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Source: *Journal of the Early Republic*, Vol. 15, No. 3, Special Issue on Gender in the Early Republic, (Autumn, 1995), pp. 359-387

Published by: University of Pennsylvania Press on behalf of the Society for Historians of the Early American Republic

Stable URL: <http://www.jstor.org/stable/3124115>

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“OF EVERY AGE SEX & CONDITION”: THE REPRESENTATION OF WOMEN IN THE CONSTITUTION

Jan Lewis

It is commonly believed that women are nowhere mentioned in the American Constitution. Although the absence of women from the Constitution has seemed quite clear, scholars have not known what to make of this silence. Some argue that the authors of the Constitution intentionally framed it in a gender-neutral language so that women might be encompassed by its provisions, perhaps at some future date if not just then. It is no accident, such scholars suggest, that the Constitution repeatedly uses such words as “persons,” “inhabitants,” and “citizens” instead of “men.”¹ Other scholars believe that the omission of women, if not intentional, reflected the patriarchal assumptions of the Founders and their belief that women had no role to play in government.² These debates go to the heart of a larger ques-

Jan Lewis is Professor of History at Rutgers University, Newark. This article is part of a larger work, tentatively entitled “Women, Slaves, and the Creation of a Liberal Republic,” to be published by Cambridge University Press. She would like to thank Norma Basch, Barry Bienstock, Joan Cashin, James Oakes, and Herbert Sloan.

¹ See for example, Herman Belz, “Liberty and Equality for Whom? How to Think Inclusively About the Constitution and the Bill of Rights,” *The History Teacher*, 25 (May 1992), 263-77; Robert A. Goldwin, *Why Blacks, Women, and Jews are Not Mentioned in the Constitution* (Washington, DC, 1990). Men, it should be noted, are not mentioned in the Constitution either, except when the male pronoun “he” is used to refer to an officeholder, such as a senator or president.

² See for example, Joan Hoff, *Law, Gender, and Injustice: A Legal History of U. S. Women* (New York, 1991), esp. 117-18. A number of historians have similarly argued that the exclusion of women from the political life and structures of the new nation

tion, which is the relationship of women to the liberal state that the Constitution created. Is there a place for women within liberalism? Or have they always stood outside it, excluded from its inception?

These questions would be easier to answer had the authors of the Constitution been more explicit about the place they envisaged for women in the polity. As Richard B. Morris once remarked, "it would have been very helpful" if the Framers "had given us a hint" about why they were so vague in their discussion of gender.³ But in fact, the Framers have left us a hint, in an amendment that James Wilson suggested to the resolutions then being debated in the Philadelphia Convention in the summer of 1787. Curiously, these words have attracted little attention from scholars of the Constitution and, so far as I can tell, none at all from historians of women.⁴ Although these words require careful interpretation, once they are placed in the context of contemporary thinking about representation and about women, it be-

was intrinsic, rather than incidental. See, for example, Linda K. Kerber, "A Constitutional Right to be Treated Like Ladies: Women and the Obligations of Citizenship," in *U. S. History as Women's History*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill, 1995), 17-35; Carroll Smith-Rosenberg, "Dis-covering the Subject of the 'Great Constitutional Discussion,' 1786-1789," *Journal of American History*, 79 (Dec. 1992), 841-73; "Subject Female: Authorizing American Identity," *American Literary History*, 5 (Fall 1993), 481-511; Susan Juster, *Disorderly Women: Sexual Politics and Evangelicalism in Revolutionary New England* (Ithaca, 1994), esp. 210-11; and Rogers M. Smith, "'One United People': Second-Class Female Citizenship and the American Quest for Community," *Yale Journal of Law and the Humanities*, 1 (1989), 229-93.

³ Richard B. Morris, *The Forging of the Union, 1781-1789* (New York, 1987), 190.

⁴ They were, however, noticed on at least several occasions in the nineteenth century. "A Petition for Universal Suffrage" presented to Congress in January 1866 by Elizabeth Cady Stanton and several other feminists noted that "the Constitution classes us as 'free people,' and counts us as *whole* persons in the basis of representation. . . ." Records of the House of Representatives (National Archives and Records Administration, Washington, DC); copy in Papers of Stanton and Anthony (Rutgers University). See also Senator Samuel Latham Mitchill's 1804 letter to his wife Catherine: "You must remember . . . that you are one of my constituents, and that I am in some degree responsible to you for my public conduct. In the theory of our Constitution women are calculated as political beings. They are numbered in the census of inhabitants to make up the amount of population, and the Representatives are apportioned among the people according to their numbers, reckoning the females as well as the males. Though, therefore, women do not vote, they are nevertheless represented in the national government to their full amount." "Dr Mitchill's Letters from Washington, 1801-1805," *Harper's New American Magazine* (Apr. 1879), 748.

comes evident that the Constitution does include women, although the role it set out for them was different than the one designed for most men.

