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## The Founders on Families

Sylvia A. Law

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## DUNWODY DISTINGUISHED LECTURE IN LAW

## THE FOUNDERS ON FAMILIES

*Sylvia A. Law\**

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As we celebrate 200 years of history under our Constitution, some of the most controversial issues arising under that grand document involve conflicting visions of the family. Can the government induce men to support their children by barring those who fail to do so from marrying?<sup>1</sup> May the state prohibit interracial marriage,<sup>2</sup> or marriage

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\*Professor of Law, New York University Law School. This article was delivered as the Dunwody Lecture at the University of Florida School of Law, on March 20, 1987. The author gratefully acknowledges the generous support of the Dunwody Lecture program and the NYU Law School Filomen D'Agostino and Max E. Greenberg Faculty Research Fund. Two New York University Law School students, Mary Faith Herndon and Susan Hart, provided creative and energetic assistance. Many people provided helpful comments on an earlier draft, including: Ellen Chesler, Norman Dorsen, William Nelson, Linda Kerber, Sybil Lipschutz, Martha Minow, and David Richards.

1. In *Zablocki v. Redhail*, 434 U.S. 374, 375-77 (1978), the Supreme Court held that the state may not thus limit access to marriage.

2. In *Loving v. Virginia*, 388 U.S. 1, 2 (1967), the Court answered no.

between two people of the same sex?<sup>3</sup> Can the state affirm the historic and contemporary reality that women care for children and home, by defining the alimony obligation as one that men owe to women?<sup>4</sup> Can the state encourage marriage by restricting benefits to children whose parents do not marry, or by limiting fathers' rights to establish relationships with children borne by women to whom they are not married?<sup>5</sup> Does the Constitution protect peoples' right to use contraceptives?<sup>6</sup> Does it matter whether the people are married?<sup>7</sup> And does it make a difference if they are old enough to vote?<sup>8</sup> Does the Constitution protect women's liberty to decide whether to have an abortion?<sup>9</sup>

Today some influential lawyers, scholars, judges, and public officials urge us to look to the original intent of the men who drafted and ratified the Constitution to determine its contemporary meaning.<sup>10</sup>

3. In *Bowers v. Hardwick*, 106 S. Ct. 2841, 2842-43 (1986), the Court upheld a Georgia law prohibiting sexual relations between people of the same sex.

4. The Supreme Court has held that alimony obligations must be cast in sex-neutral terms. *Orr v. Orr*, 440 U.S. 268, 270-71 (1979).

5. The Supreme Court's answer to these questions is complex. *See generally* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 988-98 (1984) (Supreme Court has on two occasions upheld state policies that differentiated between unmarried women and unmarried men).

6. *Griswold v. Connecticut*, 381 U.S. 479, 480-86 (1965), held that the state may not prohibit married people from using contraceptives.

7. In *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972), the Supreme Court held that states may not prohibit unmarried persons from purchasing and/or using contraceptives.

8. In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977), the Supreme Court held that the blanket prohibition of the distribution of contraceptives to minors is unconstitutional. In that opinion, the Court relied on its previous decision in *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), that a state may not enact "blanket provisions" requiring parental consent whenever an unmarried minor sought an abortion during the first twelve weeks of pregnancy. *Carey*, 431 U.S. at 685.

Yet, in *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979), the Court established an exceedingly complex, cumbersome process under which the state may require parental consent for, or state judicial review of, a minor's decision to have an abortion.

9. The Court has held that the fourteenth amendment's guarantee of liberty encompasses a woman's decision to terminate a pregnancy, *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); that a state may not create barriers that restrict women's access to abortion, absent a compelling state purpose, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427-30 (1983); *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 U.S. 2169, 2178 (1986).

10. *See, e.g.*, "[C]onstitutional law should be rooted in principles that are derived from the text and original intention of the Constitution." United States Att'y Gen. Edwin Meese, Speech Before the American Enterprise Institute 8 (Sept. 6, 1986) (arguing that *Roe v. Wade* should be overruled). Courts should "return to a jurisprudence of original intention — i.e., a way of constitutional thinking and litigating that begins with the text of the Constitution, as informed

This article examines our constitutional founders' ideas about families and women. It argues that judges today cannot look directly at the intent of the constitutional framers to resolve constitutional claims premised on conflicting visions of the family. Original intent does not provide answers for today's problems for two reasons. First, the people who crafted our Constitution held conflicting ideas and values about families and the role of women in society. Second, and perhaps more important, the founders' dominant conceptions of families denied the liberty, equality, and even personhood of women. Today, there is broad consensus across a moral and political spectrum, that women are full human beings, entitled to the panoply of classic liberal rights that our revolution and Constitution sought to secure to white men. The challenge today is to envision constitutional and cultural arrangements that read the words "We the People" quite literally, even though that was not originally intended.

The following discussion is divided into three sections. The first recounts the dominant story about women and families told by our original constitutional drafters. The second tells of the burst of increased liberty and equality of the Revolutionary period. The third briefly presents conflicting stories about women and families told by those who crafted the Civil War Amendments. The final section comments on the meaning of this history for contemporary constitutional debate.

Each of these stories considers information from constitutional debates; the intellectual, moral, and philosophical concepts that influenced those debates; the ordinary legal context that defined formal rights and relationships; and the living context in which these political and intellectual debates were rooted. Our Constitution is, after all, a popular document reflecting the aspirations and prejudices of ordinary people, as well as the ideas of those elite white men who are conventionally credited with its parentage.

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by the intentions of those who wrote, proposed, and ratified that text." Assistant Att'y Gen. Bradford Reynolds, Remarks at the Federal Society Symposium in Chicago 2 (Nov. 15, 1982). See generally, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 300-11, 363-72, 407-18 (1977); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 241-43 (1980); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698-99 (1976).

## I. THE FIRST STORY: THE DOMINANT VISION OF FAMILIES AND THE CONSTITUTION IN THE EIGHTEENTH CENTURY

Silence, absolute and deafening, is the central theme of the original founders' discussions of women and families.<sup>11</sup> In search of their wisdom on these issues, I have scrutinized the constitutional text, the *Federalist Papers*, the historic national debates that produced the Constitution, and the discussions throughout the land in which individual colonies decided to ratify the proposed Constitution of the United States. Virtually nothing in the original constitutional debates directly addresses the situation of women and families, or illuminates the difficult issues we confront today.<sup>12</sup> In the *Federalist Papers*, for example, the only reference to women or families is a brief allegorical discussion of the dangers that the private intrigues of courtesans and mistresses pose to the safety of the state.<sup>13</sup>

One often cited discussion of these issues is the private dialogue contained in the letters between John and Abigail Adams.<sup>14</sup> On March

11. It is singularly appropriate that Virginia Dare, the earliest American woman whose name is familiar to the general public, vanished without a trace shortly after her birth, along with all the other members of the Roanoke colony. Like her, successive generations of American women have vanished from the historical record, leaving not even their names for their descendants to recognize and revere. The United States has founding mothers of various races and ethnic backgrounds, but on the whole our history celebrates only the white founding fathers whose names appear again and again in standard textbooks.

M. NORTON & C. BERKIN, *Women and American History*, in *WOMEN OF AMERICA* 3 (1979).

12. References to family appear in the ratification debates about whether a bill of rights was necessary or whether the structure of the Constitution preserves to the people those rights not explicitly granted to the government. For example, Hamilton supported the Constitution and believed that its structure, without an explicit bill of rights, reserved rights to the people. He denied, moreover, that federal constitutional power could "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals." 2 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 268 (1941). Others, such as Patrick Henry of Virginia, opposed the Constitution as fatally defective without a bill of rights. Henry also speaks of the core of liberty as the sphere in which a man "enjoys the fruits of his labor, under his own fig-tree, with his wife and children around him, in peace and security." 3 J. ELLIOT, *supra*, at 54.

