

# WOMEN AND THE CONSTITUTION

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Here is a ten-minute history<sup>1</sup> of women and the Constitution.

## I. THE FOUNDING

In the 1780s, the United States Constitution was ordained and established by men. As a rule, women did not participate in the conventions that framed and ratified the Constitution. Women did not vote for convention delegates. And women—as women—did not publicly participate in constitutional debates in the press, in pamphlets, and so on. To my knowledge, only one woman played a prominent role: the Anti-Federalist Mercy Otis Warren, sister of colonial lawyer James Otis (who argued the famous 1761 writs of assistance case) and wife of James Warren, speaker of the Massachusetts House of Representatives. Mercy Otis Warren wrote an important Anti-Federalist pamphlet in early 1788, but she hardly did so as a woman. She published it under an ungendered pseudonym, “A Columbian Patriot,” which most contemporaries attributed to a man, Elbridge Gerry.<sup>2</sup> (Not until the 1930s did Mercy Otis Warren finally win authorial credit for this pamphlet.)<sup>3</sup>

## II. THE ANTEBELLUM ERA

Early Nineteenth Century America carved life into separate gendered spheres of public and private. Men dominated “public” fora—especially government—and women occupied key roles in “private” domains, such as the family. Religion was initially seen as a private domain where women could act. And act they did, associating with other women (and sometimes men) to pursue moral reform projects that took on increasing public and political significance as the century wore on—religious revivalism, the temperance movement, anti-gambling campaigns, and eventually, the abolition and women’s rights movements.

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1. Okay, fifteen. (I ran over.)

2. See, e.g., PAMPHLETS ON THE CONSTITUTION, 1787-88 1 (Paul L. Ford ed., 1888).

3. See Charles Warren, *Elbridge Gerry, James Warren, Mercy Warren and the Ratification of the Federal Constitution in Massachusetts*, 64 MASS. HIST. SOC’Y PROC. 143 (1932).

Discourse on these matters featured women, speaking and writing publicly as women—the Grimke sisters' and Harriet Martineau's public lectures against slavery, Harriet Beecher Stowe's *Uncle Tom's Cabin*, and so on. This discourse was carried on not only by women—as women—but also about women. Abolitionist literature featured graphic accounts of the lives of slave girls and slave women, as women. Slave women were breeders against their will as women. They were forced to be wet nurses as women, and sexual playthings as women. Anyone who studies abolitionist literature will see these images over and over again: they are a dominant theme of much abolitionist literature. And men get it.<sup>4</sup>

Southerners punningly define slavery as a *domestic* institution. Southern men don't like to use the word "*slavery*"—they prefer the idea of "servitude." And indeed, they prefer the idea of servitude precisely to analogize the servitude of slave to master (or should I say, of servant to master) to other sorts of servitudes that characterize the domestic sphere—in particular, the servitude that a woman owes to a man in marriage under the common law.

So much for the slave power defense, which understands some of these connections. The Republican Party also understands these gendered connections. The 1856 Republican platform defines slavery and polygamy as "twin relics of barbarism."<sup>5</sup> In a famous speech, Senator Charles Sumner makes a very similar argument, and he's caned on the floor of the Senate for suggesting that slave masters are sleeping with their slave women, and indeed, that some of those slave masters are Senators—in particular, Senator Andrew Butler of South Carolina.<sup>6</sup> The analogy to polygamy is thus quite literal. Republicans understand that slavery is itself a form of polygamy that gives Southern white men access—sexual access—to concubines, to slave women. And white women in the South understand that, too. Mary Boykin Chestnut has a biting line in her diary about how, like "the patriarchs of old," Southern men are surrounded by their "concu-

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4. See generally Neal K. Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 796-805 (1993). See also Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365-72 (1992).

5. NATIONAL PARTY PLATFORMS 1840-1972 27 (Donald B. Johnson & Kirk H. Porter eds., 1973).

6. For details, see Amar & Widawsky, *supra* note 4, at 1366 & n.22.

bines,” and the slave children “in every family partly resemble the white children.”<sup>7</sup>

So, the slavery experience should, I suggest, teach us that intimate association between men and women does not in and of itself guarantee respect and protection. (And here is where my historical study of slavery leads me to differ somewhat from Professor BeVier.)<sup>8</sup> Slave masters intimately associated with slave women. They were the fathers of slave women. They were the (half) brothers of slave women. They were the sexual partners of slave women. And sometimes they were more than one of these things at the same time. They were having sex with their daughters and their (half) sisters. And this was all very well understood in the literature of abolitionism.

