The Nineteenth Amendment and Women's Equality

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A rising demand for women's equality took shape in the middle of the nineteenth century and continues as a transformative force today. Early on, American feminists mobilized energetically to abolish outright discrimination that legally subordinated women to men and made a mockery of the nation's claim to be a community of equals.¹ Women rebelled particularly against their exclusion from the central mechanism of self-governance in a democracy: the right to vote. After winning a series of victories in the states, the suffrage campaign achieved its final success when the Nineteenth Amendment to the Constitution was ratified in 1920. Over time the right to vote became a reality for all women, as poll taxes and other racial restrictions were eliminated, and today women exercise the franchise on an equal footing with men. But in the years since women won the vote, Americans seem to have lost track of the revolutionary potential suffrage held for those who labored long, hard years for its enactment. The struggle for women's legal rights has continued almost unabated through the decades since the suffrage victory, but rarely, if ever, has the monumental achievement of the Nineteenth Amendment been cited as a constitutional support for women's claim to full equality.

The goal of this Note is to resurrect the broader purposes of the heroic suffrage campaign by arguing that the Nineteenth Amendment can and should be recognized as an affirmation of women's constitutional equality. My project is necessarily limited to making a provocative suggestion rather than establishing a constitutional fact. Full exploration of the themes exposed here will require sustained scholarly attention to the rich historical record of the campaign for the Nineteenth Amendment and the state suffrage enactments that preceded it, and a willingness to interpret that record in light of today's deeper understanding of the dynamics and persistence of gender hierarchy. Contemporary feminists often try to fit women's interests into a constitutional

1. 1 HISTORY OF WOMAN SUFFRAGE 16 (Elizabeth Cady Stanton et al. eds., AYER Co. 1985) (1881) ("[W]oman readily perceives the anomalous position she occupies in a republic . . . where the natural rights of all citizens have been exhaustively discussed, and repeatedly declared equal."). The *History of Woman Suffrage* comprises six volumes published between 1881 and 1922, while the suffrage campaign was being waged. Three leaders of the movement, Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joselyn Gage, edited the first three volumes.

framework that was built without women's active participation. My hope is to provoke consideration of how the Nineteenth Amendment—the only one to become part of our Constitution as a result of a mass movement for women's empowerment—might further promote women's equality.

The argument presented here was prompted by the contrasting interpretations of the significance of suffrage that emerged as state courts in the early twentieth century considered whether women's new status as voters qualified them for jury service. This question arose most vividly in states where women's common-law disqualification from jury duty² clashed with state law provisions that drew jurors from "electors." My analysis of these cases uncovered two deeply divergent understandings of women's history that produced differing approaches to questions of women's rights.

Some courts espoused a narrow view of the suffrage right which led them to hold that female electors could not be jurors. This "incremental" interpretation of suffrage was grounded in the assumption that women's legal status was fundamentally different from that of men, and that women possessed only those specific rights, responsibilities, and protections that men chose to grant them. A decision to extend to women any new right, such as suffrage, had no general effect on women's legal status; the new right was carefully limited to its terms. The incremental understanding of suffrage is consistent with the narrow and orthodox meaning attributed to the Nineteenth Amendment today—the Amendment simply gives women the right to vote.

Other courts held that female electors were eligible to be jurors. These courts acknowledged that women's previous exclusion from the franchise had been based on their assumed natural inferiority to men, but they interpreted the extension of suffrage to women as amounting to a rejection of that assumption. In this "emancipatory" view, the grant of suffrage represented the symbolic and substantive assertion of women's rightful place as men's equals, and as such had ramifications beyond the franchise.

The reevaluation of the relationship between suffrage and equality presented in this Note draws on several sources. Part I describes the early feminist argument for suffrage as a fundamental right of equal citizens in a democracy. The suggestion made here is that the "original intent" of these citizen framers of the Nineteenth Amendment—that is, their goal of equality for women—should be considered when interpreting that enactment. Part II focuses on two cases discussing jury service as a citizen's right. These cases,

2. Discussing eligibility for jury service, Blackstone referred to the requirement that the jury be composed of "*liber et legalis homo*," and then clarified: "Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus* . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES *362. *Propter defectum sexus* means on account of defect of sex. See BLACK'S LAW DICTIONARY 1220 (6th ed. 1990).

*Strauder v. West Virginia*³ and *Neal v. Delaware*,⁴ were important precedents to the woman juror cases because they show how black men's jury rights were intertwined with their citizenship and suffrage rights under the Fourteenth and Fifteenth Amendments. Part III presents cases representative of the "incremental" and "emancipatory" conceptions of women's suffrage, and shows how the emancipatory interpretation made a surprise appearance in the Supreme Court's opinion in *Adkins v. Children's Hospital*,⁵ a 1923 labor law case. Part IV argues that we can achieve a better understanding of the Nineteenth Amendment by evaluating the contrasting views of women's history that support the incremental and emancipatory interpretations of suffrage. This Part evaluates the relative merits of those views, and discusses the continuing movement for women's rights, to conclude that the Nineteenth Amendment is most appropriately comprehended as a statement about women's equality beyond the voting booth.

The crux of my argument is that early interpretations of the meaning of suffrage to women's equality offer clues about the constitutional significance of the Nineteenth Amendment, clues we should evaluate in light of their conceptual underpinnings. From this angle, we can see that the expansive, "emancipatory" reading of the Suffrage Amendment is consistent not only with the egalitarian impetus that drove the suffrage movement, but also with the view of women's history that is embodied by our national experience in the decades since women's suffrage was won. The vision of emancipation from the legacy of sex discrimination continues to animate the women's movement in the United States and all over the world. The durable vitality of this broad vision argues for continued recourse to it as we seek a deeper understanding of what the Nineteenth Amendment means for women's equality.

I. VOTING AND EQUALITY

The *Declaration of Sentiments* adopted at the founding event of the American movement for women's equality, the 1848 Woman's Rights Convention in Seneca Falls, New York, shows that from the start, a belief in sex equality drove the feminist campaign to win the vote. The *Declaration*, which paraphrased the *Declaration of Independence*, proclaimed, "We hold these truths to be self-evident: that all men and women are created equal," and listed as the first proof of men's "tyranny" over women, "He has never permitted her to exercise her inalienable right to the elective franchise."⁶ To feminist minds, women's inability to vote was a central feature of their oppression by men: "Having deprived her of this first right of a citizen, the

3. 100 U.S. 303 (1880).

4. 103 U.S. 370 (1881).

5. 261 U.S. 525 (1923).

6. DECLARATION OF SENTIMENTS (1848), reprinted in STANTON, *supra* note 1, at 70.

elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides."⁷

Women's advocates pressed for the vote not only as a means to improve women's lives, but also because it would symbolize recognition of women's "equal personal rights and equal political privileges with all other citizens."⁸ As the first right of a citizen, suffrage *meant* citizenship;⁹ it was the very substance of self-government.¹⁰ Suffragists thus responded eagerly when Francis Minor, a St. Louis lawyer and husband of Virginia Minor, a Missouri suffrage leader, suggested in 1869 that the newly ratified Fourteenth Amendment's guarantee of citizenship¹¹ offered women a new basis for asserting the right to vote.¹² The appeal of this idea was evident. In Francis Minor's words, "We no longer beat the air—no longer assume merely the attitude of petitioners. We claim a right, based on citizenship."¹³

This equal citizenship claim to the vote was put to the test when Virginia Minor's suit against the voting registrar of St. Louis for refusing her registration reached the Supreme Court in 1875. The result, *Minor v. Happersett*,¹⁴ was devastating. A unanimous Court declared that voting had nothing to do with the rights of national citizenship protected by the Fourteenth Amendment. The Court cited state law limitations on voting rights¹⁵ to hold that voting could not derive from national citizenship because states, not the nation, created voters.¹⁶ According to the Justices, the Fourteenth Amendment itself argued against Virginia Minor. Section 2 of the Amendment penalizes

7. *Id.*

8. 2 ELIZABETH CADY STANTON ET AL., *HISTORY OF WOMAN SUFFRAGE* 747 (AYER Co. 1985) (1882).

9. See, e.g., Percy L. Edwards, *Constitutional Obligations and Woman's Citizenship*, 75 CENTRAL L.J. 244, 246 (1912) (arguing that suffrage carries with it additional responsibilities and that suffrage thus "confer[s] upon women equal political standing with men of full citizenship"); Edward T. Taylor, *Equal Suffrage*, 19 CASE & COMMENT 301, 306 (1912) (personal freedom requires the "fullest rights of citizenship," including the right to vote).

10. See, e.g., STANTON, *supra* note 1, at 15 ("Woman's political equality with man is the legitimate outgrowth of the fundamental principles of our Government . . ."); Crystal E. Benedict, *Political Recognition of Women the Next Step in the Development of Democracy*, 19 CASE & COMMENT 327, 330 (1912) (referring to women's suffrage as an "inevitable step towards the fulfillment of democracy"); Charles H. Davis, *Shall Virginia Ratify the Federal Suffrage Amendment?*, 5 VA. L. REG. (n.s.) 354, 356 (1919) ("If our government can only derive its just powers from the consent of the governed, should not the women, equally with the men, give their consent through the ballot?"); Frederick Douglass, *The Rights of Women*, reprinted in STANTON, *supra* at 75.

11. "All persons born or naturalized in the United States . . . are citizens of the United States No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

12. Minor made this suggestion in a letter to a suffragist newspaper, *The Revolution*. STANTON, *supra* note 8, at 407-08.

13. *Id.* at 408.

