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1987

## Commentary on Law: Wallowing in Intention

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Publication: *University of Florida Law Review*

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COMMENTARY ON LAW:  
WALLOWING IN INTENTION

*Gene R. Nichol\**

Professor Law, as is her practice,<sup>1</sup> has offered a powerful and provocative comment on American constitutional jurisprudence. Her arguments are straightforward. After examining the constitutional founders' ideas about families and women, she concludes that judges cannot look to "the intent of the . . . framers to resolve constitutional claims premised on conflicting visions of the family."<sup>2</sup> By implication, however, her position is somewhat broader. Attempting to deflect some aspects of the "original intent" critique of modern constitutional decisionmaking,<sup>3</sup> Professor Law claims that a variety of controversial privacy and equality decisions are not unfounded merely because they

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1. For other works by Professor Law, see, especially, her exploration of the privacy/sexual autonomy decisions through a gender discrimination lens. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); see generally, e.g., Law, *Economic Justice*, in OUR ENDANGERED RIGHTS 134-59 (Dorsen ed. 1984).

2. Law, *The Founders Fathers on Families*, 39 U. FLA L. REV. 583, 585 (1987).

3. Primarily, of course, the "originalist" claim has been emphasized recently by Att'y Gen. Meese. See, e.g., E. Meese, Speech Before the American Bar Association (July 9, 1985) [hereinafter Speech Before American Bar], reprinted in FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (Occasional Paper No. 2, 1986) [hereinafter THE GREAT DEBATE] (calling for a "Jurisprudence of Original Intention"); E. Meese, Speech Before the Federalist Society Lawyers Division (Nov. 15, 1985) [hereinafter Speech Before Federalist Society], reprinted in THE GREAT DEBATE, supra, at 36 (describing "Jurisprudence of Original Intention"); see generally R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-72 (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

Early in her article, Professor Law cites to contemporary scholars who use the terms "interpretivism" and "original intention" interchangeably — as does the Attorney General. See Law, supra note 2, at 584 n.10. But attempting to tie judicial decisionmaking to the language of the constitutional text is different from limiting the interpretation of the text to the specific intentions of the framers. Though claiming to approach "constitutional interpretation" beginning "with the document itself," see, e.g., Speech Before Federalist Society, supra, at 33, the Attorney General apparently has little interest in "strictly interpreting" the first amendment to comply with the "no law" textual command. See e.g., ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986). For the originalist, the intentions of the framers often take on greater significance than the words of the constitutional charter. Equal protection, for example, is read to mean freedom from racial discrimination. I will use the terms "originalist" and "intentionalist" to refer to advocates of the original intent doctrine.

move beyond the contemplation of the framers.<sup>4</sup> Constitutional rulings protecting abortion rights,<sup>5</sup> interests in sexual preference,<sup>6</sup> and sexual equality,<sup>7</sup> for example, are not wrong simply because the architects of our charter might not have agreed with them.

Intention fails as a decisionmaking guide, in her view, for two reasons. First, the "people who crafted" the Constitution "held conflicting ideas and values about families and the role of women in society."<sup>8</sup> Accordingly, some difficulty is presented in locating the correct intention to instruct modern adjudication. Second, and more fundamentally, the "founders' dominant conceptions of families denied the liberty, equality, and even personhood of women."<sup>9</sup> Since this view is at odds with an existing "broad consensus across a moral and political spectrum"<sup>10</sup> supporting the recognition of the full personhood of women, our present task is to "envision constitutional and cultural arrangements that read the words 'We the People' quite literally, even though that was not originally intended."<sup>11</sup> Issues of sexual equality and autonomy are our issues, not the founders'. In these matters at least, we should let the framers rest.

Of course, taking on the challenge of commenting, or worse, responding to Professor Law's essay is no enviable task. The essay's full texture and compelling conclusions call more for reflection than refutation. The logical avenues of attack are either to attempt to rebut the historical claims presented, or to deny the validity of the ramifications for modern constitutional analysis that Professor Law draws from her review of the framers' world. In general, this commentary will pursue neither course. I am not competent to do the former,<sup>12</sup> and disinclined to try the latter.<sup>13</sup>

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4. For the decisions Professor Law seeks to rescue from condemnation specifically, see Law, *supra* note 2, at.

5. See *Roe v. Wade*, 410 U.S. 113 (1973).

6. See *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (refusing to extend privacy rights to the protection of homosexual conduct).

7. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1970) (statute that preferred male estate administrators over equally qualified females declared unconstitutional).

8. See Law, *supra* note 2, at 585.

9. *Id.*

10. *Id.*

11. *Id.*

12. I will note a small historical inaccuracy, but one which only serves to bolster Professor Law's description of the framers' disregard for the personhood of women. In making the accurate claim that "[s]ilence, absolute and deafening, is the central theme of the [Founding Fathers'] discussions of women and families," Professor Law refers to the absence of references to women and families in the constitutional debates, the *Federalist* papers, etc. See Law, *supra* note 2, at 586 n13. A reference to women in Madison's Notes, and I think (or at least Walter Dellinger

My goal, instead, is a more limited one. First, I will disagree briefly with the interpretive significance Professor Law draws from the framers' conflicting views about the rights of women. Second, and more important, I will explore a particular contribution to the debate over the use of original intent in constitutional interpretation that the Law essay provides.

Professor Law's rejection of the use of original intent to instruct contemporary decisionmaking in privacy/equality cases is based in part on the assertion that the framers entertained "conflicting ideas . . . about families and the role of women in society."<sup>14</sup> After describing what she characterizes as the dominant view of families in the eighteenth century, one lodged completely in patriarchy and male supremacy, Professor Law offers a second story. This contrasting picture, also a segment of our constitutional legacy, reveals greater gender equality and sexual freedom.<sup>15</sup> The process is repeated for the drafters of the fourteenth amendment. Dominant nineteenth century assumptions denied women the ability to take part in most economic and political activity, and did so in a more purposeful manner than ever before.<sup>16</sup> The competing, hopeful story emphasizes that the post Civil War era was a time when women took part in public activities in great numbers, and when society highly regarded the role of women as mothers and homemakers.<sup>17</sup> Professor Law suggests the tensions between these competing vistas renders the use of the founders' intentions problematic. To my mind, however, the interpretive lesson that Professor Law seeks to glean from these contrasting visions is exaggerated.

Law's optimistic eighteenth century story stems from two distinct features of colonial life: the momentum of the Enlightenment's desire

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informs me that it is so) the only reference to women contained in the debates, which Professor Law missed, is a rejected version of the fugitive slave clause: "If any person bound to service or labor in any of the United States, shall escape into another State, he or *she* shall not be discharged from such service or labor . . . but shall be delivered up to the person justly claiming their service or labor." J. MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 631 (E. Scott ed. 1970) (emphasis added). There is, of course, no small irony in the fact that only on this issue would the need to mention women arise.

13. There are, of course, those who would make such a claim with no small persuasive appeal. See, e.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

14. See Law, *supra* note 2, at 585.

15. *Id.* at 594.

16. *Id.* at 608.

17. *Id.*

to end passivity and dependence in politics and religion,<sup>18</sup> and women's increased political and social participation generated by the exigencies of the Revolutionary War.<sup>19</sup> Professor Law concedes, however, that the framers' culture interfered with their perceptions, and prevented them from seeing that the revolution's "anti-patriarchal" ideals would directly affect women and families.<sup>20</sup> Her argument rooted in the potential of Enlightenment thought therefore actually collapses into a quite distinct line of attack, which I will address in the second half of this commentary — that the framers' concept of the role of women is so much at odds with our later constitutional development that it should simply be rejected.<sup>21</sup>

I assume it is true, on the other hand, that women experienced subtle stirrings of augmented power during the Revolutionary period. But managing farms and businesses, participating in political boycotts, soliciting funds for the war effort, expanding (though still minimal) property rights, and even some increasing flexibility in marital decisionmaking<sup>22</sup> do not rise to the level of debilitating framer discord on the theories of liberty that modern privacy and equality decisions implicate. Moreover, Professor Law's characterization of the patriarchal image of family as the "dominant" strand of eighteenth century thought effectively concedes that the specific legislative purposes of the Bill of Rights did not include the protection of either non-traditional family practices or sexual equality.

