

ON FEMINIST FUNDAMENTALISM

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At a time when so many different religious fundamentalisms are coming to the fore and demanding legal recognition, I want to vindicate something I have come to call feminist fundamentalism, by which I mean a commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.² As I shall argue, both individuals and nation states can have feminist fundamentalist commitments.

I define myself as a feminist fundamentalist. I am deeply and profoundly committed to the equality of the sexes and in particular to its instantiation in the repudiation of “fixed notions concerning the roles and abilities of males and females.”³ These commitments are at my fundament, my root, my base. My commitment to them is such that I would find it very difficult to act in ways contrary to or inconsistent with them,⁴ as I think I can make clear by a few examples. First, recall that the Southern Baptists fairly recently declared that it was a wife’s duty to “submit herself graciously to the servant leadership of her husband.”⁵ Nothing would induce me to submit, graciously or otherwise, to the leadership of my husband, and to avoid doing so I

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² Indeed, more worthy of respect, to the extent that certain feminist fundamentalist commitments are not just in accord with but are also independently mandated by universal human rights norms, while some of the cultural or religious commitments to women’s subordination or to fixed sex roles conflict with those norms.

³ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

⁴ Much like a believer who finds it difficult if not impossible to deny the faith and sacrifice to what s/he believes are false idols, even when the alternative is execution; or, less dramatically, like a believer who’d rather go hungry than eat forbidden food.

⁵ See BAPTIST FAITH AND MESSAGE STUDY COMM., REPORT TO THE SOUTHERN BAPTIST CONVENTION (1998), <http://www.utm.edu/martinarea/fbc/bfm/1963-1998/report1998.html>.

will avoid acquiring a husband, if necessary. There is also nothing that would induce me to veil in the way that many Muslim women willingly do as a pre-condition for appearing in public or in the presence of unrelated adult males.⁶ My refusal to veil has consequences for, among other things, my freedom of movement. One consequence is that, unless there is profound regime change, I will not be in a position to travel freely in much of the Middle East. I cannot, for example, so much as enter Saudi Arabia or Iran, because I will not veil.⁷

Of course, many who would also identify themselves as feminists would not share my difficulties. Indeed, for some Muslim feminists the very act of veiling is itself a manifestation of their feminist commitments. Like the religious commitments to which I am pressing an analogy, feminist commitments can vary in content as well as in character. Feminists, like those within a faith tradition, diverge somewhat in their beliefs and in their views of what their beliefs require of them.⁸ Moreover, many committed feminists, like many devout religious believers, would not embrace nor be accurately described by the term fundamentalist. I am using the word fundamentalism here in ways I will seek to define which have a family resemblance, but not perfect identity, with the way the term is used by others or in other contexts. I am also seeking to maintain a distinction here between fundamentalism and perfectionism, another term others may use in somewhat different ways.⁹ I may not be clear about the edges of this distinction, but I think of myself as a fundamentalist feminist and not as a perfectionist feminist. If I were less of a fundamentalist when it comes to veiling, I might be more willing to accommodate by covering my head on occasion.¹⁰ If I were more of a perfectionist with respect to veiling, I might favor the position that no one, not even women who are freely willing to declare their religious commitments or even their subordination by covering their heads, should be allowed to veil.

⁶ While I would reject veiling as a condition of entering a country, such as Saudi Arabia, or of entering the presence of an unrelated male, I would accept veiling as a condition of entering, for example, a mosque.

⁷ See, e.g., Nazila Fathi, *Rite of Spring in Iran: A Fashion Clampdown*, INT'L HERALD TRIB., April 27, 2007, at 2.

⁸ I have always used a rather minimalist dictionary definition of feminism. Dictionary definitions generally talk about a commitment to the equality of the sexes, a commitment to women's rights, and to the removal of restrictions that discriminate against them. For further discussion, see Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369 (1995).

⁹ If there are other established or better words for the distinction I'm trying to draw, I have yet to run across them.

¹⁰ My unwillingness to compromise gives me something in common with some Muslim women who have become embroiled in litigation because they refused to remove their veils, such as Fereshta Ludin and Shabina Begum, whose cases went to the German Constitutional Court and the British House of Lords, respectively. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02; R (on the application of Begum) v. Headteacher and Governors of Denbigh High School [2006] UKHL 15. In each case, these women were offered a compromise they refused—Ludin, who taught grade school, acknowledged that she did not believe herself required to veil in front of her young pupils, but refused the compromise of removing her veil for only the time she was in class, because of the off chance an adult male might enter the classroom. It was this very unwillingness to compromise that the local school system claimed made her “unsuitable” as a teacher. Begum’s school offered pupils the possibility of veiling and wearing modest dress approved of by most Muslims, but she insisted that, after puberty, nothing less than a more extreme bodily covering, the jilbab, would suffice for her. In the House of Lords, Lord Hoffman rebuked her because she “sought a confrontation” and thereby failed to acknowledge the extent to which “[c]ommon civility also has a place in the religious life.” R (on the application of Begum), ¶ 50. Hoffman stressed the “expectation of accommodation, compromise, and, if necessary, sacrifice in the manifestation of religious beliefs” he saw in the jurisprudence of the ECHR. *Id.* ¶ 54. It’s worth reflecting on the extent to which compromise is itself a particular local value, a hallmark, of both the German and the English constitutional order. See, e.g., discussion of the German abortion cases below.

For me, the hallmark of fundamentalism is an unwillingness to compromise and that of perfectionism is a willingness to impose on others¹¹. Another way of formulating the distinction is that perfectionism speaks in the second or third person—it's about what "you" or "they" should or must do, not just about what "I" or "we"¹² must do. It is possible, I think, to be both fundamentalist and perfectionist, fundamentalist without being perfectionist, and perfectionist but not fundamentalist. People can decide they will not compromise without wishing to impose or can decide they wish to impose and perhaps in the interests of that imposition, compromise. Illustrations of these distinctions can be found in ongoing debates concerning, to use examples I will discuss, civil marriage, veiling and sex segregation, abortion, and the teaching of values in public schools. Note that, perhaps not so coincidentally, in each of the examples, there are not only feminist perfectionist and feminist fundamentalist positions but also religious perfectionist and religious fundamentalist positions.¹³ In much the same way as the various feminist positions

¹¹ Let me give here two brief illustrations of the distinction between fundamentalism and perfectionism as I define them. The illustrations center on religious fundamentalist and perfectionist approaches to policy issues (civil marriage and abortion) on which there are also feminist fundamentalist and perfectionist approaches.

First, if the state were to get out of the business of marriage, there are certain people who value religious marriage for whom that would be good, because they would be allowed to pursue their vision of marriage more clearly and simply. Some fundamentalist Protestants in the U.S. and some Muslims in Canada take this position. But there are, for example, other fundamentalist Protestants who say, "No, everybody, should have our vision of marriage and we don't want to get the state out of the business, because we want our religious vision to govern everyone." (I discuss this example further in *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005) *What Stake Do Heterosexual Women Have in the Same-Sex Marriage, Civil Union, Domestic Partnership Debates. and Why Evangelical Protestants Are Right When They Say That State Recognition of Same-Sex Marriages Threatens Their Marriages and What the Law Should Do About It* (Inaugural Lecture of the Hofstra Colloquium on Law and Sexuality).

Consider, as another example ringing the changes on perfectionism and fundamentalism, as I define them, the German law of abortion and the relationship of the Catholic Church to those laws. The German Constitutional Court over a period of 20 years has taken a pro-life position and decided, in a perfectionist but not a fundamentalist way, that the best way to prevent abortion is to make a world better for women to bring their children into and to substitute for criminal law punishments a counseling scheme designed to persuade women to carry their pregnancies to term. If a woman withstands the counseling, she gets a certificate that allows her to abort within the first twelve weeks of pregnancy. Catholic groups, including almost all German Catholic bishops, participated in the counseling with some enthusiasm. The Catholic Church in Rome demanded that the German bishops get out of the business. Pope John Paul II's position was fundamentalist. He said, we in the Church just can't involve ourselves in this license to kill, whereas the Catholic bishops who pled with the Pope and the Catholic lay groups that continued counseling in Germany were perfectionist and not fundamentalist in that they took the position that had a better chance of getting what they wanted (i.e. fewer abortions) by compromising and working with the state and working with the women. (I discuss this example, and my feminist fundamentalist takes on it, further in Appendix A to this paper, which comes from my work, *How Viable is the German Compromise on Abortion?*)

¹² As in "We, the people of the United States...."

¹³ This, of course, does not exhaust the range over which fundamentalism and perfectionism can apply, even to these debates. In the same-sex marriage debates, for example, there are gay, lesbian, and queer fundamentalist and perfectionist positions. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999). It's worth asking more generally what possibilities for non-religious fundamentalist positions other than feminist ones there are. I'm fairly confident the arguments I make here can fruitfully be applied to pacifism and to animal rights and that there is a fruitful connection to what used more often to be called "freedom of conscience."

I describe are not necessarily anti-religious or even non-religious (in the sense that they can also be defended by religious arguments), many of the religious fundamentalist and perfectionist position are not necessarily anti-feminist or non-feminist, in my view. That is to say, at least for the purposes of this paper, I want readily to concede that, notwithstanding that they are quite inconsistent with some of my own feminist commitments, veiling, sex-segregated public spaces, sex-role differentiated marriage, abortion counseling, and bans on abortion can not only be reconciled with some other people's feminist commitments, they can be endorsed as feminist and defended with feminist arguments by them.

