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Rethinking Women and the Constitution: An Historical Argument for Recognizing Constitutional Flexibility with Regards to Women in the New Republic

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RETHINKING WOMEN AND THE CONSTITUTION: AN
HISTORICAL ARGUMENT FOR RECOGNIZING
CONSTITUTIONAL FLEXIBILITY WITH REGARDS TO
WOMEN IN THE NEW REPUBLIC

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INTRODUCTION

On November 4, 2008, Barack Obama won the United States presidential election with 66,882,230 votes.¹ Women accounted for fifty-eight percent of Obama's votes.² In the entire presidential election, women comprised fifty-three percent of the total votes cast, outnumbering men by more than seven million votes.³ Since 1964, every

1. Election Center 2008, <http://www.cnn.com/ELECTION/2008/> (last visited Aug. 25, 2009).

2. I calculated this number using the election results as reported by the Federal Election Commission, as well as election statistics reported by both CNN and the New York Times. Of the 131,257,328 total votes cast in the 2008 presidential election, fifty-three percent were from women, resulting in 69,566,384 votes cast by women. Among those 69,566,384 women voters, fifty-six percent voted for Obama, resulting in 38,957,175 votes for Obama from women. Therefore, women represented fifty-eight percent of the 66,882,230 votes Obama received. 2008 Official Presidential General Election Results, <http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf> (last visited Aug. 25, 2009); Election Center 2008, Exit Polls, <http://www.cnn.com/ELECTION/2008/results/polls.main/> (last visited Aug. 25, 2009); Election Results 2008, Exit Polls, <http://elections.nytimes.com/2008/results/president/exit-polls.html> (last visited Aug. 25, 2009).

3. Election Center 2008, Exit Polls, *supra* note 2.

presidential election has seen women voting in higher numbers than men.⁴ There are also more women registered to vote than there are men.⁵

Not only do women participate as voters in the political arena, but they are leaders as well. Within the past fifteen years alone, many women have achieved political positions of great power and influence. For example, in 1993 Janet Reno was the first woman to serve as the U.S. Attorney General; in 1997, Madeleine Albright became the first woman appointed to the position of U.S. Secretary of State; in 2001, Condoleezza Rice was appointed to the position of National Security Advisor (formerly Assistant to the President for National Security Affairs) and in 2005 was appointed to the position of U.S. Secretary of State; and Nancy Pelosi was the first woman elected to serve as Speaker of the U.S. House of Representatives in 2007, making her second in line for the presidency behind Vice President Dick Cheney.⁶ Most recently, Hillary Clinton, the first first lady ever elected to public office and the first woman elected to the Senate from New York,⁷ became “the first viable female presidential candidate” during the Democratic primaries in 2008,⁸ and Sarah Palin became the first female vice presidential nominee for the Republican party.⁹

But this has not always been the case. America did not always look kindly on a woman’s participation in such a public arena as politics.¹⁰ A woman’s very presence in the public sphere was considered inappropriate.¹¹ In fact, it was not until the late eighteenth

4. Press Release, Ctr. for Am. Women and Politics, Women’s Vote Watch: Women’s Votes Could Determine Election Outcome (Oct. 10, 2008), *available at* http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_10-10-08_womensvote.pdf.

5. *Id.*

6. Ctr. for American Women and Politics, Rutgers, State Univ. N.J., Fast Facts: Firsts for Women in U.S. Politics, http://www.cawp.rutgers.edu/fast_facts/resources/Firsts.php (last visited Aug. 25, 2009) [hereinafter Fast Facts].

7. *Id.*

8. Linda Lowen, About.com, *Women Candidates in 2008 — How Many Women Candidates Ran in 2008?*, Nov. 14, 2008, <http://womensissues.about.com/od/thepoliticalarena/a/womencand2008.htm>.

9. Fast Facts, *supra* note 6. Palin was not the first female vice presidential nominee in American history; that distinction goes to Geraldine Ferraro, who was chosen as Walter Mondale’s running-mate in the 1984 presidential election. However, because the Mondale/Ferraro ticket was soundly trounced by the Reagan/Bush ticket and won only one state in that election, the argument could be made that Palin was the first viable female vice presidential candidate. Julia Baird, *From Seneca Falls . . . to Sarah Palin?*, NEWSWEEK, Sept. 22, 2008, *available at* <http://www.newsweek.com/id/158893>.

10. For purposes of simplicity, this Note will refer to the colonies and colonists as “America” and “Americans,” respectively, recognizing that the land belonged to England and the colonists considered themselves British subjects until after the American Revolution.

11. Unfortunately due to time and space restrictions, this Note focuses on white women and does not consider the plight of black women in America. The historic

century that American women began to venture beyond their private spheres into the public realm.¹² Slowly at first, women began to participate more and more frequently as the Revolution continued.¹³ Perhaps without many recognizing, or perhaps without many understanding its magnitude, change was happening. The politicization of women had begun.

This Note will argue that in the midst of this changing America, the U.S. Constitution was adopted and voted into law, and, contrary to the conventional belief, neither the Founders nor the Constitution were wholly insulated from the changes occurring in American society. The Constitution may not have explicitly mentioned women in the allocation of rights and responsibilities, but neither did it deny any rights to women. This Note argues that the Constitution, perhaps unwilling to go as far as explicitly guaranteeing women's rights, instead left open the very real — and in some cases *realized* — possibility of states recognizing the rights of and granting rights to women.

Part I of this Note will focus on women and American society. It will discuss a woman's place in society before and during the American Revolution. Part II will discuss the law of coverture.¹⁴ It will explore the English-inherited form of coverture, the shades-of-grey coverture adopted in the colonies, and how coverture was handled in the Republic. Part III will argue that the question of female patriotism — whether a woman could be political — was present in American society. It will explore the extent to which this discussion occurred and argue that, against this backdrop, the Constitution was created. It will argue that the Constitution did not deny women rights and instead left the question of women's rights up to the states. It will provide examples of how different states debated the place of women in society, with some recognizing women's rights, at least for a time, and others denying them. Part IV will address the backlash women faced as a result of their politicization. A brief conclusion will follow.

I. WOMEN AND SOCIETY

The American Revolution was not only a major turning point in the history of America but the history of American women as well. The experience of women vis-à-vis the Revolution served as the impetus for both their politicization and, later, their demands to be

experience of white women is different than that of black women, who faced oppression on two levels: race and gender.

12. See *infra* Part I.

13. See *infra* Part I.

14. The doctrine of coverture was the process by which a married woman's identity was literally "covered" by that of her husband's. See *infra* Part II.

recognized within America. "The war of the Revolution and the constitutional experiments that followed composed one of the great ages of political innovation in Western history; in these years the terms were set by which future Americans would understand their relationship to the social order."¹⁵ In order to understand how the Revolution changed women's lives, it is first necessary to understand what life was like prior to the Revolution.

A. Before the American Revolution

The American colonists inherited from the English the ideas that the family was "the central focus of society"¹⁶ and a woman's place was in the familial home.¹⁷ These ideas exemplify the inherited traditions of the separate "spheres" for men and women,¹⁸ i.e., "the dichotomy between male public activity and female private passivity."¹⁹ While men occupied the public sphere and represented their families in the outside world, women were relegated to the private, domestic sphere.²⁰ Even within this domestic sphere, the man ruled the home and the woman was expected to obey the man.²¹

Not surprisingly, then, a woman was not considered an independent entity, nor was she allowed an "independent existence."²² Being feminine meant being "submissive[], dependen[t], and domestic[]."²³ A woman was

virtually barred from the public sphere, and at home [was] under male tutelage . . . [She was] dependent and domestic, a creature not of reason but of sentiment and love. Her mission was self-sacrifice; the married woman had no important separate interests, apart from the interests of the family — and those remained entirely under her husband's benevolent power. Her gaze properly focused inward on the family, not outward on the world. She was

15. LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 7 (1980) [hereinafter KERBER, *WOMEN OF THE REPUBLIC*].

16. Mary Beth Norton, *The Evolution of White Women's Experience in Early America*, 89 AM. HIST. REV. 593, 596 (1984) [hereinafter Norton, *Evolution*].

