ORIGINALISM: HEGEMONIC MASCULINITY'S LAST GASP

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TOPICS FOR DISCUSSION

- The Tradition: Women and Inalienable rights
- First-Wave Feminism – 1890-1920: Conditions and responses
- The Post-War Period – 1948-1971: Race, Sex, Jacques Derrida and Henry Hart
- Second-Wave Feminism – 1971-1989: Bias and Stereotype
- The Backlash – 1989-2020: The Sex/Gender Split

Margaret Mead's Observation

- "We know of no culture that has said, articulately, that there is no difference between men and women except in the way they contribute to the creation of the next generation . . . Although the division [of male and female roles] has been arbitrary, it has always been there in every society of which we have any knowledge."

Simone de Beauvoir's view in *The Second Sex*

- " … humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being."
- Man is the creator and controller of culture and its norms while woman is the Other whose place is fixed by him. Man has made himself the leader of politics, industry, commerce, art and philosophy and he has made woman dependent on man.

PHILISOPHIC RELATION OF THE SEXES

- Aristotle: fetus arose from the union of sperm (an active force) with menstrual blood (a passive, nurturing force)
- Hippocrates: two kinds of seeds: the weak, female seed and the strong, male seed
- Paracelsus: homunculi are preformed in the sperm and only nurtured by the womb
- Hegel: man is the active principle while woman is the passive principle because she remains undeveloped in her unity

THE ENGLISH PRECEDENT

- "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 … Upon this principle, or a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage."

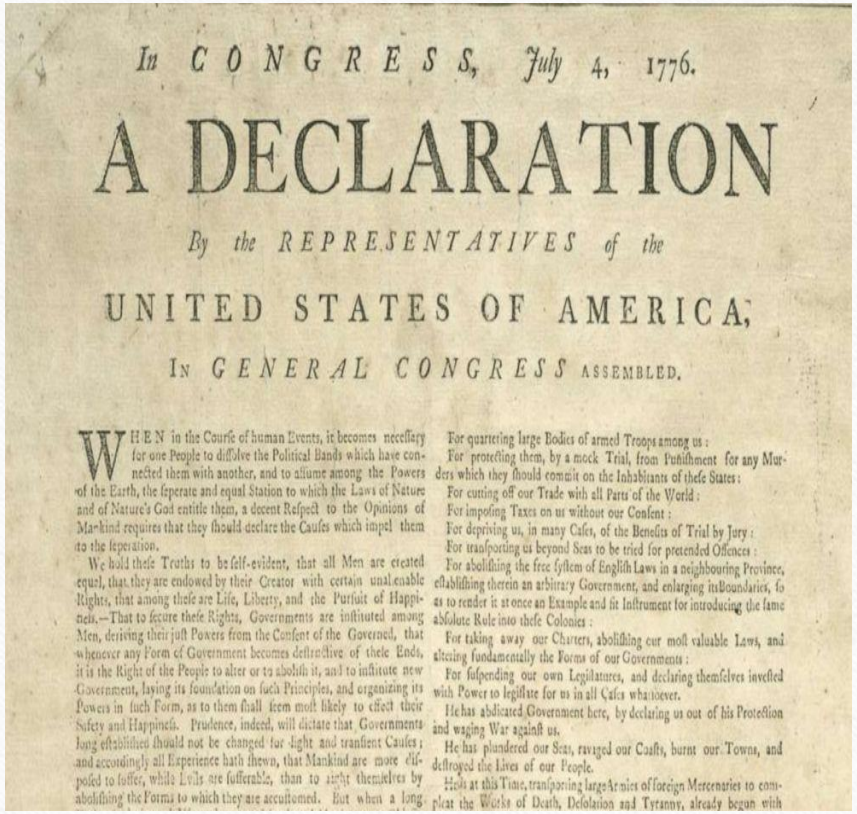
  Blackstone's Commentaries

Alfred Lord Tennyson, *Locksley Hall*

- The common law heritage ranked the married woman in relationship to her husband as "something better than his dog, a little dearer than his horse."

THE U.S. TRADITION: IT'S BEGINNINGS

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed …"



In CONGRESS, July 4, 1776.

A DECLARATION

By the REPRESENTATIVES of the

UNITED STATES OF AMERICA,

In GENERAL CONGRESS ASSEMBLED.

