

Women's Civic Inclusion and the Bill of Rights¹

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The Bill of Rights is often cited as foundation of the American rights conscious culture and as a central instrument in the protection and expansion of liberty and popular sovereignty in the United States. Yet, for women, the Bill of Rights has rarely played a significant role in advancing claims of civic inclusion or public citizenship. Instead, women's rights advocates have turned primarily to the Fourteenth Amendment in their efforts to bolster women's individual rights and civic standing under the American constitution. The failure to use the Bill of Rights as a rights claiming instrument for women comes despite the Bill's role (as suggested by Akhil Reed Amar) in fostering civil society as well as individual rights. This essay reconsiders the problematic relationship of women's rights advocates to the Bill of Rights and contends that the Bill has served as both an instrument for preserving gender hierarchy and a foundation for claims of public voice for women. To illustrate these claims, I focus particularly on constitutional controversies involving jury service, religious establishment, and the free exercise of religion.

The democratic political community envisioned by the Bill of Rights was neither inclusive nor egalitarian. Married women and slaves were not seen as members of that political community, and in all likelihood, neither were white men without property (Becker 1992, Foner 1998). Further, the individual rights protected by the Bill tended to support the authority of male heads of household in relation to their dependents. The original Bill implicitly endorsed a more limited vision of the democratic political community and protected this more constrained vision through its reliance on federalism and the ability of states to restrict political rights. Over time, the Bill has allowed for the continuation of democratic exclusions as well. Because of these limitations, women's rights advocates have mostly focused on public realm equality for women as individuals, which was most readily advanced by the Fourteenth and Nineteenth Amendments. While this pursuit of constitutional equality has advanced women's civic standing a great deal, it has foregone recognition of the more relational and community based aspects of democratic

citizenship. Ultimately the liberal vision of individual constitutional equality for women has proved itself to be limited. In this way, the political vision contained within the Bill of Rights is worth remembering. By establishing a link between democratic participation and fundamental rights, the Bill may still offer powerful tools to those who aspired to democratic inclusion.

The Bill of Rights was not helpful to women or other previously subordinate groups until they could claim the status of public persons. An examination of the religion and jury service provisions from the Bill of Rights suggest that well into the twentieth century these protections were still used to construct a social order in which women were often cast as daughters, wives, and mothers, under the authority of men and partially excluded from the public realm. Throughout our constitutional history, it appears that religious affiliation and family relations have been central in determining the constitutional rights of women. For the most part, a gendered civic identity has been used to exclude women rather than include them in public politics. Yet there remains tantalizing evidence of an alternative political vision tied to the popular sovereignty ideal present in the Bill of Rights. That alternative vision (expressed by the Anti-federalists, as well as others aspiring to democratic inclusion in American political history) is one that values social experience and communal ties as a source of political voice. This essay seeks to explain both why women's rights advocates have not relied the Bill of Rights in their campaigns for democratic incorporation, and why the popular sovereignty vision expressed in the Bill of Rights is worth recalling and recovering.

The Body Politic under the Original Bill of Rights

At the time that the US Constitution was ratified, it was understood that a Bill of Rights would be added by the new Congress to further bolster individual rights and popular sovereignty by protecting against possible encroachments by the federal government. Because of this understanding, the Bill of Rights, or first ten amendments to the Constitution, is generally viewed

as part of the original constitutional design, for without the commitment to these ten amendments, the Constitution might not have been ratified.

The Bill articulates a vision of politics that fosters civil society and shields people, both in their community associations and in their personal lives, from the intrusion of the federal government. Religious freedom, freedom of assembly, speech, the press, the right to bear arms, and the reliance on militias and on impartial juries all suggest a recognition of the role that associations of citizens play in nurturing a commitment to justice and the common good. On the other hand, in its protections against unreasonable search and seizure, established religion, standing armies, the quartering of troops, and indefinite imprisonment without charge, the Bill protects individuals against a potentially partial, self-serving, and overbearing federal government. The key political values expressed in the Bill are those of liberty for individuals and democratic majorities, and the rule of law as a restraint on government authority. Akhil Reed Amar (1991) suggests that “the People” of the Preamble are also “the People” of the Bill (as expressed in Amendments I, II, IV, IX and X) – they are the democratic sovereigns imagined in the principle of popular sovereignty.²

At the time of the ratification debates, dispute emerged over the nature of representation in a large democratic republic. The Federalists sought to unify the nation, and legitimated the new Constitution by grounding its authority on the people as a whole, as articulated in the preamble (Morgan 1988). But the Anti-federalists had a different view of popular sovereignty, one that was rooted more locally, in diverse communities so that representatives were acquainted with the “interest and condition” of the people. The Anti-federalists also supported an electoral system that promoted the election of “ordinary persons, especially farmers, middling people, the substantial yeomen on the country” (Morgan 1988, 278). Localism brought to politics a richer

² It should be noted that Amar has been criticized for his reading of the Bill of Rights by those who argue against the kind of textual analysis he engages in, which is, according to William Michael Treanor, too rooted in the words of the document itself and insufficiently attentive to the historical context in which the document was produced (Treanor 2007).

representation of cultural understandings and social identity, and not just refined economic interests. Feelings, circumstances, distresses, wants and sympathies were all the things that the Anti-federalists hoped to have their representatives express in national politics. This enriched democracy required the cultivation of intermediary associations – be they militias, congregations, women’s clubs, or reading publics (Habermas 1989, Anderson 1983). While the democratic community that the Anti-federalists invoked was still quite narrowly cast, as suggested by Taney’s *Dred Scott* opinion (60 US 393 [1856]), it offered the possibility of a richer, more particularized, and diverse civic membership. Given the limits of liberal constitutionalism as a path towards an inclusive and engaged citizenship, the Anti-federalist vision remains a promising alternative.

What sort of foundation does a rights protective political structure provide for democratization? Perhaps the two most important aspects of the Bill include its enforcement provisions (which exist in connection with the Constitutional structure as a whole), and the connection the Bill supplies between rights and democracy through its encouragement of intermediate associations in civil society. Enforcement, as Justice William Brennan (1989) once said, is necessary to make rights meaningful. In its reliance on the rule of law, and its provisions for limiting excessive exercises of governmental authority, the Constitution supplies a governing structure that is conducive to rights enforcement. With regard to rights and democracy, in considering the purported tension between majority rule and individual rights, Robert Dahl (2001) argues that “Far from being a threat to fundamental rights and liberties, political equality requires them as anchors for democratic institutions (135).” Rights serve as precursors to democratic participation – they allow citizens to debate, consider, and contend over the interests of the community without fear that their views or activities will be held against them.

Yet were all Americans part of the democratic political community invoked by the Constitution and protected by the Bill of Rights? Further, to what degree did the Bill of Rights articulate a notion of political equality and protect political rights of participation such as voting?