17. LAUREL THATCHER ULRICH, *GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750* 13 (1991).

18. COKIE ROBERTS, *FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION* 14 (2002).

19. MARY BETH NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800* 8 (1996) [hereinafter NORTON, *LIBERTY'S DAUGHTERS*].

20. *Id.* at 3.

21. *Id.* at 5.

22. *Id.*

23. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 456 (1984).

not fully a citizen; indeed, she was to be excluded from public roles, lest her seductive presence in the public arena distract men from the light of reason that should illuminate that sphere.²⁴

Best, then, to confine women “within the narrow Limits of Domestick [sic] Offices, [because] when they stray beyond them, they move excentrically [sic] and consequently without grace.”²⁵

Women accepted this confinement to the private sphere of domestic life.²⁶ While aware of the public sphere inhabited by the men,²⁷ both men and women believed women should be content in their private sphere.²⁸ There was a great societal expectation that domesticity “was . . . supposed to be the source of [a woman’s] sense of pride and satisfaction. Regardless of the exact shape of her household role . . . she should find fulfillment in . . . [and] take pleasure in performing the duties required of her as mistress of the home.”²⁹

Because of the adherence to the separate spheres, and women’s acceptance of that separation, rarely did women venture beyond their domestic realm.³⁰ In the years immediately leading up to and during the war, it proved necessary for women to venture beyond their homes and join the Revolution.³¹ Women’s contributions to the wartime efforts were a very important, arguably essential, component of the success of the Revolution.³²

B. The Revolutionary Woman

Thanks to the Revolution, and regardless of whether it was a conscious change in America, “a woman’s place *was* changing.”³³ Change was not immediate, nor did women immediately come to mind as necessary components of the Revolution: it was “[n]ot until economic boycott became a major mode of resistance to England [that it became] obvious that women would also have to be pulled out of the privacy of their traditional domain and propelled into the public world of political decisions.”³⁴ Contemplating how to effectively resist England, Christopher Gadsen in 1769 had this message for the men:

24. *Id.* at 458.

25. NORTON, *LIBERTY’S DAUGHTERS*, *supra* note 19, at 8.

26. *Id.* at 7.

27. ROBERTS, *supra* note 18.

28. NORTON, *LIBERTY’S DAUGHTERS*, *supra* note 19, at 34.

29. *Id.*

30. *SEE* HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES, 1492-PRESENT* 109 (2003).

31. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 8.

32. Paula Baker, *The Domestication of Politics, Women and American Political Society, 1780-1920*, 89 *AM. HIST. REV.* 620, 624 (1984).

33. ROBERTS, *supra* note 18, at 40 (emphasis added).

34. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 8.

[T]he *greatest difficulty* of all we have to encounter . . . [is] to persuade our wives to give us their assistance, without which 'tis impossible to succeed. I allow of the impossibility of succeeding without their concurrence. . . . [O]ur political salvation, at this crisis, depends altogether upon the strictest oeconomy [sic], that the women could, with propriety, have the principal management thereof; for 'tis well known, that none in the world are better oeconomists [sic], make better wives or more tender mothers, than ours. Only let their husbands point out the necessity of such a conduct; convince them, that it is the only thing that can save them and their children, from distresses, slavery, and disgrace; their affections will soon be awakened, and cooperate with their reason. When that is done, all that is necessary will be done; for I am persuaded, that they will be then as anxious and persevering in this matter, as any the most zealous of us can possibly wish.³⁵

This observation made in the years leading up to the Revolution sheds important light upon women's first steps into the public sphere. First, Gadsen is addressing the *men*; he is not trying to inspire the women but rather rally their husbands.³⁶ Additionally, Gadsen recognized the negative impact women in their domestic spheres could have by undermining the pre-war boycotts, even unintentionally.³⁷ Furthermore, because Gadsen believed that women only acted in connection with their domestic and familial duties, husbands would have to convince their wives to join the economic boycotts by couching their language in terms the women would understand and accept, i.e., in language relating to the private sphere.³⁸

Yet despite the fact that women entered the public sphere at the behest of their husbands, and because they believed they were still fulfilling their domestic obligations, the first steps were being taken. Women were leaving their homes to engage in political activity. These pre-war boycotts to which the husbands called their wives "initiated the politicization of the household economy and marked the beginning of the use of a political language that explicitly included women."³⁹

As the Revolution progressed, women became more and more involved in the political climate of the day. As consumers, they were asked to refrain from wearing British clothes and instead to wear

35. *Id.* at 36-37 (quoting Christopher Gadsen, *To the Planters, Mechanics, and Freeholders of the Province of South Carolina, No Ways Concerned in the Importation of British Manufacturers*, in *THE WRITINGS OF CHRISTOPHER GADSEN* 83, 84 (Richard Walsh ed., 1966)).

36. *Id.* at 37.

37. *Id.*

38. *Id.*

39. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 41.

“homespun” clothing.⁴⁰ It was also their job to “buy American” in order to demonstrate their patriotism and “provide a protected market for domestic goods.”⁴¹ Additionally, women became part of a police force of sorts: “They joined in the mobs, tarring and feathering merchants who defied the boycott against British goods.”⁴² They took part in mobs that “police[d] local merchants who hoarded scarce commodities.”⁴³ Some women even “took part in urban crowd actions, organized petition campaigns, and formed groups to help soldiers and widows.”⁴⁴ Finally, it also fell to the women to continue their husbands’ work on farms and in businesses while their husbands were away during the war.⁴⁵

These examples are not meant to suggest, however, that the majority of women undertook such direct political action.⁴⁶ In fact, *most* women aided the war effort “in an institutional context,” providing services “as cooks, washerwomen, laundresses, private nurses, and renters of houses or of rooms”⁴⁷ These services, though more broadly rendered, “did not change their domestic identity,” nor did they “seriously challenge the traditional definition of the woman’s domestic domain.”⁴⁸

The point is that *some* women, not all or even most, were engaging in the public sphere where before *none* had been. Initially, most of these women were probably engaging in political activity without the conscious recognition that they were in the public sphere.⁴⁹ Given that most calls to action came from their husbands and were couched in terms of domestic obligation, “[t]he notion that politics was somehow not part of the woman’s domain persisted throughout the war, expressed even by women whose own lives were in fact directly dependent on political developments and who had a sophisticated understanding of political maneuver.”⁵⁰ As time went on, however, women,

40. *Id.* at 38.

41. *Id.* at 45.

42. ROBERTS, *supra* note 18, at 40.

43. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 43.

44. Baker, *supra* note 32, at 624.

45. *Id.*; see also KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 48 (offering a brief explanation of women’s roles when their husbands were away); NORTON, *LIBERTY’S DAUGHTERS*, *supra* note 19, at 8 (explaining what instructions husbands did and did not feel necessary to send to their wives while the men were away).

46. The example of women continuing work on farms or in businesses, however, is an exception, as “[i]t was taken for granted that women would maintain the household economy while their menfolk were at war.” KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 48.

47. *Id.* at 73.

48. *Id.* at 73-74.

49. See *id.* (arguing that although women’s actions had political consequences, they did not tend to view these actions in political terms).

50. *Id.* at 74.

and men too, were becoming increasingly aware of women's entrance into the public sphere.⁵¹

II. COVERTURE

Although America gained independence from the Revolution, "there was no sharp *legal* break with the past. The common law system (American style) remained intact. Indeed, in some sense, the aim of the Revolution was continuity, not overthrow: continuity of the colonial traditions, laws, and ways of life."⁵² It is therefore necessary to understand the English traditions America inherited before continuing any further.