It was Monday, June 11, and the delegates who had convened in Philadelphia to revise the Articles of Confederation were now into their second week of secret meetings. The issue before the convention was who should vote for each branch of the proposed federal legislature. According to James Madison's notes, Roger Sherman of Connecticut had begun the day's session by proposing that "the proportion of suffrage" in the lower house of the national legislature, which would eventually be known as the House of Representatives, "should be according to the respective numbers of free inhabitants." Two South Carolinians, John Rutledge and Pierce Butler, immediately proposed that representation in the lower house should be based not upon the population of free persons, but upon each state's contribution to the national government. As Butler put it, "money was power." It was in this context, a debate about whether representation should be based upon population or wealth, which would include slaves, that Pennsylvania's James Wilson suggested language that would make clear that representation in the lower house would be "in proportion to the whole number of white & other free Citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state."⁵ This wording was voted upon, approved, and incorporated into the resolutions that the group would continue to debate and refine throughout the summer.⁶ Wilson's wording, only slightly modified, but with the words of interest to us here—"of every age, sex, and condition"—was included in the resolutions referred to the Committee of Style (chaired by William Samuel Johnson, of Connecticut, and including Alexander Hamilton, Rufus King, James Madison, and Gouverneur Morris)⁷ on September 10.⁸

⁵ *The Records of the Federal Convention of 1787*, ed. Max Farrand (1911; rep., 4 vols., New Haven, 1966), I, 201.

⁶ *Ibid.*, I, 201, 227, 236; James Madison, *Notes of Debates in the Federal Convention of 1787, reported by James Madison* (New York, 1987), 149-50.

⁷ *Ibid.*, II, 547, 553, 554.

⁸ *Ibid.*, 571.

The Committee of Style, reporting back on September 12, compressed Wilson's language into the words that actually appear in the Constitution. The relevant clause—now the third paragraph in Article I, Section 2—specified that both representatives and direct taxes were to be “apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons.”⁹ This change in the wording seems to have been purely stylistic, rather than a change in meaning. The delegates voted many times over the course of the summer to change particular wordings, even on August 20 to remove the words “white & other” in the same clause as “superfluous.”¹⁰ Later, on September 13, they would replace the word “servitude” for “service,” “the former being thought to express the condition of slaves, & the latter the obligations of free persons.”¹¹ Presumably, then, when the Committee of Style dropped the words “of every age, sex, and condition,” neither they nor the delegates who accepted the revision thought that the meaning of the clause had been changed.

In fact, if we follow the debate on this clause, we can see that throughout the deliberations the delegates assumed that women, as well as children, were to be included whenever the question came up of who should be counted for purposes of apportionment.¹² Wilson's original wording was part of the resolutions that the Convention was considering on June 19, and, as we have seen, most of this wording was still in the resolutions referred to the Committee of Style on September 10. But over the summer, when the delegates debated the issue of apportionment, they rendered Wilson's words in a kind of shorthand. For example, on July 5 the committee assigned the task of

⁹ *Ibid.*, 590.

¹⁰ *Ibid.*, 350.

¹¹ *Ibid.*, 607.

¹² Needless to say, the inclusion of children in the formula for representation had important implications in political thought. A discussion of this issue lies beyond the scope of this article. For a masterful analysis of the place of children in early American political thought and law, see Holly Brewer, “Constructing Consent: How Children's Status in Political Theory Shaped Public Policy in Virginia, Pennsylvania, and Massachusetts before and after the American Revolution” (Ph.D. diss., University of California, Los Angeles, 1994).

forging a compromise on the issue of representation reported out the following language (and here, of course, we are following the transformation in James Wilson's original wording, and not the thorny question the Convention was attempting to address): "that in the 1st branch of the Legislature each of the States . . . shall be allowed 1 member for every 40,000 inhabitants of the description reported" earlier, on June 19. On July 13, after further debate about the basis for representation, the language was modified again, to "number of inhabitants; according to the provisions hereafter mentioned," hence leaving aside for the moment the question of how to count slaves.¹³

All subsequent discussion about the question of apportioning representatives would focus on this explosive issue. The term "inhabitants"—later changed to "free persons"—now included women and children. Thus we can see what the Committee of Style probably had in mind when it dropped Wilson's original wording about age and sex. Women, then, certainly were considered by the Constitutional Convention, and although Wilson's reference to "sex" was ultimately excised, it seems clear that the Framers intended that women be included among those who were to be represented by the new government. The Constitution included women.

