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Exclusion to Emancipation: A Comparative Analysis of Women's Citizenship in Australia and the United States 1869-1921

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EXCLUSION TO EMANCIPATION: A COMPARATIVE ANALYSIS OF WOMEN’S CITIZENSHIP IN AUSTRALIA AND THE UNITED STATES 1869-1921

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I. INTRODUCTION ........................................... 725
II. SEPARATE AND UNEQUAL ............................ 726
III. RIGHT TO VOTE ....................................... 730
   A. United States ....................................... 730
   B. Australia ........................................ 733
IV. ENTRY TO THE LEGAL PROFESSION ............... 735
   A. United States .................................... 736
   B. Australia ......................................... 741
V. SECOND-CLASS CITIZENS ............................. 748

I. INTRODUCTION

The history of men’s opposition to women’s emancipation is more interesting than the story of that emancipation itself.

Virginia Woolf, 1929.

In Australia, as in the United States, women throughout legal history have been relegated to the status of second-class citizens. This Essay focuses on the struggles of women in both countries in the late nineteenth and early twentieth centuries to overcome opposition to their equal participation as citizens. In particular, this Essay focuses on opposition by all-male judiciaries to women’s struggles to attain full citizenship rights, including the right to vote and the right to practice

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law. As will be shown, although these struggles occurred in different legal and constitutional frameworks, the judicial reasoning invoked to deny women these citizenship rights was remarkably similar and had the effect of entrenching their traditional subordinate role in society. This Essay illustrates the narrow view of women’s citizenship held by the judiciary during this period. Underlying the legal reasoning of the courts was an assumption that women’s legal status was fundamentally different from that of men, and that women possessed only those specific rights, privileges, and immunities that the all-male legislatures chose to grant them. Legislation that granted women citizenship rights, including the right of suffrage, was narrowly interpreted by male judges who were not prepared to disregard women’s common law disabilities and extend women’s citizenship status in the absence of clear words. This Essay also illustrates that the Australian judiciary was unwilling to recognize women as full citizens, even after women had been granted the right to vote. In both Australia and the United States, each right, privilege, and immunity of citizenship, taken for granted where the subject was male, had to be contested by women.

II. SEPARATE AND UNEQUAL

Australia and the United States inherited a tradition in which gender defined the geography of social life. This geography saw men as the inhabitants of the “public” sphere of political and commercial activity, and women as occupying the “private” sphere of domestic life. These separate spheres of society had firm ideological foundations. “Until the mid-nineteenth century, virtually every major theologian and philosopher relegated women to a subordinate role.” The use of supposedly gender-neutral terms such as “man,” “mankind,” and “he” in the works of the philosophers concealed the fact that the “human nature” of which they spoke was intended to refer to male human nature

2. Id.
only. However, for these philosophers, women’s exclusion from “man-kind” did not mean their exclusion from society altogether. Women’s role in society was defined by their sexual, procreative, and child-rearing functions within the institution of the family. The biological differences between the sexes were seen as entailing all the other conventional and institutional differences in sex roles. Not only were women assigned a distinct role, they were defined separately, and often contrastingly, to men.

These contrasting public and private spheres underpinned the development of the common law inherited by both Australia and United States. Upon colonization in 1788, the British common law was transferred to Australia. The exclusion of women from legal personhood, particularly after marriage, had a firm foundation in the common law fiction of coverture. As Blackstone explained in his Commentaries of the Laws of England:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore . . . said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during marriage is called coverture. . . .

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And, therefore, all deeds executed and acts done, by her, during her coverture, are void.

Thus, at common law, a married woman was either not a person at all, or was such a subordinate person that she was taken to be coerced by her husband into all actions for which she might otherwise be held legally liable. Blackstone viewed this as preferential treatment for women, noting that “even the disabilities, which the wife lies under,
are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England. While coverture applied formally only to married women, its implications extended in practice to all members of the female sex. Barred from higher education, public office, the professions, and most other vocations outside the home, women had few economic options outside of marriage.\(^9\)

The inequality of the sexes was further countenanced in the development of the framework of government in both Australia and the United States. While neither the United States Constitution nor the Bill of Rights specifically denied equal rights to women, both created an exclusively masculine system of justice based on English common law and eighteenth-century ideals of liberty, equality, and justice.\(^10\) The framers of America's founding documents spoke of “men . . . created equal” and “endowed . . . with certain unalienable rights.”\(^11\) Although they made relatively frequent use of “persons,” “people,” and “electors,” these terms, like the terms “men” and “individuals,” were not intended to be read as generic or universal.\(^12\) That the framers did not intend “persons” in the Constitution to mean other than “male” was clearly indicated by Thomas Jefferson when he asserted: “Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.”\(^13\) It was definitely not the original intention of the founding fathers to leave open the possibility that women might qualify to vote at some time in the future.\(^14\) In fact, women were not mentioned at all in either document which purported to be the foundation stone for a free, independent, democratic society for all (men). In *The Federalist*, the only reference to women, by Alexander Hamilton, is a warning about

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9. RHODE, *supra* note 1, at 10 (citing United States v. Yazell, 382 U.S. 341, 361 (1966); ALFRED, LORD TENNYSON, LOCKSLEY HALL 50 (1842); LEO KANOWITZ, WOMEN AND THE LAW 35-37 (1969)).
the perils to the state from the intrigues of courtesans and mistresses.\textsuperscript{15} Similarly, the constitutions of the Australian Colonies failed to include women within their provisions, referring only to "males" or "persons" assumed to be male. The fact is that, "[a]lthough subject to the Constitution's mandates, women were unacknowledged in its text, uninvited in its formulation, unsolicited for its ratification, and, until the late twentieth century, largely uninvolved in its official interpretation."\textsuperscript{16} Beginning in 1839, state legislatures in the United States enacted a series of reforms that removed the most blatant restrictions on women's legal capacity at common law.\textsuperscript{17} Over the next three decades, twenty-nine jurisdictions enacted Married Women's Property Acts, which typically granted married women certain powers to make contracts, hold and convey property, and retain their separate earnings. By the turn of the century, such statutes were in place in three quarters of the states.\textsuperscript{18} In Australia, Married Women's Property Acts containing similar provisions were passed in the colonies from the late 1870s.\textsuperscript{19} However, "[m]uch of the legislative support for [these reforms] arose neither from a desire to encourage married women's advances in the public sphere nor to equalize their position in the private sphere."\textsuperscript{20} Statutory provisions reflected this fact,\textsuperscript{21} and restrictive judicial interpretations further blunted their progressive impact.