A. *The English Tradition of Coverture*

Inherited from the English common law, coverture referred to "the system of law that transferred a woman's civic identity to her husband at marriage, giving him use and direction of her property throughout the marriage."⁵³ William Blackstone's *Commentaries on the Law of England*, an influential eighteenth-century treatise on English common law, described coverture in the following way:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.⁵⁴

A married woman was a *feme covert*; her identity was literally "covered" by that of her husband.⁵⁵

51. See *infra* Part III.

52. LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 32 (2002).

53. Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805*, 97 AM. HIST. REV. 349, 351 (1992) [hereinafter Kerber, *Paradox*].

54. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 441 (17th ed. 1830), available at http://avalon.law.yale.edu/18th_century/blackstone_bk1ch15.asp.

55. *Id.* The *feme sole* was the opposite: she was the single, unmarried woman. This distinction between the *feme covert* and the *feme sole* was explained by Blackstone in his *Commentaries* when he was discussing the Queen of England. He wrote:

the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do . . . She may also sue

Coverture had specific legal consequences that the courts acknowledged as well: “The law considers a *feme-covert* as having no will; she is under the direction and control of her husband; is bound to obey his commands”⁵⁶ Because a woman was “covered,” subordinate to the will and control of her husband, any property she owned automatically became her husband’s property upon marriage; and she was not thought to be able to act for herself or of her own free will, so any crimes she committed, “except perhaps treason and murder,” were attributed to the husband and not the wife.⁵⁷

B. *The Pennsylvania Criminal Cases*

As black and white as the doctrine of coverture may have seemed, however, this was not always the case. In G.S. Rowe’s article, *Femes Covert and Criminal Prosecution in Eighteenth-Century Pennsylvania*, Rowe demonstrates that the law could, and often did, acknowledge women’s legal identities as separate from that of their husbands.⁵⁸ Despite the seeming rigidity of the doctrine of coverture, the colonies were not bound to apply the legal doctrine; they could determine for themselves how they wanted to recast the law.⁵⁹

Rowe, through an examination of Pennsylvania cases from the eighteenth century,⁶⁰ argues that despite the legal theories of the day, the reality is that the law was more flexible than it might at first have seemed, and women could retain a legal identity:

To what degree and under what conditions the legal rights she relinquished [when she married] seriously compromised her position in civil matters (and civil litigation) . . . remains the subject of lively debate. Historians who insist that a large degree

and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a *feme sole*, and not as a *feme covert*; as a single, not as a married woman.

Id. at 218.

56. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260, 293 (1805).

57. BLACKSTONE, *supra* note 54, at 444. In fact, it was specifically recognized that treason could be committed by women both married and unmarried:

Even before the Declaration of Independence, a treason statute was passed by the Continental Congress that carefully avoided the use of the generic *he* in declaring that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony.”

KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 121.

58. G.S. Rowe, *Femes Covert and Criminal Prosecution in Eighteenth-Century Pennsylvania*, 32 AM. J. OF LEGAL HIST. 138, 147-56 (1988).

59. *See id.* at 140 (noting that states did not have a “unified practice”).

60. Rowe’s case material comes mainly from old cases only available in historical societies and courthouses. *Id.* at 138 n.1.

of autonomy was exercised by *femes covert* in civil matters, despite Blackstone's assertion that they were "civilly dead," do so by stressing that society and the legal system proved more flexible and generous than the law itself.⁶¹

This was especially true in criminal matters. Based on the legal theory and custom of the time, coverture should have provided married women a shield of sorts if she committed a crime.⁶² According to the legal theory laid out by Blackstone, a woman who committed "theft, burglary or other . . . offenses against the laws of society, by the coercion of her husband, or even in his company which the law construes as coercion . . . [was] not guilty of any crime; being considered as acting by compulsion, and not of her own free will."⁶³ This was because "[h]er guilt or innocence presumably was less crucial in legal theory than her subservience to her mate."⁶⁴ The courts, however, did not always adhere to the legal theory.

Rowe offers some impressive statistics regarding *femes covert* and criminal prosecution.⁶⁵ Pennsylvania court records reveal that of the "nearly 25,000 individuals" prosecuted in Pennsylvania courts prior to the nineteenth century, "more than 3700 [of them were] women," and of whom "four hundred and seventy-seven are clearly identifiable as married."⁶⁶ In a fifty-year span between 1750 and 1800, 276 wives were prosecuted alongside their husbands, and 266 other wives were charged independently with the same crime their spouse had committed.⁶⁷ Considering that women should have had no independent legal identity once married, these statistics offer valuable insight into the reality of the legal system. Apparently the doctrine of coverture was not a hard-and-fast rule to be applied in all cases involving married women; rather, "some discretion was available to justices of the peace, prosecuting attorneys, and indeed to petit jurors."⁶⁸

The importance of Rowe's research is its demonstration that, at first glance, the doctrine of coverture seems rigid and inflexible: a woman gets married and loses all of her independent legal rights. She is therefore a dependent creature unable to make her own decisions, which in turn means she should not be allowed access to the public

61. *Id.* at 140.

62. *See supra* Part II.A.

63. Rowe, *supra* note 58, at 141 (quoting BLACKSTONE, *supra* note 54, at 8).

64. *Id.*

65. *Id.* at 142.

66. *Id.*

67. *Id.*

68. *Id.* at 144.

sphere. But the truth is that the law was much more flexible in its treatment of women than one might have originally thought.

C. *The Republic and Coverture*

Because the “Americans had no intention of relinquishing the entire British legal tradition,” especially as it related to coverture, this flexibility becomes especially important to the treatment of women’s political actions during the American Revolution.⁶⁹ “[W]omen [were caught] in a double bind: women left at home while their husbands fought for the loyalists were often ostracized by their communities and forced into exile without being asked their own political opinions.”⁷⁰ And women who left home with their husbands also faced difficulties because they risked losing their dower rights to their husband’s land.⁷¹ When a man declared allegiance to and left to fight for England, the usual punishment doled out by the colonies was seizure of the property left behind.⁷² The problem, however, was that “[n]ormally his wife claimed a dower right to a life estate in one-third of his landed property after his death,” and so the question arose as to whether the wife should still possess a dower right in the land.⁷³

After the Revolution, the states decided this question individually for themselves.⁷⁴ The Massachusetts legislature, perhaps the most radical in this regard, required that “if a woman wished the Republic to preserve her property rights in her husband’s estate, she must make her own political commitment. The Republic promised to protect her property only if she remained in America, dissociated herself from her husband, and declared her own political allegiance.”⁷⁵ Conversely, “should a woman accompany her husband into exile, patriots would assume that she was making her own political choice, and they would treat her property as forfeit.”⁷⁶ Clearly, then, Massachusetts was encouraging women to make political decisions; in fact, Massachusetts *required* such political decisions if a woman wanted to hold on to her property.⁷⁷

Generally, however, states and “[c]ourts did not try to catch the loyalist’s wife between the reality of dependence on her husband for

69. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 119.

70. *Id.* at 9.

71. *Id.* at 123.

72. *Id.*

73. *Id.*

74. *Id.* at 126.

75. *Id.*

76. *Id.*

77. *Id.*

support and the radical claim that she should have established her own individual commitment to the Republic.”⁷⁸ The majority of women who left with their husbands could reclaim their property after the war was over.⁷⁹ The point to be made here, however, is that Massachusetts *did* require political allegiance from women independent of their husbands’ allegiance when previously no such requirement was made.

The doctrine of coverture typically meant a wife’s identity was covered by that of her husband, and yet women were increasingly participating in the public sphere and even being asked to give allegiances separate from those of their husbands. The Revolution, therefore, raised one very important question particularly relevant to this Note: could women be patriots?

