black man, Edgar Smith, was arrested and charged with the rape of a white woman, Linda Heiden, in Harris County, Texas. His defense moved to quash the indictment because the jury selection process “had arbitrarily and systematically” excluded blacks from grand juries, denying Smith his Fourteenth Amendment right to equal protection of the laws. The motion overruled, Smith stood

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437 Petition for Writ of Certiorari, Smith v. Texas, 1940, 2.
trial, was convicted and sentenced to life in prison. Smith appealed to the Supreme Court in 1940.

Smith’s defense argued in favor of lessening the burden of proof by which defendants could demonstrate the existence of race discrimination in the jury selection process. The petitioners claimed that the occasional service of black jurors was nothing more than “a thin veneer of compliance” and thus should be considered unconstitutional. They showed that Harris County infrequently had black jurors, despite the fact that twenty-percent of its population was black, including six or seven thousand qualified for service. Grand juror commissioners often placed prospective black jurors in a ranking that made it unlikely that judges would select them during impaneling.\(^{438}\) Challenging the Criminal Court of Appeals’ holding that partial inclusion—five black jurors serving on grand juries over ten years—did not establish a violation of constitutional rights, Smith’s attorneys posited that “the difference is merely one of form, not of substance.”\(^{439}\) Total exclusion, they claimed was overt discrimination, reflecting court officials’ belief that blacks were racially inferior and unfit for service. Covert exclusion apparent in the limited inclusion of blacks was only “a scheme to evade the law.”\(^{440}\) Referencing the 1935 Norris v. Alabama decision, which claimed that the consequences or results of a policy were as important to consider as its expressed purpose, the attorneys posed the core question: will the jury commissioners’ “mere declarations [of neutrality] overcome their acts of discrimination?”\(^{441}\)

\(^{438}\) Ibid., 4-5.
\(^{439}\) Ibid., 17.
\(^{451}\) Ibid., 1940, 17.
\(^{441}\) Ibid., 18
Smith’s attorneys demonstrated the existence of race discrimination by highlighting the discrepancies between the demographic make-up of the county, the racial composition of its juries, and the selection procedures used by state officials. The grand jury commissioners testified that they selected jurors “merely from their personal acquaintance with the people over the county.” One commissioner stated that he “did not make any effort to determine whether any negro possessed the qualifications. Another stated he did not select any African Americans for service because he “wasn’t personally acquainted with any.” Jury commissioners relied on personal knowledge of locales to generate jury pools—an effective means of limiting black service.

The defense secured local black men to testify about the availability of qualified black jurors, confirming discrimination existed and emphasizing an association between masculinity and citizenship. C. F. Richardson, a newspaper publisher and president of the Houston Branch of the NAACP, asserted that eight thousand blacks paid poll taxes in Harris County and six thousand of those taxpayers were black men, who should be qualified to serve on grand juries. R.R. Grobe, a barber and chairman of the Educational Committee of the Third Ward Civic Club, also testified about the lack of black jurors serving in Houston, claiming that he knew many black men that met the qualifications to serve—those who had good character, were literate, had not committed any crime, and were qualified to vote by paying poll-taxes. “We have a goodly number

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442 Ibid.
443 J. W. Mills, the Clerk of the Criminal District Court for Harris County, testified that “it so happened that the names I suggested were white men; it just happened that they were; they were men of my acquaintance.” Transcript of Record, Smith v, Texas, 1940, 24.
444 Petition for Writ of Certiorari, Smith, 1940, 9-10.
possessed with the qualifications for grand jurors,” he announced in court.\textsuperscript{445} Others echoed these claims: black men had not been called to serve, but many were good, upstanding, educated, and stable citizens fit to serve. Black men defended the local black community, emphasizing its normalcy, stability, and political participation to demonstrate their worthiness of full citizenship, including jury service obligation.

The state attorney general, Gerald C. Mann, adopted arguments similar to those in the jury cases of the 1930s. His description of the crime included its racial elements, namely that the “petitioner, Edgar Smith, a negro, was tried under an indictment for the offense of rape upon a white woman.”\textsuperscript{446} Mann’s brief claimed the selection process was not discriminatory because of the intentions of the commissioners and the occasional selection of African Americans. It claimed the three jury commissioners were themselves good citizens and maintained that they did not actively exclude black men from juries. Two of them who testified explained that the “reason no negro was selected was because they did not know the name of any negro who was qualified.”\textsuperscript{447} As one commissioner had explained, “the question of race was not to be considered; a man was not disqualified because he was a negro…”\textsuperscript{448} Another commissioner stated that he “did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that Grand Jury.”\textsuperscript{449} Commissioner L. T. Culpepper explained that he “felt it was our duty to be fair to all classes in the county, and to make the grand jury as representative of all classes as

\textsuperscript{445} Petition for Writ of Certiorari, Smith, 1940, 10-11.
\textsuperscript{446} Brief for State of Texas, Smith, 1940, 1.
\textsuperscript{447} Ibid. 14-15.
\textsuperscript{448} Ibid., 5.
\textsuperscript{449} Ibid., 5.
possible, as to race and other matters.\footnote{Ibid., 9.} Judges too claimed they urged against race and other forms of discrimination in jury selection.\footnote{Ibid., 11.} The state demonstrated nominal compliance with the law, having called eighteen blacks for service over the past decade, though some were not impaneled because of their rank on the list or because they requested to be excused.\footnote{Ibid., 16.} The state highlighted the presence of some black jurors, and supported the commissioners’ characterization of the selection process as color-blind and shaped simply by happenstance and personal affiliation.

Another approach used by the state was the use of women’s exclusion from jury service to explain the limited appearance of African Americans on juries. Claiming that eight thousand black poll tax payers lived in the Houston area, one commissioner was uncertain about “how many of that eight thousand are women.” He guessed three thousand of the eight thousand were men, because he believed the county had “more negro women who pay poll taxes than men.”\footnote{Ibid., 6.} Of course, implicit in that statement was that most of the black poll tax payers were unqualified to serve on juries because they were women. This estimation contradicts one offered by the black newspaper editor, C.F. Richardson, who supposed that about six thousand of the eight thousand were men.\footnote{Ibid., 7.} These statistics showed a unified presumption that jury service was a male occupation, while the discrepancies between the two estimates reveal the attempts either to emphasize or to mitigate the number of qualified black men in the population.
Another tactic the state employed was recognizing the area’s population as exceedingly diverse and therefore its quantification in terms of being “representative” hard to manage. The state’s brief claimed that the city of Houston has “at least sixteen different nationalities,” and “it is therefore impossible to have every race and every creed represented on each Grand Jury that is empanelled.” Conflating race with ethnicity, the state hoped to make the absence of blacks less notable and emphasize the goal of “representativeness” as an unattainable ideal.

Ruling in favor of Smith, the Supreme Court not only lessened the standard of evidence the defense needed to show probable discrimination in jury systems but also transformed the conception of the jury’s role in U.S. democracy. In the fall of 1940, Justice Hugo Black wrote the majority opinion, stating that race discrimination in the selection process violated the equal protection clause of the Constitution. In addition to redefining the proper constitution of a jury and acknowledging this institution’s importance to American democracy, he announced that “equal protection to all must be given—not merely promised.” Since the jury commissioners relied on acquaintances to find potential jurors, the process of selection had resulted in race discrimination and the exclusion of blacks from juries. Black asserted, “nor could chance and accident have been responsible for the combination of circumstances under which a negro’s name, when listed at all, almost invariably appeared as number 16,” a juror slot almost never empanelled.

455 Ibid., 14.
456 Smith v. Texas (1940).
Two years later, the Supreme Court heard a second Texas jury discrimination case that replicated many of the claims of both the defense and the state attorneys in the *Smith* case. *Hill v. Texas* also featured black-on-white rape narrative; it centered on the question of commissioners’ discretion in determining juries; and it simultaneously highlighted both the exclusivity of jury service obligations based on gender exemptions and the problematic ethnic and the religious diversity among men that made constructing or proving the existence of a “representative” jury difficult.

In 1941 in Dallas County, Henry Allen Hill stood trial for the rape of a white woman and was indicted and convicted by all-white juries. Prompting challenges by the defense, the district attorney made highly-inflammatory remarks to promote both the racial and gender components of the crime and emphasize the jury’s paternalistic role. He revealed the relationship between race and sex in this rape narrative, proclaiming to the jury, “I say to you, gentlemen that a snake crawls on his own belly but human vultures crawl on the bellies of our helpless and defenseless women.” The trial court diminished the impact of this statement, explaining that “it is common knowledge that a snake crawls on his belly; and it is also commonly known that men who, by force, overcome the resistance of helpless women and commit rape, crawl on the bellies of such women.”

The defense complained about the district attorney’s questioning of the defendant, asking him “You were headed for the thickets because you know that you had raped a white woman, didn’t you, Hill?” The correlation drawn between black men’s citizenship and jury obligations in this case rested on gendered ideas of violence and protection. Much like the 1930s cases, black men challenged their exclusion from juries as men, while the

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457 Hill v. Texas, Transcript of Record, 26-27.
prosecution reaffirmed the violence of the crime of raping white women to detract from black men’s claims of equality by reinforcing paternalistic, chivalrous notions of jurors’ duties to protect white female victims.

Similar to the strategy in *Smith*, the capabilities and intentions of the jury commissioners became central to the efforts of the defense to demonstrate the existence of race discrimination. One of the jury commissioners, James O. Cherry, testified that the commissioners tried to select the “best qualified men to serve,” and stated that the commissioners knew all of the grand jurors selected personally. O.W. Cox, the other commissioner, also testified that he did not select any black men for the jury, because he did not know of any who were qualified. Cherry and Cox also revealed that the commissioners discussed the issue of black jurors being placed on the grand jury and none of them showed any prejudice against African Americans in their discussion of the jury procedure. Cherry testified that he did not know of a black man to select for service, and “the white men, I knew perhaps would be better to serve then to get some unknown negro—someone I did not know.” Cox explained that he knew black men “casually,” but he only knew laborers and was unsure if they were literate, poll tax payers, or otherwise qualified.\footnote{458 Hill v. Texas, Transcript of Record, 4.} \footnote{459 Ibid., 3-8.}

Black men once again became the model citizens called on to testify about the demographics of the area (including the sex ratio and its bearing the number of blacks qualified for jury service) while demonstrating their own civic respectability. Charles T. Brackens, C.R. Graggs, and G. F. Porter—all black men who owned property and paid
poll taxes—testified to having never been called to serve on a grand jury. They, along with Assistant District Attorney Charles A. Pippen, testified to not seeing a black man serve on a jury in Dallas County. Pearl Smith, District Clerk, also stated that she had never seen a black man summoned for grand jury service since she started her job in 1939. Ed Cobb, the Assessor and Collector for the county, testified that 58,000 whites and 8,000 blacks paid poll taxes in 1940, but on cross-examination, Cobb confirmed that he did not “know how many can read and write, or how many [sic] are women.” An employee of a black newspaper testified he believed the black population of the county was approximately 55,000, but he was unsure how many men were qualified to serve as grand jurors.

The appellate court relied on arguments about the murky knowledge of how the exemption of women from jury service limited the number of African-Americans qualified for service and on arguments about the difficulty ascertaining a “representative” jury given the diversity of the population. The Court noted that the defense could not indicate how many of the 8,000 black poll tax payers were women, illiterate or otherwise unqualified to serve. The opinion stated, “It appears that some members of the Bar of this State have, from some source, gathered the impression that when a negro is indicted by a grand jury composed wholly of white men, it is sufficient proof to show race

460 Ibid., 8-19.
461 Unlike Smith, however, Hill did not benefit from the support of Thurgood Marshall or the NAACP Legal Fund. He found he did not trust the lawyer representing Hill. Moreover, Marshall was uncertain how the Supreme Court would view the evidence produced by Hill’s defense that race discrimination on Dallas juries existed in spite of the jury commissioners’ testimony that they were not racist. Furthermore, Marshall declined to take the case because it failed to meet the NAACP criteria. Hill had confessed to the crime, and the NAACP only took cases of “innocent defendants.” The lack of NAACP support, however, did not cost Hill a favorable outcome in his Supreme Court appeal. Tushnet, Making Civil Rights Law, 60.
462 Hill v. Texas, Transcript of Record, 25.
discrimination regardless of any proof that any member of such race possessed the required statutory qualifications for grand jury service.” Sex exclusion that faced women became a barrier to arguments for racial inclusion of black men. The Court, then, attempted to draw parallels between the experiences of black men and other ethnic groups in the United States. It reasoned that “if that contention should be sustained, notwithstanding that negroes are citizens. . . then every person of Italian, Spanish, Russian, Mexican, or German descent or any other race, although citizens of the United States, would have the same right and privilege.”

The Court went further, claiming if the judicial system had to wait to construct a jury filled with members from the defendants race it would be impossible to uphold the defendant’s right to a speedy trial.

Chief Justice Harlan Stone delivered the ruling in *Hill v. Texas*, once again supporting defendants’ rights by confirming that the exclusion of blacks from juries violated the Fourteenth Amendment. Stone claimed that the jury commissioners “failed to perform their constitutional duty,” of ascertaining whether qualified blacks existed in the jurisdiction required by the fourth section of the 1875 Civil Rights Act and 1881 *Neal v. Delaware*. Without the state providing evidence to counter the demographic statistics and witness testimony, Stone concluded, “there is no room for inference that there are not among them [African-Americans] householders of good moral character who can read and write, qualified and available for grand jury service.” He closed his opinion by espousing on the importance of equal protection guarantees of the Fourteenth Amendment, noting that it “is something more than an abstract right. It is a command

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463 Ibid., 26.
which the state must respect, the benefits of which every person must demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.\footnote{Ibid.}\textsuperscript{465} The focus on the judicial process and the need to protect all defendants’ provided the impetus for the Court to continue to reaffirm constitutional protections in these cases.

Stone also offered a reevaluation of the relationship between federal and state governments in securing justice and softened the Court’s stance by recognizing the potential for states to retry defendants. He recognized the state’s role in presenting evidence of guilt and carrying out the trial procedure, while emphasizing the Supreme Court’s “duty. . . to see to it that, throughout the procedure for bringing him to justice, he shall enjoy the protection which the Constitution guarantees.” Stone also asserted that this decision did not prevent a rightful conviction, for the defendant “need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements.”

In contrast to the cases about race discrimination and black defendant’s rights to representative juries, the Supreme Court heard its first case about women’s jury service in 1941 when it agreed to consider the questionable selection practices adopted by jury commissioners in Illinois. This case did not arise in response to women’s deliberate litigation strategy; instead, the defendant questioned the objectivity of the women who served on his jury, undercutting the efforts of the Illinois League. In \textit{Glasser v. United States}, the Supreme Court faced the issue of gender representation on juries when grappling with its new conceptualization of “representative” juries. The white male
defendant claimed the exclusion of otherwise qualified women who were not part of the League of Women Voters from the jury pool violated his Sixth Amendment rights. The work of the League in promoting women jurors and teaching women to be effective jurors came under scrutiny.

An Assistant U.S. District Attorney from Illinois, Daniel D. Glasser, prosecuted “all liquor violation cases” in Chicago between 1935 and 1939, when he found himself in the middle of political infighting between his office and the Alcohol Tax Unit. Convicted for conspiring to defraud the courts by use of his office for financial or other gain, Glasser filed a motion for a new trial. The defense argued that qualified individuals were “totally” and “systematically” excluded from the jury, preventing him from having “a trial by jury free from bias, prejudice, and prior instruction.” The court denied his motion, sentencing him to a year and two months in jail and sparking him to appeal the decision.

Unlike the NAACP cases, the defendant’s rights promoted in this case questioned the selective inclusion of women. Glasser argued in his appeals to the Circuit Court and then U.S. Supreme Court that the jury commissioner and clerk of court violated his right to an impartial trial and his right to due process by illegally delegating part of their duties to a private organization and selecting jurors predisposed to favor the prosecution. The Illinois League of Women Voters (LWV) created a list of its women members and the jury commissioner relied on that list alone to select potential women jurors. He claimed that “the selection involved a systematic exclusion of all except a restricted class in a

466 Glasser v. U.S., Petition for a Writ of Certiorari to the U.S. Circuit Court of Appeals, 1940.
467 Glasser v. U.S., Petition for a Writ of Certiorari to the U.S. Circuit Court of Appeals, 1940; Glasser v. U.S. Petitioner Brief, U.S. Supreme Court, 1941.
single social-study organization,” because all 47 women selected in the venire were on the list composed of Illinois LWV members. Additionally, Glasser believed the trial was unfair because the selection of women jurors was biased. He explained that “all the women whose names were presented ‘had attended jury classes whose lecturers presented the views of the prosecution,’” and any woman not in attendance of jury classes of the Illinois LWV were not in the jury pool.468

Glasser crystallized these arguments in his appeal to the U.S. Supreme Court, contending that other women were “arbitrarily” excluded from the grand jury and the use of the list resulted in half of the trial jury being “packed” or “prejudicially selected” from the list of League members drawn up by the League itself.469 He maintained that the composition of the grand jury reflected the exclusion of women from grand jury pool, which consisted originally of sixty men and no women. Since federal courts follow the laws of the highest court in the state presenting the case, women should have appeared on the list under Illinois law which stated that “legal voters (or electors) of each sex” were qualified to serve on juries.470 Glasser also argued that the Circuit Court of Appeals ignored the problems with the selection of the petit jury, stating the process was “a clear violation of the statute enacted to ensure the fundamental right to a jury representing a fair cross-section of the community.”471

468 Glasser v. U.S., Petition for a Writ of Certiorari to the U.S. Circuit Court of Appeals, 1940.
469 Glasser v. U.S. Petitioner Brief, U.S. Supreme Court, 1941.
470 Glasser v. U.S. Petitioner Brief, U.S. Supreme Court, 1941; cited Illinois Revised Statutes, 1939, c. 78, sec. 1. The timing of the case and the effective date of the changes to the laws making women eligible allowed the prosecution to argue a technicality that women’s names had to appear on jury lists a short time after his trial.
An article published in the American Bar Association Journal in April of 1940 convinced Glasser that the jury commissioners who selected jurors for his trial inappropriately outsourced the creation of a list of qualified women jurors who all ended up being members of the Illinois League of Women Voters and had attended classes on jury service. The article Glasser cited contained “merely the impressions of one unimportant woman juror” who served in federal court in the same district that tried Glasser. She claimed to be a “layman” writing about her general experiences as a juror and her “sneaking desire to vindicate my sex” from the array of contemporary beliefs about the incompetency of women jurors. She described her arrival at court, noting that “with one exception” every woman summoned were members of the League of Women Voters and had been “recommended by that organization at the invitation of the court.” Additionally, she asserted that the men—unlike the women—“had been chosen at random.” The article also referred to Glasser. This woman had not been chosen for that jury, but she served in a different case, finding that “one of the lawyers was very much prejudiced against the League of Women Voters” and that he began by “telling the women to forget all they had learned about the duties of jurors.” Finding the information she received at jury class from “members of the Bar Association and distinguished judges” useful, she concluded that the lawyer “seemed to think that the less we knew the better.”

The Supreme Court was unmoved by the original absence of women on the jury, finding that the lack of names appearing on lists derived from the time it took for policy

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472 ABA Journal, April 8, 1940 in v. U.S., Affidavit of Daniel D. Glasser, Transcript of Record, U.S. Supreme Court, 1051-1054.
to be implemented. In this decision, it reaffirmed its traditional stance that linked federal jury eligibility to the qualifications determined by the state. Like the Circuit Court had ruled earlier, Justice Frank Murphy contended that there was no error in omitting “the names of women from federal jury lists where it was not shown that women’s names had yet appeared on the state jury lists,” because of “the short time elapsing” between the passage of Illinois legislation to allow women to serve on juries and the selection of the grand jury. So it claimed that there was no reason to find the jury selection in this case unconstitutional on the basis of women’s exclusion.

The Supreme Court did find reversible error in the selection of the petit jury because of its reliance on a particular civic group’s participation and not because of its limited inclusion of women. Murphy commented on the centrality and importance of the jury system to the effectiveness and fairness of the U.S. judicial system, noting that the fundamental right to a trial by jury could be “nullified by the improper construction of juries.” In this instance, Murphy clearly ruled that the justice system and “democracy itself, requires that the jury be a ‘body truly representative of the community,’ and not the organ of any special group or class.” Implicitly noting the work of the League of Women Voters to educate women about jury service, he stressed that court officials “must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.” He believed that allowing only particular groups to serve would “undermine” the justice system, regardless of “how high-principled and imbued with a desire to inculcate public virtue
such organizations may be.\textsuperscript{473} The purpose of these organizations’ encouragement of women to serve on juries starkly contrasted with the objectives of the NAACP, and the Court recognized the similarly lofty but less critical goals of women’s organizations’ efforts. Here, the tension between teaching citizenship and obtaining representativeness appeared, but the questions of women’s absence, their limited inclusion, or their perceived need for tailored instruction in order to become effective jurors went unaddressed.

\textit{Glasser v. United States} centered on questions of fairness and the need for juries to be representative of the community. Ironically, this Supreme Court decision meant that if women had been left off of the Illinois jury in this particular case (since the legislation requiring women to serve had not been made effective by the date of the selection of the petit jury), the jury in the case would have met the Supreme Court’s requirements for juries to be “representative of the community.” This case revealed the complexities inherent in understanding all women’s privileged exemption from juries would be considered less detrimental to the trial of a white male defendant than the question of race discrimination in jury selection in the trial of a black male defendant.

Unlike the \textit{Glasser}’s acceptance of women’s absence, the unfavorable decision the Supreme Court rendered in its third Texas case on race discrimination in jury service still required the inclusion of black men. In the 1945 \textit{Akins v. Texas} case, the Supreme Court did place limits on its new vision of “representative” juries. Like earlier cases, this trial contained definite racialized and gendered themes, NAACP support, and relatively

\textsuperscript{473} Glasser v. United States, 315 U.S. 60 (1942)
familiar arguments from the state, but the Court failed to find evidence of race
discrimination in the selection process.

While not a black-on-white rape narrative, this crime scenario featured many of
the same underlying assumptions and roles—a black man as aggressor, a white man as
chivalrous protector, and a white woman as the hapless victim. On September 15, 1941,
L.C. Akins, a black janitor, allegedly shot an off-duty white policeman, Leon Morris.
Morris had grabbed Akins’s arm to prevent him from brushing against and stepping in
front of white women, including Morris’s wife, who were boarding a street car. Morris,
the murder victim, called out “Come here, boy,” or “Wait a minute, boy,” according to
some of the trial testimony. The local newspaper printed an article, “Black Slayer of Cop
Faces Trial,” reporting that Akins pulled a knife on Morris, who then shot Akins in his
side. After a struggle, Akins used Morris’s gun to shoot and kill him. The chivalrous
move combined a gendered protection of a white woman, the stereotype of the dangerous
black man, and a racial power differential between white and black men.\footnote{474}

Within two weeks of the incident, the Dallas Branch of the NAACP came to the
aid of Akins, beginning a local drive to collect $1,000 dollars for his defense.\footnote{475} At the
request of Akins’s attorney and G.F. Porter, the local secretary of the NAACP, Thurgood
Marshall sent materials to help the defense prepare to argue against race discrimination in
jury service.\footnote{476}

\footnote{474} References to the event appear in the Akins, Transcript of Record, and in “Black Slayer of Cop Faces
Trial,” The Daily Times Herald, Dallas, Texas, 16 Sept. 1941, in NAACP Papers, Part 8, Series B, Reel 1.
\footnote{475} “Dallas NAACP to Help Defend Man Against Murder Charge,” 26 September 1941, in NAACP Papers,
Part 8, Series B, Reel 1.
\footnote{476} Marshall to Mr. Jules F. Mayer, 29 September 1941, in NAACP Papers, Part 8, Series B, Reel 1.
A month after the incident, Porter contacted Marshall to request the NAACP’s position on using Akins as a test case to gain Supreme Court protection against race discrimination. He explained the thorough research Akins’ lawyers had done on the subject of the exclusion of black men from juries in the county, but worried that it might not be enough to get the case reviewed by the Supreme Court. He believed that the judge would overrule the motion to quash the indictment and the Criminal Court of Appeals would find a “minor exception” to send the case back for a retrial as a means of avoiding Supreme Court review of the case. Porter believed that if the defense refused to participate in the retrial, the Court of Appeals would have to address the issue of race discrimination directly, providing the potential opportunity to carry the case to the Supreme Court. It was a risky proposal, forgoing another trial for the hope that the Court would agree to hear the case and reverse the decision, while simultaneously expanding the precedents condemning race discrimination in jury selection. Porter doubted whether this scenario was at all likely, claiming

it is the general belief that the local courts would rather let Negroes go free than to place Negroes on the jury. The argument against this latter procedure is that the rank and file of Dallas people who have contributed to this cause will be dissatisfied unless a hard fight is made to save Akins’ life in the original trial; notwithstanding the fact that it is the general belief that Clarence Darrow himself could not save Akins in the Dallas County Court.477

In response, Marshall clearly stated the position of the NAACP that at no time should a man’s life be placed in jeopardy only to raise a particular issue, such as jury discrimination. In fact, he claimed “it is necessary to take [e]very precaution possible in

order to save the man’s life.” Marshall reiterated this point throughout the trial. He reaffirmed the NAACP’s mission of protecting black defendants from the criminal justices system before it considered the attainment of reaffirmation of constitutional rights, revealing the NAACP’s commitment not only to securing black men’s legal rights but also to protecting black defendants from grave injustices and even death sentences.