14. 88 U.S. (21 Wall.) 162 (1875). Susan B. Anthony was among the many women whose attempts to vote created test cases. The federal prosecution of Anthony for voting is recounted in STANTON, *supra* note 8, at 648-98. The election inspectors who accepted Anthony's vote were jailed for failing to pay fines assessed against them until being pardoned by President Grant. *Id.* at 714-15.

15. *Minor*, 88 U.S. at 172-73.

16. *Id.* at 170-71.

states that deny male inhabitants the right to vote,¹⁷ and the Court asked, "[I]f suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants?"¹⁸

In an earlier time, when the national government was conceived as the creature of the states that constituted it,¹⁹ the Court's reliance on states as the sole source of the suffrage right might have had some merit. The Fourteenth Amendment, however, created a new relationship between the people and their national government. It made them "citizens of the United States" with "privileges and immunities" that flowed from that citizenship, and guaranteed to them "equal protection of the laws."²⁰ With national citizenship established by Section 1, and a penalty against states that abridged males' "right to vote" in Section 2, the Fourteenth Amendment as a whole undermined the Court's position that national citizenship and suffrage were wholly unrelated. Instead, the structure of the Amendment suggested that suffrage was a right of national citizenship.²¹

The Supreme Court's decision in *Minor v. Happersett* ignored a deeper problem. As a matter of positive law, the Court's statement that citizenship and suffrage were not coextensive was historically accurate.²² However, the Justices failed to grapple with the contradiction inherent in a democracy that legislated broad restrictions on the right to vote. This contradiction becomes apparent with the realization that underlying the very existence of an elected legislature is the presumption that at least some people are *entitled* to vote to

17. Section 2 reads:

Representatives [in Congress] shall be apportioned among the several States according to their respective numbers But when the right to vote at any election . . . 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 . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

18. *Minor*, 88 U.S. at 174. This constitutional argument against women's suffrage realized the worst fears of those feminists who had opposed ratification of the Fourteenth Amendment precisely because of the cited clause of Section 2, which had introduced the word "male" into the Constitution. The bitter conflict over the Fourteenth Amendment that arose between suffragists and their former colleagues in the abolition movement, many of whom also supported women's suffrage, is recounted from its feminist protagonists' perspective in STANTON, *supra* note 8, at 313-16; see also Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1155-58 (1988).

19. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 298-300 (2d ed. 1988) (discussing doctrine of enumerated powers, whereby states ceded to national government only those powers enumerated in the Constitution, while retaining all other powers of government); THE FEDERALIST NO. 39, at 241-45 (James Madison) (Clinton Rossiter ed., 1961) (acknowledging mixture of federal and national traits in government envisaged by Constitution, but arguing that role of states in its ratification, and limitation of federal power to "certain enumerated objects only," safeguard state sovereignty within federal structure).

20. U.S. CONST. amend. XIV, § 1.

21. See ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 146 (rev. ed. 1975) (stating that the second section of the Fourteenth Amendment "was designed to insure the new freedmen the vote").

22. But see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 169 (1969) (attributing to Thomas Jefferson the view that "'the right of suffrage' was one with 'the rights of a citizen'").

form that legislature, an entitlement that necessarily exists not by legislative enactment, but as a pre-political right. The powerful minority that restricted the right to vote to itself—propertied white men—did so not because its members doubted that voting was the foundation of self-government,²³ but because they viewed the majority of the people as incapable of self-governance.²⁴ A right to vote was thus inherent in the very formation of a republican government, and it would seem that the new relationship between the nation's people and the national government that was put in place by the Fourteenth Amendment's declaration of equal national citizenship would give rise to an equal right to vote based in national citizenship²⁵ and enforceable against state governments.

Even while denying Virginia Minor the right to vote, the Court affirmed that women were unquestionably citizens of the nation.²⁶ But theirs was a citizenship without substance. *Minor* made it clear that women could not simply claim equal rights under the Fourteenth Amendment.²⁷ Rather, they

23. Wood shows how two innovations in political theory placed suffrage at the very center of the American system of representative democracy. *Id.* at 162-70. First, "The American legislatures . . . were no longer to be merely adjuncts or checks to magisterial power, but were in fact to be the government—a revolutionary transformation of political authority . . ." *Id.* at 163. Second, the legislatures were legitimate only to the extent that they represented the people, being elected by them and exercising power on their behalf: "If the government be free, the right of representation must be the basis of it; the preservation of which sacred right, ought to be the grand object and end of all government." *Id.* at 164. These developments set "the right to vote and the electoral process in general . . . on a path to becoming identified in American thought with the very essence of American democracy." *Id.* at 168. *Cf.* THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) ("It is *essential* to such a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . .").

24. See WOOD, *supra* note 22, at 168 (quoting characterizations of men who lacked property as "under the power of their superiors" and of "a base, degenerate, servile temper of mind" to explain why "[f]ew in 1776 considered [suffrage] qualifications a denial of the embodiment of democracy in the constitution"). Wood does not discuss why women could not vote, but a later view suggests that they, too, might have been presumed incapable of exercising the franchise intelligently: "I know very well that prejudices against female voting have descended legitimately to us from the Old World; yea, more than anything else, from common law which we lawyers have all studied as the first element in jurisprudence. That system of law really sank the female to total contempt and insignificance, almost annihilated her from the face of the earth. It made her responsible for nothing." CONG. GLOBE, 39th Cong., 2d Sess. 62 (1866) (statement of Sen. Wade). *Cf.* *People ex rel. Denny v. Traeger*, 22 N.E.2d 679 (Ill. 1939):

Until within recent times woman was not thought to be on a parity with man and it was considered that she did not possess those qualitative attributes that made her capable of exercising the right of suffrage or of rendering jury service. She was excluded from jury service on the false theory of economic, sociological and legalistic inferiority . . .

Id. at 681.

25. As a contemporary critic of *Minor v. Happersett* wrote, "The court tells us in its opinion in this case, that 'there cannot be a nation without a people'—but it seems there may be a nation without voters!" *Woman Suffrage in its Legal Aspect*, 3 CENTRAL L.J. 51, 52 (1876).

26. *Minor*, 88 U.S. at 169. ("[W]omen have always been considered as citizens the same as men").

27. Political and congressional debate over the Fourteenth Amendment suggests that the words "persons" and "citizens" were chosen for its text by a Congress that was highly aware of women's rights claims. Morais, *supra* note 18, at 1155-63. Morais argues that in this context of advocacy for women's rights, the use of gender-neutral terms in Section 1, together with the use of "male" in Section 2, indicates that "[t]he framers were willing to allow the Fourteenth Amendment to reach questions of women's rights, short of suffrage," *id.* at 1160. Such claims were, however, fruitless: "These courts invariably ruled against women plaintiffs." *Id.* at 1167.

would have to force their way into the Constitution, and the suffrage amendment would be their vehicle.²⁸

Minor refocused the mobilization already underway to enact a suffrage amendment that would admit women to the "constitutional community."²⁹ The demand for the vote took women's struggle for equality to a new level. Suffrage went beyond "asking to have certain wrongs redressed."³⁰ Now the American woman "demanded that the Constitutions—State and National—be so amended as to give her a voice in the laws, a choice in the rulers, and protection in the exercise of her rights as a citizen of the United States."³¹ The suffragists gradually attained their goal, beginning with scattered victories in the western states³² and culminating in the ratification of the Nineteenth Amendment to the Constitution on August 26, 1920.³³ That Amendment proclaims: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The issue of women's right to vote at last resolved,³⁴ a new question arose. Would this monumental accomplishment, undertaken to end "the prolonged slavery of woman,"³⁵ reverberate beyond the voting booth? No

28. In a speech delivered soon after the *Minor* opinion was issued, Matilda Joslyn Gage said, "I know something of the opinion of the women of the Nation, and I know they intend to be recognized as citizens secured in the exercise of all the powers and rights of citizens. If this security has not come under the XIV. Amendment, it must come under a XVI., for woman intends to possess 'equal personal rights and equal political privileges with all other citizens.'" STANTON, *supra* note 8, at 742, 747. The broad impact of a Suffrage Amendment foreseen in this statement rests, I think, on the early feminists' view that legal recognition of women's equality was just that—the *recognition* of women's inherently equal status. Feminists were not asking that women given rights. They believed women possessed rights equal to those of men, but were forced by the nation's heritage to seek legal acknowledgment of that equality. From this standpoint, one might think that recognizing equal voting rights—meaning, as that did, equal citizenship—would sufficiently demonstrate women's equality in all aspects of the law.

29. This phrase appears in OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE: 1888-1910*, at 176-79 (1993).

30. STANTON, *supra* note 1, at 15. For an account of earlier efforts to improve various aspects of women's condition see FLEXNER, *supra* note 21, at 3-102.

31. STANTON, *supra* note 1, at 16. The broader scope of the suffrage demand invited fresh resistance. "[P]olitical rights, involving in their last results equality everywhere, roused all the antagonism of a dominant power, against the self-assertion of a class hitherto subservient. Men saw that with political equality for woman, they could no longer keep her in social subordination . . ." *Id.*

32. The first American women were enfranchised by the legislature of Wyoming Territory. Act of Dec. 10, 1869, ch. 31, 1869 Wyo. [Terr.] Sess. Laws 371. Following Wyoming were Utah Territory, Act of Feb. 12, 1870, 1870 Utah [Terr.] Laws 8; Washington Territory, Act of Nov. 23, 1883, 1883 Wash. [Terr.] Laws 39-40; and Colorado, Act of Apr. 7, 1893, ch. 83, § 1, 1893 Colo. Sess. Laws 256. The suffrage movement's great success "on western soil" may have been because the shared rigors of frontier life eased the way for men to perceive women as their legal equals. Edwards, *supra* note 9, at 244; *see also* FLEXNER, *supra* note 21, at 159-66.