III. THE REPUBLIC

A. *Female Patriotism*

In order to answer the question of whether women could be seen as political creatures, capable of embodying such an intensely political idea like that of patriotism, it must first be understood that there was a “deep skepticism toward political behavior” that pervaded American society.⁸⁰ Even the Revolution and the Republic’s most political and ambitious men “rarely acknowledged what they were doing [i.e., building successful political careers], even to close friends; often they did not acknowledge their political drive to themselves.”⁸¹ Perhaps it was this deep distrust of political behavior more than anything else that kept women, who by today’s standards would be exemplars of patriotism, from declaring themselves patriots outright.⁸²

In any event, history tells us that women were, indeed, both politically aware⁸³ and politically active.⁸⁴ Political commentary tended to originate from “privileged women who had some status from which to speak freely.”⁸⁵ Their political observations tended to be confined

78. *Id.* at 9; *see also id.* at 125-27 (offering a brief explanation of how other states treated women and dower rights).

79. *Id.* at 9.

80. *Id.* at 73.

81. *Id.*

82. For examples of women’s patriotic acts, *see supra* Part I.B.

83. ROBERTS, *supra* note 18, at 14 (noting that the letters and diaries of pre-Revolutionary women were “filled with political observations”); *see also* KERBER, WOMEN OF THE REPUBLIC, *supra* note 15, at 76-85 (discussing the content of women’s political discussions).

84. KERBER, WOMEN OF THE REPUBLIC, *supra* note 15, at 85-103 (noting that women used petitions as political tools and campaigned to raise money for the troops).

85. ZINN, *supra* note 30, at 110.

to “portfolios and . . . diaries.”⁸⁶ When women commented on politics in letters and correspondence to family and friends, they often felt compelled to apologize for doing so.⁸⁷ It is possible that these apologies served as a “way of acknowledging that they were doing something unusual” by offering their political observations “in the absence of an established tradition of female public political behavior.”⁸⁸ Remember that these women largely spent their time confined to the domestic sphere of home and family.⁸⁹ The importance of these political observations demonstrates that “politics *did* intrude into the women’s world during the trauma of the war[,] . . . and as it did women acknowledged its presence and responded to it.”⁹⁰

One woman in particular who loomed large in discussions regarding politics and the public sphere was Abigail Adams. Openly political, Abigail Adams wrote in 1775 regarding the Revolution:

I would not have my Friend imagine [sic] that with all my fears and apprehension, I would give up one Iota of our rights and privilages [sic] . . . [W]e cannot be happy without being free . . . we cannot be free without being secure in our property . . . we cannot be secure in our property if without our consent others may as by right take it away. — We know too well the blessings of freedom, to tamely resign it.⁹¹

Her husband John Adams “relied explicitly on his wife for local political news, and he expected her to keep his political fences mended.”⁹² Indeed later, during his presidency, she was publicly known to be in charge of handling some of his correspondences.⁹³

Abigail Adams was also an early believer in women’s rights.⁹⁴ She wrote to her husband, even before the Declaration of Independence was written:

I long to hear that you have declared an independancy [sic] — and by the way in the new Code of Law which I suppose it will be necessary for you to make I desire you would Remember the

86. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 84.

87. *Id.* at 76-80.

88. *Id.* at 80.

89. *Id.* at 85.

90. *Id.* (emphasis added).

91. Letter from Abigail Adams to Mercy Otis Warren (Feb. 3, 1775), in 1 ADAMS FAMILY CORRESPONDENCE 184 (L.H. Butterfield et al. eds., 1963).

92. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 82; ROBERTS, *supra* note 18, at 174 (noting that John Adams wrote to Abigail, “I always learn more of politics from your letters than any others”).

93. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 82.

94. ROBERTS, *supra* note 18, at 173.

Ladies, and be more generous and favourable [sic] to them than your ancestors. Do not put such unlimited power 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 Laidies [sic] 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.⁹⁵

Not only did Abigail Adams ask that the men “remember the ladies,” she even threatened “Rebellion” if the men did not do so! She renewed this discussion of female equality again towards the end of the Revolution:

Patriotism in the female sex . . . is the most disinterested of all virtues. Excluded from honours [sic] and from offices, we cannot attach ourselves to the State of Government from having held a place of Eminence. Even in freest countrys [sic] our property is subject to the controul [sic] and disposal of our partners, to whom the Laws have given a sovereign Authority. Deprived of a voice in Legislation, obliged to submit to those Laws which are imposed upon us, is it not sufficient to make us indifferent to the publick [sic] Welfare? Yet all History and every age exhibit Instances of patriotic virtue in the female Sex; which considering our situation equals the most Heroick [sic].⁹⁶

Clearly, Abigail Adams did not hesitate to express her political views to her husband.

John Adams, for his part, seemed not to have taken her pleas to “remember the ladies”⁹⁷ all too seriously. He responded to her:

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 But your Letter was the first Intimation that another Tribe [i.e. women] more numerous and powerfull [sic] than all the rest were grown discontented. — This is rather too coarse a Compliment but you are so saucy, I won't blot it out.⁹⁸

95. Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *SOMETHING THAT WILL SURPRISE THE WORLD: THE ESSENTIAL WRITINGS OF THE FOUNDING FATHERS* 202, 203 (Susan Dunn ed., 2006).

96. Letter from Abigail Adams to John Adams (June 17, 1782), in *4 ADAMS FAMILY CORRESPONDENCE* 328 (L.H. Butterfield et al. eds., 1963).

97. Letter from Abigail Adams to John Adams (Mar. 31, 1776), *supra* note 95.

98. Letter from John Adams to Abigail Adams (Apr. 14, 1776), in *1 ADAMS FAMILY CORRESPONDENCE*, *supra* note 91, at 382.

John Adams was clearly amused by his wife's letter. His reply rang of mockery when he wrote that the women were a "[t]ribe more numerous and powerfull [sic] than all the rest."⁹⁹ He went on to assure her that, although the "[m]asculine systems" would remain in place, it was actually *men* who were the "subjects" and masters in name only.¹⁰⁰ And men could not give up that title lest it "would compleatly [sic] subject [them] to the Despotism of the petticoat [sic]."¹⁰¹

Despite the seeming dismissal of Abigail Adams's desire for women's rights, John Adams did not seem to think women were necessarily intellectually incapable of political participation. In a letter he wrote to James Sullivan, responding to Sullivan's proposal that the vote should be extended to men without property, John Adams replied:

The same reasoning which will induce you to admit all men who have no property, to vote, with those who have, for those laws which affect the person, will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as those men who are wholly destitute of property; these last being to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.¹⁰²

The crux of the issue was independence of political action.¹⁰³ The political citizen was understood to be a "person who belonged to the nation and had the independence and virtue to participate fully as a voter."¹⁰⁴ Because political rights included the right to vote and hold office, the most important quality of a political citizen was that he had to have the independence necessary to participate in politics.¹⁰⁵

This emphasis on independence became problematic when the discussion turned to women. Independence required "freedom of judgment — freedom from the imposition of the will of another — [which] in the eighteenth century . . . meant heading a household and owning property of one's own so as not to have to look to anyone else for a job, credit, or support."¹⁰⁶ Because of the law of coverture,

99. *Id.*

100. *Id.*

101. *Id.*

102. Letter from John Adams to James Sullivan (May 26, 1776), in *SOMETHING THAT WILL SURPRISE THE WORLD: THE ESSENTIAL WRITINGS OF THE FOUNDING FATHERS*, *supra* note 95, at 204, 205.

103. Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *AM. HIST. REV.* 1440, 1448 (1998).

104. *Id.*

105. *Id.*

106. *Id.* at 1451.

married women were unable to attain this level of independence.¹⁰⁷ According to John Adams, neither were men who did not own their own property.¹⁰⁸ Men who did not have their own property were as likely to be influenced by those who would employ them as women were by their husbands.¹⁰⁹ If the vote was to be extended to men without property, it might as well be extended to women also.¹¹⁰

It is important to understand that John Adams was not advocating for women's right to vote in his letter to Sullivan. Instead, Adams was using the example of the dependent *feme covert* to demonstrate why the vote should not be extended to dependent, i.e., "propertyless," men. The interesting part about the letter, however, is the fact that John Adams made no mention of women's intellectual capacity with regard to the vote. The inference to be drawn from the letter is that, except for their dependence on others, *femes covert* and propertyless men would have the capacity to vote.