One of the things I want to argue is that asking me, given my particular feminist fundamentalist commitments, to veil should be seen as *in pari materia* with asking devout Muslim women not to veil.¹⁴ It seems to me that too little attention has been paid in the discourse around these matters to two things: first of all, there is a vast literature on the duties of the liberal state to accommodate the religiously fundamentalist individual. But there is, as far as I can tell, at least in languages I know, very little discussion about the religiously fundamentalist state's duty to accommodate the liberal individual.¹⁵ Secondly there is some, but not nearly enough, attention paid to the fact that liberal states can and do have commitments, including fundamental and indeed fundamentalist commitments. Too often we have set up a tension between feminist or liberal universalism on the one hand and local cultural commitments on the other.¹⁶ I agree with

¹⁴ I will make this argument in detail later in the paper using the case of U.S. Air Force pilot Martha McSally, who, invoking her own and the U.S. constitutional order's commitment to sex equality, challenged U.S. government regulations requiring female U.S. military personnel to be accompanied by a male companion and to wear an abaya on any trips off base in Saudi Arabia.[CITATION] One of my many concerns is the "Heads we win, tails you lose" formulation which seems to be working wonderfully well for Muslim fundamentalist proponents of veiling. If I and other women could go around Saudi Arabia without a veil or a male chaperone, I might be more receptive to claims on behalf of Muslim women in the West, who, free of state compulsion to veil or to be chaperoned, choose to go around veiled and chaperoned at all times and demand accommodation from the state for this choice. I might be somewhat more open to the claim of veiling, even fairly extreme veiling, by Muslim women in Western liberal democracies if Muslim fundamentalist states, Saudi Arabia being a prime example, would respect my commitment not to veil, not to be segregated. On the other hand, as discussed further below, a liberal culture should be at least as free as a traditional one to defend and preserve its core values by exclusion from its territory and regulation within its territory of those who threaten its fundamental commitments.

¹⁵ To take just one small example, Human Rights Watch has issued a number of reports critical of Turkey and France for mandating the removal of headscarves in the classroom and has criticized Iraqi insurgent groups for attacks on unveiled women.[CITATION] but, as far as I can tell, has never issued any statement critical of the requirements of states like Iran and Saudi Arabia that all women veil. This omission may in part be because there is so much else to criticize in these countries' treatment of women. Among those discussing, from a women's rights perspective, the tension between claims for cultural and religious rights and women's rights, see SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen et al. eds., 1999); *NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR*, (Betsy Reed ed., 2002).

¹⁶ In seeking to dissolve this dichotomy, I only wish to bracket for the purposes of this paper, not to deny, disparage, or obviate, universal human rights claims. The fact that some of our norms are required by and others are at least consistent with universal human rights norms is an independent justification for demanding respect for our norms, quite apart from their cultural significance to us; just as the fact that some other cultural norms violate or are in tension with universal human rights norms is a basis for denying such norms respect, notwithstanding their cultural significance. My claim in this paper is simply that in addition to whatever force our norms derive from their consistency with universal rights norms, they can also derive additional independent force from the fact of their imbeddedness in or centrality to our particular culture.

Pim Fortuyn,¹⁷ the assassinated Dutch leader, that we in the liberal, feminist, constitutional West have our localized, cultural commitments, too,¹⁸ which are at least as important to us and as entitled to protection as the local cultural commitments of others are to them.¹⁹ Our cultural commitments, said Fortuyn, include equality and freedom with respect to sex and gender.²⁰ The cultures produced by these commitments are at least as extraordinary, fragile and in need of defense as cultures more generally recognized as unique and endangered, such as those of, say, the Bushmen or the tribes of Papua New Guinea. Very few cultures over the history or territorial expanse of the world have embraced commitments to sex equality and freedom, and they remain at risk.

Although widely shared in the liberal constitutional West, these and related commitments can be spelled out importantly differently by different constitutional cultures, just as a shared commitment to the principles of Christianity or to Islam can work itself out in importantly different ways among different denominations or communities of believers.

An example may help to illustrate this as well. Consider the diversity of responses among the signatories to the European Charter of Human Rights, all of whom share commitments to sex equality and freedom of religion, to the question of veiling by Muslim teachers and students in state-sponsored schools. (One of my difficulties with the litigated cases generated by these diverse responses is that the local cultural norms that received the overwhelming bulk of judicial attention in them were those pertaining to religious neutrality rather than sex equality,²¹ but that

¹⁷ See, e.g., Rod Dreher, *Murder in Holland*, NAT'L REV., May 7, 2002. Fortuyn was notorious for making a number of inflammatory, somewhat contradictory statements on a wide variety of topics, most of which are recorded only in Dutch. Let me be clear that I am not endorsing more of his views than those specifically attributed to him in this paper.

¹⁸ For some liberal constitutional democracies, not all of whom have established churches, these commitments can be religious as well. There is an ongoing debate in Europe about the place of Christianity in shaping and maintaining cultural and constitutional commitments. And, as I have previously argued, given that, "at least of late, under U.S. constitutional law (just as, for Paul, 'in Christ') 'there is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female, for . . . all [are] one,'" Christian equality norms may also have shaped American constitutionalism. Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 774 (2002) (quoting *Galatians* 3:28 (New American Standard Bible)).

¹⁹ As noted above, perhaps even more important, certainly more justifiably important and more worthy of respect, to the extent that certain of our commitments are not just in accord with, but also independently mandated by universal human rights norms, and some of the cultural commitments of other nations conflict with those norms. For the purposes of this paper only, I want to bracket the question of what universal human rights norms might require. It may well be that once universal rights norms are factored in, this will put at least a thumb on the scale in favor of the local cultural commitments of countries, groups, and individuals committed to sex equality and against those opposed to it.

²⁰ The Dutch government has recently prepared a series of videos designed to educate migrants to the country as to those commitments. Newly elected French President Nicolas Sarkozy similarly said, "What's the taboo in 'identity'?...We are not an ethnicity, we are not a group of religions, we are republicans. The meaning, the values, of French 'identity' is clear. It means laicity, sexual equality, opportunity. I believe in a mix, not in communitarianism, and, when you forget those national values, communitarianism is what you get,'" in Jane Kramer, *Round One: The Battle for France*, NEW YORKER, April 23, 2007, at 30.

²¹ Some commentators similarly fail even to enumerate the state's commitment to women's equality as a relevant consideration. See, e.g., Ernst-Wolfgang Boeckenfoerde, "Kopftuchstreit" auf dem richtigen Weg?, 10 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 723 (2001) (discussing German lower court's considerations of the question of veiled schoolteachers and listing as the relevant considerations only the religious freedom of teachers, pupils, and

does not affect the usefulness of the example as an illustration.) In France, famously, a ban on the wearing of headscarves by pupils in public schools was driven by the French fundamentalist commitment to *laïcité*, which, contingently and fortuitously, happened to have been worked out in opposition to Catholicism and not originally in opposition to the display of Muslim particularity.²² A similar longstanding fundamental constitutional commitment to secularism led to a similar ban in Turkey, which was upheld by the European Court of Human Rights (ECHR) as being within Turkey's margin of appreciation.²³ But the petitioner in the Turkish case, Leyla Şahin, completed her education, still veiled, in a university in Austria, which has no comparable commitment to secularism.²⁴ The ECHR had previously upheld the prohibition on veiling by a teacher in a Swiss public school.²⁵ And, most recently, the British House of Lords, invoking, not secularism, but the British value of reasonable compromise, sided with the governors of an English school, who were prepared to allow their pupils, the overwhelming majority of whom were Muslim, to wear a uniform veil, but not the more all-encompassing jilbab.²⁶ Meanwhile, in Germany, which, like Austria, has allowed students to wear headscarves, a Muslim female probationary teacher had brought a constitutional challenge to the demand that she remove her headscarf while in the class room with her grade school pupils. The German Federal Constitutional Court ruling allowing the German states some leeway in regulating the wearing of the veil by public school teachers and other representatives of the state²⁷ has generated an ongoing debate in the federal and local German parliaments concerning the permissibility and necessity of banning the veil by schoolteachers in state-sponsored schools because of the message they, as agents and representatives of the state, may send to their pupils.

I happen to be contingently lucky that my own personal feminist fundamentalist commitments are pretty close to those embodied by the constitutional order under which I live. That is to say, we have an orthodoxy with respect to sex equality in the U.S.A. which is enshrined in Supreme Court case law and which holds, among other things, that "fixed notions concerning the roles and abilities of males and females" are anathema when embodied in law.²⁸

parents; the state's commitment to neutrality particularly in the context of education and parental rights to control the upbringing of their children).

²² The French situation is a complicated one and, for feminists, a potentially historically problematic one because *laïcité* rests on the French revolutionary liberal individual commitment to atomized, indistinguishable individuals, and from the time of the 1789 Revolution to the present and the *parité* debate, women in France have tended to be excluded from that commitment to neutral, fungible individuals. But that is for the French to work out, although my own feminist fundamentalist commitments would like the French to work it out by integrating women more rather than by abandoning the initial commitment. For further discussion, see Mary Anne Case, "*La Révolution n'a rien fait pour les pauvres femmes*": *The Rhetoric and Reality of Political Rights for Women in the French Revolution*.

²³ Şahin v. Turk., App. No. 44774/98, (Eur. Ct. H.R. June 29, 2004). The Turkish legislature, prompted by the moderate Islamist party of the Prime Minister, has just proposed to authorize legislatively headscarf wearing by university students, but secularists have threatened to respond with a constitutional challenge to any such legislation.

²⁴ There are, however, circumstances where even Austria may restrict veiling. For example, an Austrian judge has very recently told the Muslim female defendant in a terrorism case that, while she may wear a headscarf to court, she may not veil in such a way as to prevent those trying her from seeing her face.

²⁵ Dahlab v. Switz., 2001-V Eur. Ct. H.R. 447.

²⁶ R (on the application of Begum) v. Headteacher and Governors of Denbigh High School [2006] UKHL 15.

²⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02.

²⁸ Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). As I have previously argued, "There are two main ways of formulating the principle behind the constitutional norm against the denial of equal protection on grounds of

Even Chief Justice Rehnquist,²⁹ in *Nevada Dep't of Human Resources v. Hibbs*,³⁰ reaffirmed that we in the United States have so strong and well-established a constitutional orthodoxy on matters of sex and gender—an orthodoxy, not simply of sex equality, but of no governmentally endorsed sex-role differentiation in all matters, including those related to family and child-rearing—that Congress has prophylactic Section Five power to enforce it on the states. Thus, to fight the long-standing, now heretical, “pervasive sex-role stereotype that caring for family members is women's work,”³¹ Congress can impose on the states as employers the Family and Medical Leave Act, which says that persons of both sexes and not just mothers, not just women, can get leave for what Martha Fineman³² would call their inevitable or derivative dependency, i.e. for their own illness and that of close family members, as well as to care for their young children.