### III. THE RECONSTRUCTION

Women, in short, were in large part the agents and the subjects of the Thirteenth Amendment. They were agents, because women publicly mobilized for the Abolitionist movement; and they were subjects, because half of the people who were emancipated were female.

Now the Fourteenth Amendment comes along. Its first sentence talks about all native-born persons being citizens—women as well as men.<sup>9</sup> The Amendment goes on to talk about “privileges and immunities” of all citizens, and “equal protection” of all persons.<sup>10</sup> The central intellectual construct here is the distinction between civil and political rights. The Fourteenth Amendment was understood to guarantee civil rights, but not political rights.<sup>11</sup>

Political rights here are quintessentially the rights to vote, hold office, serve on a jury, and serve in a militia. Section One of the Fourteenth Amendment is not about those things, and so, for example, it’s quite hard to see one-person-one-vote as supported by the Fourteenth Amendment. If you believe in one-person-one-vote and you’re a textualist, you’re much better off making an

7. MARY B. CHESTNUT, *A DIARY FROM DIXIE 21-22* (Ben A. Williams ed., 1949), as quoted in Amar & Widawsky, *supra* note 4, at 1367 & n.23.

8. See Lillian BeVier, *Thoughts from a “Real” Woman*, 18 HARV. J.L. & PUB. POL’Y 457 (1995).

9. U.S. CONST. amend. XIV, § 1.

10. *Id.*

11. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1260-62 & n.295 (1992).

argument about the Republican Government Clause than about the Fourteenth Amendment.<sup>12</sup>

Section One of the Fourteenth Amendment was about “civil” rights. Today when we talk about “civil rights,” we often mean voting. But during the Fourteenth Amendment era “civil” rights meant such things as the right to own property, to contract, to sue and be sued, to pursue a career, to inherit, to devise, to move about freely, to speak freely, to assemble, to worship, and to be able to invoke diversity jurisdiction—rights which of course free blacks like Dred Scott did not always enjoy, according to Chief Justice Taney’s infamous opinion.<sup>13</sup>

Now, why did this distinction between civil and political rights make any sense to the people at the time? Well, in part because of the language of Article IV of the Constitution, which also talks about “privileges” and “immunities” of “citizens”. And the idea in Article IV is, if you’re from Massachusetts and you go down to South Carolina, you have a right, equal to the South Carolinians, to sue and be sued, to own real property, to make wills and all the rest. But as a Massachusetts citizen you don’t have a right to vote in a South Carolina election, or serve in a South Carolina legislature, or a South Carolina militia, or a South Carolina jury. So that’s one obvious example of how this distinction between civil and political rights would have made sense to good lawyers at the time.

But there is another model that they have in mind, consciously or not. There is, in 1866, a longstanding category of citizens who have rights as citizens—rights which Dred Scott lacked as a free black—and yet who could not vote, hold office, serve in a militia, or serve in a jury. They’re called women—unmarried white women.<sup>14</sup> So another way of putting the point is that the Fourteenth Amendment, in some ways, was designed to give everyone—all persons, all citizens—certain civil rights. These rights were largely defined by the status of unmarried white women. The Fourteenth Amendment was in effect saying that America would let blacks—black men and black women—have the rights that

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12. See generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

13. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

14. Once women married, they lost certain rights. Some of Professor Maltz’s evidence is really about married women; I don’t think it carries over to all women. See Earl M. Maltz, *Sex Discrimination and the Original Understanding*, 18 HARV. J.L. & PUB. POL’Y 415 (1995).

unmarried white women had long enjoyed. So this is a central intellectual category, defining in some ways, what the Fourteenth Amendment was all about.