To answer these questions it is important to realize three things. First, the rights articulated in the Bill were part of a federal political structure in which the states were seen as the true representatives of local political interests and sentiments. Second, the political rights of citizenship, to the degree that they were recognized and protected at the time of the founding, were seen as rights that were connected to state citizenship. Consequently, the Guaranty Clause that appears in Article IV, Section 4 of the Constitution guarantees to “every state” a “republican form of government” which was general understood to include democratic political rights, such as the right to vote. Third, and finally, it is clear from other parts of the text of the Constitution (e.g., Art. IV, Sec. 2) and from the political debates surrounding its creation, that not all of the people governed by the Constitution were imagined as members of the rights bearing democratic political community protected by the Bill. Clearly married women and slaves were not seen as members of that political community, and in all likelihood, neither were white men without property (Becker 1992, Foner 1998). Amar contends that “the People” of Amendments I, II, IV, IX and X were the citizens with full rights – who held property, served on juries and in the militias, assembled to petition the government, and voted under the laws of their home states. Those who were without property, or who were barred by state law from owning property, bearing arms, serving on juries, or voting, were not the rights bearing members of the political community envisioned by the Bill. By establishing a link between democratic participation and fundamental rights, the Bill offered powerful tools to those who aspired to democratic inclusion. Yet, in implicitly endorsing a more limited vision of that democratic political community and protecting this more constrained vision through its reliance on federalism and the ability of states to restrict political rights, the Bill allows for the continuation of democratic exclusions as well.

Women and the Bill of Rights in the Twentieth Century

Much of this changed with the Civil War. According to Hendrik Hartog (1987), “the long contest over slavery did more than any other cause to stimulate the development of an alternative,

rights conscious, interpretation of the federal constitution. Still, a modern American understanding of constitutional rights could only become embedded in the Constitution after the Civil War and emancipation. (1017)” The war wrought fundamental changes to the American constitutional order, including changes in the nature of federalism, and in relationship between the people and government authority. Before the war, the federal government was seen as the greatest threat to rights, and the rights that were protected were both individual and majoritarian in nature. After the war, the state governments came to be seen as the source of potentially abusive authority, and the federal government was celebrated as the defender of individual rights, including the rights of unpopular minorities when they were threatened by overbearing majorities (A. Amar 1998). The meaning of the Bill was altered by the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments). Today, the Reconstruction Amendments are seen as extending and securing the Bill. “Together with the Civil War Amendments, outlawing slavery and involuntary servitude and insuring all citizens equal protection of the laws and due process of law, the Bill of Rights stands as a constant guardian of individual liberty” (Brennan 425).

Nor was this the last occasion in which the Bill was redefined through changes in the American constitutional order. Struggles over the meaning of the Constitution have been struggles over the meaning of freedom. “The meaning of freedom has been constructed not only in Congressional debates and political treatises but on plantations and picket lines, in parlors and bedrooms (Foner 1998).” Similarly, Hartog (1987) offers a vision of American political history as a series over struggles over constitutional rights and claims to political inclusion, that is inspired by a “faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups. (1014)” During the twentieth century, American ideals of freedom and constitutional rights were shaped by both world wars (Skrentny 2002, Kryder 2000) and by the subsequent Cold War (Dudziak 2001). American democracy and the free enterprise tradition is what sustained the US in its struggle against fascism. In contrast to

the Nazi commitment to racial supremacy, the US represented itself as committed to social pluralism. “It was during the war that a shared American Creed of freedom, equality, and ethnic and religious ‘brotherhood’ came to be seen as the foundation of national unity. (Foner 2001, 30)” While the Cold War reinforced the American commitment to racial equality, it also helped to entrench a negative ideal of rights as government non-interference in contrast to the Communist ideal of substantive rights to housing, health care, and employment. As Robert Dahl (2001) has emphasized, American political culture (albeit a dynamic, evolving culture) has been important to the maintenance and exercise of rights. “[I]n the end, a democratic country cannot depend on constitutional systems for preservations of its liberties. It can depend only on the beliefs and cultures shared by its political, legal, and cultural elites and by the citizens to whom those elites are responsive” (99).

Historically, the Bill made little difference to women’s rights advocates in the nineteenth or twentieth centuries. According to Mary Becker (1987), “the Bill of Rights does less to solve the problems of women and nonpropertied men than to solve the problems of men of property, especially white men of property” (454). Imagining the Bill as conducive to the formation of Civil Society, the social order constructed under the Bill during the first century and a half of constitutional history was one that presumed male authority within the home. As masters of their households, it was men who were protected by those amendments that shielded the home, including the Third, Fourth, and Fifth Amendments. Violations against the ‘natural’ dependents of these men (on their wives, children, servants or slaves) were legally seen as grievances against their masters. Likewise, protections of public rights – such as those contained in the First, Second, and Fifth through Tenth Amendments – were protections of the democratic citizenry, an independent body of men with the capacity to engage in civic life, a capacity that was demonstrated, in part, through their roles as property owners and heads of households in civil society. Viewed in this way, it may help to understand why the Woman Rights movement of the nineteenth and early twentieth centuries became so focused on the vote as a way of gaining rights

for women. Obtaining the vote meant coming to see women as public persons, entitled to the protections of the First, Second, and Fifth through Tenth Amendments. Until women were seen primarily as public persons rather than private dependents, neither the protections of the Bill of Rights, nor of the Fourteenth Amendment, were considered applicable to them. As Judith Resnik (2006) has written, a key mechanism for managing this rights differential (for women, as well as other previously subordinate groups), was federalism (see, also, Ritter 2006).

Religion, Freedom and Community

The community vision contained within the Bill of Rights is apparent in its treatment of religion. The First Amendment bars Congress from engaging in the “establishment of religion” or from interfering in “the free exercise” of religion. Religion provides a source of social authority and a source of social regulation for Americans. The recognition of religious freedom may be understood as both an individual right of conscience and as the liberal constitutional order’s reliance on nonpolitical sources of community formation. Generally, in American history, when religion is seen as strengthening the political system, then it is constitutionally protected. But when religion threatens the political system – either because it competes with the government as an alternative source of public authority, or because it fails to properly order social relations and create virtuous citizens – then it is less likely to receive constitutional protection. For women, religion has both served as an alternative way of claiming public voice, and it has served as a source of constitutionally sanctioned social oppression.