During the period 1869 to 1921, women in both Australia and the United States sought constitutional equality and full citizenship from the courts by challenging the remaining common law restrictions on

\textsuperscript{15} RHODE, supra note 1, at 20 (citing THE FEDERALIST No. 6, at 54-55 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 24.
\textsuperscript{18} Id.
\textsuperscript{19} See Married Women's Property Act 1879 (N.S.W.); Married Women's Property Act 1890 (Queensl.); Married Women's Property Act 1883-1884 (S. Austl.); Married Women's Property Act 1883 (Tas.); Married Women's Property Act 1915 (Vict.); Married Women's Property Act 1892 (W. Austl.).
\textsuperscript{20} RHODE, supra note 1, at 24.
\textsuperscript{21} Id. at 24-25. The motivation for the legislation was the unsuitability of the doctrine of coverture in an expanding commercial economy due to the impediments it placed on land and credit transactions. Furthermore, the exceptions to coverture developed in the courts of equity were regarded as cumbersome and expensive to invoke and, therefore, the legislation was seen as a way to regularize these principles and extend them to the general public.
their legal status. The central issue before the courts during this period was: to what extent should women be regarded as persons, and therefore, full citizens in the eyes of the law? As the following discussion highlights, judges evaded this central legal question by delivering decisions based on traditional common law stereotypes about women. The judgments classified women as second-class citizens and cast serious doubt on their legal capacities as persons. Juridical developments highlighted the limited impact of the Married Women’s Property Acts on the citizenship status of married women, even though such statutes, and the case law construing them, had improved their property, testamentary, contractual, and fiduciary rights. The courts refused to recognize that these Acts, or the Constitution itself, could have been intended to displace women’s second-class citizenship status at common law. Provisions which appeared to grant women equal protection and remove the disabilities to which women were subject at common law were read as narrowly as possible by the judiciary, thereby prompting a need for further legislation. The judiciary was unwilling to remedy women’s legal status through a broad interpretation of constitutional and legislative provisions.

III. RIGHT TO VOTE

A. United States

The Declaration of Sentiments adopted at the 1848 Woman’s Rights Convention in Seneca Falls, New York, shows that from the beginning, women’s inability to vote was regarded as a central feature of their oppression by men. The right to vote was described as the

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22. Hoff, supra note 10, at 151.
23. Id. at 152.
24. Id.
25. Id.
26. Id.
27. Jennifer K. Brown, The Nineteenth Amendment and Women’s Equality, 102 YALE L.J. 2175, 2177 (1993). The Declaration, which paraphrased the Declaration of Independence, proclaimed, “[w]e hold these truths to be self-evident: that all men and women are created equal,” and declared that the first proof of men’s “tyranny” over women was his refusal to allow her to “exercise her inalienable right to the elective franchise.” Declaration
“first right” of a citizen. Women’s advocates pressed for the right to vote not only as a means to improve women’s lives, but also because it would symbolize recognition of women’s “equal personal rights and equal political privileges with all other citizens.” As the first right of a citizen, suffrage meant citizenship.

In Minor v. Happersett, the opportunity arose for the suffragists to test the extent of women’s citizenship rights under the United States Constitution. They relied in particular on the Fourteenth Amendment’s guarantee of citizenship as a basis for asserting women’s right to vote. The brief before the Supreme Court of the United States began with a bold statement that “there can be no half-way citizenship” under the Constitution. In relation to the Fourteenth Amendment, it was argued that voting for officials of the federal government was a privilege and immunity of national citizenship, rather than simply state citizenship, because these offices derived from the nature of federal government created by the federal Constitution. The Court refused to address this argument and considered only whether voting was a privilege and immunity of citizenship. Delivering the decision of the unanimous Court, Chief Justice Waite dismissed Virginia Minor’s claim and held that it had never been the intention of the framers of the federal or state constitutions to enfranchise women. The Court admitted that women may be “citizens” and “persons” under the Constitution, and accordingly, Mrs. Minor was a citizen who was entitled to all the priv-

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28. Id.
29. 2 History of Woman Suffrage 747 (Elizabeth Cady Stanton et al. eds., AYER Co. 1985) (1881).
30. Brown, supra note 27, at 2178.
31. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874). Virginia Minor had tried to vote at the same time as Susan B. Anthony in the fall of 1872. Because she was not allowed to register, she filed a suit against the local registrar, appealed to the Missouri Supreme Court, and ultimately appealed to the United States Supreme Court.
32. HOFF, supra note 10, at 171. The Fourteenth Amendment provides: “All persons born or naturalized in the United States . . . are citizens of the United States. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.
33. Id. at 172.
ileges and immunities of citizenship.\textsuperscript{35} Although women were citizens, their citizenship was without substance.\textsuperscript{36}

