

THE LADIES? FORGET ABOUT THEM. A FEMINIST PERSPECTIVE ON THE LIMITS OF ORIGINALISM

*Mary Anne Case**

One hundred years ago, in *An Economic Interpretation of the Constitution of the United States*, Charles Beard asked of the Framers:

Did they represent distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights, or were they working merely under the guidance of abstract principles of political science?¹

Beard examined the Framers' investments in, among other things, public securities, western lands, shipping and manufactures,² but he did not consider in any detail the possible influence of their personal experience as members of the distinct group of males who had an economic interest, through the laws of coverture, in the labor and property of the women in their families.³ Yet the Framers of both the original Constitution and

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1. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 73 (1913).

2. *Id.*

3. Had he considered their economic interest as males, Beard would have been able to raise even above his estimate of "five sixths" the "overwhelming majority of members

the post-Civil War Amendments were quite conscious of their interests in preserving their male prerogatives in law. Repeatedly and explicitly asked, as John Adams was by his wife Abigail, to “[r]emember the ladies . . . in the new Code of Laws which I suppose it will be necessary for you to make, . . . and be more generous and favourable to them than your ancestors,”⁴ the Framers deliberately rejected the demand that they “not put such unlimited power into the hands of the Husbands.”⁵ Asked to “[r]emember, all Men would be tyrants if they could,”⁶ they did not simply forget about the ladies; they specifically and intentionally determined to exclude them and to confirm men’s tyrannical power.⁷ But, far from acknowledging this as a naked power grab, they could claim to justify women’s exclusion “under the guidance of abstract principles of political science.” In particular, they could rely on a notion, common in the eighteenth century, that it would upset the balance of power to give women, who already were in a position to exert powerful indirect influence on and through their men from within the household, a more direct voice in public affairs. As Abigail Adams described this view, “It would be bad policy to grant us greater power say they since under all the disadvantages we Labour we have the as[c]endancy over their Hearts [a]nd. . .by submitting sway.”⁸ Thus, the disenfranchisement of women could be characterized as a principled decision about the allocation of power and the locus at which power is exercised in the same way as might, for example, the construction of the Senate, federalism, or the separation of

[who were] immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.” *Id.* at 149.

4. Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *THE BOOK OF ABIGAIL AND JOHN, SELECTED LETTERS OF THE ADAMS FAMILY 1762-1784*, at 121 (L.H. Butterfield et al. eds., 1975).

5. *Id.*

6. *Id.*

7. More than the Adams correspondence demonstrates that it is “not anachronistic” to consider that the Framers “explicitly denied . . . women entry into the new political regime.” *See, e.g.*, LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 9 (1998) (quoting James Otis asking if “all were reduced to a state of nature . . . had not apple women and orange girls as good a right to give their respectable suffrage for a new King as the philosopher . . . ?”). And other reasons than John Adams’s, discussed *infra*, were given for excluding them. *See, e.g.*, Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), as quoted in *United States v. Virginia*, 518 U.S. 515, 532, n.5 (“Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . women, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men.”).

8. Letter from Abigail Adams to Mercy Otis Warren, (Apr. 27, 1776), (available at <http://rotunda.upress.virginia.edu/founders/ADMS-04-01-02-0257>) (summarizing John Adams’s response to Abigail’s letter insisting that the ladies be remembered).

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powers, each of which also could be seen to serve sectarian interests.

My article will consider the offered justifications in their historical context and some possible responses to them. Like Beard's history itself, "[t]he following pages are frankly fragmentary. They are designed to suggest new lines of . . . research rather than to treat the subject in an exhaustive fashion."⁹ But my motive for wanting to take up this project at this time has less to do with Beard and the past than with my concerns about the constitutional future of sex discrimination¹⁰ at a time when voices as seemingly disparate as Justice Antonin Scalia¹¹ and Roberta Kaplan, attorney for DOMA plaintiff Edith Windsor,¹² disparage the need for heightened scrutiny for sex discrimination without taking any account of women's specifically intended historical exclusion and its lingering after-effects. The article will therefore conclude with an examination of the limits of originalism, not only for women and their rights, but for constitutional adjudication more generally.

9. BEARD, *supra* note 1, at v. This essay is also fragmentary in another sense—it cannot pretend to do justice to the volumes of primary and secondary sources that have already cogently addressed the limitations of the Constitution and its Framers when it comes to issues concerning women and sex equality, although it will cite a far from exhaustive subset of such works.

10. As Barack Obama put it in a different context, "I didn't come here to debate the past. I came here to deal with the future." Sheryl Gay Stolberg & Alexei Barrionuevo, *Obama Says U.S. Will Pursue Thaw With Cuba*, N.Y. TIMES, Apr. 17, 2009.

11. *See infra* note 65.

12. In her oral argument before the Second Circuit in *United States v. Windsor*, 133 S. Ct. 2675 (2013), Kaplan observed, "we believe that . . . being gay or lesbian is closest to being an African American than it is to being – I hate to get so personal about this, than being a woman, because there is nothing about being gay or lesbian that has anything to do with an individual's ability to perform in society and that's essentially what I believe the courts are looking at, that's the first factor, I believe it is the most important factor. Whereas, for women, and I'm obviously a member of that class, there are obviously things, we get pregnant, we are not as strong, there is the firemen cases things like that, where there could be some kind of differentiation by the legislature that would make sense. With respect to gay and lesbian people, it is very hard if not impossible to conceive of any such differentiation." In context, ironically, Kaplan's repudiation of constitutional anti-stereotyping doctrine for sex-based classifications did not serve her client's cause well, because it allowed Second Circuit Chief Judge Jacobs immediately to point out that gays and lesbians in same-sex couples could indeed be viewed as differently situated with respect to their ability to procreate. Cert. petition in *United States v. Windsor*, 2012 U.S. Briefs 59493 at *a26.

THE TYRANNY OF MEN VS. THE DESPOTISM OF THE
PETTICOAT

When Beard does discuss women, he lumps them together with slaves, indentured servants, and propertyless men among “the disfranchised” who were “not represented in the Convention that drafted the Constitution except under the theory that representation has no relation to voting.”¹³ Yet the evidence he presents as to the sources of the Framers’ wealth suggests that a considerable number of them had married heiresses or stemmed from families whose wealth was traceable chiefly from the maternal line.¹⁴ This alone would give these Framers a direct personal incentive to “insist upon retaining an absolute power over Wives”¹⁵ and their property, despite Abigail Adams’s desires