In this first trial when Akins was convicted and sentenced to life, Porter reported that the “general opinion is that he did well to escape the electric chair.” This verdict was reversed by the appellate court which cited the Smith and Hill decisions, and left Akins open to a second trial, which produced a second conviction and a death sentence. In this second trial, Akins appealed his murder conviction by claiming that race discrimination tainted the grand jury and complaining that no black man served on the jury commission itself. The argument presented differed from the Hill case and from the first trial. The grand jury in Akins had one black member, but the defense argued that eleven whites could ignore the black juror entirely and still vote for a bill of indictment. Doss Hardin, Akins’ attorney, argued that “one negro member. . . has, in reality no voice in the matter before the grand jury; is powerless as such; but constitutes a figure-head.”

The defense introduced the testimony of several court officials to underscore the discriminatory selection process and highlight the role of court administrators in excluding otherwise qualified black men from service. The Dallas Chief of Police testified that he never knew of a black man to serve on a grand jury, and in 1934 when he served as jury commissioner he “never selected one at all. No, I never would have done

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480 Akins v. Texas, Transcript of Record, 22.
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Others noted the recent push since the Hill case to include some African Americans on grand jury panels. W.H. Wells, a jury commissioner in 1943, testified about his experience selecting a black grand juror, noting the commissioners discussed their selections, decided on a particular man, and interviewed him at his home before selecting him. Wells asserted that the jury commissioners “had no intention of placing more than one negro on the panel,” so once his interview was over they ended their search for more black jurors.482

The defense also called several black men from the Dallas area to testify about the black population and their eligibility to serve on grand juries.483 Numerous successful members of the black community testified. Among them was an employee of the Federal Reserve Bank, a physician, a teacher, and a minister, all of whom testified to the historic exclusion of black from grand juries, the recent inclusion of some men on these juries, and the composition of the local black population.

As in Smith and Hill, the state made arguments about diversity among whites to challenge blacks’ claims to exclusion. At the behest of the state, one witness noted that he knew “we have not had any Chinamen on the grand jury” and “I do not know how many Arabs nor how many Mexicans have served on the grand jury.” The cross-examination of other witnesses by the state also revealed this line of argumentation that questioned the appearance of other ethnic or racial groups, including the Chinese, Dutch, Jewish,

481 Ibid., 24.
482 Ibid., 26.
483 Ibid. C.D. Johnson, one of the former black grand jurors selected, offered his opinion the composition of the grand jury, stating “It looks like to me that the way things are going you don’t give the colored race [any] show; and after it has gone this far I don’t think this is a democracy; I think the way things are going that this country will never be a true democracy.” Johnson indicated that he believed discrimination in jury selection occurred, preventing the production of a truly democratic, inclusive system.
French, and Germans.\footnote{This use of ethnicity complicates the literature on whiteness, revealing the separating out of white ethnic groups alongside other racial minorities to equate their treatment with that of black men, and ultimately justify the absence of black men from juries as benign and a practical outcome; Matthew Frye Jacobson, \textit{Whiteness of a Different Color: European Immigrants and the Alchemy of Race}, Harvard UP, 1998; David Roediger, \textit{The Wages of Whiteness: Race and the Making of the American Working Class}, Verso Books, 1999.} This conflation of white ethnic groups with racialized groups was an attempt to justify black men’s absence from the jury. Furthermore, the state attorney’s interjection of other racial minorities, including Asian and Arab groups, did little to deny the exclusion of black men but tried to obscure the extent to which black men faced discrimination.

In its petition to the Supreme Court, the defense used the Fourteenth Amendment claims as the basis for arguing that the token inclusion of black men on juries did not provide the constitutional protection guaranteed black defendants.\footnote{The defense also argued that err existed in the process by which the judge assumed the trial after the judge originally set to command the trial died, leaving his seat vacant temporarily.} The black juror who served in this trial was “one eighty-one-year-old, humble, ‘good’ Negro member” selected to “prevent a reversal by the higher court.”\footnote{George Clifton Edwards, “White Justice in Dallas,” originally printed in The Nation, 15 September 1945, reprinted in leaflet by the International Labor Defense, found in NAACP Papers, Part 8, Series B, Reel 1.} The defense claimed the limitation of black jurors to one was “an artful, as well as a tactful, evasion of the Constitutional rights of this petitioner.”\footnote{Akins v. Texas, Petitioner’s Brief, 6.} The discrimination was intentional, and the defense pointed to the commissioners’ testimony that they intended to place only one black man on the jury panel.

In June 1945, Justice Stanley Forman Reed delivered a majority opinion that emphasized the importance of proper jury selection processes while contending that the
defense failed to demonstrate race discrimination occurred in this case.\textsuperscript{488} The “mere fact of inequality in the number selected does not, in itself, show discrimination,” Reed elaborated. He believed that the evidence—including the commissioners’ testimony—did not indicate “deliberate or intentional” limitation of the number of blacks on the jury.\textsuperscript{489}

Justice Frank Murphy dissented, elaborating on the importance of protecting Americans from an unfair judicial system. He considered the protection against race discrimination to be “a fundamental tenet of the American faith in the jury system.” He stressed the negative implications of not upholding that principle, namely that it would “undermine the very foundations of this system, and would make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among the unpopular or inarticulate minorities.” He noted that while Texas courts had not excluded black jurors in this case, the “racial limitation” was “an evil condemned by the equal protection clause.”\textsuperscript{490}

Despite the unfavorable ruling, civil rights organization continued to advocate on behalf of Akins. As Akins awaited his execution, civil rights support for him grew. The International Labor Defense became involved in the case for the first time, receiving more press than the NAACP. It printed a leaflet, “To Save A Life and Beat ‘White Supremacy.’”\textsuperscript{491} The article recounted the incident, highlighting Akins’ family commitments—his disabled wife and his child. More forcefully, this commentary

\textsuperscript{488} Akins v. Texas, (1945).
\textsuperscript{489} Ibid.
\textsuperscript{490} Ibid.
\textsuperscript{491} The pamphlet directed at Texas Governor, Coke Stevenson, demanded he free Akins and charging that race had determined his fate, not crime. The leaflet reprinted an article entitled “White Justice in Dallas,” originally found in \textit{The Nation} on September 15, 1945.
proclaimed that a white man on trial in this case would not have had the same allegations or sentences, and instead this trial “put this man to death because he is black.”

The NAACP continued to support Akins after the trial as well. The Texas NAACP joined the Dallas Branch to petition the Governor for clemency in the months before the scheduled execution. The local branch had also secured some 15,000 signatures from locals urging the commutation of Akins’ sentence. The Board of Pardons recommended, and the Texas Governor followed, the reduction of Akins’ sentence from death to life imprisonment. Civil rights activists not only sought out judicial remedies and favorable Supreme Court precedents but also attempted to change the plight of the black defendants regardless of the appeal’s outcome. The continued battle for black defendant’s life in this case showcases how the struggle for equality continued even after lost Supreme Court appeals.

In the wake of the disappointing and less expansive decision in *Akins*, the Supreme Court heard its first case in which a female defendant questioned the constitutionality of sex discrimination in jury service and offered its most promising

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492 Vito Margantonio, “I am doing my part to save L.C. Akins,” (contribution card), c. 1945, in NAACP Papers, Part 8, Series B, Reel 1; The ILD wanted to continue the campaign, demanding Akins freedom—something it wished to coordinate with the NAACP. The local branch contacted the National Office explaining that the ILD “took up the fight at the last minute,” and that it was unsure whether the ILD’s “entrance into the fray was helpful or harmful.” It was sure that the ILD had made “large sums” in this effort. The National Office warned against cooperating with the ILD and claimed its job had been costly and was now over. Roy Wilkins to Porter, 25 October 1945, in NAACP Papers, Part 8, Series B, Reel 1; the NAACP did again become active in this case in late-1947 when Akins agreed to parole conditions that required him to move out of state. The local NAACP branch coordinated with other branches to assist Akins in his move, often citing his wife’s condition as an added reason to help him secure a job. The ILD also produced contribution cards to rally support for Akins and to solicit funds for the ILD. It placed a picture of Adkins wife, seated in a wheelchair, with a young child on her lap prominently on the card. Next to the picture was the heading “Help Save the Husband and Father of Mrs. Akins and Her Child: They Need Him,” and the text emphasized not only the incident and its injustice, but also pleaded that the community “aid his helpless wife and baby,” and noted that she had lost her legs and use of one arm in an accident four months before she gave birth to her son in October 1940.

493 A Maceo Smith to Louis Colman, 2 October 1945, in NAACP Papers, Part 8, Series B, Reel 1

494 Philip Hecht, *Nation*, 5 October 1945, in NAACP Papers, Part 8, Series B, Reel 1.
decision on women’s jury service of this period. Edna Ballard and her son, Donald had been convicted by a federal jury in California of mail fraud. The question of women’s exclusion from federal juries in a state where women were qualified for service became the central focus. The Supreme Court heard their case twice, first in 1944 and again in 1946. While most of the arguments made in the 1944 case hinged on First Amendment claims to freedom of religion, the 1946 trial included the argument about the exclusion of women from juries in the trial. Both times the Court ruled in favor of the Ballards.

This trial made national headlines, partially for its connection with an eccentric religious movement, founded by Guy Ballard in the early 1930s. The “I AM” movement followed teachings that the Ballard family—Guy, Edna, and their son, Donald—were divine messengers for St. Germain. They claimed to be immortal and free from human afflictions such as disease, poverty, and misery, and that they could help others attain immortality after receiving monetary gifts. Guy Ballard’s wife and son continued operating it after his death in 1939. Both Edna W. Ballard and her son Donald (along with some other members of the movement) subsequently faced charges and convictions for using the mail to defraud, a federal offense.495 State prosecutors characterized Edna as “‘glib,’ and an ‘adept prevaricator’”; as ‘the most successful faker in the history of fakery,’ ‘a charlatan’ and ‘a religious racketeer.’”496 Edna, her son, and their religious teaching became a spectacle for the American public.497

495 Edna and Donald Ballard were indicted on several counts of use of mail to defraud through distribution of propaganda of a religious organization called the “I AM” movement. Edna, sentenced to a year in prison and fined eight thousand dollars, and Donald, sentenced to a month in prison and four hundred dollar fine, had their sentences reduced to a year of probation each.
496 Petitioner Brief, Ballard v. United States (1946), 25.
497 For more information about the Ballards and their religious movement, see Bradley C. Whitsel, The Church Universal and Triumphant: Elizabeth Clare Prophet’s Apocalyptic Movement, Syracuse University
In their 1946 appeal, the Ballards’ defense posed the question of women’s exclusion from juries with a specific reference to the gender of Edna Ballard and to the mother-son relationship of the defendants. California law allowed women to serve on juries in 1917, though their inclusion on juries was not uniformly practiced. The appeal to the Supreme Court asked if it was unconstitutional for the court to exclude all women from the grand and petit jury lists, “when such exclusion is systematic, deliberate, and without cause, and when one of the defendants is a woman and another her son, both of whom are charged with misrepresentation in connection with religious tenets and beliefs?”498 The appellants claimed that after they challenged the petit jury panel because of its exclusion of women, the state stipulated that no women had been called because of their sex and that “following the usual practice in the District. . . ‘it was always the practice of judges in this court not to use women.’”499 The appellants believed that this case was the first case to question of whether or not the defendants’ Fifth Amendment rights to due process and Sixth Amendment rights to an impartial jury were infringed by the exclusion of women from jury lists.500

Before the trial, the Ballards’ attorneys had moved to quash the indictment and objected to the grand and petit juries empanelled in this case because of the exclusion of women. The court denied both of the defense’s motions. This case, the petitioners argued, was “first time” the “important question [of] whether it is reversible error ‘for the clerk of the court and the jury commissioner . . . to exclude from the jury lists one-half of all the

500 Ibid.,.
persons—that is all the women.”\textsuperscript{501} The Circuit Court of Appeals, with only one dissenting opinion (that of Judge William Denman) in this matter, found no error and ruled in favor of the U.S.\textsuperscript{502}

The Ballards’ attorneys emphasized the broader changes in women’s lives and status outside the courtroom, unlike civil rights campaigns which focused primarily on internal courtroom procedures and defendants’ rights. These attorneys claimed that women’s status and roles in American society had changed, and therefore the Court should reconsider their roles as citizens and prospective jurors. They argued that women’s increased participation in public affairs and “their contribution to the affairs of the state and nation” had come gradually, but now earlier rationales for their exclusion were inconsequential. They hoped that the Court would consider that “only the principles of a constitution remain fixed and unchanged from the time of its adoption. It must be construed as if intended to stand for a long period of time and it is not progressive and not static.”\textsuperscript{503} The Ballards’ called for a broader, equitable understanding of women’s citizenship, fusing this call with demands for a more democratic jury system. The appellants claimed that women’s presence in public activities meant that jury processes that excluded women “without reason” could not result in juries “truly representative of the community and not an organ of any special class.”\textsuperscript{504} The Ballard defense also stressed its distinctions from the \textit{Glasser} case, emphasizing the female defendant’s

\textsuperscript{501} Petitioner Brief, Ballard (1946), 60-61.
\textsuperscript{502} Ibid., 61.
\textsuperscript{503} Writ of Certiorari, Ballard v. US (1946), 68.
\textsuperscript{504} Writ of Certiorari, Ballard v. US (1946), 69.
particular position and the lengthier period of women’s eligibility in California compared
to in Illinois.\textsuperscript{505}

In this case, Edna Ballard’s position as a female defendant offered the opportunity
to make defendants’ rights claims, like those prominent in the race cases of the NAACP.
In fact, the rights of female defendants became a central point of contention. The
appellants argued that if women form a distinct and substantial class and the jury must be
“a body truly representative of the community,” then the selection of the juries (grand
and petit) in this case was unconstitutional precisely because of the absence of women.
The appellant referenced policies and social practices that relied on essentialized notions
of gender to support this point, referencing types of protective legislation which were
“predicated upon women constituting a distinct class universally upheld.”\textsuperscript{506} Here, unlike
the race cases, arguments emphasized notions of difference to support inclusive policies.
The appellant even referenced the 1908 Muller v. Oregon case that essentialized gender
difference and justified differential treatment of women with regard to labor legislation.
The idea that promoting women as distinctive from men bolstered claims that women’s
inclusion was crucial to the rendering of a just decision of a female defendant’s fate. It
was not an issue of intentionally unfair treatment—like the racism faced by black
defendants. Instead, it posited the likelihood that men would be unable to understand a
woman’s actions or experiences.\textsuperscript{507}

The appellants maintained that the defendants ought not to have the burden of
proving that prejudice existed on the jury. Instead, they claimed they should only have to

\textsuperscript{505} Ibid., 70-71.
\textsuperscript{506} Ibid., 71-72.
\textsuperscript{507} Ibid., 72.
show that the jury was unconstitutionally selected. Despite making that point, the brief also insisted that the jury was prejudicial, noting “it is apparent that Mrs. Ballard and her son are prejudiced here when in an action involving spiritual concepts all women are barred from the jury panels and where, in a trial of a woman, all persons of her sex are barred from hearing the case.”

The appellant first emphasized Edna’s gender and her position as a mother. Donald Ballard, the adult man, receded into the background of this argument, unmentioned except in his relationship as a son. Second, the appellants expanded the earlier essentialized notion of a class of women as recognized by a body of law to argue that women as a group are more inclined to be spiritual. With this argument, the appellant implied that women jurors, had they been allowed to serve, would have better understood Edna Ballard because of inherently-shared qualities of womanhood. As a result, according to their attorneys, the Ballards’ Sixth Amendment rights to an impartial jury were violated by “the systematic and arbitrary exclusion of women from the grand and petit juries.”

The petitioner relied on the ruling in Smith v. Texas (race discrimination case) that the jury be a body truly representative of the community” and the ruling in Glasser that required the jury to be “as a cross-section of the community.”

Petitioners argued that the Circuit Court ignored the recent 1946 ruling in Thiel v. Southern Pacific Company—a Supreme Court case also involving California jury qualifications. In Thiel, the Court had ruled that federal juror selection remained bound to the jury qualifications and exemptions of the state in which the court resided. Since California jury statute changed from “men” to “persons” in 1917 in order to include

508 Ibid., 73
509 Petitioner Brief, Ballard (1947), 67.
510 Ibid., 67-68.
women, women were qualified for jury service in Federal Courts in California. The exclusion of women from the juries in the *Ballard* case disregarded the Court-recognized protocol for selecting qualified jurors in federal trials. The petitioners produced a chart to show clearly the parallels between their case and the *Thiel* case, highlighting the egregious act of exclusion that harmed the Ballards. *Thiel*, a civil case, demonstrated that five-percent of the population had been excluded and with less effect on the defendant than the exclusion of women from juries in the *Ballard* case. The appellants pleaded that the Court “not place a stamp of approval” on a system that “excludes from the jury fifty percent” of qualified jurors “irrespective of proof that the excluded percentage represent a social or economic class or are otherwise distinguishable by attributes which might affect the outcome of the trial.”

The U.S. Solicitor General, J. Howard McGrath, Assistant Attorney General Theron L. Caudle, state attorney Robert S. Erdahl and a female lawyer in the U.S. Justice Department, Beatrice Rosenberg, responded to the appeal by arguing that the appellants’ reading of the *Glasser* decision incorrectly presupposed that the exclusion of women from the grand or petit panels of jurors was grounds for a reversal of the decision. The U.S. lawyers argued that the Court in *Glasser* simply denounced a jury panel that was composed of a particular group “which was not representative of the community.” The respondents claimed that “a jury limited to men only, but drawn from the community at large, is not unrepresentative of the community in the same sense as a jury which is

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511 Ibid., 64.
512 Petitioners Brief, Ballard (1947), 72-74.
513 Ibid., 72.
514 Brief for the U.S. in Opposition to Writ, Ballard, 19.
limited to members of a particular race (Smith v. Texas, 311 U.S. 128), or a political party (R. 1667-1668), or a particular economic class (Glasser v. United States, supra).”515 The state’s brief went further by prioritizing other forms of discrimination over sex discrimination. The federal attorneys contended “that the exclusion of women from the jury panel does not have the same potentialities of prejudice as exclusion of members of a race or economic class, and therefore that it does not constitute grounds for reversal.”516 According to the U.S. brief, recognition of gender difference was not analogous with race, economic, or political discrimination in jury selection. In fact, the brief virtually claimed that women’s absence from juries did not produce negative implications for the women, the defendants, or the justice system.

The U.S. brief presented a line of analysis that masked the actual record of women’s jury service and the historic power differential between the genders in courtroom, while upholding a view of gender equality through gender-neutral illustrations. The state’s brief asserted, “Prejudice cannot be inferred by the reason of the indictment or trial of a woman by a jury of men any more than it can be inferred from the indictment or trial of a man by a jury of women.”517 The federal attorneys here acknowledged the possibility that a male defendant might be tried by an all-women jury, disregarding the actual historical record of women’s exclusion and the continued underrepresentation of women on juries. The point here also revealed a surprising lack of historical information presented by the appellants to build their case in support of women jurors.

515 Ibid., 19.
516 Ibid., 19.
517 Ibid., 19.
The U.S. brief employed a view of gender neutrality when challenging the appellants’ vision of essentialized female values. The U.S. attorneys refuted the notion that women had uniquely spiritual qualities, stating “We think the position of the dissenting judge below that the petitioners were prejudiced by the absence of women because women are more religiously inclined is untenable. Interest in spiritual matters has never been limited to one sex.”518 The federal attorneys disavowed gender difference, claiming that all-male juries would function and uphold the law in ways similar to mixed juries or all-women juries.519 The U.S. brief again rebuked essentialist notions of gender in order to dismiss the notion that women’s exclusion significantly altered the jury’s dynamic. Though it recognized that women “are properly treated as a separate class” in some ways because of physical differences, such as with protective legislation, it argued that those laws did not “mean that they act as a class when sitting as jurors.”520 Interestingly, the respondents claimed women’s general sameness (perhaps not in social roles but in general capability) to men precluded any real need for their service.

The U.S. attorneys maintained that the exclusion of women, “although improper,” did not violate the Ballards’ constitutional rights or prejudice them, because of the long-established and widespread practice of excluding women. The brief noted that nineteen other states excluded women from juries and challenges to those policies based on the Nineteenth or Fourteenth Amendments had failed. In those states that excluded women, the attorneys reasoned, female defendants still received fair trials. 521 The U.S. brief also challenged race-sex comparisons in discriminatory jury service practices or policy. It

518 Ibid., 19.
519 U.S. Brief, Ballard (1946), 21.
520 Ibid., 54
521 Ibid., 20-21, 53. 55.
claimed that the “absence of constitutional limitation distinguishes this case from those involving discrimination against a particular race,” drawing comparisons to recent cases such as *Smith v. Texas*. Accordingly, they asserted “the absence of constitutional prohibitions against discrimination on account of sex ipso facto distinguishes this case from those involving discrimination against a particular race in violation of the Fourteenth Amendment.” Women’s exclusion from juries was not similar to that of black men or poorer classes, and therefore it was not unconstitutional.

The Supreme Court reviewed the *Ballard* case for a second time in 1946, addressing for the first time the issue of whether women’s exclusion from a federal jury violated the defendants’ constitutional rights. In the majority opinion, Justice William O. Douglas explained that federal law requires that federal jurors have the same qualifications as those determined by the state for its own highest court. Since California law allowed for women jurors, the federal court should not have excluded women from service. Douglas commented, “if women are excluded, only half of the available population is drawn upon for jury service.” The Court, citing *Thiel*, found the exclusion of women from federal jury in California did not follow federal law and needed correction by the courts. Furthermore, Douglas commented on the anti-essentialist argument made by the United States that all-male jury panels could be as representative of the community as ones in which women were included. He countered:

> It is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the

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522 Ibid., 20-21.
523 Ibid., 53.
community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.  

As Douglas reaffirmed the Court’s position of upholding notions of gender difference, he changed its purpose from one underpinning women’s exclusion to one justifying women’s participation. This argument followed the rationale offered by the appellants that highlighted gender distinctions in order to create a greater public space for women to access. But it also differed from the appellants’ understanding of gender. Douglas was not convinced that women would have shown the defendants more compassion. Douglas continued his analysis, claiming “to insulate the courtroom from either [sex] may not, in a given case, make an iota of difference. Yet a flavor, a distinct quality, is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.” Here, the Court very hesitantly reconfigured the possible priorities for defining representativeness of juries based on sex before race or class. At least, the Court recognized some—though limited—similarities between the use of sex as a category and the use of race or class to exclude citizens.