The Court confirmed that the constitutional neglect of women by the founding fathers had not in any way been affected by the passage of the Fourteenth Amendment.\textsuperscript{37} Women did not derive any additional protection from the Fourteenth Amendment despite its apparent conferral of equal protection.\textsuperscript{38} Consequently, the discriminatory provisions of state electoral laws did not infringe the Fourteenth Amendment where the subjects of the discrimination were women.\textsuperscript{39} Using parallel reasoning to the \textit{Dred Scott}\textsuperscript{40} decision, the Court declared that historically, women constituted a special category of citizens whose inability to vote did not infringe upon their rights as citizens or persons.\textsuperscript{41} The Supreme Court unequivocally endorsed women's second-class citizenship under the United States Constitution. The decision in \textit{Minor} made it clear that women could not simply claim equal rights under the Fourteenth Amendment, rather, they would have to force their way into the Constitution by way of constitutional amendment. Women in the United States demanded that both the state and federal Constitutions be amended so as to give them a voice in the laws, a choice in the rulers, and protection in the exercise of their rights as citizens of the United States.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{35} \textit{Id.} at 165.
\item \textsuperscript{36} Brown, supra note 27, at 2180.
\item \textsuperscript{37} \textit{Minor}, 88 U.S. (16 Wall.) at 170.
\item \textsuperscript{38} The Court examined the state laws prior to federation and concluded that the states placed qualifications on those citizens who could vote. \textit{Id.} at 172. The Court concluded that "if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared." \textit{Id.} at 173.
\item \textsuperscript{39} Since the Constitution of the United States did not confer the right of suffrage upon anyone, the Constitutions and laws of the several states which "commit that important trust to men alone" were not necessarily void. \textit{Id.} at 178.
\item \textsuperscript{40} Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
\item \textsuperscript{41} HOFF, supra note 10, at 173.
\item \textsuperscript{42} Brown, supra note 27, at 2181 (citing HISTORY OF WOMAN SUFFRAGE, supra note 27, at 16). The suffragists gradually attained their goal, beginning with victories in the western states and culminating in the ratification of the Nineteenth Amendment to the Constitution on August 26, 1920. U.S. CONST. amend. XIX.
\end{itemize}
In Australia, women were not granted the right to vote as citizens until legislative amendments were made to the constitutions of the six states and the Commonwealth Constitution. Before these amendments, women and men were clearly differentiated as citizens. In South Australia, the Constitution Act of 1855-1856 allowed men meeting the age, residency, and property requirements to vote and stand for election to the House of Assembly and Legislative Council, which together constitute the South Australian Parliament. The masculine gender only, or the word “person” assumed to be male, was used in the Constitution. As a consequence, women could neither vote nor stand for Parliament. It required a constitutional amendment in 1894 (requiring an absolute majority of both Houses of Parliament) for South Australian women to bring an end to the two-tier system of citizenship in South Australia. South Australia then joined Wyoming, Colorado, and New Zealand as the first jurisdictions in the world to grant the right to vote to female citizens. Unlike these other jurisdictions, South Australia also granted its female citizens the right to stand for and be elected to Parliament. The other states followed in later years, and an amendment to the Australian Constitution in 1902 conferred the federal franchise on all Australian women.

The attempt by Australian women to secure the franchise had the advantage of the precedent set by Acts such as the Municipal Corporations Act 1861 (S. Austl.) which made provision, without sex dis-
crimination, for all owners and occupiers of property who were of full age to be enrolled on the Citizens’ Roll and to vote in municipal elections. However, the apparently liberal nature of these Acts was put to the test in the only reported Australian case which considered the right of married women to vote under the equivalent Act in New South Wales. When called upon to interpret the clear words of the Municipalities Act 1867 (N.S.W.) in 1893, the Supreme Court of New South Wales held that married women had no civic rights.

The case, Ex parte Ogden,48 concerned a challenge to the election of Henry Vernon at a municipal election on the grounds that two married women had voted. Mrs. Lipscombe and Mrs. White were on the municipal roll, and it was argued that their disability as married women excluded their votes. The Municipalities Act 1867 provided that “every person” of full age and a lessee or owner of property was entitled to be enrolled to vote. It was argued by counsel for Vernon that the mere fact of enrollment was conclusive of the entitlement to vote.49 The court dismissed this argument, stating that married women were not persons in the eyes of the law, and that there was a distinction between status and qualification.50 Whereas a man of less than full age who was enrolled to vote would thereby be qualified to do so, in the case of married women, they were excluded by virtue of their legal status. Justice Windyeyer stated that he was bound by the English decision of R v. Harrald,51 where the court held that married women did not have the right to vote in such elections. Although the Municipal Franchise Act 1869 (U.K.)52 allowed women to vote, provided they satisfied the requirements of the Act, it did not state whether married women could vote. However, by virtue of the Married Women’s Property Act 1870 (U.K.),53 women were granted the right to hold property in their own name, and this enabled some women to meet the property qualification of the Municipal Franchise Act 1869.

48. Ex parte Ogden, 14 N.S.W.L.R. 86 (1893).
49. Id. at 87.
50. Id. at 89-90 (Stephen & Foster, JJ., concurring).
51. R v. Harrald, L.R. 7 Q.B. 361 (1872) concerned a challenge to the election of Charles Harrald on the ground that two married women had voted for him.
52. 32 & 33 Vict. ch. 55, § 9.
53. 33 & 34 Vict. ch. 93.
But the court decided that because the Municipal Franchise Act 1869 was silent on the question of coverture and the Married Women’s Property Act 1870 failed to refer to voting rights, married women continued to be disqualified from voting.