It may be easy to imagine the religious clauses contained within the First Amendment as protecting both individual rights and community governance of moral behavior. At first glance, the Free Exercise Clause protected freedom of conscience or thought, while the Establishment Clause prevented the federal government from favoring some religious associations over others. Drawing on the philosophy of such Enlightenment thinkers as John Locke, Americans associated religious belief with personal reason. As the Virginia Bill of Rights (adopted in 1776) stated:

“That religion . . . can only be directed by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience” (quoted in Witte 1996, 384). Restriction on the federal government’s ability to favor an established religion, on the other hand, drew upon states rights concerns over the ability of local communities to self-determine the role that religious institutions would play in organizing civil society. This was akin to the Anti-federalist view, as summarized by Eric Foner, which believed that “freedom . . . was more secure in the hands of smaller communities pursuing the common good than a distant federal power protecting the common interest” (Foner 1998, 11). More locally, religious establishments were regarded as intermediary social institutions which (along with schools) operated to cultivate civic virtue. This view is reflected in the Northwest Ordinance of 1787 (governing the western territories) which stated that: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” (Northwest Territory Ordinance of 1787, 52) Yet this apparent distinction between the Free Exercise Clause (as protective of individual rights) and the Establishment Clause (as protective of community governance of religion) is not as clear or simple as it first appears.

According to Eric Foner, freedom in the early American republic was understood as obedience to a moral code. As John Winthrop, governor of Massachusetts colony put it, “moral liberty” was “liberty to do only what is good” (Foner 1998, 1). In Christian terminology, liberty came through submission to God’s will. So rather than think of freedom of religion as connoting an absence of constraint, it might be better understood as a mandate to voluntarily adopt religious principles (and thereby accept them more deeply) that would guide or constrain one’s actions in the world. There was also a “freedom” component of the Establishment Clause. As suggested above, the Establishment Clause did not sever the relationship between state governments and religious establishments. Indeed, when the Constitution was adopted, many states had soft establishment provisions in their state laws or constitutions, most commonly involving religious

qualifications for office holding (Amar 1996, 2). Yet in response to the first Great Awakening (a religious revival movement in the early eighteenth century), the colonists came to believe that Americans should be free to choose which church or (protestant) denomination they belonged to, and that the success of particular churches in attracting members would be a sign of their adherence to God's commands. It was this aspect of the anti-establishment vision that called for state and colonial governments to avoid favoring a particular denomination through its tax provisions or school support. So the freedom component of the Establishment Clause may be understood as protective of a narrow understanding of religious pluralism – narrow because it was assumed that everyone would belong to *some* church, and because it supported religious pluralism only within Protestantism. In this sense, the Establishment Clause may be read as supportive of civil religion – a shared religious discourse and social formation that helps constitute the political culture of the nation.

The religion provisions in the First Amendment recognize an intimate connection religious life and civic membership. For women, that connection has manifested itself both in claims for public voice and in assertions of social subjection. Drawing on both social movement history and Supreme Court cases, the remainder of this section outlines the various ways in which religion has structured women's civic membership over the course American political history.

Anne Hutchinson and her family came to America in 1634 to follow her former minister, John Cotton, who had migrated to the Massachusetts Bay Colony the year before. At the time, church membership was a requisite for membership in the commonwealth, since “social order was thought [by the leaders of the colony] to depend on religious orthodoxy” (Withington and Schwartz 1978, 227). Obedience to Puritan religious authority and law was expected of all the colony's residents. Hutchinson, however, expressed an emerging evangelical sentiment that suggested that individuals could have a personal, unmediated relationship to God, and that it was through that personal relationship that salvation was to be found. She expressed her beliefs in private meetings with other religious women. But the growing popularity of those meetings

attracted negative public attention, eventually resulting in Hutchinson's trial and banishment from the commonwealth. While it would be a mistake to claim that Massachusetts's religious and political leaders in the early seventeenth century held views that were comparable to those of the authors of the Bill of Rights, there are aspects of this historical episode that are suggestive for our later understanding of the role of religion in governing women's place in political life.

Hutchinson's claim to public voice through religion both suggested the radical democratic potential inherent in the evangelical tradition, and the countervailing weight of religious institutional authority as sustained by the government. Until at least the nineteenth century, it was considered unacceptable for American women to speak publicly. Yet women as well as men were encouraged to acquire knowledge of moral truth through the Bible, religious teachings, and ultimately (in the evangelical understanding) directly from God's revelations. For the Puritans, this truth came from the Word (the Bible) the meaning of which was conveyed to them by their ministers (Morgan 1937, 636). Over time, however, as worship provided women with a sense of insight and understanding of the truth, it also authorized them as speakers of that truth. Hutchinson's meetings occurred privately, and were only attended by other women. But at her public trial, she defended her meetings by quoting scripture – thereby proclaiming her public authority through religious understanding. Going further, at the end of her trial, Hutchinson proclaimed that she had been subject at an immediate revelation by God. This proclamation of direct revelation was considered religious blasphemy, which threatened to upend a political order in which law and authority were tied to the Bible and submission to the Church. The offense was also compounded by Hutchinson's sex, and her willingness to assert her beliefs against the authority of male ministers and magistrates. Her proclamation was also viewed by future generations as an act of individual conscience, in which disobedience to secular authority was justified by adherence to a higher law.

Time and again in American history religion has provided a language of inspiration for those proclaiming moral truths in the public sphere, especially by women. The converts of the

second Great Awakening (which occurred in New England in the early nineteenth century) were predominantly young women, whose participation in these religious revivals simultaneously expressed the power of personal choice and conscience, and submission to a moral order. As Nancy Cott writes, “the religious choice was actually a surrender – to God’s will” (Cott 1975, 21). In the early days of the abolitionist movement, Sarah and Angelina Grimke drew on the language and practice of Quakerism in publicly proclaiming the evils of slavery. Likewise, Sojourner Truth, an abolitionist and evangelical preacher, often justified the rights of women and slaves in the language of religion, even as she questioned the religious establishment. Referring to a minister, she said that he claimed “woman can’t have as much rights as man because Christ wasn’t a man. Where does your Christ come from? . . . From God and a woman. Man has nothing to do with him.” After the Civil War, women’s rights leader Reverend Antoinette Brown Blackwell, faced a mob of angry men who denounced her call for women’s suffrage. She recalled, “There were angry men confronting me and I caught the flashing of defiant eyes, but above me and within me, there was a spirit stronger than them all.” The moral authority of religious belief inspired Blackwell’s public voice. As head of the Women’s Christian Temperance Union in the 1890s, Frances Willard drew upon women’s religious networks to build a public movement that not only opposed the sale of alcohol (as undermining family values) but also supported the right to suffrage for women. Even today, efforts to assert community standards and moral values in politics are often led by religiously inspired men and women.