Analogizing women’s situation with that of black men or laborers became a central aspect of this case, despite the fact that the constitutional provisions discussed (the 5th and 6th Amendments) were not the same as those in Smith or Thiel (namely the 14th

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Ballard v. United States, 1946; This Court decision became one often cited for its gendered language and confirmation of gender difference, largely due to this selection from the ruling.
Amendment). Douglas determined that “the systematic and intentional exclusion of women, like the exclusion of a racial group. . . or an economic or social class. . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society.” 525 He found the results of women’s exclusion reached further than the claims of harm to the defendants’ rights, noting that “the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.” In this claim, Douglas reaffirmed the 1940s re-conceptualized jury and placed women, tentatively, in it and the community. This shift in the Court’s understanding of juries from one narrowly conceived of in relation to defendant’s rights to one more broadly based in civic membership of individuals made women’s arguments for citizenship rights more effective. Yet, the limitation of this aspect of the ruling was that the whole decision depended on women’s already-established eligibility to serve on California juries. 526

The dissents in this case also adhered to the Court’s policy of recognizing differences between gender roles that granted women special privileges like exemption from jury service. These opinions, however, did not support essentialized understandings of women’s perspectives—ones that might make them decide trials differently than men. Justice Harold H. Burton contended that

526 Gretchen Ritter argued that the 1940s Court treated “sex” as an acceptable marker of social difference, unlike “race” which it claimed was protected by the Fourteenth Amendment. She claimed the Court in the 1940s jury cases refocused on “the principles of equality, individualism, and nondiscrimination.” She claims that in Ballard the concern the Court showed was for defendants’ rights under the Sixth Amendment not the right of women to be jurors. She concluded that “even where gender difference was treated positively, however, formal inclusion was often accompanied by practical exclusion, as it was in states where women were made eligible for jury service but provided with automatic exemptions from serving.” Ritter, The Constitution, 164-167.
the Court should not reverse the indictment simply because women were not included on the jury lists in 1941, finding reverence for state practice more important. He argued that since Congress never required women’s inclusion in federal juries, there was no harm in excluding them from juries even in states that allowed women to serve. In fact, Burton cited reports that noted the absence of physical accommodations that supported women’s service might prevent women from serving on federal trials. He claimed that “general and increasing absence of sound reasons for distinctions between men and women in matters of suffrage, office holding, education, economic status, civil liberties, church membership, cultural activities, and even war service emphasizes the lack of reason for making a point of the presence or absence of with sex, as such, on either grand or petit juries.” Burton upheld the gender-blind rationale to support the existence of all-male juries and did not address the inequitable, historic power differentials and gender stereotypes that might upset his view of men and women’s interchangeableness. He found that the practice of excluding women from state court juries in California was actually the court granting “women a substantial exemption from that duty.”

Burton attempted to distinguish the Thiel decision from that of the Ballard decision. He claimed that Thiel appeared after changes in the jury selection process and excluded a particular economic group traditionally obligated to serve. Women’s exclusion, on the other hand, not only “was in accordance with the congressionally approved future practice in the federal and state courts of about

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527 Ballard v. United States, 1946
40% of the states." 528 Burton argued that federal policy condoned the exclusion of women from juries in other states, so the absence of women jurors on federal juries in California was contrary to the federal position in other states. As Ritter has noted, Justice Burton’s dissent referred to changes in women’s equality but failed to place the category of sex under the purview of the equal protection of the laws. Instead, Ritter contends “for Burton, if women were different, then they could be legally excluded, but if they were the same, they could make no positive demand for legal inclusion.” 529

Justice Felix Frankfurter’s dissent also noted that in the recent Glasser decision the Court “deemed it important that a jury be selected on what may be described as a modern democratic basis.” This “modern” interpretation of jury composition, according to Frankfurter did not change the fact that “even now, this Court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process.” 530 He explicitly divided women’s claims to jury service from those of black men, whom he believed required protection against discrimination. No further discussion of women’s status or the gendered vision of citizenship appeared in his dissent. The “modern democratic basis” underpinning jury service policy did not reconstitute gendered notions of representative juries, according to Frankfurter. 531

528 Ibid.
530 Ballard v. United States, 1946
531 Also dissenting, Justice Felix Frankfurter held to the traditional Court stance on the inclusion of women on juries. He believed the women’s jury issue should not be considered by the Court because the petitioners themselves dropped the issue and because California included women on its juries since 1944—showing
While the NAACP and other civil rights activists supported the appeal process of black defendants, women’s organizations—black and white—remained notably absent from the cases dealing with race or sex exclusions. The glaring absence of support for these cases—Glasser, Ballard, and Fay (1947) by women’s organizations is puzzling. The League of Women Voters and the National Woman’s Party had supported litigation for women’s jury service in the 1930s, but they did not seem to be actively engaged in any of these trials. Only one defendant was a woman and the League of Women Voters appears incidentally in two cases because of its campaign to register women voters in states in which they are eligible. \(^5\) Glasser criticized the work of the League women in Illinois; Ballard, though having a female defendant, centered on a radical and controversial religious movement; and Fay included women alongside other marginalized segments of the population to attack women’s underrepresentation on special juries in a state that already had a successful campaign for women’s eligibility. All of these items probably dissuaded women’s rights advocates from pursuing these cases. In addition, these women’s organizations might have found lobbying and other efforts more advantageous at this time, especially since some states passed jury reform and Congress considered the ERA during this decade.

\(^5\) In fact, all of the cases that deal with women’s absence from juries came from states that allowed, even if recently, women to serve: California (1917); New York (1937); Illinois (1939).
The Court quickly revisited the issue of women jurors in the 1947 case, *Fay v. New York*. Unlike most of the other 1940s cases, *Fay* dealt primarily with the constitutionality of special or “blue ribbon” juries. This case also touched questions of women’s representation on juries only a year after the *Ballard* decision. It featured two male defendants, questioning the “representativeness” of special juries considering that the demographic composition of these juries revealed a disproportionate number of women called to serve.

The original trial feature two top-ranking union officials charged with extortion, and the facts and high-profile nature of the defendants made the trial unusual.\(^{533}\) The District Attorney of New York County, Frank S. Hogan, moved for the selection of a special jury because of the trial’s importance, intricacy, subject matter, and need for impartial judgment.\(^{534}\) Because of these factors, Hogan asserted that “intricate questions of law and fact will be presented,” about “transactions over a period of years,” making for a “complex factual situation for resolution by the jury.”\(^{535}\)

Robert J. Fitzsimmons and Moses Polakoff, attorneys for the defense, countered the call for a “blue ribbon jury,” arguing it would compromise their clients’ constitutional protections by limiting the participation of members of the working class and women. In

\(^{533}\) Joseph S. Fay, the vice-president of the International Union of Operating Engineers, and James Bove, a vice-president of the International Hod Carriers, Building and Common Laborers Union of America, were charged with extortion from contractors working on a project for the Board of Water Supply of the City of New York and were also charged with conspiring to extort contractors in several other counties by threatening “labor trouble.” In February 1945, they were convicted of extortion and conspiracy by a special jury. They were sentenced to serve two seven-and-a-half to fifteen years sentences consecutively in 1945. Transcript of Record, *Fay v. New York* (1947), 23.


\(^{535}\) Ibid., 26-27.
fact, the defense argued fervently that the defendants needed a jury of their peers “composed of persons representative of our entire society and every walk of life.” The selection process favored “executives, bankers, brokers,” among others, while virtually excluding “trade union representatives, laboring people, and women.” The claimed that special juries did not reflect the established notion that juries should be a “cross section of the community,” making them a violation of their clients’ constitutional rights to a jury of their peers.

To support their accusations of discrimination, Fitzsimmons had called Deputy County Clerk James McGurrin to testify about jury selection practices. Much like in the Glasser case, the League of Women Voters sent a list of prospective female jurors. He explained that the local League invited them to the office to provide questionnaires to women “who are civic conscious.” Fitzsimmons probed, “Now, do you solicit any group that furnishes the names of any jurors, male jurors, who are later on selected for jury service”? McGurrin reaffirmed that only voter registration and phone directories furnish the names of potential male jurors.

McGurrin also answered questions about how race and gender shaped the process by which his office determined which men and women were qualified to serve as special jurors. He claimed the examining clerks who review the jury questionnaires look for “a

536 Ibid., 27-29.
537 Ibid., 43.
538 First, jurors who placed limits on the months they were available (which he claimed was approximately 90-percent of all potential jurors) were not considered for special juries. Special jurors could not be unwilling to impose the death penalty and must be able to consider circumstantial evidence. After the initial screening, the potential special juror interviews with McGurrin or other state official, so he can “test his fitness, his intelligence, his objectivity as a juror.” Transcript of Record, Fay v. New York (1947), 51. The defense continued, asking McGurrin about the various types of people on the special jury list. McGurrin could not answer how many different occupations potential special jurors had, nor could he provide a geographical description of where most of those people listed lived. He believed special jurors tended to be...
man or a woman whose intelligence and mental alertness has been established to some extent” by his or her responses to the questionnaire. McGurrin offered information about the racial and gender composition of the special jury lists, estimating that forty or fifty African Americans and at least twenty or twenty-five women made the list of 3,000 potential special jurors.

Deputy County Clerk for the Division of Jurors, Thomas F. Kane, also testified about how special juries affected women’s eligibility. He explained that the office sent notices to individuals listed on the census, tax list, telephone directory, or other source, but that “we do not now send those notices to women because they are exempt and generally claim their exemptions if we did send notice.” He continued, “We have the right to require women to appear, but we have such a large, large percentage of them claiming their exemption that we confined it to those who volunteered—women who volunteered for jury service.”

Even with these barriers to their service, three women appeared before the court during voir dire. The prosecution and defense questioned Ruth F. Bien before removing her from the jury pool. Bien, a former teacher and her husband’s secretary, fielded questions not asked of men in similar position. While she and the others answered questions about their occupations, knowledge of the case, feelings toward labor unions, and previous jury service stints, Bien also responded to particularly probing questions of older ages generally, and he claimed that often people under the age of 22 were not considered for special juries.

Transcript of Record, Fay v. New York (1947), 46. McGurrin is also fairly careful to mention women and include gender inclusive language in his testimony, even correcting the defense attorney.

Transcript of Record, Fay v. New York (1947), 60-65; McGurrin also estimated that seven or eight thousand women’s names appeared on general jury lists.

Transcript of Record, Fay v. New York (1947), 75.
about her ability to serve and her understanding of the role of the juror. The prosecutor questioned, “Do you think you could put all sympathy and prejudice out of your mind and decide the guilt or innocence of these defendants exclusively on the testimony brought forward by the witnesses?” Bien also confirmed that she “appreciate[d] that the jurors should never concern themselves with the possible punishment in the case,” prompting Hogan to ask, “And you wouldn’t get that tangled up in your thinking in any way, would you?” He instructed her that “the function of the jurors is simply to submit a report on the facts in the case. . . and it should not be complicated by anything.”

Bien also got special questions from the defense attorney. Fitzsimmons asked, “You realize that that [passing on the guilt or innocence of defendants] is a very important mission; and if you are chosen, and as a result of all the evidence you heard and the law that will be given to you by the Court . . . would you hesitate to in any way quit them”?

Certainly, men questioned in this situation answered questions about their ability to be impartial and their ability to keep their oath, but they did not consistently receive the same sort of instructive, lengthy questions about the job or duties of the juror as Ruth Bien did.

Louise G. Harding also participated in the voir dire. The first question the prosecutor asked her was what her husband’s occupation was. He then asked if she worked for his public relations business. When she responded “no, sir,” he continued, “Just a housewife,” illustrating, perhaps, a gendered assumption and even judgment. She replied that she was a volunteer for the Red Cross full time. Hogan, then, asked if serving

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542 Ibid., 224-226.
543 Ibid., 227.
on the jury would “interfere” with her volunteer work “in any way.” She explained she could schedule around serving on the jury. He pressed the issue, continuing to question her ability to serve by asking “do you think that you could add to jury service that type of service—and it must be very hard work, I am sure?” She responded by saying she could take the time away from volunteering to serve. Harding also testified that she had served as a juror on a criminal case before this trial, and she was sworn in as Juror No. 8.

The attorneys questioned a third woman, Mildred Simon, as they looked for two alternate jurors to serve in the trial. After establishing that she was married, they inquired about her occupation and her husband’s work as well. She announced she had served on juries in civil cases, but that she felt she would not be able to be impartial in this case. Since she had discussed it with her son, an attorney, her interview was short, and she was excused.

Robert J. Fitzsimmons, Fay’s attorney, filed a petition for writ of certiorari in 1946. The question posed in the appeal was about the constitutionality of special juries, asking whether “a jury from which women and laborers were largely, systematically, and intentionally excluded denied” the defendant his Fourteenth Amendment rights to due process and equal protection of the laws. The petition explained that though women were eligible for jury service in New York, jury commissioners never send notices to women “to appear to be examined for jury duty,” and the office only accepts women who volunteer to serve. Implicitly referencing the Glasser decision, Fitzsimmons asserted that the Division of Jurors “makes a concerted effort” to get female volunteers from civic

\[\text{(544) Ibid., 269-270.}\]
organizations, including the League of Women Voters. Women’s exemption and disproportionate service was one of the objections cited against the use of “blue ribbon” juries.

The petitioners relied on the Smith, Glasser, and Thiel decisions to argue that their case also deserved a ruling by the Supreme Court’s that endorsed the idea that jury should be representative of the community and a drawn from a cross-section of the community. The issue of a jury system that included only women who opt-in by volunteering to serve became a central point of contention. Fitzsimmons elaborated that: “the virtual exclusion of women from jury service by deliberately failing to call them for jury duty and accepting only such women as happen to discover that they are eligible and appear to volunteer for duty certainly does not comport with the constitutional requirement that a jury be ‘a body truly representative of the community.’”

In his brief, Fitzsimmons drew comparisons to the race discrimination decision in Smith v. Texas. He grouped sex discrimination with other forms of discrimination based on factors of identity, including race, in order to indicate it violated the equal protection clause. Fitzsimmons maintained, “there can be no doubt that the intentional exclusion of any person or group of persons from jury service on some ground which has no relation to their qualifications to serve as jurors raise a question under the equal protection clause whether the exclusion be based on race, sex, nationality, political, religious, economic, or social belief or position, or any other distinguishable characteristic.” He tried to

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547 Petition for Writ of Certiorari, Fay v. New York (1947), 11-12. Fitzsimmons tied this argument to a Federal District Court ruling (United States v. Roemig, 52 F. Supp. 857) which quashed a grand jury’s indictment because women were excluded from the jury though they were qualified to serve.
broaden the interpretation of the Fourteenth Amendment to include sex discrimination by using the Court’s re-conceptualized jury as an opening for this line of argumentation.

The brief explained the procedure by which women received discriminatory treatment. The Division of Jurors, the brief noted, was responsible for “this discriminatory refusal to notify women of their right to serve on juries and to put in force on their behalf the machinery by which that right can be exercised.” The result was the exclusion of “the bulk of women” otherwise qualified to serve. Fitzsimmons claimed this discrimination was intentional, since women did not have the opportunity to decide whether or not they would claim their exemption. Without summoning women at all, the office endorsed the virtual exclusion of women from service. The brief illuminated that the “intentional discrimination against women” was “intensified” in the selection process for the special jury.  

The question of the defendant’s gender as a relevant matter in determining the merits of his argument about the exclusion of women from the jury was addressed in the petitioner’s brief. Fitzsimmons claimed that his client, “a male,” had standing to claim that the exclusion of women from the jury violated his Fourteenth Amendment rights because it is a “fundamental question concerning the application of the constitutional provision in matters of judicial procedure.”  

Fitzsimmons claimed that even though Fay was not a member of the excluded group nor claimed women’s exclusion affected the impartiality of the trial, it still violated his Fourteenth Amendment rights. The argument made here was one of procedure; the jury chosen was selected by discriminatory means.

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549 Petitioner’s Brief, Fay v. New York, 21; The statistical analysis rendered showed that women made up 11-percent (7,000 of 60,000 jurors) of the general juror pool, but only approximately 1-percent (25-to-30 of the 3,000 jurors) of the special jury pool.

and did not reflect the community. He exclaimed, “the principle is not that the jury should represent the defendant, but rather the community; and a jury from which women are intentionally excluded does not represent the community.” These arguments did not invite questions about women’s rights; instead, the issue emphasized a procedural aspect of the trial, asking whether special juries could be representative of the community if they underrepresented certain groups including women.

District Attorney Hogan argued that the statutes of New York that allow for special juries were fair and appropriately used. He claimed that the Division of Jurors “did not discriminate against any class or category of qualified persons, citing the testimony of the two officials—McGurrin and Kane—who testified. He argued that “the official in charge of jury selection were without motive—either official or personal—to indulge in unlawful discrimination. . . and that the petitioners’ statistical tables do not suggest intentional, or even accidental, discrimination.” The intentions of the jury commissioners, he believed, outweighed the possible flaws in past selections or court procedures.

Hogan contrasted the defendant’s situation with the arguments made in the cases of race discrimination in jury selection, citing Strauder, Neal, and Smith. He claimed that the situations were not analogous. In this case, Hogan argued, “the record wholly fails to suggest any personal motive for discrimination on the part of those charged with jury selection.” In the race cases, by comparison, the excluded persons—African Americans—were part of a “clearly defined minority group, for whose protection against

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551 Ibid., 24.
majority prejudice specific constitutional and statutory measures had been enacted.\textsuperscript{553} The case of women, or even the working class, differed. Hogan argued there was no exclusion of women from the jury, because New York statute provides women “an absolute and unconditional exemption from service.”\textsuperscript{554} Exemption, accordingly, met not obligatory or equal service, and he insisted it resolved any argument of exclusion without ever addressing the fact that women had not exempted themselves but had their exemptions invoked by government officials.

Hogan further argued that if the petitioner could show deliberate exclusion of these particular groups, including women, that still no constitutional question would require a hearing. The state brief asserted that since the defendants did not belong to any of the classes—economic or sex—that were in question he could not raise an equal protection claim. Hogan even quoted the Supreme Court decision in \textit{Strauder}, in which the Court endorsed the state’s ability to limit its qualified citizens to men.\textsuperscript{555} Hogan claimed that even more recent Court decisions, like the one in \textit{Ballard}, confirmed the Supreme Court’s willingness to follow state restrictions on jury qualifications, even if they excluded women.

Fitzsimmons prepared a reply brief reaffirming the position that Fay’s rights to due process and equal protection of the laws had been compromised by the jury selection process. Fitzsimmons emphasized “the principle that a jury must be ‘a body truly representative of the community’ is a constitutional principle, one of the fundamental principles of liberty and justice which lies at the base of our civil and political

\textsuperscript{553} Respondent’s Brief, Fay v. New York 10.
\textsuperscript{554} Ibid., 11.
\textsuperscript{555} Ibid.
institutions.” This position, he claimed, differed substantially from Hogan’s claim that the
state has ultimate authority over the process of jury qualification and selection.
Fitzsimmons argued that no burden to show “actual bias” existed and that the Supreme
Court decisions in Smith, Glasser, and Thiel supported his position. Fitzsimmons also
referenced women’s exclusion to indicate a violation of his client’s right to equal
protection. He deemed that the state’s notion that “it would only give rise to ‘useless
irritation’ to compel ‘unwilling women’ to present themselves for examination for jury
duty” endorsed a process by which all women were presumed “unwilling.” The result
was the “systematic and automatic” exclusion of many women. 556

In his second brief for the Supreme Court, Hogan explained that the Division of
Jurors found it “impractical to compel women to appear for examination,” and therefore
only contacted volunteers or “those recommended by other women or by various civic
organizations.” He explained women who arrived at the office experienced the same
procedures as men compelled to serve. Furthermore, Hogan mentioned in a footnote that
the League of Women Voters had slightly more than 2,000 members, but the Division
had located upwards of 7,000 women to list as potential jurors, undermining the
petitioner’s claim that women’s organizations furnished the names of women on jury
lists. He also highlighted that three women appeared during voir dire and one of them
served on the jury without compliant from either side. 557

In June of 1947, the Supreme Court handed down its decision in favor of the state,
confirming its position that women need not be on juries in order for them to be deemed


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“representative” and casting women’s absence from juries in terms of their privileged position in society. In his majority opinion, Justice Robert H. Jackson stated that New York statutes providing for the use of special juries did not violate constitutional principles. The Court ruled that the petitioner failed to show discriminatory practices of exclusion of laborers or women that would compromise his constitutional rights to due process or equal protection. The Court expounded, “it will be remembered that the law of New York gives to women the privilege to serve, but does not impose service as a duty.”\textsuperscript{558} The Supreme Court reestablished its deference to state qualifications that excluded or exempted women from service and its commitment to a balance of federal power that allowed for state determination of most jury qualifications. Equal protections claims to juries representative of the community did not require the appearance of women even in states where women were eligible to serve but had substantial exemptions based on sex.

The Court also continued contrasting race discrimination with a benign view of sex discrimination, claiming that “because of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves.” Alluding to the extreme injustice and violence, including lynchings, that African-American communities faced, the Court found that it should not analogize women’s situation with that of African-American men. Jackson explained that the “majestic generalities of the Fourteenth Amendment are reduced to a concrete statutory command” in race discrimination cases, but not in “every other case of alleged discrimination.” He continued by stating that the Court had never ruled that any other form of discrimination

has violated a defendant’s right to due process or to equal protection. The Court left unanswered the question of whether the defendant would have to identify with the group excluded from the jury to have his due process or equal protection rights violated, noting that all of the previous cases included black defendants arguing against the exclusion of blacks from the jury. Jackson explained, “nevertheless, we need not decide whether lack of identity with an excluded group would alone defeat an otherwise well established case under the Amendment.”

Jackson justified women’s absence, emphasizing not the rights and obligations of citizenship but those of “womanhood.” The ruling dissected the argument that women were excluded from the panel unconstitutionally, forgoing the question of the defendant’s standing to make such an argument as men. Jackson reasoned “there may be no logical reason for this [exclusion of women], but there is an historical one.” Here, he explained state policies that had and continued to exclude and exempt women from service since the adoption of the Fourteenth Amendment. Therefore, he believed:

- it would. . . take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where, by state law, they are eligible, but woman jury service has not so become part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally

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may regard as the most desirable practice in recognizing the rights and obligations of womanhood.\textsuperscript{560}

Jackson confirmed a separate set of expectations for women than men, being sure to emphasize the view that women’s exemption from jury duty was something “desirable,”—a favor. This notion continued to differentiate women’s experiences from those of black men, whose right to serve on juries stemmed from the Court’s acknowledgement that the justice system would not operate fairly with their exclusion. Women’s absence did not generate those same concerns.\textsuperscript{561}

Also in 1947, the Supreme Court ruled in favor of eliminating race discrimination from jury selection, showing the strong connection between race and equal protection that was not in place in \textit{Ballard}. This case also revealed the tenacity of civil rights activists fighting a continuous battle for equal justice in the South, despite the previous victories in the Supreme Court. The NAACP brought the appeal of Eddie (Buster) Patton before the Court, hoping to realize more meaningful change. Eddie (Buster) Patton was the black defendant indicted in Mississippi for murder of a white owner of the Rock Hill Night Club, J. L. Meador. His defense attorneys, Jim T. McDonald and L.J. Broadway, argued that no African American was selected from the general venire list; that the list did not include the names of any African Americans, and that since 1935 county officials participated in “a systematic, intentional, deliberate, and invariable practice . . . to

\textsuperscript{560} Fay v. New York, 1947; The Court reestablished its position as protecting the standards of the trial process without interfering in state procedures and practices unnecessarily. The opinion maintained that the Court’s interpretation of the Fourteenth Amendment has been such that it would not “impose uniform procedures upon the states whose legal systems stem from diverse sources of law and reflect different historical influences.” The diversity among states trumped the requirement for more diversely composed juries.

\textsuperscript{561} Justice Murphy, joined by Justices Black, Douglas, and Rutledge, dissented in this case, finding that the Court should not sit “idly” by while classes of qualified jurors were excluded from special juries. Although mentioning the Smith and Glasser decision and restating the principle that the jury should be selected from a cross-section of the community, Murphy did not discuss the exclusion of women in his opinion.
exclude negroes from the jury lists, jury boxes, and jury service” violating the equal protection clause.\textsuperscript{562}

During the proceedings over the motion to quash the indictment, the defense questioned county officials about the frequency of black jurors and the obstacles preventing them from serving. They found that many could not remember having any serve outside one instance in federal court, where eight names of black jurors were verified as qualified for service and placed on the list. The officials testifying appeared resistant to the defense’s questions, answering indirectly or evading the questions entirely. Underlying much of the testimony of these witnesses was the issue of poll tax payments being a necessary precondition for jury service qualification. Circuit Clerk Cicero Ferrill testified that the number of blacks on the voter registration books for a particular area would not “exceed fifty,” and that “half of those are women.”\textsuperscript{563} He also testified, like other witnesses, that he could not recall any black men serving as jurors in over a decade. McDonald requested that Deputy Circuit Clerk Addie Rivers use the poll tax books for the area to determine the eligibility and race of particular people he listed by name. The defense revealed that at least eight to ten qualified blacks appeared in two poll tax books for one particular precinct. The prosecutor cross-examined Rivers, asking if she knew how many of the people listed were dead, how many still lived in the area, or how many were women. He finished by confirming that he could not be sure that any of them were qualified to serve at the time of the jury selection.\textsuperscript{564}

\textsuperscript{562} Patton v. Mississippi, Transcript of Records, 2; Untitled Summary, probably written by Broadway, in NAACP Papers, Part 8, Series B, Reel 11.  
\textsuperscript{563} Patton v. Mississippi, Transcript of Records, 17.  
\textsuperscript{564} Ibid., 8-12, 40-42
Tom Johnson, a member of the Board of Supervisors for the county, testified about the race and juries in the area, noting that he did not know of any qualified blacks on the list then or in the ten years prior. He claimed he remembered one older black man who was on the list years before, but he could not remember much more about him. When asked if he ever made an attempt to register blacks for service intentionally, he claimed “I have never had that in mind, because we did not have any darkies of consequence in the beat.” During cross-examination, the prosecutor asked whether Johnson tried to find “men that have good intelligence, fair character, and sound judgment” to service, implying that those factors might limit the ability to find qualified black jurors. He continued, asking whether blacks were disinterested in elections, and Johnson replied that they “don’t seem to be interested at all, the negroes don’t. The darkies don’t seem to be interested at all.” The defense attorney responded by asking if he considered the intellect or judgment of white poll-tax payers before putting them on the list, and Johnson replied only if he knew of something specific about a particular person did it prevent the use of the name.