Because no one objected to Wilson's insertion of the word "sex," and because women seem so readily to have been comprehended by the other delegates in the terms "inhabitants" and "person," we might be tempted to think that Wilson was simply inserting words that reflected the common practice of the day. Even though no one raised an objection to Wilson's terminology, it seems to have represented a genuine innovation, and because so few have noticed since, the genuine radicalism of the Constitution's doctrine of representation has been obscured. Although, as J. R. Pole and others have shown, in the revolutionary period democrats were beginning to insist that persons, not property were the proper basis for representation, not until the Federal Constitution had any government based representation upon inhabitants rather than taxpayers or adult men. When Massachusetts and Pennsylvania, for example, revised their constitutions, they defined "population" as "rateable polls" or "taxable inhabitants," rather than the total number of inhabitants, whether

¹³ Farrand, ed., *Records of the Federal Convention*, I, 526, 603.

eligible to vote or not. In fact, none of the new state constitutions enacted at the time of the Revolution numbered women and children as among those who were to be represented.¹⁴ Similarly, the Northwest Ordinance of 1787 specified that representation was to be based upon the number of “free male inhabitants, of full age.”¹⁵

To include female inhabitants when apportioning representatives, then, was a significant extension of democratic trends that were reshaping representation in the states. Wilson took this logic further than others had taken it until now and, in fact, further than those who would frame state constitutions in the near future would be willing to go. Kentucky’s constitution of 1792 based representation on “an enumeration of free male inhabitants above twenty-one years of age,” and Tennessee’s, framed four years later, on “an enumeration of the taxable inhabitants.”¹⁶ But because Wilson’s additional language about sex was uncontested, it is not immediately clear what he and the other delegates intended by their innovation.

¹⁴ J. R. Pole, *Political Representation in England and the Origins of the American Republic* (1966; rep., Berkeley, 1971), 204, 274-75. See also Rosemarie Zagari, *The Politics of Size: Representation in the United States, 1776-1850* (Ithaca, 1987), 39-42, 57-60; and, for a concise overview, Peter S. Onuf, “The Origins and Early Development of State Legislatures, in *Encyclopedia of the American Legislative System*, ed. Joel Silbey (3 vols., New York, 1994), I, 175-94. For the relevant sections in the constitutions of Massachusetts and Pennsylvania, see *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now or Heretofore Forming the United States of America*, ed. Francis Newton Thorpe (7 vols., Washington, DC, 1909), V, 1898, 3086-87. New York’s 1777 constitution specified that in years to come, the legislature should be reapportioned on the basis of the “number of electors” in each county. (V, 2629) The following states assigned each county, and in some cases town, a certain number of representatives in the lower house: Delaware (I, 562); Georgia (II, 778-79); Maryland (III, 1691); New Hampshire (IV, 2452); New Jersey (V, 2595); New York (V, 2629); North Carolina (V, 2790); South Carolina (VI, 3244-45); Virginia (VII, 3815-16). When the Georgia Constitution was rewritten in 1798, the basis for representation was changed to the “numbers of free white persons, and including three fifths of all the people of color”; that is, the basis for representation was essentially that of the Federal Constitution, except that race, rather than freedom was to be used as the principle of inclusion (II, 791).

¹⁵ “Northwest Ordinance,” in *The Founders’ Constitution*, ed. Philip B. Kurland and Ralph Lerner (5 vols., Chicago, 1987), I, 27. Each of the states created out of the territory, however, was to be eligible for admission to Congress once it had “sixty thousand free inhabitants” (Article V, I, 29). Representation, however, was to be based upon the number of free adult males.

¹⁶ Thorpe, ed., *Federal and State Constitutions*, III, 1265, VI, 3414.

When we examine Wilson's wording in the context of the convention's debate about the issue of representation, however, we may begin to understand what he and the other authors of the Constitution had in mind. The question of counting women when apportioning representatives was bound up in a matter the Framers found much more compelling, the issue of how to count slaves. While there was no discussion about including women when apportioning representatives, the Framers vigorously debated whether and how to count slaves; these discussions are quite revealing about what the delegates thought about the question of representation in general and who should be represented in particular. The slavery issue and one other, balancing the competing claims of the small and large states, were the most difficult ones the Convention faced; each threatened to send the delegates home without a plan for a national government. And both of these thorny issues touched upon the overarching question of representation. Any debate about counting slaves or small versus large states soon brought the delegates into discussions not only about very practical considerations, such as which of their states might benefit, but also theoretical views on the nature of representation in a republic. These more abstract discussions yield some clues as to what the delegates had in mind when they simplified James Wilson's original language. In fact, if we follow Wilson himself through the debates in the Convention, his original intention in adding the language about sex becomes much more clear.