33. 41 Stat. 1823 (1920) (Secretary of State's certification that Nineteenth Amendment ratified).

34. Resolved formally, that is. Efforts to secure full enforcement of voting rights for black women and other women of color began with a constitutional amendment that abolished poll taxes, U.S. CONST. amend. XXIV, and continued with passage of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1988).

35. STANTON, *supra* note 1, at 13. The quoted phrase reflects the equality basis of the women's suffrage demand. Suffragists also claimed that women's (presumed) moral virtue—that is, women's difference from men—specially qualified them to vote. Over time, the emphasis shifted back and forth between these equality-based and difference-based arguments for women's suffrage. *See* NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 16-30 (1987); Ellen C. DuBois, *Outgrowing the Compact of the*

doubt its citizen framers intended such a result. They saw suffrage as a symbol of women's legal and political equality.³⁶ A purely structural reading of the Constitution could lead to the same conclusion. The Nineteenth Amendment nullified the only sex-based distinction in the text of the Constitution, Section 2 of the Fourteenth Amendment,³⁷ arguably giving rise to an inference that in the absence of male-specific rights, men and women would have equal rights.³⁸ As it happened, virtually the only judicial pronouncements on the scope of women's new suffrage right arose in the woman juror cases. Understanding these decisions requires some discussion of how jury service, like voting, symbolizes citizenship.

II. JURY DUTY AND CITIZENSHIP

The woman juror cases examined in this Note are state court decisions about whether women's ineligibility for jury service was altered by their new status as voters.³⁹ At first blush, jury service cases may appear to be a poor source of insight into the meaning of women's suffrage laws. To the modern mind, jury duty may evoke little more than the obligation to spend long hours in shabby court facilities, waiting for something to happen. In this light, serving as a juror scarcely seems to be a civil right. The characterization of

Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878, 74 J. AM. HIST. 836 (1987).

36. See *supra* text accompanying notes 8-13.

37. See *supra* notes 17-18 and accompanying text.

38. Reading the Nineteenth Amendment's alteration of the Fourteenth Amendment in this manner, so that their combined force is to ensure constitutional equality for women, is an exercise in "synthetic interpretation" of the Constitution. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 459 (1989). The thought can also be expressed in constitutional arithmetic: The Fourteenth plus the Nineteenth Amendments should protect against discrimination on the basis of sex to the same extent that the Fourteenth plus the Fifteenth Amendments protect against discrimination on the basis of race. Cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1202-03 (1991) (arguing that Ackerman's concept of synthesis supports reading Nineteenth Amendment together with Second Amendment to abolish women's exclusion from military and jury service).

One argument against recognizing the Nineteenth Amendment as a statement of women's constitutional equality might be that its most ardent supporters proposed the Equal Rights Amendment almost immediately after the Suffrage Amendment was ratified. See COTT, *supra* note 35, at 125 (ERA, backed by National Women's Party, introduced in Congress in 1923). It seems plausible, however, that feminists read *Minor v. Happersett*, 88 U.S. (14 Wall.) 162 (1875), as a clear message that women could not rely upon the Fourteenth Amendment to secure any right a legislature would deny. In this context an Equal Rights Amendment might have seemed prudent even if theoretically unnecessary. As it turned out, no sex-discriminatory statute was held to violate the Equal Protection Clause of the Fourteenth Amendment until the case of *Reed v. Reed*, 404 U.S. 71 (1971).

39. On women's common-law disqualification from jury service see BLACKSTONE, *supra* note 2. This Note considers female jury service cases only for their interpretations of suffrage. Accordingly, I do not discuss the constitutionality *per se* of excluding women from juries. See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that defendant's Sixth Amendment right to jury drawn from cross-section of community invalidates requirement that women, but not men, specially register for jury service, overruling *Hoyt v. Florida*, 368 U.S. 57 (1961) (holding special registration scheme does not violate women's Fourteenth Amendment rights)).

jury duty as a right fades further given our general understanding that the jury's primary function is to protect the rights of the accused.

The female juror cases are significant, however, because the jury stands not only as a protection for defendants, but more fundamentally as a mechanism for community self-governance. The institution of the jury expresses a mutual faith among citizens who assign to each other a function otherwise reserved to professional judges and lawmakers: the power to determine wrongs, to remedy them, and to decide each others' fates. The expression "a jury of one's peers" imbues jury service with a dignitary value. Conversely, when certain members of society are barred from jury service, not because of their duties to the community but because of who they are, they are denied the full measure of trust and respect accorded to equal citizens.⁴⁰ Excluding women from jury service also kept them from having a voice in deciding what the law should be, since it was the jury that defined the bounds of "reasonable" behavior and brought community morality to bear on the law.

The significance of jury duty as a right of citizenship is highlighted in two cases that are also important as precedents for the female jury cases. In the first of these, *Strauder v. West Virginia*,⁴¹ the Supreme Court held that a state denied a black defendant equal protection of the law by "compelling [him] to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone."⁴² According to the Court, keeping blacks off Strauder's jury panel violated not only his rights as a criminal defendant, but also a broader principle of equality. The exclusion of black men from the jury pool was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."⁴³ The racial barrier also denied blacks the right "to participate in the administration of the law, as jurors."⁴⁴ As one commentator noted, the Court's decision moved "in the direction . . . of an increasing emphasis upon the upholding of the dignity and equality, the legal status, of the negro race."⁴⁵

It might appear that the principle of equality and fairness that animated the holding in *Strauder* would guarantee women's equal participation on juries based on the Fourteenth Amendment alone, without any consideration of suffrage, at least in cases involving female defendants. Yet *Strauder* did not

40. See *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991) (holding that race-based jury selection violates prospective jurors' equal protection rights and "offends the dignity of persons and the integrity of the courts"); Amar, *supra* note 38, at 1187-89 (discussing jury as a form of political participation).

41. 100 U.S. 303 (1880).

42. *Id.* at 309.

43. *Id.* at 308.

44. *Id.*

45. Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 729 (1935).

provide women any such guarantee; rather, the Court stated in dicta that a state "may confine the selection [of jurors] to males,"⁴⁶ and repeated the contention, made in its earlier Fourteenth Amendment jurisprudence, that the Amendment was addressed solely to race discrimination.⁴⁷ Thus with *Strauder*, the Court established that jury service was an important civil right whose denial breached the Fourteenth Amendment's guarantee of equal citizenship, even while stating baldly that excluding women from juries would not be constitutionally improper. One year later, however, in *Neal v. Delaware*,⁴⁸ the Court handed down a decision that clearly supported the proposition that suffrage conferred eligibility for jury service on women in states where electors comprised the jury pool.

The plaintiff in *Neal v. Delaware* was, like *Strauder*, a black man tried by a jury from which blacks had been excluded. In *Neal*'s case, local officials had deliberately excluded blacks from the jury pool, although no statute directed them to do so. The central holding of *Neal* was that *Strauder*'s equal protection principle applied whether blacks were excluded from juries by official action or by state law. But to reach this issue, the Court dealt with a preliminary consideration of great importance for the woman juror cases: whether the Fifteenth Amendment, by making black men electors, had automatically made them eligible for jury service. Under Delaware law all persons qualified to vote could serve as jurors,⁴⁹ and under the Fifteenth Amendment, black men were qualified to vote. The state constitution, however, still defined "electors" as "white male citizens."⁵⁰ This language raised a question. Should jurors be drawn from that class of people who were "electors" when the juror qualifications were established—that is, white men—or were all current electors in the jury pool? The Court resolved this issue by writing that since the Fifteenth Amendment made black men electors "the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote."⁵¹

Neal v. Delaware would seem to have ensured the eligibility of newly enfranchised women for jury service in states that drew jurors from electors,

46. *Strauder*, 100 U.S. at 310.

47. *Id.* at 306-08. The Court relied on its decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class . . . will ever be held to come within the purview of [the Fourteenth Amendment]."). In *Strauder*, the Court broadened its definition of race discrimination by stating that the Fourteenth Amendment would be violated by bars to jury service for white men or "naturalized Celtic Irishmen," 100 U.S. at 307, but did not extend its vision to place women of any race under the Amendment's protection.

48. 103 U.S. 370 (1881).

49. *Id.* at 388. Jurors were also required to be "sober" and "judicious." *Id.*

50. *Id.* at 387-88.

51. *Id.* at 389. This principle—that where jurors are drawn from electors, every newly qualified elector is automatically qualified for jury service—was undisputed in *Neal*. The State of Delaware conceded the point, *id.* at 383, as did those who dissented from the Court's opinion, *id.* at 400.

especially once the Nineteenth Amendment was ratified. The text of that Amendment exactly tracked the Fifteenth Amendment, substituting “sex” for “race, color, or previous condition of servitude” as the prohibited criterion for denial of the franchise. If a black (male) suffrage amendment “enlarged the operation” of state jury qualification statutes to include black men, a women’s suffrage amendment should work the same enlargement to include women of all races. *Strauder* spoke to the importance of jury service for equal citizenship, and *Neal* affirmed that black men’s suffrage had meaning beyond simply voting. It remained to be seen how courts would apply these cases when it came time to interpret the meaning of women’s suffrage.