The prosecutor discounted the absence of blacks on the juries. He emphasized in his questions a sense that blacks were not politically motivated or active in elections. He often asked how many black registered voters and poll tax payers were women, preachers, elderly, or part of another exempt group. He also referenced the importance of finding jurors of sound judgment and good character. These efforts became coded ways to underreport the number of qualified black men available to serve.

565 Patton v. Mississippi, Transcript of Record, 46.
566 Ibid., 47.
Broadway appealed his case to the State Supreme Court. The Court acknowledged the strong record of precedents supporting the claim that exclusion of blacks from juries violated defendant’s equal protection rights; however, its decision reconfirmed the state statutes which determined that “jurors shall be qualified electors and must be men, not women, and that large numbers of persons are exempt.” After recounting the testimony of county officials, the Court determined the best estimate of the appropriate ratio of black to white jurors on the list, finding that one black for every four hundred white men should be listed. If more than three blacks had been listed alongside the 1,200 white names, the Court explained, it “would have been to discriminate not against negro jurors but in their favor.” The Court asserted that the assumption must remain that court officials acted appropriately and the “absence” of blacks was “legitimate.” The Court even referenced the general sentiment that jury service was undesirable, claiming white men try to escape it, so “even more so we can be certain that the few negro jurors in a county such as this when called would be moved by the same desire and purpose to get excused.” After addressing the other points in the defendant’s appeal, the Court affirmed the original trial’s outcome.

Even though Patton’s local lawyer petitioned the NAACP for help, it declined intervention in the case until April 1947. Before the Supreme Court agreed to hear this case, the NAACP was reluctant to take the case primarily because of financial limitations. Patton’s lawyer persuaded the National Office of the NAACP to reconsider supporting the appeal, noting “this case presents . . . the chance of a lifetime to have our

567 Ibid., 146-147.
568 Ibid., 148.
569 Ibid., 149.
570 Franklin H. Williams to L. J. Broadway, 1 October 1946, in NAACP Papers, Part 8, Series B, Reel 11.
high court say whether in Mississippi, under its peculiar jury laws, negroes are entitled to serve on the juries in our courts." In the spring of 1947, the NAACP agreed to join and suggested putting primary emphasis on the jury issue.

Thurgood Marshall appealed Patton’s case to the Supreme Court, arguing that the defendant’s Fourteenth Amendment rights to equal protection and due process had been violated by the exclusion of blacks from the jury and by the use of intimidation and force to extract a confession. Marshall claimed that “established practices” of court officials had “systematically excluded” qualified blacks from petit and grand juries in the state. He explained that the statutes themselves did not discriminate against blacks, but the discrimination at the hands of “administrative officers [was] as uniform and effective as if required by statute.” Marshall summarized the testimony of the fourteen witnesses and maintained that the Mississippi Supreme Court adopted a ruling that emphasized the lowest estimates and relied heavily on assumptions in the testimony of only three witnesses. Marshall posited that the number of black men eligible for jury service increased after World War II as Mississippi instituted a law exempting veterans from paying poll taxes. Then, he argued for a higher estimate of qualified blacks in the county and explained that the state had failed to prove its burden of showing that blacks “were not unconstitutionally excluded.” He also contended that the state court failed to consider exclusion of blacks in previous years as establishing a pattern of discrimination. He also noted the tone of the officials who testified, highlighting the words of Tom Johnson as illustrative of the “atmosphere” in which selection of juries occurred. In his

571 Broadway to NAACP Legal Defense, 3 April 1947, in NAACP Papers, Part 8, Series B, Reel 11.
572 Patton, Petitioner Brief, 4.
573 Ibid., 5.
574 Ibid., 13.
conclusion, Marshall asserted that race discrimination “not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.”

Marshall emphasized the vision of juries put forth by the Court in the *Smith* case.

Greek L. Rice and George H. Ethridge’s brief for the state argued that evidence of race discrimination in jury selection was “utterly insufficient.” “It does not sufficiently appear that any registered negro had the qualifications to vote,” likely referencing the poll tax requirement. They pointed out that the testimony had not provided a definitive number of qualified black voters registered in the county nor had it presented information about how many of the qualified black electors would not be exempted or disqualified from service because of sex, age, occupation, education, or some other factor. Rice and Ethridge also noted that “Mississippi has never authorized women to sit on juries and the record shows that approximately fifty per cent of the voters who are registered are women.” They too relied on women’s exclusion to water down black men’s calls for inclusion.

The brief also referenced two state court decisions—one from Oklahoma and the other from Mississippi. The Oklahoma ruling stressed the point that the exclusion had to be based “solely” on race or color, and that the Fourteenth Amendment “does not require the jury commissioners. . . to place negroes upon the jury list simply because they are negroes.” The Mississippi court issued a similar decision in *Lewis v. State*. The opinion explained, “There is nothing in our jury law which does not apply with equal force to all

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575 Patton, Petitioner Brief, 20.
576 State Brief, Patton, 3-4.
577 Ibid., 26.
citizens, whatever be their race or color. It is a mistaken impression, which seems to have become prevalent, that in order to constitute a valid jury there must be some negroes in the jury list. Such is not the case.”

The brief also referenced other Supreme Court cases, including *Gibson v. Mississippi* from the turn of the century and *Smith v. Texas*. He argued that the state did not compel people to register to vote, and therefore jury service was limited to those who chose to register and vote. He also mentioned that jurors selected in the state were chosen “because of their good intelligence, sound judgment and fair character,” as well as being registered voters and “able to read and write under the Constitution of the State.”

The brief also mentioned the Supreme Court decision in *Ballard*, which supported state regulation of jury qualifications and selection processes. According to the *Ballard* decision, he claimed, the federal courts followed state guidelines about the eligibility of women for jury service. He emphasized that states could determine procedures to select impartial, qualified juries, and that jury did not have to consist of members of every group in society to be constitutional.

In December 1947, the Supreme Court reversed the decision in *Patton v. Mississippi*, finding that the exclusion of blacks from juries violated the equal protection clause. Justice Hugo Black noted that even though African Americans made up approximately one-third of the county’s population, still no black man had served on a jury in the county for the past thirty years. This fact “created a strong presumption that Negroes were systematically excluded . . . and it became the State’s duty to justify such

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578 Ibid., 34-35.
579 Ibid., 39-40.
an exclusion as having been brought about for some reason other than racial discrimination.” Black explained that when jury selection processes outlined by a state result in “the complete and long continued exclusion of any representative at all from a large group of negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.” Here, he stressed the exclusion in the administration and design of the law as well as highlighting the particular importance of the race of the defendant in determining whether equal protection clause had been violated.

After the Patton case had been sent back to Mississippi for retrial, the Lauderdale County Bar Association gathered to address the recent Supreme Court decision. It allegedly “passed a resolution to the effect that the mandate of the Supreme Court . . . should be ignored and that Negroes should continue to be excluded from the jury service in the county.” The inter-office memorandum of the NAACP recognized the likelihood that a member of the bar would be selected to represent Patton in his new trial since Broadway and the NAACP regrettably withdrew from the case for financial reasons after the successful appeal. As a result of this issue, the determination of the Assistant Special Counsel, Franklin M. Williams, and the new-found support of the local NAACP, Broadway agreed to represent Patton in his second trial.

581 Memorandum to Mr. White From Franklin H. Williams, 16 March 1948, in NAACP Papers, Part 8, Series B, Reel 11; Broadway to Williams, 10 February 1948, in NAACP Papers, Part 8, Series B, Reel 11.
582 Williams to Broadway, 17 February 1948, in NAACP Papers, Part 8, Series B, Reel 11.
This time three black jurors served in the venire for the petit jury, denying Patton the ability to argue as effectively exclusion on the basis of race.\textsuperscript{583} Broadway explained that he still motioned to quash the indictment on grounds of racial discrimination. He explained that “although some negroes’ names were put on the jury list, it was but a gesture at compliance with the decision of the U.S. Supreme Court. Of course, no negro sat on the petit jury which tried the case, although one was called and excused by the court on the challenge for cause by the state’s attorney.”\textsuperscript{584} The NAACP responded by expressing doubt about the prospects that the Supreme Court would hear the case. It found it unwise to spend the limited funds on appealing the case as a result, citing that “recent experience has taught us that the Supreme Court will not review jury cases unless the proof of discrimination is clear.”\textsuperscript{585}

The Supreme Court’s attempt to recast the composition of juries as “representative” of the community in the 1940s fell short. Black men as defendants rarely realized the protections extended to them, because successful appeals accounted for only a small handful of cases with black male defendants and even some of these appeals prompted new trials that still contain discriminatory practices. White women, while gaining access locally to juries though still disproportionately absent from juries, remained outside the public or “representative” community the Court imagined. Black women remained absent from juries because of both their sex and race, and arguments for their inclusion do not readily surface in any of these cases that redefined the conception

\textsuperscript{583} Memorandum to Thurgood Marshall from Franklin H. Williams, 13 July 1949, in NAACP Papers, Part 8, Series B, Reel 11.
\textsuperscript{584} Broadway to Williams, 10 September 1948, in NAACP Papers, Part 8, Series B, Reel 11.
\textsuperscript{585} Williams to Broadway, 3 August 1949, in NAACP Papers, Part 8, Series B, Reel 11.
of jury. The contrast between the pressure to uphold democratic ideals and the perceived need to protect women and their distinctive roles in society appears sharply in these cases. Additionally, the Court resisted completely eclipsing the power of the states to set juror qualifications or jury selection practices, and therefore, supported some, though not all, of the state’s efforts to construct expert or professional juries despite the inherent unrepresentative character of those juries. Through this contest between democracy, federal protection, and representative institutions on the one hand and restrictive, gendered, and state-guided qualifications on the other, began the process of reconsidering the constitution of the jury. It, however, fell short of challenging the previous Court position of condemning race discrimination and condoning gender distinction in jury eligibility and obligation.
Chapter 6: Confronting the “Weird World of All-White, All-Male Juries”: Pursuing More Representative Juries in the Second Rights Revolution

“We think that sex discrimination can be better understood if compared with race discrimination and that recognition of the similarities of the two problems can be helpful in improving and clarifying the legal status of women,” argued Pauli Murray and Mary O. Eastwood in their 1965 article “Jane Crow and the Law.” Murray, a black female lawyer offered analysis about the dual discrimination faced by African-American women and served to bridge civil rights and feminist strategies throughout her career. She and her colleague Eastwood, a white feminist attorney for the Department of Justice, grounded their strategy for achieving women’s rights in the 1960s in the use of race-sex analogies to pursue anti-discrimination policies. They denounced the Court’s reliance on “classification of sex” espoused in the infamous Mueller decision, likening it to the former doctrine of “separate but equal” that guided race relations during the period of Jim Crow segregation. By condoning “‘protection’ and ‘privilege’” and promoting “‘chivalry’ and concern for the ‘ladies,’” the government denied women’s equality.

Jury service, more than the vote, taxation, or most other civic rights and obligations, became one in which the differential treatment of women most often hinged on notions that exemption or exclusion privileged women. Women’s exclusion from

military drafts has relied on similar claims, yet unlike the varied policies on jury service, the exclusion of women was absolute and nationally imposed. This argument—the need to protect women from this onerous task—had been the foundation for many of the arguments of opponents to women’s service. This basis remained in stark contrast to the consistent recognition that black men required jury service rights as a means to protect black defendants and the African-American community. Here, Pauli Murray and other sought to merge these two discussions—in part by centering the experiences of African-American women—in order to promote women’s equal standing as citizen and challenge the previously prevailing claims of “privileging” women.

Women of color—especially Pauli Murray—became central figures in the legislative and legal fights for equal citizenship and justice in the second rights revolution, and this chapter demonstrates, as Susan M. Hartmann also has, how black and white women often worked outside of organized, mainstream feminist organizations to play critical roles in shaping this rights revolution’s implications for women. By the 1960s, female federal legislators and feminist lawyers demanded that the federal government truly protect African-American’s existing rights to serve on state and federal juries and extend those rights to all women, uniting discussions of race and sex discrimination. This chapter reveals the continuity in women’s citizenship claims and activism that, more than activism around other issues, crossed feminist divides and to some extent side-stepped debates over the Equal Rights Amendment.  

587 Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment*, Yale University Press, 1998; Also see, Dorothy Sue Cobble, Cynthia Harrison, Leila Rupp and Verta Taylor, Joanne Meyerowitz, for works on American feminism before the second-wave movement of the 1960s and 1970s.
Federal rights expanded for traditionally marginalized groups in society, including women, in the 1960s and 1970s. Congress, not the Supreme Court, first rethought its position on women’s jury service and began to revise the Reconstruction-era policy that condoned women’s exclusion from juries. Especially after recommendations from the President’s Commission on the Status of Women surfaced, congresswomen employed the rising rights revolution in legislation to lobby for women’s equal obligations to jury service. As John D. Skrentny noted, the rise of a conservative, white backlash in the late-1960s coincided with the bipartisan support of extending minority rights. This chapter, while tentatively agreeing with Skrentny’s interpretation, examines a policy process that had bipartisan support but still failed to reach the goals of women’s rights advocates. Seeing the civil rights movement as an independent source from which other rights campaigns sprung, Skrentny claimed that the imperfect analogy between race and sex presented women with more obstacles than other minorities. This chapter complicates his story of causations, revealing that black and white women pursued both civil rights and women’s rights policies in concert with one another and that feminists operated within liberal organizations and government to achieve equal citizenship for women. Dissension over protecting women from sex discrimination complicated the legislative push for women’s equal jury service rights, and a bipartisan group of female legislators—using race-sex analogies—fought vigorously for the extension of federal policies prohibiting race discrimination to include protections for women.\footnote{John D. Skrentny, \textit{The Minority Rights Revolution}, Harvard University Press, 2002.}

This chapter will first address how Congress initiated the process of changing its long-standing policy on women’s jury service during the first years of the rights

\footnote{John D. Skrentny, \textit{The Minority Rights Revolution}, Harvard University Press, 2002.}
revolution, while the Supreme Court resisted revising its position. Then, it will follow the pioneering work of Pauli Murray and long-time ACLU member and white feminist lawyer Dorothy Kenyon in securing a stunning—though limited—victory in *White v. Crook* that identified sex discrimination in jury service as a violation of the Fourteenth Amendment. With the limited scope of this federal district court decision, female congresswomen pressed for legislative remedies to women’s exclusion, securing hard-won, but only partial victories with 1968 federal jury reform legislation. Finally, this chapter will trace the 1970s Supreme Court decisions in which Ruth Bader Ginsburg and the ACLU, on behalf of white, male defendants, successfully argued that women’s exclusion and absolute exemption from jury service was unconstitutional.

Nearly a century after the first rights revolution, Reconstruction-era policy still failed to secure black men’s access to juries in practice. White women gained gradual rights to serve on juries after states began changing their laws in the mid-twentieth century, but they still served in disproportionate numbers compared to those of white men. In 1957 in a response to the rising tide of social activism, Congress passed the first civil rights legislation since Reconstruction. The Civil Rights Act of 1957 emphasized the need to protect African-Americans’ civil rights, while also incidentally eroding some obstacles to women’s citizenship. This legislation was a reaction to the violence and injustice civil rights workers faced in the South and it attempted to provide remedies for the corrupt justice system of all-white juries that exonerated whites accused of racially-
motivated crimes.\textsuperscript{589} Even though it met resistance from white Southern Democrats, Congress started considering the need to achieve equal justice in the South.\textsuperscript{590}

Congress also revisited the issue of women’s exclusion from federal juries, taking its first step to providing equal obligations for women. The Civil Rights Act of 1957 deviated from Congress’s long-standing tradition of relying on state jury qualifications to determine the eligibility of jurors for federal courts. It instead authorized women to serve on federal juries even if women were disqualified under state law.\textsuperscript{591} This act, aimed at combating discrimination because of “race, color, religion or nationality,” had the additional consequence of negating any state-based exclusions based on sex for federal jury service. From the beginning of the second rights revolution, Congress—not the

\textsuperscript{589} Gendered language infused the discussion over the need for jury trials to protect those (Southern whites) charged with contempt. Assistant General Warren Olney exclaimed that the jury trial amendment “would ‘emasculate the whole bill.’” \textit{Time} magazine reported the Southern Democrats responded to Olney’s turn of phrase by stating that his “choice of words . . . merely proved that the original intention of the bill was to rape the South.” See “National Affairs: The Civil Rights Bill,” \textit{Time}, 6 May 1957, http://www.time.com/time/magazine/article/0,9171,809408-1,00.html, Accessed 9/16/10; Additionally, some civil rights activists, obviously, did not see this legislation as complete success, pointing to its weaknesses and insufficiencies. For instance, Valores Washington, a prominent black Republican and Director of Minorities for the Republican National Committee, criticized this maneuver in a press release and letter to Senator Lyndon Johnson in 1957. He asked, “If a southern jury would not convict confessed kidnappers of Emmett Till after he was found murdered, why would they convict an election official for refusing to give a Negro his right of suffrage.” He continued by questioning the change of heart of the senators who had recently supported the bill, stating “I am positive, Senator that neither you, nor any of your Southern colleagues would vote for this Bill unless you know it is meaningless and ineffective.” The Attorney General, along with other federal agencies, recognized the limitations the senate’s addition, finding that “the practical effect [of the amendment] . . . will be to hamper not only the enforcement of the Civil Rights Bill itself, but also to make it much more difficult to enforce federal law and policy in other vital areas involving the public interest.” See, Acting Attorney General William P. Rogers to Representative Joseph W. Martin, August 9, 1957, http://eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_Civil_Rights_Act/CivilRightsActfiles.html

\textsuperscript{590} White Southern Democrats weakened the policy by insisting that juries try contempt cases so that jury commissioners would face all-white juries if they faced punishment for disregarding this policy.\textsuperscript{591} Civil Rights Act of 1957; The amended language of the 1861 U.S. Code for federal juror qualifications then made uniform federal standards for jury eligibility of any U.S. citizen who was literate in English, not convicted of any crime, mentally and physically fit, at least twenty-one years old, and at least one year a resident of the federal district.
Court—began the process of revising the bifurcated system of Reconstruction by continuing to draw together discussion of race discrimination and sex discrimination.

The Supreme Court also had a chance to revise its position on the use of sex-based exemptions and the overwhelming absence of women on juries with the 1961 case, *Hoyt v. Florida*, but it instead continued to emphasize the special roles of women in society and to view exclusion as “privilege.” The “feminine mystique” lauded in the postwar U.S. promoted prescriptions for rigid gender roles and characterized the experiences of many women who married at younger ages and bore more children; these ideas informed the perspective of the justices in 1961. The Court agreed to hear the appeal of Gwendolyn Hoyt, a Florida woman convicted by an all-male jury of murdering her husband with a broken baseball bat. Hoyt had pled not guilty by reason of temporary insanity.592 After being convicted by a jury of six white men, Hoyt appealed her case and received support from various organizations, including the ACLU.593

The ACLU, with the guidance of a long-time women’s rights advocate and established lawyer, Dorothy Kenyon and later Pauli Murray, became a “leading spokesman” for jury service litigation of the 1960s and 1970s. It began its work by filing the amicus curiae brief in support of Hoyt’s appeal.594 The brief presented statistical evidence of women’s dramatic underrepresentation on juries in Hillsborough County. Only 220 women of the 46,000 registered female voters had volunteered for service.595

593 Kerber, 165-170. Hoyt’s new councilor was lawyer and former councilor for Sacco and Vanzetti, Herbert B. Ehrmann and Raya Spiegel Dresden, a female lawyer who did pro bono work alongside Ehrman for the Boston firm of Goulston &Storrs.
594 The League of Women Voters, the American Bar Association, the National Association of Women Lawyers, among others, declined.
595 Hoyt v. Florida, 368 U.S. 57, 1961
Kenyon hoped her analysis of the disparity between the number of women voters and women jurors would convince the Court to rule in favor of Hoyt. As Linda Kerber has claimed, the defense wanted to emphasize both women’s equality to men and women’s distinctiveness from men to claim that women jurors were both qualified and necessary to provide impartial, fair trials of women.\textsuperscript{596} This attempt to stress women’s equality with men and their unique attributes as women required the erosion of notions of female privilege long-held by many policymakers and jurists.

In 1961, the Supreme Court reconfirmed its long-held stance on the legality of states exempting women from jury obligations. The Court in \textit{Hoyt v. Florida} unanimously declared that the Florida statute exempting women from service and the practice of registering only female volunteers were constitutional and not in violation of the Fourteenth Amendment.\textsuperscript{597} Writing the decision, Justice John Marshall Harlan II crystallized the central aspect of the case: the appellant’s “claim that the nature of the crime of which she was convicted peculiarly demanded the inclusion of persons of her own sex on the jury.”\textsuperscript{598} Addressing Hoyt’s claim that female jurors “would have been more understanding or compassionate than men” in rendering their judgment on her actions, Harlan countered that this assumption “misconceives” the Court’s interpretation of

\textsuperscript{596} Kerber, 176.
\textsuperscript{597} Louisiana and New Hampshire had similar opt-in systems for women’s jury service in 1961. Three states—Alabama, Mississippi, and South Carolina—excluded women entirely. Eighteen states (and the District of Columbia) had absolute exemptions based on sex (Alaska, Arkansas, D.C., Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, Nevada, New Hampshire, New York, North Dakota, Rhode Island, Tennessee, Virginia, Washington, and Wisconsin). Eight other states provided exemptions only to women with family responsibilities (Connecticut, Massachusetts, Nebraska, North Carolina, Oklahoma, Texas, Utah, and Wyoming). Twenty-one states had equal obligations for women and men (Arizona, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland (except four counties with absolute exemptions), Michigan, Montana, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, and West Virginia.
\textsuperscript{598} Hoyt v. Florida, 368 U.S. 57, (1961)
of the Fourteenth Amendment. He implied that even in race discrimination cases appellants were not “entitled” to “tailoring” a jury to their situation. Harlan also divorced this case from those prior race cases, claiming that it “in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service.” The federal government’s position on women’s jury service was consistent. Both Congress and the Supreme Court since Strauder respected the states’ authority to determine whether sex should affect eligibility in state courts. Florida’s proceedings offered women “a reasonable classification,” and thus limited citizenship status, Harlan wrote, “Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of the community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.” The connections explicitly drawn between women and family reinforced notions of a dependent citizenship that tethered women to homes as wives and mothers. In upholding these gendered differences, Harlan noted, states might be “acting in pursuit of the general welfare,” considering the onerous duty might conflict with women’s “special responsibilities.”

In the same year as the Hoyt decision reaffirmed the Court’s view of gender distinctions in policy, the President’s Commission on the Status of Women (PCSW) studied gender inequality and women’s roles in American society and proposed policy changes to secure more equitable legal status for women. In 1963, the Commission’s

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600 Ibid.
report, *American Women*, outlined a variety of issues including jury service. It emphasized that the “right to trial by a jury that reflects the community is a bulwark of justice,” and found the Civil Rights Act of 1957 to be insufficient in preventing sex discrimination in jury selection. Despite the new eligibility, women remained underrepresented on many federal juries. Three states—Alabama, South Carolina, and Mississippi—barred women’s service, and over half of the states allowed for sex-based exemptions from women.\(^{601}\)

The Committee on Political and Civil Rights of the PCSW offered specific recommendations for women’s jury service that centered on a Fourteenth Amendment strategy to procure equal obligations. Pauli Murray, along with Mary Eastwood and Marguerite Rawalt, a white feminist lawyer and the lone ERA supporter on the Commission, took the lead in deciding the appropriate strategy for tackling this issue. They agreed that women in all fifty states needed equal jury service obligations without allowing special exemptions for mothers. Pauli Murray drafted the Committee’s recommendations and substantially shaped the legal strategy adopted by the PCSW. Opposed to the ERA at that time, Murray proposed that the Commission challenge discriminatory laws without jeopardizing protective legislation for disadvantaged groups, including women. She instead suggested expanding the interpretation of the Fourteenth Amendment’s equal protection clause to include protection against sex discrimination. Murray’s goal with this approach was to achieving legal recognition of the diversity of women’s roles and capabilities. Murray also hoped this position would unify women’s organizations, regardless of their ideological stances on the advancement of women’s

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While she believed that the fight for an Equal Rights Amendment had “stimulated the gradual removal of inequalities,” her strategy was to have the Supreme Court announce “unequivocally that women are guaranteed equal rights without distinction on the basis solely of sex,” rather than work for a constitutional amendment.  