13. THE FEDERALIST No. 6 (A. Hamilton).

14. Adams' role in crafting our Constitution is controversial. From 1774 when he left his family to serve in the Continental Congress, John Adams was a staunch supporter of the Revolution. Beginning in 1777, he represented the Revolutionary American government for a decade in a variety of European diplomatic missions. Both his long absence in Europe, and the substance of his views on the Constitution, placed him outside the mainstream of debate on the original Constitution. Nonetheless, both his ideas and services to country earned John Adams a place in the galaxy of constitutional founders. See G. WOOD, *AMERICAN CONSTITUTIONAL, 1776-1787*, at 567-92 (1969).

31, 1776, on the eve of the Declaration of Independence, John Adams was serving in the Continental Congress in New York, while Abigail Adams, in the midst of insecurity, war, and epidemic, managed their farm, family, and household in Braintree, Massachusetts. She wrote:

I long to hear that you have declared an independency — and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited powers into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular [sic] care and attention is not paid to the Ladies we are determined to foment a Rebellion [sic], and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity. Men of Sense in all Ages abhor those customs which treat us only as the vassals of your Sex. Regard us then as Beings placed by providence under your protection and in immitation [sic] of the Supreem [sic] Being make use of that power only for our happiness.<sup>15</sup>

John Adams' response made plain both that he did not take her modest request seriously and that he saw alteration of the traditional relations between men and women as a threat to the social order he knew. He replied:

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands 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 the Masters. But your Letter was the first Intimation that another Tribe more numerous and powerful than all the rest were grown discon-

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15. M. FRIEDLEANDER & M. KLINE, *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762-1784*, at 121 (1975).

tented. — 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 system. Although 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 completely subject Us to the Despotism of the Petticoat, I hope General Washington, and all our brave Heroes would fight. I am sure every good Politician would plot, as long as he would against Despotism, Empire, Monarchy, Aristocracy, Oligarchy or Ochlocracy.<sup>16</sup>

John Adams' confident belief that "our Masculine system" would long endure reflected the intellectual tradition of his time. Many of the men who crafted the fundamental structures of our democracy drew on the work of the classic and more contemporary philosophers, as well as their own experience, in creating the new American republic.<sup>17</sup> For political philosophers, from Plato and Aristotle, to Rousseau and Locke, the function of the family and the nature of women were matters of importance. With the exception of the vision Plato offered in the *Republic*, all of these philosophers assumed the necessity of the male-headed nuclear family, and women's subservient role in that family.<sup>18</sup>

16. *Id.* at 123.

17. [T]he Americans were seeking to determine the scientific principles that would explain man's political and social actions, "the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands."

G. WOOD, *supra* note 14, at 8; *see generally id.* at 14, 29, 48, 290, 371, 282-91.

18. For an excellent discussion, see S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* (1979). "Plato's treatment of women in the *Republic* is clearly unparalleled in the history of Western thought." *Id.* at 234. Plato argued that the innate qualities of women could not be known, so long as the socialization and education of the sexes was so different. *See* PLATO, *THE REPUBLIC* 209-10 (H.D. Lee trans. 1955). As a prescriptive matter, *THE REPUBLIC* would include women in the guardian or governing class for both moral reasons and because confining all women to domestic seclusion was extremely wasteful of human resources. But for Plato, including women in the public sphere was made possible only by abolishing the family and creating a highly hierarchal society in which essential work was done by slaves and others excluded from the privileged class. Throughout our history Americans have rejected this notion and affirmed the core social role of the family. *See Parnham v. J.R.*, 442 U.S. 584 (1979). Indeed even Plato, in later work, *THE LAW*, affirmed the value of the family and resurrected the notion of women's natural domesticity to preserve it. *See* PLATO, *THE LAW* 805a-d (1934).

In Enlightenment political theory, the male headed family, not the individual, was the basic unit of political interaction. For example, in the political sphere, John Locke challenged absolute patriarchal rule and virtual representation of ordinary people by the elite.<sup>19</sup> Yet, at the same time, he thought it natural and inevitable that men were dominant in the home and represented the family in politics. Where matters of common interest and property are concerned, Locke argued, since the husband and wife may disagree, the husband should prevail because he is "the abler and the stronger."<sup>20</sup>

Our constitutional founders also relied more directly on the contemporary political writings of the English Commonwealth and Radical Whig Opposition. Historian Linda Kerber observed that the American political system emulates the historical English Whig notion of ignoring basic values concerning women. American Whigs, like their British ancestors, did not clutter their political theory with concepts concerning the correct relationship between women and politics.<sup>21</sup>

Historian Carl Degler summarized the ideology of our founders concerning the role of women in society. The founders denied that women were individuals with a separate identity. Rather, as the legal and customary head of the family, the husband was the only family member worthy of characterization as an individual.<sup>22</sup> This historical denigration of women is no trivial matter. The consequence of the founders' belief is not just that women were unfairly excluded from

19. Locke attacks Robert Filmer's effort to justify absolute monarchy by analogy to the patriarchal family. Filmer relied on the biblical injunction to "honor thy father." Locke took seriously the biblical commandment to "Honor thy father and thy mother" and argued that if family power and responsibility is shared by men and women, governmental power too must be shared and limited by mutual responsibility. 1 J. LOCKE, TWO TREATISES OF GOVERNMENT (T. Cook ed. 1947). For discussion, see L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 16-19 (1981).

20. 1 J. LOCKE, *supra* note 19, at 210.

Thomas Hobbes, while generally recognizing that civilization is the product of convention and not nature, defended patriarchy on the grounds that "men, are naturally fitter than women, for actions of labour and danger" and "for the most part commonwealths have been erected by the fathers, not by the mothers and families." T. HOBBS, LEVIATHAN 128, 131 (M. Oakeshott ed. 1946).

Rousseau had strong ideas about women's proper place. Women ought "[t]o oblige us, to do us service, to gain our love and esteem . . . these are the duties of the sex at all times, and what they ought to learn from their infancy." 3 ROSSEAU, EMILIUS, OR A TREATISE OF EDUCATION 74-75 (1763).

21. L. KERBER, *supra* note 19, at 28, 30.

22. C. DEGLER, AT ODDS 189 (1980).



public life. Women were assigned, on the basis of status, to perform the essential work of production, reproduction, maintenance, consumption, and acculturation in the home. Home and family, the core social unit upon which our constitutional, political, and economic arrangements are built, were constructed on the premise that women are not active citizens or people free to pursue the full range of common occupations and callings.

The ordinary law that governed the lives of our constitutional framers and their contemporaries also assumed, along with the philosophers and political theorists, that the patriarchal family was natural and socially vital. Blackstone's *Commentaries*, published in England between 1765 and 1769, was quickly reprinted in America.<sup>23</sup> For colonists, without law books, the *Commentaries* was a convenient codification of the British common law and was widely accepted and used. Even after independence, it served as a guide to those portions of the common law that American statutes had not revised.<sup>24</sup> The *Commentaries* had great appeal to American constitutional drafters, not simply as a statement of common law, but also as an effort to glean basic tenets from English common law and make them a science.<sup>25</sup>

As Blackstone explained, when a woman married, her legal identity merged into that of her husband. She was civilly dead. She could not sue, be sued, enter into contracts, make wills, keep her own earnings, or control her own property. Her husband had the right to chastise her, restrain her freedom, and force her to engage in sexual intercourse against her will.<sup>26</sup> Close examination of the property rights of American women, both before and after the Revolution, reveals "above all else a picture of their enforced dependence . . . ."<sup>27</sup>

Because in American political theory, claims to political rights were premised on Locke's notion that only those who owned a stake in the community property had a voice in its affairs, the married woman whose control over her property had passed to her husband by mar-

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23. The first American edition of Blackstone was published in Philadelphia in 1771. See Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 737 n.36 (1976).

24. Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848*, in 6 HUMAN RIGHTS 115, 119 (1977).

25. G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 91 (1857), quoted in G. WOOD, *supra* note 14, at 10.

26. 2 W. BLACKSTONE, COMMENTARIES 442-44 (Tucker ed. 1803); Williams, *Reflections on Culture, Courts and Feminism*, in 7 WOMEN'S RTS. L. REP. 175, 176-77 (1982).