Just as the new constitution of Iraq mandates that “No law that contradicts the established provisions of Islam may be established,”³³ so the equality of the sexes, together with racial equality and the non-establishment of religion, is among the very few commitments the existing U.S. constitutional order makes fundamentally binding on government whenever it acts or speaks. Interestingly, in some respects sex equality is the one of these three that has come closest to being reduced to an orthodoxy. When it comes to racial equality, it is not as clear, for example, where on the spectrum between color-blindness and race consciousness we fall, but an

sex. The first is that women should not be subordinated, by the law or, more broadly, by men. The second is that sex should be irrelevant to an individual's treatment by the law, and, more broadly, to his or her life chances. On the latter view, ‘fixed notions concerning the roles and abilities of males and females’ are problematic when embodied in law, even in law that does not in any articulable way subordinate women to men.” Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1473 (2000).

²⁹ In addition to generally favoring rather strict limitations on Congress's Section 5 powers, Rehnquist was notoriously a latecomer to acceptance of the current constitutional law of sex discrimination's repudiation of distinctions between the roles of men and women. While in the Office of Legal Counsel, he unsuccessfully urged the Nixon Administration to oppose the ERA, accusing its supporters of “a virtually fanatical desire to obscure not only legal differentiation between men and women but, as far as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.” See *Rehnquist: ERA Would Threaten Family Unit*, LEGAL TIMES, Sept. 15, 1986, at 4. As an Associate Justice, he regularly dissented from decisions striking down sex-respecting rules, although he did concur in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), which, like *Hibbs*, concerned sex-distinctions in the benefits offered parents of young children. As Chief, he accepted those decisions as settled law in his *United States v. Virginia* concurrence, 518 U.S. 515 (1978), while nevertheless seeking to retain a space for separate but equal treatment of the sexes. For further discussion, see Case, *supra* note 28, at 1475. New York Times reporter Linda Greenhouse has suggested that Rehnquist's personal experience as the father of a single working mother who occasionally when his daughter “had child-care problems . . . left work early to pick up his granddaughters from school” may have influenced his change of position. See Linda Greenhouse, *Ideas and Trends: Evolving Opinions; Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3.

³⁰ *Nev. Dep't of Human Res. v. Hibbs*, 538 US 721 (2003).

³¹ *Id.* at 731.

³² See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

³³ IRAQ CONST., § I, art. 2, First, A; see also, e.g., PAK. CONST. art. 227(1) (“All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”).

unbroken line of Supreme Court precedent has established that our commitment to equal protection on grounds of sex means at least no “fixed notions concerning the roles and abilities of males and females.”

I’ve argued elsewhere³⁴ that, as with racial equality, this is an orthodoxy that it is incumbent on the government to follow-through on in all fields—in its hortatory pronouncements, in its funding decisions, in its necessary interventions into the private sphere, such as its custody and adoption decisions.³⁵ Thus, while government as speaker and dispenser of subsidies is free to take a variety of positions, among the positions it may now no longer take nor promote is, for example, that of Justice Bradley in *Bradwell v. Illinois* to the effect that, “The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life [etc.] . . . ,”³⁶ notwithstanding that such a position may still be fervently held by many people of faith. Moreover, government as decisionmaker must also act consistently with its commitment to sex equality.

What might this mean in practice? Consider a few examples, some more hypothetical than others. First, at one extreme of the hortatory axis, what constitutional limits might there be on mere government pronouncements of principle unmoored from direct, binding connection to policy? In 1993, the commissioners of Cobb County, Georgia adopted resolutions proclaiming, *inter alia*, “that ‘the traditional family structure’ is in accord with community standards, . . . that ‘lifestyles advocated by the gay community’ are incompatible with those standards . . . and that Cobb County would not fund ‘activities which seek to contravene these existing community standards.’”³⁷ If, by “traditional family structure,” the commissioners had explicitly indicated that they meant, not just a heterosexual couple, but a patriarchal one, with wives submissive to husbands and confined to the domestic sphere, as Justice Bradley urged, the resolution would violate existing U.S. constitutional equality norms. “[L]ifestyles advocated by the [feminist]

³⁴ The project I pursue here is an outgrowth of my response to Kathleen Sullivan’s Jorde Symposium lecture on Constitutionalizing Women’s Equality, in which Sullivan endorsed “normative pluralism” through “constitutional immunity for a private sphere” and sought to reinforce a dichotomy between “judicially enforceable and hortatory norms.” In my view, Sullivan overstated, even under existing law, the permissible or desirable scope for normative pluralism on matters concerning women’s equality. See Case, *supra* note 19. [PINCITE]

³⁵ The strength of our constitutional commitment to racial equality has led to constitutionally mandated limitations on government tolerance of and participation in private discriminatory acts. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (placing constitutional limitations on ability of court deciding child custody to take possibility of private racial prejudice against family into account); *Norwood v. Harrison*, 413 U.S. 455 (1973) (placing constitutional limitations on state’s ability to subsidize private racially discriminatory schools); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (placing constitutional limitations on ability of county to close public schools and subsidize private ones rather than desegregate); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (placing constitutional limitations on court’s ability to enforce racially restrictive covenant on private land).

³⁶ *Bradwell v. State*, 83 U.S. 130, 141 (1892) (Bradley, J. concurring). For an argument similar to the one I make here, see Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1637 (2001) (arguing that “federal constitutional norms have put limits upon government’s ability to perpetuate traditional gender roles.”).

³⁷ Joel Achenbach, *A Report from the Front Line of the ‘Culture War’* WASH. POST, Sept. 26, 1993, at G1. The ordinance was prompted by commissioners’ objections to the subsidized production of Terrence McNally’s *Lips Together, Teeth Apart*. It went unchallenged in court because it had no legal force—it was simply a declaration of principle. See, e.g., Caroline Davies, *The Man Who Dared to Say No*, MAIL ON SUNDAY, Aug. 22, 1993, at 8.

community”³⁸ can no longer be “incompatible with the” official community standards of any unit of government in the United States. “Welcome to Cobb County, Where a Woman's Place is in the Home” would be a combination welcome mat/no trespassing sign with, in my view, serious constitutional problems.

The problems only intensify when government seeks to use its powers to fund or regulate to promote such a problematic message. Attention to such problems is particularly urgent at times such as the present, when the federal government is increasingly interested in sending messages about appropriate family structure and sexual behavior backed by carrots and sticks. For example, assuming *arguendo* that “promoting marriage” through subsidies, hortatory and regulatory means is an appropriate activity for the federal government, it is still constitutionally constrained to promote only egalitarian marriage.³⁹ And, when the Department of Education funds a PBS television series, *Postcards from Buster*, specifically designed to showcase the diversity of American families—especially when such a series unproblematically included a Muslim family who veiled their 12 year old daughter, as well as evangelical Christian and Mormon families—there are, in my view, serious constitutional problems with Secretary of Education Spellings’s decision to force out of the series an episode featuring Gillian Pieper and her partner, a lesbian civilly-joined couple from Vermont who run a maple sugaring operation with their three children.⁴⁰

Justice Souter, in dissent from the school voucher case, wrote that not “every secular taxpayer [will] be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably

³⁸ Those “advocated by the gay community” have a more ambiguous status under current law: So long as they do not transgress the limits set by the Court in *Romer v. Evans*, 517 U.S. 620 (1996), units of government still have some degree of freedom in the extent to which they celebrate or condemn “gay lifestyles.” It should go without saying that, in adapting the language of the Cobb County resolution to my rhetorical purposes, I do not mean to suggest that this language is anything but hopelessly vague.

³⁹ For a description and critical analysis of the sort of marriage promotion I claim is constitutionally out-of-bounds for government in the United States, see Linda McClain, *Some Thoughts on Marriage (E)quality and Promoting a “Marriage Culture”* (March 9, 2002) (on file with author) (describing and critiquing from a sex equality standpoint the efforts to involve government in promoting marriage of, *inter alia*, Wade Horn, Assistant Director for Children and Families in the George W. Bush Administration's Dep't of Health and Human Services); see also Linda McClain, *Child, Family, (Religion), and State in Religious Stances on Human Rights Instruments* (July 19, 2005) (paper delivered at the 2005 meeting of the International Society for Family Law) (on file with author). Court challenges to these programs have to date focused unsuccessfully on claims under the religion clauses, see, e.g., *Christianson v. Northwest Marriage Inst.*, No. C06-5520 FDB, 2007 U.S. Dist. LEXIS 19757 (W.D. Wa March 20, 2007), but that a government funded program whose promotion of marriages in which wives are to be submissive to their husbands does not rely in a “pervasively sectarian” way on Scripture for its subordinating message should not be enough to shield such a program from further constitutional scrutiny. See also Deborah A. Widiss, Elizabeth L. Rosenblatt, Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 *Harv. J.L. & Gender* 461, 298-505 (2007) (detailing impermissible sex-stereotyping in various government funded marriage and abstinence promotion programs).

⁴⁰ See, e.g., Julie Salamon, *A Child Learns a Harsh Lesson in Politics*, N.Y. TIMES, Feb. 5, 2005, at B7. The episode featuring the Vermonters was called “Sugartime,” and there were snide suggestions in the press reporting on Spellings’ actions that “sugaring” was thought to refer to an exotic sexual practice.

taught in any schools adopting the articles of faith of the Southern Baptist Convention.”⁴¹ I would go a step further than Souter did and say that it would already be unconstitutional for the government to fund this sort of teaching, in the same way as it has been held unconstitutional for the government to fund racial segregation.

Implicated as well are limits on the messages state-sponsored schools can offer—today such schools are not merely permitted⁴² but also required to refrain from promoting a message of inequality between men and women.⁴³ Unfortunately, when one moves beyond those institutions bound by Title IX, there has to date been comparatively little in the way of regulatory attention paid in the United States to ensuring that the education provided to students through state-regulated private and home schooling even minimally communicates or comports with norms of sex equality.⁴⁴

⁴¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting). In support of his statements on Muslim and Baptist, views, Justice Souter cited respectively RICHARD C. MARTIN, *ISLAMIC STUDIES* 224 (2d ed. 1996) (interpreting the Koran to mean that “men are responsible to earn a living and provide for their families; women bear children and run the household”) and *The Baptist Faith & Message*, Art. XVIII, <http://www.sbc.net/bfm/bfm2000.asp#v> (“A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ”).