A late nineteenth century Supreme Court case on polygamy illuminates the role of religion in undergirding the political system. In *Reynolds v. US*, 98 US 145 (1878), the Court rejected George Reynolds contention that his conviction for bigamy should be overturned as a violation of his religious freedom. Reynolds lived in Utah Territory and was a member of the Church of Jesus Christ of Latter Day Saints, which at the time sanctioned polygamy. In addressing the question of religious freedom, the Court commented that polygamy was “odious among the northern and western nations of Europe” and was “almost exclusively a feature of the

life of Asiatic and African people” (98 US 164). Immediately, then, this practice was cast as contrary to the moral traditions that informed American society and public culture, a view that was also expressed in racial terms. The Court went on to review the history of legal prohibitions of polygamy found in English common law and enforced by both civil and ecclesiastical courts. According to the majority, the social ordering function of religion was expressed in laws governing marriage. “Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal” (98 US 165). Marriage was a sacred or religious institution. It was also an institution that created a social order (“social relations and social obligations”) upon which the governments of civilized nations relied. Preserving this social ordering function required legal oversight, since there was a direct connection between the moral principles that governed marriage and the democratic character of the government: “according to as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people . . . rests” (98 US 165-6) If polygamy were allowed, it might threaten the constitutional order. “[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism” (98 US 166). The concern here was not with what Carole Pateman (1988) calls fraternal patriarchy, or the rule of men over women. Rather, the Court feared the rise of paternal patriarchy in the rise of a community where religious, social, and political authority was concentrated among a few male elders. This opinion shows a Court that believed that religion could play a positive role in providing the social foundations for democracy, or a negative role when it fostered a social order in which political authority was concentrated and conflated with religious authority. Further, to the degree that the Court was concerned with religion’s impact on democracy, it was only in relation to the rights of men.

Religion and civic identity reemerge as themes dealing with education in the twentieth century. In a series of cases over the 1920s (*Meyer v Nebraska*; *Pierce v Society of Sisters*) and 1940s (*Prince v Massachusetts*), and 1970s (*Wisconsin v Yoder*) the Court provided a doctrinal bridge between the religion clauses of the First Amendment and substantive due process protection found in the Fifth and Fourteenth Amendments.³ The key term in this link was liberty, as stated in the Fifth Amendment's guarantee that no one could "be deprived of life, liberty or property without due process of law." This doctrinal migration from religious freedom to due process liberty is important in two respects: because of the parallel between the two due process clauses, the Court was able to restrict the actions of not only the federal government, but also the state governments; and in social governance terms, the Court gave greater attention and protection to the family as a site of social ordering. In time, the Court would develop the privacy doctrine (which is commonly grounded in the due process clauses) as a way to encapsulate both the idea of individual freedom of conscience expressed in choices that relate to family formation, sexuality and reproduction, and the idea that homes and families are social institutions that inculcate moral values and provide for community responsibility for social dependency.

Meyer v Nebraska, 262 U.S. 390 (1923) and *Pierce v Society of Sisters*, 268 U.S. 510 (1925), both deal with a parent's right to choose alternative schooling for their children. Education, as Akhil Amar suggests and the earlier quote from the Northwest Ordinances indicates, was often associated with religion as social institutions that create good citizens. Further, the constitutional view of educational establishments tended, as it did with religious establishments, towards limited pluralism. Education is necessary and important to the creation of

³ For other discussions of these cases, see Tamar Ezer, (2004). "A Positive Right to Protection for Children," *Yale Human Rights and Development Law Journal*, 7: 1-50; Anne Dailey, (2006). "Developing Citizens," *Iowa Law Review*, 91: 431-503; Chafetz, Josh. (2006) "Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the *Yoder* Problem," *William and Mary Bill of Rights Journal*, 15: 263-301; and Biedrzycki, Lisa. (2006). "'Conformed to the World': A Challenge to the Continued Justification of the *Wisconsin v Yoder* Education Exception in a Changed Old Order Amish Society," *Temple Law Review*, 79: 249-278.

national identity and civic virtue, but within that broad mandate, the Court expressed tolerance for a degree of community and family governance over education. Yet this pluralism was challenged the early twentieth century as tensions arose regarding the political loyalties and civic integration of recent immigrant groups.

At issue in *Meyer* was a state law that barred instruction in foreign languages prior to the eighth grade. The plaintiff was a parochial school teacher convicted of teaching German to his students. Meyer challenged the statute under which he was convicted as an unreasonable infringement on his liberty as protected under the Due Process Clause of the Fourteenth Amendment. According to the Nebraska Supreme Court, the law was justified, since “[t]o allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue” which would “naturally inculcate in them the ideas and sentiments foreign to the best interests of this country” (262 US 398). Here, public school is seen as a counterweight to the socializing functions of families and private schools, when those institutions are regarded as suspect in their civic allegiances (just as the Mormon church was seen as suspect in its civic orientation). Yet in supporting Meyer’s complaint and overturning the state court’s ruling, the Supreme Court elaborated on the meaning of constitutional liberty.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (262 US 399)

Liberty had both personal and community related elements. At the personal level, it expressed a sense of freedom of conscience, which included such things as religious worship, self-education, and the decision to marry and create a family. The community aspects of liberty were implicit in

the social relations and duties created by church membership, marriage, and family formation (including the obligation to educate one's children), and are indicated by the Court's acknowledgment of these activities as "essential to the orderly pursuit of happiness by free men." At a social level, these were necessary rather than optional activities – and they were activities that created order within the community of free men. In times of "peace and domestic tranquility," the state's effort to interfere with the right of parents to educate their children in accord with their cultural and religious values, could not be tolerated.

A similar coupling of liberty and order was expressed in *Pierce*. Oregon had passed a law mandating that all children be sent to public school. That law was challenged by a private religious school. Citing *Meyer*, the Court ruled that the state of Oregon had infringed on "the liberty of parents and guardians to direct the upbringing and education of children" (268 US 534). Further detailing the rights and duties of parents to educate their children, the majority continued,

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (268 US 535)

Indeed, the state had a right to regulate the education of children – within limits, since the government could not "*standardize* its children." For parents, a child's education was not only a right but a "high duty" – one that would lead a parent to prepare their child for "additional obligations." The obligations that the Court likely had in mind were social obligations such as work, civic involvement, religious participation, as well as marriage and parenting - preparing a child's place in the community *he* will join as an adult. Again, a tension is visible in the Court's account of socializing functions of public schools versus families, but so long as families and religious communities inculcate the proper civic values in their children (preparing them for "additional obligations"), then tolerance for educational and religious pluralism should be

respected. Stephen Carter has written in defense of *Pierce*, that the Court's ruling implies "the state may not use its power to compel education as a tool for destroying religion" (quoted in Chafetz, 278).

In *Prince v. Massachusetts*, 321 US 158 (1944), the Court more explicitly paired concern for religious liberty with substantive due process reasoning. The case involved Sarah Prince's conviction under the state's child labor law for allowing her niece (and guardian) to proselytize in the public square for the Jehovah Witnesses. Prince challenged her conviction as a violation of religious freedom and of her liberty as a parent to raise her niece according to her beliefs. In upholding Prince's conviction, the Court reaffirmed its concern for parental liberty and religious freedom, while also expressing the limits of those rights – limits that were framed in particularly gendered terms.