Now, a few textual points. The Fourteenth Amendment does not mention race, in contrast to the Fifteenth Amendment. Section One of the Fourteenth Amendment does not, in its words at least, treat race discrimination as different from gender discrimination. Section Two of the Fourteenth Amendment does insert for the first time the word “male” into the Constitution,<sup>15</sup> and women were outraged by this. They lobby against this in great numbers.<sup>16</sup> There are petitions introduced in the 39th Congress signed by hundreds and thousands of women mobilizing against Section Two. But no one, none of the women, challenges Section One. They think Section One protects them because it isn’t limited to race—it protects all citizens, all persons.<sup>17</sup>

So, if we look first and foremost, as good constitutionalists, at the text, and we look second not at narrow legislative history, but at public understanding—what “We the People” reading the text in 1866 would understand, especially reading the text in connection with other constitutional material, like the *Dred Scott* case, or Article IV—I think we see a rather different picture from Earl Maltz’s.<sup>18</sup> A picture emerges in which women are in some ways at the center of Section One of the Fourteenth Amendment.

Let’s take the 1873 *Bradwell* case involving Myra Bradwell’s challenge to an Illinois law that prevents women from practicing law.<sup>19</sup> The *Bradwell* case does not deny that the Fourteenth Amendment covers gender discrimination; it just says that *this* particular discrimination—implicating the “public” domain of practicing law—is permissible, and even there, the great abolitionist and free soil lawyer, the Chief Justice of the United States, Salmon P. Chase, dissents. In a nutshell, I agree with an author who wrote the following about *Bradwell*:

[C]ounsel for Mrs. Bradwell was no less than Senator Matthew Carpenter, a leading member of both the Supreme Court’s bar and the Republican Party. He argued that the Privileges or Immunities Clause forbade discrimination on the basis of sex

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15. U.S. CONST. amend XIV, § 2.

16. See generally Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988).

17. For more documentation and analysis, see *id.*

18. See Maltz, *supra* note 14.

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

just as it forbade discrimination based on race. Carpenter's argument probably had merit, but this was a very hard question.<sup>20</sup>

The author? Some activist liberal academic, you say. A Justice Brennan clone. (And I suppose it's suspicious that the quote appears in an article in the notoriously liberal *Yale Law Journal*.) But we have the author here, today—my friend John Harrison of the University of Virginia faculty, a Bork clerk, a self-described originalist, and a old friend of the Federalist Society.<sup>21</sup>

Now a few words about the Fifteenth Amendment. The Fifteenth, unlike the Section One of Fourteenth, specifically addresses political rights. Unfortunately for women, it doesn't protect women's political rights, but only the political rights of black men—to vote, to hold office, to serve on juries. The Fifteenth Amendment explicitly talks only about voting, but what does one do in a jury or in a legislature? One *votes* in a jury and in a legislature. And so indeed, the famous case of *Strauder v. West Virginia*<sup>22</sup> is best understood, not as a pure Fourteenth Amendment case, but also as anticipating blacks' Fifteenth Amendment right to equal political participation.<sup>23</sup>

Now women divide over the Fifteenth Amendment. Remember, the women's rights movement had supported abolitionism in the Thirteenth Amendment, and freedom and equality in Section One of the Fourteenth Amendment; but now we have black men being protected in political participation, but not women. And the women's movement splits. Some support the Fifteenth Amendment under the notion it's the black man's hour; others oppose it.<sup>24</sup>

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20. Guess who. (No peeking.)

21. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1461 (1992).

22. 100 U.S. 303 (1880).

23. That flaming judicial activist Lino Graglia has himself acknowledged as much in the *Stanford Law Review*. See Lino A. Graglia, *Interpreting the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1042-43 (1992). For more evidence, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1202-03 & n.313 (1991); and especially Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. (forthcoming 1995).

24. See Sandra Rierson, 1 DUKE WOM. L.J. (forthcoming 1995); see also JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 U.C.L.A. WOM. L.J. 701 (1994).

## IV. THE SUFFRAGE REVOLUTION

Eventually, however, our Constitution restores symmetry between race and gender with the Nineteenth Amendment. And the Nineteenth Amendment—born only after years of hard labor of a women's rights crusade led by women—is about women's equality. It's about the right to vote, but not just for legislatures; it's also about their right to vote in juries, and in legislatures.<sup>25</sup> It's even about their equal military participation. In effect, if the Fourteenth Amendment (although it doesn't use these words) is about "civil" rather than "political" rights, the Fifteenth and Nineteenth (though they also don't use these words) are about "political rights"—the entirety of political rights, even military participation. The Second Amendment basically says those who are voters should be arms-bearers too. (Once blacks are allowed to be voters, they participate in the military. Indeed, one of the reasons they were allowed to vote in the first place, is that they had fought in the Civil War. And Woodrow Wilson supports the Nineteenth Amendment under the idea that women are economic soldiers in the fight against Germany in World War I.<sup>26</sup>)