In Ogden, women’s citizenship rights were limited by a narrow interpretation of the law. The Municipalities Act 1867 granted women the right to vote in municipal elections, and the only issue before the court was the status of married women to vote in such elections. It was open to Justice Windeyer to take the view that the Married Women’s Property Act, passed in 1879 in New South Wales, had removed the common law restrictions on women’s rights, in particular coverture, and that, accordingly, married women had full citizenship rights which included the right to exercise a vote in municipal elections. The Municipalities Act and the Married Women’s Property Act, read together, could reasonably have been interpreted in favor of women’s rights. However, Justice Windeyer refused to interpret the two Acts in this way, and in effect, refused to categorize married women as women. The reforms effected by the Married Women’s Property Act were viewed as “exceptional,” whereas women’s common law disabilities were regarded as “general” and as not being displaced in the absence of an express legislative direction.

IV. ENTRY TO THE LEGAL PROFESSION

Not only were women denied the fundamental citizenship right to vote, women also found the judiciary unwilling to recognize their right to choose their occupation and to enter the professions, in particular

54. *See supra* note 19.
56. Justice Windeyer could also have chosen to distinguish *Harrald* on the basis that the electoral roll was conclusive and that a person who was enrolled could not subsequently have their vote challenged. In fact, there were two cases of equal authority to *Harrald* to this effect, cited by counsel, which were disregarded by Justice Windeyer in reaching his decision, namely, *R v. Tugwell*, LR 3 Q.B. 704 (1868) and *Ex parte Gale*, 7 W.N. (N.S.W.) 1.
the legal profession, by sole reason of their sex. Although qualified for admission to legal practice, women were barred through judicial interpretation of the word “person,” whose meaning was restricted to the male sex. The judiciary refused to concede that women were entitled to the privileges of citizenship, which were undeniable where the citizen was a male. It was only by virtue of legislative reforms that females were granted access to a profession open to males as of right. This was characteristic of women’s struggle for equal participation in the public sphere during this period. Whereas men were regarded as its natural inhabitants, women were forced at every stage to have the normal rights of citizenship granted to them by males.

A. United States

The first woman to attempt to gain admission to legal practice in the United States, Belle Mansfield, achieved what would prove to be an enormous hurdle for those who were to follow her, namely, judicial recognition that she was a person. In 1869 she applied for the Iowa bar examinations, aware of the gender restrictions of the Iowa Code of 1851. Fortunately for Miss Mansfield, the matter was heard by the liberal and progressive Justice Francis Springer. Justice Springer was satisfied that she had the necessary qualifications of intellect and character to practice law, but felt constrained by the wording of the Iowa Code. However, Justice Springer referred to another Iowa statute that provided “words importing the masculine gender only may be extended to females.” Justice Springer opined that when a statute contained an affirmative declaration of gender it could not be construed as an implied denial of the right to females. As a consequence of Justice Springer’s liberal interpretation, in June; 1869, Belle Mansfield became the first woman to gain admission to the bar in the United States. The decision of Justice Springer was, however, an anomaly in the subse-

57. Section 1610 of the Iowa Code of 1851 limited admission to “any white male person, twenty one years of age, who is an inhabitant of this State” and who satisfies the court that “he possesses the requisite learning . . . .” KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 12 (1986).
58. Id.
59. Id.
sequent development of the law in relation to the right of women to enter legal practice. It was to be openly challenged and effectively overruled by courts in other states and eventually by the Supreme Court of the United States.

A mere two months after Belle Mansfield was admitted to the Iowa State bar, Myra Colby Bradwell completed the Chicago bar exam in 1869, which rendered her qualified to be admitted to legal practice.\textsuperscript{60} In support of her petition for a license to the Illinois Supreme Court to practice law, she argued that the only matter for determination was whether her sex disqualified her from practicing law. She relied on the same argument that had been successful in the Mansfield decision in Iowa.\textsuperscript{61} In its initial rejection of her application, the Illinois Supreme Court relied on the fact that Mrs. Bradwell was a married woman, and therefore, by virtue of the doctrine of coverture, was unable to enter into contracts with clients.\textsuperscript{62} Mrs. Bradwell was incensed by the court’s determination and filed a supplementary brief in which she relied on the Married Women’s Property Acts of 1861 and 1869,\textsuperscript{63} which conferred on a married woman the right to enter contracts and hold property as a \textit{feme sole}. Mrs. Bradwell argued that for the court to deny her the right to be admitted would be to disregard the “liberal statutes of our State, passed for the sole purpose of extending the rights of married women and forever removing from our law, relating to their power to contract in regard to their earnings and property, the fossil foot-prints of the feudal system, and following the strictest rules of the common law.”\textsuperscript{64}

\textsuperscript{60} \textit{Id.} at 14-15.
\textsuperscript{61} \textit{Id.} at 16; \textit{History of Woman Suffrage}, \textit{supra} note 29, at 602. Mrs. Bradwell argued that Section 28, Chapter 90 of the Revised Statutes of Illinois, which provided that “when any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included,” rendered her qualified for admission. She further pointed to other Illinois statutes which provided for both rights and obligations to be imposed on citizens of the state which were framed in the masculine gender but which clearly applied to women.
\textsuperscript{62} \textit{History of Woman Suffrage}, \textit{supra} note 29, at 603.
\textsuperscript{63} \textit{Id.} at 603-09.
\textsuperscript{64} \textit{Id.} at 608.
The Supreme Court of Illinois had before it a clear opportunity to declare that the Married Womens’ Property Acts of 1861 and 1869, read together, had the effect of removing all common law disabilities on married women. However, the court chose to avoid this construction, and instead resorted to an interpretation of the Illinois statute against a common law background that denied women full citizenship status. In doing so, the court concluded that it was contrary to the principles of the common law to grant women entry to the legal profession and that this could not be the intention of the legislature. The court disregarded the reform Acts entirely, as occurred in Ogden, in favor of adopting an interpretation consistent with the common law. The court chose to deny women a citizenship right which could simply have been declared as bestowed upon them by virtue of the recent legislative initiatives that sought to remove women’s common law disabilities. The court played a crucial role in ensuring the continuation of women’s second-class citizenship status.