III. TWO MEANINGS OF SUFFRAGE

Women’s jury service was the subject of a number of cases decided in the decades following *Neal v. Delaware*. Had courts simply followed *Neal*, and recognized that where jurors were drawn from electors, suffrage made women eligible for jury service, these opinions would hold little interest. But few courts were content simply to apply *Neal*’s straightforward logic; instead, they treated the prospect of female jurors as a complex issue. Some of the cases were decided with little or no discussion of women’s aspirations to equality, and many ignored altogether the tie between jury duty and citizenship established by *Strauder* and *Neal*. In other cases, though, courts delved into these issues and developed the emancipatory and incremental interpretations of suffrage to guide their decisions on jury service. The discussion that follows is not intended to establish either of these meanings as the definitive interpretation of the Nineteenth Amendment, but rather to show that, within the limited realm of the jury service issue, judges expressed a variety of opinions on the meaning of suffrage. In this analysis, the female juror cases raise the possibility that the Nineteenth Amendment can be interpreted as an enactment for women’s equality.

A. *The Emancipatory Meaning of Suffrage*

1. *State Court Cases*

Parus v. District Court,⁵² decided by the Nevada Supreme Court in 1918, provides the fullest elaboration of a court’s reliance on a particular understanding of women’s history to support an emancipatory interpretation of suffrage. The petitioner in *Parus* challenged the validity of his indictment because women served on the grand jury that rendered it. Nevada law made

52. 174 P. 706 (Nev. 1918).

all qualified electors jurors,⁵³ and the state constitution recognized women's right to vote,⁵⁴ so the apparently simple question before the court was whether women were qualified as jurors, now that they were electors.

The Nevada court first summarized the holding of *Neal v. Delaware*⁵⁵ and left the reader to draw the obvious conclusion: just as the Fifteenth Amendment qualified black men as electors and therefore jurors, the Nineteenth Amendment qualified women as electors and thus jurors.⁵⁶

The majority had to go beyond *Neal* and *Strauder* to meet a dissenter's contention, grounded in Nevada precedent, that because the jury at common law was composed of men, "our constitutional convention provided for a grand jury of *men* as clearly as though the Constitution itself had used the word 'men.' The word 'men' is written into the Constitution by operation of law."⁵⁷ The majority's response pointed out that Nevada had already cast aside the property requirement for jurors that existed at common law and had substituted a single criterion for jurors: qualified electorship.⁵⁸ The court continued:

It may be urged that at the time of the framing of our organic law, qualified electorship was not considered as being attributable to women. But time has wrought the unanticipated change, and by amendment to our Constitution women have been clothed with the qualification of electorship, and by this change the female citizens of the state have automatically become members of the class from which class alone grand jurors may be drawn, and which classification . . . constitutes the only circumscription . . . fixing the citizenry from which grand jurors might be in the first instance selected.⁵⁹

The court seems to have sensed that this exercise in logic would not fully satisfy its detractors, and that it must confront the crucial issue: what justified a departure from women's jury disqualification at common law?⁶⁰ The answer, according to the court, was that the old rule for women was a thing of the past:

Blackstone tells us that the term "homo," though applicable to both sexes, was not regarded in the common law, applicable to the

53. *Id.* at 707.

54. *Id.* at 708.

55. 103 U.S. 370 (1881).

56. *Parus*, 174 P. at 708.

57. *Id.* at 713 (Coleman, J., dissenting). The precedents were about juries generally, not women's eligibility for them.

58. *Id.* at 708. Nevada did not admit all electors to jury service; every elector was qualified "who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity." *Id.* at 707.

59. *Id.* at 708-09.

60. See BLACKSTONE, *supra* note 2 (discussing common-law disqualification of women).

selection of grand jurors, as embracing the female. Woman, he says, was excluded *propter defectum sexus* When the people of this state approved and ratified the constitutional amendment making women qualified electors of the state, it is to be presumed that such ratification carried with it a declaration that the right of electorship thus conferred carried with it all of the rights, duties, privileges, and immunities belonging to electors; and one of the rights, one of the duties, and one of the privileges belonging to this class was declared by the organic law to be grand jury service. Nor can we with any degree of logical force exclude women from this class upon the basis established by Blackstone, *propter defectum sexus*, because we have eliminated the spirit of this term from our consideration of womankind in modern political and legal life. Woman's sphere under the common law was a circumscribed one. By modern law and custom she has demanded and taken a place in modern institutions as a factor equal to man.⁶¹

Speaking of the grand jury's investigatory powers, the judges added:

Can we reasonably say that although woman, on whom has been conferred the right of electorship, the right to enjoy public office, the right to own and control property, and on whom has been imposed the burden of taxation in a common equality with men, is nevertheless deprived of the privilege of sitting as a member of an inquisitorial body, the power, scope of inquiry, and significance of which affects every department of life in which she, as a citizen and elector, is interested and of which she is a component part? The spirit of the constitutional amendment silences such an assertion.⁶²

The *Parus* court adopted what I call the emancipatory view of the meaning of suffrage within the context of women's history. In general terms, this view characterized the past as oppressive to women, credited the trend toward equality with bringing about a transformative legal act, and urged that the transformative act be given broad effect to further promote women's equality. According to the *Parus* court, women suffered from oppression in the past; their sphere was "circumscribed." A broad movement for women's equality had taken hold—"she has demanded and taken a place . . . as a factor equal to man"—and the "spirit" of *propter defectum sexus*⁶³ had been eliminated from "modern political and legal life." The grant of suffrage culminated that movement—"time has wrought the unanticipated change"—and suffrage stood for a transformation in women's status as a result: "[I]t is to be presumed that

61. *Parus*, 174 P. at 709.

62. *Id.*

63. See *supra* note 2 for a definition of *propter defectum sexus*.

such ratification carried with it . . . all of the rights, privileges, and immunities belonging to electors.”⁶⁴

The uses of the word “spirit” in this opinion suggest that the *Parus* court was not only construing the state constitution, but also seeking to identify and acknowledge the social forces and deeper principles that shape the law. The court recognized that *propter defectum sexus* represented the common law stance toward women, and stated emphatically that the people had rejected this attitude in their “consideration of womankind in modern political and legal life.”⁶⁵ The court found the tone of the new age in “[t]he spirit of the constitutional amendment” for women’s suffrage; that spirit affirmed women’s involvement in matters of governance, in “every department of life in which she, as a citizen and elector, is interested and of which she is a component part,” and it “silence[d]” the notion that women had achieved their gains only to continue to be “deprived” of legal privileges not specifically granted.⁶⁶

The *Parus* court’s language was reminiscent of the opinion in *Rosencrantz v. Territory*,⁶⁷ a very early case that involved suffrage and women’s eligibility for jury service. The *Rosencrantz* court held that a new statute on family relations, together with a women’s suffrage law previously enacted, brought women within the class of “electors and householders” who were eligible for jury service. The opinion in *Rosencrantz* interpreted a family relations statute rather than a suffrage enactment. Yet I include it here because the court interpreted the statute by sketching out the same picture of women’s history that would later support the emancipatory understanding of suffrage in the *Parus* case. The *Rosencrantz* court bemoaned the “harsh rule of the common law,” in which a wife’s “identity was largely lost in that of her husband.”⁶⁸ It celebrated the family relations statute as “radical legislation . . . consonant with the spirit of the times,” which gave husbands and wives “absolute equality before the law.”⁶⁹ The court’s emancipatory interpretation of a law apparently designed to improve women’s property rights within marriage thus provided the basis for opening the courthouse to women as jurors.

A few years after *Parus*, the Michigan Supreme Court confronted the issue of women’s eligibility for jury service with a bold demand: “What was the purpose and object of the people in adopting the constitutional amendment striking out the word ‘male’ from the Constitution? Was it not to do away with all distinction between men and women as to the right to vote, or as to being electors?”⁷⁰ The court treated its answer—that the people intended women to

64. *Parus*, 174 P. at 709.

65. *Id.*

66. *Id.*

67. 5 P. 305 (Wash. Terr. 1884), *overruled by* Harland v. Territory, 13 P. 453 (Wash. Terr. 1887).

68. *Id.* at 306.

69. *Id.*

70. *People v. Barltz*, 180 N.W. 423, 425 (Mich. 1920).

have all the rights of electors—as a foregone conclusion, but on closer inspection this opinion, *People v. Barltz*, shows that the court considered both the emancipatory and the incremental interpretations of suffrage, and chose the emancipatory view. The incremental view was represented by the court's reference to *Harland v. Territory*,⁷¹ a Washington Territory case that had reversed *Rosencrantz*. In *Harland* the court had denied women's eligibility for jury service, stating that when "the people" had adopted women's suffrage they had intended to give women the vote and nothing more.⁷² Rather than adopt the narrow reading of suffrage enunciated in *Harland*, the *Barltz* court cited and approved the liberal reading of suffrage found in *Rosencrantz*,⁷³ signaling its sympathy with the emancipatory view.

The *Barltz* opinion offers a more detailed discussion of another issue that divided the incremental and emancipatory outlooks on suffrage and women's history: whether the use of the word "men" in jury laws represented an intentional decision by the legislature to exclude women from jury service, and if so, whether such a decision should be honored even after women had been enfranchised. Several provisions in the Michigan state constitution referred to juries of "twelve men,"⁷⁴ and in an earlier decision the Michigan court had written, "This right was a trial by a jury of 12 men, good and true."⁷⁵ Whether "men" meant *men*⁷⁶ was critical to the outcome of *Barltz*. A literal reading of the word would void the claim that women could be jurors.