The competing visions offered of the world of 1868 similarly pose little actual interpretive difficulty. Law's optimistic view of nineteenth century thought stresses the writings of John Stuart Mill, women's heavy participation in the abolitionist movement, the Seneca Falls Convention, and the granting of the franchise to women in two states. But, as she also explains, the rebuff to women's equality reflected in the Civil War Amendments was, if anything, more dramatic than the omission of constitutional protections in 1791. Section two of the fourteenth amendment put the word "male" in the Constitution for the first time. Prominent feminists accordingly campaigned against its

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18. *Id.* at 594 (citing F. WEINSTEIN & G. PLATT, *THE WISH TO BE FREE: SOCIETY, PSYCHE AND VALUE CHANGE* 49 (1969)).

19. Law, *supra* note 2, at 595-97.

20. *Id.* at 594.

21. See *infra* notes 26-60 and accompanying text.

22. See Law, *supra* note 2, at 597-99.

enactment. Furthermore, Congress rejected efforts to include the word "sex" in the fifteenth amendment's guarantee of the right to vote.<sup>23</sup>

I do not mean to imply that no one believed in sexual equality or autonomy in either 1791 or 1868. Any fair reading of the history of those periods, however, including Professor Law's, would necessarily conclude that sexual independence and gender parity, as we know those terms, were then beyond our general societal ken. This may seem obvious and insignificant. But recall that Professor Law's thesis is presented as rebuttal to a claim. She begins with the acknowledgment that "many influential lawyers, scholars, judges, and public officials urge us to look to the original intent of the men who drafted and ratified the Constitution to determine its contemporary meaning."<sup>24</sup> She counters, in part, that such a venture is impossible in actions based on disputed family and sexual roles because the framers' visions themselves were in conflict. She points, however, to no widely held theories of liberty, in either 1791 or 1868, that would embrace, for example, the right to procure an abortion, to engage in heterosexual or homosexual sodomy, to obtain contraceptives for minors, or to protect illegitimates from discrimination. These are the types of cases that Professor Law seeks to rescue from attack at the hands of a "Jurisprudence of Original Intent." But here the conflict argument disappears.

As Professor Law claims, we probably should refuse to tie constitutional interpretation to the specific notions of liberty and equality its draftsmen entertained. But that is not because, in the circumstances giving rise to the controversial decisions Professor Law seeks to defend, the framers' designs are contradictory. The demands of the Revolutionary War, like those of later wars, gave women a more prominent role in public life. But they merely became more visible, not more equal. The laws of coverture and dependence Professor Law identifies were crafted to prevent the full development of women. By the time of the Civil War Amendments, the women's movement had begun to wage its long battle for progress. But the struggle lasted decades, and for the better part of a century was unsuccessful. The "separate spheres" notion that Professor Law describes was consciously constructed to thwart the nascent move toward female emancipation. At some level, the framers may have disagreed on the role

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23. *Id.* at 606.

24. *Id.* at 584.

women should play in society. They showed precious little confusion, however, about the unequal status of women under the law.<sup>25</sup>

As explained below, it is a strange effort to explore the minds of the framers to find constitutional answers to problems concerning, for example, contraception, teenage pregnancy, the eased access to abortion resulting from technological change, and the spiritual and ethical conundrum created by modern developments such as surrogate motherhood and test tube babies. Despite Law's arguments, however, those who do advocate interpretation via original intent can confidently assert that the framers of the fifth, ninth, and fourteenth amendments had no acknowledged desire to assure non-traditional sexual autonomy or gender equality. Professor Law's essay offers no serious rejoinder to that claim. Substantial indication of this view lies in the fact that the optimistic views proffered are not in any way linked to the men who drafted and ratified the Constitution. Professor Law, instead, focuses on pockets of colonial or Reconstruction thought that provide more hopeful portraits of the full humanity of women and children. For the rigid intentionalist, these pockets represent, at most, loser's history, even if the losses were short term in nature. They do not, as Professor Law suggests, render it impossible to conclude that the framers' conceptions of liberty and equality did not embrace what in the latter decades of the twentieth century we consider the rights of women.

But this criticism goes only to a minor plank in the Law platform. "The Founders on Families" demonstrates the far more significant claim that the framers' conceptions of women and family were so dramatically different from our own that they cannot be made the basis for modern constitutional decisionmaking. In the process, Professor Law's essay offers a noteworthy contribution to the debate on decisionmaking by original intent. In a relatively brief essay, she immerses the reader in a world rarely explored in constitutional jurisprudence — that of the American woman of the eighteenth and nineteenth

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25. Of course, using the concrete intentions of the Constitution's framers to determine the outer boundaries of contemporary adjudication begs the question of the level of generality to be given to broad guarantees to liberty and equality. It is, on that score, a controversial undertaking. See *supra* notes 38-42 and accompanying text for a discussion. Given an elevated level of generality, a conflict between the aspirations of the Enlightenment and the specific conceptions of sexual equality held by the framers could be engendered. That, however, is not the sort of clash that Professor Law describes. See generally Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983).

centuries. In the course of the inquiry, we learn a great deal about the heavy use of original intent in constitutional decisionmaking. It is to that lesson that I now turn.