Even before he suggested the wording about "age, sex, and condition," Wilson had developed before the delegates his own theory of representation. Early in the proceedings, on June 9, Wilson "entered elaborately" into a defense of proportional representation. Representation should be based upon population; "as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives, and different numbers of people different numbers of representatives."¹⁷ It was only two days later that he introduced his amendment to add the additional words, including the terms "of every age sex and condition," as well as the three-fifths clause. In this context, then, it seems evident that Wilson intended women to be included among the people, from whom "all authority was derived."

¹⁷ Farrand, ed., *Records of the Federal Convention*, I, 179.

In Wilson's mind, at least, women were included in the "We the People" who authorized the Constitution.

At this particular moment in the deliberations, Wilson was engaged in a debate about whether representation in the lower house should be based upon wealth or population. Hence, Massachusetts' Elbridge Gerry immediately objected to Wilson's amendment, addressing the three-fifths clause and asking, "Why then shd. the blacks, who were property in the South, be the rule of representation more than the Cattle & horses of the North."¹⁸ Gerry did not, however, contest Wilson's suggestion that women should be included among the people who were to be represented.

Nor did any of the other delegates who would argue about the proper basis for representation. Pierce Butler of South Carolina would continue to argue that "property was the only just measure of representation. This was the great object of Governnt: the great cause of war, the great means of carrying it on."¹⁹ Although conservative nationalists such as New York's Gouverneur Morris agreed that "property was the main object of Society," he was troubled by the South Carolinians' desire to include slaves as part of the population.²⁰ He thought that the Three Fifths Compromise was "an incoherence. If Negroes were to be viewed as inhabitants . . . they ought to be added in their entire number, and not in the proportion of 3/5." If instead, slaves were being counted as a measure of wealth, then the delegates should acknowledge that representation was being based upon population and property both.²¹

Wilson recognized the contradiction that Morris pointed out. He could not "see on what principle the admission of blacks" for purposes of representation "could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? then why is not other property admitted into the computation?"²² Earlier New Jersey's William Paterson had made the same point even more explicitly. He "could regard negroes as in no light but as property. They are no free

¹⁸ *Ibid.*, 201.

¹⁹ *Ibid.*, 542; see also, *ibid.*, 562.

²⁰ *Ibid.*, 533.

²¹ *Ibid.*, 603-04.

²² *Ibid.*, 587.

agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master.” After neatly distinguishing between slavery and freedom, Paterson went on to lay out his theory of representation. “What is the true principle of Representation?” he asked. “It is an expedient by which an assembly of certain individuals, chosen by the people is substituted in place of the inconvenient meeting of the people themselves. If such a meeting of the people was actually to take place, would the slaves vote? they would not. Why then should they be represented?”²³ Although women could vote only in New Jersey, and children were not admitted to the polls anywhere,²⁴ Paterson made no objection to including them in the basis for representation. In some clear, if unspecified way, women were members of political society in ways that slaves simply were not.

While Wilson recognized the inconsistency of counting slaves, he was willing to compromise on this issue for the sake of the federal union. He would never concede, however, that “property was the sole or the primary object of Government & Society.” To the contrary, “the cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation.”²⁵ Now we can see what Wilson had in mind when he added the words “age sex & condition” to the resolutions the delegates were debating. If the purpose of government and society was not property, but the improvement of the human mind and the protection of other personal rights, then surely women must be included.

Although Wilson’s intent seems clear enough, the delegates never commented upon Wilson’s wording or the place of women in the government that they were creating. We may infer from their silence, however, a general acceptance of Wilson’s reasoning, if not an understanding of its practical application. These delegates were alert to—and spent a long summer debating—the subtlest shifts of meaning;

²³ *Ibid.*, 561.

²⁴ For the case of New Jersey, see Judith Apter Klinghoffer and Lois Elkis, “‘The Petticoat Electors’: Women’s Suffrage in New Jersey, 1776-1807,” *Journal of the Early Republic*, 12 (Summer 1992), 161-93. For children, see Holly Brewer, “Constructing Consent.”

²⁵ Farrand, ed., *Records of the Federal Convention*, I, 605.

surely, then, someone would have noted and objected to Wilson's formulation had it seemed problematic for the purposes at hand. The implications of Wilson's wording on slavery, in contrast, were very much contested, and there the delegates could achieve no common understanding. The Three-Fifths Compromise, as Wilson suggested, was a compromise both on the place of slavery in the new nation and on the proper basis for representation; in a document that everywhere else insisted that persons, not property, were to be represented, the compromise inserted the principle of the representation of wealth. James Madison would later attempt to wrest a logic out of this "incoherence" by arguing in *The Federalist* Number 54 that the Constitution intentionally recognized slaves' "mixt character of persons and property." "This is in fact their true character," Madison asserted. And "if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants."²⁶ By necessary implication, women, who were counted fully, were to be represented fully as well.