WHEN in the Course of human Events, it becomes neceſſary for one People to diſſolve the Political Bands which have connected them with another, and to aſſume among the Powers of the Earth, the ſeperate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Reſpect to the Opinions of Mankind requires that they ſhould declare the Cauſes which impel them to the ſeperation.

We hold theſe Truths to be ſelf-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among theſe are Life, Liberty, and the Purſuit of Happineſs.—That to ſecure theſe Rights, Governments are inſtituted among Men, deriving their juſt Powers from the Conſent of the Governed, that whenever any Form of Government becomes deſtructive of theſe Ends, it is the Right of the People to alter or to aboliſh it, and to inſtitute new Government, laying its foundation on ſuch Principles, and organizing its Powers in ſuch Form, as to them ſhall ſeem moſt likely to effect their Safety and Happineſs. Prudence, indeed, will dictate that Governments long eſtabliſhed ſhould not be changed for light and tranſient Cauſes; and accordingly all Experience hath ſhewn, that Mankind are more diſpoſed to ſuffer, while Evils are ſufferable, than to right themſelves by aboliſhing the Forms to which they are accuſtomed. But when a long

For quartering large Bodies of armed Troops among us:

For protecting them, by a mock Trial, from Puniſhment for any Murders which they ſhould commit on the Inhabitants of theſe States:

For cutting off our Trade with all Parts of the World:

For impoſing Taxes on us without our Conſent:

For depriving us, in many Caſes, of the Benefits of Trial by Jury:

For tranſporting us beyond Seas to be tried for pretended Offences:

For aboliſhing the free ſyſtem of Engliſh Laws in a neighbouring Province, eſtabliſhing therein an arbitrary Government, and enlarging its Boundaries, ſo as to render it at once an Example and fit Inſtrument for introducing the ſame abſolute Rule into theſe Colonies:

For taking away our Charters, aboliſhing our moſt valuable Laws, and altering fundamentally the Forms of our Governments:

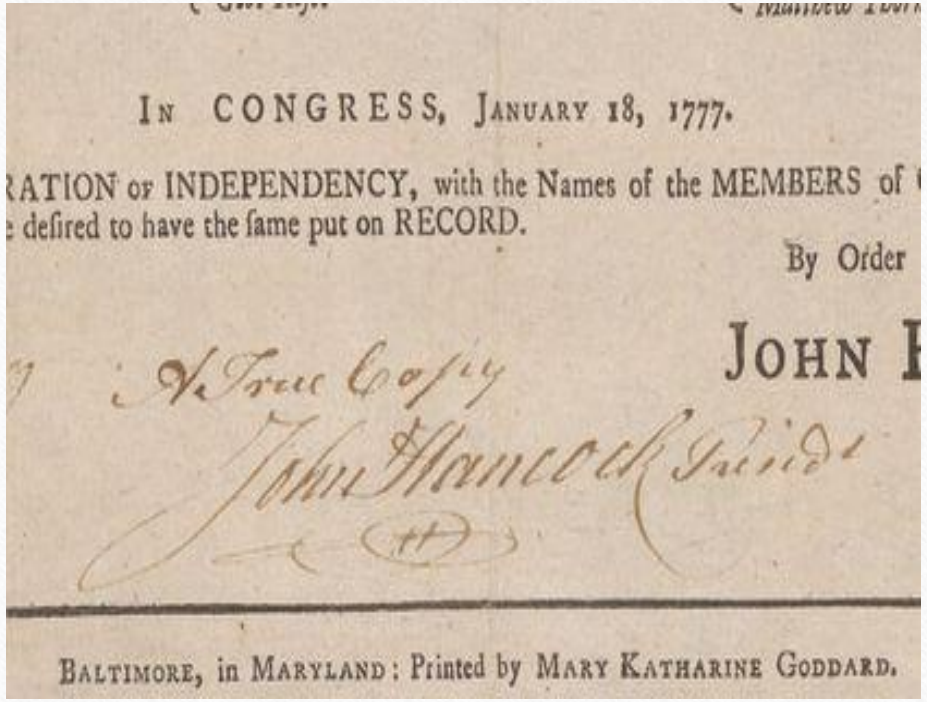
For ſuſpending our own Legiſlatures, and declaring themſelves inveſted with Power to legiſlate for us in all Caſes whatſoever.

