

## The Constitution as Social Design

A constitution not only constitutes a structure of power and authority, it constitutes a people in a certain way. It proposes a distinctive identity and envisions a form of politicalness for individuals in their new collective capacity.

— SHELDON S. WOLIN, *The Presence of the Past*

Harriet Stanton Blatch was committed to woman suffrage. When her mother, Elizabeth Cady Stanton, passed away in 1902, Harriet returned from England to carry on her mother's work. Winning the vote became Harriet's full-time mission until the Nineteenth Amendment was adopted in 1920. The amendment was a personal as well as a political victory. It represented the fulfillment of a long-held family dream that American women would become full and equal citizens. Yet for Harriet, like her mother before her, the vote was merely a starting point in the campaign for true democracy. Reflecting on the seventy-fifth anniversary of the 1848 Woman's Rights Convention at Seneca Falls, Blatch confided, "My mother could not conceive of suffrage as standing by itself, as an issue unrelated to other issues. For her it was inseparable from the antislavery agitation, from women's demand for entry into the field of labor, into the universities and professions" (DuBois, 1997, 226). Blatch was well aware that women's fight for equality did not end with the vote. Women's inclusion in the electorate did little to change their status of economic dependency. As wives, mothers, and

workers, American women remained economically subordinate, and the political system was ill equipped to address the problems of industrial exploitation and legal discrimination that made them so.

By her eightieth birthday, in 1936, Blatch was still looking to the future: "The failures of a decade cannot shake my faith in democracy and liberty," she declared to the friends and family who had gathered in New York to celebrate with her. "I am here to represent the feminist side in this discussion of the future of democracy," she said (DuBois, 1997, 5). Blatch must have known when she passed away in 1940 that much remained to be done. Women still suffered legal discrimination. Even with the gains made during the New Deal, American social provisioning paled in comparison to the social policy regimes emerging in Western Europe. Under the leadership of Franklin Delano Roosevelt, American democracy was more vibrant than it had been when women first won the vote in 1920. Yet it seemed that there were limits on how much American democracy could expand. Both Elizabeth Cady Stanton and Harriet Stanton Blatch had operated within a constitutional order which made the achievement of a more expansive, enriched democracy difficult.

This book is about the contribution that generations of feminists made to the promise of American democracy. It is also about the constitutional order that both constrained and inspired their democratic ambitions.

When did women achieve full civic membership in the United States? Was it in 1789, when the Constitution was adopted? Or was it in 1868, when the Fourteenth Amendment defined national citizenship for the first time? Was it in 1920, when women finally received the right to vote? Or in the 1960s and 1970s, when women were granted new rights in employment and education? Or, perhaps, did the failure to adopt the Equal Rights Amendment in the early 1980s illustrate that women are still not recognized as full and equal members of the polity? The absence of a clear answer to this question is indicative of women's ambiguous place in the American civic order.

For much of the nation's history, women's presence in the community of "the People" was assumed but not specified. Before the twentieth century, women's place in the American political community was conceived of relationally. As wives, daughters, servants, and slaves, women were represented in public affairs through their husbands, fathers, and masters. They had no

independent civic status. Then, in the late nineteenth century and throughout the twentieth century, women gradually came to be seen as individuals. Individualism seems essential for civic recognition in America, a nation whose public philosophy is premised on liberalism and natural rights.<sup>1</sup> American women's claim to an autonomous legal and political status has been hard-fought; in many ways they are still not fully recognized in those terms. Yet autonomy is not an unambiguously positive status for women. It remains uncertain what it would take for women to secure a civic membership that provides them with equal rights and status, and that is more fully expressive of their social identities, experiences, and concerns.

This book is about gender and civic membership in American constitutional politics, from the adoption of the Nineteenth Amendment through second wave feminism. There are two central concerns that motivate this work. First, it examines how American civic membership is gendered, and how the terms of civic membership available to men and women shape their political identities, aspirations, and behavior. Second, this book explores the dynamics of American constitutional development through a focus on civic membership, which is understood here as a legal and political construct at the heart of the constitutional order. In other words, this is a book about gender politics and constitutional development, and about what each of these can tell us about the other.

Within the American constitutional order women have undergone a shift from a civic status based upon marriage, family relations, and economic dependency to one based upon the principles of liberal individualism and legal personhood. Yet the attainment of a liberal civic status remains partial; in the struggle to achieve standing as public-realm individuals, women still face resistance to the idea that their sex does not matter to their civic membership. The federal government and many in the broader society will go only so far in granting women constitutional equality. Many prefer to think that it is appropriate for women to be recognized as relational beings, tied to their children and spouses, who are situated and shaped by their lives in the domestic realm.

The shift from a citizenship based on domesticity and dependency to one that is imperfectly based on liberal individualism and legal personhood corresponds to the nation's emergence as a modern liberal constitutional order.<sup>2</sup> By considering the constitutional transition from a common law system of social governance to a modern liberal system of social governance, we can

better understand how our modern institutions sometimes alleviate social hierarchies and sometimes reformulate them. Many of these hierarchies contain changing conceptions of the household and the place of its members in politics. I contend that the modern liberal order that took hold in the United States in the twentieth century retained imprints from the earlier common law system of governance, meaning that status hierarchies connected to marriage, labor, and race were modernized under such rubrics as privacy, autonomy, and federalism. Put positively, despite the problematic way in which it is conceived, individualism (a status that for women is premised on their separation from domestic relations) affords some members of previously subordinated groups new opportunities for political efficacy and social mobility.

Approaching constitutional development through debates over civic membership allows for new insights into one of the central paradoxes of American history—namely, how it is that a nation founded on universalist principles of equality is so marked by a history of hierarchy, subordination, and exclusion. How can Thomas Jefferson be both the author of the Declaration of Independence and the master (and father) of slaves? How can the legacies of slavery, coverture, immigrant exclusion, Indian extermination, and relocation camps be reconciled with a history that includes the Declaration, the Bill of the Rights, the Emancipation Proclamation, the Four Freedoms, and the “I have a dream” speech? Many resolve this contradiction by imagining that liberal individualism and equality constitute the core truth about America, while practices of subordination do not represent the nation’s spirit or destiny and are better understood as historical remnants that eventually were swept away by the power of American political ideals. Such a portrait is seductive, not least for the subordinated groups who invoke it to advance claims of inclusion.<sup>3</sup> Yet it is also a troublesome misrepresentation for a nation that often proves willing not only to retain and reformulate certain forms of social hierarchy, but to generate new institutions and practices of political and social exclusion. It makes more sense, then, to begin with the premise that both hierarchy and equality have been central to the principles and practices of the American constitutional order.