So, the Nineteenth Amendment, read narrowly, is about the right to vote, but that right extends beyond voting for legislatures to voting in juries, and to voting in legislatures. It also can be understood as establishing a kind of *a fortiori* argument: if women have equal political rights, *a fortiori* they should have equal civil rights. This is the view of Justice Sutherland, in the famous 1923 Supreme Court case of *Adkins v. Children's Hospital*.<sup>27</sup> In effect, Sutherland, writing for the Court, says after the Nineteenth Amendment is passed, America can't have paternalistic legislation for women's, but not men's, maximum hours and minimum wages.<sup>28</sup> Before the Nineteenth Amendment, maybe America could have that kind of differential regulation, but not afterwards. And he cites the Nineteenth Amendment for that proposition.<sup>29</sup>

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25. We could also see the latter as the right of women to be voted for. One way to disenfranchise people is to limit their ability to vote for their first choice candidate, so to preserve the right of women to vote, we must preserve their right to vote for women, and thus women's right to be voted for.

26. See Akhil Reed Amar, *supra* note 23, at 1164 n.152.

27. 261 U.S. 525 (1923).

28. *Id.* at 553.

29. *Id.* In dissent, Justice Holmes harrumphed: "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or

The Nineteenth Amendment also works as a kind of estoppel argument. Certain arguments about the difference between the sexes that might have been constitutionally permissible, as justifying differential treatment before the Nineteenth Amendment, are, as a matter of law, precluded by the affirmation of political equality in the Nineteenth Amendment itself. And so it's staggering that it has taken the Supreme Court so long to see that the Nineteenth Amendment really means that women must be equal participants in jury service, which is, like voting, the way in which first-class citizens exercise that citizenship.<sup>30</sup> If women must be equal for the ballot box, why not for the jury box too? Isn't government estopped from claiming that women and men are not political equals? There's a case pending right now in the High Court about peremptory challenges of jurors on the basis of gender, for which this Nineteenth Amendment vision is extremely relevant.<sup>31</sup>

Thus, the Nineteenth Amendment can be understood as protecting more generally full rights of political participation. For example, let's ask the question, "Can a woman be president today?" If we're narrow about it, we look at Article II, and find that the Constitution says "he" over and over again to describe the president. At the Founding, presidents are always analogized to kings and never to queens—yet we know that the Founders had experience with queens. (Virginia is named after one, William and Mary is named after another.)

But however plausible that kind of Originalist argument might be under the original Constitution, it makes no sense after the Nineteenth Amendment. The Nineteenth Amendment is about women's equal political participation, even though it doesn't explicitly modify the language of Article II.

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that legislation cannot take those differences into account." *Id.* at 569-70 (Holmes, J., dissenting).

30. The Supreme Court did not explicitly recognize women's constitutional right to jury equality until 1975—more than a half century after the Nineteenth Amendment became the supreme law of the land, in an opinion that nowhere mentioned that Amendment. *See Taylor v. Louisiana*, 419 U.S. 522 (1975).

31. *See J.E.B. v. Alabama ex. rel. T.B.*, 114 S. Ct. 1419 (1994). Alas, this case, decided after these remarks were delivered, represents yet another missed chance to develop a Nineteenth Amendment analysis. *See Jeff Rosen, Oversexed*, THE NEW REPUBLIC, May 16, 1994, at 12.

## V. THE CURRENT SITUATION

Where does all this leave us today? I would argue as follows: if the Nineteenth Amendment is fundamentally about women's political participation—in voting booths, but also in juries and in legislative assemblies—mere association with men in the civil domain, in the private domain, may not be enough, despite Professor BeVier's powerful points.

When women become half of those who vote in legislatures, I'll probably join Professor BeVier.<sup>32</sup>

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32. See BeVier, *supra* note 8. On political participation, I do think Professor BeVier very usefully focuses us on some important distinctions. One, there is formal political participation in the vote. Two, there is participation in self-consciously understood public speech in the political domain. And three, there is private speech influencing those who do get to publicly speak and vote.