⁴² *See Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (upholding, against parents’ free exercise objection, a school board’s refusal to excuse young children from classes presenting an untraditional view of sex roles). Although the New Hampshire District Court did not rely on constitutional sex-equality guarantees, among the parents’ rejected objections to the school curriculum were these: “Our schools are contributing to the Womans’ [sic] Liberation Movement by making [it] mandatory that the boys take home economics and the girls take shop. . . . [B]oys between [the] ages of 12 and 16 . . . are very vulnerable to effeminate or homosexual development if [a] certain environment is provided. . . . [I]f students who already have possible unknown problems in this area were placed in this atmosphere condoned and imposed by those in authority it would certainly contribute to a particular students [sic] overall destruction of masculinity. Men are the head of the family not the homemakers. . . . [W]e insist that because our daughter is a girl she will just have to be treated like a girl and regardless of who else is taking home economics she will be taking it as well. our [sic] boy will take shop.” *Id.* at 403–04.

⁴³ The ongoing debate in the courts and legislatures of Germany concerning the permissibility and necessity of banning the veil, not when worn by Muslim schoolgirls, as in France, but when worn by Muslim schoolteachers in state-sponsored schools because of the message they, as agents and representatives of the state, might send to their pupils, provides an interesting case study here. Early U.S. cases that upheld bans on veiling by U.S. public school teachers focused, as did the majority in the German case, on the obligation of religious neutrality in public schools. *See, e.g., Cooper v. Eugene Sch. Dist.*, 723 P. 2d 298 (Or 1986) Appeal dismissed for want of substantial federal question, 480 U.S. 942 (1987); *cf. Ambach v. Norwick*, 441 US 68, 78-79 (1979). (“Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school.”). Like the French insistence on religious neutrality in the classroom, American bans on veiling by teachers have their historical origins in fears of Catholic, not Islamic, sectarianism. Anti-veiling statutes date back to concerns about nuns in habits teaching in public schools .

⁴⁴ By contrast, the European Court of Human Rights has upheld Germany’s decision to ban home schooling under similar circumstances. *See Konrad v. Germany*, App. No. 35504/03 (Eur. Ct. H.R. Sept. 18, 2006) (“The Federal Constitutional Court found that the interferences with the applicants’ fundamental rights were also proportionate given the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions . . .”).

What it might mean in practice for sex equality norms to operate as a necessary constraint on state action is particularly tricky when that state action involves children. But, as has been clear for some time when it comes to state laws governing matters such as alimony and child support,⁴⁵ sex equality norms also should constrain government on those occasions when it necessarily adjudicates concerning the family. For example, the state should no more select as appropriate adoptive parents those who believe and will teach their children that females are inferior to and ought to be subservient to males than it would those who believe non-whites are inferior to and should be subservient to whites.⁴⁶ That such beliefs are sometimes justified with reference to religious faith should not immunize them from scrutiny.⁴⁷ Should a strong commitment to traditional, fixed sex roles doom a prospective adoptive parent? And to what extent should government as adjudicator of custody as between already recognized parents take commitment or opposition to women's equality into account? Certainly it should not, contrary to the arguments of some opponents of parenting by gays and lesbians, weigh negatively the likelihood of a child's rejecting traditional sex roles.⁴⁸ And evidence of commitment to sex equality should be at least as assiduously enquired into and at least as positively weighted as a prospective adoptive or custodial parent's commitment to providing a child with religious training, something many decision-makers in adoption and custody cases seem to enquire into and weigh favorably, often without much apparent attention to the substance of the religious beliefs.

As things now seem to stand, however,⁴⁹ when repressive religious beliefs are pitted against secular feminist ones, the religious beliefs begin with a presumption to respect I want to insist is even more deserved, but I realize is often not granted, to the feminist ones. Consider, as a frightening example, the case of Laurie April Wang, who left her husband after his church had her “undergo an exorcism to rid herself of the ‘evil, unsubmitive spirits,’—the spirits which caused her to speak up for herself and to exercise authority rather than completely submit to her husband”⁵⁰ and then found a court adjudicating custody unwilling to consider whether her

⁴⁵ See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding unconstitutional Alabama state law that made wives, but not husbands, potentially eligible for alimony payments incident to a divorce); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (equalizing the age of majority for purposes of child support and education payments given that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

⁴⁶ I was first moved to reflect on these potential constitutional sex equality constraints on adoption and custody as a result of a question Vicki Been asked at Rachel Moran's NYU Law School workshop presentation of chapters from her book, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* (2001).

⁴⁷ My position on these matters is in tune with that articulated by James G. Dwyer in, *inter alia*, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996), and is diametrically opposed to that articulated in Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

⁴⁸ For a similar argument to this effect, see Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003).

⁴⁹ It is notoriously difficult to determine what is actually happening as a general matter in family law cases, given how few result in reported decisions and how manipulable and vulnerable to judicial bias, conscious or unconscious, the relevant standards, such as “best interests of the child,” are.

⁵⁰ *In re Marriage of Wang*, 896 P.2d 450, 454 (Mont. 1995) (Leaphart, J., dissenting). Eugene Volokh's recent work seems to argue on First Amendment grounds that views such as those of Mr. Wang are constitutionally required to be accorded respect and not stifled. See Volokh, *supra* note 48.[pincite?]

husband's religious convictions and his efforts to pass them on to his son might adversely affect her relationship with her son.

Even courts that do, in the end, rule against parents who claim religious authority for the sexist beliefs and practices those parents seek to impose on their children often do so without giving any explicit consideration to the role constitutional norms of sex equality should play in their decision-making. For example, a Virginia judge did terminate a father's visitation with his son and daughter after hearing a) testimony by a clinical psychologist that the daughter "is particularly at risk of psychological damage because of [her father's] telling her that women should not strive to accomplish what men accomplish and that they are supposed to be subservient to men;" b) evidence that the daughter, an "excellent student," did "better in school this academic year, during which no visitation has occurred, than she did last academic year, when there was visitation;" and c) evidence that the father had told both children that they and their mother, whom he called "a sinner" and "of the devil," would all go to hell.⁵¹ The judge concluded that visitation with the father was causing "serious psychological and emotional damage to the children" in no small part because "the values being taught to the children by [their father] are different from the values being taught to the children by [their mother]." Among these conflicting sets of values, were that the mother "encourages the children to be whatever they want to be. [The father] tells [his daughter] women cannot do what men do." But, even with respect to these values, the judge insisted only, "Whichever set of values is right, and the court makes no judgment on which set of values is right, they are irreconcilably at odds." It may well be true that, as between "tolerance" and "fire and brimstone"—another of the enumerated conflicts in values between these parents—a court can make no judgment, but I would argue that a court is constitutionally compelled to choose encouragement of a daughter's unrestricted choice of occupation over a fixed and subordinating message that "women should not strive to accomplish what men accomplish and are supposed to be subservient to men."

May a court enter a support order providing funds, explicitly on grounds of sex,⁵² for a son's higher education but not a daughter's,⁵³ or should this judicial enforcement of private prejudice be deemed unconstitutional, as judicial endorsement of private racial prejudice has been? Must government disfavor in competition for children those who, for example, would make a girl do all the household chores while her brother goes out to play?⁵⁴ Recently released data on the chores performed by children shows that this is far from a hypothetical problem—girls in many households do in fact spend many more hours on household chores than boys, leaving boys more

⁵¹ *Roberts v. Roberts*, 60 Va. Cir. 49 (2002).

⁵² As opposed to differences in the individual academic abilities or interests of the siblings.

⁵³ *Stanton v. Stanton*, 421 U.S. 7 (1975), dealt only with categorical state law, not individual parental decisions directly supervised or adjudicated by the state. *But see id.* at 19-20 (Rehnquist, J., dissenting) (suggesting that what was really at issue was a private agreement between the divorcing Stantons).

⁵⁴ Would it ever think to allow adoption of a black child as, in effect, a household servant for his or her white adoptive siblings? This notwithstanding historical examples of poor children being adopted largely to provide an extra pair of hands for labor.

time to play and to study.⁵⁵ Moreover, the chores girls are given to do are less likely to be paid and less likely to be marketable than those assigned to boys.⁵⁶

Before readers protest that I am proposing massive government intervention into constitutionally protected parenting choices, they should recall that I am focusing my attention here on situations where there is already of necessity governmental intervention, such as necessary government adjudication of custody disputes between two fit parents. Thus, it was perfectly appropriate of a Nevada court that awarded custody of a young Mexican girl to her U.S. resident father in preference to her illegal immigrant mother to take into account, *inter alia*, that while in her mother's custody the girl had been forced to assume substantial care giving responsibilities for her disabled brother.⁵⁷ Similarly, a court considering a teacher's petition to remove an eleven year old student from the custody of her migrant Mexican mother and adopt her was right to consider, *inter alia*, how many school days the girl had unwillingly missed in order to care for her siblings.⁵⁸ Although difficult and controversial borderline questions will arise, in confining analysis of governmental immunity for normative pluralism in the private sphere to adult women's choices—including the choice to accept traditional sex-roles or even subordination to men in their private lives—rather than attending as well to the choices imposed on “young women,” commentators such as Kathleen Sullivan tend to oversimplify the divide between private and state action.⁵⁹

Unfortunately, the fundamental U.S. commitment to an integrationist vision of the sexes may already be under threat even in the public sphere, and more fragile than it appears from a reading of the canonical case law. Part of the reason is the change in personnel on the current Supreme Court. Replacing Chief Justice Rehnquist with Roberts was, I think, a real loss for sex

⁵⁵ See, e.g., Sue Shellenbarger, *Boys Mow Lawns, Girls Do Dishes: Are Parents Perpetuating the Chore Wars?*, WALL ST. J., Dec. 7, 2006, at D1 (reporting on nationwide studies such as that by the University of Michigan's Institute for Social Research).