Deciding the meaning of "men" forced courts to choose between two competing explanations of why women were not men's legal equals. One possibility was that women had been intentionally excluded from juries, presumably based on some judgment about their lack of fitness.⁷⁷ On this understanding, legal distinctions between the sexes were not mere byproducts of a social structure that assigned women and men to separate spheres; instead, they had been deliberately created. In one court's words, "[T]he Legislature

71. 13 P. 453 (Wash. Terr. 1887).

72. The court wrote in *Harland*,

The change [to women jurors] is so marked, and the labor and responsibility which it imposes so onerous and burdensome, and so utterly unsuited to the physical constitution of females, that we ought not to depart from the old order without the most indubitable evidence that the legislature so intended.

Id. at 456.

73. *Barltz*, 180 N.W. at 425 ("We are aware that [*Rosencrantz*] has since been overruled by a divided court in *Harland v. Washington*, but the language of the *Rosencrantz* Case is so appropriate and the reasoning so clear that we are disposed to adopt it.").

74. *Id.* at 424, 425.

75. *Id.* at 424 (quoting *McRae v. Grand Rapids, L. & D.R.R.*, 53 N.W. 561, 562 (Mich. 1892)). *McRae* did not concern women's eligibility for jury service.

76. One court rather colorfully phrased the issue as whether the masculine included the feminine, "as, for example, the word 'horse' at common law was held to include 'mare.'" *People v. Lensen*, 167 P. 406, 407 (Cal. 1917).

77. See Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986) (describing how supporters and opponents of women's jury service portrayed their competence as jurors).

ordained that jurors shall be men.”⁷⁸ This view of the origin of women’s legal inferiority underlay what I call the incremental view of suffrage. Its adherents recognized that a sex-based distinction in the law could be erased, but insisted this could happen only through an intentional decision to alter women’s legal status. A suffrage amendment could open the voting booth to women, but it could not put them in the jury box because there had been no distinct decision to remove the legal barrier to their service.

Courts that declined to read “men” literally faced a more complex task. One court simply declared that “[s]ince the world began, in all writings concerning the human race, the word ‘man’ or ‘men’ has been used in a generic sense, or as representing the human race.”⁷⁹ This response, however well-intentioned, was clearly inadequate because until the women’s suffrage amendments, the literal meaning of “men” in elector and juror statutes was accurate—all voters and jurors *were* men. A more promising approach was to account for how a use of “men” that might once have been literal could, over time, have taken on a generic meaning. One possibility was to retrospectively read the literal use—which dismissed women from political and legal life—as an error. On this view it was quite appropriate that rectification of sex inequality in one area, suffrage, should suffice to correct the error in another, jury service.⁸⁰

Faced with this question, the *Barltz* court cited a California case⁸¹ that had rejected a “men means *men*” claim and approved female jurors. Citations to cases from other jurisdictions and a law dictionary supported the view that “[i]n some of its uses [man] is construed to mean ‘all human beings, or any human being, whether male or female.’”⁸² After quoting two dictionaries in which “a human being” appeared as the first definition of man,⁸³ the opinion concluded, “[I]n any view of the case which we are able to take . . . Miss

78. *State v. Kelley*, 229 P. 659, 661 (Idaho 1924).

79. *Cleveland, Cin., Chi. and St. L. Ry. v. Wehmeier*, 170 N.E. 27, 29 (Ohio 1929) (holding that use of “men” in jury statute did not exclude women).

80. The following passage, from an opinion upholding a statute that made women eligible for jury service against a claim that the law violated the constitutional right to trial by jury because that right guaranteed a common law “jury of twelve men,” illustrates this view:

Women are now the peers of men politically, and there is no reason to question their eligibility upon constitutional grounds.

The fact that a common-law jury was defined to be a “jury of twelve men,” etc., had its origin in the circumstance of the political servitude of women in the early days of juridical history so that they were not the “peers” of a man accused of crime. In the broad sense of the word they are now “freemen,” and neither the Constitution nor the laws, when they use the term “men,” except in rare instances, use it with reference to sex.

State v. Chase, 211 P. 920, 923 (Or. 1922). Other cases that rejected the literal definition of men include *State v. Walker*, 185 N.W. 619, 626 (Iowa 1921), and *Browning v. State*, 165 N.E. 566, 567 (Ohio 1929).

81. *Ex parte Mana*, 172 P. 986 (Cal. 1918), quoted in *People v. Barltz*, 180 N.W. 423, 426 (Mich. 1920).

82. *Barltz*, 180 N.W. at 426.

83. *Id.*

Gitzen . . . was a qualified juror under the Constitution and laws of this state."⁸⁴

The *Barltz* judges asserted that the people's intent in enacting suffrage was to give women all the rights of electors, and declined to take literally earlier laws that spoke of jurors as men. While the opinion in *Barltz* lacked the ringing endorsement of women's new legal equality that marked the *Parus* decision, its conclusion that suffrage made women eligible for jury service seemed to rest on an understated sense that suffrage marked women's emancipation.⁸⁵

2. The Adkins Decision

The most striking endorsement of suffrage as a symbol of women's emancipation from the inequality of the common law appeared in 1923 when the Supreme Court struck down a Washington, D.C. minimum wage law that applied only to women. The case, *Adkins v. Children's Hospital*,⁸⁶ was decided just three years after ratification of the Nineteenth Amendment.

Adkins is known today as one of the Court's liberty of contract decisions, which nullified various labor laws as infringements of the constitutional rights of employers and workers to negotiate the terms of employment freely.⁸⁷ Before *Adkins*, the Supreme Court had not applied the liberty of contract doctrine to labor laws that affected only women, giving priority instead to a perceived public interest in women's welfare founded on their capacity to bear children.⁸⁸ According to the Court, this interest justified otherwise impermissible legislative intrusions into the employment relationship.⁸⁹ The *Adkins* decision marked a sharp reversal in the Court's approach to female-specific labor laws, and the Court justified its move by endorsing an equality

84. *Id.* at 427.

85. Cases that arrived at decisions favorable to women jurors without considering issues of women's status include *State v. Walker*, 185 N.W. 619 (Iowa 1921), and *Commonwealth v. Maxwell*, 114 A. 825 (Pa. 1921). The *Walker* opinion cited *Neal v. Delaware*, 103 U.S. 370 (1881), to support its holding, but said that suffrage and jury duty were *not* related, and that states, if they so wished, could bar women from juries. *Walker*, 185 N.W. at 623.

86. 261 U.S. 525 (1923).

87. These decisions, including the most famous, *Lochner v. New York*, 198 U.S. 45 (1905), have been widely criticized as products of a conservative court that defended the interests of the wealthy against the rising power of the working class. See sources cited in *TRIBE*, *supra* note 19, at 566 n.44, 567 n.46. An alternative interpretation analyzes *Lochner* as the principled effort of a Court that believed government was a social contract authorized to pursue only limited ends. These Justices felt compelled to preserve the constitutional value of liberty, as they understood the meaning of that term, from intrusions by legislative majorities. *FISS*, *supra* note 29, at 157-65.

88. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (stating that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest").

89. "Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.* at 422. For comment on the relation between such "public policy" arguments and women's legal status, see *infra* text accompanying notes 141-145.

for women that some would have described as paradoxical, if not downright perverse: women and men had an equal right to work without the protection (or as the Court saw it, the inhibition) of a minimum wage.

Whatever its merits as a labor law decision, the *Adkins* case presented a view of women's history that credited the suffrage amendment as a virtual declaration of women's equality—at least in most spheres:

[T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case*, has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.⁹⁰

There are several points to be made about this passage. First, the Court evinced an unmistakably negative view of women's "ancient inequality." Entirely absent was any suggestion that women benefited from the "old doctrine." Instead, the Court described women as "subjected to restrictions" and "special restraint," and implied that insult was added to injury by failing to treat "women of mature age" as legal adults. Limitations in the realm of contractual, political and civil rights were rejected in favor of the "present day trend" of "emancipation." The Court indicated that its assessment of past and present was widely shared, by referring to it as "common thought and usage."

Second, the Court simultaneously espoused opposing views of whether this change had been a gradual transition or a radical transformation. Its quotation from the earlier *Muller* decision, which had approved a woman-only labor law, suggested continuity with the past: inequality was "diminishing" to "the vanishing point." But the Court also depicted a sharp break with what had gone before, calling the changes in the fifteen years since *Muller* not only "great" but "revolutionary." This sense of drastic change was enhanced by the

90. *Adkins*, 261 U.S. at 553.

Court's use of the word "emancipation," which connotes the single act by which the slave becomes free.

Also notable here was what might be called the penumbra of sex equality that emanated from the Nineteenth Amendment.⁹¹ While the *Adkins* case was not about the Nineteenth Amendment, the Court's reference to it is remarkable. The Amendment appeared not only as a result, but as an engine of social change. Suffrage was the culmination of "revolutionary" developments that forced the Court to abandon a legal system that had treated women "[a]s minors, though not to the same extent,"⁹² developments that led the Court to embrace women as the civil law equals of men. The importance of the Suffrage Amendment to the Court's analysis suggested a change of heart foreshadowed at the close of the earlier *Muller* opinion where the Court had written:

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.⁹³

It almost seems that by denying any connection between suffrage and civil rights, the *Muller* Court had set in motion a mental process that eventually reached quite the opposite conclusion, embodied in the *Adkins* decision: suffrage had everything to do with equality.