13. BEARD, *supra* note 1, at 24.

14. See *id.* at 75-76 (“Richard Bassett, of Delaware . . . was the adopted son of Mr. Lawson, a lawyer, who married a Miss Inzer. The Inzer family was . . . heir to Bohemia Manor. . . . Mr. Bassett was educated and trained for the profession of law by Mr. Lawson, whose heir he became. By this inheritance he came into possession of six thousand acres of Bohemia manor.”); *id.* at 82-83 (“George Clymer, of Pennsylvania, was the son of ‘a well-to-do merchant and ship builder of Philadelphia’ who had augmented his fortunes by marrying the daughter of a fellow merchant of the same city. . . . Clymer’s personal fortune was further enhanced by a happy marriage to Elizabeth Meredith, the daughter of Reese Meredith, ‘one of the principal merchants of Philadelphia.’”); *id.* at 87 (Had John Dickinson’s “personal fortunes . . . not been sufficient . . . , his marriage into one of the first and wealthiest commercial families would have more than made up for his deficiencies. In 1770 he married Mary Norris, and for a time lived at the family estate, Fairhill, one of the show places of the day.”); *id.* at 88-90 (“Though [Oliver Ellsworth] was almost briefless during the early days of his practice, he had the good fortune to wed the daughter of William Wolcott, of East Windsor, ‘a gentleman of substance and distinction.’”); *id.* at 91 (Thomas Fitzsimons “married the daughter of Robert Meade, and established business relations with his brother-in-law ‘who was one of the prominent merchants and shipowners of Philadelphia.’”); *id.* at 117 (William Samuel Johnson “added to his own patrimony by marrying the daughter of a ‘wealthy gentleman’ of Stratford.”); *id.* at 119 (“Rufus King was also fortunate in his marriage . . . his wife ‘was the only child of Mr. John Alsop, a very respectable and eminent merchant in [New York]’”); *id.* at 124 (William Livingston “married Miss French, ‘whose father had been a large proprietor of land in New Jersey.’”); *id.* at 127 (George Mason “married the daughter of a Maryland merchant, from whom a large estate came into his family.”); *id.* at 148 (George Wythe’s “second wife ‘was a lady of a wealthy and respectable family of Taliaferro, residing near Williamsburg.’”). As Mary Ritter Beard points out, Blackstone, whose exaggerated description of wives’ legal subjection to husbands was eagerly embraced by Americans, also profited from family ties to wealthy women. See MARY RITTER BEARD, *WOMAN AS FORCE IN HISTORY: A STUDY IN TRADITIONS AND REALITIES* 91 (1946) (describing Blackstone as a tradesman’s son whose mother and wife were from the landed gentry, through which family connections he obtained a legal education and a country seat to house him when he failed at law practice).

15. Letter from Abigail Adams to John Adams (May 7, 1776), in *THE BOOK OF ABIGAIL AND JOHN*, *supra* note 4, at 127 (“I can not say that I think you are very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist upon retaining an absolute power over Wives”).

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to the contrary.¹⁶ Abigail observed of John's unwillingness to "[e]stablish. . . some Laws in [women's] favour upon just and Liberal principals" what Beard documented with respect to the Framers more generally: "I have . . . been making trial of the Disintrestedness of his Virtue, and when weighd in the balance have found it wanting."¹⁷

Like Beard, John Adams, in his response to Abigail, lumps women with the rest of the disenfranchised:

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bonds of Government every where. That Children and Apprentices were disobedient—that schools and Colleges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerfull than all the rest, were grown discontented.—This is rather too coarse a Compliment, but you are so saucy, I wont blot it out.

Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would compleatly subject Us to the Despotism of the Peticoat, I hope General Washington, and all our brave Heroes would fight.¹⁸

For John Adams to equate discontented women with insolent Negroes might suggest to a modern audience that the decision not "to repeal our masculine systems" is no more than a naked power grab by what Abigail Adams called a "sex naturally tyrannical."¹⁹ But, in the late eighteenth century, his expressed concern about a

16. Abigail never ceased to press John on this score. Years after first asking him to "remember the Ladies," she wrote, "Even in the freeest countrys our property is subject to the controul and disposal of our partners, to whom the Laws have given a sovereign Authority. Deprived of a voice in Legislation, obliged to submit to those Laws which are imposed upon us, is it not sufficient to make us indifferent to the publick Welfare?" Letter from Abigail Adams to John Adams (June 17, 1782), in 4 ADAMS FAMILY CORRESPONDENCE 328 (L.H. Butterfield et al. eds., 1973).

17. Letter from Abigail Adams to Mercy Otis Warren, *supra* note 8.

18. Letter from John Adams to Abigail Adams (Apr. 14, 1776), in THE BOOK OF ABIGAIL AND JOHN, *supra* note 4, at 122-23. Laughter was an all too common response to women's rights claims. See Mary Anne Case, *From the Mirror of Reason to the Measure of Justice*, 5 YALE J.L. & HUMAN. 115 (1993) (situating in historical context the laughter that greeted Representative Smith's introduction of a prohibition against sex discrimination into the text of Title VII of the 1964 Civil Rights Act).

19. Letter from Abigail Adams to John Adams, *supra* note 4, at 121 ("That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute").

possible “Despotism of the Petticoat” would have resonated instead with concerns about the separation of and balance of powers between men and women and between their respective spheres.²⁰ As Mary Beth Norton describes it, the term “Petticoat Government,” used as the title of a 1702 pamphlet by John Dunton, editor of the *Athenian Mercury*, on the accession of Queen Anne to the British throne, originates in a time of transition from mid-seventeenth century Anglo-America, when “high social status rather than gender identified the appropriate wielders of power in both household and state,”²¹ to the pre-revolutionary eighteenth century, which increasingly defined all women out of public life into a private sphere. “Dunton began by praising women in general, denying any sexual difference in minds or souls,”²² but went on to endorse rigidly separate spheres, with a man’s province being the “out of doors” or public sphere and that of a woman who was not a hereditary monarch being “the Discreet and Housewifely Ruling of a House” where “her very Husband lives under *Petticoat-Government*.”²³

It was the French rather than the American revolutionaries who were most alive to the risk of the “despotism of the petticoat.” The sentiment that politically powerful women did more harm than good was well-nigh universal in a country with a vivid memory of inept female regents (from the two Medicis to Anne of Austria), interfering royal mistresses (from Maintenon and Pompadour to DuBarry, who was guillotined for her crimes), ambitious court intrigantes (from the frondières to the Comtesse de Polignac) and a network of intellectuals, artists and officials entirely dependent on the whims of fashionable women.²⁴ Women’s extravagance could be blamed for the bankruptcy of France, their scheming for ruinous foreign policy, their patronage

20. Cf. LINDA K. KERBER, *WOMEN OF THE REPUBLIC* 200 (2000) (noting that in the early republic, “[m]otherhood was discussed almost as if it were a fourth branch of government”).

21. MARY BETH NORTON, *SEPARATED BY THEIR SEX: WOMEN IN PUBLIC AND PRIVATE IN THE COLONIAL ATLANTIC WORLD*, at xiv (2011).

22. *Id.* at 101.

23. *Id.* at 102 (quoting JOHN DUNTON, *PETTICOAT GOVERNMENT* 97 (1702)).

24. See, e.g., MONTESQUIEU, *PERSIAN LETTERS* 197 (C.J. Betts, ed. & trans., Penguin 1973) (1721) at 197 (Letter 107, Rica to Ibben) (“[F]or every man who has any post at court, in Paris, or in the country, there is a woman through whose hands pass all the favours and sometimes the injustices that he does. These women are all in touch with one another, and compose a sort of commonwealth whose members are always busy giving each other mutual help and support. It is like another state within the state, and a man who watches the actions of ministers, officials, or prelates at court, in Paris, or in the country, without knowing the women who rule them, is like a man who can see a machine in action but does not know what makes it work”).

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for the appointment of the inept and corrupt, their control over cultural life for the effeminacy of the French nation.²⁵ The embodiment of all these evils was Marie Antoinette. There was a widespread view that upper-class women, whose exercise of secret power was associated with some of the worst excesses of the Old Regime, had to be purged from the system if it was to have a hope of avoiding corruption. As for the mobs of lower class women, they could be excluded from political rights on much the same theory as were the “children, the insane, and the infamous” with whom they were so often lumped²⁶—the theory that a rational political system demands rational, informed, responsible participants.²⁷ As a result, French women, who had been voters from the time of Philip the Fair in the 14th century and who had participated in voting for the Estates General of 1789 on terms nearly equal to those of men,²⁸ were denied all voting rights in the Revolution and did not regain them until 1946.

