PANEL II: THE CONSTITUTION ON SEX

GENDER DISCRIMINATION AND THE ORIGINAL UNDERSTANDING

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Today I wish to address one of the more common justifications for enhanced judicial scrutiny of gender-based classifications. This argument—perhaps most aptly described as "neooriginalist"[1]—seeks to connect enhanced scrutiny to the original understanding of the Fourteenth Amendment by comparing gender discrimination to race discrimination. Focusing on the Equal Protection Clause, scholars and judges who rely on this analysis begin with the premise that the Fourteenth Amendment was aimed primarily at unjust classifications. While conceding that the major concern of the Framers was discrimination against free blacks, these commentators note that Section One of the Fourteenth Amendment itself is not limited to a prohibition on race discrimination. Therefore, they contend, the most plausible interpretation of the original understanding is that Section One outlaws all government classifications that are analogous to race discrimination.[2] Since these scholars view gender discrimination as functionally equivalent to race discrimination, they believe that the same level of scrutiny should be applied in both situations.[3]

Such an extrapolation might be plausible in the absence of clear, direct evidence of the Framers' attitude toward gender-based discrimination. In fact, however, a close examination of the historical record reveals a variety of direct evidence on this issue. The Republicans who were responsible for drafting the Fourteenth Amendment specifically addressed questions of gender discrimination in a number of contexts. On those occasions, they consistently denied that the proposed amendment would

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1. Neooriginalist constitutional theories are described and analyzed in detail in EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994).

2. *See, e.g.*, Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (providing a typical example of this argument).

3. *Id.*

subject such discrimination to any special constitutional scrutiny.[4]

Indeed, mainstream Republicans indicated that gender-based classifications would be subject to less constitutional scrutiny than many other forms of discrimination. While Republicans were primarily concerned with discrimination against blacks and Unionists, the theoretical linchpin of their position was that states should not be allowed to deny the fundamental rights of citizenship—the rights to life, liberty and property—to any group of men.[5] By contrast, they specifically countenanced gender-based classifications that limited women's access to these same fundamental rights. Thus, for example, Representative William E. Lawrence asserted that, "distinctions created by nature of sex . . . are recognized as modifying conditions and privileges" of citizenship,[6] and Representative John A. Bingham—the author of Section One—explicitly noted that states would remain free to limit the rights of married women to own and dispose of real property.[7]

Justice Joseph Bradley's much-maligned opinion in *Bradwell v. Illinois*[8] elaborated on this theme. *Bradwell* was a Fourteenth Amendment challenge to the refusal of the state of Illinois to admit women to the practice of law. The challenge did not allege that the state's policy violated the Equal Protection Clause; instead, the argument was based on the Privileges and Immunities Clause of Section One.[9]

This choice of tactics might seem odd to a modern observer; however, it made perfect sense in the context of late nineteenth-century legal analysis. The Framers considered the Privileges and Immunities Clause as the most important provision of Section One.[10] Conversely, they did not view the Equal Protection Clause as establishing a wide-ranging prohibition on unjust classifications; it was, instead, simply a requirement that all would be provided the protection of law for interests otherwise embodied in

4. *See generally* Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framer's Idea of Equality*, 7 CONST. COMMENTARY 251, 266-81 (1990).

5. *Id.*

6. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866).

7. *Id.* at 1089.

8. 83 U.S. (16 Wall.) 130, 139-42 (1873) (Bradley, J., concurring in the judgment).

9. *Id.* at 132.

10. *See generally* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-69 (1990).

either natural or positive law.[11] Thus, the Privileges and Immunities Clause provided the only plausible vehicle for a constitutional challenge to the Illinois policy.

By an eight to one vote, the Court rejected Bradwell's challenge.[12] For the majority, the case presented no significant problems. Only the day before, the Court had interpreted the Privileges and Immunities Clause very narrowly in the *Slaughter-House Cases.*[13] Thus, they could simply conclude that Bradwell was not claiming one of the privileges and immunities guaranteed by the Fourteenth Amendment.[14]

For Justice Bradley, by contrast, the case presented greater analytic difficulties. He had dissented in the *Slaughter-House Cases,* arguing that the right to pursue lawful vocations was in fact guaranteed by the Privileges and Immunities Clause.[15] Thus, unless he was willing to concede that the Illinois policy was unconstitutional, Justice Bradley needed to provide a rationale for the legality of excluding women from legal practice in Illinois. It was in this context that he delivered his famous characterization of the proper role of women in society:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . 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 paramount destiny and missions of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. . . .
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> . . . [I]t is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.[16]

Of course, Justice Bradley's argument is anathema to modern feminists. Nevertheless, his argument accurately reflects the views of those who adopted the Fourteenth Amendment. Clearly, one might still make a purely nonoriginalist argument that would

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11. *Id.* at 96-102.
12. *Bradwell,* 83 U.S. at 142. Chief Justice Chase dissented without an opinion. *Id.*
13. 83 U.S. (16 Wall.) 36, 72-81 (1873).
14. *Bradwell,* 83 U.S. at 137-39.
15. *The Slaughter-House Cases,* 83 U.S. at 111-24 (Bradley, J., dissenting).
16. *Bradwell,* 83 U.S. at 141-42 (Bradley, J., concurring in the result).

support enhanced scrutiny of gender-based classifications. However, it is impossible to connect such scrutiny to the original understanding of the Fourteenth Amendment in any meaningful way.