In none of these discussions was it argued that slaves, free blacks, women, or children should vote, although in some states free blacks and in one women were exercising the franchise.²⁷ Instead democrats such as Wilson and Madison believed that all free inhabitants were part of the "imagined community" that they called the United States.²⁸ They drew a distinction between being a member of the nation or community, which they called civil society, and voting. Every state in the new nation restricted the suffrage on the basis not only age, sex, race, and freedom, but also wealth as well.²⁹ Not even all adult white men could vote. According to the tenets of republicanism, participation in the republic, and not simply voting, should have been

²⁶ *The Federalist*, ed. Jacob E. Cooke (Middletown, CT, 1961), 368.

²⁷ Of course, the Constitution left the qualifications for suffrage up to the states. For free blacks voting in state elections, see James Oliver Horton, *Free People of Color: Inside the African American Community* (Washington, DC, 1993), 151. For women, see Klinghoffer and Elkis, "'Petticoat Electors.'"

²⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York, 1991); Michael Walzer uses the term "political community" in *Spheres of Justice: A Defense of Pluralism and Equality* (New York, 1983), 28-30.

²⁹ See the useful summary in James Wilson, *Lectures on Law*, in *The Works of James Wilson*, ed. Robert Green McCloskey (2 vols., Cambridge, MA, 1967), I, 408-11.

restricted only to those who held enough property to secure a stake in the community and maintain their independence. Nascent liberals such as Wilson and Madison thought of the nation in much more expansive terms. Every free person who inhabited it was, in fact, a citizen, deserving of its protection and entitled to representation in the halls of government. In this context, women, who explicitly were to be represented but who just as explicitly were not permitted to represent themselves, became the touchstone of the modern, liberal state. By construing women as interested citizens incapable of representing themselves, liberalism provided a justification for the state: protecting those who could not protect themselves.³⁰

James Wilson set out this theory of representation in his *Lectures on Law*. Over the winters of 1790-1791 and 1791-1792, he delivered two sets of lectures at the College of Philadelphia, but he never completed the entire course, nor had he even completed revisions on the entire set of lectures at the time of his death in 1798.³¹ Born in Scotland in 1742, Wilson was not quite fifty years old when he was appointed the first Professor of Law at the College of Philadelphia, yet he had already played a prominent role in the critical political events of the era. Educated at St. Andrews and the University of Edinburgh, he moved to America in 1765, settling in Philadelphia where he studied law with John Dickinson. He became active in the revolutionary movement, serving in a number of important capacities at the state and national level. His "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament" (1774) was one of the models for the Declaration of Independence, and Wilson himself

³⁰ Here again, the distinction between a republican and liberal understanding of citizenship becomes more clear. For republican thinkers, liberty means the right to self-government, and because only those who are independent may participate in government, the scope of republican liberty is restricted. That is, even though republicans distinguished between personal liberty—which included an array of civil rights—and public liberty—the right of a people to govern itself, they thought of freedom fundamentally as the right to participate in government. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, 1969), 18-28; and Alan Craig Houston, *Algernon Sydney and the Republican Heritage in England and America* (Princeton, 1991), 118. Liberals such as Wilson shifted the emphasis or, perhaps more precisely, expanded the compass to include protection of life, liberty, and happiness, for the entire society, not simply those who participated directly in government.

³¹ "Introduction," McCloskey, ed., *Works of Wilson*, I, 28-30.

was one of only six men to sign both the Declaration of Independence and the Constitution. In 1789, George Washington made him one of the original associate justices of the Supreme Court.³²

Even in the incomplete form in which Wilson's *Lectures* were published after his death, they constitute one of the most significant—and least explored—documents in political and social thought from this period of American history. If they lack the focus of *The Federalist*, they make up for it with their sweep. And although coherent political and social theories are embedded in the writings of the great thinkers of the age—Jefferson, Madison, Hamilton, Adams—none of them set out as systematically to articulate a comprehensive theory of society and politics. In their subject matter, the *Lectures* invite comparison with John Locke's *Two Treatises of Government*, and as such, they are a key text in the history of liberal thought in America. Moreover, because Wilson was self-consciously a synthesizer,³³ which is another way of saying that he was not always original, he is an especially useful guide to the assumptions shared by a wide range of political thinkers, particularly those whose thinking ran along liberal lines. Furthermore, because the lectures attempted to discuss systematically the relationship between society and government, they illuminate connections that others left unstated.