We can begin to make sense of the duality of the American political experience by looking comprehensively at the constitutional order as a social design that expresses and manages, through the terms of civic membership, the competing principles of individual rights and concerns with social order. The polity is shaped by a civic order that affords different terms of rights and

recognition and that demands different duties from various groups within the nation. Variations in the terms of civic membership accord with the civic standing and social place of particular social groups. The focus of the book's analysis is debates on gender and civic membership. For, as both a central and long-subordinated group in American politics, women's civic membership reveals the boundaries and nature of the constitution order. The first part of the book considers the impact of the Nineteenth Amendment and finds that, while suffrage provided women with a claim to an identity as engaged citizens and legal persons, marriage remained a defining element in the civic status of women and men. Part II focuses on the 1940s, and finds that the new validations of labor status and military status worked to elevate the civic position of American men over women. Part III examines the impact of second wave feminism on civic membership. Inspired by the civil rights revolution, the 1960s and 1970s were decades when women's citizenship expanded under the rubric of equality. Yet, since many Americans remained convinced that sex differences run more than skin deep, and that women's social roles should involve more than their individual ambitions, there was a limit to how far equality pursuits could go. In areas like contraception and abortion, privacy became an alternative principle for expanding the rights of women. What emerges from this analysis is the long, uneven, and still unfinished process of claiming the status of full legal personhood for women. The conclusion of this book offers an alternative vision of civic presence for women based on an embodied, public form of civic membership.

### *Theoretical Framework*

A vast comparative literature on citizenship and civic membership has emerged in recent years. This literature arose in response to large-scale historical events in the late twentieth century, such as the birth of new nations following the collapse of the Soviet Union; the rise of globalization and attendant changes in political and economic relations; the growth in political formations and claims based on race, gender, ethnicity, and religion; and an increase in claims of civic dualism associated with new patterns of migration and the expansion of transnational governing institutions. These events have changed and complicated the terms of civic membership away from the stable patterns established after World War II in the industrial West.

Understanding this shift away from industrialism, nationalism, and legal individualism as foundations for civic membership has led many scholars to consider the role that institutions play in organizing political identities and the relationship between the populous and the state. Some of this work, including this book, takes the form of historical inquiry into where we have been in order to clarify our view of where we are going.

This study of U.S. civic membership and gender politics is situated within the framework of constitutional politics. *Civic membership* refers to the legal and political status of all persons under U.S. political authority. In addition to citizens, this category would include slaves, wards (e.g., Native Americans), permanent residents, immigrants in the process of naturalizing, colonized subjects (e.g., the populations of the Philippines and Puerto Rico following the Spanish American War), and women who lost their U.S. citizenship through marriage to foreign nationals. In contrast, *citizenship* is conceived of here in the formal sense, as a legal status. One either is or is not a citizen of a nation. Since the adoption of the Fourteenth Amendment in 1868, all persons born in the United States, or naturalized by the federal government, are considered American citizens. Specific legal rights typically attach to citizenship, such as the right to vote or to serve on a jury. Certain duties are expected of citizens, including the duty to defend the nation in times of war. Governments typically provide certain social benefits to their citizens as well, often in recognition of their civic service—such as social security, veterans' benefits, and Medicare. Though not all citizens have these rights, benefits, and duties, citizenship is typically used as a legal marker for their assignment. Throughout this book, references to citizenship are narrowly specified in terms of formal legal status.

Civic membership also refers to the broader political, legal, and social meanings that attach to one's place within the polity. It is conceived of dynamically and historically, as involving everyday political practices and processes in which the state and its members both enact and contest members' rights, duties, and civic statuses within different institutional and discursive settings. Civic membership is located in all of the places where the state and the populous intersect: in the legal realm, the regulatory and policy realms, and the realm of political representation and popular culture. Within the nation the experience of civic membership varies, both according to the institutional or ideological site where interaction occurs (in a voting booth, before a court of law, on a welfare line, or in a classroom where stu-

dents pledge allegiance to the flag), and according to the social group represented in that experience. The positions of various social groups come together in a larger civic order, where the civic standing of each is defined relative to the rest.

The *constitutional order* of the United States refers to the role of the Constitution, constitutional discourse, and constitutional law in structuring the polity institutionally and socially.<sup>4</sup> Appeals to constitutional laws and norms represent appeals to foundational law and to fundamental political commitments that bind us across generations. The community invoked and created in the phrase “We, the People,” stands at the center of the institutional framework and political community that the Constitution defines. On the one hand, the Constitution outlines the power and offices of the national government. On the other hand, the Constitution suggests a civic order in which the government and “the People” have a set of rights and duties toward one another. Civic membership, to the extent that it speaks to the reciprocal relationship between the people and the government, is at the heart of the constitutional order. Usually in American politics, the overall terms of civic membership are assumed, but occasionally they are deeply challenged, either internally (by social movements and political realignments) or externally (by wars or economic depressions), in ways that affect the structure of the larger constitutional order and the relationship of various social groups to one another within constitutional politics.

Some scholars suggest that it is useful to see the Constitution as containing both social and structural elements. The structural elements (e.g., Articles 1–3) provide an institutional design for the federal government, designating the division of labor between the branches, the organization and operation of different offices, the areas of governing authority, and the relationship with the states. The social elements of the Constitution reflect the normative commitments contained in the document (e.g., the Preamble; the Guaranty Clause), address issues of political membership (e.g., Article 4, Section 2; Amendments XIII–XV, XIX, XXIV, and XXVI), and provide for individual rights and popular sovereignty (e.g., the Bill of Rights). I contend that this division between the structural and social elements of the Constitution relies upon a false dichotomy.

Even in its structural elements, the Constitution provides a social design, both when it creates a body politic and when it provides the means for its social recognition and regulation.<sup>5</sup> Aspects of this social design include: the

purpose of government is to serve the people; the power of government derives from the consent of the governed; different forms of democratic representation provide for the expression of different social interests in government; federalism allows for and endorses the social-ordering authority of states; and the guaranteeing of certain rights expressed in various amendments suggests support for certain social roles, forms of social organization, and types of political engagement. Further, both the Bill of Rights and the checks-and-balances mechanisms of the Constitution express an eighteenth-century concern with limiting the authority of the government over *the people*. This social-design perspective may be applied to understanding constitutional development in the debates over civic membership.