Female equality was not a discussion limited to the Adams family. These "[i]deas of female equality were in the air during and after the Revolution."¹¹¹ One such notable source was Mary Wollstonecraft's *Vindication of the Rights of Woman*.¹¹² Although Wollstonecraft was "express[ing] what a larger public was already experiencing or was willing to hear," her book nonetheless "found resonant echoes in America."¹¹³ Additionally, it is likely that at least some of the population was aware of the "debate concerning women's place in society that accompanied the early years of the French Revolution."¹¹⁴

Of course, this is not to say that everyone supported female equality. For example, when Thomas Jefferson's "Secretary of the Treasury Albert Gallatin had the presumption to suggest . . . [that Jefferson] might consider women for public service . . . [he] elicited this sharp rejoinder: 'The appointment of a woman to office is an innovation for which the public is not prepared, nor am I.'"¹¹⁵ Again, the point is not that men advocated for women's rights, but merely that

107. *Id.*

108. Letter from John Adams to James Sullivan, *supra* note 102, at 204.

109. *Id.* at 204-05.

110. *Id.* at 205.

111. ZINN, *supra* note 30, at 111.

112. *Id.*

113. KERBER, WOMEN OF THE REPUBLIC, *supra* note 15, at 222-24. Aaron Burr, for example, thought Wollstonecraft's book was "a work of genius" and recommended it to his wife with the promise to read it aloud to her." *Id.* at 224.

114. Judith Apter Klinghoffer & Lois Elkis, "The Petticoat Electors": Women's Suffrage in New Jersey, 1776-1807, 12 J. EARLY REPUBLIC 159, 173 (1992).

115. Richard B. Morris, "We the People of the United States": The Bicentennial of a People's Revolution, 82 AM. HIST. REV. 1, 4 (1977) (quoting Letter from Thomas Jefferson to the Secretary of the Treasury (Jan. 13, 1807), in WRITINGS OF THOMAS JEFFERSON 9:7 (Paul Leicester Ford ed., 1892-99)).

they were aware of these discussions at the time the Constitutional Convention convened in Philadelphia.

B. The Constitution

This Note does not intend to argue that the Founding Fathers included women in the Constitution, or even that they thought women *should* be included. Instead, the premise of this Note is that the Constitution was adopted during a period of societal change. This change may not have been recognized or fully understood, but it was happening nonetheless. Women were venturing outside their private spheres, beginning to take up discourse about politics, and talk of female equality was starting to permeate American society.

In the midst of all of these changes, the Founding Fathers did nothing to stop women. They could have drafted a constitution that specifically and unequivocally limited women's rights and excluded them from anything outside the domestic sphere. But they did not do so. Instead, they drafted a Constitution that began "We the People"¹¹⁶ and never once referenced "man" or "men."¹¹⁷ "If it is true that the society of 1787 was sexist, the remarkable thing is that the Constitution . . . nevertheless shows no linguistic trace of that sexism."¹¹⁸

Specifically, "the Constitution does not deny women the right to vote. It is true that the Constitution does not guarantee them the right to vote, but neither does it guarantee that right to men."¹¹⁹ Instead, the Constitution leaves the vote to the states.¹²⁰ States can determine voter eligibility by any means they choose, "leav[ing] the states free to include women as they see fit, just as it leaves to states the determination of whether there should be a property qualification for voting."¹²¹

C. States and Women's Rights After the Adoption of the Constitution

*1. New Jersey: The Petticoat Electors*¹²²

Perhaps the best example of such state-determined voter eligibility that enfranchised women is that of New Jersey. In 1776 New

116. U.S. CONST. pmb.

117. U.S. CONST.

118. Glen E. Thurow, *"The Form Most Eligible": Liberty in the Constitutional Convention*, 20 PUBLIUS 15, 30 (1990).

119. *Id.* at 29.

120. *Id.* at 29-30; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

121. Thurow, *supra* note 118, at 30.

122. The term "Petticoat Electors" comes from the article used as the main source for this section. Klinghoffer & Elkins, *supra* note 114, at 159.

Jersey adopted into its state constitution a suffrage clause that read: "That all freeholders, and householders, inhabitants of this colony, who are worth fifty pounds clear estate in the same, shall be admitted to vote representation in Assembly and also for all other public officers that shall be elected by the people."¹²³ When other state constitutions were limiting the vote to men, specifically white men, the New Jersey Constitution considered eligible anyone who had the requisite amount of property.¹²⁴

New Jersey women were notably politicized.¹²⁵ Perhaps the gender-neutral suffrage clause of the New Jersey Constitution reflected the strong politicization of these women. Perhaps the New Jersey legislature hoped to secure the allegiance of these rather independent women by "includ[ing] them . . . in the body politic."¹²⁶ Regardless, the wording of the suffrage clause was phrased in deliberately gender-neutral terms; it was not a mistake or "the result of simple carelessness due to haste."¹²⁷

Because of "their location in the heart of battle," New Jersey women were especially exposed to the politicizing effects of the Revolution.¹²⁸ Such was the politicization of the women in this state that these women "did not hesitate to take positions markedly in variance with that of other members of their family,"¹²⁹ nor were these women unwilling "to take up arms in support of the patriotic cause."¹³⁰ Even the Governor of New Jersey, using a female pseudonym, appealed to the political sensibilities of these women.¹³¹ Rather than end the Revolution in compromise with the English, he urged women to "draw their pens' and enter their 'solemn protest' against all efforts to reach a compromise solution to the war."¹³²

After the Revolution, all New Jersey citizens, not just the women, were eager to "turn[] away from public affairs" so that they might "rebuild their lives and state."¹³³ Politics was relegated to the backburner in the minds of the population.¹³⁴ In 1789, however, a few

123. *Id.* at 166.

124. *Id.* at 159, 168.

125. *Id.* at 168.

126. *Id.*

127. *Id.* at 166-67.

128. *Id.* at 169.

129. *Id.* at 168.

130. *Id.* at 169.

131. *Id.* at 171.

132. *Id.* (quoting Belinda, Letter to the Editor, N.J. GAZETTE, May 6, 1778, reprinted in NEW JERSEY IN THE AMERICAN REVOLUTION 1763-1783, A DOCUMENTARY HISTORY, at 340-41 (Larry R. Gerlach ed., 1975)).

133. *Id.*

134. *Id.*

years after the adoption of the U.S. Constitution, the state was re-politicized when “an attempt to control the elections”¹³⁵ of statewide congressional representatives saw the “birth of the . . . Federalist party”¹³⁶ and the “rejuvenation of party strife.”¹³⁷

In an effort to “widen their political base,” the Federalists sought the inclusion of women in the voting process.¹³⁸ They “emphasiz[ed] the suitability and desirability of female political participation,” but only in the seven counties of the state that boasted the largest Federalist population.¹³⁹ They campaigned for female political participation only where it would be of the most help to their Federalist party.¹⁴⁰ Despite their motives, one female commentator noted, “I congratulate the ladies of New Jersey that they are in some thing put on a footing with the gentlemen and the most extraordinary part it is, that it has been done by the gentlemen themselves”¹⁴¹

What was done by men, however, could be undone by men. Historians recognize “the turn of the century as a period in which the boundaries between the sexes were sharpened and women left or were pushed out of the formal political arena.”¹⁴² Coinciding with this trend, the end of the eighteenth century saw Federalist verve for female political participation waning.¹⁴³ No longer could the Federalists “be counted among the supporters of the political rights of the ladies of New Jersey.”¹⁴⁴ At least part of this change of heart can be explained by changes in voting mechanics in New Jersey, which gave the Republican party greater access to women voters as well.¹⁴⁵ The Federalists worried that suffrage would benefit Republicans over their own party.¹⁴⁶ Of course later when the Republican party had risen to some power, they in turn feared that suffrage would benefit the Federalist party and not their own.¹⁴⁷ Eventually, it was party politics that led to a revision of the state constitution and the disenfranchisement of women.¹⁴⁸

Probably the most damaging aspect of the disenfranchisement was not that women lost the right to vote, but that along with losing

135. *Id.* at 171-72.