As a general principle, the Court confirmed the authority of parents as a constitutionally protected aspect of liberty. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents" (312 US 166). Yet, a parent's authority was constrained by the state's obligation to safeguard the welfare of children. "The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power" (312 US 169). In siding with the state over Sarah Prince, the Court implies that it is less respectful of her authority role as a parent (as a mother, or, even less persuasively, a guardian aunt) than it was of the parents in these earlier cases. Recounting the events that led up to Prince's arrest, the Court recalled, "That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded" (312 US 162). Maternal emotions overcame Prince's better judgment.

Further on, the Court considers Prince's claim to be defending her freedom of religion rather than her freedom of speech.

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First

Article can be given higher place than the others. . . Heart and mind are not identical.

Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life. (312 US 164-5)

Religion – at least as practiced by Sarah Prince - was a freedom of the *heart*, while speech was a freedom of the *mind*. While the Court denied such rights could be separated, it nonetheless cast Prince on the side of heart, intuition, and spirit, rather than mind. Freedom of conscience in this case was not a rationale, enlightened pursuit of ordered liberty. Rather, it produced emotional, disordered outcomes in which a lone woman tended to her niece on the street, beyond the safety of the home or the guidance of a father. The disorderly aspect of this intuitive faith might also have reflected the Court’s disregard for a non-mainstream religion such as the Jehovah Witnesses.⁴

Further, in questioning Prince’s parental authority, the Court wrote of street preaching as “zealous” propaganda that created situations that were “wholly inappropriate for children, especially of tender years, to face.” The majority was concerned for the possible “psychological or physical injury” entailed, and concluded that parents are not free “to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves” (312 US 169-70). Prince was religiously zealous, and her zealousness led her to expose her niece to emotional excitement as well as psychological or physical injury. That danger derived partly from the location of religion practice on a street corner. Both the nature of the parental error and the fear of the harm that might ensue were cast in gendered terms. There was no mention of a “Mr. Prince”. Rather, there was only an emotional aunt who left the shelter of domesticity to expose her young, impressionable niece to the harms of the streets. These cases

⁴ Indeed, in another religion and education case from the previous year (*Gobitis*), the Court upheld the state of Pennsylvania’s right to expel students who refused to say the Pledge of Allegiance because it conflicted with their religious beliefs as Jehovah Witnesses.

suggest that claims of parental authority were more likely to succeed as substantive due process claims when they were made by authoritative, rational fathers rather than solitary, emotional mother figures. The age of the affected children was also likely at issue. Freedom of religion and the liberty of parents were protected by the Bill of Rights when they conformed to our larger vision of the social ordering role of families and religious establishments – a vision that was challenged by the presence of solitary women or marginalized religions.

The Court’s treatment of Sarah Prince’s parental authority contrasts sharply with the deference shown to Amish fathers in *Wisconsin v Yoder*, 406 US 205 (1972). Wisconsin state authorities had fined Jonas Yoder (along with two other fathers from local Amish and Mennonite sects) for their refusal to send their children to school beyond the eighth grade. The fathers challenged the law under which they were fined, claiming that compulsory school attendance violated their religious freedom and parental authority. Citing *Pierce*, the Court framed *Yoder* as a case that “involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children” (406 US 233). For the Amish, public high school threatened their religious beliefs and way of life, “because the values they teach are in marked variance with Amish values and the Amish way of life” included the Amish view that “salvation requires life in a church community separate and apart from the world and worldly influence” (406 US 210-211). Given the conflict between these competing sources of social ordering, the Court sided with church and family. While the Amish were committed to creating a life “aloof from the world and its values” (406 US 210) the Court also found that they were “a highly successful social unit within our society” (406 US 222) with an “excellent record as law-abiding and generally self-sufficient members of society” (406 US 213). Indeed, the Court seemed to idealize the productive, agrarian Amish as being emblematic of the Jeffersonian “ideal of the ‘sturdy yeoman’” (406 US 225).

Responding to *Pierce*’s invocation of a parental duty to prepare children for “additional obligations” (as well as the state’s claim that children should be educated to prepare them for

public life), the Court in *Yoder* concurred, stating that this duty “must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship” (406 US 233). Yet, in contrast to the Jeffersonian vision, the religious and cultural values of the Amish did not prepare them to become democratically engaged citizens. Their primary civic virtues seemed to consist of hard work and self-reliance rather than political participation. Indeed, the Amish were a community apart, who were exempted by Congress from paying social security taxes in light of their refusal to accept any public welfare. Yet since the Amish community did not challenge the political authority of the state (as the Mormons had), nor threatened the health or welfare of minors (as Sarah Prince purportedly did), nor offer social ordering values that clashed with the nation’s predominant Judeo-Christian traditions (regarding marriage, work, and family), they were allowed to exist as a separate social unit, less subject to the socializing influences of the public school system.

In his dissent, Justice Douglas chastised the majority for failing to consider the interests of the children represented in this case, and for assuming “that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other” (406 US 241). For the Court majority, the Amish claims of liberty were defensible given their standing as a faith community in which “the Amish religious faith and their mode of life are . . . inseparable and interdependent” (406 US 215). The Court contrasted the defensible claims that grew from the precepts of established religion to the indefensible claims of individual conscience, such as those that moved Thoreau to “isolate himself at Walden Pond” on the basis of his “philosophical and personal” beliefs (406 US 216). The established religious community of the Amish was, of course, a patriarchal one, where men spoke for their wives and children both in the Courts and in their churches. In contrast, Douglas offered a view of Amish families as containing individuals with possibly competing interests on matters of faith and education. This view was rejected by the majority, which deferred to “traditional concepts of parental control over the religious upbringing and education of their minor children,” although the only parents before the Court in

Yoder were fathers and not mothers. For Douglas, religion spoke more to matters of conscience and judgment than community control. “Religion is an individual experience,” Douglas claimed, demanding that the voices of the students be heard in recognition of their constitutional right “to be masters of their own destiny” (406 US 243). In this distinction between religion as individual truth and public voice versus religion as an institution of community control and social ordering, the Court affirmed the latter perspective in protecting the authority of Amish fathers over the religious and educational training of their children.