65. The court rejected the argument that because the Illinois Legislature had expressly removed the common law disabilities in regard to holding property not derived from their husbands, the legislature had therefore, by necessary implication, also removed other common law disabilities in regard to making contracts, and invited women to enter equally with men into those occupations from which they were presently barred. The court stated that the Married Woman’s Property Act of 1861 was to be given a narrow reading, and that to say that the Act had relieved married women from all their common law disabilities would be “simple misinterpretation.” The court then referred to the Married Woman’s Property Act of 1869, which gave married women the separate control of their earnings, and stated that this Act was not relevant to the present case as “the sex of the applicant, independently of coverture, is, as our law stands, a sufficient reason for not granting this license.” Id. at 610.

66. The court stated that, although it had a discretion to grant a license to practice law, this discretion was limited to a person or class of persons who were intended by the legislature to be admitted. The Illinois admissions statute had adopted the common law of England, where female attorneys were unknown and where “God designed the sexes to occupy different spheres of action” was “regarded as an almost axiomatic truth.” Therefore, when the legislature gave the court the power of granting licenses to practice law it was not the legislature’s expectation that this privilege would be extended equally to men and women. There had been no legislation since then to change this legislative intent, except the Acts of 1861 and 1869. The court stated that they were not at liberty to exercise their power in a mode never contemplated by the legislature and inconsistent with the usages of courts of the common law from the origin of the system to the present day. It was not the province of the court, “by giving a new interpretation to an ancient statute, to introduce so important a change in the legal position of one-half the people.” Id. at 611-12.
Undeterred, Mrs. Bradwell filed a writ of error with the United States Supreme Court. Her argument was based on the Fourteenth Amendment and Article IV of the United States Constitution; namely, that she was entitled to the same privileges and immunities as citizens of all other states and that the State of Illinois could not limit admission to the bar to a class of citizens on the grounds of race or sex.\(^\text{67}\) Whereas her counsel, Carpenter, accepted that the Fourteenth Amendment did not grant women the right of suffrage, he stated that the professions were open to all citizens of the United States.\(^\text{68}\) Whereas the states could determine qualifications for admission, such as age and requisite learning, a qualification that a whole class of citizens could never attain was not a regulation of admission, but rather, a prohibition.\(^\text{69}\) He challenged the Court to determine that married women had no rights that were to be respected, and that the Fourteenth Amendment, although it spoke of all persons and declared them to be citizens, meant only male and unmarried female citizens.\(^\text{70}\) He also argued that the Fourteenth Amendment should be taken to its "logical conclusion," eliminating the principles of the common law regarding married women and the express provisions of state constitutions and statutes.\(^\text{71}\)

The Supreme Court held that the privileges and immunities of citizens of the United States did not extend to admission to practice in the courts of a state, and accordingly, this could be abridged by the States.\(^\text{72}\) The *Bradwell* decision was based on the *Slaughter-House Cases*\(^\text{73}\) decision, which had been delivered the day before and had placed severe limitations on the scope and meaning of the privileges and immunities clause of the Fourteenth Amendment.\(^\text{74}\) It has been

\(^{67}\) History of Woman Suffrage, *supra* note 29, at 615-22.

\(^{68}\) *Id.* at 620. Carpenter conceded that the Fourteenth Amendment did not confer on women the right of suffrage, which was the argument that the Court would accept in *Minor.*

\(^{69}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) *Id.* at 622.

\(^{72}\) *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). Citizenship of itself was not relevant as there were many distinguished (male) lawyers who had been admitted to practice in both the state and federal courts who were not citizens. *Id.* at 139.

\(^{73}\) *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

\(^{74}\) HOFF, *supra* note 10, at 165. In the *Slaughter House Cases*, the Court denied
said that the Court’s narrow interpretation in the *Slaughter House Cases* was probably influenced by its realization that a broad interpretation would necessarily change the status of women.\(^{75}\) The Court refused to even consider the argument that the apparent guarantee of equal protection in the Fourteenth Amendment had the effect of sweeping away the relics of the common law on which women’s second-class citizenship was based. In the Blackstone tradition, Justice Bradley, who wrote the well-known concurring judgment of the Court, insisted that women had no legal existence separate from their husbands despite the passage of Married Women’s Property Acts in a number of the states.\(^{76}\) For Justice Bradley, the “law of the Creator” could not be superseded without a clear, unequivocal statement to that effect by the legislature.

In *Bradwell*, the Supreme Court rejected the opportunity presented to it to afford women, as a privilege or immunity of national citizenship, the right to choose their occupations, in particular to enter the legal profession. It was available to the Court to adopt the view of Justice Bradley in his dissent in the *Slaughter-House Cases* that “a law which prohibits a large class of citizens from adopting lawful employment . . . does deprive them of [their] liberty; [t]heir occupation is their property. Such a law also deprives these citizens of the equal protection of the laws. . .”\(^{77}\) However, this also would have required 

butchers the right to choose an occupation under the privileges and immunities clause and stated that the equal protection clause of the Fourteenth Amendment could only be applied to class distinctions based on race.

75. *Id.* (quoting BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 7-8 (1975)).

76. *Id.* at 165. Justice Bradley opined that for females to be admitted as members of the bar was “contrary to the rules of the common law and the usages of Westminster Hall from time immemorial and it could not be supposed that the legislature had intended to adopt any different rule.” *Bradwell*, 83 U.S. (16 Wall.) at 140. Justice Bradley declared that it could not be affirmed as a historical fact that the right to practice law had ever been established as one of the fundamental privileges and immunities of the sex. “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.” *Id.* at 141. This was the “law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based on exceptional cases.” *Id.* at 141-42. Accordingly, it was not a woman’s fundamental right and privilege to be admitted into every office and position. It was within the power of the state “to ordain what offices, positions, and callings shall be filled and discharged by men and shall receive those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.” *Id.* at 142.

77. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 122 (1872). It is ironic that Justice
the Court to accept that the equal protection afforded to citizens by the Fourteenth Amendment extended to all citizens regardless of sex or color. The Supreme Court assisted in reinforcing women’s traditional subordinate role and confirmed that the protection of the Fourteenth Amendment extended only to men.

The Bradwell decisions illustrate the narrow view of women’s citizenship held by the all-male judiciary during this period. The judgments of both the Illinois Supreme Court and the United States Supreme Court were founded on the assumption that women’s legal status was fundamentally different from that of men, and that women possessed only those specific rights, responsibilities, and protections that the (all-male) legislatures chose to grant them. A decision to extend to women any new right, such as the right to hold property, had no general effect on women’s legal status. Any new right granted was carefully limited to its terms. This illustrates the incremental nature of women’s rights from the viewpoint of the judiciary. Each right granted to women by the legislature was assumed to be read in the narrowest terms and only excluded the common law understanding of women’s rights if there was a clear and express statement to that effect. As a consequence of the Bradwell decision, women in each of the states had to seek legislative endorsement of their right to practice law, as the Supreme Court had denied that this right existed as a national citizenship right for women under the Constitution.

B. Australia

In Australia, the secondary citizenship status of women during 1869 to 1921 is illustrated by two cases involving the question of the eligibility of women to enter the legal profession and to be appointed public notaries. These decisions arose in a different constitutional framework than those in the United States. Although there are constitutions in each of the Australian States and a Federal (Commonwealth) Constitution, nowhere are there any constitutional guarantees of rights

Bradley dissented in this case and yet followed the majority in Bradwell. His argument in support of the butchers was precisely the argument that would have granted Myra Bradwell the protection of the Fourteenth Amendment that she was seeking.
as exist in the Amendments to the United States Constitution. Women's rights, if they existed at all, were found in the common law. If the right did not exist at common law, then specific legislation was required to confer that right to women. However, the distinguishing feature of the Australian cases discussed below is that, at the date of these decisions, Australian women had been granted the right of suffrage both at a federal level and in the six states. Furthermore, women in Australia were granted the right to be elected to federal parliamentary office in 1902, and by 1923, all six of the states had granted women the right to stand for office.78 Despite the apparently liberal approach of the Australian legislatures in granting women this citizenship right, women found that there was little relationship between their right to vote and other citizenship rights when tested in the courts. The unique feature of the Australian "persons" cases is that, unlike those decided in other common law jurisdictions including the United States, they were decided after Australian women had been enfranchised. Despite this, the view of the courts remained that women were not persons despite their enfranchisement, the so called "first right" of citizenship.79

It was not until 1904 that women formally tested in the Australian courts the extent of their citizenship rights in Australia, post-suffrage. In Western Australia in 1900, a barrister, Mr. R.A. Haynes KC, wrote to the Barrister's Board requesting permission to have his daughter Edith articled to him under the Legal Practitioners Act 1893 (W. Austl.).80 Although Edith Haynes' application as a law student was approved, she was warned by the Board that it could not guarantee her admission.81 In 1904, she sought permission to be admitted to the intermediate examinations. The Board refused her request on the

78. See supra notes 45-46.
80. Geraldine Byrne, Just Dears: Western Australia's First Women Lawyers, 21(4) BRIEF 13, 13 (1994). The Barrister's Board supervised and regulated the admission of legal practitioners.
81. Id.
grounds that "women were not eligible for admission under the Act."82 She then obtained an order nisi calling upon the Board to show cause why a writ of mandamus should not be issued directing the Board to admit her.83

The Legal Practitioners Act 1893 (W. Austl.) provided that "every person" who complied with certain conditions was eligible for admission. Furthermore, the Interpretation Act 1898 (W. Austl.), Section 3, provided that the masculine included the feminine. The Full Court of the Supreme Court of Western Australia held that the words "every person" in the Act did not include women, and that accordingly, women could not be admitted as practitioners. Justice Burnside stated that "the right of a woman to be admitted is a misnomer . . . the common law of England has never recognized the right of women to be admitted to the Bar."84 Justice Burnside was "unable to find any instances where any right has been conferred. It is a privilege which has been conferred by the courts originally, and then has been regulated subsequently by statute from almost time immemorial, and which has been confined to the male sex."85 Justice Burnside stated that throughout the civilized world he had not been able to ascertain any instances under the common law of the United States or England where the right of women to be admitted to the Bar had been conferred.86 He did not find the argument "very forcible" that because the words of the statute referred to "every person," the statute should include women. Justice Burnside was not "prepared to start making law." He stated that "when the legislature in its wisdom confers the right on women, then we shall be pleased to admit them."87

82. In re Edith Haynes, 6 W.A.L.R. 209 (1904).
83. Id.
84. Id. at 212-13.
85. Id. at 214.
86. Id. at 213. Justice Burnside's research on this matter appears to be somewhat deficient as he did not appear to find the Mansfield case in Iowa. See discussion supra notes 57-59 and accompanying text.
87. Haynes, 6 W.A.L.R. at 214. Justice McMillan was concerned about the possibility of women becoming judges if they were admitted to the Bar. He stated that the "change was of such importance that it should be made, and in fact could only be made, by the legislature. . . ." Haynes, 6 W.A.L.R. at 212.
The only "authority" referred to by the court was the case of Bertha Cave, who, in 1903, applied to join Gray's Inn in London as a barrister. When the Benchers of the Inn refused to call her to the Bar, she appealed against their decision to a special tribunal consisting of the Lord Chancellor, the Lord Chief Justice, and five other judges. The Benchers argued that the regulations of the Inns of Court indicated that males only were to be admitted to practice at the Bar and that no female had ever been admitted to the Inns of Court. The Lord Chancellor replied that there was no precedent for ladies being called to the English Bar and that the tribunal was unwilling to create such a precedent. Although this was the only "authority" to which the Supreme Court of Western Australia referred in Haynes, it was not bound by this decision of an English Tribunal. The court refused to interpret the clear words of the statute and declare that Miss Haynes was a "person," and therefore, eligible for admission upon complying with the conditions of the Legal Practitioners Act.