136. *Id.* at 172.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 174.

142. *Id.* at 175.

143. *Id.*

144. *Id.*

145. *Id.* at 175-78.

146. *Id.* at 177.

147. *Id.* at 181-84.

148. *Id.* at 186-89.

access to that “political process, [women] also [lost] their image as virtuous individuals.”¹⁴⁹ Disenfranchisement was justified “by emphasizing [women’s] irrationality and pliancy,” which was “incompatible with the independence of heart and mind” necessary for participants in the political sphere.¹⁵⁰ Although party politics was the impetus behind disenfranchising New Jersey’s women, the “growth of gender ideology,” which was so central to the backlash that forced women back into their private spheres, gave the state an alternative and readily-available rhetoric with which to explain their actions.¹⁵¹

2. *Massachusetts: Martin v. Commonwealth (1805)*¹⁵²

Massachusetts is another example of a state engaging in an internal dialogue regarding the treatment of its women citizens. In *Martin*, the Attorney General of Massachusetts argued that Anna Martin’s lands had been properly confiscated by the State because, although a *feme covert*, she had acted in an independent, politicized manner such that she *and* her husband were both traitors.¹⁵³ Although the Supreme Court of Massachusetts ultimately rejected this argument, unwilling to alter the traditional *feme covert* doctrine, it is important to recognize that states *were* engaging in such internal conversations regarding the status of women.¹⁵⁴

William and Anna Martin were Loyalists.¹⁵⁵ William Martin was an officer in the Royal Regiment of Artillery.¹⁵⁶ When the American Revolution erupted, the Martins left with the British.¹⁵⁷ When the Martins fled Massachusetts and New Hampshire, both states confiscated the property the Martins left behind.¹⁵⁸ In February of 1801, James Martin, the son of William and Anna Martin, filed a writ of error to the Supreme Court of Massachusetts demanding the return of his mother’s property.¹⁵⁹ In order to prevail in his suit, James Martin had to convince the court that the doctrine of coverture

149. *Id.* at 191.

150. *Id.*

151. *Id.* at 192.

152. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260 (1805).

153. *Id.* at 276.

154. *Id.* at 290-97.

155. Kerber, *Paradox*, *supra* note 53, at 355-56.

156. *Id.*

157. *Id.* at 356.

158. *Id.* at 357. Massachusetts acted under the authority of the Massachusetts Confiscation Act, which declared that anyone who had “left this State . . . & joined the Enemies thereof” forfeited any rights to property they had previously owned. *Id.* at 357 n.25.

159. *Id.* at 349.

meant that his mother had not acted of her own free will when she and William Martin had fled America with the British.¹⁶⁰

When a woman married, her property came under the control of her husband.¹⁶¹ Interestingly, however, *control* was all the husband could exercise over the property; *ownership* remained in the woman's family.¹⁶² When Anna Martin, previously Anna Gordon, married William Martin, her property became his to control.¹⁶³ Any "real estate that came to her by bequest was set off to her directly . . . [she would retain] a right of remainder in it, and it would descend to her heirs."¹⁶⁴ So assuming the husband did not waste the property during his life, upon the death of both William and Anna (because "William Martin was 'seized and possessed' of Anna Martin's properties only 'during his natural life'"), the property would pass either to her heirs or revert back to the Gordon line; it would not pass to William Martin's heirs.¹⁶⁵ This was important in *Martin v. Commonwealth* because the property Massachusetts had confiscated had belonged to Anna Martin, not William Martin.¹⁶⁶ James Martin, therefore, had the opportunity to reclaim his mother's property by demonstrating that the doctrine of coverture prevented the state from applying the Confiscation Act to her property because she was subordinate to the will of her husband.¹⁶⁷

While James Martin utilized the theory of coverture, the Attorney General and Solicitor General for Massachusetts argued the opposite.¹⁶⁸ They presented to the court "a woman who had been redefined as a competent citizen by revolutionary legislation and challenged to make her own political choices in the crucible of revolution."¹⁶⁹ The American Revolution had "broaden[ed] the obligations of citizenship to stretch past physical service and include the emotional and mental act of allegiance. Women could share this sort of citizenship, and . . . women could also share its obligations."¹⁷⁰

The Massachusetts Supreme Court ultimately rejected the idea of the married, politicized woman.¹⁷¹ The court relied on the inherited

160. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260, 284 (1805) ("The real question is, whether the statute was intended to include persons who have, by law, no wills of their own.").

161. Kerber, *Paradox*, *supra* note 53, at 356.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 356-57 (quoting *Martin*, 1 Mass. (1 Will.) at 261).

166. *Id.* at 349.

167. *Id.*

168. *Id.* at 371.

169. *Id.*

170. *Id.*

171. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260, 290-91 (1805).

tradition of coverture to make its decision.¹⁷² The court upheld the notion that, “[i]n the relation of husband and wife, the law makes, in her behalf, such an allowance for the authority of the husband, and her duty of obedience, that guilt is not imputed to her for actions performed jointly by them.”¹⁷³ A married woman who commits an offense is “exempted from punishment, not because she is not within the letter of the law . . . but because she is viewed in such a state of subjection, and so under the control of her husband, that she acts merely as his instrument, and . . . no guilt is imputable to her.”¹⁷⁴

Furthermore, the court did not want to punish wives for obedience to their husbands:

Can we believe that a wife, for so respecting the understanding of her husband as to submit her own opinions to his, on a subject so all-important as this, should lose her own property, and forfeit the inheritance of her children? Was she to be considered as criminal because she permitted her husband to elect his own and her place of residence? Because she did not, in violation of her marriage vows, rebel against the will of her husband?¹⁷⁵

It would be ridiculous, the court determined, that anyone might argue that “it was the intention of the legislature to demand of *femes-covert* their *aid and assistance* in the support of their constitution of government.”¹⁷⁶ The Massachusetts Confiscation Act was never meant to force wives to “oblige them either to lose their property or to be guilty of a breach of the duty, which, by the laws of their country and the law of God, they owed to their husbands.”¹⁷⁷

The Massachusetts Supreme Court therefore ruled for James Martin, holding that the property of *femes covert* could not be confiscated under the Confiscation Act.¹⁷⁸ Anna Martin was “[a] wife who left the country in the company of her husband [and] did not *withdraw* herself; but was . . . withdrawn by him. She did not deprive the government of the benefit of her personal services; she had none to render; none were exacted of her.”¹⁷⁹

The case of *Martin v. Commonwealth* is interesting because the State argued that the Revolution had created a politicized, married

172. *Id.* at 290.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 291.

177. *Id.* at 295.

178. *Id.* at 292.

179. *Id.* at 291.

woman.¹⁸⁰ The State argued that any wife who therefore left America with her husband became a traitor just as her husband was a traitor.¹⁸¹ It was not the Constitution that required Massachusetts to see married women as *femes covert*, incapable of any independent action; it was the Massachusetts Supreme Court that was unwilling to extend such an idea of politicization and independence to the *femes covert* of their state.¹⁸² The court maintained the status quo and held that “[t]he law considers a *feme-covert* as having no will; she is under the direction and control of her husband; is bound to obey his commands; and in many cases which might be mentioned . . . cannot jointly with her husband act at all.”¹⁸³

3. *Illinois: Bradwell v. State (1873)*¹⁸⁴

The case of *Bradwell* demonstrates that states were still responsible for deciding the rights of women, even after nearly a century had passed since the Constitution was adopted.¹⁸⁵ Additionally, Justice Bradley’s concurrence in *Bradwell* further demonstrates that the idea of the separate spheres for men and women was still in strong circulation throughout the country.¹⁸⁶ The backlash from the Revolution’s creation of the politicized woman had great staying power.¹⁸⁷

In 1873 Myra Bradwell applied to the Illinois Supreme Court for a license to practice law.¹⁸⁸ The State had previously granted her a special charter that allowed her to “edit [and] publish the Chicago Legal News as her own business.”¹⁸⁹ It was a successful business, and Chicago’s attorneys even relied on her Legal News for their records after the great Chicago fire of 1871 destroyed many of their law offices.¹⁹⁰ Bradwell studied law with her husband, a lawyer, and in 1873 applied for her own license to practice.¹⁹¹ Having once been a citizen of Vermont but now residing in Chicago, Illinois, Bradwell asserted her right to a license in Illinois based on the privileges and

180. *Id.* at 275-76.