⁵⁶ *Id.*; see also Viviana Zelizer, *The Priceless Child Revisited*, in *BABY MARKETS*, (Michele Goodwin, ed., forthcoming 2007). *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (excusing Amish children from attendance at high school) does not offer support for these practices. See, e.g., JOHN A. HOSTETLER AND GERTRUDE ENDERS HUNTINGTON, *CHILDREN IN AMISH SOCIETY: SOCIALIZATION AND COMMUNITY EDUCATION* 18 (1971). (“Although the Amish girls always wear dresses and the little boys, after they are toilet-trained, wear trousers, there is little difference in the tasks they are taught to perform. Boys are encouraged to like horses and machinery, but children of both sexes accompany their father around the farm and help their mother with simple household tasks.”).

⁵⁷ *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005).

⁵⁸ See Shaila Dewan, *Two Families, Two Cultures and the Girl Between Them*, N.Y. TIMES, May 12, 2005, at A16. This case was drawn to my attention by Michele Goodwin's paper, *Baby Markets and the Neopolitics of Choice* (Nov. 10, 2006) (prepared for the Baby Markets Roundtable and resulting Cambridge University Press book which she organized and in which I am a participant). Goodwin's angle on this case is almost diametrically opposite to mine. She is critical of a judicial system that removes a child from her mother's poor, unassimilated, Spanish-speaking home to place her with a family that “lives in a brick ranch house with a basketball hoop in the driveway, a swimming pool in the backyard,” Dewan, *Two Families, Two Cultures*, and lists as the factors that determine the loser in competition for this child only “poverty, immigrant status, limited political clout, and limited English proficiency,” nothing connected to sex and gender roles. See Goodwin, *Baby Markets*. [pincite?]

⁵⁹ See Kathleen Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 755 (2002).

equality.⁶⁰ The replacement of Justice O'Connor with Alito was more generally conceded to be such. The Bush Administration has recently publicized guidelines saying that public schools can have single-sex institutions, not even separate but equal, but just separate. In the recent state constitutional same-sex marriage decisions, we see a reintroduction of a concept of state-approved sex-roles, both in decisions, such as that of the New York Court of Appeals, ruling against gay and lesbian couples,⁶¹ and in some of the decisions that rule for them but allow a separate status than marriage to be established for them.⁶² This is particularly troubling for one with my feminist fundamentalist commitments, as I have discussed at length in other work.

In much of Western Europe, different, but in my view quite serious, threats to an integrationist vision of sex equality are presented, *inter alia*, by the demands of some Muslims for governmental accommodation of their desire to separate the sexes physically as well as in their roles and behaviors. I don't want to suggest that veiling or that physical segregation of the sexes

⁶⁰ Two things distinguish Rehnquist's record from Roberts's when it comes to women's rights. The first is Rehnquist's respect for established law. Not only did he apply it in his own decisions, he chastised others, such as the Virginia Military Institute, who failed to pay it sufficient heed.[*See* U.S. v. Virginia, 518 U.S. 515, (1996)(Rehnquist, concurring). Roberts, by contrast, seems not to recognize established law when it stares him in the face. In 1984, Roberts forced a White House official to delete from a speech the claim that "it is illegal to pay a woman less than a man for doing 'work of equal worth, effort and responsibility.'" Roberts insisted that "the quoted language is a vague gloss readily capable of being misinterpreted] In fact, the language was taken essentially verbatim from the text of the Equal Pay Act, which, as the official (but not Roberts) realized, "is the law and has been since 1963." Roberts was no more attuned to case law on sex equality than he was to statutes. At the time he wrote, in 1981, that "extension of heightened scrutiny [beyond race] to other 'insular and discrete' groups . . . represents an unjustified intrusion into legislative affairs,"[] the application of heightened scrutiny to sex classifications was settled law, applied by Rehnquist himself in opinions written while Roberts was his clerk. The second disturbing difference is that Roberts, unlike Rehnquist, seems concerned about sex discrimination only when men's rights are at stake. As far as the record indicates, the only law discriminating between the sexes Roberts ever described as "presumably unconstitutional" was Florida's "proposal to charge women less tuition at state schools because they have less earning potential." [Rehnquist, by contrast, might have upheld such a law, because, as he put in his majority opinion in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), written while Roberts was his clerk, there is "nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts." *Id.* at 476. Roberts, however, regularly expressed special solicitude for men, and only for men, worrying, for example, that taking affirmative action into account in layoffs might hurt men with more seniority and that court ordered equalization of prison education programs might lead to elimination of programs for male prisoners.[CITATION] When others in the Reagan administration wanted to intervene on behalf of women prisoners in Kentucky who were being trained on outmoded equipment for jobs the best of which paid less than the lowest paying job available to male prisoners, to whom all the federal job training funds were funneled, Roberts talked his colleagues out of it.[CITATION] Much has been made of Roberts's opposition to comparable worth. Like opposition to heightened judicial scrutiny for classifications other than race, opposition to government intervention in the market can stem from principled conservatism. But, just as Roberts was lopsidedly willing to accept heightened scrutiny for sex classifications when men's rights might otherwise be compromised, so Roberts seems only to object to government intervention in setting pay scales when it is women, rather than men, who stand to benefit. The only principle that seems to have guided Roberts is that men should never lose. *See* *Mary Anne Case*,

⁶¹ *Hernandez v. Robles*, 7 N.Y.3d 338, 359 (2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.").

⁶² *See, e.g., Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

is *per se* incompatible with the equality of the sexes,⁶³ but I see no way around the conclusion that each may be incompatible with certain instantiations of sex equality norms. For example, I can see no way around the conclusion that segregation, separate spheres and fixed sex-roles simply cannot be made compatible with integration and a lack of “fixed notions.” Moreover, a “mélange,” as Jeremy Waldron would put it, of the two, may be deeply unsatisfying to both integrationists and separationists,⁶⁴ even assuming *arguendo* it were practically sustainable.⁶⁵ It may be easier to see in the case of the Virginia Military Institute⁶⁶ or Saudi Arabia why one woman or one scantily clad woman could destroy the system, but I also see the risk of the one woman in a niqab or one public sex-segregated, role-differentiated institutional space like VMI for a “no fixed notions” society or an integrationist one. One might argue in response that categorical opposition to veiling itself is an impermissible “fixed notion.” That seems to be the line taken by German Constitutional Court Judge Summer, author of the majority opinion in the Ludin case, who stressed that a teacher in a veil could open up to her students the liberatory possibility of full participation by devout Muslim women in public life. But, especially in a world in which modesty norms are not imposed equally on both sexes,⁶⁷ veiling does seem itself

⁶³ In earlier work, I argued that

among the important questions posed by a serious and detailed inquiry into the comparative constitutionalism of women's equality (one, presented, if not squarely in the Afghan case, in other Islamic countries) is how possible it might be to imagine a satisfactory constitutionalism of equality in separate spheres. Can one imagine, for example, workable constitutional guarantees of women's learning, exercising, working, competing, speaking, trading, politicking, and governing in a world of women parallel to and equal with the world of men, with women doctors treating women patients, women spectators cheering on women athletes, and women judges deciding women's cases? This would be a radically different form of separate spheres than that familiar to us (and thus far rejected by our constitutional law), which tends to feature men and women in complementary roles rather than in parallel universes.

Case, *supra* note 19, at 774–75 (footnotes omitted).

⁶⁴ See Jeremy Waldron, Raz on Culture and Autonomy 21 (Oct. 19, 2006) (paper presented at a Conference on the Twentieth Anniversary of Joseph Raz, THE MORALITY OF FREEDOM). I see at the heart of this problem the paradox of diversity—both a variety of uniformity and a uniformity of variety deny diversity as much as they affirm it. See Mary Anne Case, *Molecular Constitutionalism and Community Standards*, 25 HUM. RTS LAW J.10 (2005). [

⁶⁵ I hope to be able to investigate with game-theoretical models the extent to which accommodation of demands for segregation can lead to the inevitable failure of integration. [Ecological models, racial integration tipping points, Nash equilibria] Francesco Parisi and I are at the beginning stages of a project attempting to model the extent to which and circumstances under which integration and segregation of the sexes cannot coexist in equilibrium, using the examples of veiling and sex segregation demands in European countries with Muslim minorities, a project I first outlined at the University of Minnesota's Institute for Law and Rationality's 2007 Meeting of the Minds.

⁶⁶ See *U.S. v. Virginia*, 518 U.S. 515 (1996) (mandating the admission of women to previously all-male state-sponsored military academy).

⁶⁷ Ludin by herself cannot impose modesty on Muslim men, but that may be one of the constraints in cultural choice Waldron admits of. See Waldron, *supra* note 66. Personally, I would have less objection to covering as a condition of entering a Muslim country if Muslim men were forced to cover as well. My objection is not to modesty in dress, but to asymmetrically imposed modesty and what it communicates about sex roles. If both male and female devout Muslims in the West dressed equally modestly then they'd just look like a bunch of people with somewhat eccentric ideas about clothing rather than a bunch of people with potentially oppressive ideas about sex roles. I also acknowledge the unfairly asymmetric burden and limitations on freedom bans on the veil impose on Muslim women, especially as compared with Muslim men, because of the veil's visibility, cultural particularity and tendency to become a flashpoint. (Note, though, that the Turkish regulations at issue in Şahin excluded also males

to embody a fixed notion about women's place [in space?] and behavior, as well as of sexual difference, and arguably of sexual subordination, as the German dissenters and the Judges of the European Court of Human Rights observe.⁶⁸ More worryingly, veiling may get the bulk of the attention, but it often functions as a combination stalking horse and Trojan horse for the far more serious threat that excusing schoolgirls from everything—from swim class to field trips to contact with boys—creating public sex segregated spaces for adult males and females, and otherwise using the legal order to re-impose sex roles is to the fragile integration and equality in liberty of the sexes in Europe.⁶⁹

Because I am so committed to and so alive to the fragility of an integrationist vision of the sexes, I am in sympathy with efforts by European countries to put brakes on the possibilities for introduction (or, in Turkey, reintroduction) of norms of sex-segregation and sex-role differentiation. Like the Muslim governors and head of Begum's British school and legislators and school officials in France and Turkey, as well as substantial percentages of their constituencies, Muslim and non-Muslim, I fear that accommodation of demands by some Muslims for more sex-segregation or dress and role differentiation of girls and women will only increase, perhaps to breaking point, the pressure on other Muslim girls and women to conform to

with beards, not just females with headscarves, from the university and that the history of clothing regulation by the modern secular Turkish state includes early 20th century bans on the wearing of the fez by men and the execution of some men who refused to comply.)