All of the dignitaries of the new federal government turned out for Wilson's inaugural lecture as Professor of Law at the College of Philadelphia. Women also were among the audience—not an unusual occurrence for such events, and at one point Wilson addressed them directly. “Methinks I hear one of the female part of my audience exclaim—What is all this to us? We have heard so much of societies, of states, of governments, of laws, and of a law education. Is everything made for your sex? why should not we have a share? Is our sex less honest, or less virtuous, or less wise than yours?” Women were

³² There is no modern biography of Wilson. For brief treatments, see *ibid.*, and “James Wilson (Sept. 14, 1742—Aug. 21, 1798)” *Dictionary of American Biography* (22 vols., New York, 1928-1958), XIX, 326-30.

³³ Stephen A. Conrad, “Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory,” in *Supreme Court Review*, ed. Philip B. Kurland, Gerhard Casper, and Dennis Hutchinson (Chicago, 1985), 359-88, esp. 386-87; Shannon Stimson, “‘A Jury of the Country’: Common Sense Philosophy and the Jurisprudence of James Wilson,” in *Scotland and America in the Age of the Enlightenment*, ed. Richard B. Sher and Jeffrey R. Smitten (Princeton, 1990), 193-208.

not, Wilson averred, any less honest, virtuous, or wise than men. Moreover, although he doubted “whether it would be proper” for women “to undertake the management of publick affairs,” they had an important role to play in society. He told the women in his audience that “you have indeed heard much of publick government and publick law; but these things were not made for themselves: they were made for something better, and of that something better, you form the better part—I mean society—I mean particularly domestick society. . . .”³⁴ Wilson continued with a discussion of the relationship between government and society that recalls Thomas Paine’s famous dictum that “society in every state is a blessing, but government even in its best state is a necessary evil.”³⁵ Wilson noted that

By some politicians, society has been considered as only the scaffolding of government; very improperly, in my judgment. In the just order of things, government is the scaffolding of society: and if society could be built and kept entire without government, the scaffolding might be thrown down, without the least inconvenience or cause of regret.

Government is indeed highly necessary; but it is highly necessary to a fallen state. Had man continued innocent, society, without the aids of government, would have shed its benign influence even over the bowers of Paradise.³⁶

Government was created to serve society, not as an end in itself.

Wilson would return to this point so frequently in his lectures that it is evident that it was not simply a passing thought, intended to placate the women in his audience. Instead, it was one of the central

³⁴ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 85-86. For the presence of women in similar audiences at this time, see Jan Lewis, “Politics and the Ambivalence of the Private Sphere: Women in Early Washington, D.C.,” in *A Republic for the Ages: The United States Capitol and the Political Culture of the Early Republic*, ed. Donald Kennon and Barbara Wolanin (forthcoming).

³⁵ Thomas Paine, *Common Sense*, ed. Isaac Kramnick (London, 1976), 64. Consider also the philosophy of government embedded in Jefferson’s First Inaugural Address, particularly by reading his encomium to “a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement,” in the light of his injunction to his fellow citizens to “restore to social intercourse that harmony and affection without which liberty and life itself are but dreary things.” Thomas Jefferson, *Writings*, ed. Merrill D. Peterson (New York, 1984), 494, 493.

³⁶ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 86-87.

tenets in his political canon.³⁷ “Government,” to put it succinctly, “was instituted for the happiness of society.”³⁸ Like John Locke, Wilson believed that government originated in a social compact. As Wilson explained it, in terms reminiscent of Locke, government was created “by a human establishment, to acquire a new security for the possession or the recovery of those rights, to which we were previously entitled by the immediate gift, or by the unerring law, of our all-wise and all-beneficent Creator.”³⁹

For the past several decades, however, historians have been at pains to discount the influence of Locke in revolutionary thought, placing much more emphasis upon its sources in civic humanism, British Opposition party ideas, and the Scottish Enlightenment. As a consequence, it no longer seems possible to make a statement so simple as Carl Becker’s comment in 1922 that “Jefferson copied Locke.”⁴⁰ Still, the influence of Locke on thinkers such as Wilson is so clear that it requires our continued attention; we must ask how he and those who thought like him integrated Lockean ideas with ones they adopted from the British Opposition and the Scottish Enlightenment. We might begin this task by examining how Wilson understood the Lockean social contract, and what his interpretation of it meant for women.