While anti-feminist French legislators took from their history the desirability of women’s permanent exclusion from political life and power, French feminists like Marie Olympe de Gouges

25. Although he balances the catalogue with examples of males influenced by private passion quite apart from any female influence, Alexander Hamilton’s account of the baleful influence of women who “abused the confidence they possessed” is much like that of the French. See THE FEDERALIST NO. 6, Concerning Dangers from Dissensions Between the States, Independent Journal, Wednesday, Nov. 14, 1787 (“Pericles, in compliance with the resentment of a prostitute, at the expense of much of the . . . treasure of his countrymen, attacked, vanquished, and destroyed the city of the Samnians. . . . The influence which the bigotry of one female [Madame de Maintenon], the petulance of another [Duchess of Marlborough], and the cabals of a third [Madame de Pompadour], had in the contemporary policy, ferments, and pacifications, of a considerable part of Europe, are topics that have been too often descanted upon not to be generally known”).

26. Archives Parlementaires 29 April 1793, report of Languinas p. 562.

27. For further discussion, see Mary Anne Case, “La Révolution n’a rien fait pour les pauvres femmes”: The Rhetoric and Reality of Political Rights for Women in the French Revolution (unpublished manuscript) (on file with the author). I was delighted to have the opportunity, in returning to the University of Virginia for the Beard Conference, to pursue themes I first voiced there in my 1990 job talk for the University of Virginia School of Law.

28. The regulations governing the convocation of the Estates General of 1789 explicitly gave noble females with fiefs and communities of religious women the right to name proxies to represent them. For the Third Estate, the regulations called for participation by all inhabitants on the tax rolls of cities and other communities, assembled by corporation, with those not belonging to a corporation or similar body electing separate delegates. There was substantial regional variation in the interpretation of this requirement, including the extent to which women were meant to participate. In general practice, however, the unit of participation seems to have been, not the individual, but the hearth and almost all the numerous women recorded as participating in local assemblies are described as “widows” or unmarried “girls maintaining their own hearths.” Occasionally, however, married women with substantial property in their own name appear to have sent their husbands as their proxies. For further elaboration, see LÉON ABENSOUR, LA FEMME ET LE FÉMINISME AVANT LA RÉVOLUTION 325-52 (1923).

instead argued that women's corrupt misrule would end only when they are better educated, are given job opportunities that do not involve the sale of their sexual favors, and have direct rather than devious access to power. De Gouges saw the best hope for improvement in the passage of laws providing for women to be educated and "to join in all the activities of men. If man insists on finding this means impracticable, let him share his fortune with woman, not according to his whim, but according to the wisdom of the law."²⁹

Just as Olympe de Gouges's demand for a legally mandated sharing of power and property between the sexes resonates with that of Abigail Adams, the French revolutionary notion that women already had so much power in the home and in society that they couldn't be afforded any power in the state, that it would upset the balance of power to give them political rights, is consistent with John Adams's expressed view that men were already their wives' subjects and would be victims of petticoat despotism if they yielded further.

THE LEGISLATIVE INFLUENCE OF UNENFRANCHISED WOMEN

A much more benign view of women's behind-the-scenes influence on politics comes through in Mary Ritter Beard's essay *The Legislative Influence of Unenfranchised Women*,³⁰ published a year after her husband's *Economic Interpretation of the Constitution* and six years before the ratification of the Nineteenth Amendment, in the midst of a campaign for woman suffrage in which she was an active participant.³¹ She contrasts two

29. MARIE OLYMPE DE GOUGES, DECLARATION OF THE RIGHTS OF WOMAN AND THE FEMALE CITIZEN (1791). Among the laws for improving the financial aspects of relations between the sexes De Gouges proposed were ones mandating equal inheritance, indemnities for seduced and abandoned women, rights for the illegitimate to "the name and property of the father," community of property in marriage, and equal division in case of divorce. She further favored laws providing for termination of marriages at will, clerical marriage, and the restriction of prostitutes to designated quarters. None of these proposals was outrageous for its time. Indeed, many were enacted by the Revolutionary legislature. But Olympe de Gouges herself was guillotined, a fact which may cast in a darker light John Adams's apparently flip insistence that male prerogatives should be defended by force if necessary. For further discussion, see Mary Anne Case, Olympe de Gouges: "Foremother" of Feminists? Or their Heir? (unpublished manuscript) (on file with the author).

30. MARY RITTER BEARD, *The Legislative Influence of Unenfranchised Women*, 56 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1914), reprinted in MARY RITTER BEARD, A SOURCEBOOK 89-94 (Ann J. Lane ed., 1977).

31. Mary Ritter Beard worked both ends of the suffrage campaign, giving a Statement to the House Committee on Woman Suffrage and campaigning to win over

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forces behind “invisible government”: the malign force of “powerful economic interests, organized and always alert” and the “beneficent influences . . . of voteless women.”³²

With respect to those women powerful enough to engage in “statesmanlike wire-pulling, . . . organized efforts of women for the accomplishment of definite programs; lobbies in legislative chambers . . . and cooperation with men in organized legislative effort,”³³ Mary Ritter Beard seems to imagine them nearly exempt from the pursuit of self-interest her husband looked for in the Framers. All the issues with respect to which she lists these women as exerting influence, with the exception of “legislation dealing with their own enfranchisement,”³⁴ involve “local improvements of one kind or another” or “the progress of modern social legislation of all kinds.”³⁵ Yet, in urging “Votes for Workingwomen,” Mary Ritter Beard stressed “they need the vote for what it can do for them” on issues including “[t]he white slave traffic, mothers’ pensions, unemployment, education, child labor” and a host of others she enumerated “which vitally affect workingwomen and will never be dealt with to their advantage until they make themselves felt as human beings with minds and hearts.”³⁶ And she found it “interesting to note that those women most actively using indirect influence are coming to prefer direct action on their own account.”³⁷

FREEING THE SLAVES, BUT NOT A MAN’S WIFE AND DAUGHTERS

Just as Charles Beard mentions, but does not analyze in detail, the financial incentives the Framers might have had for opposing either political power for their wives and mothers or a reform of the laws of coverture as proposed by Abigail Adams, he also mentions, but does not analyze, their possible financial stake in denying political power and legal rights to their unmarried daughters. Beard notes that

working class men. See MARY RITTER BEARD, *Statement to the House Committee on Woman Suffrage*, in MARY RITTER BEARD, *A SOURCEBOOK*, *supra* note 30, at 100.

32. RITTER BEARD, *The Legislative Influence*, *supra* note 30, at 89-90.

33. *Id.* at 90.

34. *Id.* at 91.

35. *Id.* at 93.

36. MARY RITTER BEARD, *Votes for Workingwomen*, 3 *WOMAN VOTER* 3 (1912), reprinted in MARY RITTER BEARD, *A SOURCEBOOK*, *supra* note 30, at 80, 84.