At first glance, the original intent critique of modern constitutional jurisprudence is extremely attractive.<sup>26</sup> The present constitutional landscape is littered with decisions such as those demanding the busing of school children, prohibiting prayer in the schools, and limiting the state's ability to proscribe abortions, which have on occasion been the subject of massive public disapproval. It is broadly understood that constitutional interpretation involves more than reading opinion polls. But the relationship between such controversial rulings and the text of our fundamental charter has sometimes appeared tenuous. And if Supreme Court decisionmaking represents mere policy choice, can it truly be said to be constitutional interpretation at all? Posing an argument from democracy, therefore, the originalist concludes that "[t]he will and judgment of persons accountable to the electorate should be limited not by the countervailing will and judgment of the judiciary, but only by the will and judgment of the Framers."<sup>27</sup> Not only is this vision of judicial power demanded by our commitment to majority rule, but it reflects the popular "civics book"<sup>28</sup> understanding of the distribution of governmental authority in the American political system. Judges apply the law; they don't make it. And when judges move beyond the intended meaning of a legal provision, they exceed their authority.

This appealing claim has been attacked from a number of directions. As several commentators have noted, it is far from clear who the relevant framers are.<sup>29</sup> Participants in the state legislatures or ratifying conventions, rather than the actual draftsmen, are the most logical candidates. But pinpointing the specific intentions of so large and diverse a group is problematic and records of state deliberations, especially regarding the Civil War Amendments, are scanty.

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26. By "originalist" I refer to what Professor Brest has described as an advocate of "strict intentionalism." See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980). For the strict intentionalist, "[t]he whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its Framers and the people who adopted it." See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934).

27. See Perry, *Interpretivism, Freedom of Expression and Equal Protection*, 42 OHIO ST. L.J. 261, 276 (1981).

28. *Id.* at 276.

29. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 11-41 (1980).



Others have questioned the originalists' use of history. Strict intentionalism, as an interpretive device, assumes that constitutional decisionmaking can be grounded in a sufficiently clear understanding of the framers' designs to eliminate judicial subjectivity. The Attorney General, for example, has argued that "we know how the Founding Fathers lived, and much of what they read, thought, and believed . . . . We know who did what, when, and many times why."<sup>30</sup> History does provide reasonably clear portraits of the framers' intentions concerning some issues.<sup>31</sup> But on many of the most intractable and controversial aspects of constitutional jurisprudence, such as the incorporation doctrine, freedom of the press, and separation of church and state, the purposes of the framers are far from clear. Mark Tushnet has suggested that the only way to bridge the gap between the founders and ourselves is to "creatively construct" history.<sup>32</sup> "Particularly in aspects that the interpretivists care about, [the past] is in essence indeterminate . . . ." <sup>33</sup> Uncertainty, however, seriously undermines the rationale for originalism.

Professor Powell, on the other hand, has argued that the 1787 framers almost certainly did not view the Constitution as the embodiment of their specific intentions.<sup>34</sup> Late eighteenth century common lawyers regarded a provision's intent not as what the drafters meant, but rather as what judges, employing legal reason and judgment, understood the words to mean.<sup>35</sup> Moreover, Madison himself claimed

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30. Speech Before Federalist Society, *supra* note 3, at 33.

31. To my mind, indeterminacy alone does not defeat all uses of originalist jurisprudence. It does seem plausible to conclude, for example, given the fifteenth amendment, that the framers of the fourteenth amendment did not believe its provisions guaranteed voting rights. *See, e.g.*, Justice Harlan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641, 667-68 (1966) (Harlan, J., dissenting). I also think, as I have argued here, that there is little doubt that the framers of the Bill of Rights had no specific desire to assure gender equality. Still, intentionalist jurisprudence becomes massively indeterminate on many of the central issues of American constitutional jurisprudence. The dispute over the incorporation doctrine is perhaps the best, and most important, example. Moreover, as I claim below, the originalist position has more flaws than mere indeterminacy.