The Supreme Court never went beyond the *Adkins* decision's tantalizing hint that the Nineteenth Amendment represented more for women than simply the right to vote. Exploration of that possibility took place only in the woman juror cases. None of these cases discussed *Adkins*—indeed, many predated that decision—yet *Adkins* is relevant to the effort to understand and evaluate the jury cases. *Adkins* distinguished between permissible laws concerned with protecting women's health, and unconstitutional restrictions on women's rights.⁹⁴ While the line between these categories was not necessarily

91. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

92. *Muller*, 208 U.S. at 421.

93. *Id.* at 423.

94. The *Adkins* Court's careful distinction between laws that violated women's equality and those that "properly take the [physical differences] into account" led it to strike down New York's women's minimum wage law, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), while upholding restrictions on women's night work that were justified on health grounds, *Radice v. New York*, 264 U.S. 292 (1924). This distinction was swallowed up when the Court abandoned *Adkins* and its liberty of contract doctrine to uphold a women-only minimum wage law in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). The *West Coast Hotel* decision, made without reference to the Nineteenth Amendment, seemed tacitly to accept the sentiment expressed by Justice Holmes in his *Adkins* dissent: "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation

clear—the labor law litigation generally concerned whether health-related laws infringed civil rights—the principles of the *Adkins* decision favored women's jury service. For one thing, jury service posed no conceivable threat to women's health. And, as the Supreme Court had recognized in *Strauder v. West Virginia*,⁹⁵ jury service was emblematic of exactly that equal citizenship that the *Adkins* Court suggested women had now attained.

More broadly, the *Adkins* decision's emancipatory vision of the importance of the Nineteenth Amendment within women's history suggested that it was not only appropriate, but perhaps necessary that courts recognize the revolution around them by giving full scope to the significance of suffrage. In the emancipatory view, women had stepped forward from an oppressive past to claim the vote and with it, a full measure of equality. The fruit of the arduous suffrage campaign was women's equality before the law.

B. *An Incremental View of Suffrage*

The *Adkins* decision captured the vision of suffrage as a symbol of women's emancipation from the legal inequality of the past, a vision that inspired the cases, considered earlier in this Note, that upheld women's right to be jurors. But in other cases courts held that the attainment of suffrage had been a discrete event in the legal history of women. According to these cases, the attainment of suffrage had no impact on juror qualifications or any other aspect of women's rights because women could not serve as jurors, or achieve any other change in legal status, without explicit legislative authorization. The following pages present this "incremental" interpretation of suffrage.

A full account of the incremental understanding of suffrage appeared in 1921, when the Supreme Judicial Court of Massachusetts upheld the criminal conviction of a female defendant that was rendered by a jury from which all women were excluded. *Commonwealth v. Welosky*⁹⁶ presented questions about the scope of women's suffrage from several different angles. First, the Massachusetts jury law specified that all "persons" eligible to vote could be jurors. Since women had become voters by virtue of the Nineteenth

cannot take those differences into account." *Adkins*, 261 U.S. at 569-70 (Holmes, J., dissenting). On the historical conflict within feminism between equal rights and recognition of sexual difference, see COTT, *supra* note 35, at 117-42. For a recent account, see Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig after Cal Fed*, 77 CAL. L. REV. 171, 194-96 (1989) (discussing opposing feminist positions concerning California law, upheld by Supreme Court in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), requiring businesses to grant women maternity leaves, without requiring similar accommodation for men who are new fathers); see also *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (holding that Title VII, Civil Rights Act of 1964 prohibits employers from protecting fetal health by barring all fertile women from potentially hazardous jobs).

95. 100 U.S. 303 (1880).

96. 177 N.E. 656 (Mass. 1931). *Welosky* was preceded by an advisory opinion, rendered by the same court, which also concluded that the Nineteenth Amendment was an incremental enactment that did not make women eligible for jury service. *In re Opinion of the Justices*, 130 N.E. 685 (Mass. 1921).

Amendment, the court had to explain why women did not now qualify for jury service. Second, Massachusetts had readily admitted others to the jury box once voter qualifications that had kept them out, such as property requirements, had been lifted. Again the question was, why wouldn't this rule apply to women? The third issue was perhaps the thorniest: *Welosky* was a female defendant tried by a jury that excluded all women, which seemed to put *Strauder v. West Virginia*⁹⁷ and *Neal v. Delaware*⁹⁸ firmly on her side. The court would have to distinguish these venerable precedents if it were to rule against *Welosky*'s Fourteenth Amendment claim.

The court began by construing the word "person" in the state jury statute—"a person qualified to vote shall be liable to serve as a juror"—to mean men.⁹⁹ In fact, the court argued, not only did the legislature mean "men" when it wrote "person," but this was "the only intent constitutionally permissible" because the state constitution had allowed only men to vote when the legislature had enacted the jury statute.¹⁰⁰ This recourse to legislative intent was deeply inconsistent with the relevant precedent, *Neal v. Delaware*.¹⁰¹ *Neal* involved a state statute defining voters as jurors that was enacted at a time when state suffrage was constitutionally restricted to white males. Yet the State of Delaware had not argued to the Supreme Court that because the only "constitutionally permissible" intent of its legislature when it had authorized electors to be jurors was to make *whites* jurors, a state policy of excluding blacks from juries must later be upheld; the constitutional violation inherent in trying blacks before all-white juries was clear.

Undaunted by this flaw in its argument, the *Welosky* court turned to the question of why women, unlike other newly enfranchised groups, did not automatically become jurors upon getting the vote. The court explained that when suffrage was expanded among male citizens,

These concurring enlargements of those liable to jury service were simply an extension to larger numbers of the same classification of persons. Since the word "person" in the statutes respecting jurors meant men, when there was an extension of the right to vote to other men previously disqualified, the jury statutes by specific definition included them.

97. 100 U.S. 303 (1880).

98. 103 U.S. 370 (1881).

99. *Welosky*, 177 N.E. at 660 ("Manifestly, therefore, the intent of the Legislature must have been, in using the word 'person' . . . to confine its meaning to men."). The *Welosky* court also repeated the Supreme Court's dictum that the legislature "may confine the [jury] selection to males," *id.* at 664, quoting *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). *Welosky* was unusual in that it construed "person" to mean men, but as the cases discussed elsewhere in this section show, a number of courts agreed that both the *Strauder* dictum and the use of male pronouns in reference to juries argued strongly against women's eligibility to serve. See also *supra* text accompanying notes 77-80.

100. *Welosky*, 177 N.E. at 660.

101. 103 U.S. 370 (1881); see *supra* text accompanying note 51.

The Nineteenth Amendment to the federal Constitution conferred the suffrage upon an *entirely new class of human beings*. . . . It added to qualified voters those who did not fall within the meaning of the word "person" in the jury statutes.¹⁰²

Why? Because "[t]he change in the legal status of women wrought by the Nineteenth Amendment was radical, drastic and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication."¹⁰³ The justices seem to have been frightened by the possible implications of the "radical" amendment; they urged a policy of strict containment. In fact, the court reached back fifty years to a Massachusetts version of the *Bradwell* case¹⁰⁴ for a reassuring quotation:

In making innovations upon the long-established system of law on this subject, the legislature appears to have proceeded with great caution, one step at a time; and the whole course of legislation precludes the inference that any change in the legal rights or capacities of women is to be implied, which has not been clearly expressed.¹⁰⁵

Here was the foundation of the incremental interpretation of suffrage: Women gained new rights not because the law had come to recognize sex equality, but only because law-makers occasionally saw fit to exercise their discretion on women's behalf.

The court's greatest challenge was to explain why a female defendant's jury could be drawn from a pool that excluded women, when it was well established by *Strauder*¹⁰⁶ and *Neal*¹⁰⁷ that a black male defendant could not be tried by a jury drawn from a pool that excluded black men. The court resolved this dilemma by arguing that when it came to the need for constitutional rights, sex and race created "utterly different"¹⁰⁸ situations. First, the justices harked back to the view that the Fourteenth Amendment was enacted for the exclusive benefit of blacks, asserting that this principle was "not shaken or affected by later decisions . . . recognizing the Fourteenth Amendment as extending its protection to all persons, white or black, or corporations."¹⁰⁹ The court did not attempt to explain how the earlier view, that the Fourteenth Amendment protected *only* blacks from race discrimination,

102. *Welosky*, 177 N.E. at 661 (citation omitted) (emphasis added).

103. *Id.*

104. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (denying Fourteenth Amendment challenge to Illinois rule that excluded married women from admission to the bar).

105. *Welosky*, 177 N.E. at 661 (quoting *Robinson's Case*, 131 Mass. 376, 381 (1881), in which the Massachusetts Supreme Judicial Court, following *Bradwell v. Illinois*, denied Lelia J. Robinson's eligibility for admission to the bar on the ground that she could not be a lawyer because of her sex).

106. 100 U.S. 303 (1880).

107. 103 U.S. 370 (1881).

108. *Welosky*, 177 N.E. at 663.

109. *Id.*

could remain in force once other decisions had expanded the Amendment's reach to "all persons . . . or corporations." The effect of its pronouncement was, however, clear: the Fourteenth Amendment simply did not apply when women—of any race—challenged their treatment as women.

The justices continued by contrasting the situation of blacks before the Thirteenth, Fourteenth, and Fifteenth Amendments with that of women before the Nineteenth Amendment. The court, apparently thinking only of white women, described women's status before the Nineteenth Amendment:

Women had not been enslaved. They had been recognized as citizens and clothed with large property and civil rights. Woman has long been generally recognized in this country as the equal of man intellectually, morally, socially. Opportunities in business and for college and university training had been freely open to her. . . . In many respects laws especially protective to women on account of their sex had been enacted. Most of those formerly imposing limitations, even upon married women with respect to property and business, had disappeared.¹¹⁰

In light of this account of women's history, there was little left for the Nineteenth Amendment to accomplish and, according to the court, its advocates knew that: "Current discussion touching the adoption of the Nineteenth Amendment related exclusively to the franchise. The words of that amendment by express terms deal solely with the right to vote."¹¹¹ The Nineteenth Amendment granted women the vote and nothing but the vote.