He has abdicated Government here, by declaring us out of his Protection and waging War againſt us.

He has plundered our Seas, ravaged our Coaſts, burnt our Towns, and deſtroyed the Lives of our People.

He is at this Time, tranſporting large Armies of foreign Mercenaries to compleat the Works of Death, Deſolation and Tyranny, already begun with

"… and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors." Letter to John Adams, March 31, 1776.



IN CONGRESS, JANUARY 18, 1777.

RATION OF INDEPENDENCY, with the Names of the MEMBERS of
e desired to have the same put on RECORD.

By Order

JOHN H

A True Copy

John Hancock Presidt

BALTIMORE, in MARYLAND: Printed by MARY KATHARINE GODDARD.

Thomas Jefferson's view about women's status before the law

- "Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."

July 19, 1848
Seneca Falls Convention

- First women's rights convention
- Lucretia Mott, Elizabeth Cady Stanton and others organized the convention
- Declaration of Sentiments: "The history of mankind is a history of repeated injuries and usurpation on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world."

THE FOURTEENTH AMENDMENT: EQUAL PROTECTION OF THE LAWS

- "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
- Contains a promise of "equal" treatment – but equal to what?
- What are the privileges or immunities of citizens?

Bradwell v. Illinois (1873)

- Myra Bradwell's application for a license to practice law denied by Illinois Supreme Court because she was female.
- No one appeared to argue against her in the Supreme Court
- Because female attorneys at law were unknown in England when the statute at issue was enacted (early application of originalism)
- "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth."

Justice Bradley's Concurrence

- "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 on 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 paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."

Muller v. Oregon (1908)

- Oregon statute prohibited the employment of women in any mechanical establishment, or factory, or laundry, for more than ten hours per day.
- The Court had declared a similar statute applicable to bakery employees (male and female) to be unconstitutional as interfering with the right to contract. (Lochner v. New York)
- This statute is different. Women require special protection.

Muller

- Woman's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious, especially when the burdens of motherhood are upon her.
- Healthy mothers are essential to vigorous offspring; an issue of public importance. (Social Darwinism)
- There is that in her disposition and habits of life which will operate against a full assertion of personal and contractual rights.

Muller would lay the foundation for 70 years of female protective legislation which restricted women from broad categories of jobs.

Women could not work: more than 8 hours per day; night shift work; as meter readers, delivery jobs, elevator operators; any job that involved the repeated or frequent lifting of 25 pounds or more

EARLY CONSTITUTIONAL CHALLENGES AND "WOMANHOOD"

- *Goesaert v. Cleary* (1948) – no female could be a licensed bartender unless she is the wife or daughter of the male owner of a licensed establishment. "Bartending by women may … give rise to moral and social problems against which [the legislature] may devise pretentive measures." Makes no difference that women may work as waitresses.
- The fact that women may have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes.

MORE CASES

- *Hoyt v. Florida* (1961) – woman charged with killing her husband with a baseball bat after an altercation when he humiliated her. Not unconstitutional to exclude women from juries
- Despite the enlightened emancipation of women from the restrictions and protections of bygone years, "woman is still regarded as the center of home and family life." Therefore it is rational to exclude women from civic duty so they can care for the families.

Henry Hart and Jacques Derrida

- Henry Hart – Member of the Harvard Law School faculty; along with Albert Sacks founded the "Legal Process" school. Decisions must be based on principles of general applicability and neutrality. "Reasoned elaboration" recognizes that judges do, indeed, make law when they apply rules. Ruth Bader Ginsburg studied under Hart and Sacks.
- Jacques Derrida – French philosopher best known for his theory that language cannot be understood outside its context; created "Deconstructionism" which questioned the assumptions of the Western philosophical tradition and Western culture.

Critical gender theory

- One of the developments of the intersection of Legal Process and Deconstructionist theory was the rise of critical gender theory in law schools. One aspect of this theory is that women's legal status is constructed by male dominance and the sexual domination of women by men is a primary source of the general legal and social subordination of women.
- Deconstructing this subordination requires reexamining the concept of "equality."

Second-Wave Feminism

- Ruth Bader Ginsburg (and others) recognized that the cultural stereotype, reflected in the idea of woman as passive - mothers, wives, helpers - had a male parallel as well: men as actors – providers, doers.
- Construct legal challenges which focus on how men who do chose different life styles or do not fit the cultural norm.
- This led Ruth Ginsburg, and others, to develop a litigation strategy that raised up men who sought to live their lives in less traditional ways.