32. *See* Tushnet, *supra* note 25, at 800.

33. *See id.*; *see also* Brest, *supra* note 26, at 222 ("[In most instances] the interpreter's understanding of the original understanding [is] so indeterminate as to undermine the rationale for originalism."); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981) ("There is no such thing as the intention of the Framers waiting to be discovered . . . . There is only some such thing waiting to be invented.").

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

35. *Id.* at 896.

that his knowledge of the views actually held by delegates to the Philadelphia and Virginia conventions was a source of "bias" in his constitutional interpretations: "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character."<sup>36</sup> The originalist is thus required to reject the framers' specific belief that their intentions would not be dispositive in constitutional interpretation. On historical grounds, these twin shortcomings of indeterminacy and internal inconsistency leave the originalist path a difficult one to navigate.<sup>37</sup>

Others have leveled broader charges. Tom Grey has shown that a stringent and consistent application of the intentionalist theory, which would cast into doubt, for example, the incorporation doctrine, substantive and much procedural due process protection, all equality jurisprudence as against the federal government and most against the states, would require "an extraordinarily radical purge of established constitutional doctrine."<sup>38</sup> Professor Dworkin has persuasively argued that tying the interpretation of various phrases to the specific, concrete intentions of the founders fundamentally mischaracterizes the nature of some components of the Constitution.<sup>39</sup> A framers' intention, Dworkin claims, can be characterized "abstractly, as intending the enactment of the 'concept' of justice or equality [for example], or concretely, as intending the enactment of his particular 'conception' of those con-

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36. *Id.* at 936 (quoting Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228, 228 (Philadelphia 1865)). Consider also Madison's claim that "difficulties and differences of opinion might occasionally arise in expounding terms and phrases used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."

37. See Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1240-43 (1984); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985).

38. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 713 (1975); see also Nichol, *Giving Substance Its Due* (Book Review), 93 YALE L.J. 171, 185-87 (1983) (quoting Grey, *supra*, at 713). This is one example of radical politics that the Attorney General apparently endorses. See Speech Before the American Bar, *supra* note 3, at 7-9 (arguing for the rejection of the incorporation doctrine).

39. Dworkin refers specifically to "what are often called 'vague' standards, for example, the provision that the government shall not deny men due process of law, or equal protection of the laws." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 133 (1977).

cepts."<sup>40</sup> Originalists demand that the religion clauses, the due process and equal protection clauses, and the speech and press clauses be given no more expansive interpretations than the particularized conceptions of the framers can support. But if those who drafted the broad clauses of the Constitution had intended to set out "particular conceptions," Dworkin argues, "they would have found the sort of language conventionally used" to accomplish that task.<sup>41</sup> One is reminded, of course, of Edmund Randolph's claim that the Constitutional Convention's Committee on Detail, in drafting the text, sought "[t]o insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."<sup>42</sup>

As a whole then, the arguments leveled against a "Jurisprudence of Original Intent"<sup>43</sup> are substantial. Professor Law's essay, however, approaches intention from a different, and compelling, direction. Instead of exploring the vagaries of historiography or the nature of the Constitution as law, "The Founders on Families" delves into the world eighteenth and nineteenth century women experienced. Its tenor and effect have little in common with the typical theoretical discussions of what the framers meant or did not mean, and what the judicial ramifications of the inclusions or exclusions might be. As a result, we must consider the Founders' intentions on a different plane, imagining their relationships and their hierarchies and comparing them to our own. This view into the sexual arrangements of our ancestors' world, how-

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40. See Dworkin, *supra* note 33, at 490. But see Monaghan, *supra* note 13, at 379-80; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037-41 (1977); Perry, *supra* note 27, at 297-98; Tushnet, *supra* note 25, at 791 (each challenging aspects of the Dworkin dichotomy). Dworkin has most frequently been criticized for failing to carry the burden of demonstrating that the framers meant to constitutionalize concepts rather than conceptions. See *id.* (framers' vision of law more positive and naturalistic than that which Dworkin describes). These criticisms may well be correct, though it seems to me that Professor Powell's work on original intention bolsters the Dworkin claim. I think, at a minimum, Dworkin demonstrates that the use of language like "equal protection of the laws," "due process of law," and "cruel and unusual punishment" reflects a desire to enact constitutional principles that reach beyond the specific applications of those principles contemplated by the framers. See generally Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 814-821 (1982).