Even after the Court’s unfavorable ruling in *Hoyt*, Murray still encouraged feminists to prioritize a Fourteenth Amendment strategy for women’s achievement of full citizenship, including jury service obligations. In 1962, she offered the PCSW her “Memorandum on Applicability of Fourteenth Amendment to State Statutes and Administration or Executive Practices with Distinguish on the Basis of Sex.” She had outlined this more detailed plan of action to highlight the need to adopt a revised strategy. Murray noted that the recent *Hoyt* decision, while not a success for expanding women’s rights, still could have been worse. The Court had avoided stating that the Fourteenth Amendment did not apply to distinctions made on the basis of sex. She also could not determine a “general pattern” in the attitudes of the courts on the concept of “reasonable classification” and the scope of the Fourteenth Amendment. In the Court’s lack of firm ruling on this issue, Murray saw possibility.

In making her case, Murray drew parallels between the quest for racial equality and women’s fight for citizenship, underlining the time-lag and the sequence between the two struggles. She emphasized that “litigation involving the rights of women as fully
participating citizens in the United States, is almost a half century (and certainly a quarter-century) behind that of litigation seeking to establish equal rights for Negroes and other minorities."\textsuperscript{606} She recommended that the Commission create a legal advisory committee that could compile “historical, sociological, psychological, etc. data for the ‘Brandeis type brief’ needed to enlighten and persuade the various courts” to offer women favorable outcomes. Murray believed that with these efforts and a careful selection of test cases, women’s rights advocates could present a solid case for women’s jury rights and, more importantly, for an expansive reading of the Fourteenth Amendment. She proposed that the legal advisory committee ask civic organizations and agencies (rather than women’s organizations), including the ACLU and the NAACP, to alert the Commission when any cases involving women’s rights appeared.\textsuperscript{607}

The President’s Commission agreed with Murray’s position and in its 1963 report confirmed this stance. In addition to supporting litigation, it advocated “further Federal legislation as necessary” to ensure women’s access to federal juries, concluding that “appropriate action, including enactment of legislation where necessary, should be taken to achieve equal jury service in the States."\textsuperscript{608}

The ACLU also supported Murray’s position, believing that the Court had already begun expanding the interpretation of the Fourteenth Amendment. In a letter to Esther

\textsuperscript{606} Ibid.
\textsuperscript{607} Pauli Murray, “Draft Memorandum on Applicability of Fourteenth Amendment to State Statutes and Administrative or Executive Practices Which Distinguish on the Basis of Sex,” 24 August 1962, in Rawalt Papers, Box 30, Folder 41; It might be of note that Murray suggested these civil rights and liberal organizations. She might have believed they offered a better chance to showcase race and sex analogies, had better resources and respectability; and provided the best legal support for this mission. Hartmann has argued that some black women preferred the use of liberal organizations to women’s organizations. See, Susan M. Hartmann, “Pauli Murray and the ‘Juncture of Women’s Liberation and Black Liberation’,” \textit{Journal of Women’s History}, 2002, 74-78.
\textsuperscript{608} PCSW, \textit{American Women}, 1963.
Peterson, a labor feminist, Director of the Women’s Bureau, and executive vice-chairperson of the PCSW, the ACLU’s executive director pointed to the favorable decision for Mexican-Americans in *Hernandez v. Texas* (1954), arguing that it would be difficult to see why the logic of that decision “should not apply to women, in states excluding women from jury service, for instance, as well as to persons of the excluded color or race.” He noted the ACLU commitment to dismantle discriminatory policies and practices through litigation and offered to cooperate with the PCSW to achieve these goals.609

The ACLU held up its commitment to pursue such a case, finding one in Alabama in 1965. Lowndes County demonstrated the extent of both race and sex discrimination in the southern justice system. Statistics from the county showed that the exclusion of blacks and women from juries meant that of the 5,603 residents between 18 and 64, only 738 people (white men in that age bracket) were eligible for service.610 As a result of this discrimination and the injustice it created for civil rights workers abused or killed in the area, a group of black men and white and black women, including the case’s plaintiff Gardenia White, filed suit against jury officials with the help of the ACLU in August 1965. As a result, *White v. Crook* would be the first case to successfully merge Fourteenth Amendment equal protection arguments against race discrimination with those against sex discrimination.

The well-known, outspoken civil rights attorney for the ACLU, Charles Morgan, Jr., spearheaded the class-action lawsuit, initially conceiving of it as part of his mission to

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609 John de J. Pemberton, Jr. to Esther Peterson, 4 February 1964, in Kenyon Papers, Box28, Folder 4, Sophia Smith Collection, Smith College.
610 Phineas Indritz to Florence Dwyer, Patsy Mink Papers, Box 73, Folder 7 Library of Congress.
achieve racial justice. A diverse group of lawyers, including black lawyer and chairperson of the Alabama Democratic Conference, Orzell Billingsley, Jr., Dorothy Kenyon, Pauli Murray, and Melvin L. Wulf, the legal director of the ACLU, accompanied Morgan in this effort. This impressive council represented Gardenia White, the Episcopal Society for Cultural and Racial Union, and the other plaintiffs claiming that the exclusion of African-Americans and women from juries in the county violated their constitutional rights.

The ACLU brief in the case referenced the tumultuous past civil rights activities and the deaths of activists in “Bloody Lowndes” County, where “men and women, Negro and white, struggle in the continuing American revolution.” The brief also highlighted the black community’s view of the injustice and violence produced by southern courthouses by comparing it to the way Europeans must view concentration camps. Morgan claimed that democracy would fail without a working justice system, since fear of retribution without impunity would prevent individuals from voting. Referencing other notable American trials, including the Sacco and Vanzetti trial, the Eugene V. Debs trial, and the Leo Frank case, the brief offered examples of how exclusion of certain social groups from juries had thwarted justice historically. It concluded that “to try civil rights workers and Negroes who do not bow to the social, political, economic and other customs of the Deep South by juries from which Negroes and women have been excluded is akin

612 Hartmann, *The Other Feminists*; Kerber, *No Constitutional Right*
613 ACLU, Plaintiff’s Brief, White v. Crook, 1965, Patsy Mink Papers, Box 73, Folder 9; Here the ACLU relied on the work of Dr. Robert Coles.
to the exclusion of Negroes from the jury at the treason trial of John Brown.” Exclusion meant not only individual injustice but allowed for widespread political repression.

Meeting some resistance, Pauli Murray and Dorothy Kenyon fought for the inclusion of arguments about women’s access to juries. Dorothy Kenyon suggested attacking sex discrimination in addition to race discrimination, but found that “the civil rights workers as a group were against the idea, saying that to mix up the woman issue with civil rights was to muddy the waters.” Kenyon did not back down. When discussing this argument after the case, she expressed her frustration, asking “How stupid can men be?” She, like Murray, believed that including women’s exclusion on the list of grievances “actually doubles the impact of the Negro issue (Jane Crow).” Kenyon experienced it as a lonely fight, with most involved in arguing the case other than Murray “struggling” against her. Kenyon noted a few months after the White decision that “a great revolution in southern habits and customs is in the making, I believe, and who know[sic], women’s active participation may be the catalyst.” She conceived of women’s participation not as simply a result of the civil rights movement but as a fundamental part of its success.

Women committed to civil rights became important players for the convergence of race and sex discrimination campaigns for equal jury service. Pauli Murray, along with Dorothy Kenyon, researched the case history of women’s jury service claims,

615 ACLU, Plaintiff’s Brief, White v. Crook, 1965, Patsy Mink Papers, Box 73, Folder 9
616 Kenyon to Dr. Charles T. Duncan, 17 March 1966, Kenyon Papers, Box 28, Folder 6.
617 Kenyon to Peterson, 6 April 1966, Kenyon Papers, Box 29, Folder 10.
618 Kenyon to Mrs. M. E. Tilly, 5 April, 1966, Kenyon Papers, Box 28, Folder 6.
spearheading the inclusion of arguments against sex discrimination—the process that led to the “historic” decision in *White v. Crook*. Murray rejoined her PSCW colleagues, Harriet Piplel, a white feminist lawyer best known for her work as reproductive rights advocate, and Sophia Yarnall Jacobs, a white civil rights activist and author, in supporting women’s claims to jury service as a member of the ACLU Board in 1966. These feminists elevated the issue of women’s exclusion by analogizing it to and integrating it with civil rights claims.

Pauli Murray revealed that her pursuit of women’s rights arose out of feeling underappreciated and excluded from the civil rights movement. “My acute sensitivity to all of this [status of women] stems directly from a kind of fateful exclusion from the inner circles of civil rights activities,” Murray contended. “In other words, having an intellect and an equalitarian point of view has been almost a handicap to me in finding a place in the civil rights struggle, as if it were a threat to male colleagues. No one, however, can deny me the right to speak out on behalf of women. Hooray for our side!” Her frustration with her position in the civil rights movement, perhaps, allowed her to champion enthusiastically women’s rights while always connecting her struggle for gender equality to her awareness of racial inequality.

Murray and Kenyon emphasized the argument that the exclusion of women from juries violated the Fourteenth Amendment and pressed for a more complicated investigation of the relationship between race and sex discrimination in order to unravel the notion of “privilege” that stymied white women’s rights, historically vilified black women.
men, and usually ignored black women altogether. As a reflection of their efforts, the White brief also explored the relationship between the “negro revolution” and the “American woman,” focusing on the convergence of racial and gender stereotypes that reinforced one another. The brief explained that, “When knighthood—and chivalry—were in flower, women’s status was perhaps at its lowest ebb.” Challenging the paternalistic view of women’s jury service in the 1930s, Kenyon and Murray claimed that the purported protection of women under the guise of chivalry was really about control. The brief described the relationship between white women and blacks in the South and emphasized the role of white men in policing those interracial interactions. Referencing Dr. Robert Coles, prominent psychologist and author, the brief also noted the potential for white women to show sympathy for African Americans, despite white men’s perception that they needed to protect white women from black men.

Murray and Kenyon not only discussed the interlocking nature of race and sex in rationales for exclusion, but they also more directly compared the meanings of exclusion for both women and black men. While the brief conceded that women’s status had changed significantly since the nineteenth century, it claimed that women’s exclusion from juries hurt the civil rights movement. It asserted that women and blacks had similar legal statuses in the past—“both being treated as inferior persons, without human rights or dignity.” It analogized their experiences, finding that “both were suffering much from

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623 Mary Eastwood to Mattie Belle Davis, 4 December 1965, in Pauli Murray Papers, Box 38, Folder 692, Schlesinger Library
the same disabilities, including total exclusion from the rights and responsibilities of citizenship.\textsuperscript{624}

The discussion of changes to women’s roles in society over the twentieth-century and the new emphasis on the diversity among women’s lived experiences bolstered these comparisons drawn between race discrimination and sex discrimination while eroding the correlation historically drawn between women’s roles and privileged citizenship. The brief challenged essentialized notions of womanhood, claiming that women’s “functions and interests vary widely as individuals.” It deemed that “recognition of the diversity of women as individuals and the multiple roles they play in society had brought increasing pressure for the removal of the remaining legal and social inequities in their status which are out of harmony with the expanding concept of individual rights and democratic participation in representative government.”\textsuperscript{625} To illustrate this point, the brief listed women in high-ranking state positions, including the state treasurer, secretary of state, and presiding judge of the state court of appeals. It noted that women in Alabama also served in the legislature, as sheriff, and as policewomen. It also revived some arguments reminiscent of earlier suffrage and jury service campaigns, highlighting the contrasting legal rights to serve on juries offered to black men and to all women.\textsuperscript{626}

In this brief, the ACLU also claimed that women—white and, more importantly, black—were essential to the success of the civil rights movement and needed to be on

\textsuperscript{624} ACLU, Plaintiff’s Brief, \textit{White v. Crook}, 1965, Patsy Mink Papers, Box 73, Folder 9, Library of Congress.

\textsuperscript{625} Ibid.

\textsuperscript{626} Ibid; Arguing that sex discrimination should be viewed with strict scrutiny by the Court like cases of race discrimination, the brief continued by comparing women’s exclusion with the other statutory qualifications to serve on state juries in Alabama. It noted that “habitual drunkards,” those with “a permanent disease or physical illness,” and those “convicted of an offense involving moral turpitude” are also disqualified to serve.
juries to ensure a fair justice system for black defendants. They maintained that “women, negro and white, have continued the struggle in the South for equal rights for all. At times since 1954 without women the struggle for the rights of Negroes would have been lost.” The brief emphasized the role of black women who “have been in the forefront of the struggle for equal rights in Alabama and elsewhere in the South.”

Black women’s support for civil rights underpinned the need for black women’s equal participation in public institutions.

The ACLU’s position in White challenged the Supreme Court’s 1879 holding in Strauder v. West Virginia directly. The ACLU claimed that twentieth-century state court decisions against women’s inclusion on juries had relied on the dicta in this race discrimination case decided during a time when women had fewer political rights and when the Court interpreted the Fourteenth Amendment narrowly. The ACLU recognized the legacy of the first rights revolution on the circumscribed political position of women in the twentieth century. Its brief argued that more recent Court decisions upheld a new ideal of representative juries—a concept at odds with women’s exclusion.

The U.S. Department of Justice joined the plaintiffs in the case before the ruling of the Federal District Court in February of 1966. The DOJ, however, took a firm stance only against race discrimination in the selection process, remaining silent on the question of women’s exclusion. The federal government maintained its general policy developed

628 Ibid.
629 Ibid.
During the first rights revolution, one that condemned race inequality but condoned sex discrimination by states.

Despite the DOJ’s unwillingness to revisit the issue of women’s citizenship obligations, the Federal District Court considered both questions and delivered a historic ruling that denounced both race and sex discrimination. The panel of three judges found that the jury commissioners’ selection procedures “limited [juries] to a small number of adult, while male citizens” and excluded black men and “female citizens of both races.” The “recirculating pool” of white jurors revealed racially discriminatory practices that violated the Fourteenth Amendment. Furthermore, the Court also held that Alabama’s statute excluding women from juries was unconstitutional under the equal protection clause. This decision became the first ruling to consider both race and sex discrimination simultaneously and to rule favorably for women.

The landmark decision in *White* offered an expanded interpretation of the application of the Fourteenth Amendment to women. The anticipated Supreme Court review of it gave many women new hope for equal citizenship. Pauli Murray had speculated prior to the decision that 1966 might be “the year of WOMEN.” She believed the decision in *White v. Crook* to be truly path-breaking. In a letter to Marguerite Rawalt, she likened it to a *Brown v. Board of Education* case for women. Murray asserted that “it is unthinkable that it [the Supreme Court] could say any less.” She explained that the ACLU’s simultaneous support for a 1966 bill that would equalize women’s

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631 Certainly not everyone found this decision to be significant or desirable. For instance, the some members of the Alabama League of Women Voters and the state prosecutor found women’s eligibility to be humorous or problematic. See, Branch, At Canaan’s Edge, 311-312.

632 Pauli Murray to Mary Eastwood, 19 January 1966, in Mary Eastwood Papers, Box 5, Folder 56. 251
obligations was “more than a narrow campaign on a single issue (reform of juries),” and she thought the *White* decision might give “momentum” to the lobbying campaign in the Senate. In fact, Murray claimed to be thankful for the original omission of “sex” as a protected category in the civil rights bill, because that omission prompted the ACLU activity in *White*. Rawalt also believed the decision in *White* was path-breaking in its expansion of the interpretation of the Fourteenth Amendment, and she believed—however incorrectly—that it would affect the laws of other states. Mississippi and South Carolina’s exclusion of women from juries and the opt-in systems of Florida, New Hampshire, and Louisiana, she thought, would be forced to change after this federal court decision. Mattie Belle Davis, pioneering woman judge and former president of the Florida Association of Women Lawyers, hoped to file an amicus brief in support of *White* if an appeal went before the Supreme Court. Rawalt concurred, believing that the National Association of Women Lawyers and the National Federation of Business and Professional Women Clubs would have joined the appeal as well.

Esther Peterson and Margaret Hickey, lawyer and long-time feminist activist, believed the decision in *White* might eradicate the need for the ERA. Dorothy Kenyon, in a letter to Peterson, lamented that “nobody is ever going to give me any credit, of course, now that we have won,” and no longer needed a separate amendment. She noted her long battle to make the Fourteenth Amendment a viable strategy for arguing women’s

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633 Murray to Rawalt, 16 February 1966, Rawalt Paper, Box 30, Folder 38.
634 “Article by Marguerite Rawalt, Member of Citizens Advisory Council on the Status of Women, in Rawalt Papers, Box 30, Folder 40.
635 Handwritten note on Mary Eastwood to Mattie Belle Davis, 4 December 1965, in Pauli Murray Papers, Box 38, Folder 692, Schlesinger Library; Rawalt to Helen K. Leslie and Emma C. McGall, 9 February 1966, Rawalt Papers, Box 30, Folder 38.
rights, despite other women’s opposition. These women championed the court’s reading of the Fourteenth Amendment, seeing the decision as a bulwark for women’s rights. Hickey claimed that the “thrilling” decision was “evidence of a world-wide human rights revolution” that included women’s equality before the law. Other women’s rights advocates saw the decision as an opening for women to challenge sex discrimination in education, employment, and property rights cases.

Like Peterson and Hickey, Murray hoped the success of the jury issue would aid in healing the divide between feminists over the ERA. She reached out to National Woman’s Party feminists such as Alma Lutz and Alice Paul to encourage their support for this issue. Murray said that she wanted to “pay homage” to all the women who fought for equal rights in past decades, and she believed that there existed “a movement in embryo to reconcile the various points of view within women’s groups and to give honor to the pioneers.” She thought this renewed cooperation was a “salutary by-product of the White v. Crook victory.” She also reassured equal rights advocates that she did not believe that favorable decisions for women under the Fourteenth Amendment necessarily hurt the ERA cause, and she wanted women to support all advances. She did, however, emphasize her support for the re-conception of the Fourteenth Amendment, and urged women in the NWP to do the same “while pursuing [their] own independent goals . . . [so] the women of the country would be united and could win hands down.”

Regardless of the predictions of these feminists, the Federal Court decision was not enough by itself to eradicate sex discrimination in jury service policy or eliminate

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637 Kenyon to Peterson, 28 February 1966, Kenyon Papers, Box 28, Folder 6.
638 Mary Dublin Keyerling to Members of the PCSW, 11 March 1966, Rawalt Papers, Box 30, Folder 41.
639 Murray to Lutz, 15 March 1966, Eastwood Papers, Box 5, Folder 56.
640 Ibid.
discussion over the ERA. These women’s rights activists soon found their hopes for a Supreme Court decision that confirmed the ruling in White dashed. The state did not appeal, so women’s organizations did not get the opportunity to have the Supreme Court address the application of the Fourteenth Amendment to women’s absolute exclusion from juries. Meanwhile, Kenyon noted that the decision in White, regardless of an appeal, was not a complete solution to sex-based exemptions that provided women with unequal jury service obligations. The ACLU, she believed, needed to “go on to try to persuade the world that voluntary women jury service is also unconstitutional, that jury service is obligation as well as a right and that classification of women qua women in respect to jury service is unreasonable and therefore unconstitutional.”

She directed her attention at overturning the Hoyt decision.

The White case sparked similar cases to appear in other states, but the unfavorable rulings quickly indicated how limited the effects of the White decision would be. On February 28, 1966, two black litigants filed a class action suit on behalf of all of the blacks and women in a Mississippi county, claiming that the systematic exclusion of black men and the outright exclusion of women from juries were unconstitutional. The Mississippi Supreme Court held that the female plaintiff, Virginia Hall, was not denied equal protection of the laws because of women’s exclusion from juries, finding the White

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641 Kenyon to Peterson, 28 February 1966, Kenyon Papers, Box 28, Folder 6.
642 In May 1966, Marguerite Rawalt asked the President of the South Carolina Federation of Business and Professional Clubs if two or three members might serve as plaintiffs to test the constitutionality of state laws excluding women from service. Rawalt suggested that women needed a decision to reach the Supreme Court—something White v. Crook did not do. She explained, “You see it is not only the jury service right, but the overall principle that women are persons within the U.S. Constitution’s 14th amendment that is important. She also informed her that Charles Morgan of the ACLU would provide counsel for the plaintiffs. See, Rawalt to Mrs. Bertha M. Fortune, 4 May 1966, Rawalt Papers, Box 30, Folder 36.
decision not binding. The court deferred to the legislature to change jury qualifications and asserted that “no citizen has the absolute right to serve on a jury” and that excluding women allowed them to “continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.” Rhetoric of women’s privilege resounded; *White* had not removed the remnants of the pedestal.

The Mississippi Supreme Court decision in *Hall* relied on the Reconstruction-era federal policy to support the exclusion of women. Extensively citing the *Strauder* case, it limited the Fourteenth Amendment to issues involving race. It also noted that the 1875 *Minor v. Happersett* case in which the Supreme Court held sex discrimination in voting qualifications as constitutional under the Fourteenth Amendment, recognizing the continued severance of citizenship from its rights and obligations. Relying on more recent Supreme Court decisions in *Hoyt* and *Fay*, the court ultimately concluded that sex as a classification was “reasonable.” *Hall* also pointed to Congressional policy, finding that “Congress considered the Fourteenth Amendment as not bestowing upon women the right to serve upon juries. The Federal Statute. . . was so worded that women could not serve in Federal Courts as jurors unless the law of the state where the court was being held so permitted” until the Civil Rights Act of 1957 changed that procedure. The

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644 State v. Hall, 187 So. 2d 861, Miss. Supreme Court, 1966; Only the Chief Justice dissented in the case, finding that the classification of “sex” to be arbitrary.

645 State v. Hall, 187 So. 2nd 861, Miss Supreme Court 1966
ruling viewed the changes in federal legislation, even with the more recent rights legislation, insufficient to prompt a new interpretation of the Fourteenth Amendment or to warrant changing women’s roles in society. Additionally, the Supreme Court failed to grant the *Hall* case a hearing.

The ACLU activists who supported *White* correctly predicted that “Congress will, no doubt, act again, and more often to remedy the ills of 400 years of history,” and Congress and the Johnson Administration did pursue new policies on jury service reform in the mid-1960s. President Lyndon B. Johnson announced that eliminating discrimination in jury selection was an essential part of the pursuit of civil rights. In fall 1965, he called for Congress to address the issue. In a message to Congress in 1966, LBJ explained, “denying jury service to any group deprives it of one of the oldest and most precious privileges and duties of free men. It is not only the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross section of the community. The people’s confidence in justice is eroded.”

Congress began considering federal civil rights legislation that included jury service provisions.

In February, Senator Paul Douglas (D-IL) introduced the Civil Rights Protection Act of 1966, an omnibus bill aimed in part at securing fair jury service practices. The Leadership Conference on Civil Rights—a group composed of members of other civic...
organizations including the ACLU, NAACP, SCLC, CORE, and the National Council of Catholic Women, among others—drafted the legislation. On the issue of jury reform, the Conference worked from an outline submitted by the ACLU that discussed a broad policy targeting discrimination and using federal regulation in states with exclusionary practices. Once the ACLU plenary board got drafts of the legislation from the Leadership Conference, it recommended the expansion of the scope of the policy to include sex discrimination that excluded women from juries. After resistance from some men in the ACLU, the proposed addition became known as the “Murray Amendment,” and “was adopted [by the ACLU] unanimously.” The Leadership Conference, however, did not include the ACLU’s suggested revision, and Senator Douglas introduced this legislation to the Senate without adding protection against sex discrimination in state courts.

Murray saw the ACLU as playing a unique role in this campaign for antidiscrimination legislation and taking “leadership in this area” of jury service rights, with women’s and rights organizations in supporting roles. While she noted that the ACLU had a “longstanding policy” of supporting women’s legal equality, she also claimed that the ACLU’s legal staff offered them a better position for arguing these issues than women’s organizations without similar resources. This approach of moderating the social activism with the broader expertise in legal maneuvering of the ACLU might benefit the cases, Murray thought. She explained that “since the Union is

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650 Murray to Rawalt, 2 February 1966, Rawalt Papers, Box 30, Folder 38.
651 Murray to Rawalt, 2 February 1966, Rawalt Papers, Box 30, Folder 38. For a discussion of the internal debate over this change, see Hartmann, The Other Feminists, 65.
not a special interest group in the same way as Negro civil rights organizations, labor
groups, women’s groups, etc., but devotes its energies to a variety of problems involving
civil rights and civil liberties of individuals, it could perform a useful service by taking
the initiative in this field.\textsuperscript{652} The ACLU provided an excellent combination of flexibility,
support for a wide-range of issues, well-established reputation, and substantial resources,
making it appealing to women’s rights activists like Murray.