What is unique about the Haynes case, unlike any of the other "persons" cases in the United States, and indeed England and Canada, is that Haynes was decided at a time when Australian women had been granted the right to vote, and therefore, arguably had attained citizenship status. However, it appears that the recently-attained citizenship status of Western Australian women was inconsequential to the Supreme Court of Western Australia in reaching its decision. The gender-neutral term "person" was found to encompass only male applicants for admission. As occurred in the Bradwell case, the court avoided the opportunity it had before it to confer upon women a privilege of citizenship, which was taken for granted where the subject was male. In a case such as this where the legislation read literally to include women, the court succumbed to the appeal of the tradition of the common law.

88. Id. at 211. Reference is made to this case in ALBIE SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES 28 (1978).
89. Reported in THE TIMES, Dec. 3, 1903. In the proceedings which lasted five minutes, Miss Cave addressed the tribunal herself.
90. Women had been granted the right to vote in Western Australian State elections in 1899 and in federal elections in 1902. See supra note 46.
91. Thornton, supra note 79, at 6.
in preference to the rights of the female citizenry. As a consequence of this decision, Edith Haynes was never admitted to legal practice. It was not until 1923 that the Women's Legal Status Act (W. Austl.) was passed and the first woman was admitted to practice in Western Australia in 1930.92

The unwillingness of the all-male judiciary to confer on women their full citizenship rights was not isolated to Western Australia, nor to women's entitlement to enter legal practice. In South Australia, although Section 33 of the Language of Acts Act 1872 (S. Austl.) provided that in every Act of Parliament, all words of the masculine gender also included the feminine, this did not extend to the rules of court which were all framed in the masculine gender. When Doris Jones became the first woman to enroll in law subjects at the University of Adelaide in 1910, she was undertaking studies to qualify for a profession from which women were barred. The South Australian Parliament moved quickly to ensure that the restriction on women entering legal practice was removed. The Female Law Practitioners Act 1911 (S. Austl.) guaranteed that women could proceed to admission as legal practitioners on the same basis as men93 and enabled Mary Kitson, the first woman law graduate from the University of Adelaide, to be admitted to practice in the Supreme Court of South Australia on October 20, 1917.

In 1921, Miss Kitson applied for appointment as a public notary under the Public Notaries Act 1859 (S. Austl.), which would entitle her to administer oaths and certify certain classes of documents. When her application came before the Supreme Court of South Australia, the court held that, despite there being no question as to her ability to perform the duties and exercise the functions of a public notary, the

92. Women's Legal Status Act 1930 (W. Austl.). The enabling legislation passed in the other states included the Female Law Practitioners Act 1911 (S. Austl.); Women's Legal Status Act 1918 (N.S.W.); Women's Disabilities Removal Act 1903 (Vict.); Legal Practitioners Act (amendment) 1904 (Tas.); and the Legal Practitioners Act (amendment) 1905 (Queensl.).

93. Section 2 of the Female Law Practitioners Act 1911 provided that "notwithstanding anything contained in any Act or any rules of court . . . any woman would be entitled to practise as a barrister, attorney, solicitor or proctor of the Supreme Court on complying with the rules of court."
words “every person” in Section 3 of the Act did not include women. Justice Poole noted that, whereas the Parliament had removed the restriction on women practicing as lawyers, it had not seen fit to remove the common law restriction on women filling the office of public notary. Justice Poole conceded that “person” was a term which, in its ordinary sense, included both men and women. Although Section 26 of the Acts Interpretation Act 1915 (S. Austl.) provided that words of the masculine gender included the feminine gender, this was subject to Section 3 of the Act, which provided that if this interpretation was inconsistent with the intent and object of the Act, then the Acts Interpretation Act would not apply. The question was, therefore, whether it was “inconsistent” with the object and intent of the Public Notaries Act to construe “person” to include persons of both sexes. Justice Poole relied on the interpretation of “every person,” “every man,” and “a person” in the common law cases of R v. Crosthwaite, Chorlton v. Lings, and Beresford-Hope v. Lady Sandhurst, and concluded that because a woman could not fill the office before the passage of the Public Notaries Act 1859, and because the Act evidenced no intention to remove such a disability, to construe the term “person” to include both men and women would be to give the words a meaning inconsistent with the object and intent of the Act. The legislature alone could alter the law, and until it did so, the court had to hold that no woman could be appointed a public notary.

94. In re Kitson, S.A. St. R. 230 (1920). Section 3 of the Act provided that “[e]very person who shall be desirous of obtaining an appointment as a Public Notary . . . shall apply by petition . . . setting forth such facts . . . as to his fitness and qualification to discharge the duties and exercise the functions of a Public Notary. . . .”

95. Id. at 237. Justice Poole considered that the Female Law Practitioners Act 1911, pursuant to which Miss Kitson had been admitted, was “not sufficiently wide in its terms to give authority for her appointment.” Id. at 232.