The argument then took a surprising turn. The court cited Supreme Court decisions that approved significant restrictions on women: women had no right to practice law,¹¹² no right to vote before the Suffrage Amendment,¹¹³ and woman-specific labor legislation was constitutional.¹¹⁴ Noting that all these cases rejected Fourteenth Amendment challenges, the court wrote, "Those rights appear to us quite as essential to the privileges and immunities of citizens and equal protection of the laws as the duty to serve as jurors."¹¹⁵ The Massachusetts justices who had just described how women enjoyed equality now pointed to cases that ratified the constitutionality of laws that treated women unequally.¹¹⁶

110. *Id.*

111. *Id.*

112. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

113. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875).

114. *Muller v. Oregon*, 208 U.S. 412 (1908).

115. *Welosky*, 177 N.E. at 664.

116. The court also quoted with approval a New Jersey decision, *State v. James*, 114 A. 553 (N.J. 1921), which held that the constitutional right to a jury trial guaranteed a common law jury consisting of men. *Welosky*, 177 N.E. at 664. One claim Frank James made in appealing his murder conviction was that the exclusion of women from juries violated his right to trial by an impartial jury. The New Jersey high court rejected his argument that the Nineteenth Amendment served to qualify women as jurors under a state

Despite its evident confusion, the *Welosky* opinion is a comprehensive statement of suffrage as a discrete and incremental alteration of women's legal status. The passage comparing the status of (white) women with that of blacks before emancipation was intended to show that women did not suffer legal or social oppression, and for this reason the justices refused to apply *Strauder's* Fourteenth Amendment holding to defendant *Welosky*. Yet the *Welosky* court acknowledged that the law continued to approve significant restrictions on women's rights. This contradiction could be resolved only from within the incremental perspective, which accepted inequality between the sexes, and allowed women only those rights that were selected for them. The Massachusetts justices endorsed that perspective by reading the word "person" in the jury statute to mean "men" and by characterizing women as "an entirely new class of human beings" to enjoy the privilege of voting. To them, suffrage was an important but limited achievement. Following this, the conclusion was inevitable that the Nineteenth Amendment could not be "extended by implication" to create additional rights; indeed, the "whole course of legislation"¹¹⁷ argued against such a result. Winning the vote had altered one aspect of women's legal status, but had left unchanged their underlying inequality before the law.

The incremental interpretation of laws affecting women's legal status accepted the status quo of sex inequality as an appropriate and intentional response to perceived differences between men and women. The law treated the sexes differently because they were different. Since women's unequal legal status was accepted and normal, courts adopted a cautious stance toward legislative enactments that altered women's status, giving such enactments their due but not extending them on any abstract theory of sex equality.

The opinion in *Harland v. Territory*¹¹⁸ is an earlier expression of this incremental view. This case reversed *Rosencrantz*,¹¹⁹ the earlier Washington Territory case that had established women's eligibility for jury service. In *Harland* the judges determined that the Territory's women's suffrage law was invalid,¹²⁰ and stated in lengthy dicta why women, even if electors, could not be jurors. The court embraced women's exclusion from jury service as justified by the rule of the common law that was summarized in Blackstone's phrase,

law that made "citizens" jurors. The *James* opinion relied on BLACKSTONE, *see supra* note 2, the statutory use of "personal pronouns of the masculine gender," 114 A. at 555, and the view that the Nineteenth Amendment "emancipate[d] women only so far as the right of suffrage is concerned," *id.* at 556, to confine the meaning of "citizen" in this case to men. The court also rejected James's standing as a man to raise an issue of women's constitutional rights. *Id.* at 557-58.

117. Robinson's Case, 131 Mass. 376, 381 (1881), *quoted in Welosky*, 177 N.E. at 661.

118. 13 P. 453 (Wash. Terr. 1887); *see supra* text accompanying notes 71-72.

119. 5 P. 305 (Wash. Terr. 1884); *see supra* text accompanying notes 67-69.

120. The author of the *Harland* opinion betrayed a certain depth of feeling about the subjects of women's suffrage and women's jury service, writing, "Of course, if [the suffrage] act is invalid, the whole superstructure of the argument by which female jury duty is demonstrated falls to the ground, a broken and shapeless mass." *Harland*, 13 P. at 457.

propter defectum sexus.¹²¹ The opinion quoted Justice Bradley's famous statement that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."¹²² "[W]e ought not to depart from the old order," the judges wrote, "without the most indubitable evidence that the legislature so intended."¹²³ Presaging the *Welosky* opinion, they asserted that "the fourteenth amendment . . . is not yet strong enough to overcome the implied limitations of prior law and custom"¹²⁴ on women's rights.

The South Carolina Supreme Court also embraced the incremental view of suffrage in *State v. Mittle*¹²⁵ when it refused a criminal defendant's challenge to his conviction on the ground that women were excluded from the venire of petit jurors for his trial. The court held that women were ineligible for jury service in the state.¹²⁶

The South Carolina judges represented Mittle's claim as an assertion that the Nineteenth Amendment had, in itself, made women jurors. This was probably something of an overstatement, as the route from suffrage to jury service was always traced through a provision that electors were qualified as jurors, but the court spared no energy in its denunciation:

The right to vote and eligibility to jury service are subjects of such diverse characteristics and demanding such different regulation that it is impossible to consider the one as implied in the other. To hold that one who is a qualified elector is ipso facto entitled to jury service is to deprive the Legislature of the right to prescribe any other limitation upon the right to jury service. It could not prescribe the age limit, the sex, or the mental, moral, or physical qualifications of a juror.¹²⁷

The problem with this argument lay in the South Carolina constitution's two provisions about jurors. The first read, "The petit jury of the circuit courts shall consist of twelve men"; the second, "Each juror must be a qualified elector under the provisions of this Constitution, between the ages of twenty-one and sixty-five years and of good moral character."¹²⁸ These provisions

121. *Id.* at 454. See *supra* note 2 for a definition of this phrase.

122. *Id.* at 456 (quoting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).

123. *Id.*

124. *Id.*

125. 113 S.E. 335 (S.C. 1922).

126. In fact, the *Mittle* court went one step further, saying of the Nineteenth Amendment:

It is a popular, but a mistaken, conception that the amendment confers upon women the right to vote. It does not purport to do so. It only prohibits discrimination against them on account of their sex in legislation prescribing the qualifications of suffrage, a very different thing from conferring the right to vote

Id. at 337. On this reading, even if jury eligibility could be inferred from the right to vote, women could not claim jury service as a constitutional right because they had no constitutional right to vote.

127. *Id.*

128. S.C. CONST. of 1895, art. V, § 22.

simply did not supply the court's perceived need for "such different regulation" of voters and jurors. The *Mittle* court also held that "the right of jury service by a woman was expressly denied by the state Constitution" because of the provision for a jury "of 12 men";¹²⁹ the court did not pause to consider whether "men" meant *men*.¹³⁰

The opinion in *State v. Mittle* said little about why suffrage should have only an incremental and narrow effect. Assessment of the court's view of women's history is largely a matter of implications drawn from its silence. The South Carolina Supreme Court presented the Nineteenth Amendment in a contextual vacuum, which precluded interpreting the Amendment as part of a larger drive toward equality. The court's hairsplitting insistence that the Nineteenth Amendment did not grant women the right to vote but only prohibited states from denying the franchise based on sex¹³¹ was meaningless as a matter of law—granting the right and prohibiting its denial equally allow women to vote, except for those who are otherwise disqualified. But the court's choice of words cut against the claim that women had equal legal rights.

The literal reading of "jury of 12 men" as a bar to women's participation was a tacit acknowledgment that sex-specific legislation was presumptively appropriate. The court did not refer to the debate in other cases over whether "men" should be read literally, but instead simply accepted that legislation could give women inferior status. *State v. Mittle* is an example of the incremental interpretation of suffrage derived more by ignoring than by interpreting women's legal history.

Some other cases that relied at least in part on the incremental interpretation of suffrage to reject female jury service were, like *Commonwealth v. Welosky*¹³² (1931), among the later opinions on the question. Cases such as *State v. Kelley*¹³³ (1924) and *People ex rel. Fyfe v. Barnett*¹³⁴ (1925) departed from the more expansive interpretation of the meaning of suffrage expressed in the earlier opinions of *Parus v. District*

129. *Mittle*, 113 S.E. at 338.

130. The court did, however, write that a state "may confine the selection to males." *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880)).

131. See *supra* note 126.

132. 177 N.E. 656 (Mass. 1931).

133. 229 P. 659 (Idaho 1924). Kelley's conviction by an all-female jury was overturned in an opinion of the Idaho Supreme Court. Despite a statute that stated, "Words in the masculine gender, include the feminine," *id.* at 661, the judges denied women's eligibility as jurors on the basis of statutory references to jurors as "men," *id.* at 660-61, and the common-law rule of *propter defectum sexus*, *id.* at 661. They also ignored *Neal v. Delaware*, 103 U.S. 370 (1881), by declaring that "[t]he jury statutes restrict jury duty to men, males, who are citizens and electors; the Suffrage Amendment increased the number of electors, but it neither related to nor affected the qualifications of jurors." *Kelley*, 229 P. at 661.