Murray attempted to generate support for the inclusion of the “Murray
amendment” by reaching out to women’s organizations (both those in and outside the
Conference) and women in leadership roles in other institutions. Among those
organizations she targeted were black and Jewish sororities, black women’s professional
clubs, and women’s religious organizations. She wanted to “organize an Ad Hoc
Committee of women from women’s organizations and other sympathetic organizations
to bring to the attention of Congress. . . our point of view.” She recommended that
women legislators also be alerted of this effort.\textsuperscript{653} Both Dorothy Height, civil rights and
women’s rights activist and President of the National Council of Negro Women, and
Anna Arnold Hedgeman, black civil rights leader and leader in the National Council of
Churches supported the objective “wholeheartedly.” They believed, according to Murray,
that the ACLU’s activity was “significant.” Murray explained that these women were
willing to discuss the activities with their own organizations, and more importantly, that
they “appear to be convinced that, far from endangering the draft statute referred to
above, the inclusion of ‘sex’ in the appropriate sections will increase support for the

\textsuperscript{652} Murray to Rawalt, 2 February 1966, Rawalt Papers, Box 30, Folder 38; Hartmann makes a similar
claim, finding that Murray and other women found working within liberal organizations more
advantageous than working in women’s organizations. See Hartmann, \textit{The Other Feminists};
\textsuperscript{653} Murray to Rawalt, 2 February 1966, Rawalt Papers, Box 30, Folder 38.
passage of the bill and will help to mobilize women’s group [sic] on the issue about which there is little difference of opinion.”

The ACLU also solicited support of efforts to amend the legislation to include sex discrimination by contacting women’s organizations and emphasizing the plight of black women in its analysis of the current legislation’s insufficiencies. John de Pemberton, Jr., the Executive Director of the ACLU, sent letters with a general statement about the ACLU’s position to 350 women’s organizations or other organizations interested in women’s issues. The ACLU memorandum supported the targeted efforts of combating the “unrepresentative character” of the Southern jury systems that excluded black men. But it also offered a more general argument about creating a “broadly representative” jury system by also eliminating “discrimination against more than one half of the adult population, i.e. women.” The ACLU strategy included linking women’s participation with ability to achieve racial equality.

The ACLU stressed the position of black women making its case for eliminating sex discrimination. “Both halves of the Negro adult population (male and female) must be assured this right if justice is to be meaningful,” it claimed in a memo likely drafted by

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654 Ibid.
655 John de J. Pemberton, Jr. Executive Director, ACLU, 3 March 1966, Rawalt Papers, Box 30, Folder 41.
657 The ACLU also recommended the addition of a new section in the legislation that would create a standard of one-third of either sex be on active juries over the period of two years to determine whether sex discrimination occurred. This proposition, it explained, was to prevent jury commissioners from eliminating women from rosters and encourage the replacement of sex exemptions with gender-neutral “functional distinctions” based on occupation or circumstance. The rationale that informed this suggestion emphasized the various stages of women’s lives that might allow them to serve as easily as men; it pointed to single, working women; women without children; and women with older children; See American Civil Liberties Union, Memorandum on Civil Rights Protection Act of 1966, February 16, 1966, Papers of Patsy Mink, Library of Congress, Box 78, Folder 7.
Murray. The inclusion of “sex” as well as “race” will assure that twice as many Negroes are available to serve on juries and protected in that right than would be the case if “sex” is omitted. Therefore, the ACLU addressed sex discrimination in jury service by integrating its discussion with arguments against race discrimination and by highlighting, rather than ignoring, the plight of black women.

Like the ACLU, a bipartisan group of eight female legislators latched on to Johnson’s proposal for more equitable jury service and sought to add sex as a protected category in the Civil Rights Protection Act of 1966. Republican Representative Florence Dwyer (NJ), an early civil rights advocate and proponent of the Civil Rights Bill of 1957, spearheaded the challenge. She first asked civil rights lawyer and counsel for the House Committee on Government Operations, Phineas Indritz, to research the status of women jury service in federal and state courts.

Phineas Indritz advised Dwyer that the new civil rights bill was probably drafted after the decision in White v. Crook and that some of the drafters may have had doubts about the constitutionality of extending the protection to women. Indritz also claimed that he believed the Fourteenth Amendment offered Congress the authority to include sex

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658 The rhetoric and arguments in the memorandum resembles the contents of some of Pauli Murray’s other writings.
660 Florence Dwyer, Patsy Mink, et. al. to LBJ, 1966, Patsy Mink Papers, Box 78, Folder 7; Florence Dwyer to Patsy Mink, February 16, 1966, Papers of Patsy Mink, Box 73, Folder 7; “Lady Lawmakers Seek Equal Rights as Jurors,” in Patsy Mink Papers, Box 73, Folder 7. The other women legislators included Sen. Margaret Chase Smith (R-ME); Sen. Maurine B. Neuberger (D-OR); Rep. Frances P. Bolton (R-OH); Rep. Catherine May (R-WA); Rep. Julia Butler Hansen (D-WA); and Rep. Charlotte T. Reid (R-IL); Phineas Indritz to Florence P. Dwyer, February 1966, Papers of Patsy Mink, Box 73, Folder 7; Patsy Mink had copies of the transcript of the White case in her file on the civil rights act of 1966.
661 Phineas Indritz to Florence Dwyer, in Papers of Patsy Mink, Box 73, Folder 7; Also, Dwyer, while a supporter of the ERA and other women’s rights legislation, did not consider herself a feminist and claimed that she never used her gender as a campaign tactic. See Florence P. Dwyer, in http://womenincongress.house.gov/member-profiles/profile.html?intID=64; Accessed 13 December 2010.
discrimination protections in legislation. He continued this line of argument by
analogizing race and sex discrimination. Ignoring any claims of women’s privilege, he
explained that race and sex discrimination were quite similar with respect to jury service,
because “in neither case does the distinction bear a reasonable relationship to either civic
responsibility, the quality of juror selection, or the proper functioning of the jury
system.”662 Indritz stressed the form in which the discrimination restricted individuals’
service rather than focusing on how black men’s and women’s presence on juries would
function in terms of their distinct social roles and their frequency as defendants.

Indritz’s research became the basis for a group plea to the President to support a
revised version of the civil rights legislation. On February 25, two female senators and
six female representatives petitioned the Attorney General and President Johnson to
expand the legislation to include protections against sex discrimination.663 Dwyer and the
others emphasized the beliefs of some of legislators that “the arbitrary discrimination in
the jury system on the basis of sex is wholly unjustified and must be eliminated.”664 The
letter stated that the initial draft of the legislation had “unduly limited language,” and
would fail to provide safeguards for civil rights the President hoped to protect. It
expounded on the importance of this pursuit, claiming that juries were “the very
foundation of a democracy in the administration of justice,” and conduits for justice for
all groups. The congresswomen elaborated, “Women constitute a cross section of one
half of the adult community. The jury system will not be representative, or

662 Phineas Indritz to Florence Dwyer, Patsy Mink Papers, Box 73, Folder 7.
663 The Right of Women to Serve on Juries, A Summary Leading Developments—as of June 24, 1966” in
Rawalt Papers, Box 30, Folder 40.
664 Papers of Patsy Mink, Box 73, Folder 7.
nondiscriminatory, unless and until no distinction is made between men and women with respect to jury service.”

These legislators were worried that the proposed legislation would not be comprehensive enough to change substantially women’s access to juries. Dwyer, along with Democratic Representative and first Asian-American congresswoman, Patsy Mink and the six others, recognized the limitations of the 1957 federal legislation that provided women access to federal juries, claiming that those the 1957 law was still being undermined by the selection process. They went even further to illustrate how state courts housed a “much worse” situation when it came to women’s service. Less than half of the states obligated women as they did men to serve on juries. Twenty-eight states had statutes that treated women differently than men. Mink outlined the various ways states discriminated: three states excluded women; three states had opt-in systems; fourteen states allowed for sex-based exemptions; eight states excused women (and not men) for family or child care responsibilities; two states had women jurors only where buildings suited their participation; and two states exempted women from serving on trials entailing certain crimes. The proposed 1966 legislation would have certainly stopped women’s outright exclusion, but it would not have challenged gendered distinctions in the law that exempted or excluded women. The congresswomen warned,

666 Pasty Mink Papers, Box 73, Folder 7, Three states that exclude women were Alabama, Mississippi, and South Carolina; Three states that had opt-in systems were Florida, New Hampshire, and Louisiana; the Fourteen states that gave broad exemptions based on sex included Arkansas, Washington, D.C., Georgia, Kansas, Maryland (in 4 of 23 counties), Minnesota, Missouri, Nevada, New York, North Dakota, Rode Island, Tennessee, Virginia, and Washington; the eight states with familial exemptions for women were Connecticut, Massachusetts, Nebraska, North Carolina, Oklahoma, Texas, Utah, and Wyoming; the two states that made allowance for women’s exclusion without bathroom facilities were Rhode Island and Nebraska; and two states that exempted women from hearing cases involving certain crimes were Massachusetts and Nebraska.
The sex distinctions now drawn in these 25 jurisdictions result in a great evil. They are used in many locations to discourage women from serving on a jury. Frequently, women asked to be excused because they are disturbed by the gratuitous suggestions about the inconvenience of jury service, the uncertainty of time required, the unwholesomeness of the surroundings, or the distasteful facts to be heard in some cases. These sex distinctions undermine women’s sense of civic responsibility. They introduce totally unwarranted distortions in the selection of a jury so that it fails to be a cross section of the community.667

These female legislators continued by listing their reasoning for supporting the addition of sex discrimination protections to the Civil Rights Bill of 1966. They wanted equal laws, applicable to both men and women—statutes that did not make gendered distinctions. They believed “that making women eligible for jury service on the same basis as men will not drag the mother away from her home-making and child-care duties. The existence of such responsibilities, which is a proper functional basis for excuse from jury duty, should be a reason available to any citizen, not just women.”668 Directly refuting rationales promoted in recent the cases of Hoyt and Hall, these policymakers challenged the association drawn between women and the home, recognizing that the diversity of women’s experiences belied such blanket exemption.669

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667 Mink to Johnson, Pasty Mink Papers, Box 73, Folder 7
668 Pasty Mink Papers, Box 73, Folder 7; Congressional Record—House, March 1, 1966, 4311-4313, in Papers of Patsy Mink, Box 73, Folder 7; “Lady Lawmakers Seek Equal Rights as Jurors,” in Patsy Mink Papers, Box 73, Folder 7.
669 Remarks by Representative Patsy T. Mink on March 15, 1966 Relating to Civil Rights Protection Act of 1966, Patsy T. Mink Papers, Box 73, Folder 7. Patsy Mink addressed the concerns raised by other female legislators and the ACLU about the Civil Rights Protection Act in Congress, lamenting that the Senate bill did not address the exemption of women from jury duty. Therefore, Mink announced on that she submitted an amended bill to the House “in the hope that it will lead to uniformly throughout America of the procedures to be followed in the selection of juries.” Mink Bill, Patsy Mink Papers, Box 73, Folder 9. On March 10th, Mink’s bill provided that the U.S. Courts could administer selection in jurisdictions under investigation for their practices. Following the recommendation of the ACLU, it also stipulated that when the ratio of the number of people of a particular race or sex exceeded by at least a third the ratio of people serving on jury it would automatically be deemed discriminatory. It also applied the same standard to sex ratios, except it did allow for a count of those women excused from service as well.
Female legislators relied on support from women’s organizations and activists as they pressed for amended legislation. Both of these groups stressed the position of black women. Pauli Murray expressed her “delight” with Mink’s proposal in a letter and enclosed copies of her article “Jane Crow and the Law,” and reports from the PCSW. Only ten days after the introduction of the new proposal Council of Delegates of the National Association of Women Lawyers supported a resolution calling for adoption of legislation that would eliminate sex discrimination from federal and state juries. The District of Columbia Federation of Women’s Clubs also supported this legislation. The Women’s Bar Association of D.C. also adopted a resolution endorsing the women’s equal jury service. Marguerite Rawalt played a significant role in campaigning for federal legislation for women’s jury service rights and obligations. She wrote speeches, articles and letters on the subject, assisted with briefs on legal cases, drafted and proposed the resolutions adopted by many of these organizations, and urged other women to lobby for federal legislation. She attempted to collaborate with multiple organizations, taking action such as sending a letter asking for an endorsement by the NWP, noting that she could not see why they would not support such legislation. On April 28, 1966, Florence Dwyer read Marguerite Rawalt’s article on women’s exclusion from juries into the Congressional Record. This article highlighted the work of women in the courts and in

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671 References and Source Materials, Rawalt, Box 30, Folder 35.
672 Resolution Adopted by the Women’s Bar Association of the District of Columbia on May 24, 1966, in Rawalt Papers, Box 30, Folder 41.
673 “Personal Activites of Marguerite Rawalt—re Jury Service” March 1967 in Rawalt Papers, Box 30, Folder 40.
674 Rawalt to Miss Mary Glenn Newell, 4 June 1966, Rawalt Papers, Box 30, Folder 35; District of Columbia Federation of Womens Clubs, May 23, 1966, in Box 30, Folder 37..
the Congress to fight sex discrimination in jury service. It also simultaneously analogized race and sex discrimination and underscored the particular plight of black women. Rawalt claimed that “the inclusion of sex as well as race among eligibles would assure twice as many Negroes available for jury service. Is a Negro woman to be eligible on the basis of race and ineligible on the basis of sex?”

The NAACP, in contrast to its focus on the exclusion of black men from juries in the early twentieth-century, began actively supported the struggle for women’s inclusion in the 1960s. It supported the changes proposed to eliminate sex discrimination, because they recognized connections between women’s service and racial equality. Roy Wilkins, Executive Director of the NAACP and Chairman of the Leadership Conference on Civil Rights, testified before House Judiciary Committee, emphasizing the significance of the proposed civil rights legislation. In an article in the Crisis adapted from his testimony, Wilkins explained that jury discrimination “exists not on an accidental or limited basis, but as part of widespread, systematic and concerted state action practiced in contempt of the Constitution and in total disregard of the civil rights of millions of American citizens whose skin happens to be colored.” To illustrate his point, Wilkins cited the work of the NAACP on jury service cases throughout much of the twentieth century. He also showed support for the associated efforts to challenge sex and economic discrimination at the same time, claiming that “those states where women are barred from jury service” also have “harsh treatment of Negroes in judicial procedures.” He continued, stating “we would hope that the inclusion of ladies in the jury system would add elements of both mercy and justice” since some Southern women had been longtime advocates of

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675 Congressional Record – House, April 28, 1966, Rawalt Papers, Box 30, Folder 38.
antilynching policies. The NAACP expanded its jury service advocacy to include women for the first time, perhaps because women’s service was less controversial than in previous years and therefore less distracting from their real objective of saving black male defendants from injustice, or perhaps because the work of a black female member, Murray, prompted the NAACP to consider it.

Underscoring Congress’s authority to extend jury service to women, Murray and Kenyon, on behalf of the ACLU, released their collaborative report, “The Case for Equality in State Jury Service,” on May 1, 1966. They argued that the due process and equal protection clauses required juries consisting of a fair cross-section of the citizens and that the exclusion of women violated those principles. They also claimed that sex was an “arbitrary, irrational and discriminatory” category of classification by which to exclude or exempt citizens—one rooted in historic “badges of second-class citizenship.” Women’s inclusion on juries, they contended, especially in the South, was “a democraticizing and civilizing influence” and would help maintain “law and order consistent with the protection of individual constitutional rights.” Finally, the brief asserted that Congress had authority to pass laws to prohibit sex discrimination in jury service under the Fourteenth Amendment. These writings bolstered the female legislators’ arguments and emphasized the important intersections between racial equality and women’s participation.

677 Pauli Murray and Dorothy Kenyon, “The Case for Equality in State Jury Service: Memorandum in Support of ACLU Proposal to Amend S.2923 (Civil Rights Protection Act of 1966)—To Deal With Exclusion of Women from Service on State Juries,” Prepared for the ACLU, in Murray Papers, Box 61, Folder 1028. Murray and Kenyon inserted a note in this document to adopt it to the second legislation proposed in Congress following the Civil Rights Protection Act, that dealt with jury service policy. 678 Ibid., 17.
Race-sex analogies underpinned Murray and Kenyon’s analysis, though they recognized the obstacle that conceptions of female privilege posed for their comparisons. They noted the differing legal rights procured by black men and all women in the late-nineteenth century but highlighted how both groups continued to fight for inclusion throughout much of the twentieth century. The brief stated that “the parallel between these two struggles of Negroes and women to win their rights is one of the striking phenomena of our time.” Yet, the contrasting gender roles assumed of men and women still informed many of the arguments for excluded or exempting women from service—a set of arguments that did not reveal sex as similar race discrimination. Murray and Kenyon discussed the “traditional assumptions” that women were essential to home and family life, which required the extension of certain “privileges” to them. These arguments showed the race-sex analogies to be imperfect, perhaps undercutting their effectiveness to expand women’s rights quickly. However, they did analyze some of the ways understandings of race and sex worked together to exclude blacks and women from the political system. The brief explained that through “privilege” and exemption, “paternalism, or white male supremacy, was rationalized as chivalry and concern for the ‘ladies.’” The courts and legislatures had failed to recognize sex discrimination as an arbitrary distinction in violation of the Constitution, and the “result has been an untenable position for every woman who moves from first-class to second-class citizenship as she crosses state lines. Nowhere has this anarchy been more strikingly apparent than in the

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679 Ibid., 21
680 Ibid. 36.
proliferation of court decisions on women and jury service.” The objective of the ACLU was to improve and define women’s citizenship and constitutional status as well as to “raise the standard of jury service form an onerous duty or a device to maintain white male control into a right and obligation freely enjoyed and conscientiously fulfilled by all citizens, otherwise qualified, without discrimination.  

The day after the Murray and Kenyon issued their “Case for Equality,” President Johnson sent a message to Congress alongside his legislative proposal, the Civil Rights Act of 1966, which ignored the concerns of female legislators or women’s rights advocates. Congressman Emanuel Celler (D-NY) and Senator Philip A. Hart (D-MI) introduced the new draft legislation in Congress. While it prevented the complete exclusion of women in state courts, the bill did not address sex distinctions in state statutes that made women’s service voluntary or offered them exemptions not available to men, ignoring the demands of women activists and congresswomen.

Florence Dwyer and the other female legislators voiced their frustration with the bill and pressed for a broader amendment for women’s equal jury service rights. On June 22, 1966, eight female members of Congress again addressed letters to President Johnson and his Attorney General, asking them to endorse the elimination of sex distinctions in jury service. Dwyer insisted that “we believed then [when the first bill was submitted] as we do now that women also deserve equal treatment in the exercise of their civic responsibilities, one of the most important of which involves service as jurors in the

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681 Ibid., 39.
682 Ibid., 59.
administration of justice in civil and criminal controversies.”  

She expressed her “great disappointment” with the President’s civil rights bill’s focus on only the exclusion of women from state courts.

Dwyer made another unsuccessful plea before Congress, asking that the bipartisan proposal to eliminate sex discrimination in both federal and state juries be considered. She voiced her and her colleagues’ concerns that the administration’s proposal would not prohibit sex-based exemptions that kept women underrepresented on juries in many states. She explained that those statutes “undermine women’s sense of civic responsibility.” Also on June 22, these legislators introduced a new amendment to the House. The amendment would broaden women’s access to juries, highlighting that the draft of this amendment was “strongly endorsed” by women’s and civic organizations. She also included copies of her letter to the President, the resolution of the Women’s Bar Association of D.C. and a letter from the National Federation of Business and Professional Women’s Clubs to support this position.  

With Representatives Dwyer and Martha Griffiths proposing the amendment after “tremendous work” gathering support, the House adopted the proposed changes to make jury service qualifications uniform for men and women on August 1.

Senators championed women’s privilege and failed to equalize jury obligations of women. The all-male Senate committee voted against the addition of Dwyer’s proposed amendment. In a nod to female privilege, the committee reasoned that “if anybody is

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683 Florence Dwyer, Congressional Record, Vol. 112, No. 102 , June 22, 1966, in Patsy Mink Papers, Box 73, Folder 8.  
684 Dwyer in Congressional Record, June 22, 1966, Rawalt Papers, Box 30, Folder 38.  
685 Rawalt to Mrs. Gerald Northrop, February 11, 1967; Papers of Marguerite Rawalt, 1892-1989, Box 30, Folder 35; Emma McGall to Rawalt, 6 September 1966, Rawalt Papers, Box 30, Folder 39.
discriminated against by such laws it is the men, who are denied similar chances to escape jury duty.” In September, senators on the committee considering the Civil Rights Bill, moved to adopt the House bill’s wording with the exception of the amendment that would provide women equal access to juries. Rawalt explained that this “affirmative action” was directly solely at the advancement of women’s legal equality. She concluded in a letter to the President of NAWL that this change in course “could only have been in response to those thinking only of discrimination on the account of race, who have never wanted to take their women along with them on the road to equality,” revealing an underlying tension in piggybacking women’s rights claims onto legislation primarily designed with a focus on racial equality. In the end, however, opposition to the part of the bill that would ban housing discrimination, killed the Civil Rights Bill of 1966 by Senate filibuster.

The frustration of failing to get legislative change propelled calls from feminist and women’s organizations for new legislation and coincided with some change at the state level. Marguerite Rawalt pressed for the General Federation of Women’s Clubs to urge the President to “adopt formal action calling for legislation which will result in the exercise of this civil right on the same basis for all citizens, be they male or female, of whatever race, origin or economic status.” By 1967, four states also had adopted more

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687 “Urgent Call for Action for Uniform Jury Service for Men and Women,” Marguerite Rawalt, 9 September 1966, Rawalt Papers, Box 30, Folder 38.
689 Rawalt to Mary Louise McLeod, 11 November 1966, Rawalt Papers, Box 30, Folder 38.
690 Nick Kotz, Judgement Days: Lyndon Baines Johnson, Martin Luther King, Jr. and the Laws that Changed America, 2006, 378; For more about the politics surrounding the filibuster, see Theodore Rueter, The Politics of Race: African-Americans and the Political System, 1995, 244.
691 Rawalt to Northrop, 11 February 1967, Papers of Rawalt, Box 30 Folder, 35.
favorable laws for women jurors. Alabama and South Carolina allowed women to be eligible for service for the first time, though Alabama also extend sex-based exemptions to women. Florida women gained access to condemnation juries in eminent domain proceedings but still could not serve on juries in eminent domain cases. Maryland changed laws in the four counties that gave women absolute exemptions, so that women across the state had equal jury service obligations to men. In early 1967, women’s rights activists—and new feminist organizations—pushed for federal reform of jury service. In January 1967, the National Organization for Women’s legal counsel and officers, including Betty Friedan, met with the Attorney General Ramsey Clark, emphasizing the need for legislation for women jurors.

Still some legislators considered the need for reform to be one focused on eliminating race—not sex—discrimination. The following month, Senator Philip A. Hart (D-MI) wrote an article in the ABA Journal that outlined the need for federal jury service reform. He argued that while the Supreme Court has recognized that jury commissioners have “an affirmative duty” to compile jury rosters represent a cross-section of the community, federal law “does not afford sufficient guidance to federal jury commissioners.” The inconsistencies in selection procedures among various federal districts did not provide “truly representative juries,” Hart warned. Citing a DOJ survey from 1966, he revealed that federal districts in the South severely underrepresented African Americans. Hart particularly worried about the use of “key-man” systems by jury

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692 “Highlights of 1966 State Legislation of Special Interest to Women,” 1 April 1967, Rawalt Papers, Box 30, Folder 40.  
commissioners to procure names of jurors. Key-man systems, he argued, had jury officials identify “prominent persons” to ask for suggestions of names of qualified jurors, and Hart noted that these systems existed in federal districts across the U.S, creating underrepresentation of not only blacks but also working-class citizens as well. As a result, he called for new federal legislation that would generate more representative juries through streamlining and regulating the selection process. He urged that the new policy make it harder to exclude individuals or groups of citizens “to assure implementation not only of the cross-section policy but also of the principle that jury service is a serious obligation of citizenship,” but in his plea for reform, he never mentioned women’s exclusion, exemption, or relative absence from juries.