37. RITTER BEARD, *The Legislative Influence*, *supra* note 30, at 94.

Hamilton in his report on manufactures . . . observes that one of the advantages of the extensive introduction of machinery will be “the employment of persons who would otherwise be idle, and in many cases, a burthen on the community, either from bias of temper, habit, infirmity of body, or some other cause, indisposing or disqualifying them for the toils of the country. It is worthy of remark, that, in general, women and children are rendered more useful, and the latter more early useful, by manufacturing establishments, than they would otherwise be. Of the number of persons employed in the cotton manufactories of Great Britain, it is computed that four-sevenths, nearly, are women and children; of whom the greatest proportion are children, many of them of a tender age.” Apparently this advantage was, in Hamilton’s view, to accrue principally to the fathers of families, for he remarks: “The husbandman himself experiences a new source of profit and support, from the increased industry of his wife and daughters, invited and stimulated by the demands of the neighboring manufactories.”³⁸

Although Beard ends his economic history with the framing of the original Constitution, it is worthy of note that, in the debates around the framing of the post-Civil War Amendments, the continued economic interests of the fathers of families in the labor of their wives and daughters was front and center in debates about the expected meaning of these Amendments. Thus, as Jill Hasday observed, “congressmen on all sides of the debates over the Fourteenth Amendment hoped that the amendment’s Equal Protection Clause would not be read to disrupt common law coverture or prohibit sex discrimination, even as their discussion of the amendment made clear that such an interpretation of equal protection was possible.”³⁹ And, as Lea VanderVelde, among others, has documented, whatever their inclinations with respect to the abolition of Negro chattel slavery, congressmen were at pains to insist “that the term ‘involuntary servitude’ not apply to family relationships where the head of the household legally held a property right in the services of other household members.”⁴⁰ Thus, for example, Chilton White of Ohio argued against abolition and in favor of due process and compensation for slave owners as follows:

38. BEARD, *supra* note 1, at 24-26.

39. Jill Elaine Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1719 (2013).

40. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 454 (1989).

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The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs All these rights rest upon the same basis as a man's right of property in the service of slaves. The relation is clearly and distinctly defined by the law, and as clearly and distinctly recognized by the Constitution of the United States.⁴¹

And, after ratification, Senator Edgar Cowan, "the primary voice for a limited thirteenth amendment,"⁴² insisted:

Now . . . in all good faith, what was the meaning of that [phrase, "involuntary servitude"]? What was its intent? Can there be any doubt of it? . . . That amendment, everybody knows and nobody dare deny, was simply made to liberate the negro slave from his master. That is all there is of it. Will . . . anybody . . . undertake to say that that was to prevent the involuntary servitude of my child to me, of my apprentice to me, or the quasi servitude which the wife to some extent owes to her husband? Certainly not.⁴³

A POSSIBLE RESPONSE: SLAVERY IN THE OTHER DOMESTIC RELATIONS⁴⁴

If one wanted to work within an originalist framework to vindicate some of the rights of women as wives and daughters and

41. CONG. GLOBE, 38TH CONG., 2D SESS. 215 (1865) (remarks of Rep. White), quoted in VanderVelde, *supra* note 40, at 454-55.

42. VanderVelde, *supra* note 40, at 456.

43. CONG. GLOBE, 39TH CONG., 1ST SESS. 499 (1866) (remarks of Sen. Cowan), quoted in VanderVelde, *supra* note 40, at 457. Cowan later observed, "Nobody can pretend that those things were within the purview of that amendment; nobody believes it. It was mentioned as a matter of ridicule, in some places, that it did actually liberate the minor from the control of his parent or guardian; that it did actually entitle the wife to be paid for her own services, that they should not go to the husband; but that was false." See CONG. GLOBE, 39TH CONG., 1ST SESS. 1784 (1866) (Civil Rights Bill) (remarks of Sen. Cowan), quoted in VanderVelde, *supra* note 40, at n.93. According to VanderVelde "No congressmen claimed the term should apply to wives or children." VanderVelde, *supra* note 40, at 457.

44. This section is an extremely abbreviated form of the argument in Mary Anne Case, *Slavery in the Other Domestic Relations*, Panel Address during the University of Chicago-Loyola University Law School Symposium: Slavery, Abolition, and Human Rights: Interdisciplinary Perspectives on the Thirteenth Amendment (Apr. 18, 2009) (transcript on file with author). In prior work, I have argued that the Fourteenth Amendment guarantee of sex equality, as interpreted by the Supreme Court, is a fundamental commitment of the United States which it was "incumbent on government to follow-through on . . . in its necessary interventions into the family and the private sphere, such as its custody and adoption decisions." Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 549, 561 (2011). I distinguished in that work between fundamentalism (defined as an

workers, one might nevertheless begin with the Thirteenth Amendment. As the Supreme Court recognized in *Frontiero*, “throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”⁴⁵ In addition to the legal restrictions enumerated in *Frontiero*,⁴⁶ laws, ratified by the Supreme Court in cases from *Bradwell v. Illinois*⁴⁷ through *Goesaert v. Cleary*,⁴⁸ had also disabled women from pursuing many forms of paid employment. Of course, many legal disabilities were those of *married* women, but just as a case like *Dred Scott* extended the disabilities of slaves to blacks in general,⁴⁹ so a case like *Bradwell*, with the concurrence of Justice Bradley, extended the disabilities of married women to women in general.⁵⁰

inability to compromise) and perfectionism (defined as a willingness to impose). *Id.* at 551. My analysis here shows that one way of interpreting the Thirteenth Amendment is as a perfectionist requirement of government intervention to prevent extreme forms of submission by wives and daughters to husbands and fathers. This more perfectionist approach would likely involve more active government intrusions into intact families (i.e. those not already before the courts because of disputes over, for example, custody) to combat unequal treatment on the basis of sex, even if stops short of what is now treated as abuse.

45. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

46. *See id.* (“Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children”).

47. 83 U.S. (16 Wall.) 130 (1873) (holding that Illinois could exclude women categorically from the practice of law).

48. 335 U.S. 464, 467 (1948) (upholding a law precluding all women other than the wife and daughter of a bar’s owner from tending bar notwithstanding the possibility that “the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling”).

49. *Dred Scott v. Sandford*, 60 U.S. 393, 405, 407 (1856) (holding that “neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people”: they were, instead, an “inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them”).

50. *Bradwell* 83 U.S. at 141-2 (1872) (Bradley, J., concurring) (“It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. . . . And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”). *Cf.* Letter from John Adams to James Sullivan (May 26, 1776), available at <http://rotunda.upress.virginia.edu/founders/ADMS-06-04-02-0091> (“Government cannot accommodate itself to every particular Case, as it happens, nor to the Circumstances of particular Persons. It must establish general, comprehensive Regulations for Cases and Persons. The only Question is, which general Rule, will accommodate most Cases and most Persons.”) As I have previously argued, the core of our current constitutional law of sex discrimination, for which Bradley’s opinion in *Bradwell* serves as a negative precedent, is precisely that when it comes to sex “the rules of civil society’ not only can but ‘must be adapted to . . . exceptional cases.’” *See* Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1471 (2000).