⁶⁸ According to the dissent in the German Ludin case, for example, it was not unreasonable to associate veiling with an idea concerning the relations between the sexes that is not the idea of the German constitutional system. It is an idea that at minimum is about separation and differentiation, and also, for many, both within and outside of Islam, is associated with the subordination of women, and we as a German constitutional system reject that, they said.[] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02. Like the German dissenters, I myself also do not mean to essentialize the veil. I do not mean to take any position at all as to what the veil means to its wearers. The question presented when representatives of the state in their representative capacity wish to wear it is about what the veil reasonably can be interpreted to mean by people both within and without the Muslim community who must deal with the state through this representative. Consider an American analogy. I accept that the Confederate flag, to many of the people who display it, is not meant as statement of racism or white supremacy or anything of the kind, but just a statement of heritage. I nevertheless would think it reasonable if governments in the former Confederacy disavowed that flag as a symbol of their state, and prevented civil servants from wearing it on duty or displaying it at their desks because one might reasonably interpret it as having among its possible meanings, something about slavery, white supremacy, nostalgia for a pre-Civil War or pre-Brown race relations. The analogy is, I admit imperfect for many reasons, not least of which is that no one that I know of claims to be under a fundamentalist compulsion to display the Confederate flag.

⁶⁹ Justice Ginsberg may have had a similar danger in mind when, responding in *U.S. v. Virginia* to claims that one public university from which women were excluded did not threaten the Constitutional guarantee of equal protection by sex, she observed that

Thomas Jefferson stated the view prevailing when the Constitution was new: "Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men."

518 U.S. at 531, n.5 (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 WRITINGS OF THOMAS JEFFERSON 45–46, n.1 (P. Ford ed., 1899)).

such restrictions.⁷⁰ While I see many practical problems with recent attempts by Britain and Baden-Wuerttemberg to introduce examinations to ensure that immigrants understand and accept, *inter alia*, local constitutional and cultural norms of sex equality,⁷¹ I do not find it objectionable in theory for a polity to take steps to ensure that those who wish to enter it as citizens or permanent residents not only agree to abide by but also truly accept its fundamental values. And, just as I do in U.S. debates around issues for which participants on one side use the connection of their position with their religious faith to claim, not only authority for their position, but a righteous sense of grievance when challenged, I want to vindicate those, such as Tony Blair and Jack Straw in Britain,⁷² who are not silenced in their articulation of disapproval by an unjustified demand for polite deference on the part of their religious opponents.⁷³

I am quite alive to the analogies between the arguments I am making here and those made by opponents of legal recognition of same-sex marriage and other legal protections for gay men and lesbians.⁷⁴ There are many reasons, however, why I do not think I can fairly be taxed with a charge of inconsistency in my approach to these issues. Let me just mention what is perhaps the most controversial of these reasons here: One thing the most virulent of the opponents of same-sex civil marriage and I agree on is that, in the end, compromise or a *cuius regio eius religio* solution on these issues in the United States is not possible, and a permanent state of tolerance as opposed to endorsement by government of one side or the other will be very difficult, although perhaps not as difficult as maintaining the nation half slave and half free.⁷⁵ The discussion above about necessary state intervention concerning children suggests some of the reasons why.⁷⁶

⁷⁰ I also understand the real danger that oppression makes any faith grow stronger, that there is a risk that girls will wear or feel compelled to wear the veil much more when it is forbidden, but this is a practical problem dependent on specific circumstance.

⁷¹ See, e.g., Jeffrey Fleishman, *German Muslims Object to Citizenship Tests on Political, Religious Issues*, N.Y. SUN, Apr. 13, 2006, at 6 (“Baden-Wuerttemberg requires an education course and a 30-question oral test to determine whether an immigrant supports issues such as women’s rights and religious diversity. The test is graded at the discretion of the interviewer.”).

⁷² See, e.g., Alan Cowell, *Blair Criticizes Full Islamic Veils as “Mark of Separation,”* N.Y. TIMES, Oct. 18, 2006, at A3.

⁷³ I can also empathize with them, having, for example, tried to have a reasonable debate about the Baptist injunction that wives be submissive with a conservative Christian law professor who accused me of being disrespectful to people of faith but looked genuinely surprised when I responded that I felt equally disrespected and demeaned as a woman by the Baptist message and his defense of it. Cf. Mary Anne Case, *Community Standards and the Margin of Appreciation*, 25 HUM. RTS. L.J. 10 [pincite?] (2005) (“There does not seem to be the same solicitude for freethinkers upset by Christian fundamentalist depictions of Voltaire rotting in hell as the European Court accorded to believing Christians upset by representations of Theresa of Avila in sexual ecstasy or God the Father senile.”).

⁷⁴ See, e.g., Robert George, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* [pincite?] (Robert P. George & Jean Bethke Elshtain eds., 2006) (quoting Joseph Raz saying, “Monogamy . . . cannot be practised by an individual . . . It requires a culture which recognizes and supports it . . . through its public attitudes and through its formal institutions.”).

⁷⁵ Note, for purposes of this paper, I bracket the question of which side of the current debates should be analogized to slavery and Jim Crow. My point here is about the impracticalities of continued coexistence. It is not (at least not here and now) to analogize gay and black civil rights.

⁷⁶ In particular, there will be conflict and a resulting need to take sides so long as public schools do any education at all that in any way concerns matters such as the structures of family life—and even with a radical revision of public

I want now to move very briefly to considering some individuals whose feminist fundamentalist commitments ought to be, I think, more recognized.⁷⁷ I have already discussed above Laurie April Wang (the woman allegedly possessed by demons of unsubmitiveness) and Darlene Pieper and her partner (the couple excluded from the PBS series on family diversity). Let me discuss further below heterosexual marriage resisters; Darlene Jespersen, whose commitment not to wear makeup was disrespected by a majority en banc of the Ninth Circuit,⁷⁸ and Col. Martha McSally, who engaged in a multi-year campaign ending in litigation followed by Congressional action against the U.S. military's requirement that she wear an abaya, the all-encompassing black cloak that is the Saudi Arabian instantiation of hijab, or modest covering of the female body.

HETEROSEXUAL MARRIAGE RESISTERS

The ongoing U.S. debates concerning the extension of civil marriage to same-sex couples bring together a number of different fundamentalist as well as perfectionist perspectives, including a variety from within both the gay rights and religious conservative movements. I have long been of the view that one underrepresented and undervalued set of perspectives in these debates was those of feminists, including those who resist marriage from a feminist perspective. Among the big losers in the recent spate of decisions concerning same-sex couples are heterosexual feminist couples, whether living in a state like New York, whose high court has now said that marriage is going to be reserved for them because of traditional sex roles,⁷⁹ or even, perhaps especially, those living in states which have recognized the claims of gay and lesbian couples for recognition, but allowed marriage to be (p)reserved—or at least the name of “marriage” to be (p)reserved—for heterosexual couples “‘because of,’ not merely ‘in spite of’”⁸⁰ its traditions. The traditions of marriage, including its legal traditions, are anything but free of “fixed notions concerning the roles and abilities of males and females,” also anything but free of female subordination.⁸¹

education, this might not be possible to eliminate. Consider the controversies concerning the reading of books such as *King and King* and *Heather has Two Mommies* in the public schools of, respectively, Massachusetts after the state's recognition of same-sex marriage and New York decades ago. See, e.g., Jason Szep, *Gay Fairy Tale Sparks Civil Rights Debate*, REUTERS, Apr. 24, 2006.

⁷⁷ I recognize that some of the people I discuss in this section might not even be willing to call themselves feminists, let alone feminist fundamentalists. I am nevertheless fairly comfortable describing the positions I seek to vindicate on their behalf as partaking of feminist fundamentalism as I have defined it.

⁷⁸ See *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006).

⁷⁹ See *Hernandez v. Robles*, 7 N.Y.3d 338, 349 (2006), quoted in note above..

⁸⁰ I take this language, of course, from *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring discriminatory intent as well as disparate impact for claims of violation of equal protection on grounds of sex).

⁸¹ This is not to say that civil marriage today need be a prisoner of its traditions, only that, by explicitly seeking to limit it to heterosexual couples because of its traditions, the laws of Vermont, etc., so imprison it and the couples who enter it. As I have been arguing since 1993, see Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA L. REV. 1643 (1993), but for the lingering cloud of repressive history hanging over marriage, it would be clear that marriage today provides far more license, and has the potential to be far more flexible, liberatory, and egalitarian than most available alternatives, such as most domestic partnership schemes or ascriptive schemes. Of course, the law is not the only constraint placed on couples. It may well be that no matter how much license the law gives married couples to structure their lives, societal expectations and traditions, which envelop marriage far more than they do domestic partnership, will leave married persons comparatively constrained.

Only marriage in Massachusetts is open on the same terms to all couples regardless of sex. All other states to date who offer any formal legal recognition at all to same-sex couples have set up separate regimes for them and put those regimes off limits to the mine run of male-female couples.⁸² Vermont and New Jersey, as a result of court decisions, and Connecticut, California and New Hampshire, through the legislative process, have decided to reserve civil marriage for male-female couples and to offer same-sex couples a similar package of legal benefits if they enter into a new status, denominated civil union in all of these states but California. Although civil union offers “all the same benefits, protections and responsibilities under [state] law . . . as are granted to spouses in a marriage,”⁸³ only same-sex couples may form civil unions. These bifurcated regimes send a message of subordination to both gays and lesbians on the one hand and heterosexual women on the other, while reaffirming patriarchy. Withholding from same-sex couples the opportunity to marry devalues their unions both symbolically and practically,⁸⁴ while restricting marriage to male-female couples and male-female couples to marriage forces women who wish to unite themselves to men under state law to do so in an institution whose all too recent legal history is one of subordinating wives both practically and symbolically, an institution reserved for them alone because of and not in spite of its “traditional” (i.e., patriarchal) significance.⁸⁵ While civil union may have gone a long way toward constitutionalizing the equality of gay men and lesbians in the states that offer it to them, it was, in my view, a step backward for constitutionalizing the equality of straight women.