Reform of state jury systems proved to be more contentious than revising the federal system, because of concerns over federalism and the national government intervention in state decisions. The Jury Discrimination Bill of 1967 received more criticism, despite support from women’s organizations and the American Bar Association House Delegates. Congress failed to pass the bill, and the ABA Journal printed “State Court Juries: WE DON’T NEED FEDERAL INTERVENTION,” an article by Oklahoma lawyers Hicks Epton and Earl Q. Gray demonstrating the resentment of this legislative agenda.

In the 90th Congress, legislation aimed at equalizing federal jury service obligations resurfaced. In 1968, Congress adopted only the first aim of the 1966 legislation, requiring that federal juries be selected randomly from a “fair cross section”

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of the community, and that “no citizen shall be excluded on account of race, color, religion, sex, or national origin or economic status.” The Act limited the discretion of the jury officials in determining exclusions and exemptions.

With this act, Congress authorized, “for the first time, a relatively uniform method of selecting juries [that was] imposed throughout the federal court system.” The policy mandated that federal courts employ voter registration lists or election lists to select jurors, though it still allowed the use of other records to provide names to supplement jury lists if necessary to make them more representative. It eliminated the use of the “key-man” system as the primary way to construct jury lists. Many states modeled their own reform efforts after this federal legislation.

While 1968 Jury Service and Selection Act was not an ideal solution for women’s rights advocates because it only affected federal juries, Congress nonetheless provided some remedy for the problem of women’s exclusion from service alongside its policy against race discrimination on juries. The Supreme Court in the 1960s, in the period many considered the heyday of Warren Court activism, on the other hand, continued to replicate the Reconstruction-era policy of upholding black men’s rights while ignoring or condoning sex discrimination. In two mid-1960s cases involving race discrimination in jury service procedure, the Supreme Court maintained its approach of invalidating black men’s exclusion.

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696 Rawalt, Box 30, Folder 37
697 John W. Silva, An Introduction to Crime and Justice, Ardent Media, 1973, 212
698 Ibid., 211
700 Arnold v. North Carolina, 376 U.S. 773, 1964. In 1964, the Court offered a per curiam decision in Arnold v. North Carolina that found discrimination in selection process violated the defendants’ rights to equal protection of the laws. The all-white juries, like the one that indicted the defendants with murder, had
As the Supreme Court continued to review these cases in the 1960s, one case upheld a pattern quite similar to the decisions issued in the late-nineteenth century. In January 1967, the Supreme Court handed down a unanimous decision in *Whitus v. Georgia*. Finding that the petitioner presented a prima facie case for race discrimination, the Court ruled that the practice by which commissioners used legally segregated tax records to select names of prospective jurors was unconstitutional. The Court also explicitly recognized Georgia’s absolute exemption from jury service provided to women in its first footnote. While the reference restricted the demographic statistics to male

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701 Swain v. Alabama (1965) The Court also limited the reach of the Fourteenth Amendment in a 1965 jury service case, *Swain v. Alabama*, by being unwilling to determine that preemptory strikes had been employed unconstitutionally to discriminate against blacks. Justice Byron White delivered the opinion for the Court. He explained the position of upholding a system of preemptory strikes: “Alabama contends that its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries. . . This system, it is said, in and of itself, provides justification for striking any group otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.” He confirmed centrality of preemptive strikes to the justice system, finding their continuing application in the U.S. possibly a result of adapting to the rather heterogeneous society. He claimed these challenges are “no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.” He turned the question upside down, claiming both sides had to decide “not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.” White determined that to rule otherwise—making the use of preemptory strikes against people because of race a violation of the equal protection clause—would transform and undermine the use of preemptory strikes. Ultimately in this decision, the Court revisited its understanding of juries as representative cross-sections of the community, claiming that “neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.” Swain v. Alabama (1965); Justice Goldberg wrote the dissent in *Swain*, with Chief Justice Earl Warren and Justice Douglas concurring. They found the case to be an obvious violation of the equal protection clause, since the state does not challenge the fact that blacks had been excluded from the jury system. Instead, the state explained the absence “resulted from the use of the jury-striking system.” Goldberg believed the Court was imposing “substantial additional burdens” to black defendants in order to protect unduly the system of preemptory challenges. The dissent emphasized that “were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge preemptorily, the Constitution compels a choice of the former.” He believed the Court deviated from its prior rulings in *Strauder* and *Norris* and increased the “barriers” to constitutional administration of justice for black defendants by upholding racially discriminatory practices of state preemptory strikes system.
citizens, it also showed a consistent pattern in Supreme Court cases to uphold gendered exemptions, female privilege, and state’s authority to discriminate on the basis of sex.

The Court again replicated its century-long policy of explicitly banning race discrimination while condoning sex distinctions in jury service rights.\textsuperscript{702}

The Supreme Court also reinforced state authority over determining the qualifications for jury service. In 1969, it heard a class-action suit in which the plaintiffs argued that blacks were excluded from juries by both state statute and a “deliberately segregated” jury commission. In 1970, the Court ruled in \textit{Carter v. Jury Commission of Greene County} that the state could impose qualifications requiring honesty, intelligence, and good character for jurors, despite arguments by the plaintiffs that these subjective categories allowed for covert race discrimination.\textsuperscript{703} So, throughout the 1960s, the Supreme Court with few exceptions—like Carter which did not limit state jury qualification requirements—maintained consistent policy of endorsing sex discrimination while denouncing race discrimination.

\textsuperscript{702} Coleman v. Alabama (1967) The Supreme Court heard two other race discrimination cases in the late-1960s in which it ruled jury selection processes unconstitutional on the basis of race discrimination. In 1967, it delivered a per curiam ruling in \textit{Coleman v. Alabama}, deciding that the historical record clearly indicated the exclusion of blacks and the state provided no sufficient evidence justifying the restrictions; Duncan v. Louisiana (1968); A year later the Court affirmed the importance of jury trial as a central component in state justice systems, relying on both the Sixth and Fourteenth Amendments. The opinion exclaimed that, juries in criminal cases were “fundamental to the American scheme of justice.” In this case, \textit{Duncan v. Louisiana}, it decided in favor of the black defendant because a judge, rather than a jury convicted him of assaulting a white boy.\textsuperscript{703}

\textsuperscript{703} Justice William O. Douglas dissented in part of this decision, claiming that “there comes a time when an organ or agency of state law has proved itself to have such a racist mission that it should not survive constitutional challenge.” Targeting the all-white jury commission, he further provided the analogy of the interpretation test that prevented blacks from voting in southern states, like Louisiana. He believed the evidence showed white jury commissioners “consistent with southern racial patterns” knew few blacks in the area, contacted on a few to serve, and relied on “subjective” standards and judgments that negatively impacted the black community. He asserted that he could not find “any solution to the present problem, unless the jury commission is by law required to be biracial.” He explained that if one race controlled the process “no jury will likely be selected that is a true cross-section of the community.” He cited prior cases in which he questioned the all-white Selective Service boards could refrain from racially discriminatory results.
In 1970, Dorothy Kenyon still fumed at the holding in *Hoyt v. Florida*. She asserted that the Court, and Harlan, “refuses to change the ancient eighty year old rule that states may, if they wish, refuse to allow women to serve on juries, and that the matter is really undebatable, and that women may be deprived of a right or obligation, and it is really both, to serve on juries, by any state, under the guise of ‘general welfare,’ but more likely under the impulse of the hard-dying slogan that women really belong at home.”

While in the 1960s, the Court remained committed to its traditional stance on women’s access to juries, the Court began to reconsider its position in several 1970s cases, changing its view of women’s roles as citizens.

Not until 1972 did the Supreme Court hear its first case on both sex and race discrimination in jury service, though it did not immediately revise its stance on women’s exclusion. The Court considered the issue of sex discrimination in the context of litigation on race discrimination in the NAACP Legal Fund-supported case of a black male defendant convicted of rape. In *Alexander v. Louisiana*, however, the Court sidestepped the question of sex discrimination. It found that the use of racial identifications on the questionnaires returned by potential jurors resembled the unconstitutional practices of using segregated tax lists or color-coded drawing slips contested in the early decisions of *Avery v. Georgia* and *Whitus v. Georgia*. The Court found the black male petitioner’s challenge of the statutory exemption provided to women who did not actively register for jury service to be “novel.”

Occasionally, white men appealed convictions by arguing that race discrimination in jury selection excluded blacks from the jury. In 1964, the Georgia Court of Appeals decided the defendant—a white civil rights activist from Massachusetts—had standing to make the claim that his Fourteenth Amendment rights had been violated by the exclusion of blacks from his grand jury panel. The trial court in Allen’s case ruled

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704 Kenyon to Mr. Osmond Franekel, 4 December 1970, Kenyon Papers, Box 29, Folder 1.
705 Occasionally, white men appealed convictions by arguing that race discrimination in jury selection excluded blacks from the jury. In 1964, the Georgia Court of Appeals decided the defendant—a white civil rights activist from Massachusetts—had standing to make the claim that his Fourteenth Amendment rights had been violated by the exclusion of blacks from his grand jury panel. The trial court in Allen’s case ruled
petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.” The Supreme Court again readily ruled on race discrimination, while implicitly condoning women’s limited obligation.

Justice William O. Douglas’s concurrence supported a revision of the Reconstruction-era policy. He was “convinced” that the Court “should also reach the constitutionality of Louisiana’s exclusion of women from jury service.” He noted the issue was “of recurring importance,” and contended that perhaps racial exclusion was an “easier” question than women’s exclusion. He believed “the time has come to reject the dictum in Strauder v. West Virginia, that a State ‘may confine’ jury service ‘to males.’”

Douglas asserted that providing defendants with a jury representative of the community was imperative to securing a fair justice system and that a list that “systematically excluded” women was not representative of the community. He contended that the Louisiana system proved more exclusive than the Florida system under scrutiny over a decade ago in the Hoyt case. In Lafayette Parish, women were absent from the grand jury that indicted Alexander and from the grand jury venire panel. No women received one of the 11,000 questionnaires distributed to select the venire. Women were on the lists in Florida though granted exemptions—but in Louisiana women did not appear on the jury lists and “one of the feeblest efforts were made to interest women.” Douglas concluded that a white defendant “would not be prejudiced by the absence of Negroes from the county’s jury panels.”

The appellate court reaffirmed the right to a jury representative of a cross-section of the community, but noted that the Supreme Court had never determined “whether the fourteenth amendment compels reversal of a state conviction by a nonrepresentative jury when the defendant was not a member of an improperly excluded class,” citing Fay v. New York. See “Constitutional Law. Fourteenth Amendment. White Defendant Has Standing to Challenge Systematic Exclusion of Negroes from Jury Lists. Allen v. State (Ga. Ct. App. 1964)” Harvard Law Review, 78:3 (January 1965), 667-670.
that the “absolute exemption” in this case “betrays a view of a woman’s role which cannot withstand scrutiny under modern standards.” His perspective underscored the changes to women’s status over the previous decades, and he noted that social roles, not inherent gender difference, meant that some women would still require exemptions but many women would not. The virtual exclusion of women casted as “exemption” did not recognize the extent to which women participated civically in society. He found the underlying stereotype of women as “naturally” suited or ill-suited for tasks and the relegation of women to “home life” outdated and “discredited.”

Revealing a new trend in claims made by defendants not sharing in the identity of those excluded from juries, Peters v. Kiff, a jury service case in which the NAACP filed amicus curiae, revealed the Supreme Court’s refining of its understanding of race discrimination claims to include white men arguing against the exclusion of black men from the jury. The NAACP wanted to promote the inclusion of African-Americans on all juries, stressing that the race of the defendant was irrelevant and that inclusive juries provided better justice and equal citizenship for blacks. In NAACP’s supporting brief, it referenced precedents concerning both race and sex discrimination in jury service in order to promote the need for integrated juries for all defendants. The lower court decisions determined that court procedures had not violated the defendant’s rights, since the defendant—a white man—was not part of the group excluded from the jury. The Supreme Court reversed this decision, concluding that the state could not use juries selected by discriminatory methods to try defendants regardless of whether the defendant revealed any actual discriminatory effect on the case. Justice Thurgood Marshall, in the majority opinion, asserted that when a jury had been improperly selected, “the existence
of a constitutional violation does not depend on the circumstances of the person making the claim.” The state maintained that the presumption in similar cases with black defendants was that the potential prejudice was apparent; however, in cases with white defendants, the state claimed the defendant “must introduce affirmative evidence of actual harm in order to establish a basis for relief.” Marshall countered that “illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.” Marshall also stressed the egregious nature of race discrimination by comparing it to “other exclusions from jury service” and contending that it “is clear beyond all doubt” that exclusion of blacks from juries “cannot pass constitutional muster.” These 1970s cases reaffirmed the Court’s commitment to eliminating race discrimination, and they opened up possibilities for women to claim equal obligations to jury service.

As the Court began reconsidering jury obligations for women, several states modified their jury statutes to equalize women and men’s eligibility and exemptions. In 1972 and 1973, four states amended their statutes to extend family responsibility exemptions to men or to eliminate sex-based exemptions for women. As a result, gender neutral laws replaced sexually discriminatory ones. Still, not all places in the U.S. followed suit, so the campaign for equitable jury obligations continued. Five other states and Washington D.C. still provided women with absolute exemptions on account of sex. Rhode Island continued basing women’s qualification for service on whether “courthouse facilities permit” them to serve. Finally, ten other states—Arkansas, Connecticut, Florida, New Hampshire, North Carolina, Oklahoma, South Carolina, Texas, Utah, and

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Wyoming—provided care-giving or family responsibility exemptions only to women.\(^{707}\) Pauli Murray understood the problematic nature of challenging women’s “exemptions” rather than simply demanding women’s inclusion. She noted that one of her “greatest worries” was not being able to demonstrate that exemption promoted exclusion. One example Murray offered was a story of New York City jury clerks informing “a woman four times . . . that ‘you don’t have to serve; as a woman you are exempt’) which, in my book, amounts to discouragement.” She knew that this example would not likely meet judicial standards “of ‘deliberate and intentional’ exclusion, intimidation or whatever.”\(^{708}\) Nevertheless, the persistent need for policy change in order to provide women equal obligations prompted new attempts to garner a favorable decision from the Court.

In 1973, Louisiana was the last state in the U.S. to require women’s affirmative action to serve on juries, and the constitutionality of the Louisiana opt-in process became the subject of two cases—\textit{Healy v. Edwards} (1974) and \textit{Taylor v. Louisiana} (1975).\(^{709}\) In \textit{Healy}, a class action suit tested the statute. Three groups of litigants—women excluded from jury service; men qualified for service under different terms than women; and female litigants in civil cases—challenged the constitutionality of the opt-in system.\(^{710}\) The federal district court held the system unconstitutional because it violated all litigants’ rights to due process and denied female litigants their right to equal protection of the


\(^{708}\) Murray to Rawalt, 16 February 1966, Rawalt Papers, Box 30, Folder 38.

\(^{709}\) Two other states, New Hampshire and Florida had eliminated their opt-in systems in 1967. Both still provided exemptions for particular categories of women, including pregnant women or women with children under certain ages. Other states also had sex-specific exemptions. For example, Massachusetts law deemed women could be excused from cases involving sex crimes if they so chose; See Duren v. Missouri, (1979), footnote 3.

laws.\footnote{Jury Service, excerpt from "The Legal State of Women," i1974-1975 edition of The Book of the States, published by Council of State Governments, in Rawalt Papers, Box 30, Folder 40.} The District Court overrode the Hoyt decision, claiming that “When today’s vibrant principle is obviously in conflict with yesterday’s sterile precedent, trial courts need not follow the outgrown dogma.”

In 1974, the ACLU, under the guidance of Ruth Bader Ginsburg and Melvin L. Wulf, undertook the appeal in the Healy case, hoping to continue its success in overturning gender discriminatory statutes by calling for a broader interpretation of the Fourteenth Amendment and emphasizing how the current practice disadvantaged men as well as women. Ginsburg and Wulf argued that the state had no “legitimate objective” warranting the sex distinction in juror treatment and that the sex discrimination inherent in the system violated the equal protection and due process clauses of the Fourteenth Amendment. Citing the recent successes in the Frontiero and Reed cases, which required strict scrutiny of disparate treatment, they claimed that the Court had moved past the reasoning that underpinned the Hoyt decision, especially the idea that women were the center of the family and the home. Their brief asserted that the state’s practice “is at best misguided chivalry.”\footnote{Bader Ginsburg, Melvin L. Wulf, Kathleen Peratis, and George M. Strickler, Jr., Brief for Appellees, Edwards v. Healy, 1973, in Papers of Ruth Bader Ginsburg, Box 4, Healy v. Edwards, 21.} It elaborated on this point, claiming “overlooked in Hoyt is the reality that jury service, more than voting, is not only a right, it is a statutory duty and ‘crucial citizen responsibility.’”\footnote{Ibid.} The brief also presented the argument that the Louisiana system prevented juries from being representative of a cross-section of the community, a violation of the due process clause.\footnote{Ruth Bader Ginsburg, Melvin L. Wulf, Kathleen Peratis, and George M. Strickler, Jr., Brief for Appellees, Edwards v. Healy, 1973, in Papers of Ruth Bader Ginsburg, Box 4, Healy v. Edwards.} Highlighting a new strategy that
emphasized the ways in which gender distinctions negatively impacted men, the *Healy* brief also stressed men’s more potent burden in the Louisiana system. It claimed the opt-in “scheme injures males as well.” Men would also benefit, it implied, from juries representative of the community.

In *Healy*, the American Bar Association submitted an amicus curiae brief, crafted by Chesterfield Smith, Sara-Ann Determan, Brooksley Landau, and Marguerite Rawalt, a feminist lawyer devoted to the cause of and active in the struggle for women’s jury service. It noted the “strong stand” the ABA had taken in support of women’s constitutional equality, citing its 1972 endorsement of the ERA and the history of the ABA in supporting fair administration of justice. The brief argued for the application of the equal protection of the laws to invalidate sex distinctions requiring women register for service by analogizing sex with race. It claimed, “sex, like race, is an accident of birth; moreover, it is a highly visible characteristic.” It contended that sex—like race—needed to be considered a suspect classification. The brief stated that women “should not have to wait for a successful full-scale court challenge to each and every such law in order to attain first-class citizenship.” The brief made the second argument that Louisiana’s statute violated the equal protection and due process clauses because it denied litigants a jury representative of a cross-section of the community.

The District Court dismissed the *Healy* case in September 1975, on account of the question being moot, since another Louisiana case superseded it. In January, the Supreme Court handed down its decision in *Taylor v. Louisiana*. Justice Byron White

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716 Marguerite Rawalt notes, in Rawalt Papers, Box 30, Folder 41.
delivered the majority opinion, finding that the Louisiana jury system, while not disqualifying women, resulted in the systematic exclusion of a number of eligible women. Unlike the previous federal court victory for women in White or the recent Healy case, the central question in Taylor focused on the Sixth Amendment’s fair cross-section requirement, not the Fourteenth Amendment’s equal protection clause. The Court reversed its stance on women’s exclusion from juries, overturning Hoyt. The systematic exclusion of women from juries violated the Sixth Amendment guarantee (made binding on states by the Fourteenth Amendment) to a jury selected from a “representative cross-section of the community.” The Court decided that “if it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed.”

While Congress revised its policy on discrimination in federal jury selection in 1968 and adopted the Equal Rights Amendment in 1972, the Court followed slowly, revising its stance on women’s exemption from jury service in 1975. It repeated the same pattern it had during the rights revolution—adopting and reaffirming the extension of rights prompted through congressional action and social activism. While Justice Byron White cited a length case history, including Smith, Carter, Peters, Ballard, and Glasser, he also referenced the recent Federal Jury Selection and Service Act of 1968, to support

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717 Taylor v. Louisiana was argued by Ruth Bader Ginsburg in conjunction with the case Edwards v. Healy. The Healy case was a class-action suit filed by female complainants. The case became moot after changes to the Louisiana constitution eliminated the volunteer system by which women accessed juries. In a per curiam decision, the Court remanded the case to district court for a decision on whether the central question became moot in light of recent legal changes in Louisiana. The Taylor case remained relevant, since he questioned the constitutionality of the selection process that produced his jury. Ruth Bader Ginsburg, “Gender in the Supreme Court: The 1973 and 1974 Terms,” The Supreme Court Review, 1975, 14-15. Chesterfield Smith and Marguerite Rawalt filed an amicus curiae for the American Bar Association, and Nancy Stearns filed another for the Center for Constitutional Rights.
the opinion. He explained that the legislation reaffirmed the Court-established “requirement of a jury’s being chosen from a fair cross-section of the community is fundamental to the American system of justice.”

Finally, the Supreme Court’s re-conceptualization of juries in the 1940s expanded to include women.

Even though the Court claimed to base its decision on the Sixth Amendment, much of the decision’s rationale depended on Fourteenth Amendment precedent in cases related to race discrimination in jury service. Referencing the 1940 Smith case, White noted that the Court had emphasized the need for “representative” juries for more than thirty years. He also referenced more recent federal legislation and court precedent confirming that the Sixth Amendment required jury composition to mirror a “cross-section of the community.” The omission of a discussion of the equal protection clause’s centrality to the other cases referenced perhaps stemmed from the usually divergent positions of blacks and women in the courtroom and the division between rights of defendants to representative juries and obligations of citizens to serve.

Despite its favorable decision in Taylor, the Court remained supportive of some notions of gender difference it outlined in Hoyt. It elaborated on the rationale supporting the fair cross-section requirement by emphasizing gender difference: “We are also persuaded that the fair cross-section requirement is violated by the systematic exclusion of women. . . This conclusion necessarily entails the judgment that women are sufficiently numerous and distinct from men, and that if they are systematically eliminated from jury panels, the Sixth Amendment’s fair cross-section requirement

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718 In years around and after the Taylor decision, cases challenging sex-based exemptions continued to surface in several states. Some contested the exemptions given to expectant mothers or mothers of children under the age of 18. Others demanded more equitable representation of women and minorities on juries. 718
cannot be satisfied.” The Court directly addressed the issues raised in Hoyt about women’s position in society and the undue burden jury service might bestow. It concluded that other exemptions—not rooted in sex—could provide relief to those unable to serve for a variety of reasons. White claimed

a system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.

Furthermore, he linked his analysis here with reverence for the Ballard opinion, which included a restatement of the special “flavor” women provide to juries and a denouncement of the “fungibility” of the sexes. 719

Ironically, this case in which the Supreme Court granted women rights to serve on juries was pursued through the appeal of a white male defendant charged with violent crimes against women. Billy Taylor was originally accused of rape and eventually convicted of aggravated kidnapping involving two female victims. 720 The Court deemed that a male defendant had standing to challenge the constitutionality of the Louisiana jury statutes despite his not being a part of the class (women) he claimed was excluded. In this

719 Justice William Rehnquist provided the only dissenting opinion in this case. He found the Duncan precedent to be more limited then it was described in the majority opinion, and argued that he “cannot conceive that today’s decision is necessary to guard against oppressive or arbitrary law enforcement, or to prevent miscarriages of justice and to assure trials.” In fact, he even noted that the Hoyt decision presented a case more persuasive to that particular argument being it was a female defendant who actually appealed her conviction.
effort, Taylor won his appeal, and women in Louisiana finally obtained equal access to juries. The Court did also reestablish jury service as a duty of citizenship for those who participate in addition to its purpose in providing a fair trial for defendants by citing the *Thiel* case, stating “sharing in the administration of justice is a phase of civic responsibility.” White claimed that the Constitution “affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community” and the Court found that “it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male.” Even though it was premised on the rights of the defendant, *Taylor* equalized women’s right to serve on juries, allowing them to share the duties of citizenship and participate in society as full civic members.  

Four years later, the Supreme Court heard another appeal filed on behalf of a white male defendant who claimed that automatic exemptions from jury service granted to women solely on the basis of sex prevented the selection of a fair jury. Unlike the system discussed in the *Taylor* decision, Missouri and Tennessee were the only two remaining states that allowed women to opt out of service. In Missouri, women could fill

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721 After reaching a decision in *Taylor*, the Court decided that the precedent could not be retroactively applied to similar cases. Three cases—two with female defendants—had appeals based on the constitutionality of opt-in systems before the Supreme Court in 1975. The Supreme Court issued a per curiam decision in *Daniel v. Louisiana* but did not hear the other two cases. The brief explanation offered by the Court explained its intentions in the *Taylor* decision, namely noting the Justices “were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression.” Furthermore, the opinion underscored that the *Taylor* decision did not deem all jury trials had been unfairly administered because of the jury selection process. Finally, the retroactive application of *Taylor* would overwhelm some state court systems, while it “would do little, if anything, to vindicate the Sixth Amendment interest at stake.” Only Justice Douglas dissented, citing the retroactive application of the well-known *Miranda* decision and stating the ruling was retroactively applied in *Taylor* and so should be retroactively applied in all cases.
out a particular paragraph on the questionnaire mailed to them to claim their exemption. Officials also considered them as claiming exemption if they returned their summons by mail or failed to appear for jury service on their scheduled day. In 1979, the Supreme Court held in *Duren v. Missouri* this state law unconstitutional.