Before we proceed with this analysis, we should note that feminist political theorists such as Carole Pateman have argued that women were left out of the social contract that created the liberal state. Applying Pateman’s formulation to early America, Linda K. Kerber has recently written that “men and women have been differently situated

³⁷ Near the end of his *Lectures on Law* Wilson quoted from his Introduction that “‘public law and publick government were not made for themselves;’ but that ‘they were made for something better;’ that ‘I meant society;’ that ‘I meant particularly domestick society.’” This was no “encomium,” he insisted, but a principle “founded in sound politicks and genuine philosophy.” *Ibid.*, II, 608. For a different reading, see Smith, “‘One United People,’” 245-47.

³⁸ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 239; see similarly I, 284, 283, II, 585.

³⁹ *Ibid.*, II, 583.

⁴⁰ Carl L. Becker, *The Declaration of Independence: A Study in the History of Ideas* (1922; 3rd ed., New York, 1970), 79. For the influence of civic humanism, see, for example, J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975). For British Country thought, see, for example, Wood, *Creation of the American Republic*. For the Scottish Enlightenment, see, for example, Morton White, *The Philosophy of the American Revolution* (New York, 1978); Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (Garden City, 1978); and Henry F. May, *The Enlightenment in America* (New York, 1976).

in relation to consent theory. . . . Men are imagined as entering the social contract as free agents, but most women enter the social contract already bound by marriage and by antecedent obligations to their husbands.’’ It is undeniable that, as Kerber and others have shown, the Common Law doctrine of coverture, which held that upon marriage a woman’s legal personality was merged into that of her husband, remained the basis for property and domestic relations law after the Revolution.⁴¹ It is equally true, however, as Kerber herself has demonstrated, that while some used coverture as a model for women’s political position as well, others were beginning to imagine that women could be participants in the social compact, acting independently of their husbands or other male protectors.⁴² James Wilson was one of those who found a place for women in the social compact.

One of Wilson’s earliest statements about the nature of political society succinctly outlined the fundamental beliefs that he would develop at greater length in his *Lectures on Law*. ‘‘All men are,’’ Wilson asserted in 1774, recapitulating Locke and anticipating Jefferson,

by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government.⁴³

Some of the terms—freedom, equality, the state of nature, the requirement of consent—are familiar from Locke’s *Second Treatise*.⁴⁴ Other elements, however, betray Wilson’s Scottish upbringing and education and his wide reading among ancient and modern authori-

⁴¹ Carole Pateman, *The Sexual Contract* (Stanford, 1988); Kerber, ‘‘A Constitutional Right to Be Treated Like American Ladies,’’ 17-35 (quotation at 20). For coverture, see Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York* (Ithaca, 1982); and Basch, ‘‘Equity v. Equality: Emerging Concepts of Women’s Political Status in the Age of Jackson,’’ *Journal of the Early Republic*, 3 (Fall 1983), 297-318.

⁴² Kerber, ‘‘The Paradox of Women’s Citizenship in the Early Republic: The Case of *Martin v. Massachusetts*, 1805,’’ *American Historical Review*, 97 (Apr. 1992), 349-78.

⁴³ Wilson, ‘‘Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,’’ in McCloskey, ed., *Works of Wilson*, II, 723.

⁴⁴ John Locke, *Two Treatises of Government*, ed. Peter Laslett (2 vols., Cambridge, Eng., 1960).

ties both; according to the editor of Wilson's published works, he cited almost two hundred different sources. Moreover, as Morton White has demonstrated, Wilson was something of a plagiarist, sometimes copying a line here or there without citing his source. Perhaps even more important, Wilson was self-consciously a synthesizer who tried to reconcile what seemed to be contradictory points of view.⁴⁵

Wilson's accomplishment was to merge a Scottish Enlightenment sociology and a Lockean politics; accordingly the happiness of society, a concept that is undeveloped in Locke, becomes the object of government. Although Locke seems to have posited a sphere of civil society, standing between the private realm of family and work and the public domain of government, he did not describe it in any detail or fit it into his social or political theory. In fact, in some places he made it appear as if civil society and government were one and the same.⁴⁶ A century later, when civic culture itself was a much more visible feature of public life and such philosophers of the Scottish Enlightenment as Francis Hutcheson and Thomas Reid had helped shift the focus from the individual to society,⁴⁷ James Wilson could write with much more specificity about both civil society and women's role in it.

Men and women were, by nature, social beings. "We are fitted and intended for society, and . . . society is fitted and intended for us," Wilson asserted in his *Lectures on Law*.

We have all the emotions, which are necessary in order that society may be formed and maintained: we have tenderness for the fair sex: we have affection for our children, for our parents, and for our

⁴⁵ Wilson, "Bibliographical Glossary," in McCloskey, ed., *Works of Wilson*, II, 849-56; White, *Philosophy of the Revolution*, 133; Conrad, "Polite Foundation," esp. 386; Stimson, "'A Jury of the Country.'" As Jay Fliegelman has recently noted, plagiarism was almost an accepted intellectual practice in this period. See *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford, 1993), 164-89.