27. M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA, at xv (1986).

riage had also conceded her political voice.<sup>28</sup> By this logic, unmarried adult women property owners should have been allowed to vote. But, while unmarried women could protect their property, they were not permitted to exercise the political rights that theoretically accompanied those economic interests.

Formal legal rules do not necessarily describe ordinary daily life. While there are serious limits on our ability to understand the texture of ordinary life in the eighteenth century, we do know that the families our founders knew were profoundly different from the families of today. Economic, personal, and sexual relations among family members would seem foreign to us. Families stood in different relation to the community, church, state, and economy. When our Constitution was adopted, "over ninety per cent of the population lived outside the few cities, and the number of large-scale enterprises within the cities and towns could be counted on the fingers of two hands."<sup>29</sup> The family was the central economic unit of society, both producing and consuming almost all goods and services. Often family members worked together, whether production was for consumption or for sale, and whether the family lived in rural areas or ran cooperative enterprises such as shops, inns, and other businesses in towns and villages.

Legal, religious, and social ideology condemned any sexual relationship except procreative sex within marriage. The strictures on sexual behavior and the expectations of patriarchal family life were enforced by the formal legal rules, the family, the churches, and neighbors of the communities in which people lived. Privacy was rare in the founders' America. Most people lived in small houses in which all family members slept in the same room, especially during winter, when a single fireplace provided heat for the entire home. Loosely constructed houses allowed neighbors and kin to observe what happened behind closed doors.<sup>30</sup> Churches fined or excommunicated sexual transgressors, and public opinion reinforced community values by condemning extramarital sexuality.<sup>31</sup> A homogeneous population, common religious values, and geographical proximity facilitated community responsibility for upholding conventional moral standards.<sup>32</sup>

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28. See Kerber, *supra* note 24, at 118.

29. C. DEGLER, *supra* note 22, at 5.

30. D. FLARHERTY, PRIVACY IN COLONIAL NEW ENGLAND 42-43, 76 (1972).

31. P. LASLETT, THE WORLD WE HAVE LOST 155, 158 (1984).

32. The boundary between family and community was much more permeable than it is today. P. ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 405-07 (R. Baldick trans. 1962).

Custom and law strongly encouraged family formation and virtually everyone lived in a family. New England colonies forbade solitary living, to insure that everyone would be subject to the discipline of living in a family unit.<sup>33</sup> Fathers controlled their children's choices of marital partners, basing those choices on economic factors rather than attraction or affection.<sup>34</sup> Connecticut even made it a crime for a man to court a woman without her father's permission.<sup>35</sup> But even without the legal rules, economic survival necessitated family living for all but a few affluent men.

The central fact of family life of the late eighteenth century was that once married, women of all classes could expect to bear children from the time of marriage until menopause. The average white woman of the Revolutionary era bore more than seven children.<sup>36</sup> Black women, whose masters could increase their human property simply by encouraging their female slaves' fertility, experienced ten or eleven pregnancies during their fertile years.<sup>37</sup>

This pattern of constant childbearing was both debilitating to women and sometimes fatal. Pregnancy, and caring for newborns and children who survived past infancy must have been exhausting, espe-

33. The Massachusetts Bay Colony prohibited solitary living from early in its history. In 1669 the Plymouth Colony first compelled unmarried persons to live under regular "family government." Even when Plymouth allowed unmarried men to live alone, they were required to seek permission of local authorities to do so and permission could be withdrawn if they deviated from accepted standards of decent behavior. Spinsters invariably lived with a relative, either a parent or sibling. J. DEMOS, *A LITTLE COMMONWEALTH, FAMILY LIFE IN PLYMOUTH COLONY 77-78* (1970).

34. J. FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800*, at 136 (1982). The legal norms were not always followed. Indeed, Fliegelman's central thesis is that "[t]he struggle for American independence and for subsequent federal union was intimately related to, and ideologically reflected in, a national affirmation of the sacred character of affectional and voluntaristic marriage." *Id.* at 129.

35. See C. DEGLER, *supra* note 22, at 9. Paternal influence over choice of marriage partner was less pronounced in the Southern colonies, *id.* at 11, perhaps because there were so many more men than women during the early history of these colonies.

36. In 1800, the average woman bore 7.04 children. The birth rate had fallen steadily since 1750. *Id.* at 181. Average birth rates in Plymouth Colony were 7.8 for first generation families, 8.6 for second generation families, and 9.3 for third generation families. J. DEMOS, *supra* note 33, at 192.

37. M. NORTON, *The Myth of the Golden Age*, in *WOMEN OF AMERICA, A HISTORY*, *supra* note 11, at 37 [hereinafter *The Myth*]. "Even though at the time of the Revolution blacks constituted amongst 20 percent of the American population, a higher percentage than at any time thereafter, historians have completely neglected the study of female slaves in the colonial era." *Id.*

cially when combined with the work of running a household. Women engaged in production of clothing and food, time-consuming food preparation and preservation, candle and soap making and doing laundry in iron pots over open fires, with water carried by hand from the nearest well or stream.<sup>38</sup>

Understandably, many women experienced dissatisfaction with domestic life. Discontent might have been rooted not simply in the necessity of hard work, but also in the invariable routine of domestic labor. Even the poorest male farmer had greater opportunities to participate in more diverse activities than his wife had. A farmer's basic cycle was yearly, while his wife's was daily and weekly. The wife also had additional obligations each season.<sup>39</sup> The all-encompassing domestic role left women little or no private time. While most women did not question their lot, they often belittled their work and understood that it had very low status in the eyes of society.<sup>40</sup>

Thus, the conventional story of women and families in the time of the founders assumed that women were assigned by birth to a life of relentless procreation and work. Privacy and individuality did not exist and were regarded as suspect. The family, the central political, economic, and social unit of the society, was tightly integrated with and controlled by community and church.

This story is not intended to bemoan that life was difficult in the colonial era.<sup>41</sup> Nor is this story presented to suggest a view of history as ineluctable progress. Observe how far we have come. Rather, this story is intended to convey a totality of social assumptions about family and women that are both so profoundly sexist, and so foreign to late twentieth century America, as to preclude any assumption that the founders' particular views on a discrete issue can be assimilated as guidance for contemporary society.

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38. *Id.* at 44.

39. M. NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800*, at 12 (1980) [hereinafter *LIBERTY'S DAUGHTERS*].

40. *Id.* at 34-39.

41. Although "historians of American women have traditionally regarded the seventeenth and eighteenth centuries as a 'golden age,' in which women were better off than either their English female contemporaries or their descendants of the succeeding Victorian era," today serious historians regard the issue of progress for women as far more complex. See, e.g., *The Myth*, *supra* note 37, at 37.

## II. THE SECOND STORY: STIRRINGS OF LIBERTY AND EQUALITY IN EIGHTEENTH CENTURY FAMILY LIFE

It is possible to tell another, very different story about the founding fathers, families, and women. This is a story of increasing gender equality and sexual liberty. This story too is a part of our constitutional legacy.

In principle, the central tenet of our Constitution is that all lawful power derives from the people. The state is nothing more than the sum of its citizens. The people themselves are sovereign. Against a long religious and secular tradition in which the populace conceived of legitimacy and power as flowing from God and the monarch, our constitutional founders were truly revolutionary in asserting that the people are sovereign and the State is merely an artifact that serves to effectuate those purposes specifically assigned to it by the people. Our founders' revolutionary new concept of political theory embodies two conflicting elements. On the one hand, the state is ultimately responsible to the will of the majority. On the other hand, the power of the state is strictly limited, no matter what the will of the majority, according to the non-majoritarian precepts of a constitutional structure.

Enlightenment thought has accurately been described as reflecting a hope to eliminate political passivity and dependence.<sup>42</sup> The champions of our Revolution and Constitution rebelled against the patriarchal power of kings and the notion that political authority may legitimately rest on birth status.<sup>43</sup> That their culture prevented them from perceiving clearly that these anti-patriarchal principles also have a direct application to women and families does not eradicate the centrality of the founders' commitment to equality and individual liberty.