181. *Id.* at 276.

182. *Id.* at 290-91.

183. *Id.* at 293.

184. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

185. *Id.* at 139.

186. *Id.* at 141.

187. See *supra* Part IV for a discussion of women’s suffrage post-Revolution.

188. Linda K. Kerber, “*Ourselves and Our Daughters Forever*”: *Women and the Constitution, 1787-1876*, THIS CONST.: A BICENTENNIAL CHRON., Spring 1985, at 25, 32, available at <http://www.apsanet.org/imgtest/womenandconstitution.pdf> [hereinafter Kerber, *Ourselves and Our Daughters*].

189. *Id.*

190. *Id.*

191. *Id.*

immunities provision in Article IV of the Constitution¹⁹² and the Fourteenth Amendment¹⁹³ to the Constitution.¹⁹⁴

The Illinois Supreme Court denied her application.¹⁹⁵ It held that, though the state legislature had given it broad discretion regarding whom to admit to the practice of law, one of the limitations placed on the court was “that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required.”¹⁹⁶ Such limitations, the court said, “must operate to prevent our admitting women to the office of attorney at law. If we were to admit them, we should be exercising the authority conferred upon us in a manner which . . . was never contemplated by the legislature.”¹⁹⁷ Bradwell was married, which made her a *feme covert* in the eyes of the law, and the Illinois Supreme Court was not willing to admit a woman, much less a married woman who was therefore “not fully a free agent,” to the practice of law.¹⁹⁸

Bradwell appealed this decision to the United States Supreme Court.¹⁹⁹ “Bradwell’s attorney argued that among the ‘privileges and immunities’ guaranteed to each citizen by the Fourteenth Amendment was the right to pursue any honorable profession.”²⁰⁰ More specifically, he “argue[d] that admission to the bar of a State of a person who possesses the requisite learning and character is one of those [privileges and immunities which belong to a citizen of the United States] which a State may not deny.”²⁰¹

The Supreme Court disagreed. Acknowledging that there *were* “privileges and immunities belonging to citizens of the United States . . . which a State is forbidden to abridge,” the Court nonetheless held that “the right to admission to practice in the courts of a State is not one of them.”²⁰² The majority of the Court based its decision solely on a consideration of privileges and immunities and whether the admission to a state bar was a privilege and immunity of citizenship of the United States.²⁰³ In so doing, the majority was

192. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

193. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

194. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 137 (1872).

195. Kerber, *Ourselves and Our Daughters*, *supra* note 188, at 32.

196. *Bradwell*, 83 U.S. (16 Wall.) at 132.

197. *Id.*

198. Kerber, *Ourselves and Our Daughters*, *supra* note 188.

199. *Id.*

200. *Id.*

201. *Bradwell*, 83 U.S. (16 Wall.) at 138.

202. *Id.* at 139.

203. *Id.* at 133.

able to avoid a discussion of whether Illinois's policy that a woman may not be admitted to the bar was acceptable.²⁰⁴ Just as the Founders intended, the question of women's rights was a question left to the states. It was within Illinois's power to determine whether women should have the right to be admitted to the state bar.

The interesting thing about the *Bradwell* decision, however, is the concurrence of three Justices.²⁰⁵ Written by Justice Bradley, the concurrence demonstrates that, although the question of women's rights was left to the states, the federal judiciary was considering state justification for the denial of those rights where before they had not. In this case, however, Bradley agreed with the state. According to Bradley, Bradwell's claim that "the privileges and immunities of women as citizens [allowed them] to engage in any and every profession, occupation, or employment in civil life," was completely ridiculous.²⁰⁶ Bradley argued that

civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.²⁰⁷

For Bradley, then, nature itself required that a woman's place be in the private sphere of the home and the family.

One of the most interesting aspects of Bradley's concurrence is his acknowledgment of the *feme sole* as a potentially capable woman. He writes that "[i]t is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state."²⁰⁸ The capable *feme sole*, however, was the

204. *Id.* at 132.

205. *Id.* at 139-42 (Bradley, J., concurring) (joined by Justices Swayne and Field).

206. *Id.* at 140.

207. *Id.* at 141.

208. *Id.* at 141-42.

exception, not the rule, “[a]nd the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”²⁰⁹ It would not be proper nor sensible to require Illinois to change its laws regarding admission to the state bar simply because there may be a woman unfettered by the laws of coverture.

Bradley’s concurrence reveals that although the question of women’s rights may have been an issue for states to consider, it was also on the federal judiciary’s radar. And despite his acknowledgment of the expansion of a woman’s place in society, Bradley agreed that “[i]t is the prerogative of the [state] legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State”²¹⁰ The concurrence is therefore interesting because Bradley *does* expound so long on the differences between men and women when ultimately he says bar admission is properly left to the prerogative of the state legislatures; it was not for the federal government to set those restrictions.²¹¹

The Supreme Court’s decision in *Bradwell* is illustrative of the fact that it was not the federal government that was restricting the rights of women. It was the Illinois Supreme Court that determined that women not be admitted to the state bar. Although the United States Supreme Court affirmed this decision, it did so based on the idea that it was for the states to determine who may or may not be admitted to practice law within the individual states. The Supreme Court did not declare that women may not or should not be admitted to practice law.

Although the Constitution left to the states the opportunity to recognize women’s rights, it also left to the states the opportunity to deny them. As often happens, following closely on the heels of the changes occurring in America was the backlash. When the men realized that the women had begun their *own* kind of mini-revolution, the response was to once again deny women access to the public sphere. The men had at their disposal the tradition of the separate spheres. According to the men, if women wanted to contribute to politics, it could be done within the private, domestic sphere, as “Republican Mothers.”²¹²

209. *Id.*

210. *Id.* at 142.

211. *Id.*

212. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 11.

IV. THE BACKLASH

Although the Revolution provided a revolutionary politicization of women, “the turn of the century [was] a period in which the boundaries between the sexes were sharpened and women left or were pushed out of the formal political arena.”²¹³ This was the backlash. “For many women the Revolution had been a strongly politicizing experience, but the newly created republic made little room for them as political beings.”²¹⁴ Americans needed to create “a political context in which private female virtues might comfortably coexist with the civic virtue that was widely regarded as the cement of the Republic.”²¹⁵ Republican Motherhood offered the answer.²¹⁶

As a Republican Mother, a woman could integrate the “political values” she had learned or developed during the Revolution with her “domestic life,” her private sphere.²¹⁷ “Dedicated as she was to the nurture of public-spirited male citizens, she guaranteed the steady infusion of virtue into the Republic.”²¹⁸ In such a way, a woman could meld her domesticity and familial obligations with her political inclinations.²¹⁹

Although Republican Motherhood allowed a woman a limited justification for the continuation of “political education and political sensibility,”²²⁰ the reality of the Republican Mother was that she served a very limited role.²²¹ It “provided [her] no outlet . . . to affect a real political decision.”²²² Although women had been politicized to an extent, they were still “not fully political.”²²³

The irony of this situation, though, is that Republican Motherhood “would eventually usher women into public life as reformers and activists.”²²⁴ Benjamin Rush, one of the founding fathers, “declared that ‘Virtue, Virtue alone . . . is the basis of a republic,’ expressing a growing consensus of the early republic. Since women were the untainted possessors of virtue, it would be their duty to ensure that American society would remain as pure as women were.”²²⁵

213. Klinghoffer & Elkins, *supra* note 114, at 175.

214. KERBER, *WOMEN OF THE REPUBLIC*, *supra* note 15, at 11.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 12.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Eyal Rabinovitch, *Gender and the Public Sphere: Alternative Forms of Integration in Nineteenth-Century America*, 19 *SOC. THEORY* 344, 354 (2001).