41. R. DWORKIN, *supra* note 39, at 136.

42. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 (M. Farrand ed. 1966).

43. The term is the Attorney General's. See Speech Before Federalist Society, *supra* note 3, at 36.

ever, leaves its mark. It necessarily affects the way we regard decisionmaking according to the "intentions" of the framers. Next I will attempt to explain why.

Most of the debate over original intent focuses on the appropriate contours of clauses such as "due process of law," "equal protection of the law," "freedom of speech," "cruel and unusual punishment" and the like.<sup>44</sup> The text of the Constitution offers no explicit<sup>45</sup> direction on the way in which these open-ended provisions should be interpreted. The methodology, strict or loose, literal or figurative, must be brought from the outside. The originalist concludes, usually based on an argument from democracy, that the open-ended phrases of the charter should invalidate only those government practices, or their direct modern analogues,<sup>46</sup> that the framers expressed a desire to proscribe. Originalist jurisprudence thus employs a substantial interpretive presumption. As Judge Bork has explained, "Courts must accept any value choice the legislature makes unless it runs *clearly contrary* to a choice made in the framing of the Constitution."<sup>47</sup> This strategic decision, demanded neither by text, intention,<sup>48</sup> or the nature of the enterprise, is, as Justice Brennan has argued, a political one.<sup>49</sup>

44. See generally R. BERGER, *supra* note 3, at 166-220. Professor Schauer has elegantly reminded us recently that such open-ended provisions take on exaggerated significance for law professors — leading too easily to the conclusion that the constitution is fundamentally incomprehensible. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

45. If anything, the text of the Constitution cuts the opposite way than the intentionists claim. The closest thing to an interpretive mandate in the federal charter is the ninth amendment. At the very least, the amendment indicates that rights are not to be "denied or disparaged" because they are not explicitly listed in the Bill of Rights. The amendment was included in Madison's package to attempt to defeat the inference that government was empowered to abrogate all rights not clearly set forth in the text. The strong originalist, therefore, embraces the inference, in the name of legislative intention, which Madison went to such pains to deny. See Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343, 353 (1981); Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1311-16.

46. It is thought acceptable, for example, to apply fourth amendment principles to electronic eavesdropping.

47. Bork, *supra* note 3, at 1.

48. See generally Powell, *supra* note 34.

49. W. Brennan, Speech to Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), reprinted in THE GREAT DEBATE, *supra* note 3, at 15. Justice Brennan stated:

A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption . . . against the claim of constitutional right . . . Nothing intrinsic in the nature of interpretation . . . commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority.

Of course the political choice within the originalist claim is not without rationale. A reluctance toward the recognition of minority rights and a passive approach to ambiguity<sup>50</sup> are thought necessary to avoid "being subjected to the whims of willful judges trying to make the Constitution live."<sup>51</sup> The phrases of the text could bear more expansive readings than demonstrable intention can support. But in order to escape the dangers of judicial usurpation, our constitutional visions of liberty and equality should remain anchored in those of the framers.

Professor Law's essay demonstrates that this position is most palatable in the abstract. It is easy to suggest generally that judges have been authorized<sup>52</sup> to invalidate only the sorts of evils the framers had on their minds. The originalist argues simply that the constitutional provision in question was not designed to prohibit the governmental activity challenged. Discrimination against women or illegitimates or homosexuals may indeed be unfortunate. But those practices do not implicate the fourteenth amendment's notion of equality because they were not the problems the framers sought to cure.

When made concrete, however, the political choice of the intentionalist faces a heavier burden. The intentionalist's argument suggests that our constitutional standards of liberty and equality must remain rooted in a world view, at least for purposes of judicial interpretation, that denies the very personhood of a substantial segment of our political community. The originalist's policy choice, thus placed appropriately in its context, becomes a comparative one. Once we recall that neither the language and structure of the text nor the designs of its framers demands a grounding in specific intention to sustain a claim of constitutional right, the conjured fear of judicial usurpation must indeed be strong to force us to tie ourselves to 1791 or 1868. The intentionalist's desire to focus interpretation strictly on the founders' world can only be defended as strategic. Professor Law's essay effectively demonstrates that the originalist strategy cannot always be characterized as a worthy one.