Note that, if these states had opened either marriage to same-sex couples or civil union to male-female couples, I myself, unlike some other feminist fundamentalists, would not be complaining about an affront to women's equality. For, if marriage were opened to all couples, it could continue its development away from its patriarchal past rather than be preserved in the tradition of that past. And, if civil union were open to all couples, women who wished to receive state recognition of their union with a man, together with the associated bundle of legal benefits, could do so without being forced to submit to entry into a form of union that traditionally has subordinated them.⁸⁶

⁸² Unless one of them is a senior citizen, a male-female couple is ineligible for either the New Jersey or the California domestic partnership registry. Same-sex couples, by contrast, are limited to domestic partnership in California, as well as, until the recent substitution of civil union for them, in New Jersey, and are denied the opportunity to marry. Similarly, the Hawaii reciprocal beneficiaries law is open only to couples who are otherwise unmarried and “legally prohibited from marrying one another,” that is to say to all same-sex couples, but only to those male-female couples too closely related to one another to marry.

⁸³ Vt. Stat. Ann. tit. 15, § 1204(a) (2002).

⁸⁴ Of course, providing any legal status at all to same-sex unions puts these states ahead of most others from a gay rights perspective..

⁸⁵ Although the expressive harm may come most sharply into focus when the legal regimes differ in little but name (as in Vermont and Connecticut, and as of 2007 in New Jersey), the addition of substantive and procedural differences (as in California and, until recently, in New Jersey) additionally increases complication and confusion.

⁸⁶ The Netherlands are an instructive counterexample here. That country, which began by gradually granting certain rights to cohabiting same-sex as well as opposite-sex couples, first allowed these couples to register their partnership in 1998, and then, as of 2001, allowed same-sex couples to marry. But, unlike, for example, California, the Netherlands opened registered partnership to opposite-sex as well as same-sex couples. And, also unlike California, it did not abolish older options when it made new ones available. Thus both unregistered and registered partnership and marriage are now available to all. For at least a five-year period, registered partnership and marriage will both exist as options for Dutch couples of any sex. “The relatively high number of different-sex couples that contracted a

In some ways marriage is like the abaya in the McSally case, discussed below: Among other similarities, they both historically involve the “covering” of women in circumstances where men are not similarly covered: an abaya physically through its cumbersome enveloping folds; marriage legally, through the encumbrance of coverture, which subsumed a wife’s identity in her husband’s. Some women who voluntarily enter the one or put on the other do so without feeling or intending to “communicate . . . a belief that women are subservient to men.” Others by such acts embrace and announce their adherence to such a belief, as is their personal right. But a government committed to constitutionalizing women’s equality in the way that U.S. law now demands should not condition important privileges, including membership in the armed forces and in a legally recognized union, on a woman’s willingness to accept trappings whose social meaning she reasonably associates with a message of subordination she (and this nation) rejects.

There have been heterosexual feminist fundamentalist marriage resisters, male and female, in the United States for centuries. But they have never gotten much respect from the law. In recent years, a wide variety of challenges by them to benefits extended to unmarried same-sex couples by employers and units of government have been met with the judicial response that because these couples can legally marry, they suffer no impermissible discrimination.⁸⁷ No weight at all is given to their fundamentalist objections to civil marriage. Moreover, a side-effect of recent successful opposition to recognition of same-sex relationships, including the so-called mini DOMA movements, is that their ability to order their relations by enforceable contract has suffered setbacks in many states.

DARLENE JESPERSEN

A standard gambit of proponents of veiling or of the rights of Muslim women such as the students and schoolteachers in Europe to veil is to note that the West also imposes what can also be seen as role-differentiating, subordinating attire on women, but instead of freeing them from sexual threat and sexualization, such attire makes them sex objects; instead of covering them it exposes them.⁸⁸ From the time the Supreme Court decided *Price Waterhouse v. Hopkins* in 1989

registered partnership in 1998 . . . make[s] it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage. Therefore, the [Dutch] government wants to keep the institution of registered partnership in place, for the time being.” Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL EUROPEAN AND INTERNATIONAL LAW* 437, 457–58 (Robert Wintemute & Mads Andenaes eds., 2001); see also *Case, Marriage Licenses*, *supra* note 10, at 1777.

⁸⁷ See, e.g., *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001).

⁸⁸ I should note that my resistance to my own forced veiling extends to forced imposition on me of Western garb reserved for females, especially that which, like the abaya, hampers freedom of movement. Although warned by other lawyers that I might be denied admission to the seating reserved for the Supreme Court bar for the oral argument of the VMI case if I wore a pantsuit, I wore one, relishing the irony if the case for which I were to be excluded was precisely that one, making sure the suit was one a male would be admitted in, keeping a borrowed tie in my pocket so I could bring my legal challenge cleanly if I had to, but also knowing that I’d have to wait hours outside the Court in the freezing dawn before I could take my seat, and that pants were warmer than pantyhose, so something more practical than a taste for androgyny or non-discrimination was at stake.

until very recently, I would have claimed that, in accord with its and my feminist fundamentalist commitments, the U.S. legal order offered women who wished to resist the demand to “dress more femininely, wear make up, have [their] hair styled, . . . wear jewelry” its strong support.⁸⁹ In 2006, however, the Ninth Circuit en banc decided that Darlene Jespersen could be fired after two successful decades as a bartender for Harrah’s Casino simply because she would not wear make-up.⁹⁰ Jespersen’s account of her reasons for refusing to do so sounds to me like a feminist fundamentalist parallel to the cases of Muslim women who won’t unveil, and a feminist fundamentalist twin of the case of Col. McSally, who would not veil, discussed below. As the majority that ruled against her summarized it:

Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she “felt very degraded and very demeaned.” In addition, Jespersen testified that “it prohibited [her] from doing [her] job” because “[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.”⁹¹

Although the majority disrespected Jespersen’s commitments, describing her as idiosyncratic and Harrah’s rules as neither rooted in sex stereotypes, nor posing an undue burden on women, dissenting Judge Kosinski observed:

If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way. Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women’s faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah’s quaint notion of what a “real woman” looks like.⁹²

MARTHA MCSALLY

⁸⁹ For an extended discussion of the Hopkins case and its implications, see Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1 (1995).

⁹⁰ See *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006).

⁹¹ *Id.* at 1108.

⁹² *Id.* at 1117–18 (Kozinski, J., dissenting).

While an Air Force fighter pilot stationed in Saudi Arabia, Colonel Martha McSally brought a court challenge⁹³ to regulations requiring all female military personnel on all trips off base in Saudi Arabia, to be accompanied by a male companion and to wear an abaya, the full body covering which is the Saudi Arabian instantiation of the Islamic requirement of hijab, or modest covering of women's bodies. Before bringing suit, she had tried unsuccessfully but vigorously for a number of years to get these regulations changed within the military hierarchy. McSally's complaint said these regulations violated her constitutional rights for several reasons, among them by forcing her as a Christian woman to portray herself as a Muslim and put on Muslim garb and "by forcing her to communicate the false and coerced message that she adheres to the belief that women are subservient to men, by according her different treatment and status based solely upon her gender, and by undermining her authority as an officer."⁹⁴

Her complaint made several things clear. First, these requirements were imposed by the U.S. military, not by Saudi law. Other female U.S. government personnel, such as State Department employees, were not required or encouraged to nor did they abide by them; rather they complied with Saudi veiling requirements by donning only a headscarf. Second, male U.S. military personnel were not only not required, they were categorically prohibited, from wearing local dress. McSally gave practical examples of how the rules undermined her authority, but also how the rules were actually counterproductive to their intended purpose, given that the local religious police or vice squads, who might have left her in peace had she been lightly veiled and obviously a Westerner, treated women in abayas as coming more fully under their jurisdiction and hence eligible for punishment for minor transgressions, such as letting the abaya slip.

Of the people I am calling feminist fundamentalists I've listed in this last portion of the paper, all are losers so far in the American legal order with the exception of McSally, but I think it is instructive to note how and why she won. She didn't win in the courts. Her case is also one of the Constitution outside the courts. McSally won by a voice vote of the Congress which directed the U.S. military not to enforce or even suggest such a thing as veiling to female military personnel in Saudi Arabia, but if you look at the little debate there was 90% or more of it was about how this poor Christian woman should not be forced to portray herself as a Muslim⁹⁵ and very little time was given to the feminist claim, which I think was an at least equally central claim to McSally, based on her subsequent conduct. McSally was subsequently promoted, unusually for a resister to military policy, to a position no female before her had held and showed up for the inauguration ceremony in the male version of the Air Force cap, saying there also should be no distinction between male and female uniforms. So it seems that she took the feminist fundamentalist claim at least as seriously as the Christian claim, and I'm sorry that the U.S. Congress did not do likewise.

APPENDIX A

⁹³ *McSally v. Rumsfeld*, No. 1,01CVO2481 (D.D.C. 2001).

⁹⁴ Plaintiff's Complaint at para. 11, *McSally* (No. 1,01CVO2481).

⁹⁵ I do take seriously McSally's claim in this regard, which I see as part of a far broader problem: Either hijab is a requirement only of Muslim women, in which case McSally is right that imposing it on her forces on her the false claim that she is a Muslim, or it is seen as a requirement of women generally, in which case the Muslim authorities are making a universalist, perfectionist claim to be resisted.