As James Morone illuminates in his book, *Hellfire Nation* (2003), religion is enmeshed with American public culture and nationalism in ways that are not fully acknowledged or understood by most scholars of political science. More research needs to be done to understand the role that religion and morality have played in uniting the nation, legitimating candidates and policies, fuelling certain kinds of social divisions along racial, ethnic and gender lines; preventing the formation of counter coalitions, for instance, along class lines; and providing the impetus for state building. This tendency towards moral ordering in public life not only engaged many women in politics through religiously inspired social movements, but has also subjected them to legal regulation. Morone’s book suggests that the regulation of women and morality provided an acceptable realm of government action long before the regulation of industry did. It is an important insight, and one that could be followed much further in tracing the ways that American constitutional development has evolved less on the basis of shifting class or labor relations, than on the basis of shifting race and gender relations, for instance in moral debates over slavery, prohibition, segregation, miscegenation, abortion and gay marriage. This may be partly because, as Ayelet Shachar (2005) argues, “women and the family often serve a crucial symbolic role in constructing group solidarity vis-à-vis wider society” (50). While the original Bill of Rights vision may have been one in which community regulation of women and morality provided the social foundation for a democratic public sphere, over time the pressures of religious, ethnic, and national diversity created tension between the socializing function of groups and the state’s role

in the civic reproduction of the nation. Particularly with regard to minority religions and ethnic groups, courts may be caught in a “clash between the state’s interest in social reproduction” and the interest of families or minority religious communities “in religious [or cultural] reproduction” so as to “perpetuate [their] collective way of life” (Chafetz 2006, 264). Since women and families stand at ground zero in the fight over social and civic reproduction, the constitutional governance of gendered roles (including those of mother and father) tells us a great deal about ongoing tensions between individual rights and community ordered liberty.

A Jury of Peers

Since at least the Magna Carta, trial by jury has been regarded as a fundamental right of free men. Within the Bill of Rights, juries are upheld in three amendments: the Fifth, which provides that a person cannot be held for a capital crime except under “indictment by a Grand Jury;” the Sixth, which guarantees a public trial for a criminal offense “by an impartial jury of the State or district wherein the crime shall have been committed;” and the Seventh, which protects the “right to trial by jury” in civil suits. At the time that the Bill of Rights was adopted, these jury guarantees were put in place both to protect individuals from abuses of power by the federal government, and to give communities a voice in administering justice. Over the course of American history, women’s struggle to be included in these protections (as jurors and as individuals entitled to a jury of one’s peers) spoke to both their struggle to be seen as rights bearing individuals in the public sphere, and concerns over the place of women within the American political community.

In *The Law of the Other* (1994), Marianne Constable writes about an older tradition of jury trials dating to the early modern era in England. The institution of the mixed jury was used when a plaintiff and defendant came from different communities – defined by occupation, religion, nationality, or ethnicity, for instance. In such instances, the court would impanel a jury that drew equally from members of both communities, since it was thought that these

communities had their own particular understanding of justice that they might bring with them to the judgment of a crime. Constable writes, “Early juries embody a principle of personal law, whereby both non-alien and alien persons are entitle to be judged *secundum legum quam vivit* - by the customs of the community to which the person belongs, or, literally, ‘according to the law by which one lives’” (2). Over time, community governance of justice was gradually displaced by a system of written law and rules dictating the way that judgments regarding guilt or innocence must be made. By the time of the American Revolution, there was only a weak echo of the community justice ideal contained within the mixed jury system. Yet over the years even this echo has been largely silenced by the rise of positive law, the belief that standards of justice come from above, and the commitment to an impartial jury in which social experiences and community norms have no bearing on determinations of justice.

The inclusion of a right to trial by jury in the Bill of Rights represented a compromise between the Federalists and the Anti-Federalists. On the issue of juries, Alexander Hamilton outlined the difference in the views of these two groups during the debates over ratification. “The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government” (Rossiter 1961, 499). Prior to the Revolution, juries were a site of contestation where colonists resisted abuses of authority by the Crown. Grand and petit juries regularly refused to indict or convict those accused of seditious libel or treason, until the British government demanded that colonists accused of treason be transported to England for trial (Alschuler and Deiss 1994, 872-5). Echoing the Anti-federalist view, Alexis de Tocqueville noted years later that Americans regarded the jury “as a political institution . . . one form of sovereignty of the people” (Tocqueville 1945, 283). Yet the sovereignty that was being enacted was limited to those regarded as full citizens – typically white male property owners at the time of the Founding.

In Maryland, atheists were among those disqualified from jury service (Alschuler and Deiss 1994, 877).

After the Civil War, when the Bill of Rights began being read through the Fourteenth Amendment as primarily protective of individual rights rather than community governance, jury service became an issue of political incorporation. On the eve of the Civil War, Chief Justice Roger Taney argued for the majority in *Dred Scott v Sandford*, 60 US 393 (1856), that African Americans were not citizens. In making his case he reviewed the numerous legal restrictions on African Americans imposed by the states and colonies – including prohibitions on voting, militia service, labor rights, intermarriage, and education. Detailing one such law, barring African Americans from serving in the militia in New Hampshire, Taney reflects that this indicates “He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it” (60 US 415). So the rights of popular sovereignty contained within the Bill of Rights – such as jury service and militia service - were rights that indicated civic standing and membership. Once jury service came to be seen in the post-Reconstruction Era more fully as a marker of civic inclusion, would women as well as African Americans be welcomed there?

The ruling in *Strauder v. West Virginia*, 100 US 303 (1879), endorsed the vision of jury service as a marker of civic inclusion. In *Strauder*, the Supreme Court overturned a law barring African Americans from jury service. “The very idea of a jury is a body of men composed of peers or equals of the person whose rights it is summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds” (100 US 308). Jury service was a measure of legal status, so the exclusion of African Americans amounted to a denial of legal equality. Denying African Americans the right to sit on juries would serve to place “practically a brand upon them, affixed by law, an assertion of their inferiority” (100 US 308) which would result in unequal citizenship. Although the opinion was framed doctrinally as a Fourteenth Amendment equal protection matter, the Court referred repeatedly to jury service as a right or an immunity, and stressed its interest in protecting the citizenship status

of the freedmen. Indeed, indicating that juries were still institutions of community governance, the Court suggested that other forms of discrimination in jury selection remained acceptable. “It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications” (100 US 310).

Despite *Strauder’s* ringing proclamation of civic inclusion for African Americans in jury service, racial exclusion continued to operate *de facto* for many more decades. For women, the battle for inclusion did not gain momentum until the Nineteenth Amendment was adopted in 1920. For the courts and legislatures, gender was not only seen as a social difference that mattered, it was also seen as a social difference that rooted women in domestic life, and prevented from participating in the more demanding duties of public citizenship – such as jury and military service. In contrast, some early women’s rights advocates called for women’s inclusion on juries as a means of countering masculine control over the implementation of justice. As Antoinette Brown said at the Syracuse Women’s Rights Convention in 1852, “The law is wholly masculine; it is created and executed by man. . . The law then could give us no representation as woman, and therefore no impartial justice even if the present lawmakers were honestly intent upon this; for we can be represented only by our peers” (Stanton, et. al., 1881, 594). In an echo of the mixed jury tradition, Brown presented jury service as a form of office holding in which women represented other women in their communities.⁵ By the early twentieth century, women’s claim for jury service was akin to the Court’s opinion in *Strauder* – as recognition of the legal status of potential jurors. Hoping to build on the parallel between the Fifteenth Amendment and the Nineteenth Amendment,⁶ women’s rights advocates claimed that the grant of suffrage made them full

⁵ One special form of the mixed jury was the matrons’ jury, in which a group of 12 women were called upon to judge whether a woman defendant was with child. In colonial America, matrons’ juries also served in some witchcraft trials. The presumption in both instances was that women (especially married women and mothers) had the experience and understanding to judge the testimony and physical condition of other women. See Taylor 1959, 225 and Weisbrod 1986, 60.