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Focusing on the “especially harsh forms of labor control”⁵¹ women are subjected to, not only in the labor market, but also in the household, reinforces the notion that slavery is one of the domestic relations and invites a focus on two of the others—husband and wife and father and daughter. Feminists such as Elizabeth Cady Stanton argued that “[a]ccording to man’s idea, as set forth in his creed and codes, marriage is a condition of slavery.”⁵² One need not accept this argument categorically and argue, contrary to the views of its framers, that all marital and filial relations are called into question by the Thirteenth Amendment to make the case that some are. Thus, in the same way as the parent-child relationship is not enough to save the master-slave relationship between a white man and his child by a black slave, so neither a wife’s slave-like submission to her husband⁵³ nor a daughter’s to her father should be free from legal scrutiny.

Unique textual features of the Thirteenth Amendment come into play here: The Amendment bans slavery categorically, whether voluntary on the part of the slave or not.

And, in declaring that “neither slavery nor involuntary servitude . . . shall exist within the United States,” the Amendment’s relationship to state action has two distinctive features—not only does the Amendment reach beyond governmental action to private action, it also requires the state to act. The Amendment puts the state under an obligation to eradicate slavery, creating, extraordinarily under U.S. law, a positive constitutional right. As scholars have suggested, the Thirteenth Amendment therefore can be seen to have implications for the government’s obligations toward children

51. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 *YALE L.J.* 1474, 1500-01 (2010) (“ In addition to race, sex might play an important role in Thirteenth Amendment jurisprudence. . . . The relation of sex to labor rights is complicated by the ideology of separate spheres, the unpaid character of women’s work in the home, and the problem of uncompensated reproductive labor . . . Women, like members of subordinate racially defined groups, often tend to be targeted for especially harsh forms of labor control”).

52. *Quoted in* AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 176 (1998).

53. *See, e.g.,* *Spires v. Spires*, 743 A.2d 186, 192 (D.C. 1999) (Schweib, J. concurring) (“[A] ‘contract’ such as the one between these parties, which formalizes and seeks to legitimize absolute male domination and female subordination within the marital relationship, is against the public policy of this jurisdiction. It may not be enforced in our courts, nor can it be permitted to affect adversely the rights of the oppressed wife or her children. . . . [T]he parties’ now-defunct marriage made Mrs. Spires her former husband’s partner, not his slave.”).

abused by their parents⁵⁴ and wives abused by their husbands⁵⁵ as well as for the authorized scope of government action with respect to women and girls.⁵⁶

Given that the Thirteenth Amendment's framers viewed slavery and polygamy as "twin relics of barbarism,"⁵⁷ a particularly apt situation in which to invoke the Amendment might be in quest of a remedy more effective than hitherto offered under state law to the underage plural wives and other children of the Fundamentalist Church of the Latter Day Saints (FLDS), whom the Texas Department of Family and Protective Services tried unsuccessfully in 2008 to remove from their families on the Yearning for Zion ranch.⁵⁸ Accounts by those who have escaped the FLDS tell of girls "treated like an indentured servant, forc[ed] to do all the cooking, cleaning and babysitting," being denied education, put at risk of physical violence and sexual assault, "condemned to a life of virtual slavery," and taught that "[a] woman's role is to be obedient without question to her husband."⁵⁹

54. See, e.g., Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1377 (1992) (arguing that "[w]hen the child's interests are utterly disregarded" as Joshua DeShaney's were by his father "the child is in effect being treated as a possession, as a chattel—as a slave" and the state is under a Thirteenth Amendment duty to act).

55. See, e.g., Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992) (arguing that both civil and criminal constitutional claims could be brought against some batterers who hold their victims in what amounts to involuntary servitude).

56. See, e.g., Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1942 (2012) ("When abortion is prohibited, the state is doing what it was doing when it enslaved women before the Civil War"); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1988) (arguing that the Thirteenth Amendment could provide the constitutional support the Supreme Court held that the Commerce Clause and Section 5 of the Fourteenth Amendment did not provide for a federal civil remedy for the victims of gender-motivated violence).

57. See Republican Platform of 1856, available at http://www.ushistory.org/gop/convention_1856republicanplatform.htm ("[I]t is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.")

58. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. Ct. App. May 22, 2008) (finding that there had been no proof of risk of imminent physical harm to the children, despite the concern of the Department that "due to the 'pervasive belief system' of the FLDS, the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims of sexual abuse").

59. See Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L.REV. 381, 404-05 (quoting accounts of former members of the FLDS). As I have previously argued, convicting some of the patriarchs of the FLDS of rape after the fact does little to protect the girls who are their victims and a failure to protect these girls is a failure to offer equal protection on grounds of sex. *Id.* at 401-06.

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THE LESSONS OF ORIGINALISM FOR FEMINISM AND
OF FEMINISM FOR ORIGINALISM

I have used the specific possibility of making legal arguments against the slavlike submission of wives and daughters notwithstanding the claims of the framers of the Thirteenth Amendment that their intent was to leave in place the law of domestic relations other than master and slave to show what creative opportunities not inconsistent with originalism there might be for feminist legal arguments. But unquestionably the broader conclusion one must reach after examining the history of the framing of both the original constitution and the post-Civil War Amendments is that no version of original meaning—not the specific intent of the Framers, not the general understanding of the ratifiers, not the original public meaning, not the original expected application, nor any other version of what originalists may say they look to in order to determine the scope of constitutional provisions holds much promise for yielding what Abigail Adams demanded of John—a constitutionally mandated code of laws more “generous and favorable” to women than the one the Framers inherited. As Ward Farnsworth carefully demonstrated, even the heroic efforts scholars have devoted to an originalist defense of racial desegregation⁶⁰ would, if turned to questions of originalism and women’s rights, lead “to the conclusion that nineteenth-century laws imposing serious legal disabilities on women were constitutional.”⁶¹

Scholars, lawyers, and activists have had a variety of responses to this well-nigh inescapable conclusion. Ruth Bader Ginsburg, whose litigation on behalf of the ACLU Women’s Right’s Project made the constitutional law of sex discrimination what it is today, frankly acknowledged early on:

Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment’s equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities.⁶²

60. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

61. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000).

62. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161.

Despite Ginsburg's success in entrenching a constitutional case law of sex equality,⁶³ some have concluded it continues to be crucial to ratify an Equal Rights Amendment so as to lay a groundwork for constitutional sex equality even originalists would have to acknowledge.⁶⁴ Many supportive of claims for women's rights and sex equality have argued in various ways that the Nineteenth Amendment, read correctly and broadly, can be used to ground claims for sex equality under the Constitution, including but not limited to those already accepted by the Supreme Court.⁶⁵

Giving feminists cause for worry, however, some of the most prominent self-proclaimed originalists have announced themselves perfectly comfortable with the conclusion that the Constitution does not prohibit sex discrimination. Most notorious

63. She was later able to ratify this constitutional case law as a Justice in *United States v. Virginia*, 518 U.S. 515 (1996), and see it endorsed by Chief Justice Rehnquist as sufficient to ground Section 5 power in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

64. Cf. Mike Rappaport, *Originalism and Sex Discrimination VI: Originalism, Nonoriginalism, and the (Possible) Failure of the Constitution to Protect Against Sex Based Distinctions*, *The Originalism Blog* (Dec. 23, 2011, 8:00 AM), <http://originalismblog.typepad.com/the-originalism-blog/2011/12/originalism-and-sex-discrimination-vi-originalism-nonoriginalism-and-the-possible-failure-of-the-con.html>. ("If the original meaning of the Constitution does not protect against sex discrimination, it is not the fault of originalism. *Instead, it is the fault of nonoriginalism.* The reason is that there seems little doubt that an equal rights amendment would have passed in the 1970s if not for nonoriginalism").