The constitutional order creates legal persons and a political community; it orders relations among the members of that community; and it provides a purpose or mission for that community.<sup>6</sup> In this regard, the constitutional order invokes and creates a body politic that is both bounded and internally ordered. At the interface between the polity and society, by recognizing and rewarding certain social roles and relationships, the constitutional order helps to constitute society itself. Of course, not all aspects of our social roles and relations are generated by our civic membership. But to a greater extent than is typically recognized, who we are, what we do, and who we are attached to are contingent upon our constitutionally inscribed place in the polity.<sup>7</sup>

Constitutions do not just call upon social identities; they help to create and regulate a *social order*. All communities are structured around different social roles — those of husbands and wives, parents and children, masters and servants, teachers and pupils, and so on. These roles find expression in politics through the government's recognition and regulation of these social relationships in legal codes dealing with marriage, morality, family relations, racial segregation, and labor relations. In American politics, social-order concerns typically are treated as matters of state law when they are regulated under the authority of a state's police power.<sup>8</sup> But at various times in our national politics, social roles prove pertinent to civic membership, sometimes explicitly and sometimes implicitly. Community and social regulatory concerns governed under the police power are often in tension with constitutional guarantees of individual liberty. Thus social-order interests may oppose liberty interests, an opposition made particularly visible in cases considering the civic status of subordinate groups like women and African



Americans. These groups' contributions to social ordering sometimes outweigh claims to liberty and individual rights, a tendency that leaves governing authorities with the task of finding the constitutional means to justify this preference for order over liberty. *The constitutional order acts as an instrument of social design when social roles are made pertinent to civic membership, and when the terms of civic membership are used to regulate social relations.*

This function is not just a matter of federal judges ceding authority to the states. More important are instances when constitutional actors uphold social arrangements for substantive reasons. When Congress and the courts express a preference for certain forms of marriage — monogamous, intraracial, or heterosexual — they connect this preference to the health and character of the body politic. Sometimes governing authorities do not just recognize certain social roles; they also reward particular roles — like the roles of head of household, husband, or worker — with political privileges or social benefits. The terms of civic membership are attached to these social identities and functions. Finally, the courts may give constitutional validation and purpose to laws that regulate social relations in the interest of upholding a certain kind of social order, for instance when they affirm antimiscegenation laws.

Some constitutional orders make their social-order commitments clear and unambiguous features of their constitutional texts.<sup>9</sup> That is not the case with the U.S. constitutional order. The text of the U.S. Constitution sets out general social-ordering principles (popular sovereignty, principles of personal liberty, etc.) and only occasionally provides explicit terms for the Constitution as social design — in the Three-Fifths Clause, the Voting Amendments, and the Prohibition Amendment, for instance. The elaboration of the constitutional order as social design happens mostly elsewhere: in court rulings, congressional debates, presidential declarations, and social-movement pronouncements on the meaning of the Constitution. Sometimes these elaborations become authoritative and are institutionalized — meaning they shape the terms of civic membership for the broader community — and sometimes they do not.

The process of elaboration has changed over time. During the first hundred-plus years of constitutional experience, preference for particular social arrangements was clearly stated by constitutional actors; in time, in the course of the twentieth century, the terms of articulation became more remote. Looking across American constitutional history, one can see a shift

from the articulation of express social-ordering concerns to a more neutral, liberal language that stresses individualism, achievement, and choice. Once governing authorities spoke in terms of women's perpetual dependence (*Muller v. Oregon*, 208 U.S. 412 [1908], 421); "the degraded condition of" an "unhappy race" (*Dred Scott v. Sandford*, 60 U.S. 393 [1857], 409); women's natural entitlement to "special considerations" (*Breedlove v. Suttles*, 302 U.S. 277 [1937], 282); or of "a race so different" it was excluded from citizenship (*Plessy v. Ferguson*, 163 U.S. 537 [1896], 561). Later, their language evolved to include references to a group's failure to assimilate (*Hirabayashi v. U.S.*, 320 U.S. 81 [1943], 96); the "usages, customs and traditions" that justified segregation (*Plessy v. Ferguson*, 550); privacy as the value that protected domestic life (*Griswold v. Connecticut*, 381 U.S. 479 [1965]); and the "attitudes, interests and beliefs" which prevented women's economic advancement (*EEOC v. Sears, Roebuck and Co.*, 839 F.2d 302 7th Cir. [1988], 321). Sometimes the shift to a language of liberalism was accompanied by an expansion in rights and political power for subordinate groups; sometimes it represented a recoded justification for social hierarchy. This book traces the changes in the way that social-ordering concerns have been constitutionally articulated over time and considers how these changes have affected the terms of civic membership.

Many of the struggles over civic membership have revolved around the tension between social-order concerns and individual liberty. The two main founding documents of the American constitutional order—the U.S. Constitution and the Declaration of Independence—tend to be read as emphasizing different political values and interests.<sup>10</sup> From a social-design perspective, the Declaration speaks to the rights of the individual, while the Constitution begins with an invocation of community. Both documents begin with "We."<sup>11</sup> But in the Declaration the weight of the main text, and the presumption that provides legitimation for self-governance, lies in the "truth" that "all men are created equal." That is the part of the Declaration that has historically sparked the political aspirations of different groups. In contrast, the Preamble of the Constitution focuses on the political interests of the community for whom a government is created that will "promote the general welfare." Political elites and governing authorities have relied on the Preamble in their efforts to identify the boundaries of the American political community. This distinction in emphasis is captured by the shorthand phrases we commonly use to invoke these documents. That phrase for the

Constitution is “We, the People,” while for the Declaration it is “all men are created equal.” Throughout American history, these two central texts have been given meaning by the political actors who have laid claim to them, articulating their “constitutional aspirations” (Hartog, 1987) with reference to them.

Much of the writing about the role of liberalism in American political development considers whether the political recognition of social arrangements is at odds with the individualist, autarkic presumptions of liberalism. Some contend that concerns about social order appear as a remnant from an earlier stage in political development, as represented, for instance, in the ongoing vitality of the common law tradition of domestic relations in American politics (Orren, 1991; Tomlins, 1995; Zeigler, 1996a and 1996b). For others, liberal theory, with its presumption of possessive individualism, offers an insufficient account of how society should be organized, leaving itself open to illiberal programs for ordering society (Tocqueville, 1945; R. M. Smith, 1997; Hartz, 1955). Finally, there are those who think that liberal philosophy has an implicit sociology connected to it, in which groups are organized hierarchically between rational, public individuals, and the irrational, dependent others who are under the public and private authority of autonomous individuals (Mehta, 1999). Within feminist theory, many scholars seek to uncover and analyze the ways that liberal politics and institutions fail to promote gender equity or are premised on the social and political disempowerment of women (W. Brown, 1995; Pateman, 1988).

The duality of American experience — the struggle between social order and individual rights — is often expressed in debates over civic membership. A couple of examples will illustrate this point. Prior to the Civil War, Abraham Lincoln thought that slavery was wrong and corrupting, and believed that African Americans were human beings entitled to the recognition and protection of the Declaration of Independence. Yet the prospect of civic or social equality for African Americans was also unimaginable for him. As William Cain writes, “Lincoln insisted that while blacks were covered by the terms of the Declaration of Independence, they could not permanently dwell in the nation. . . . Given his doubts about blacks ever becoming full-fledged U.S. citizens, it appears that Lincoln was ‘a pessimist on the subject of the possibility of an interracial, egalitarian society’ ” (Cain, 1996, 57–58). So while African Americans deserved recognition as human beings under the terms of the Declaration, they would not make good members of the politi-

cal community invoked by the Constitution. Lincoln favored recolonizing former slaves in Africa.