Abigail Adams was not alone in questioning the political theory by which women had "no voice, or Representation." In an early Revolutionary paper, James Otis<sup>44</sup> asked, "Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?"<sup>45</sup> In 1781, Mary Willing Byrd contested a Virginia decision

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42. F. WEINSTEIN & G. PLATT, *THE WISH TO BE FREE: SOCIETY, PSYCHE AND VALUE CHANGE* 49 (1969).

43. "No Title of Nobility shall be granted by the United States." U.S. CONST. art. I, § 9.

44. Otis, of Massachusetts, an early supporter of the Revolution, argued more generally that the Constitution codified preexisting human rights. See G. WOOD, *supra* note 14, at 292-94.

45. L. KERBER, *supra* note 19, at 30-31. Kerber observes, "Although Otis could ask embarrassing questions and imply their answers, on this as on so many points of theory, his developing mental illness prevented him from suggesting constitutional devices for implementing them." *Id.* at 31.

depriving her of property and claimed redress as a woman, mother of eight children, a virtuous person, and a friend to the United States who always abided by the laws.<sup>46</sup> In explaining the implications of being virtuous she adopted the Revolutionaries' own rhetoric, saying she had paid her taxes even though she had never been personally or virtually represented.<sup>47</sup>

In daily life, many women and families of the Revolutionary era did not fit the ideological mold ascribed to them.<sup>48</sup> The traditional school book narrative of the American Revolution depicts a series of pitched battles between uniformed armies. But in fact, the Revolution was a civil war involving the entire population. With men away in the Army, white American women confronted critical choices and assumed responsibility for maintenance of family and property.<sup>49</sup> As active fighting drew near, women had to decide whether to attempt to flee to safety or to stay and protect their homes. Flight, with children and such provisions as they could carry, was harrowing. The Army often required those who stood firm to quarter and maintain soldiers, and displaced friends and relatives who were in circumstances of utmost deprivation and danger also sought refuge with the families who stayed home.<sup>50</sup>

When active fighting subsided, women managed farms and businesses and dealt with the dangers of epidemics of smallpox and dysentery. They had to decide whether to inoculate themselves and their children with live smallpox virus, risking death or disfiguration to avoid the near certainty of death if the disease was contracted in its natural form.<sup>51</sup> Historian Mary Beth Norton described a standard pattern that emerged from letters of Revolutionary couples. At first male friends and male relatives advised the wife while the husband fought

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46. *LIBERTY'S DAUGHTERS*, *supra* note 39, at 226 (quoting J. BOYD, *THE PAPERS OF THOMAS JEFFERSON* 703-04 (1950)).

47. *Id.*

48. For an early treatment of women's resistance to the passive roles ascribed to them, see M. BEARD, *AMERICA THROUGH WOMEN'S EYES* (1933).

49. As people other than elite white men have entered the history profession, many have focused on the previously neglected history of their own predecessors. "It is as though, like Columbus, historians have found a whole new hemisphere crying out for exploration, the existence of which will eventually change their comprehension of the previously known world." M. NORTON & C. BERKIN, *supra* note 11, at 4. For an early effort to describe women's role in American history, depicting them as active agents rather than simply subservient, see generally M. BEARD, *supra* note 48.

50. *LIBERTY'S DAUGHTERS*, *supra* note 39, at 195-205.

51. *Id.* at 200-01.

in the war. But after "months and sometimes years of controlling their own affairs, women tended to reply testily when their husbands persisted in assuming their subservience."<sup>52</sup>

Of course, the standard pattern does not describe the lives of all women in the Revolutionary period. Some, particularly those from families with fewer material resources, travelled with the Army, working for wages as cooks and nurses.<sup>53</sup> Black women confronted a very different set of choices. The British, in an effort to disrupt the labor supply, offered liberty to black slaves. While previously only single men attempted to flee the plantations, when the British camp lay only a few miles away, many more women and children fled. Others remained, either because they feared the harsh conditions in the British refugee camps or were attached to the homes they knew.<sup>54</sup>

Women also made more direct political contributions to the Revolutionary cause. Boycott of British goods, such as tea, clothing, and ale, was a central Revolutionary tactic, with both practical and symbolic content. Revolutionary women supported the boycott and urged others to do so.<sup>55</sup> Women, sometimes by the hundreds, physically attacked the property of merchants who hoarded scarce or stocked British goods.<sup>56</sup> As purchasing was politicized, so too was manufactur-

52. *Id.* at 216-22.

53. See L. KERBER, *supra* note 19, at 51-55; LIBERTY'S DAUGHTERS, *supra* note 39, at 213. James Fenimore Cooper paints a fictional portrait of a woman who traveled with the revolutionary army for motives of patriotism, as well as economic need. See generally J. COOPER, THE SPY: A TALE OF THE NEUTRAL GROUND (1882).

54. LIBERTY'S DAUGHTERS, *supra* note 39, at 209-10; see generally I. BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974).

55. In 1768 Milcah Martha Moore wrote a poem that assumes women are in fact more patriotic than men in this regard.

Since the Men form a Party, on fear of a Frown,  
Are kept by a Sugar-Plumb, quietly down  
Supinely asleep, and depriv'd of their Sign  
Are strip'd of their Freedom, and rob'd of their Right  
If the Sons (so degenerate) the Blessing despise,  
Let the Daughters of Liberty, nobly arise,  
And tho' we've no Voice, but a negative here,  
The use of the Taxables, let us forbear,  
(Then Merchants import till yr. Stores are all full  
May the Buyers be few and yr Traffick be dull).  
Stand firmly resolved and bid Grenville to see  
That rather than Freedom, we'll part with our Tea  
And well as we love the dear Drought when adry,  
As American Patriots, — our Taste we deny.

M. Moore, "Patriotic Poesy," in 34 WM. & MARY Q. 307-08 (1977).

56. See L. KERBER, *supra* note 19, at 43-45.

ing. Patriotic women gathered together in spinning bees, saved rags for paper making and bandages, turned in lead weights from windows to be melted down for bullets, and saved family urine for saltpeter.<sup>57</sup>

The Revolution generated the first women's proclamation and political organization of our Nation. As we have seen, very little in the dominant political ideology of the time supported a direct political role for women.<sup>58</sup> Nonetheless, in Philadelphia in 1779, the wives and daughters of the Revolutionary leaders issued a proclamation and initiated a door to door campaign soliciting funds to support the Revolutionary army. The Philadelphia women raised over three hundred thousand dollars, and inspired women in other places to mobilize similar campaigns.<sup>59</sup> In the years following the war, scores of women's services and reform societies were organized to provide charity for widows and orphans.<sup>60</sup> Many of the women who became interested in politics during the Revolutionary period no longer accepted the convention that their sphere of concern was solely domestic. They continued to read the newspapers, follow public events, and express their political observations in letters and conversation.<sup>61</sup>

The stirrings of women's liberty and equality in the late eighteenth century were not limited to those changes generated by the exigencies of the Revolutionary War. In the economic sphere, while the law continued to preserve male control over married women's property, husbands and wives worked jointly on the farms and in small businesses that dominated the American economy in the era of our founders. One historian of this period, Mary P. Ryan, described women's economic role as equality of function and dependency of status.<sup>62</sup> Further, even though women lacked formal legal rights, in the post Revolutionary era, courts of equity increasingly exercised discretion to recognize married women's property interests. Courts of law also

57. *See id.* at 38, 42.

58. *See supra* notes 19-22.

59. *See* L. KERBER, *supra* note 19, at 99-111. Kerber comments, Many historians of women in the Revolution have admired the Philadelphia project excessively. . . . Benjamin Rush, whose wife was an enthusiastic participant in the campaign, wrote, "The women of America have at last become principals in the glorious American controversy." But they were not principals, of course, they were fund raisers, and only for a brief time . . . .