134. 150 N.E. 290 (Ill. 1925). In this case, a Chicago woman unsuccessfully sought a writ of mandamus ordering the restoration of her name to the jury roles. The commissioners, erring perhaps because of her unusual name, had placed Hannay Beye Fyfe on the jury list only to remove her upon learning her sex.

*Court*¹³⁵ (1918) and *People v. Barltz*¹³⁶ (1920). Their departure is all the more striking given that they also came after the *Adkins* opinion and its endorsement of the emancipatory view. These later opinions may express a retrenchment from, or a backlash against, the spirit of sexual equality that had galvanized the successful suffrage campaigns. Perhaps as the struggle for suffrage receded from political awareness, courts lost sight of the suffragists' rhetoric of women's equality. No doubt that rhetoric had faded from view to some degree even before the Nineteenth Amendment was won, as support for women's suffrage expanded from its origins in visionary feminism to the political mainstream. Perhaps these courts shared the concern, expressed in *Welosky*, with limiting the consequences of this "radical, drastic and unprecedented"¹³⁷ Nineteenth Amendment.

IV. READING LAW BY THE LIGHT OF HISTORY

This sample of the female juror cases offers no definitive answer to the question posed by the Michigan Supreme Court in *People v. Barltz*, "What was the purpose and object of the people in . . . striking out the word 'male' from the Constitution?"¹³⁸ I have explored them here because they illuminate two interpretations of suffrage—one narrow, one more broad—that we can evaluate in light of our national experience and aspirations as they have developed in the years since the ratification of the Nineteenth Amendment.

It is clear that as judges struggled to determine the impact of suffrage on women's jury service, they drew constantly on their own conceptions of women's legal history. Those who believed that women fit well within the separate sphere assigned to them by men and the legal system were careful to extend to women only those precise rights that legislatures decided to grant. Implicitly or explicitly, these courts rejected the view that women's inferior legal status was detrimental and assumed the legitimacy of legal distinctions between the sexes. In this view of women's legal history the grant of suffrage was no more than an incremental alteration in women's legal status whose impact was confined to the voting booth.

Other judges took a very different view. In their eyes, women had been subjected to imposed legal inferiority quite long enough. If women had not yet arrived at the status of full equality, they were bound soon to be recognized as men's equals. These courts looked to other legislative enactments as support for their view that suffrage was a robust expression of women's aspiration toward equality. They drew parallels between the impact of enfranchisement on black men's jury rights and its impact on women's jury service. Interpreting

135. 174 P. 706 (Nev. 1918).

136. 180 N.W. 423 (Mich. 1920).

137. *Commonwealth v. Welosky*, 177 N.E. 656, 661 (Mass. 1931).

138. 180 N.W. 423, 425 (Mich. 1920) (emphasis added).

suffrage as the people's affirmation of women's equal political rights, they readily extended its force at least from the ballot box to the jury box.

The transformative potential of this latter emancipatory vision of suffrage and the Nineteenth Amendment was demonstrated in *Adkins v. Children's Hospital*,¹³⁹ where the Amendment appeared as a virtual declaration of women's constitutional equality. That potential was soon vitiated as sex-specific legislation was upheld under the caveat in *Adkins* that "the physical differences must be recognized in appropriate cases."¹⁴⁰ The "recognition" of those differences invited a resurgence of special laws aimed at women and justified as sound public policy. The ramifications for women's drive toward legal equality were profound.

In a scathing 1935 survey of the failure of constitutional law to grant or protect women's rights, Blanche Crozier criticized the ascendance of "public policy" as a rationale for "the progressive intrusion of the police power upon personal liberty in the field of women's employment: . . . The health of the race brings all paid work of all women within the field of public control."¹⁴¹ She observed that for a time, women were gaining legal rights "all necessarily in derogation of the common law,"¹⁴² and, as we have seen in the jury cases,

[I]t began to seem that the common law . . . was on the wrong track anyway, and that it was inadequate to say that a constitutional right expressed in the most universal terms nevertheless did not extend to women because women had no such right at common law. . . .

Between the decline of the authority of the common law in this field and the later enormous growth of the application of public policy, there was a hiatus; and this hiatus is the highest point in the constitutional position of women. This interval contains the strongest statements against discrimination based on sex which have ever been made by American courts.¹⁴³

Crozier continued, "Only once did the United States Supreme Court fall into this new trend, which turned out to be only temporary and not the way the law was going. This was in the *Adkins* decision, which we fear is not today in the best of repute."¹⁴⁴ The tone of weary resignation at the conclusion of her discussion is haunting years later, with full equality for women still so distant a goal:

139. 261 U.S. 525 (1923).

140. *Id.* at 553.

141. Crozier, *supra* note 45, at 746.

142. *Id.*

143. *Id.* at 746-47.

144. *Id.* at 748. Crozier identified the principle that sex discrimination is unconstitutional as the "actuating philosophy" of the *Adkins* decision, adding, "[T]he *Adkins* case was the immediate fruit of the Nineteenth Amendment, although there is no connection whatever between suffrage and the question in the case." *Id.*

The principle of the constitutionality of discrimination based on sex was slowly weakening during the last years under its old sponsor, the common law; it reached a critical point where even some courts thought it might die; but it weathered the change from ancient to modern nomenclature, and under its new sponsor, public policy, it has fully regained its old strength.¹⁴⁵

My survey of these cases, originally inspired by the *Adkins* view of suffrage, leaves me with the same feeling of opportunity lost that Blanche Crozier expressed. It was not the suffrage amendment alone, or any other legal enactment, that for a time seemed to give such impetus toward equality for women, but instead the "spirit of the amendment," and of the movement responsible for its success.

The reasons given in the jury cases for a narrow reading of the Nineteenth Amendment are not empty. The argument that the Amendment says nothing on its face about jury duty is undeniably accurate. So, to an extent, may be assertions that when legislators enacted jury laws, "men" meant *men*.¹⁴⁶ The heart of this controversy, however, lies not in the words of statutory or constitutional enactments, but in the competing views of the backdrop of women's history, against which the impact of suffrage must be measured. In my view, the choice between the incremental and the emancipatory interpretations of the Nineteenth Amendment should take into account both the historically inferior legal status of women and the centrality of suffrage to equal citizenship in a democracy, in order to reach an understanding of what kind of equality women achieved by winning the right to vote.

Today we take for granted the incremental view of women's suffrage. In our constitutional understanding, the Nineteenth Amendment stands for no more than women's right to vote. But the conception of women's history that underlies the incremental view, as expressed in these cases, seems deficient. Courts that adopted the incremental view showed little comprehension of the oppressiveness of the common law to women—a reality those courts that adopted the emancipatory interpretation admitted freely. Moreover, aspects of the incremental view—particularly the literal adhesion to the word "men" and the failure to use constitutional precedents to override women's common-law status—amounted to a position that the Constitution did not apply to women, and that only the express terms of a statute could alter women's rights from what they were at common law.

145. *Id.* at 748-49.

146. *But see* *People ex rel. Denny v. Traeger*, 22 N.E.2d 679 (Ill. 1939). In this case the Illinois Supreme Court had to decide whether the use of the word "men" in the state constitution's jury provisions excluded women. Referring to the state's constitution which, paraphrasing the *Declaration of Independence*, stated "[a]ll men" have "certain inalienable rights," the court declared that a literal reading of "men" must be rejected because it "would act to remove from many of the governed the protection guaranteed by the bill of rights." *Id.* at 682.

The entire thrust of the feminist movement has been to reject these contentions, by reading women *into* the Constitution, and by insisting that maleness has served as a prerequisite for positions of responsibility and authority not because it is a bona fide qualification, but because of the historical oppression of women. The feminist movement's many successes in the legal arena demonstrate that both the judiciary and the legal profession as a whole have rejected the presumption of women's inequality that served as the underpinning for the incremental interpretation of suffrage. Not only are the basic tenets of the incremental viewpoint now discredited, but the belief in women's trajectory toward equality that underlay the emancipatory interpretation of suffrage has continued as a vital force right up to the present.

V. CONCLUSION

The Nineteenth Amendment was the product of the revolutionary idea that women have equal status in a democracy. As a nation, we are still pursuing this vision of equality, yet we have allowed this constitutional enactment only a paltry existence. The woman juror cases, with their contrasting incremental and emancipatory interpretations of suffrage, provide good reason to reconsider the limited scope accorded the Nineteenth Amendment. This incremental interpretation of women's suffrage turns out to be founded upon a constricted view of women's place in the legal order that has been wholly rejected by modern Americans. The understanding that suffrage was an emancipatory enactment, however, rests on a warm embrace of women's equality that is far more consonant with our national ideals and constitutional values.

The meaning of the Civil War Amendments for racial equality has never been treated as a settled matter. Rather, the understanding of their significance is continually informed and reformed, both by new scholarship about their origins, and by an ever broadening awareness of how deeply our institutions and common life must change to realize fully the aspiration of racial justice. The Nineteenth Amendment merits a similarly deep, broad, and continuing inquiry, so that the fullest and truest aspirations of this constitutional amendment may be recovered and realized.

The Nineteenth Amendment brought women into political citizenship after centuries of exclusion by men, a tremendous achievement by any measure of democracy. Perhaps there is yet more this women's amendment to the Constitution can accomplish to eliminate the spirit of *propter defectum sexus* "from our consideration of womankind in modern political and legal life."¹⁴⁷

147. *Parus v. District Court*, 174 P. 706, 709 (Nev. 1918).