65. See, e.g., W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26 (1970); Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465 (1995); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2-15 (2011). Calabresi and Rickert also make a Fourteenth Amendment argument on behalf of women's equality, but it appears to be a textualist, rather than an originalist argument: They acknowledge that the Amendment's Framers and their contemporaries clearly did not see the Amendment as calling laws restrictive of women into question, but, they assert this was because of "unenacted factual beliefs about the capabilities of women" and "[w]e now know more about women's capabilities than the Fourteenth Amendment's Framers knew." *Id.* at 9. To the extent this really is a claim about the evolution of knowledge of ordinary facts, not the evolution of political judgements, I see no evidence to support it. The Framers did not doubt their wives and daughters abilities as a matter of fact—they were in far greater doubt of the abilities of the blacks they did enfranchise, which is what allowed Elizabeth Cady Stanton to make, as early as 1848, the unsuccessful arguments for which she is castigated today about the mistake of enfranchising uneducated immigrant men before educated WASP women. See e.g., Address by Elizabeth Cady Stanton on Woman's Rights, September 1848, available at <http://ecssba.rutgers.edu/docs/ecswoman1.html> ("[T]o have the rights of drunkards, idiots, horse-racing, rum selling rowdies, ignorant foreigners, and silly boys fully recognised, whilst we ourselves are thrust out from all the rights that belong to citizens—it is too grossly insulting to the dignity of woman to be longer quietly submitted to").

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among them is Justice Scalia. When interviewer Calvin Massey put it to him that:

In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?⁶⁶

Scalia responded:

Yes, yes. Sorry, to tell you that. . . . But, you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.⁶⁷

66. *The Originalist: Justice Antonin Scalia*, CALIFORNIA LAWYER (Jan. 2011), <http://www.callawyer.com/clstory.cfm?eid=913358> (interview with Calvin Massey).

67. *Id.* Even Scalia appears to lack the courage of his convictions, because, when questioned about precisely these statements by Senator Dianne Feinstein, who read them back to him verbatim, he insisted that he "was speaking of Title VII and laws that prohibit private discrimination. The 14th Amendment says nothing about private discrimination, only discrimination by Government." *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Committee on Judiciary of the Senate of the United States*, 112th Cong. 37 (Oct. 5, 2011), at 20. Whatever else may be unclear about Scalia's views, he was clearly speaking of the Constitution, not Title VII, in his *California Lawyer* interview. More recently, when questioned by Jennifer Senior, he again abjured:

What about sex discrimination? Do you think the Fourteenth Amendment covers it?

Of course it covers it! No, you can't treat women differently, give them higher criminal sentences. Of course not.

A couple of years ago, I think you told *California Lawyer* something different.

What I was referring to is: The issue is not whether it prohibits discrimination on the basis of sex. Of course it does. The issue is, What is discrimination? If there's a reasonable basis for not letting women do something like going into combat or whatnot . . .

Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 7, 2013. Of course, in many states for much of U.S. history, women were indeed treated differently in criminal sentencing and given higher sentences, for example under statutes that provided indeterminate sentences for them, and shorter fixed sentences for men. *See e.g.*, Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 26-29 (1995) (citing examples of unequal sentencing laws and noting that "[c]ourts justified legislative distinctions which imposed

I must confess that I approach the question of the effect of an originalist approach like Scalia's on constitutional interpretation of protections against laws that discriminate on the basis of sex in Beardian terms, motivated by a combination of "interests [I] underst[and] and fe[el] in concrete, definite form through [my] own personal experience" and "the guidance of abstract principles of political science."⁶⁸ Richard Fallon has expressed concern that

an originalist theory that . . . left the contemporary constitutionality of paper money and Social Security hostage to the outcome of historical tests that they might not pass—despite the devastating consequences that their invalidation would entail—might rate high on the scale of being principled, but it also would be morally, politically, and legally irresponsible.⁶⁹

I am much more worried about an originalist theory that will find coverture and the elimination of women from public life constitutional. After all, I am a single woman, licensed to practice law, gainfully employed, with liberty and equality that non-originalist constitutional case law, (and not any version of originalism) has guaranteed me, and a concern that the overturning of precedent by a principled originalist might have "devastating consequences" for me personally and the "abstract principles" I am guided by and committed to. In past work, I have called these abstract principles "feminist fundamentalism,"⁷⁰ which I have defined as an uncompromising commitment to the equality of the sexes, further specified in my own particular case (in terms taken, as it happens, from the current U.S. constitutional case law) as an uncompromising opposition to "fixed notions concerning the roles and abilities of males and females."⁷¹ The substantive rules that were in place and reaffirmed by the Framers of both the original Constitution and the post-Civil War Amendments with respect to women are, for both personal and ideological reasons, rules I don't want to live with.

longer sentences on women than men as reasonable in view of the state's purpose of providing more effective rehabilitation for women").

68. See *supra* note 1.

69. Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?* 34 HARV. J.L. & PUB. POL'Y 5, 20 (2011).

70. See, e.g., Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, *supra* note 43.

71. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

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It was because of these commitments and concerns that, in 2010, I accepted the invitation of the Federalist Society to appear as the only woman with a speaking part in their national symposium, Originalism 2.0. As I explained to the Federalists, I understood quite well why, if the topic was originalism, they really needed a woman to speak, even if to find one they had to reach out to someone like me who was neither a Federalist nor a fellow traveler of Federalists, who had not in the past either written, spoken, or even thought very hard about originalism, and who had been spending almost as much time with the canon law as with the U.S. Constitution in the preceding year. The question I had for the Federalists was, having defended *Brown* on originalist grounds, do you also defend *Frontiero* and its progeny, and, if you cannot, what constitutional brake is there to a return to coverture and the rest of the “masculine systems” John Adams and his fellow Framers refused to repeal? The question the Federalist Society asked me to address was, “Is originalism a rationalization for conservatism or a principled theory of interpretation?”

I began my remarks by agreeing with Richard Fallon that even if originalism can be a principled theory of interpretation this does not mean it is indeed employed as such or that it should be. I illustrated this point with an analogy to astrology, noting that, several decades ago, when I was a practicing lawyer in New York, I was in a reading group with, among others, a professional astrologist, who would try her best, whatever book we were reading, to chart the horoscopes of the characters. She was a very serious and principled astrologist, but frustrated in her efforts because there was not usually enough relevant information in the books to chart the characters in a way to get a determinate principled result. That, *mutatis mutandis*, is also a problem with originalism. Additionally, however, it does not seem we are engaged in principled originalism any more than people are engaging in principled astrology when they do not look to a careful and specified charting of their own signs and the signs of the people around them, but turn to the *Daily News* or the *New York Post*, look for their sun sign, read a simple, single little phrase that’s billed as their fortune for the day, and take it seriously.⁷²

72. Cf. Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55, n.3 (2003) (observing that if the “Supreme Court had determined a winner in *Bush v Gore*, not by constitutional adjudication, but by divination, as the ancients often claimed to select leaders. . . . it might be noteworthy whether the decision was framed

In the very limited time that I had to prepare to address the Federalist Society, I tried to educate myself as to what role originalism had actually played in Supreme Court cases. I was surprised to learn, when I looked for basic descriptive empirical work that systematically examined U.S. Supreme Court cases in which originalist arguments could have been employed to see if they were employed, and if so, by whom, and how often these arguments were outcome-determinative, that such work did not appear to have been done.⁷³ There is a great deal of published work available on the theory of originalism, but apparently very little on the practice. I think this undercuts the notion that originalism is being applied in any kind of principled fashion, and it is not clear to me that to attempt to apply it in a principled fashion would make any more sense than to apply astrology in a principled fashion. Perhaps it can be done, but we do not do it, and, as Fallon cogently argues, we may be right not to. Among the many reasons not to is that delving into eighteenth-century archives, like delving into the motions of the planets, seems an enterprise too far removed from the subjects directly at issue in constitutional cases to be geared toward generating either productive conversation or helpful insights.⁷⁴

Even more instructive than an analogy to astrology, and less susceptible of being dismissed as flip, is the analogy of originalism to biblical literalism. It does seem to make much more sense to want to interpret a text according to its original intent if you think that the original intent is the intent of God.⁷⁵ And it is certainly

by reference to astrology rather than palmistry or the reading of entrails, although it is possible to choose any of these techniques in good or bad faith, to apply any one well or badly by its own terms, and to make a choice of technique consistent with or divergent from one's usual choices").