*Id.* at 103; *see generally* LIBERTY'S DAUGHTERS, *supra* note 39, at 177-88.

60. L. KERBER, *supra* note 19, at 111.

61. LIBERTY'S DAUGHTERS, *supra* note 39, at 188-90.

62. M. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT ch. 1 (1985).



protected the rights that some acquired through prenuptial contracts with their prospective husbands.<sup>63</sup>

Our founders lived in a world in which both relationships between men and women, and ideas about those relationships, were changing rapidly. Increased mobility, the disestablishment of the Protestant church, the growth of cities and commercial agriculture all weakened the interlocking control that community, family, and church exerted over individual social and sexual relationships. Enlightenment ideas about the relation of individual and society supported a new concept of marriage as serving individual happiness, not simply the duty to procreate or to fulfill obligations to one's spouse.<sup>64</sup> For the first time in our history, sexual relationships outside of marriage became possible, as a practical matter, for those who lived outside of small, watchful communities. At least for elite, white, heterosexual men, a range of non-marital relationships was tacitly condoned.<sup>65</sup>

As community, family, and religious constraints on premarital sexuality weakened, young women bore greater responsibility to preserve their chastity. The incidence of premarital pregnancy rose sharply in the late eighteenth century.<sup>66</sup> During that time, up to one third of all brides in New England were pregnant, compared to under ten percent in the seventeenth century.<sup>67</sup> Illegitimate birth rates also increased.<sup>68</sup> In the years following the Revolution, both men and women were allowed greater latitude in selecting their mates. Parents increasingly permitted children to choose their own partners, and republican prescriptive literature urged parents to do so.<sup>69</sup> Strong, objective evidence

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63. On equitable actions to protect women, see Williams, *supra* note 26. For prenuptial contracts, see J. DEMOS, *supra* note 33, at 82-86. On women who managed businesses, see E. DEXTER, *COLONIAL WOMEN OF AFFAIRS* (1924); L. KERBER, *supra* note 19, at 140-41.

64. L. STONE, *FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* ch. 10 (1977); see J. FLIEGELMAN, *supra* note 34.

65. See J. FLIEGELMAN, *supra* note 34.

66. Historians are divided on the reasons behind this phenomenon. For a comprehensive discussion, see D. SMITH & M. HINDUS, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, in 5 J. INTERDISCIPLINARY HIST. 537 (1975); see generally J. HOFF-WILSON, *The Illusion of Change: Women and the American Revolution*, in *THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 404 (A. Young ed. 1976).

67. M. GORDON, *THE AMERICAN FAMILY: PAST, PRESENT, AND FUTURE* 173 (1978).

68. R. Wells, *Illegitimacy and Bridal Pregnancy in Colonial America*, in *BASTARDY AND ITS COMPARATIVE HISTORY* 354-55 (1980).

69. For example, an advice columnist in the *Massachusetts Magazine* confronted her idealized republican parents, Mr. and Mrs. Vigilus, with the dilemma of a daughter who has fallen in love with a man they believe to be a fortune-hunter. Mrs. Vigilus explained, "We

of falling birth rates within marriage suggests that in the 1780s, precisely as our founders drafted the Constitution, married couples began to practice contraception.<sup>70</sup> Contraceptive practices represented a new willingness to make family size a matter of choice, rather than a fate determined by God. Such practice also suggested that sexual pleasure, apart from reproduction, was important to married couples. No new breakthrough in contraceptive technology explains this decline in birth rate. Historian Mary Beth Norton attributes increased contraceptive practice, and the corresponding decline in birth rates, to the “new egalitarianism” in marriage that arose in response to the Revolution and women’s participation in it. While women’s primary role was to be subordinate in the home, husbands who customarily wielded domestic authority determined their wives’ childbearing futures, despite women’s desires to have fewer children.<sup>71</sup> As women developed a sense of themselves as people, and the culture encouraged a concept of marriage as a relation of mutuality, contraceptive practices that depended upon cooperation became possible.

Post-war patterns of divorce also suggest a freer, more egalitarian concept of marriage than was prevalent in pre-Revolutionary years. During the period when our Constitution was adopted, some states liberalized divorce laws, divorce became more common, and the proportion of women initiating divorce actions increased.<sup>72</sup> England did not allow divorce, and some American Revolutionaries defended the freedom to leave an intolerable marriage as a republican right. In 1773, the English Privy Council disallowed a new Pennsylvania divorce act and sent instructions to all colonial governors to withhold consent from any provincial bill of divorce. Freedom to regulate colonial marriages, like freedom to regulate colonial taxation, became a Revolutionary issue.<sup>73</sup>

abhorred constraint, and we regarded persuasion . . . as no better than a specious form of tyranny.” *LIBERTY’S DAUGHTERS*, *supra* note 39, at 230. Thomas Jefferson announced the wedding of his daughter to a French friend, explaining, “[a]ccording to the usage of my country, I scrupulously suppressed my wishes that my daughter might indulge her own sentiments freely.” *Id.* at 229.

70. R. Wells, *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, in 25 *POPULATION STUDIES* 73 (1971).

71. *LIBERTY’S DAUGHTERS*, *supra* note 39, at 232.

72. See Cohn, *Connecticut’s Divorce Mechanism 1639-1969*, 14 *AM. J. LEGAL HIST.* 35, 35-48 (1970); Cott, *Divorce and the Changing Status of Women in Eighteenth Century Massachusetts*, 33 *WM. & MARY Q.* 592, 594, 613-14 (1976).

Even under the liberalized laws divorce was available only in a narrow set of circumstances, e.g., desertion, adultery, or fraud, and in some states divorce was not available at all. See L. KERBER, *supra* note 19, at 159-73.

73. See L. KERBER, *supra* note 19, at 160.

More generally, the new responsibilities and stature that women had assumed during the Revolution did not vanish when the fighting ended. Rather, women's efforts were redirected to the vital republican enterprise of inculcating qualities of virtue in the young. Our founders assumed that the democracy could work only if citizens were "virtuous" in their public and private lives.<sup>74</sup> Post-war attitudes reflected a renewed admiration for the central role of the family in a democratic society. These new attitudes elevated women's status in society because women typically directed household activities. Thus, with startling swiftness, women gained respect in the public arena. By the 1780s and 1790s, authors stressed the value of women in American society.<sup>75</sup>

In the post-war years an increased effort to educate women emerged. But the purpose of that education was merely to make them better wives and mothers. Dr. Benjamin Rush, a Philadelphian physician and scientist and leading proponent of education for women, explained that as equal citizens and participants in a democratic society, women should be educated to enable them to teach their sons about liberty and government.<sup>76</sup>

The generalities of republican principles, and the reality of women's active participation in the war effort, conflicted sharply with dominant legal and cultural concepts of their subservience and non-existence. The culture of our founders responded to this tension by constructing the Republican Mother. The purpose of the Republican Mother was to educate her children and guide them in paths of morality and virtue. Linda Kerber observed that the concept of Republican Motherhood appeared to surpass the Enlightenment in defining the role of women in American society. Republican Motherhood involved decreasing female involvement in the polis and thus represented yet another conservative choice Americans made in the post-war years. Yet this choice contradicted the spirit of the Americans' revolutionary radicalism.<sup>77</sup>

### III. THE FOURTEENTH AMENDMENT: CONFLICTING VISIONS OF FAMILIES AND WOMEN CONTINUE

The fourteenth amendment has been the principal constitutional basis for judicial decisions holding that the state may not discriminate

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74. G. WOOD, *supra* note 14.