Women offered a more difficult problem for managing the tension between individualism and social order. They were necessarily a part of the political community, since it was a living, expanding community in which women bore and raised the next generation of citizens. But women were members of that community indirectly, as attachments to men. In this sense, they fell under the terms of the Preamble to the Constitution from the beginning, but their inclusion in the Declaration took generations. What these debates also suggest is the double meaning that inheres in the phrase "We, the People." "The People" may be seen as a community of equals, who are also the rights-bearing individuals of the Declaration. Because of the presumption of meaningful equality, Lincoln was unable to imagine African Americans as members of the constitutional community of "the People." Or, "the People" includes the unequal dependents of rights-bearing individuals, who together constitute the nation as a social body. So one could be a member of the community invoked by the Constitution without falling under the terms of the Declaration.

Likewise, civic membership had a double meaning: in nineteenth-century America, it meant either all those recognized as members of the national community (anyone entitled to an American passport), or only the rights-bearing individuals entitled to full civic status and political participation (those who could vote, hold office, etc.). Women, if they were native-born and white, were always civic members in the first sense, yet they campaigned for decades to become civic members in the second sense as well, a campaign that lasted far longer for nonwhite women.<sup>12</sup> Subordinated political groups typically have sought to change the terms of their civic membership and claim inclusion by invoking the Declaration of Independence.<sup>13</sup> This claim to personhood and equality also implies a reconceptualization of "the People" in whose name the polity operates. Who is a part of "the People," and on what terms, has been a central question in the overall meaning and purpose of the constitutional order.

This approach to thinking of the Constitution as social design contrasts with several others that appear in the literature. Often scholars of American political development focus on the workings of state institutions while giving less attention to points of intersection between state institutions and public action. Such studies might approach civic membership in terms of

immigration policy (King, 2000), or the extension of political rights to new groups (Orren, 1991; Kryder, 2000), or the development of social provisioning bureaucracies (Skocpol, 1992; Lieberman, 1998). The theoretical literature on gender and civic membership (Yuval-Davis, 1997; Burgett, 1998; Lister, 1997), or race and civic membership (Yu, 2001; Gilroy, 1993; Lipsitz, 1998), frequently is framed in terms of the construction of political identity or a broadly conceived notion of the public sphere. Such literature pays relatively little attention to places where civic members interact with state institutions, or to the ways in which their political identities and actions are formed by those institutions. Some studies, however, are at the intersection of political science, historical sociology, and legal history, and examine in detail how state institutions form civic membership and how civic membership is enacted or contested by various social groups (Mettler, 1998; McDonagh, forthcoming; Novkov, 2001). This book is clearly indebted to this scholarship, which tends, nonetheless, to be more specific regarding the groups, institutions, or periods on which they focus. The present study endeavors to create a more historically and theoretically comprehensive account of the role of governing institutions in shaping the terms of civic membership for men and women in the United States.

In analyzing constitutional development through debates over civic membership, this book considers how the changing terms of civic membership shift the polity *institutionally* as well socially. Such institutional changes may involve new mandates for government action in support of newly recognized rights; shifts in the balance of authority between levels of government or branches of government; or restrictions on the actions of government as interferences with the rights of citizens. In its focus on debates over civic membership, this book outlines several instances where developments in the institutional and social aspects of the constitutional order reflect one another, such as the shift that occurred in the 1930s and 1940s when the Supreme Court found that the recognition of civic difference between men and women was constitutionally acceptable as part of the shift from a negative-rights to a positive-rights regime in labor law.<sup>14</sup> The acceptance of civic difference had broad implications for the organization of the social insurance programs developed in support of social citizenship under the New Deal. This example, and others, are elaborated in an analysis that views the Constitution as an instrument of social design in order to highlight both the

shifting institutional commitments of government and the changing terms of membership in the community of “We, the People.”

The next section analyzes a constitutional movement that occurred at the end of the Civil War along with two significant Supreme Court cases from that period, considered here for two reasons. First, it is essential to understand the nature of the constitutional order that emerged from Reconstruction, since that order provides the framework for the constitutional struggles over civic membership in the twentieth century. A great deal of excellent scholarship already exists on this period in American constitutional development. The particular focus of this inquiry is on the role that the Woman Rights movement played in shaping the interpretation of the Reconstruction Amendments. Second, this analysis is meant to be exemplary, demonstrating what it means to think about constitutional development and struggles over civic membership as reflective of one another.

### *The Civil War Legacy*

The American constitutional order was remade in the aftermath of the Civil War. Three constitutional amendments — which abolished slavery, defined national citizenship, and protected the right to vote against racial discrimination — grounded this new constitutional order. Relative to the states, the authority of the federal government had been greatly expanded in the wake of secession. The new constitutional order that emerged from Reconstruction provided the framework for subsequent conflicts over the terms of civic membership for various social groups. With the incorporation of the freedmen into the citizenry, the composition of “We, the People” was forever changed, although their place within the polity remained a subject of much conflict and debate. Women, too, sought to change their place within the political community of the nation, and demanded recognition as full, rights-bearing civic members under the terms of the Reconstruction amendments. Those demands were rejected: women’s political exclusion lasted until the adoption of a new constitutional amendment in 1920. Yet even today the three amendments adopted between 1865 and 1870 supply much of the framework for civic membership.

With the end of the Civil War and the adoption of the Reconstruction

Amendments, national citizenship was defined and specified by the Constitution for the first time. As the terms of the new constitutional regime were elaborated in Congress and the courts, one question with which these governing institutions grappled was what the new civic order meant for women. Previously, women were presumed to lack independent civic standing; they were represented in the public realm by their fathers, husbands, and masters. Were women to be included under the new terms of civic membership, as national citizens with the same rights and privileges as others? If so, what impact would this have on the terms of social ordering? Just as this issue emerged, the suffrage movement moved forward with a campaign to claim for women all the rights and privileges of national citizenship under the Fourteenth Amendment.

Within the postbellum constitutional context, the status of African American women was often obscured in constitutional and political discussions. African American women participated in the suffrage movement and civil rights movements of the nineteenth and early twentieth centuries. Yet their participation was frequently neglected, derided, or obscured by leaders of the civil rights movement and the mainstream suffrage movement (Terborg-Penn, 1998). The exclusionary character of these movements was also reflected in the federal courts and Congress, where the discussions typically referred to *men* for African Americans and *whites* for women. This book seeks to specify which groups are being discussed in these legal and political texts and highlights places where concerns about race intersected with concerns about gender status.