⁶ The parallel between the Fifteenth and Nineteenth Amendments was elaborated in connection to the ruling in *Neal v Delaware* 103 US 370 (1880) which found that once African Americans were given the

citizens with the full rights and duties that went with that status. Yet this call frequently fell on deaf ears as judges and legislators took the view that the Nineteenth Amendment had given women the right to vote and nothing more (Ritter 2002, Brown 1993). As I have written elsewhere, following the adoption of the Nineteenth Amendment, women's citizenship was caught between a narrow understanding of their rights as individuals in the public realm, and their place as domestic dependents within their families and communities (Ritter 2006). Given the old Bill of Rights vision of those communities as hierarchically structured, and governed by independent men, it is not surprising that when women were seen in gendered terms (as socially situated within families and communities) they were commonly excused from the burdens of jury service.

By the 1940s, the Supreme Court was vacillating between support for women's civic inclusion and continued tolerance of their civic exclusion in relation to jury service. The majority in *Ballard v. United States*, 329 US 187 (1946) upheld the plaintiffs claim that the exclusion of women from the jury that convicted them adversely affected their right to a fair trial. Women's presence made a difference in determinations of justice, but the concern in this case was not with the rights of women as potential jurors. It was a concern for the civil rights of defendants, and the potential biases of an all-male jury. "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; . . . The exclusion of one may indeed make the jury less representative of the community," (329 US 193-4). What made the presence of women particularly relevant to this case was the fact that is involved the "prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program" (329 US 194). Quoting from a lower court opinion, the Court affirms the association of women with parental nurture, education, and religion.

right to vote through the Fifteenth Amendment they were entitled to all the rights and duties of electors, which in Delaware included jury service.

In the average family from which jurors are drawn, the souls of children in their infant and early adolescent bodies receive the first and most lasting teaching of religious truths from their mothers. . . . In the public schools over ninety-five per cent of the primary and grammar school teachers are women. In the churches of all religions the numbers of women attendants on divine service vastly exceed men. . . Well could a sensitive woman, highly spiritual in character, rationalize all the money income acquired by Mrs. Ballard.

(329 US 194-5)

By the 1940s the language of gender difference had begun to shift from one of natural difference to one that focused on social roles, such as the roles of women as mothers, teachers, and church members. These invocations of community roles allowed for safe articulations of social difference in an era where the legal language of equal individual rights was growing stronger. Even in the legal realm, however, tolerance for discriminatory gender distinctions remained strong, as Justice Frankfurter indicated when he upheld a law prohibiting women (who were not related to bar owners) from employment as bartenders in *Goesaert v Cleary*, 335 US 464 (1948). Writing for the majority, Frankfurter asserted that the state “could, beyond question, forbid all women from working behind a bar” and went on to endorse the state’s view that oversight “by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight” (335 US 466). The themes of domesticity, family governance under male authority, and women’s civic exclusion remained strong in the mid-twentieth century.

Over time, the states came to recognize women’s eligibility for jury service as a right or duty of citizenship, and in addition, the courts recognizing a defendant’s right to a jury that was representative of a fair cross section of the community (Babcock 1993). State by state over several decades, the laws changed. By 1959, one commentator wrote “jury service for women is recognized in all but a few states” (Taylor 1959, 224). As with suffrage, southern states were the most reluctant to grant women this new right or duty (Taylor 1959, 225). Yet even after eligibility was established (in all fifty states as of 1968), many states allowed for the de facto exclusion of

women through the liberal use of exemptions in deference to women's domestic duties as mothers and homemakers. This policy of gender specific exemptions was upheld by the Supreme Court in *Hoyt v. Florida*, 368 US 57 (1961), only to be finally overturned in *Taylor v. Louisiana*, 419 US 522 (1975). That judgment was reaffirmed in *Duren v. Missouri*, 439 US 357 (1979) which ended automatic exemptions for women. In an article on women's jury service, Joanna Grossman contends that the slow pace of full inclusion reflects the reluctance of states and courts to make jury service a recognized right of citizenship for women (Grossman 1994, 1138-9, also see Kerber 1998).

The difficulty of achieving full inclusion is illuminated by situating jury service in relation to both the popular sovereignty provisions within the Bill of Rights and the equality of status protection offered by the Fourteenth Amendment. As a right of popular sovereignty (within the Sixth Amendment), jury service suggests political participation, and in accordance with the antebellum reading of the Bill of Rights, it also suggests community governance and regulation of community members by their states. While the popular sovereignty view of jury service is appealing in its participatory guise, it is also dangerously limiting since it allows for a hierarchically ordered community, in which only some members have the social requisites of full participation. The long history of women's automatic exemption from jury service recalls the connection between women's domestic role and their exclusion from civic participation. Yet the equal protection argument for jury service tends to operate as an argument against exclusion, but not as an affirmative argument for inclusion. Treating jury service (like voting) as an individual right against exclusion left women little room for the elaboration of a public, distinctly feminist civic membership. This was not about what women might bring with them, from their experience as community or family members to the voting booth or jury box, rather it was about how direct exclusion amounted to a mark of legal difference that ought to be erased. Vikram David Amar (1995) outlines an alternative vision, that would bring together the participatory, community based aspects of the Bill of Rights with the nondiscriminatory provisions of the voting

amendments to create a robust mandate for civic inclusion. It is an appealing vision, but one that has yet to be realized.

Conclusion: Community Governance and Individual Rights

Over the middle and latter parts of the twentieth century, the US underwent a “rights revolution” that celebrated equal treatment and unfettered opportunities for individual achievement without regard to ascriptive social differences. The historical roots of the rights revolution lay in the American response to the Second World War and the Cold War, and the desire to highlight the nation’s commitment to individual worth in response to Nazi and Soviet attacks on American racial segregation (Skrentny 2002; Dudziak 2000). John Skrentny (2002) outlines the ways in which the Civil Rights movement created a model for political success in the 1960s and 1970s that was quickly adopted by other social groups. The terms of American citizenship were expanded in the 1960s to include support for economic opportunity for African Americans and other previously marginalized groups, including women. In the wake of the Civil Rights movement, civic equality was defined as freedom from economic discrimination on the basis of race or sex, and the machinery of nondiscrimination (particularly the EEOC as well as the Civil Rights division of the Justice Department) was available for use by those who could claim ascriptive discrimination. Michael Piore and Sean Safford (2006) have described this as a change from an industrial relations regime to an employment rights regime that emphasizes social identity rather than class. Once discrimination is addressed (under the terms of Title VII of the Civil Rights Act of 1964), and all Americans are treated as individuals who are judged by the ability and their effort, then the government’s responsibility for creating economic opportunity ends, and the responsibility of individuals to succeed through their own efforts begins.