75. See LIBERTY'S DAUGHTERS, *supra* note 39, at 243.

76. See B. RUSH, THOUGHTS ON FEMALE EDUCATION 6-7 (1787).

77. L. KERBER, *supra* note 19, at 283, 287.

on the basis of gender<sup>78</sup> or parental marital status,<sup>79</sup> arbitrarily restrict access to marriage or to divorce,<sup>80</sup> unreasonably interfere with familial autonomy,<sup>81</sup> or burden rights to make choices about procreation.<sup>82</sup> By its terms, the fourteenth amendment recognizes that all people born in the United States are citizens, and prohibits states from abridging citizens' privileges and immunities or denying them the equal protection of the law.<sup>83</sup>

Through the nineteenth century, conceptions of family and women changed dramatically. With urbanization and the growth of industry, people increasingly relied upon wages, rather than home based production, for material support. Family size continued to decline, so that by the adoption of the fourteenth amendment, the average white woman bore fewer than five children.<sup>84</sup> These cataclysmic changes in both economic and family life produced heightened consciousness of the role of families and women. Like the original constitutional founders, those who crafted and ratified the Civil War Amendments held sharply conflicting ideas about families, women, and the meaning these amendments might have for each.

78. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

79. See *supra* notes 1 & 5.

80. See *supra* notes 1 & 2.

81. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

82. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

83. The fourteenth amendment provides,

[all] persons born or naturalized in the United States . . . are citizens. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

84. Fertility rates continued to decline steadily until the 1940s, when the average total fertility rate was 2.19. In the 1950s and early 1960s, fertility rates rose, and have again declined in recent years. See figures and discussion, Smith, *Family Limitation, Sexual Control, and Domestic Feminism in Victorian America*, in *A HERITAGE OF HER OWN* 225-26 (N. Cott & E. Pleck eds. 1979).

A. *A Story of Liberty and Equality for Women and Families  
Under the Civil War Amendments*

In the years preceding the Civil War Amendments, ideas about family and women changed significantly from those of the Revolutionary era. In the mid-nineteenth century, the English philosopher, John Stuart Mill, vigorously denounced discrimination against women as irrational, unjust, and socially harmful.<sup>85</sup> Mill was the first major philosopher since Plato to argue that goodness was the same in a woman as in a man.<sup>86</sup>

In popular culture and ordinary lives, concepts of families and women also underwent profound change in the nineteenth century. Over ninety percent of women and over ninety-five percent of married women were not employed outside the home.<sup>87</sup> The family was thus the main focus of women's lives. Declining fertility rates, largely dependent upon male cooperation in withdrawal or abstinence, demonstrate both the enhanced power and autonomy of women within the marriage relation and the declining economic value of children in an industrial society.<sup>88</sup> Society attached greater prestige to domesticity and the nurturing of children. Because women were in charge of chil-

85. Earlier in 1792, Mary Wollstonecraft argued that women should not be denied political and civil rights, should be allowed to study medicine, politics, and business, and should not be forced to rely on marriage for economic support. Wollstonecraft, *A Vindication of the Rights of Women*, in *THE FEMINIST PAPERS* 40-41 (A. Rossi ed. 1974). She deplored the "false system of education" that made women "only anxious to inspire love, when they ought to cherish a nobler ambition, and by their abilities and virtues exact respect." *Id.* Although a Republican periodical reprinted *Vindication* and some Americans admired it, for the most part it was not influential in this country. L. KERBER, *supra* note 19, at 222-25, 279.

John Stuart Mill was convinced that the utilitarian goal of the greatest happiness for the greatest number could not be achieved apart from the greatest possible moral and intellectual advancement of the human race. The emancipation and equality of women would, he argued, both increase their own happiness and improve humanity. "The ideas and institutions by which the accident of sex is made the groundwork of an inequality of legal rights, and a forced dissimilarity of social functions, must ere long be recognized as the greatest hindrance to moral, social and even intellectual improvement." 3 J. MILL, *PRINCIPLES OF POLITICAL ECONOMY, COLLECTED WORKS* 765 (1965). Two other principles figure prominently in Mill's feminism: liberty, or the opportunity for self-determination, and justice, in the sense of equal consideration or impartiality. Both of these concerns are, however, explicitly related to the moral and intellectual advancement of humanity, as well as to the happiness of women themselves. J. MILL, *THE SUBJECTION OF WOMEN* 89 (1970) [hereinafter *SUBJECTION OF WOMEN*].

86. S. OKIN, *supra* note 18, at 220.

87. Smith, *supra* note 84, at 226.

88. This is Smith's central thesis. See Smith, *supra* note 84; see generally C. DEGLER, *supra* note 22, at ch. 18.

dren at a time when child rearing assumed great social importance, motherhood became a source of status and power. Historian Daniel Scott Smith described women's assertion of autonomy and value within the family as "domestic feminism."<sup>89</sup>

The belief that women possessed superior virtue and piety both enhanced the status of women's work inside the home and supported new forms of female activity outside of it.<sup>90</sup> The anxiety and dislocation generated by urbanization and industrialization led many Americans to revivalist religions and to a proliferation of new charitable and community organizations. Women were the mainstay of these groups. The idea of women's moral and social superiority allowed women to break the bonds of domesticity to form political associations focused on such important female issues as social purity, temperance, and care of the abandoned and infirm.<sup>91</sup>

From the 1830s, the moral fervor of the abolitionist cause drew Northern women more deeply into public life than ever before in our history.<sup>92</sup> Some of the women who met in the anti-slavery movement perceived parallels between the subjugation and disenfranchisement of black people and the oppression of women.<sup>93</sup> In 1848, the First Women's Rights Convention, held in Seneca Falls, New York, issued a proclamation that closely tracked the original Declaration of Independence.<sup>94</sup> In the years before the Civil War, advocates of women's

89. Smith, *supra* note 84, at 222.

90. M. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK 1790-1865* ch. 5 (1981); K. SKLAR, *CATHERINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1973).

91. E. FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* ch. 13 (rev. ed. 1975); M. RYAN, *supra* note 90, at ch. 3. For example, the Young Women's Christian Association was founded in the 1860s; The American Association of University Women in 1882; The Women's Christian Temperance Union in 1874. *Id.* at 181-82. For a discussion of black women's organizations formed during the nineteenth century, see P. GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 75-117 (1984). On women's organizations in the South, see S. LEBSOCK, *THE FREE WOMEN OF PETERSBURG* ch. 7 (1984).

92. In 1838, Angelina Grimke addressed a committee of the Massachusetts State Legislature that was conducting hearings on an anti-slavery petition. It was the first time that a woman had ever appeared before a legislative body. E. FLEXNER, *supra* note 91, at 49.

93. The first explicitly feminist organizations arose when anti-slavery groups refused to allow full participation by women. *Id.* at 41-43.

94. The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. He has never permitted her to exercise her inalienable right to the elective franchise. He has compelled her to submit to laws, in the formation of which she had no voice.

rights pressed their cause in speeches, petitions, and tracts to legislators, the press, and religious leaders.<sup>95</sup>

The supporters of women's liberty and equality achieved significant victories in the mid-nineteenth century. States adopted married women's property acts repudiating Blackstone's notion that married women were civilly dead.<sup>96</sup> Institutions of higher education trained women in a broader range of subjects.<sup>97</sup> Women campaigned for suffrage across the country.<sup>98</sup> By 1870, Wyoming and Utah allowed women to vote and to serve on juries.<sup>99</sup>

Because evolving concepts of family and women's roles were central cultural concerns in the 1860s, these issues colored and informed the constitutional debates on the post Civil War Amendments. In an important recent reexamination of the history of the thirteenth and fourteenth amendments, Professor Peggy Davis demonstrates that the framers of these amendments perceived that freedom to create ties of kinship is a sacred and inalienable right.<sup>100</sup> Professor Davis shows that both those who supported and those who opposed the constitutional amendments recognized that basic rights of citizenship, liberty, and equality encompassed concern with familial relationships.<sup>101</sup>

One of the first cases to construe the meaning of the fourteenth amendment involved the rights of women as citizens and the presumed relationship between women as individuals and the family. Myra Brad-

The Declaration of Sentiments (First Women's Rights Convention 1848), *reprinted in* A. KRADITOR, *UP FROM THE PEDESTAL* 185-86 (1970). This remarkable document protests discrimination against women in property law, employment, education, religion, and morality and insists that women "have immediate admission to all the rights and privileges which belong to them as citizens of the United States." *Id.*

95. See generally E. FLEXNER, *CENTURY OF STRUGGLE* 3-102 (1970).

96. See Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1061-70 (1972).

97. E. FLEXNER, *supra* note 91, at ch. 2.

98. *Id.* at ch. 12.