Arguing that the state policy violated the Sixth Amendment requirement that juries consist of a “fair cross-section” of the community and pointing to the underrepresentation of women, who made up only about 15 percent of jurors in venires, the Court firmly disapproved the automatic exemptions offered to Missouri women. The Court rejected the gendered rationale supporting the 1961 *Hoyt* case, recognizing that women played roles outside “family and home life” frequently. Instead of permitting sex-based exemptions, the Court suggested that other options existed for providing child caregivers with exemptions that still met the fair cross-section requirement. Those options would avoid excluding “a group in the community [such as women] of sufficient magnitude and distinctiveness.”

The lone dissent in *Taylor* and *Duren*, Justice William Rehnquist merged discussions of race and sex discrimination to uncover what he believed were inconsistencies in the application of constitutional protection and to restate his concern with treating sex discrimination as analogous to race discrimination. In *Duren*, he called into question the Court’s reliance on the Sixth Amendment when it appeared to be really a decision based on previous interpretations of the Fourteenth Amendment in race cases. He condemned the Court’s attempt to distinguish the *Taylor* and *Duren* cases from the question presented in *Hoyt* by using the Sixth Amendment fair-section requirement and

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not the Fourteenth Amendment’s equal protection clause. He pointed to cases appearing in the footnotes of the Duren decision, like Alexander v. Louisiana, which were based on arguments of equal protection – and not ‘entirely analogous.’” Women’s roles in society, he believed, necessitated their special treatment. He argued that the reliance on the Smith decision in deciding Taylor failed to consider what “exclusion” really meant, implying that since women opted in or opted out the “exclusion” happened at their own hands rather than at the hand of a racially discriminatory practice. By using the “fair cross-section requirement,” Rehnquist claimed, the Court was unfairly burdening the state and women. He found that the Court’s “decision today puts state legislators and local jury commissioners at a serious disadvantage,” having to compose and underwrite juries with much higher percentages of women. He asserted that “the majority [of the Court] is, in truth, concerned with the equal protection rights of women to participate in the judicial process, rather than the Sixth Amendment right of a criminal defendant to be tried by an ‘impartial jury,’ is vividly demonstrated by the Court’s crab-like movement from the equal protection analysis of its early jury composition cases to the internally inconsistent ‘fair cross-section’ rationale of today’s due process decision.”

White women and women of color became central proponents in this fight for equal citizenship of women. Despite a lack of a mass social movement for jury service, female policymakers and lawyers in government and national civic organizations networked to press for both legislation and litigation. In their effort, they not only highlighted the intersection of race and sex in the lived experiences of women’s

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723 Rehnquist’s dissent, Duren v. Missouri (1979).
citizenship obligations but also used that recognition of women’s intersecting identities to challenge the long-standing basis for women’s exclusion—“female privilege.” These women, especially Murray and Kenyon, successfully demonstrated how this rationale hampered white women’s civic participation, relied on demonized stereotypes of black men, and erased black women from the discussion. While the result of their lobbying and litigation often failed to remedy all of the obstacles to women’s equal service, their determination over two decades proved an important part of the democraticizing process, transforming the composition of the juries, reforming the American justice system, and reconceptualizing women’s civic membership.

The policy outlined in the first rights revolution was eventually dissembled by the second rights revolution. It, however, provided the framework that all social activists, jurists, and policymakers mobilized when reconsidering women’s citizenship, their constitutional guarantees, and the usefulness of the analogies drawn between race and sex. In this way, the first rights revolution limited the ability of simultaneous, interconnected campaigns for equal jury service rights by complicating the ability for activists to use the same arguments or approach to plead for access. Not until the 1960s, when women—especially women of color—became central figures in these conversations did they bridge gaps between the two campaigns by analyzing both forms of discrimination together.
Epilogue: Preventions and Privilege: Race, Sex, and Jury Service Since 1979

The second rights revolution produced increased federal protection of African-American men’s jury service rights and secured equal jury service obligations for women. The results of this reconfigured federal policy, however, failed to meet expectations for a completely democratized jury system. Despite reaffirmation and expansion of Supreme Court doctrine about the unconstitutionality of race and sex discrimination in jury selection, the justice system continued to produce unrepresentative juries.

Despite the Court’s more forceful recognition of the harm that discrimination in selection has on individual jurors and on defendants, the problem remains difficult to recognize and remedy because of the nature of this obligation. Unlike voting with its near-universal participant pool and scheduled elections, jury duty requires only some citizens to perform service through a continuous procession of trials. Also, the brief commitment required for voting stands apart from the more burdensome time required for jury duty. The compulsory nature of this obligation—rather than voting rights—provokes some individuals to find ways to avoid it. The complexity of the selection process and the limited perspective on the workings of the system provided to jurors infrequently and irregularly passing through the system allows for exclusion or underrepresentation to be more easily overlooked and exist unchallenged.
Race and sex often worked together to limit the access of black men and all women to juries throughout much of the late-nineteenth and twentieth centuries. In fact, most discussions of jury service policies relied on or challenged race-sex analogies. Beginning with Reconstruction-era policies, federal legislators and justices adopted a policy that addressed race discrimination in jury service obligations as a serious threat to black defendants’ rights and to the legitimacy of the American justice system. These policymakers simultaneously justified women’s exclusion from service, understanding gender distinctions in the law to be benign necessities that reflected women’s separate social obligations. This foundational policy federalized black men’s rights and condoned state’s exclusion of women, thus shaping and separating the jury campaigns of white women from those of black men and creating barriers for black women to join either group. In the context of a violent, racist society and unjust legal system, black men sought protection through litigation that promoted defendants’ rights. White women, who as a group were not nearly as vulnerable to prosecution or public displays of violence, cultivated state campaigns to lobby primarily for legislative changes. Both black men and white women saw gradual inclusion over the twentieth century with black men consistently appealing to the Supreme Court to ensure their service and white women winning legislations state-by-state. Not until the 1960s, during the second rights revolution, did black women become central figures in these struggles for inclusion. Their position as dually-disadvantaged because of their race and sex allowed them to merge the campaigns and contribute to the development of more successful sex-race analogies.
The rationales behind the two forms of persistent discrimination echo earlier rationales for exclusion. Black men and women met exclusion in voir dire by prosecutors using a wide-range of color-neutral but “coded” language deeming them unfit citizens. Women (including those all races, though perhaps presumed white by some) found new privileges extended to mothers through state legislation. Prevention and privilege remain the two paths of exclusion.

**Peremptory Strikes and the Challenge of Representative Juries**

While race and sex could not be factors used to determine qualifications of jurors selected for voir dire, the practice of selecting jurors still required discrimination among those within the pool—an opening for the exclusion of all individuals of a particular race or sex. Some prosecutors limited women’s or African Americans’ access to the jury through the use of peremptory strikes—challenges to a juror made without requiring a justification. This facet of the jury selection process allowed for government officials to restrict citizens’ access to jury.

The Supreme Court continued to denounce race and sex discrimination in jury selection, ruling state use of peremptory strikes in order to exclude African-Americans or women from the jury unconstitutional. The first case in which the Supreme Court would emphasize the need for representative juries and not just jury venires was the 1986 case *Batson v. Kentucky*, in which an all-white jury tried and convicted a black man. The prosecutor had used his peremptory challenges to strike four black potential jurors. In the appeal to the Supreme Court, Batson’s defense questioned whether the discriminatory use of the peremptory strikes to exclude African Americans violated his Sixth and Fourteenth
Amendment rights. Reversing, in part, the decision in Swain v. Alabama (1965), the Court found that this form of race discrimination in selection not only violated defendants’ rights to a fair trial but also harmed “the entire community,” and “undermines public confidence in the fairness of our system of justice.”

Batson fit well with the mildly effective, but determined stance of the Court its previous jury service cases.

In Batson, the Court also furthered it explanation of the harm caused by racially discriminatory practices in jury selection process, declaring that “by denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror.” The lack of a neutral explanation for the prosecutor’s actions in this case, the Court decided, confirmed the discriminatory nature of the process and therefore established a prima facie case for the defense. After the second rights revolution, the Court highlighted the role of the state, or state officials, in the exclusion of certain individuals without providing a color-blind rationale for their dismissal and saw it not only as a problem for the defendant and wider community but also as impinging on a right of the juror. Without the work of a class-action suit (like White (1966) or Carter (1970)), this case did not require the Court to address the implications of discrimination for the excluded juror—but it did.

Peremptory challenges made possible racial discrimination in the selection process and prevented the attainment of truly representative juries, yet Batson provided only a partial solution. In his concurrence, Justice Thurgood Marshall noted that “misuse

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725 Ibid.
726 White v. Crook (1966); Carter v. Jury Commissioner of Greene County (1970);
of the peremptory challenge to exclude black jurors has become both common and flagrant." This ruling prioritized the need for representative juries (rather than just the need for representative jury venires). Perhaps it placed that objective above the attainment of an impartial jury or, at least, did not find the two—achievement of representative juries and the attainment of impartial juries—to be mutually exclusive.

Yet, the decision was also limited; it applied only to the prosecution’s use of peremptory challenges in criminal trials where the juror(s) excluded were of the same race as the defendant. The Court did expand its decision in *Batson* to include use of peremptory strikes to exclude a racial group from the jury in civil trials in a 1991 case, *Edmonson v. Leesville Concrete* and to allow white defendants to challenge the exclusion of African Americans from the jury.

In a 1994 case, *J.E.B. v. Alabama ex rel T.B.*., the Supreme Court ruled that the use of peremptory strikes to exclude jurors on the basis of gender was a violation of the equal protection clause. A mother, seeking paternity and child support, relied on the state to make her claim against her child’s father. Alabama, on behalf of the mother, used its strikes to exclude nine of the ten men from the jury. With the father’s defense eliminating the only other man, an all-female jury found in favor of the mother. In the appeal, the

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727 Batson v. Kentucky, 476 U.S. 79 (1986); Marshall offered examples from recent cases. He noted that 1974 Missouri trials of 15 black defendants had prosecutions challenge 81% of black jurors; In an eastern district of Louisiana between 1972 and 1974, prosecutors used almost 70% of their strikes to challenge black jurors who made up less than 25% of the venire. Marshall also cited statistics from South Carolina where 13 trials with black defendants had prosecutions that challenged 82% of black jurors. In Dallas County in 1983 and 1984, prosecutors office used an instruction book that “explicitly advised” prosecutors that they had the power to remove “any member of a minority group” from the jury, and prosecutors in Dallas County used those strikes to remove 405 out of 467 eligible black jurors from 100 felony trials in 1983 and 1984. As a result chances of a black person serving were 1 out of 10 but the chance for a white person to serve was 1 out of 2. See, Marshall, concurrence, *Batson v. Kentucky* (1986).

Court condemned the prosecution’s use of peremptory challenges in this manner, arguing “we hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.” It further clarified, “while the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, ‘overpower those differences.”’\textsuperscript{729} The Court cited recent decisions regarding race discrimination in the use of peremptory strikes, drawing explicit comparisons between the two forms of exclusion.

The Court here also noted that the exclusionary practices harmed not only the defendant and wider community but also the individual jurors discriminated against by the process. It claimed, “in recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures.” Rather than defining it as an obligation or privilege, the Court noted “this right extends to both men and women.” It explicitly confirmed women’s equal obligation. The Court dismissed gendered assumption that might be used to preclude or excuse women, deeming that “all persons, when granted the opportunities to serve on a jury, have the right to not be excluded summarily because of the discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.” The Court emphasized the potential harm to women that allowing this practice might produce, claiming that “it

denigrates the dignity of the excluded jurors, and for a woman, reinvokes a history of exclusion from political participation.”\textsuperscript{730} Women should have equal access to juries.

The Court also recognized the interconnected nature of race and gender discrimination in this decision. It claimed that “because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination.” It distinctly acknowledged the particularly precarious position of women of color in the context of legal categories of identity. Women’s exclusion could not only hamper women’s equal obligation but also could be used to undermine the integration of juries racially. It could dilute the number of African Americans or other racial minority able to serve on juries. The Court explicitly considered women of color.

Recognizing the differences between categories of race and gender, Justice Sandra Day O’Connor’s concurrence in \textit{J.E.B.} noted the complex implications of adopting gender neutral position rather than one highlighting gender difference. O’Connor explained that “today’s important blow against gender discrimination is not costless.” While she supported the decision of the Court, she qualified her approval by supporting only government use of gender-based challenges. She believed that limiting criminal defendants’ or civil litigants’ use might hurt individuals unduly, and that impartial juries might not always be representative ones. O’Connor stated, “we know that like race, gender matters,” dismissing any real possibility of being able to achieve gender-neutrality. She claimed that “to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.” She believed some defendants might benefit from excluding individuals—including women—based on a

\textsuperscript{730} J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994)

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factor of identity. Using a scenario of a battered wife on trial for murdering her abuser as an example, O’Connor noted that perhaps the over-inclusion of women—because of their similar gender understanding—might benefit the defendant.

Justice Kennedy concurred, but directly viewed the role of juror as one devoid of any race or gender identity—one that required gender neutrality. He emphasized that “it is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen.” He believed that jurors needed to deliberate objectively, claiming that “a juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.” While representativeness was a necessary component of the jury, the jury needed to remain impartial as a “structural mechanism for preventing bias, not enfranchising it.” Juries needed to be representative; jurors needed to be impartial.

Other justices still prioritized ending race discrimination over sex discrimination and questioned the relationship between values of representativeness and impartiality in the process of selecting juries. Justice William Rehnquist dissented, finding “sufficient differences between race and gender discrimination” as to warrant a different decision from the one in *Batson*. While his dissent recognized that “both groups”—presumably one racial minorities and the other women—still faced discrimination, “racial equality has proved a more challenging goal to achieve on many fronts than gender equality.” Rehnquist noted that the state might have “legitimate interest” in discriminating on the basis of gender, and he reaffirmed a long-standing Court position on gender difference. He claimed that “the two sexes differ... [and] accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which
peremptory challenges directed at black jurors may be.” Of course, he ignored the position of black women. Gender difference, according to Rehnquist, might make differential treatment of citizens on the basis of sex preferable in order to attain impartial juries. Impartiality of juries—something Rehnquist believed might be compromised by requiring the inclusion of both sexes—was more important than representativeness, and the two values could be in tension with one another.

Joined by Chief Justice Rehnquist and Justice Clarence Thomas, Justice Antonin Scalia’s dissent questioned the rationale the Court used to support what he determined was a politically-correct decision. Scalia argued that since the petitioner in the case was a man—and noting that he challenged nine women and one man in process of selecting his jury—the Court wrongly focused on the historic exclusion of women from juries and the bar. He also maintained that “if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor’s ‘impermissible’ use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant. Indeed, far from having suffered harm, the petitioner . . . has himself actually inflicted harm on female jurors.” Scalia believed that the Court had simply positioned itself against “male chauvinism” in this case without truly having reason to do so. Furthermore, he believed that peremptory challenges were a foundational aspect of the justice system that guarded against partial juries, and this decision threatened to “vandalize” that long-standing “tradition” unduly.\footnote{Scalia dissent, J.E.B. v. Alabama, ex rel T.B. (1994)}

By the 1990s, the Court remained consistent in denouncing race and sex discrimination in jury selection, even though support for each position continued to vary.
Both race and sex became categories by which prosecutors could not discriminate in their use of peremptory strikes; rather, neutral explanations must coincide with any challenge by a state actor. The Court decision to deem sex discrimination unconstitutional was a 6 to 3; whereas the race case of *Batson*, in part because of the composition of the Supreme Court, garnered a 7 to 2 decision. J.E.B. benefited from the Court’s race-sex analogies for the most part. The Court highlighted the position of black women. Only a minority of the Court, in the dissenting positions, ignored the position of black women and questioned whether women had suffered discrimination to the same extent as racial minorities.

**Preventing the Service of Black Jurors**

Despite the continuation of Supreme Court decisions that condemned race discrimination in jury selection, black men and women still face obstacles to their service. The exclusion of citizens from juries on the basis of race continues largely through the use of colorblind challenges in the selection process. African Americans, particularly in the South, have been underrepresented on juries and prevented from engaging in a central component of civic membership.

In June 2010, the *New York Times* reported that the Southern criminal justice system relied on discriminatory selection practices that kept black men and women off juries. The article focused on a new study by an Alabama-based non-profit law organization, Equal Justice Initiative (EJI), and its dramatic finding of race discrimination in Southern courts. The EJI examined practices across eight states, finding “shocking evidence of racial discrimination in jury selection in every state.” It reported that a new

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study had revealed that prosecutors “routinely use peremptory challenges to remove blacks from juries.”Prosecutors and other government officials used a variety of “pretextual reasons intended to conceal racial bias,” including their martial status, their age, “the way they walk,” or their neighborhood’s racial composition. Primarily the use of peremptory challenges allows prosecutors to prevent the service of racial minorities. As a result, the EJI concluded that “today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.”

Some of the evidence of underrepresentation presented by the EJI is startling. It found that between 2005 and 2009 prosecutors in Houston County, Alabama removed 80% of qualified black jurors through the use of peremptory challenges in cases where the jury ultimately imposed the death penalty. The result was that even though the area population was over one-quarter African-American, half of these empanelled juries were all-white and the other half had only one black juror. Other locales in Louisiana and Georgia also had high levels of exclusion in areas with substantial black populations.

Appellate courts’ application of Batson to cases over the past twenty years has not provided an adequate solution to the problem. Cases reversed on appeal in several states have been followed by more cases reversed on appeal. An Alabama prosecutor has had her cases reversed thirteen times, yet she remains in office. In Jefferson Parish,

736 EJI, 13.
Louisiana, a district attorney has had five cases reversed since his first election to office in 1996. The EJI found that prosecutors rarely face punishment or consequence for excluding African Americans from their juries.\textsuperscript{737} Tennessee stands out, having more than 100 defendants appealing their cases on the basis of race discrimination and never receiving a favorable decision from the state courts.\textsuperscript{738}

One of the arguments the EJI made was that “racial discrimination in jury selection violates the constitutional rights of the jurors themselves.” The EJI conducted numerous interviews with those people dismissed from service across the South in order to document the effects of the exclusionary practices of Southern courts. The EJI found African-American citizens who recounted “the sting of mistreatment” and the upset over presumptions that they were “somehow unworthy for full civic life.”\textsuperscript{739} Rejected jurors described the “shame,” “humiliation,” anger, and sadness that coincided with their experiences. These voices reveal first-hand how equal obligations to juries remain important components of citizenship.

The EJI also listed alternative reasons for the underrepresentation of blacks on juries, including ones that hinged on gender issues. It noted that the poor and women who are the sole caregivers for their children often cannot serve on juries because of logistics. The outcome is that “many poor and low-income people and parents without child care options never serve on a jury and an important perspective is excluded from civil and criminal proceedings.” One of the potential solutions alluded to by the EJI is providing poor women and mothers with young children access to juries.

\textsuperscript{737} EJI, 21.
\textsuperscript{738} EJI, 22.
\textsuperscript{739} EJI, 28.
The EJI’s report demonstrates the shortcomings of the *Batson* and other race discrimination cases decided by the Supreme Court. Prosecutors and state courts prevent black men and women from claiming truly equal obligations to serve on juries. African-American men and women, outraged and shamed, still find that full citizenship and civic membership eludes them.

**Privileging Mothers and Exempting Women**

As women’s movements advocating protection for breastfeeding mothers or family-friendly legislation mobilized in recent years, several states responded by adopting measures that allow for new exemptions from jury duty. At least ten states have “family friendly jury duty legislation” that permits parents of young children or caregivers of elderly or disabled relatives to have their service deferred or excused. Twelve states and Puerto Rico explicitly exempt breastfeeding mothers from jury service. Several other state legislatures have considered similar legislation. The West Virginia state legislature is currently considering legislation to exempt breastfeeding mothers.

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740 California, Idaho, Illinois, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Oklahoma, Oregon, and Virginia.


The struggle for “family friendly” jury legislation appears to have begun with the work of one woman, Kathy Schattner. In August 1999, Schattner was called for jury service in the Fayette District Court in Lexington, Kentucky. Her experience of being scolded by the judge for asking a temporary deferment of her duty in order to continue caring for her young children prompted her interest in obtaining “family friendly” jury legislation in her state. Upset by her own treatment, she began lobbying her state legislators the following year to change jury duty exemption laws to make them more “family friendly.” Shortly after beginning her political campaign, she began a website devoted to assisting others in different states to pursue similar goals.743

Anecdotal evidence reveals that some women have terrible experiences with jury service. One Idaho woman reported that she faced trial when she refused to leave her infant daughter whom she was still nursing in order to serve on a jury, offering to postpone her service until after her child had been weaned. Other women shared similar difficulties obtaining exemption or deferment of their service because of their breastfeeding obligations. An Illinois woman accumulated fines for failing to appear for duty because she was taking care of sickly and elderly parents.744 These women, outraged and upset by inflexibility in the system, sought to uphold personal, familial obligations rather than civic ones. While—perhaps other than breastfeeding—these duties could be performed by men, women seem to still be overwhelmingly responsible for parenting and care-giving duties. Echoing arguments of opponents of women’s jury

743 http://www.familyfriendlyjuryduty.org/
744 Ibid.
service for the past century and a half, these women argued that women often face competing obligations to civic service and to family.

While most of the state “family friendly” jury duty legislation is gender neutral, the arguments promoted for its establishment and spread to other states contain both gender-neutral rationales as well as ones tied to the lives and roles of women. Caregivers of elderly and disabled relatives, stay-at-home parents of young children, and single parents—all gender neutral classifications—might be unduly inconvenienced if summoned to serve on a jury. Other prominent arguments stipulate women’s unique position in society as mothers and caretakers, noting breastfeeding obligations and women’s care-giving for special-needs children.745

Numerous organizations and individuals have supported either local or more broadly conceived campaigns for revised jury legislation. Children-centered organizations like Family Foundation of Kentucky or Family and Home Network have endorsed legislation. Conservative church officials and social commentators, like Dr. Laura Schlesinger, have promoted this legislation. Women’s organizations—including groups associated with minority women—have also been proponents of this type of legislation. Moms for Ohio PAC and Mothers of Color at Home are two examples of these types of organizations. La Leche Leagues and other mothers’ organizations have also supported “family friendly” jury legislation and breastfeeding mothers’ exemptions.746

745 http://www.familyfriendlyjuryduty.org/ This website seems to be the most often cited and useful to analyze the arguments and endorsements of this legislative movement.
746 http://www.familyfriendlyjuryduty.org/Endorsements/EndorseTable.htm
The Congressional Research Service, a non-partisan supportive body for the federal legislature, examined state laws and court rulings on the issue of breastfeeding and jury duty in May 2005. This report noted the large variety among various state law and policy on the subject, though also recognizing its recent popularity within the past decade. While no federal legislation addresses these issues, the question of breastfeeding exemptions from jury duty still presented itself in some form to federal policymakers.

Certainly, the recent trend of protecting breastfeeding mothers through legislation and policy remains an issue, and the tensions between motherhood obligations of some women and civic obligations of most citizens has prompted new gendered approaches to jury service. Privileging mothers’ obligations to children, family, and the home explicitly might be the best protection from women’s mistreatment in courtrooms; however, gender-neutral policies that protect parents and care-givers regardless of their sex would not legally confer privileges only to citizens of a certain sex. The question becomes one of priority. The offering of special privileges to women based on their roles as mothers perpetuates gendered assumptions about women’s fitness for full civic participation and the notion that motherhood is inherently at odds with equal citizenship. It undermines women’s full civic membership. Providing gender neutral protections to those in need of them provides better for all care-givers regardless if they follow traditional or “normative” family structures.

The relationships among race, sex, and civic duty remain complicated. Tendencies to exclude or exempt particular groups based on facets of their identity continue to exist. Race discrimination exists across the South, despite countless attempts
to condemn and prevent it. Sex exemptions, in particular those of mothers, still appear as active parts of the dialogue on women jurors. Women themselves have taken the lead in supporting the bestowal of new sex-based privileges for breastfeeding mothers.

Historically familiar rationales for the inclusion of blacks and the exemption of women linger, appearing in contemporary discussions of jury service policy. The result has been that both race and sex categories continue to play central roles in shaping civic obligation and understanding citizenship.
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