The Thirteenth Amendment was adopted just as the Civil War ended in 1865, abolishing slavery and involuntary servitude throughout the United States and empowering Congress to enforce the amendment's provisions. After the adoption of the Thirteenth Amendment, questions remained about the status of the freedmen. There was growing concern about the mistreatment of African Americans in the South, where there was considerable resistance to the idea of civic equality across the races. Seeking to secure the civic status of former slaves, Congress passed the Fourteenth Amendment, which was adopted in 1868 and declared that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This sentence that opens the amendment makes all those born in the United States, regardless of race or gender, citizens of both the nation and of their state.

The Fourteenth Amendment also sought to protect these newly made citizens from hostile or discriminatory action by the states. The second sentence of Section 1 includes three key clauses. The first clause forbids the individual states from “abridg[ing] the *privileges and immunities* of citizens of the United States.” The Privileges and Immunities Clause is the only one of the three that specifically addresses the rights of *citizens*, yet this clause was narrowly interpreted, so it proved less relevant to the efforts of rights advocates to expand civic membership. Echoing the Fifth Amendment, the second clause prevents states from depriving “any *person* of life, liberty or property without *due process* of law.” Due process jurisprudence became a significant and controversial source of rights development both early on and later in the twentieth century. Finally, the third clause commands the states not to “deny to any person within its jurisdiction the *equal protection* of the laws.” This last clause proved vital to the expansion of civil rights in the twentieth century.

The terms of the Fourteenth Amendment are both general and specific. Generally, the amendment establishes national and state citizenship for all persons born in the United States. More specifically, the Fourteenth Amendment provides protection to all persons from hostile or discriminatory state action — particularly relevant for the newly freed slaves, whose civil rights the amendment was meant to secure. The second section, which addresses the issue of political rights, calls for a reduction in national political representation for states that deny voting rights to any males over the age of twenty-one. This addition of the word *male* to the Constitution was derided by women’s rights advocates, who demanded equal treatment for all civic members, regardless of race or sex. Eventually, this amendment became the foundation for a civic membership based on equality and individual rights.

The last Reconstruction Amendment, the Fifteenth Amendment, provides that the right to vote may not be abridged on account of race or previous condition of servitude. While this amendment does not provide a positive right or a direct grant of suffrage, it does protect that right (which emanates from the states) from discrimination wherever it exists. The reference to subordinate status also links the Fifteenth Amendment to the Thirteenth Amendment. Prior to the adoption of the Fifteenth Amendment in 1870, there was uncertainty over whether the Fourteenth Amendment provided for the right to vote. Most believed that the amendment secures



civil rights but not political rights, though some thought that political rights are necessarily implied by the amendment. The passage of the Fifteenth Amendment was read as evidence that the Fourteenth Amendment did not include the right to vote. Yet some link between suffrage and the Fourteenth Amendment was retained with the addition of the Fifteenth Amendment. To many, the vote implied full civic status. Suffrage also was viewed as an instrument of political self-defense for the other rights and interests of citizenship. Although many leading suffragists worked with the abolition movement prior to the war, some opposed the Fourteenth and Fifteenth Amendments since they were viewed as impediments to women's rights. Eventually, the language of the Nineteenth Amendment was patterned on the language of the Fifteenth Amendment. Nonetheless, the courts found that the Nineteenth Amendment had less impact on the civic status of women than the Fourteenth and Fifteenth Amendments had on the civic status of African American men (Ritter, 2000a and 2002).

#### THE NEW DEPARTURE

Early women's rights activists, such as Lucretia Mott, Susan B. Anthony, Paulina Wright Davis, and the Grimke sisters, began their activist careers in the antislavery cause in the early 1840s. The natural rights and religious humanist philosophy of the movement (as well as the discriminatory attitudes of many male leaders) inspired these activists to call for the recognition of women's rights and humanity. The woman destined to become the intellectual giant of the movement, Elizabeth Cady Stanton (then a young mother of several small children, not yet including Harriet), called a convention in the small Upstate New York town of Seneca Falls in 1848, thus launching the Woman Rights movement. The gathered assembly of men and women issued a declaration (paraphrasing the Declaration of Independence) demanding different rights and protections for women, including suffrage. After a flurry of activity in the 1850s, the work of the movement was put on hold for several years while attention was devoted to the Civil War and abolition. As the war ended, many former allies were divided over whether to pursue universal rights for all Americans or to focus first on the position of the freedmen in the South. After the Thirteenth and Fourteenth Amendments had been adopted, two large women's rights organizations were formed to promote the cause of suffrage for women. The

more radical group was the National Woman Suffrage Association (NWSA), headed by Stanton and Anthony. The more reformist organization was the American Woman Suffrage Association (AWSA), headed by Lucy Stone and Harry Blackwell.

Despite opposition by the radicals, the Fourteenth Amendment was adopted. So at the 1869 NWSA annual convention Virginia Minor unveiled a new strategy for securing the vote:

I believe that the Constitution of the United States gives me every right and privilege to which every other citizen of the United States is entitled. . . . [A]ll rights and privileges depend merely on the acknowledgment of our right as citizens, and wherever this question has arisen the Government has universally conceded we are citizens; and as such, I claim that if we are entitled to two or three privileges, we are entitled to all. (Stanton, Anthony, and Gage, 1969, 409–10)

Minor's speech and accompanying resolutions marked a radical departure for the woman suffrage movement. These suffragists now asserted that as citizens (under the Fourteenth Amendment) women were already entitled to vote. This change in strategy was heralded as the "New Departure" (DuBois, 1987 and 1995; Winkler, 2001).

The New Departure sought to demonstrate that under the Reconstruction Amendments, women were national citizens with all of the rights and privileges of other national citizens, including the right to vote. The effort failed, but an analysis of the campaign reveals how the new American constitutional order tolerated distinctions between groups of citizens. The distinction between state and national citizenship was used to recognize equality in national citizenship, while differences in rights and duties were retained among the ranks of state citizens. Since the New Departure took place just as the federal courts began interpreting the Reconstruction Amendments, I suggest that the campaign promoted a more restrictive interpretation of the Fourteenth Amendment that weakened the link between voting and civic membership, delayed the adoption of woman suffrage, and limited the impact of the Nineteenth Amendment once it was secured.