73. It is my understanding that my colleague Eric Posner, together with Lee Epstein, has recently embarked on such empirical work and I look forward to reading it when it is complete. See generally FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013) (evaluating the use and absence of originalist arguments in Supreme Court opinions).

74. The same cannot, by contrast, be as readily said of, for example, either a Ronald Dworkin-style moral reading of the Constitution or a Richard Posner-style economic analysis of law, whatever other limitations these approaches may have. Cf. Justice Alito in the oral argument of *Brown v. EMA*, 2010 U.S. Trans. LEXIS 57, at *14 ("I think what Justice Scalia wants to know is what James Madison thought about video games. . . . Did he enjoy them?") Transcript of Oral Argument at 14, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448). 2010 U.S. Trans. LEXIS 57. Even asking, as Scalia insisted he was, "what James Madison thought about violence," *id.*, risks turning the discussion away from legal reasoning toward antiquarianism the more seriously it is taken not merely as a relevant but as the outcome determinative question.

75. Cf. BEARD, *WOMEN AS FORCE IN HISTORY*, *supra* note 14, at 90 ("Jefferson was scarcely exaggerating when he wrote long after the *Commentaries* appeared: 'The opinion

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the case that people take biblical literalism much more seriously; they are much more interested in getting it right and doing the necessary work, whatever in their faith tradition that work is seen to be, to see what original intent might be.

Much has already been said and much still remains to be said about the connections between methods for the interpretation of constitutional and biblical texts. Both constitutional and biblical texts are susceptible to tensions between clause bound and holistic interpretations. Both present the challenge of interpreting as a coherent whole a document theoretically propounded by a single authoritative voice—whether that of God or We The People—but actually written by multiple authors over a period of centuries. Reading together the first and the second creation story in Genesis or the Old and the New Testaments presents challenges akin to reading together the original constitution, the Bill of Rights and the post-Civil War Amendments.⁷⁶ It is noteworthy to me as a comparativist that the United States, with a dominant Protestant tradition of biblical exegesis overshadowed by claims of biblical inerrancy, is virtually the only country to take originalism seriously as a method of constitutional interpretation.⁷⁷ Strict textualism is akin to *sola scriptura*. And in France, with its Catholic heritage, Portalis, one of the principal authors of the Napoleonic Civil Code, endorsed an interpretive method far closer to living constitutionalism than originalism.⁷⁸

According to David Strauss, pursuing the analogy between originalism and Protestantism cuts against the position that originalism is conservative:

seems to be that Blackstone is to us what the Alcoran is to the Mahometans, that everything which is necessary is in him, and what is not in him is not necessary”).

76. For an example of interpretive problems posed for originalists in the writing of the present day Constitution by multiple authors in multiple centuries, see Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (arguing that, contrary to common practice, “[a]n originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment,” rather than the eighteenth-century Framers of the Bill of Rights, “understood the scope and substance of the rights at issue”).

77. See, e.g., Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER, Jan. 17, 2011, at 70, 76 (“Originalism, which has no purchase anywhere but here, has a natural affinity with some varieties of Protestantism, and the United States differs from all other Western democracies in the far greater proportion of its citizens who believe in the literal truth of the Bible”).

78. See Preliminary Address on the First Draft of the Civil Code Presented in the Year IX by Messrs. Portalis, Tronchet, Bigotpréameneu and Maleville, Member of the Government-Appointed Commission, (1801), translated and available at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/index.html>.

Perhaps the greatest of all originalist movements—the Protestant Reformation . . . attacked the existing order, the existing tradition, as corrupt and wrongheaded and called for a return to the text and the original understandings. Originalism is, therefore, in its essence, a destructive creed. It does not provide answers. It gives you a way of challenging the received wisdom. It is a way of getting rid of things. When you want to rebuild, when you want to start building up a doctrine, originalism does not really help you; it is too indeterminate.⁷⁹

Focusing on their approaches to women, let me pursue instead an analogy between American originalism and Anglicanism that points up originalism's methodological as well as substantive conservative tendencies.⁸⁰

Keith Whittington has argued that the most prominent normative justification for originalism grounds it “in a theory of popular sovereignty and democratic lawmaking. . . . One should be an originalist because the Constitution was authorized by democratically elected delegates who had legitimate authority to ratify the constitutional text.”⁸¹

Among the earliest prescriptions for democratic lawmaking is a Latin maxim that had its origins in the Roman law of guardianship, migrated into the canon law, and expanded into political theory as early as the Middle Ages. It goes by the Latin tag *quod omnes tangit*, short for either *Quod omnes tangit, ab omnibus approbetur* or alternatively *Quod omnes tangit omnibus tractari et approbari debet*, meaning, “What touches all must be [debated and] approved by all.”⁸² Some see this maxim behind the French king's invocation of the Estates General, which, as noted above, did include women in each of the three estates from the 14th century on.

79. David Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. L. & PUB. POLICY 137, 144 (2011). It should go without saying that if Strauss is right I have much to fear from an application of originalism to the sex equality precedents I hold dear.

80. The analogy I am pursuing here applies to originalism in the American context, but would not extend to a constitution in whose framing and ratification women were fully included. Cf. Kerri A. Froc, *Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment"* (unpublished manuscript on file with author) (considering an originalist approach to Sec. 28 of the Canadian Constitution that takes full account of the views of its “feminist framers”).

81. Keith E. Whittington, *Is Originalism Too Conservative?* 34 HARV. J.L. & PUB. POL'Y 29, 39 (2011). Fallon, Whittington, and I were asked to address the same topic by the Federalist Society.

82. See, e.g., GAINES POST, *A Romano-Canonical Maxim, Quod omnes tangit, in Bracton and in Early Parliaments*, in STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322 163 (1964).