PERFECTIONISM AND FUNDAMENTALISM IN GERMAN ABORTION REGULATION

Both the German law of abortion and the relationship of the Catholic Church to those laws⁹⁶ can be seen to ring the changes on perfectionism and fundamentalism, as I define them, and not just on feminist fundamentalism. For this reason, I append this discussion of them, as a case study of the interaction between religious and feminist fundamentalist and perfectionist commitments and to help clarify what I mean by fundamentalism and perfectionism in these contexts. I begin with some background, for those not familiar with the lay of the land.

The German and American constitutional law of abortion have been interesting mirror images of one another for the last quarter century. In both the Federal Republic of Germany and the United States in the 1970s, courts intervened on constitutional grounds with legislative schemes governing abortion. In the Federal Republic of Germany, legislation liberalizing abortion access was overturned as incompatible with the constitutionally guaranteed right of the fetus to life; in the U.S., restrictive criminal laws on abortion were overturned as incompatible with the pregnant woman's rights. Both decisions resulted in considerable controversy and political agitation. And both decisions were revisited in the 1990s, in Germany largely as the result of unification and in the U.S. largely as the result of changes in Supreme Court personnel. Both the U.S. Supreme Court's *Casey* decision and the German Constitutional Court's decision of 28 May 1993 were intended to offer the possibility of a stable compromise. Although starting from opposite positions concerning the constitutionality, in principle, of abortion, the conclusions reached by the two courts are not as different as their starting points might suggest—each holds, in effect, that the state may not impose an undue burden on a pregnant woman in the restrictions it imposes on her termination of her pregnancy. The legal details of both decisions, like those of their predecessor decisions, were readily susceptible to criticism. The German decision in particular was extremely lengthy, complex and full of apparent tensions and contradictions. But the German decision seems to have accomplished what the American *Casey* decision did not—a compromise most of the leading participants in the abortion debates find attractive enough to be worth preserving, even at the expense of ignoring or underplaying any tensions or contradictions.

Among the salient features of the compromise was the requirement of a mandatory counseling scheme directed toward preserving fetal life. Women who undergo counseling are licensed to abort in the first twelve weeks of pregnancy without risk of criminal sanctions, even though the abortions they obtain remain characterized as wrongful acts. Government funded counseling centers are required to be set up in all parts of Germany. Some are run by the regional governments themselves, others by physicians, by Pro Familia (the German equivalent of Planned Parenthood) and, at first, others by the Catholic Church, through Caritas (the German equivalent of Catholic Charities). So strong was the commitment of the German Catholic hierarchy to participation in the counseling scheme that even orders from Rome to cease cooperation were resisted. In the end, the German Catholic bishops were indeed forced to withdraw from participation in counseling, but the place of the Church itself was taken by organizations of committed pro-life Catholic laity.

⁹⁶ For a summary of the Church's role, *see supra* note 11.

The pragmatism of these German Catholics parallels a pragmatism on the part of the Constitutional Court majority, which took the view that, given that abortion is wrongful, the important thing is not that abortion be condemned, but that it be stopped. If other means are more effective than the threat of criminal sanctions in actually reducing the number of abortions (something on which the Constitutional Court itself took lengthy testimony), then implementing those other means best accords with the state's affirmative duty to protect fetal life. In addition to counseling, the other means contemplated in the comprehensive scheme approved by the court included increased social support for women and their children and the potential imposition of legal sanctions on anyone who pressured a woman to abort, from her spouse and other family members to her employer, landlord and creditors. Not all aspects of the scheme have been implemented as contemplated by the court. But, in part because the compromise has seemed so workable, what was a flood of German writings on the abortion problem has slowed to a trickle.⁹⁷

The German Constitutional Court's pro-life position is, in my terminology, perfectionist, but not fundamentalist. The Vatican's response was fundamentalist as well as perfectionist: It said, we as a Church just can't involve ourselves in this license to kill, whereas the Catholic bishops who pled with the Pope and the Catholic lay groups that continued counseling in Germany were, like the German Constitutional Court, perfectionist without fundamentalism, in that they said, we get more chance of getting what we want (i.e. fewer abortions) by compromising and working with the state and working with the women. I have had the opportunity to spend time with the leaders of one of these Catholic lay groups, Donum Vitae, and was struck by their attitude to the requirement that groups authorized to provide abortion counseling also teach sex education, including the use of contraceptives, in the schools. Wasn't this difficult for them as Catholics, I asked, given that their Church forbade artificial means of contraception as well as abortion? Of course not, they responded with some puzzlement; every successful contraception is an abortion that does not need to happen. Like much about the German compromise, this attitude on the part of Catholic activists is worthy of further study at a time when the most politically powerful religious opponents of abortion in the United States are uncompromisingly combining fundamentalism with perfectionism, and demanding with some success that the agenda of the Bush administration follow suit. Far from focusing their attention on the prevention of abortion, for example, they have with uncompromising fervor also opposed information about and access to contraception.

As a self-described feminist fundamentalist, one of my main concerns about the German abortion laws are their effect on women and on sex equality. I am particularly concerned that the counseling scheme encourages a view of women as uniquely unable to make responsible decisions without aid. My concerns intensify when I look at abortion counseling in light of the history of the regulation of women as mothers under German

⁹⁷ I do not mean to suggest that the current state of the law in Germany raises no objections or that all abortion questions are deemed settled, only that, in comparison with the situation in the United States, both the recognizably open questions and those agitating most vocally for their clear resolution are somewhat more marginal.

law: until the 1970s, for example, a male guardian, with decision-making authority from the state, was required to be appointed for every child of any unmarried mother, regardless of the mother's age, fitness as a parent, economic or educational level. My concerns would be abated if the counseling scheme were not so anomalous in present-day German law. If, for example, counseling were a well-established, frequently encountered practice under present-day German law, if persons seeking to engage in a wide variety of acts were required to undergo counseling beforehand, my concerns would not be as strong. As things stand, however, pregnant women are uniquely seen as in need of counseling, uniquely requiring guidance in making decisions. Let me stress three things: First, the response of feminist supporters of the German abortion compromise would be that, in the end, the compromise puts the ultimate decision whether or not to abort in the hands of the pregnant woman; it can thus be seen as more respectful of a woman's decision-making ability than prior schemes, in both Germany and the pre-*Roe v. Wade* United States, that put the ultimate decision whether a woman was in a condition of sufficient distress that she should be allowed to proceed with an abortion in the hands of doctors or boards. Second, my concerns apply only to mandatory, not to voluntary counseling. Third, these concerns about mandatory counseling, are, in my view, independent of any underlying commitment on abortion. Thus, those who favor abortion rights may see counseling as an acceptable price to pay for the ultimate opportunity to abort, while those who oppose abortion may see counseling as a useful tool for discouraging abortion. On the other hand, a fundamentalist focus on sex equality under law might perhaps lead one to the conclusion that it better befits women's dignity as independent responsible legal actors to send them to jail for aborting, rather than to mandatory counseling before they do so.

A fruitful comparison may be to the German procedures for conscientious objection by young men to mandatory military service (*Kriegsdienstverweigerung*). As I understand it, the process by which young men established their eligibility for alternative service has traditionally been more of an adversarial examination than a counseling session. Unlike pregnant women, young men were not treated as necessarily in need of advice or guidance. One could, however, readily imagine how a counseling approach might work. ("Listen, son, it's not really so bad in the army, and the country needs defending, doesn't it? You want to do your part, don't you? Think it over . . ."). To what extent do intractable differences between the two situations and to what extent do norms of masculinity and femininity help account for the differences in approach? One question to pose is whether increased and broader applicability of a counseling approach might be beneficial.⁹⁸

⁹⁸ I am also interested in exploring what analogies there might be in the law of Germany, or indeed of any country, to an abortion counseling scheme that in essence says to pregnant women, we will license you to engage in an unconstitutional and wrongful act provided that you give us the opportunity to talk you out of it first. The closest analogies I have yet come upon (though importantly distinguishable) are in the Dutch law of drug addiction and of euthanasia. German law analogies are much weaker. One I should like to explore is the developing German law around the so-called *Fixerstube*, a governmentally-endorsed safe space in which to use illegal drugs. A U.S. analogy is the Illinois proposal for mandatory counseling of sub-prime mortgagors, which, like the German abortion counseling, has been criticized for assuming a particular demographic group is in particular need of counseling not required of others.

A second set of feminist and fundamentalist concerns arises from the abortion financing regulations put in place after the May 1993 decision. That decision, somewhat paradoxically, held that 1) any abortion for reasons other than to preserve the life or health of the mother being a wrongful act, a pregnant woman's comprehensive health insurance was constitutionally prohibited from paying for it but 2) in the event a pregnant woman was too poor to pay for the abortion herself, the state itself was constitutionally required to pay. Subsequent regulations⁹⁹ implementing the decision interpreted the mother's straitened financial circumstances very broadly, such that, in theory, even the non-wage earning wife of a millionaire, because she earns no income and may have no liquid assets in her own name, can qualify for state aid. One under-publicized consequence of these generous regulations is that, in the aftermath of a decision reaffirming abortion's wrongfulness and loudly trumpeting constitutional restrictions on payments for abortions, the overwhelming majority of abortions are paid for by the state. This fact alone is worthy of attention, *inter alia* as another example of the rejection of fundamentalism by the German constitutional order. But, in addition, it is worth noting that the group of women most directly disadvantaged by the 1993 decision are those who could have justified their abortions and had them paid for by insurance under the old scheme but, because they are wage-earners in their own right, must now pay for abortions without being given the same opportunities previously available to justify themselves. My own feminist fundamentalist commitments lead me to worry about the extent to which abortion funding decisions may fit with a broader tendency in German law and society to privilege the interests of housewives more generally over those of independent professional women.¹⁰⁰

⁹⁹ It is important to recognize that these regulations, like so many aspects of the German abortion regulation regime, are the product of institutional dialogue, or back and forth, between a court relatively conservative on abortion and a more liberal legislature.

¹⁰⁰ A third set of feminist concerns arises out of the largely unfulfilled promise of the post-unification legislation to prevent a need for abortion by creating a network of social services for women and children. Such emphasis on social welfare sharpens the longstanding contrast between abortion framed as part of a general right of reproductive freedom and abortion as something only defensible in the face of medical or economic necessity.