96. Id. at 232.

97. Id. at 232-33.

98. Id. at 233-34.


100. Chorlton v. Lings, LR 4 C.P. 374 (1868).


103. Id. at 237.
The Kitson case is a dramatic illustration of the secondary citizenship status bestowed on women by the Australian judiciary.\textsuperscript{104} Like Edith Haynes, Miss Kitson was denied her application to be appointed a public notary by virtue of the court’s interpretation of “every person” in the Act and its reliance on common law authorities. However, what is remarkable about the court’s reliance on these “authorities” is that they were all concerned with women’s enfranchisement in the United Kingdom, an issue long settled in the State of South Australia.\textsuperscript{105} In 1894, an amendment to the South Australian Constitution granted all women the right to vote and the right to stand for Parliament (public office), making it among the first in the world to do so.\textsuperscript{106} The significance of women’s citizenship status in the State of South Australia appears not to have impacted upon the judicial consciousness, although more than a quarter of a century had elapsed. It was open to the court to say that the amendments to the South Australian Constitution evidenced an intention on the part of the legislature to grant to women full citizenship rights, which included the right to be appointed to the office of public notary. The court could have dismissed these earlier authorities simply on the basis that they were inapplicable in a jurisdiction which had recognized the full citizenship status of its women.

Furthermore, the fact that the legislature had a decade earlier, in 1911, enacted legislation to permit women to be admitted to practice in South Australia, and the fact that it had been the Supreme Court itself who had admitted Miss Kitson to practice, did not cause the court to disregard the relics of the common law and its denial to women of their full citizenship rights.\textsuperscript{107} It required yet another piece of legislation, the Sex Disqualification (Removal) Act 1921 (S. Austl.), to grant women a citizenship right taken for granted by men, namely, to permit women to perform the functions of a public notary.\textsuperscript{108}

\textsuperscript{104} Thomton, supra note 79, at 6.

\textsuperscript{105} Id. at 7.

\textsuperscript{106} See supra note 45.

\textsuperscript{107} Thomton, supra note 79, at 7.

\textsuperscript{108} Mary Kitson was appointed a public notary through the provisions of the Sex Disqualification (Removal) Act 1921 (S. Austl.), which removed sex and marriage as disqualifications for a person’s appointment as a public notary or justice of the peace.
This prompt legislative response suggests that the wider community regarded the decision as anomalous. Nevertheless, the decision provides striking evidence of the qualified meaning of citizenship attributed to women by the judiciary in the post-enfranchisement era in Australia.109

V. SECOND-CLASS CITIZENS

The foregoing discussion highlights the fact that women in the late nineteenth and early twentieth centuries were never properly accepted as citizens in either Australia or the United States. Even after the right of suffrage, women were not recognized by the courts as full citizens, nor were they "persons." The view of the all-male judiciary was that, as second-class citizens, women did not have an automatic entitlement to the normal citizenship rights, privileges, or immunities that existed as of right for men. If these rights were to be conferred on women, it would only be by way of an express legislative enactment by an all-male legislature. During this period, every right or privilege which was automatic as a corollary of citizenship for men had to be contested by women.

The legacy of the philosophers' theories of the seventeenth century persisted into the mid-twentieth century in the reasoning of the judiciary. Like these philosophers, the judiciary was far readier to uphold women's traditional subordinate role than to acknowledge the importance of women's potential and their rights. They too were inclined to view the "feminine" characteristics of women as immutable factors — as the "natural condition" of women — rather than to recognize them as largely the effects of the patriarchal conditions of society.110 It was the judiciary who held to these views much longer than the legislatures who were prepared at each stage to grant women citizenship rights, which in turn were interpreted as narrowly as possible by the judiciary.

The constitutional and legal framework in which the judiciary operated was underpinned by the notion of separate spheres that

110. MOLLER OKIN, supra note 3, at 273.
viewed women incorporated into society not as the equals, but as the subordinates of men.\textsuperscript{111} The basis of women's inclusion in society was their natural role and their occupancy of the private sphere, which complemented man and enabled him to fully exercise citizenship rights in the public sphere. According to this theory, the citizen was male, and full rights of citizenship attached only to him. Therefore, the attempts by women during this period to convince the judiciary to declare as universal that which was fundamentally male was doomed to failure. This provides an explanation for why women's attainment of citizenship rights could only occur, and did occur, incrementally and with substantial resistance from the judiciary. It also raises the question of whether, in a society based on such foundations, women can ever be full and equal citizens as their participation depends on their subordination.\textsuperscript{112}

This Essay has sought to illustrate the pivotal role played by the judiciary in the United States and Australia in reinforcing women's traditional second-class citizenship status at common law during this period. The judiciary was central to upholding women's position in society, not as full citizens but as the subordinates of men. The common law and the constitutional framework that underpinned the system of government in both countries was based on the notion of separate spheres and required the judiciary to play the role it so capably did in denying women status as full citizens in the absence of a clear legislative direction. The judiciary was crucial in upholding the status quo and ensuring that women would attain citizenship rights only where the legislative intent was clear. For women, the struggle from exclusion to emancipation was one that was achieved only incrementally and with substantial resistance. However, emancipation from the second-class

\textsuperscript{111} For further discussion, see Carole Pateman, \textit{The Sexual Contract} (1988); \textit{The Disorder of Women: Democracy, Feminism and Political Theory} (1989).

\textsuperscript{112} For a fuller discussion of these issues see Carole Pateman, \textit{Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship, in Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity} (Gisela Bock & Susan James eds., 1992). Pateman argues that in order to achieve a "genuinely democratic citizenship" where men and women are equal citizens, it is necessary for the different contributions of women to be valued rather than viewed as inferior as the rationale for their subordination.
citizenship status to which the women of this period were relegated did not ensure for them equal citizenship status. The struggle to achieve this status, and thus full equality, is one that lay ahead, and which arguably is still to be achieved as we approach the end of the twentieth century.