The New Departure campaign lasted from 1869–75, ending with a firm rejection of its key argument by the Supreme Court in *Minor v. Happersett*,

88 U.S. 162 (1874). Prior to this ruling, the advocates of the New Departure employed four tactics in their campaign to secure the vote: the first was *publicity*, in the form of speeches, pamphlets, and newspaper articles, circulated in hope of creating a public dialogue about the cause of women's suffrage and the rights of women as citizens; the second was *legislative*, aimed particularly at Congress in the form of memorials and testimony calling for resolutions to recognize women's inherent right to vote or laws to punish states that discriminated against women in the right to vote; the third was *direct action*, as women around the country attempted to register and vote, sometimes successfully; and the fourth was *judicial*, because as a result of women's efforts to vote, cases came before the state and federal courts on the question of whether women possessed the right of suffrage as an aspect of citizenship (Stanton, Anthony, and Gage, 1969, chaps. 23–25).

The most insightful and innovative advocates of the New Departure (such as Anthony and Stanton) interpreted the Fourteenth Amendment as a mandate for civic inclusion and rights. First, they claimed that since women were born in the United States and were persons, they were citizens of the national government. Second, as citizens, women were entitled to all of the rights and privileges of citizenship. Next came their key and most controversial claim—that under the Privileges and Immunities Clause of the Fourteenth Amendment, all citizens were entitled to vote. This claim rested on three assumptions: first, that national citizenship was superior to state citizenship; second, that voting was a privilege of citizenship; and third, that the voting privilege was protected under national citizenship.

In testimony before Congress, Stanton rejected the view that states could infringe on the rights of national citizens: “While the Constitution of the United States leaves qualifications of electors to the several states, it nowhere gives them the right to deprive any citizen of the elective franchise . . . hence those provisions of the state constitutions that exclude women from the franchise are in direct violation of the Federal Government” (Stanton, Anthony, and Gage, 1969, 411–12). Stanton contended that control of the franchise was a matter that concerned both the state and the federal governments, yet the federal government reigned supreme here. States could regulate qualifications for the franchise but they could not arbitrarily disenfranchise large groups of people.

How is voting a privilege of citizenship? Here Stanton looked beyond the Fourteenth Amendment to the principles expressed in the Preamble. “Even

the preamble recognizes, in the phrase ‘We, the people,’ the true origin of all just government” (Stanton, Anthony, and Gage, 1969, 412). Women were members of the political community whose consent legitimated the government. The New Departure advocates linked their expansive, inclusive view of “the People” with the guaranty of a republican government (assumed to imply a representative government) contained in Article 4. Finally, the suffragists read the Constitution through the Declaration of Independence. As Anthony said prior to her trial for voting in the 1872 presidential election, “The Declaration of Independence, the National and State Constitutions, . . . all alike propose to protect the people in the exercise of their God-given rights. . . . [H]ere, in this very first paragraph of the Declaration, is the assertion of the natural right of all to the ballot; for, how can ‘the consent of the governed’ be given, if the right to vote be denied?” (Stanton, Anthony, and Gage, 1969, 631). Women were a part of the political community recognized by the Declaration and the Constitution. They had *always* had the right to vote, even if earlier generations of men failed to recognize that right. The constitutional order that Stanton and Anthony envisioned went beyond the intentions of the founders or even the words of the constitutional text. It was an order founded in the *principles* expressed in both the Constitution and the Declaration — an order in which all of the people had certain natural and inalienable rights, including the right of suffrage.

#### RESPONSE TO THE NEW DEPARTURE

The response to the New Departure by Congress and the courts was to insure that the new terms of civic membership did not disturb gender roles within the social order. The understanding of the right of suffrage that existed prior to the Civil War was more classically republican or corporatist than liberal in nature, as spelled out in the various state constitutions and laws.<sup>15</sup> Electors were typically defined as male inhabitants, freeholders, taxpayers, freemen, and (especially in the South) white. Property qualifications for voting were gradually removed during the antebellum era, but the requirement that a voter be a taxpayer or a householder was often retained. These freeholders or householders may not have owned medieval estates, but they did represent all members of their household in the public realm. Under the common law of domestic relations, the master of a household held authority over his wife, children, wards, servants, and slaves, and it was

in the interest of all of these people that he spoke in the public realm. In nineteenth-century America, when free white men entered the public realm, they met there as members of the social compact and as liberal individuals enjoying equal rights. But in their households, they were republican masters.

Women, then, held a border status. The civic identities of women in the nineteenth century were governed primarily under coverture (explicitly for wives and implicitly for single women who were treated as would-be wives), which left many antebellum state judges to struggle with the question of whether women were citizens (Kettner, 1978). After the Fourteenth Amendment, it was clear that women were citizens. What remained unclear was their relationship to the state: Was it mediated or was it direct? Were they individuals and legal persons, or were they dependents of their fathers and husbands? What position did they hold, exactly, in the community of “We, the People”? With the end of the Civil War and the adoption of the Reconstruction Amendments, the racial order of the United States was remade (though the extent of that remaking was sharply debated). Yet Congress and the judiciary moved to limit the degree to which this new political structure disturbed the remainder of the social order (Stanley, 1988). That desire to limit the amendments’ impact on the broader social order was expressed most strongly in connection to gender. Government authorities clearly asserted that the Reconstruction Amendments were not intended to and did not change the political status of women. How did the courts and Congress manage to preserve gender hierarchy within the old social and political order while still acknowledging the changes wrought by the war and Reconstruction in race relations?<sup>16</sup> The key to that puzzle lays in their interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment.

On the same day in the early 1870s, the Supreme Court handed down two cases that provided the first major interpretations of the Fourteenth Amendment. The Court’s ruling in the *Slaughter-House Cases*, 83 U.S. 36 (1872), sharply limited the scope of the Privileges and Immunities Clause of the Fourteenth Amendment. The second case was *Bradwell v. Illinois*, 83 U.S. 130 (1872), where the Court upheld Myra Bradwell’s exclusion from the Illinois bar. This case is remembered especially for the notorious concurrent opinion of Justice Joseph P. Bradley. It is illuminating to read these two cases together, for not only did *Slaughter-House* provide the means by which the gender order was left undisturbed by the Fourteenth Amendment in

*Bradwell*, but *Bradwell* may provide part of the explanation for the motivation behind the Court's ruling in *Slaughter-House*.

The complaint in *Slaughter-House* was brought by a group of Louisiana butchers to protest the state government's establishment of a monopoly on facilities for animal slaughtering in New Orleans. The butchers contended that the new slaughtering facilities violated their rights as citizens to pursue a calling or livelihood. The key questions in the case concerned the relationship between state and federal citizenship, and what constituted a privilege or immunity of citizenship. The majority opinion is prefaced by a summary of the plaintiff's argument before the Court, which states: "The purpose [of the Fourteenth Amendment] is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority" (83 U.S. 53). Writing for the majority, Justice Samuel F. Miller rejected this interpretation because he saw a different purpose in these amendments, emphasizing "the one pervading purpose found in them all, . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" (83 U.S. 71). While the Fourteenth Amendment defined national citizenship and protected the privileges that attached to it, it did not disturb the terms of state citizenship. "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual" (83 U.S. 74). It was through federalism, then, that the "different characteristics or circumstances in the individual" were expressed in relation to civic membership. Federalism allowed the Court to preserve a differentiated social order while proclaiming an egalitarian national citizenship designed to protect the freedmen. The privileges of national citizenship, at least for white butchers, did not include professional or employment rights.