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Shortly before I spoke to the Federalist Society, I had the occasion to examine this maxim in the context of sex and gender in comments I was asked to write⁸³ on Archbishop of Canterbury Rowan Williams's discussion of the potential schism in the Anglican Church concerning issues, not only of homosexuality, but also the ordination of women as bishops. The Archbishop invoked this maxim of canon law, saying that, because "what affects the communion of all should be decided by all," therefore the Anglican Communion has to move slowly with respect to change; it has to discuss and debate it.⁸⁴

Given the historical exclusion of women from decisionmaking in the Church and the historical exclusion of women from decisionmaking in the Republic, to require them, at the moment of their inclusion, to expend energy and political capital on effecting legislative repeal or constitutional amendment of every aspect of the legal system that is already stacked against them is to perpetuate their disadvantage when compared to those whose interests have already been taken into account because they could and did participate in the framing of the system. To use a maxim like *quod omnes tangit* or an interpretive methodology like originalism as a brake on change—as a rationale for conservatism—leaves out those people who were not able to be part of the original process of popular sovereignty and democratic decisionmaking.⁸⁵

Were women a part of *omnes* in the framing of canon law? Were they a part of We the People in any meaningful sense in the framing of the original Constitution and post-Civil War Amendments?⁸⁶ If Abigail Adams's insistence that the Framers "remember the ladies" had no other effect on John, it may at least

83. Mary Anne Case, *Homosexuality and the Anglican Debate*, THE IMMANENT FRAME, blogs.ssrc.org/tif/2009/08/04/homosexuality-and-the-anglican-debate/.

84. Rowan Williams, *Archbishop of Canterbury, Communion, Covenant and Our Anglican Future*, THE GUARDIAN, Monday, 27 July 2009, <http://www.theguardian.com/commentisfree/belief/2009/jul/27/rowan-williams-anglican-communion>.

85. Thus, that women are currently included in democratic deliberation does not by itself remedy their prior exclusion. Nor is it determinative that, for example, the laws of coverture in the United States were never constitutionally mandated but were subjects of ordinary legislation. At the time women received the vote, they inherited a system of laws unfavorable to them, which served as a built-in headwind. To effect the repeal of such laws through the ordinary legislative processes would require an expenditure of effort and political capital not required of those groups whose interests were fully represented in the Constitution's framing.

86. Cf. Antonin Scalia, *The Disease as Cure: "In Order To Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 152 ("My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man.").

have made him consider this question. When, in the spring of 1776, James Sullivan, invoking *quod omnes tangit*, urged the elimination of property qualifications for voting, John Adams responded, with Abigail's urging fresh in his mind:

It is certain in Theory, that the only moral Foundation of Government is the Consent of the People. But to what an Extent Shall We carry this Principle? Shall We Say, that every Individual of the Community, old and young, male and female, as well as rich and poor, must consent, expressly to every Act of Legislation? No, you will Say. This is impossible. . . . Whence arises the Right of the Men to govern Women, without their Consent?⁸⁷

Unfortunately, the conclusion John Adams draws from this is that it would be “dangerous to attempt[t] to alter the Qualifications of Voters” in any way because “[t]here will be no End of it. New Claims will arise. Women will demand a Vote.”⁸⁸ Adams argued that

The Same Reasoning, which will induce you to admit all Men, who have no Property, to vote, with those who have, for those Laws, which affect the Person will prove that you ought to admit Women . . . for generally Speaking, Women. . . have as good Judgment, and as independent Minds as those Men who are wholly destitute of Property: these last being to all Intents and Purposes as much dependent upon others, who will please to feed, cloath, and employ them, as Women are upon their Husbands. . . .⁸⁹

This line of analysis suggests that, for Beardian reasons, John Adams was deaf to his wife's principal claim, since it was precisely the legally mandated dependence of wives on “the unlimited power . . . of the husbands”⁹⁰ it was Abigail's chief purpose to see dissolved in a new code of laws. Instead, for John Adams, two wrongs seem to have made a right—women's legally mandated dependence helped justify their exclusion from political power,

87. Letter from John Adams to James Sullivan, *supra* note 50. Sullivan had written to Gerry, in a letter transmitted to Adams, “Every member of Society has a Right to give his Consent to the Laws of the Community or he owes no Obedience to them.” *Id.* Adams drafted his response within two months of having been prompted by his wife to “remember the ladies.”

88. *Id.*

89. *Id.*

90. See Letter from Abigail Adams to John Adams, *supra* note 4, at 121.

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rather than their exclusion from political power calling into question their legally mandated dependence.⁹¹

Abigail Adams's main concern was not voting rights, but a substantive code of law more just and favorable to women. She did, however, tell John that, should the laws not improve, the ladies "are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation."⁹² Objection on behalf of women to their exclusion from democratic deliberation has a very long history,⁹³ as does the claim that they should not be bound by unequal laws from whose framing they were excluded. There is actually a tale in Boccaccio's *The Decameron* in which a woman named Madonna Filippa is taken in adultery and serves very effectively as her own lawyer, making good use of *quod omnes tangit* before the magistrate and the men and women of her town. Confessing to adultery, she adds,

I am certain you know that the laws should be equal for both sexes and made with the consent of those who are to obey them. That is not so in this case, for it only touches us poor women, who are yet able to satisfy many more than men can; moreover, no woman gave her consent or was even consulted when this law was passed. And so it may reasonably be called

91. Compare John Adams's proposed response to the disenfranchisement of propertyless men, in his letter to Sullivan, *supra* note 50. ("Power always follows Property. . . . The only possible Way then of preserving the Ballance of Power on the side of equal Liberty and public Virtue, is to make the Acquisition of Land easy to every Member of Society: to make a Division of the Land into Small Quantities, So that the Multitude may be possessed of landed Estates. If the Multitude is possessed of the Ballance of real Estate, the Multitude will have the Ballance of Power, and in that Case the Multitude will take Care of the Liberty, Virtue, and Interest of the Multitude in all Acts of Government").

92. Letter from Abigail Adams to John Adams, *supra* note 4, at 121. While she repeats that she "threat[ened] fomenting a Rebellion in case we were not consider[ed], and assured him we would not hold ourselves bound by any Laws in which we had neither a voice, nor representation" in her letter to Mercy Otis Warren detailing John Adams's "sau[c]y" response to her "List of Female Grievances," Abigail Adams also tells Warren, "I think I will get you to join me in a petition to Congress," a far less revolutionary approach." See Letter from Abigail Adams to Mercy Otis Warren, *supra* note 8.

93. Consider Ockham's Dialogus, in which Magister repeatedly suggests women are part of *omnes*. See, e.g., WILLIAM OF OCKHAM, DIALOGUS, Book 6, Chapter LXXXV in AUCTORES BRITANNICI MEDII AEVI, (John Kilcullen et al., eds.), available at <https://www.britac.ac.uk/pubs/dialogus/ockdial.html>. Kenneth Pennington in *A Note to Decameron 6.7: The Wit of Madonna Filippa*, 52 SPECULUM 902, 903-04 (1977), asserts first that the maxim's "logic was never extended to women in the Middle Ages," then goes on to acknowledge that Ockham's "magister declares that women should not be excluded from a general council, especially in matters of faith 'quae omnes tangit'" but observes that "the student responds that he cannot take such an irrational argument seriously" and concludes that "Ockham meant to amuse his readers with the irony of this passage."

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an inequitable law. . . . The case concerning so well known a lady had attracted to the Court almost all the inhabitants of Prato . . . [who] with one voice shouted that the lady was right and spoke well. Before they separated, with the judge's consent they modified this cruel law.⁹⁴

Let me conclude that it is long past time to adopt the approach of Madonna Filippa and of Abigail Adams in considering whether originalism makes sense in general, but particularly from the perspective of women, their rights and liberties.

94. BOCCACCIO, 2 DECAMERON, Day 6. Tale 7, at 33-35 (Richard Aldington trans., 1969).