Recall the world she describes. The colonial wife became civilly "dead" through marriage, subject to physical, sexual, financial, polit-

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50. The phrases employed in the constitutional text — freedom of speech, equal protection of the laws, and the like — often served, of course, by their very ambiguity, to mask disagreements among the framers.

51. See Tushnet, *supra* note 25, at 787.

52. Of course, permission cannot be used in any strong sense here because it begs the central issue of the dispute. It is not clear, based on text or intention, that, for example, the fourteenth amendment constitutionalizes only an 1868 vision of equality or due process.

ical, and even moral domination by her husband.<sup>53</sup> She was a cog, an essential one to be sure, but still only a cog in his patriarchal unit, to be employed as he saw fit. Like the slave and the child, she possessed few rights that her superior partner was obliged to recognize. Each man needed a family to be complete. Still, it was only the adult white male in such an arrangement whom the law actually considered to be an individual.

The most heartening aspect of American history has been its steady, though painful and grudging, movement away from the elitism of the founding generation. Although not yet accomplished,<sup>54</sup> its progress has been sufficient to render the world Law describes essentially unknown to us. I believe contemporary constitutionalists can barely imagine, let alone resurrect, the degree of subjugation colonial women experienced. Nor, as Professor Law suggests, can the framers' vision of sexual equality be squared even with the text of the Constitution any longer. A conception of the role of women that denies their very personhood cannot survive the nineteenth amendment as a component of our constitutive order. The claim that the boundaries of appropriate interpretation of the constitutional mandates of liberty and equality must be rooted in the ideologies and practices of the eighteenth and nineteenth centuries, therefore, fails.

Professor Law's essay, to my untrained eye, is good history. Yet I doubt strict intentionalists will welcome it. The originalist jurisprudence assumes we can mentally resurrect a composite framer to instruct constitutional decisionmaking. When presented with a claim to abortion rights or gender equality, our representative founder would respond, in a felicitous tone, that "those were not the problems that we sought to address." End of case.

But Professor Law forces the conversation further. The hypothetical framer must explain not only that the challenged government practice is beyond the reach of the relevant constitutional prohibition, but why it is so. "Women," he would continue, "could never be thought the equal of men. They are incapable of sophisticated thought or conversation. Politics is beyond their competence. And the management of property is best left to less frivolous minds. They are destined for the benign offices of wife and mother. Such is the unchanging law of God."

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53. See Law, *supra* note 2, at 590.

54. See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (homosexual relationships not constitutionally protected).

Perhaps this portrait overstates the case. But Law is correct that the framers' social assumptions about women and the family were "so profoundly sexist and so foreign to late twentieth century America"<sup>55</sup> that they cannot provide a basis for modern constitutional decisionmaking. It is considerably more difficult to demand that we tie ourselves to the framers' visions of equality once Professor Law has forced us to wallow in them for a time.

That does not mean that the framers' designs of the Constitution have no role in modern interpretation. The first step in giving content to the open-ended phrases of our fundamental charter is to explore what the draftsmen meant by those terms. On the one hand, this process is a familiar component in any hermeneutical enterprise. But even more fundamentally, it gives recognition to our own dependence. We did not make ourselves. As Alice Walker has written, "the grace with which we embrace life, in spite of the pain, is always a measure of what has gone before."<sup>56</sup>

But the ideas of our forefathers cannot provide a final solution to our constitutional dilemmas. Transporting ourselves back to the founders' world to legitimize judicial decisionmaking is often neither possible in fact, nor consistent with the constitutional design the framers chose to employ. Chief Justice Taney's opinion for the Court in *Dred Scott v. Sandford*,<sup>57</sup> it should be remembered, was announced as an attempt "to interpret the instrument they have framed . . . according to its true intent and meaning when it was adopted."<sup>58</sup> By purporting to explore "the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens" of the Union, the Court arrived at its conclusion that neither "the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."<sup>59</sup> The legacy of our forefathers, in many particulars, is a source of inspiration and pride for American public life. It is also, on occasion, something to be overcome.

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55. See Law, *supra* note 2, at 593.

56. A. WALKER, REVOLUTIONARY PETUNIAS AND OTHER POEMS 1 (1971).

57. 60 U.S. (19 How.) 393, 405 (1856).

58. *Id.* at 411-12.

59. *Id.* at 407.