In his dissent, Justice Stephen J. Field took a different view of the relationship between national and state citizenship: "A citizen of a State is now only a citizen of the United States residing in that State" (83 U.S. 95). By implication, civic rights resided in national citizenship: "The fundamental rights, privileges, and immunities which belong to him as a *free man* and a free citizen, now belong to him as a citizen of the United States, and are not

dependent upon his citizenship of any State” (83 U.S. 95, emphasis mine). For Field (who went on to quote from the Declaration), as for Anthony and Stanton, the rights of citizens did not derive from the Constitution. Rights were merely expressed in the Constitution and protected by it. Yet for Field, these rights were still gendered — they were the rights of a “free man.”

In the Supreme Court journal, the conclusion of *Slaughter-House* is followed on the next page by the start of the Court’s opinion in *Bradwell*, which considered whether women have the right to practice law. Although Myra Bradwell was an esteemed member of the Chicago legal community and the editor of Chicago’s daily legal journal, she had been denied admission to the Illinois bar. Arguing the case before the Supreme Court, Senator Matthew Hale Carpenter opened by saying, “The question does not involve the right of a female to vote” (83 U.S. 133). This statement was a clear attempt by Carpenter to distance himself from the advocates of the New Departure. Yet Carpenter’s disavowal of the New Departure position did not protect him from the Court’s narrow construction of national citizenship. Writing again for the majority, Justice Miller rejected Carpenter’s claim that professional licensing was a privilege of citizenship protected under the Fourteenth Amendment, noting that the “opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary” (139). Rather, as the logic of the prior case suggested, “the right to control” professional licensing was “not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license” (139). Once again, federalism allowed for differentiated terms of civic membership.

That explains the *how*, but still leaves open the question of *why*. Why did the federal courts tolerate such differences in civic membership? Justice Bradley’s infamous concurrence gives us the answer to this question. At issue, wrote Bradley, was the claim that “under the fourteenth amendment” it is “one of the *privileges and immunities of women as citizens* to engage in any and every profession, occupation, or employment in civil life” (140; emphasis mine). Bradley made a subtle shift in his opinion from referring to “citizens of the United States” to discussing the rights of “women as citizens.” Women citizens were a distinct category, with their own privileges and immunities, which conformed to the common law (that is, coverture), the civil law, and “nature itself.” The opinion continues, “On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in

the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" (141). Women were unfit for the activities of the civil, or public, sphere. There was a "harmony" of "interest" within the family, represented as its own governing unit, separate from the civil sphere. Yet if women were citizens, and were barred from the civil sphere, how were their interests and concerns to be represented there? They were represented by their husbands, since under common law "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state" (141). Though citizens, women were not legal persons. They were members of the community recognized by the Constitution but not, yet, persons recognized by the Declaration. They had no legal existence apart from their husbands, who represented them in the "social state." The Fourteenth Amendment did not displace coverture as the source of women's civic status. What of unmarried women? The norm of coverture covered them as well, since "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother" (141). Unmarried women were seen as exceptional and abnormal, and their lack of representation in the public sphere was deemed of little concern.

Bradley's opinion is all the more striking when read alongside his dissenting opinion in *Slaughter-House*. There, he wrote that the Fourteenth Amendment affirmed "that citizenship of the United States is the primary citizenship in this country," while state citizenship was "secondary and derivative" (83 U.S. 112). Further, this newly strengthened national citizenship brought with it many "*traditional* rights and privileges" that "the government, whether restricted by express or implied limitations, cannot take away or impair" (114). Among the rights that made citizenship meaningful, according to Bradley, was the "right to choose one's calling" (116). When writing generally about national citizenship, Bradley quoted the Declaration and wrote in universalistic terms about fundamental rights. When he imagined white bakers and the new freedmen, Bradley saw national citizenship as a status that held a broad range of privileges and immunities, such as the right to pursue a calling. But when he envisioned women's civic membership, this universalism and individualism faded. Women were particular kinds of citizens, who were not individuals or legal persons, but people whose special calling placed them in the domestic realm.



After *Slaughter-House* and *Bradwell* national citizenship was narrowly construed to include a few civil rights, such as the right to travel. My contention here is *not* that the Court's response in these cases was entirely motivated by their abhorrence of the New Departure. Nor do I argue that the New Departure's vision of the Constitution was likely to become authoritative in the late nineteenth century. Rather, my modest claim here is that the movement influenced the *severity* of the Court's reaction and contributed to a particularly narrow interpretation of the Privileges and Immunities Clause. This movement had an impact on constitutional development, therefore, but the impact was negative; it inspired a more restrictive understanding of civic membership within the new constitutional order.<sup>17</sup>

Despite these developments, suffrage advocates pushed forward the claim that voting was necessary to protect citizens in the exercise of all of their civic rights. If voting was implied by the Fourteenth Amendment (something left in doubt by the new Fifteenth Amendment), then this right was likely to be found in the Privileges and Immunities Clause. Once that clause was narrowly interpreted by Justice Miller, it was easy for the lower state and federal courts to dismiss the claims of the New Departure movement—something they did on a regular basis in the early 1870s. Anthony hoped to have her name on the case that went before the Supreme Court on the question of woman suffrage (as mentioned above, she was arrested and tried for voting in the presidential election of 1872), but a federal judge in New York ended her dream by dismissing her claim to a right to vote under the Fourteenth Amendment.

The case that settled the suffrage question was brought by Virginia Minor. Francis Minor (Virginia's husband) argued the plaintiff's position before the Court in *Minor v. Happersett*, 88 U.S. 162 (1874). In his brief before the Court, Francis Minor contended that the franchise was a necessary privilege of national citizenship, since it was "preservative of all rights and privileges; and especially of the right of the citizen to participate in his or her government" (164). The majority was not persuaded. As part of the people who formed the United States, the Court found, women had always been citizens, though before the war they were never explicitly acknowledged as such. Going further, the Court proclaimed that "*sex has never been made one of the elements of citizenship* in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both" (170; emphasis mine). Within the realm of national citizenship the

Court denied that there was, or had ever been, a civic hierarchy based on sex. That denial was used to dismiss the relevance of the Fourteenth Amendment as a basis for defending women's citizenship or defining her privileges and immunities.