Women at the founding did not vote or enter the public square, or at least not as women. During the Reconstruction era they did not vote, but they did enter the public square. It is very interesting, for example, that in the 1860s, the Senate refused to hear the petition of any alien, because the Constitution speaks of the right of the people to petition, but aliens were not understood to be part of "We the People." The Senate simply refused to hear their petitions. See Amar, *supra* note 10, at 1226, 1282-83. Yet women could, and did, petition because even though they were not voters, they were understood as part of "We the People." So, here we see the second category, second-class citizenship, as it were.

You might think that what is most important is the ability simply to influence, through daily association, those who do vote and participate in the public square. And Professor BeVier made a very nice case for that. That approach once resonated with me, influenced as I was by *Brown v. Board of Education*, 347 U.S. 483 (1954). I once thought that all that was necessary was to get different groups to mingle together daily—blacks and whites, at least 40 years ago, did not typically live in the same neighborhood, did not work in the same workplaces, and did not worship in the same churches. (Sunday at 10 a.m. is still one of the most segregated hours in America.) And so I thought that if we just brought them closer together, that would create ties of connection and virtual representation. My study of slavery has suggested it isn't quite so simple as that. Remember, slavery involved very intimate, cheek by jowl association—of blacks and whites and of men and women. And so slavery's lesson for me is that unless the participation or the association is characterized by certain conditions of equality and mutual respect, it might actually contribute to, rather than eliminate, the plight of the undercaste. So, *Brown*, in my new understanding, was very important, because it was about creating an intimate association in *institutions where there would be concern and respect*—in schools, in universities— and that is why I now talk about equal participation in juries and in legislatures.

Yet when I look around today, I see women under-represented in legislatures—and here I do not mean women of a certain kind. I mean women of all political persuasions, all ideologies, all views. I would love it if I saw Lillian BeVier one day on a bench or in the legislature.

But what are the conditions that have impeded women's equality in legislatures? Consider first women's historic lack of control over reproduction—the story of Anita Allen's mother, for example. See Anita Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995). Much of the progress that has been made by women in the last two hundred years, or indeed over the last two thousand years, has been created not by law but by technology, and in particular, reproductive technology that has made childbearing and childbirth less deadly and contraception easier. These have had a dramatic impact on women's ability to control their reproduction, and therefore their lives. Only after some of those changes did it make economic sense to invest in women's higher education. If a

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woman was going to have eight kids, and might well die before menopause, it did not make sense as an economic investment to send her to college or to groom her for the Senate.

A couple of final points about how the under-representation of women in legislatures in particular, and political office more generally, is not merely the product of individual choices, but structural in nature. First, I will pander to the crowd. Term limits might be a good thing—we would have more rotation. You all should like it, because most of you are Republicans, and most of the legislators are Democrats. [Note: These remarks were delivered before the November 1994 elections.] And it's not quite a free election, because every time you vote against an incumbent your district loses competitive seniority, and therefore pork, vis-a-vis other districts. So, we've got a built-in prisoner's dilemma structure that is conducive to re-election. Women, interestingly, are having much better results of late running for open seats, than when they have to challenge incumbents. And right now we've got a lot of men who are incumbents. Now that in some ways just pushes the question 20 years back or 30 years back, because there were open seats after the Nineteenth Amendment. But there have always been other structural impediments to women's equal participation in government.

We have today, and have always had, legal discrimination in the military. That discrimination differentially advantages men in political office. Men can present themselves as having served the Republic, knowing what they are talking about when they talk about military policy, whereas Patricia Schroeder is told to shut up because she has not been there. People who serve their country militarily are far more credentialed in the political domain, and always have been. When you get out of the military, you get veteran's preferences—and not simply pensions and money, but actually preferences for holding offices like administrative law judgeships, which is why over 90% of the administrative law judges are men: because there's a veteran's preference that is absolutely gendered.

Finally, let's talk about the economy more generally. The great differential in wages between men and women is actually not between unmarried men and unmarried women. That differential has almost been eliminated. The big gap is between married men and married women, and this is not merely a function of individual choices, but our tax code. And differential economic power can translate into differential political power. So inequality of representation in legislatures is not merely the result of individual choice, but of laws—discriminatory laws.