The Turning Point

- *Reed v. Reed* (1971) – Richard Reed, minor, dies. Sally Reed, mother, sought to be administrator of estate (totaling about $1000). Father objected. Under Idaho law if several persons seek appointment "males must be preferred to females." Father selected without regard to his abilities. Idaho S.Ct. rejected Sally Reed's constitutional challenge
- Supreme Court overturned the "arbitrary preference established in favor of males" even though the presumption simplified probate proceedings.

More cases

- *Frontiero v. Richardson* (1973) Lt. Sharron Frontiero sought housing and medical benefits for her husband as a "dependent." Men got the benefit automatically for wives but women had to prove actual dependency to get the benefits for husbands.
- S.Ct. ruled that benefits given by the United States military to the family of service members cannot be given out differently because of sex.
- During argument, Ruth Ginsburg told the all male court that policies that were based upon the assumption that women were on a pedestal, in fact put them in a cage.

And more …

- *Weinberger v. Wiesenfeld* (1975): widows but not widowers could get Social Security Benefits while caring for minor children.
- Held unconstitutional

- *Califano v. Goldfarb* (1977): Widower applied for Social Security survivor's benefits after his wife's death, who had worked he entire life. Denied because he had to meet higher proof of dependency.
- Held unconstitutional

Craig v. Boren (1976) – the turning point

- Oklahoma passed a statute prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of 21 but allowed females over the age of 18 to purchase it. Justified by traffic safety statistics.
- The S.Ct. created a new standard: intermediate scrutiny. While traffic safety is an important governmental function, there is a loose fit between sex and traffic safety.

The first broad consequence

- The decisions in these cases left an open question: How do you remedy the violation? Extend the benefit to those who were denied it or apply the restriction to the favored class.
- Resolving this issue required the courts to second-guess the legislature.
- As a general matter, the courts extended the favorable treatment to the disfavored class.
- This meant that men and women who did not live traditional lives were free to pursue their own interests.

Second broad consequence

- 1989 – *Price Waterhouse v. Hopkins* – woman denied partnership in firm because she did not talk like a woman, walk like a woman, and wear makeup. Violation of Title VII that prohibits sex discrimination in the workplace.
- By recognizing that the statutes were based upon "sex-role stereotyping," the discussion turned from "sex" to "gender." "Gender" is not necessarily a binary concept.
- Courts used their inherent powers to fill in the gaps by relying on fundamental rights and privileges of individuals.

The Backlash

- In addition to the constitutional developments, other statutes changed the way society looked. Title VII (employment opportunities); Title IX (educational and athletic opportunities); Fair Credit Act (women's economic independence); women in the military.
- Conservative legal movement arose opposed to perceived activism of federal judges, particularly the view that the courts should be used to change the status quo.

The Federalist Society

- Funded in 1982, its ideals include "checking federal power, protecting individual liberty and interpreting the Constitution according to its original meaning.“
- Not appropriate for the government to promote racial or gender fairness. There is no legal difference between considering race or gender for purposes of exclusion and considering race or gender for purposes of inclusion. Both are harmful and make the problems worse.
- Six of the nine Supreme Court Justices are members. Dozens of district and appellate court judges.

Justice Scalia's role

- *United States v. Virginia (VMI)* (1996)
- He recognized, too late, what the Court had done when it rejected "sex discrimination" as a biological construct and replaced it with "gender," a cultural construct.

Originalism and Gender

- *Bostock v. Clayton County* (2020) – same-sex Title VII case
- Justice Alito: There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.
- It represents a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society.

Justice Alito's standard

- Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people at the time they were written." … If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

Justice Kavanaugh's standard

- Courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.
- The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now.

The Growing Threat

- "Originalism," as described by Justices Alito and Kavanaugh (and perhaps other members of the Court), ignores the "literal" meaning of words.
- It also does not judge the social context in which the words were spoken but accepts it as the standard.
- Any consideration of gender is improper. Therefore, you cannot take gender into consideration, including drafting statutes that address the "special" needs of women or minorities.
- Any right not specifically identified in the Constitution is suspect: abortion, contraception, travel,