Suffrage was a state matter. According to state law, suffrage rights were open to differences between the sexes. The Reconstruction Amendments neither created nor added to the rights of national citizens; they only protected rights that were already present. "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it" (171). For suffrage to be a necessary part of national citizenship, the Court reasoned, it must have been an absolute right of citizenship in all the states at the time of the founding. The style of argument here is similar to the reasoning used in the majority opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).<sup>18</sup> Like Justice Roger B. Taney before him, Justice Miller reasoned inductively to uncover the balance between social-order concerns and individual rights within the constitutional order. The evidence from which both judges drew to determine the terms of civic membership were prior laws and practices governing subordinate social groups. Since women were citizens but not voters in virtually all the states since the founding, then suffrage could not be a necessary right of citizenship.

The Court also intuited the nature of American civic membership from the second section of the Fourteenth Amendment: "if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants?" (174). This question was central, and clearly expressed the tension between liberty and social order. On the one hand, Section 2 protected liberty and individual rights by punishing states that infringed on the right to vote. On the other hand, Section 2 implicitly recognized the relevance of gender to civic membership by denying protection to women as would-be voters. Even worse, for the advocates of woman suffrage, was the Fifteenth Amendment. "If suffrage was one of these privileges or immunities [under the Fourteenth Amendment], why amend the Constitution [with the Fifteenth Amendment] to prevent its being denied on account of race, &c.?" (175). This view was taken in contrast to the arguments made in *Slaughter-House*, where each new Reconstruction Amendment confirmed and enforced the rights expressed in the previous amendment. In *Slaughter-House* voting was a right that protected all other civic

rights. But in *Bradwell* voting was something different — it was separate from the civil rights of citizenship, and it was a grant from the states to those citizens who contributed to the public good. Voting was no longer viewed as coextensive with democratic citizenship. As a result of these cases, the meaning of national citizenship was narrowed as political rights were separated from and made secondary to civil rights.

#### THE LONG-TERM IMPACT OF THE NEW DEPARTURE

The irony of this story, then, is this: partly in response to the New Departure, the courts established a constitutional framework in which suffrage did not define civic status more broadly. This demarcation occurred at a time when, popularly, voting *was* regarded as the central right of citizenship and as the crucial marker of civic status within the ranks of citizens (Baker, 1984; Burnham, 1974; McGerr, 1986). The inclination of the courts during Reconstruction was to substantiate the importance of suffrage as an aspect of national citizenship for the freedmen. To make this argument, the courts relied heavily on the Fifteenth Amendment, stressing its connection to the Fourteenth Amendment. But, having downplayed the significance of the participatory rights of citizens (through their interpretation of the Privileges and Immunities Clause) in the Fourteenth Amendment, and having separated the civil and political rights of citizens in response to the claims of the suffragists, the courts created a framework in which it was easy to limit political rights.

In the two decades around the turn of the century, many states passed new constitutional provisions restricting the right to vote through such mechanisms as the poll tax and the literacy test (Keyssar, 2000; Kousser, 1999). By the time *Giles v. Harris*, 189 U.S. 475 (1903), was handed down, suffrage was a virtually unenforceable right in the South. As Richard Pildes writes, “notwithstanding the Fourteenth and Fifteenth Amendments, *Giles* carves out from them the category of ‘political rights’ and holds such rights unenforceable” (Pildes, 2000, 298). After the Nineteenth Amendment, the right of suffrage for women was not deemed unenforceable, but the significance of this right was greatly reduced by a constitutional structure that made voting an insignificant aspect of citizenship and democracy. Again from Pildes: “*Giles* reflected and shaped a constitutional culture in which the large issues of democratic governance and institutional structure were, like unknown ter-

ritories on a medieval map, cast as threatening monsters and placed outside the known domains of constitutional law” (318). All American citizens lost something when participatory rights were displaced from the constitutional core of civic membership. When the women’s rights movement was revitalized in the 1960s and 1970s, it focused less on political rights like voting and more on civil rights like equal treatment before the courts. This focus made for a less deliberative and more elite-driven democracy than we might otherwise have had.

### *Conclusion*

Generations of American women—Elizabeth Cady Stanton, Harriet Stanton Blatch, and Nora Blatch among them—fought to expand the constitutional order and make it more democratic. Their efforts propelled constitutional development in the United States. The chapters that follow trace American constitutional development over much of the twentieth century. Starting with the right to vote and advancing through privacy and the protection of reproductive rights, the account that follows outlines a gradual shift from a constitutional order in which women’s civic membership was based on domesticity and dependency to one in which they are mostly seen as autonomous, rights-bearing members of the polity. The emergence of this new civic status for women was marked by the institutional arrangements and norms of the prior constitutional order. Despite the advantages available to many women under these new terms of civic membership, there is growing evidence of the discrepancies and disadvantages that derive from individualism and equality as they are cast in this modern, liberal constitutional order.

The discussion undertaken in the previous section illustrates how this approach to the Constitution as social design illuminates the process of constitutional development in the decades after the Civil War. Debates over the citizenship of African Americans and women prompted the Supreme Court to assert that the Reconstruction Amendments were meant primarily to assist the freedmen, and to take a conservative view of the general framework of citizenship established by the amendments. Institutionally, this stance led the Court to rely heavily on the structure of federalism in order to differentiate the rights of male and female citizens. The general content of national citi-

zanship was made virtually null in *Slaughter-House*, as the Privileges and Immunities Clause was found to be of little value to those claiming that their rights as citizens had been violated. Civic membership remained primarily rooted within the states. Socially, the Court validated a structure of civic membership in which the rights and position of African American men were protected, while women, both black and white, remained under the cloak of coverture in domestic harmony with their husbands. Yet this bifurcated structure provided weak protection for African American men, since political rights had only limited significance in the structure of national citizenship, and since state governments retained their authority to differentiate among ranks of citizens, albeit not directly along the color line.<sup>19</sup> Not surprisingly, a constitutional structure that made social ordering by sex allowable was used to assert and protect social differences along the lines of race as well.

The failure of the New Departure movement provides important background for the analysis undertaken in Part I on the impact of the Nineteenth Amendment. Scholars are often puzzled by the apparent failure of the Nineteenth Amendment either to provide women with equal citizenship or, more broadly, to remake the American constitutional order (Shklar, 1991). The contention here is that the impact of the Nineteenth Amendment was limited by the constitutional framework created during Reconstruction. In their early rulings on the meaning of the Reconstruction Amendments, the Court parsed political and civil rights in the overall structure of citizenship. At the time that rights advocates first called for women to be granted the right to vote, it was the central right of citizenship, both politically and legally (e.g., see the main opinion in *Dred Scott*). But by the time the Nineteenth Amendment was finally adopted, the significance of suffrage had declined, to be gradually replaced by other institutional links between the citizens and the government (Ritter, 2002). Consequently, the norms of coverture — which gave women a dependent and indirect position within the civic community of “We, the People” — were only partially displaced by the Nineteenth Amendment.