225. *Id.*

Republican Motherhood “granted women an increasing means for direct action in the public sphere. In order to ensure that American society was truly virtuous, women started to disseminate opinions in print, effect legislation, and demonstrate publicly on behalf of ‘virtuous’ causes.”²²⁶

Suffrage, however, was a different issue. When it came to the issue of suffrage, there was a distinct split between the Republican Mothers who believed female-led civic associations were the proper use of a woman’s time and energy versus the Republican Mothers who championed the suffrage movement.²²⁷ These two groups

disagreed about how women could best use their power of moral superiority. Suffragists believed that the conduct and content of electoral politics — voting and office holding — would benefit from women’s special talents. But for others, woman suffrage was not only inappropriate but dangerous. It represented a radical departure from the familiar world of separate spheres, a departure that would bring, they feared, social disorder, political disaster, and, most important, women’s loss of position as society’s moral arbiter and enforcer.²²⁸

Ultimately, the former still believed in and accepted the idea of the separate spheres while the latter did not.²²⁹

As the states became less flexible in their view of women’s rights, however, increasing numbers of women began to champion the suffragist cause and fight back.²³⁰ The system of “male dominance” and “female dependence” was a system “that women themselves [had been] persuaded to cooperate in maintaining The idea of ‘woman’s place’ [was] sold to women as well as men — and often sold to them by other women.”²³¹ But some women were no longer interested in buying into that system, and by 1848, these women were ready to speak out against and challenge that system.

In 1848, Seneca Falls, New York, hosted “[t]he first convention in America on the subject of women’s rights.”²³² The women in attendance adopted resolutions in order that they might show their dissatisfaction with the position of women in society.²³³ The Resolutions

226. *Id.* at 355.

227. *Id.* at 361.

228. Baker, *supra* note 32, at 620.

229. Rabinovitch, *supra* note 224, at 361.

230. KERBER, OURSELVES AND OUR DAUGHTERS, *supra* note 188, at 6.

231. Karst, *supra* note 23, at 459.

232. *Id.*

233. Minutes from Woman’s Rights Convention, Held at Seneca Falls (July 19, 1848), in 1 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 76-77 (Ann D. Gordon ed., 1997) [hereinafter Minutes].

announced: that women were the equal of men;²³⁴ that the double standard which required women to be virtuous yet imposed no such requirement on men was unacceptable;²³⁵ that women would no longer be satisfied with remaining in their private sphere;²³⁶ and that women had duties which they had previously ignored but that would no longer be overlooked.²³⁷

The women at the Seneca Falls convention declared not only that women ought to be considered the equals of men, but also that it was the *duty* of every woman to educate herself about the public sphere so that women might make a claim to become part of it.²³⁸ In addition to the Resolutions, the convention also adopted a “Declaration of Sentiments” mimicking the wording and style of the Declaration of Independence.²³⁹ “We hold these truths to be self-evident,” the Declaration of Sentiments begins, “that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; [and] that among these are life, liberty, and the pursuit of happiness.”²⁴⁰ The Declaration of Sentiments then went on to discuss “such legal issues as obedience to one’s husband, divorce, and marital property, and also to the double standards of morals.”²⁴¹ The first grievance listed was that women were denied the “right to the elective franchise.”²⁴²

Although these women’s rights movements, including the gathering at Seneca Falls gained little to no “integration into the nineteenth-century American public sphere,” what is important is that the women were *trying*.²⁴³ Women were trying to rally and secure for themselves

234. *See id.* (resolving that “all laws which . . . place [woman] in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority” and “woman is man’s equal — was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such”).

235. Rabinovitch, *supra* note 224, at 355-56; *See Minutes, supra* note 233, at 77 (resolving that “the same amount of virtue, delicacy, and refinement of behavior, that is required of woman in the social state, should also be required of man”).

236. *See Minutes, supra* note 233, at 77 (resolving that “it is time she should move in the enlarged sphere which her great Creator has assigned her”).

237. *See id.* (resolving that “it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise [and] it is demonstrably the right and duty of woman, equally with man, to promote every righteous cause, by every righteous means”).

238. *Id.*

239. *Compare* Declaration of Sentiments, Minutes from Woman’s Rights Convention, Held at Seneca Falls (July 20, 1848) in 1 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, *supra* note 233, at 78-81, with THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

240. Declaration of Sentiments, *supra* note 239, at 78.

241. Karst, *supra* note 23, at 472 n.100.

242. Declaration of Sentiments, *supra* note 239, at 79.

243. Rabinovitch, *supra* note 224, at 361.

rights which the Revolution had given the men in society. They invoked the American Revolution to explain their plight, throwing at the men the same rhetoric and ideology the Americans had used against the British a generation before.

CONCLUSION

When evaluating history, it is important to “recognize that significant change more often occurs gradually rather than precipitously, in an evolutionary rather than revolutionary manner. It is also true, however, that some events are decisive and epoch-making, even if their impact and import are not fully experienced and understood until considerable time has passed.”²⁴⁴ The Revolution was both revolutionary and evolutionary. The former was the new Republic the Revolution created seemingly overnight; the latter was that it “spe[d] the integration of women into the civil polity.”²⁴⁵ Where before women had been pre-political, the Revolution began the process of politicizing them.

Unlike the creation of the Republic, women’s politicization would be an extraordinarily long process. Yet it is also important to recognize and acknowledge that the change started during the Revolution and continued into the new Republic. Throughout the process, American society was aware of and discussing the changing roles of women.

Within this societal framework, the Constitution was adopted. It is true that the Constitution did not explicitly guarantee rights to women. But it did not revoke women’s rights, either. The states had the option of granting or recognizing women’s rights. One state chose to enfranchise women.²⁴⁶ Another state witnessed an internal conflict in its legal system that involved an argument over whether married women should be recognized as independent citizens capable of taking independent action.²⁴⁷ Again, the important thing to recognize here is that these debates *were* happening, sometimes in very public ways, and the Constitution *allowed them to happen*.

Granted, the process would take over a century to achieve women’s politicization.²⁴⁸ In part this was because the men had not intended a revolution within their own society. When “any demands

244. Herman Belz, *Liberty and Equality For Whom? How to Think Inclusively About the Constitution and the Bill of Rights*, 25 HIST. TEACHER 263, 268 (1992).

245. Kerber, *Ourselves and Our Daughters*, *supra* note 188, at 8.

246. See Klinghoffer & Elkins, *supra* note 114, at 166 (noting that New Jersey had enfranchised women to vote).

247. See *id.* at 191 (discussing the seizure of property by Massachusetts).

248. See ZINN, *supra* note 30, at 384 (“Women had finally, after long agitation, won the right to vote in 1920 with the passage of the Nineteenth Amendment . . .”).

for change” come from those not in the ruling bodies, it is not surprising that such demands “will be met with contestation and conflict, if not direct suppression and violence.”²⁴⁹ For those women fighting the system, “at almost every step, whenever it seemed that women were attempting to assume an active position of authority over men, they were vehemently challenged by those who believed this departed from ‘woman’s sphere.’”²⁵⁰

It is important to recognize that this backlash occurred *because* change was happening and people were advocating for that change. The Constitution, though silent on the specifics, allowed the debate. The Constitution did not provide sexist language with which the men might attack the reformers. Instead, the Constitution allowed the struggle to occur and eventually absorbed the women’s victory into itself.

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249. Rabinovitch, *supra* note 224, at 357.

250. *Id.*

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