For women, the Equal Pay Act, Titles VII and IX of the Civil Rights Act, the Pregnancy Discrimination Act, and equal protection jurisprudence (starting with *Reed v Reed*, 404 US 71) have all contributed to the expansion of economic opportunity. Nicholas Pedriana (2006)

documents the powerful effect that the anti-discrimination framework had on the feminist movement in the 1960s and 1970s. Following the adoption of Title VII in 1964, the National Organization for Women pushed the new Equal Economic Opportunity Commission to prohibit protective legislation in favor of equal treatment for women workers (see also Costain 1992). What the anti-discrimination framework did, in effect, was it encouraged women's rights advocates to claim equal rights for women as individuals in the public realm, regardless of their ascriptive status. The appeal of this approach was partly based upon its proven success for other groups. In the mid-1960s, NOW was inspired by the successes of the Civil Rights advocates who worked with allies on the EEOC to address race based economic discrimination. Similarly, Ruth Bader Ginsburg self-consciously modeled the judicial approach of the ACLU's Women's Rights Project (which she directed) on NAACP Legal Defense and Education Fund's efforts to overturn *Plessy v. Ferguson* which finally succeeded with *Brown v Board of Education* in 1954 (see Ritter 2006).

There are several things worth noting about the effect of the anti-discrimination model on women's rights and gender politics in the United States. First, this model neglected issues that were connected to the domestic economy and relational obligations. Second, the rights revolution happened largely in the courts, a realm suited to activism by legal advocacy groups rather than regular citizens. In that sense, rights advancements were less likely to be tied to increases in civic participation for women. Third, the anti-discrimination model is premised on a rejection of ascriptive identities as an appropriate foundation for citizenship. Ascriptive identities are treated as something that should be overcome – their relevance in the form of legal classification is taken as an indication of discrimination (see also W. Brown 1995). The ideal endpoint of the anti-discrimination approach is the complete erasure of sex and race as markers of civic difference. As such, policies and politics that emphasize gender related social experiences and concerns, including family care concerns, do not find ready purchase in a rights based, anti-discrimination framework (Ritter 2006).

This may help to explain the public's mixed attitudes towards Second Wave Feminism. While Americans agree with the view that women should have equal opportunities in the public realm, there is deep disagreement over how to manage women's private realm roles. In politics, that disagreement expresses itself in conflicting attitudes towards childcare and abortion, for instance (Sanbonmatsu 2002). The roots of this bifurcated vision of gender roles and politics lie in American liberalism and the division between public and private. Yet I also want to suggest that the republican vision of popular sovereignty that is expressed in the Bill of Rights provides some hope for those seeking a more inclusive notion of equality and citizenship that draws on women's experiences in their families and communities as well as their interests as autonomous individuals in the public realm.

In outlining such an alternative, it is important to recognize and guard against the subordinating potential of community governance proposals, such as those supported by modern day civic republicans. Ayelet Shachar (2005) uses the multicultural citizenship literature as a starting point for her proposal on how to balance recognition of social embeddedness and communal ties with respect for individual rights. She summarizes the multicultural vision (drawing on the work of Will Kymlicka, Iris Young, and Charles Taylor) as follows:

Instead of prioritizing either individual rights or a strong sense of membership in the political community, as in the classic liberal or civic-republican conceptions of membership, proponents of differentiated citizenship called for a new vision: citizenship, they claimed, should be re-imagined as 'a heterogeneous public, in which persons stand forth with their differences acknowledged and respected.' This understanding of citizenship has as its foundation the view that group-based distinctiveness should be recognized, respected, and even nourished by the contemporary state, rather than ignored in favour of assimilation into the dominant or majority identity. (57)

The problem with this new vision, as Shachar and other feminist critics have pointed out, is that it tends to insulate cultural communities from external political pressures, thereby allowing

practices of subordination (particularly in relation to women and children) to go unchallenged. This is, indeed, the danger inherent in the popular sovereignty vision as well. Does appreciation for the role of communities in creating social orders and providing a foundation for civic engagement require an attitude of tolerance or neutrality towards cultural practices and values that produce social hierarchy and subordination? Further, what if the invitation to bring one's social experiences and values into public politics results in an influx of racist, sexist, and homophobic beliefs about how societies should be morally governed? It is easy to see how such concerns have motivated Brian Barry (2001) and others to call for a strict separation between private cultural commitments – such as religion – and public politics.

But on both normative and empirical grounds, it seems that the liberal constitutional vision of individual rights is insufficient to promote democratic inclusion and empowerment for women (Ritter 2006, McDonagh 2002). Consequently, Shachar proposes a joint governance plan, which rejects theories that “encourage groups to insulate themselves from the wider society in which they operate” and recognizes that “cultures are not static, and that group members may emphasize different aspects of their identity in different social contexts” (71-2). Her proposal calls for a deliberative approach that encourages voice among all members of a group, and provides incentives for groups to improve the rights and standing of their more vulnerable members by allowing for greater community autonomy when there are fewer rights violations asserted by group members. To do this, Shachar would put in place governing structures that allow “group members to draw on input from both state law and group tradition in resolving legal disputes in family law, criminal sentencing, immigration law, environmental law, [and] education” (72). While Shachar's main concern is with the place of women in minority religious communities (for instance, in the controversy over the French prohibition of the hijab), her proposals are useful for those seeking to supplement liberal constitutionalism with popular sovereignty, while avoiding the pitfalls of community imposed forms of social subordination.

The popular sovereignty vision present in the Bill is worth recalling because it emphasizes the way that social experience and social diversity matter to politics. Instead of suggesting that we should strip away or leave aside our religious values, family ties, community commitments, ethnic heritage, and gendered experiences when we enter the voting booth, school board meetings, or the jury box, this perspective calls upon citizens to bring those values, commitments, and experiences with them and put them into dialogue with people from other social backgrounds as we seek a larger common good. This should be done in a way that encourages voice and expression within communities (and not just between them), so as to allow for dissent and guard against subordination. Allowing for consideration of different sources of cultural traditions and community norms in political and judicial venues while remaining attentive to claims of injury of subordination by the less powerful or privileged is a promising starting point for such an approach. A politics that is responsive to the needs and concerns of a diverse society cannot merely be based on a stripped down liberal individualism – it must expose and appreciate the way that social embeddedness and community values shape us all.

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