99. *Id.* at ch. 11. New Jersey's Constitution of 1776 did not specifically disfranchise women, and they voted sporadically until 1807 when the constitution was amended to limit the franchise to free white, male citizens. *Id.* at 164.

100. P. Davis, *The Right of Family: Unrecognized Constitutional Sources* 11 (1986) (unpublished draft) (quoting CONG. GLOBE, 38th Cong. 1st Sess. 1324 (1864)).

101. Opponents of the Civil War amendments, and the Civil Rights Acts that implemented them, frequently invoked popular fears of miscegenation. *Id.* at 2-33. Supporters of the Civil Rights Acts acknowledged that these acts implicated the rights to marry and form a family, but addressed the miscegenation fear by posting a "separate-but-equal" approach to marriage rights that asserted that black and white are equally free to form families with those of their own race. *Id.* at 33-34.

well was the founder and publisher of a legal newspaper widely read by lawyers in the midwest in the nineteenth century.<sup>102</sup> She challenged Illinois' decision denying her a license to practice law solely because she was a woman, arguing that the state violated the fourteenth amendment's prohibition of laws that abridge the privileges or immunities of citizens of the United States.<sup>103</sup> After the United States Supreme Court refused to require her admission to the bar, the Illinois legislature authorized her to keep her own earnings, made her an honorary member of the bar, and three years later adopted a statute assuring all people freedom of occupation.<sup>104</sup>

In the years following the adoption of the fourteenth amendment, many women asserted that the right to vote for federal officials was a privilege or immunity of federal citizenship.<sup>105</sup> No one questioned that women were citizens, at least for purposes of paying taxes and holding passports. Thus, the women argued that as citizens, the privilege and immunity clause of the fourteenth amendment protected their right to vote.<sup>106</sup>

102. See Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 846.

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

104. ILL. REV. STAT. ch. 48, §§ 3-4 (1876); see Minow, *supra* note 102, at 849.

105. In 1871, women in many states attempted to vote, invoking the protection they asserted was provided by the fourteenth amendment's privilege and immunity clause. 1 E. STANTON, S. ANTHONY, & M. GAGE, *HISTORY OF WOMEN'S SUFFRAGE* 586-756 (1882).

Susan B. Anthony was prosecuted for voting in New York. *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873) (No. 14,459). When the court said "the prisoner has been tried according to the established forms of law," Anthony replied

Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor's ordered verdict of guilty, against a United States citizen for the exercise of "*that citizen's right to vote*," simply because that citizen was a woman and not a man. But yesterday, the same man made forms of law, declared it a crime punishable with \$1,000 fine and six months imprisonment for you, or me, or any of us, to give a cup of cold water, a crust of bread, or a night's shelter to a panting fugitive as he was tracking his way to Canada. And every man or woman in whose veins coursed a drop of human sympathy violated that wicked law, reckless of consequences, and was justified in so doing. As then the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so, now must women, to get their right to a vote in this government, take it; and I have taken mine, and mean to take it at every possible opportunity.

A. KOEDT, E. LEVINE, & A. RAPONE, *RADICAL FEMINISM* 18-19 (1973).

106. U.S. CONST. amend. XV, § 1 provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); see also *infra* text accompanying note 109 (Court ignored language of amendment).



Women's claims for liberty and equality, and a corresponding transformation of traditional family structures, were supported by both the language of the fourteenth amendment and the rhetoric and culture of the era in which they were adopted. Yet these implications of the Civil War Amendments were not developed until the latter half of the twentieth century.

### B. *The Dominant Story of the Civil War Amendments*

The Supreme Court rejected Myra Bradwell's claim that she should be licensed to practice law and held that the fourteenth amendment protected only those privileges and immunities that owed their existence to the federal government, its national character, Constitution, or laws.<sup>107</sup> Justice Bradley, concurring, asserted that "divine ordinance" and "the nature of things" proscribed a "family institution [that] is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."<sup>108</sup> In 1875 the Supreme Court, ignoring the literal language of the then new Constitutional amendment, denied women the right to vote because, historically, women had always been disenfranchised.<sup>109</sup> Under the Court's narrow formulation, neither the right to vote nor the right to practice law was a privilege or immunity of citizenship.

Much of the history of the Civil War Amendments supports the Supreme Court's initial refusal to extend constitutional guarantees of equality and liberty to women. Section two of the fourteenth amendment included the word "male" in the Constitution for the first time.<sup>110</sup> Susan B. Anthony and Elizabeth Cady Stanton, were so enraged at this language that they urged opposition to the amendment.<sup>111</sup> Two years later, feminists sought to persuade Congress to add the word "sex" to the fifteenth amendment's guarantee of the right to vote. But again, the attempt to draw persuasive parallels between the status of blacks and women was rebuffed.<sup>112</sup>

107. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

108. *Id.* at 140 (Bradley, J., concurring).

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

110. [W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST amend. XIV, § 2.

111. E. FLEXNER, *supra* note 91, at 146-47.

112. *Id.* at 150-52.

Both the drafters of the Civil War Amendments, and the judges who interpreted them, shared social and cultural assumptions about families and the nature of women. The culture of the nineteenth century had a more self-conscious concept of family than earlier times.<sup>113</sup> The family became a unit unto itself. Home became a safe harbor for the family, where the women and children would spend most of their time, and where men would take refuge from the outside world. This setting created a specific division of labor within the family. The husband became the sole wage earner while the wife devoted herself to activities within the household. The ideal woman was seen as the centerpiece of the home. Family life had become divorced from the working world.<sup>114</sup> Development of the ideology of separate spheres responded to growing commercialization and industrialization, but also both predated and facilitated those economic developments.<sup>115</sup> It is an intellectual and moral concept about who men and women are and who they should be. As historian Linda Gordon observed, the idea that women were profoundly different from men was indicative of a new male-created tenet to keep women in their homes as well as women's adaptation to this new situation.<sup>116</sup>

The new concept of the family was also reflected in the law. Blackstone's fiction that married women were civilly dead was replaced by a theory that recognized woman's legal personhood but assigned her a place before the law different from that of her husband. Ordinary law assumed that the man was the family's breadwinner and representative in the public world and that the woman was the center of the private world of the home.<sup>117</sup> Thus in 1873, Justice Bradley reflected the culture of his time in asserting that Myra Bradwell's desire to practice law was inconsistent with her ordained role as wife and mother.<sup>118</sup>

Even John Stuart Mill, who so presciently defended women's right to equality in education, careers, and participation in public life, was unable to imagine a world without traditional family arrangements

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113. J. DEMOS, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 49 (V. Tufte & B. Myerhoff eds. 1979).

114. *Id.* at 51.

115. M. RYAN, *supra* note 90, at 239.

116. L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 18 (1976).

117. N. COTT, *THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 197-200 (1977).

118. *See supra* note 108.

built upon the work and devotion of women. There is, Mill asserted, an “infinitely closer relationship of a child to its mother than to its father,”<sup>119</sup> and “nothing can replace the mother for the education of children.”<sup>120</sup> While Mill defended women’s right to choose between a career and marriage, he assumed that most would continue to choose marriage. A woman who chooses to marry also chooses to manage a home and raise children for as many years as these roles demand. She must forego any other occupation that would be inconsistent with the requirements of these roles.<sup>121</sup>

The idea of the separate spheres of men and women has deep implications that we still carry today. For example, the assumption that women preserve a private world of caring and morality in the home frees the male political and economic worlds to operate in relentless pursuit of wealth and power.<sup>122</sup> The idea of separate spheres allows wage work and public life to be structured on the assumption that workers and political leaders have no responsibility for the care of young children or aged parents. The separate spheres arrangement has produced a pattern of child rearing under which women bear sole responsibility for the nurture of young children. Virtually all adults, when they were young and vulnerable, depended upon women. The intense feelings of love and hate that abject dependency generates are directed exclusively toward women.

Thus, as in the eighteenth century, it is possible to tell two sharply conflicting stories about the attitudes of the nineteenth century constitutional founders toward women and families. The story of expanding liberty and equality emphasizes that this was a period in which women participated in public life at unprecedented levels, and the culture and law placed high value on the contributions that women made as mothers and the center of the home. But the dominant assumptions of the nineteenth century denied women the right or capacity to participate in most forms of economic and political life and did so in a manner that was far more self-conscious and deliberate than in earlier periods.

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119. Letter from John Stuart Mill to Isabella Beecher Hooker (Sept. 14, 1869), *reprinted in 17 LATER LETTERS, COLLECTED WORKS 1640, quoted in OKIN, supra note 18, at 227.*

120. Letter from John Stuart Mill to Princess Marie Stecherbatov and Associates (Dec. 18, 1868), *reprinted in 17 LATER LETTERS, COLLECTED WORKS, supra note 119, at 1528, quoted in OKIN, supra note 18, at 227.*

121. *See* SUBJECTION OF WOMEN, *supra* note 85, at 89.

122. N. COTT, *supra* note 117, at 197-99.

#### IV. THE INTENT OF THE FRAMERS AND A CONSTITUTION FOR THE AGES

How then does this history illuminate the meaning of our Constitution for contemporary families? Sometimes today particular positions on current constitutional controversies are defended as intended by the founders.<sup>123</sup> As a dramatic example, in 1986, the Supreme Court upheld state power to impose criminal sanctions on two adults of the same sex who engage in private, consensual, sexual activity. Justice White, writing for the Court, rejected arguments that important individual interests in liberty, privacy, expression, and equality were violated by such prosecution. He invoked the intent of the framers, saying proscriptions against sodomy are deeply entrenched in history.<sup>124</sup> Common law treated sodomy as a criminal offense and the original thirteen states forbade such behavior at the time of the ratification of the Bill of Rights.<sup>125</sup> Chief Justice Burger, citing Blackstone, concurred, suggesting that sodomy was a crime against nature, more heinous than rape.<sup>126</sup> Justice Burger also pointed out that the colonies received English common law, which prohibited sodomy.<sup>127</sup>

This article's brief examination suggests that history is too ambivalent and complex to allow the meaning of the Constitution today to be inferred by direct, literal appeal to the "intent of the framers." Historic intent points in different directions. Sharply divergent stories can be told about concepts of families and the role of women that were held by the people who adopted our Constitution.

Further, simplistic use of original intent proves far too much. To the extent that the framers' intent can be fairly fathomed, their dominant conceptions denied the humanity and equality of a majority of the American people, including women, the Native American population, and people of color.<sup>128</sup> As we have seen, the legal world of the framers was built upon a particular form of family structure that was enforced by a complex, intrusive web of legal and social norms that defined women as civilly dead,<sup>129</sup> and required citizens to submit to the discipline of a tightly proscribed form of familial governance.<sup>130</sup>

123. See *supra* note 10.

124. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986).

125. *Id.*

126. *Id.* at 2847 (Burger, C.J., concurring).

127. *Id.*

128. In relation to black people the framers were quite conscious of the tension between the rhetoric of freedom, on the one hand, and the reality of slavery, on the other. See B. BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 232-46 (1967).

129. See *supra* note 26-27.

130. See *supra* note 29-34.

That belief structure is inconsistent with the more abstract principles upon which our nation was founded. Fortunately for the brilliance and stability of our constitutional structure, the framers did not intend that their personal expectations, purposes, and intentions would control the future meaning of specific constitutional provisions.<sup>131</sup> The Constitution, as any political document, is the product of compromise and is bound by the culture of its time. It incorporates departures from its own best principles. Both the disenfranchisement of women and the institution of slavery violated republican principles of equality and liberty of all people. The framers understood the Constitution and the Republic it shapes as an experiment, built upon the experience and theories of others, but, at the same time, creating something truly unique.<sup>132</sup> The founders intended the spirit of experimentation to continue and grow.

The Supreme Court participates, with the original framers, in giving meaning to the generalities of the Constitution. More broadly, all of the American people participate in giving meaning to the Constitution. The Supreme Court does not act alone or of its own initiative in articulating the meaning of the Constitution. Rather, the Court responds to evolving concepts of justice and equality in giving flesh to the Constitution. We the people develop norms of justice and equality in many ways. For example, the Court applied the first amendment to state and local officials when the men and women of the labor movement took to the streets asserting they had rights to assemble and speak.<sup>133</sup> In the 1960s, the Court responded to the moral voices of the civil rights movement in first opening many of the institutions of American life to black people.

While sexism and deep intrusion to enforce particular familial relations were pervasively rooted in the specific intent of our constitutional founders, the Supreme Court has correctly recognized that laws allocating rights and responsibilities on the basis of gender are inconsistent with our more general constitutional commitment to individual

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131. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

132. In the Virginia ratification convention, Madison observes: "I can see no danger in submitting to practice an experiment which seems to be founded on the best theoretic principles." 3 J. ELLIOT, *supra* note 12, at 394. At the South Carolina convention, Charles Pinckney said, "our Constitution was in some measure an experiment," and that he considered it "the fairest experiment ever made in favor of human nature." 4 *id.* at 262.

133. D. KAIRYS, *Freedom of Speech*, in THE POLITICS OF LAW 140 (1982) (discussing *Hague v. CIO*, 307 U.S. 496 (1939)).

liberty and equality.<sup>134</sup> Blatantly sexist concepts of families and women are so inconsistent with contemporary values that even Attorney General Meese, who is zealous in urging adherence to the original intent of the framers, also affirms that discrimination on the basis of gender "offends our best principles as a nation."<sup>135</sup> Venerable forms of gender discrimination have been rejected not primarily because the modern Supreme Court is wiser and more sensitive, but rather because women came to understand their situation more clearly and to speak out for equality. Women and men have developed new norms of gender equality both in public debate and political action, and in forging new forms of commitment in intimate relationships and in reordering daily personal lives.

It has proven much easier to integrate women into the realms of economic and political life than it has been to transform the familial structures built on the assumptions of women as second class citizens. The Supreme Court has recognized and given normative constitutional force to the social reality that women are no longer "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."<sup>136</sup> But the mirror image of this proposition, that men are no longer destined solely for the marketplace and the world of ideas, but bear individual and collective responsibility for the nurture of the young and the vulnerable, does not reflect social reality and does not carry normative constitutional force.<sup>137</sup>

Professor Martha Minow suggests that we conceptualize the Constitution as foundational and observes that the dictionary tells us that a foundation is the "ground upon which something is built up or overlaid."<sup>138</sup> For 200 years, Americans have engaged in the process of constructing our social edifice upon the foundation of our Constitution. That foundation has provided a language and process within which we have engaged in passionate debates about our identities, values, and visions as a people.

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134. See *supra* note 4 & 9.

135. Address by Att'y Gen. Edwin Meese, Dickinson College 13 (Sept. 17, 1985). It should be noted that the Attorney General asserts his opposition to gender bias while attacking affirmative action programs that would aid women in overcoming centuries of discrimination. *Id.* at 10-17.

136. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

137. Professor Wendy Williams used this image in her Bicentennial talk at the New York City Public Library, April 6, 1987.

138. WEBSTER'S COLLEGIATE DICTIONARY 487 (anniv. ed. 1981). Professor Martha Minow pointed out this definition at New York University's Law and Society Colloquium, March 11, 1987.

It is also appropriate to conceptualize families as foundational to our individual personalities and character, as well as to all other social, economic, and political institutions. For most of our history that foundation, and women's central role in maintaining it, have simply been assumed. Society has excluded the voices of women from the debates by which our culture and law are shaped. Yet, just as plainly, women have always played a vital role in constructing our nation. A challenge for the coming century is to reconstruct the family, and the society of which it is an integral part, to promote the liberty and equality of all people.