⁴⁶ Locke observed, "The only way whereby any one divests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their Properties. . . . When any number of Men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick. . . ." Locke, *Two Treatises of Government*, II, 124.

⁴⁷ On the influence of the Scottish Enlightenment, see White, *Philosophy of the American Revolution*; Wills, *Inventing America*; Conrad, "Citizenship and Common Sense"; and David Daiches, "John Witherspoon, James Wilson and the Influence of Scottish Rhetoric on America," *Eighteenth-Century Life*, 15 (Feb. 1991), 163-80.

other relations: we have attachment to our friends: we have a regard for reputation and esteem: we possess gratitude and compassion: we enjoy happiness and pleasure in others, especially when we have been instrumental in procuring it: we entertain for our country an animated and vigorous zeal: we feel delight in the agreeable conception of the improvement and happiness of mankind.

Sociability, then, was nurtured in the family, and the bonds of affection that were created there stretched ever outward, from the family, to friends, the community, the nation, and even to humankind itself.⁴⁸

It was for this reason that Wilson would say again and again that government was “instituted for the happiness of society.” Although women could play no part in the masculine realm of government without jeopardizing their femininity,⁴⁹ they certainly had an impor-

⁴⁸ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 233; see also I, 241-42. So important was this point to Wilson that he would repeat it verbatim in his lecture on “Natural Rights,” II, 587. See also Thomas Jefferson to Thomas Law, June 13, 1824, in Peterson, ed., *Writings*, 1335-39. Consider as well James Madison’s *Federalist* Number 14, in Cooke, ed., *The Federalist*, 88.

⁴⁹ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 85-88. As Rosemarie Zagari has pointed out, Wilson followed the lead of Scottish thinkers in advocating social equality for women while insisting upon political inequality. See her “Morals, Manners, and the Republican Mother,” *American Quarterly*, 44 (June 1992), 207. Wilson’s thinking about women, like that of many of his contemporaries, was contradictory. He argued that women could not enter politics both because of their status, as unpropertied dependents, and their nature, which he called “female virtue.” Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 411, 86-88. Paul A. Rahe has suggested that Wilson’s paean to female virtue was “inspired by Jean-Jacques Rousseau’s celebration of domesticity as a bulwark against the psychologically debilitating effects of the corrosive individualism at the core of modern life,” but there is little evidence that Wilson was particularly concerned by modern individualism or that he shared Rousseau’s notorious misogyny. See Paul A. Rahe, *Republics Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill, 1992), 564-65. It may be useful to note that the tendency to assign political roles on the basis of status is characteristic of republican approaches to government, while assigning them on the basis of “nature” is more typical of liberal thought. At the same time it should be remembered that each approach to government offered means both for including and excluding. Because republicanism excluded the poor, the propertyless, and the dependent, it left open the possibility that single, propertied women might vote, which is precisely what happened in New Jersey between 1776 and 1807. See Klinghoffer and Elkis, “Petticoat Electors.” As republican approaches to government were replaced by liberal ones, women would be excluded on the basis of their (supposed) nature, including their special virtue. Yet if post-revolutionary liberalism restricted women from the suffrage and office-holding, it also, as will be suggested, opened up a space for them as members of civil society.

tant role to play in constituting society. Indeed, marriage was the pattern for all other social relationships and for patriotism itself. Yet while that other influential Scottish émigré John Witherspoon could use this logic to assert the “absolute necessity of marriage for the state,”⁵⁰ Wilson would turn that logic around and insist that government was created for society and for domestic society in particular. Because the purpose of government was to protect and even improve “social life,” although women could not participate in the running of government, they had “a most intimate connexion with the effects, of a good system of law and government.”⁵¹ Women in this sense were the very object of government, and that was precisely why they had to be represented by the new government created by the Constitution.

From our present perspective, perhaps what we confront here is the question of whether the glass of political thought is half empty or half full. It is undeniable that Wilson’s philosophy of government justified the exclusion of women from the vote and from office holding, and that basing this exclusion upon women’s feminine nature would ultimately make it difficult for women to enter these political spheres.⁵² Yet at the same time, Wilson’s liberalism made a place for women not simply in the family, but in the large and important sphere of civil society—what Jürgen Habermas has called the “bourgeois public sphere.”⁵³ In fact, although Habermas based his theoretical discussion of society upon European nations, it bears an uncanny resemblance to Wilson’s description of the ideal society that he hoped would be sustained by a republican form of government. After expatiating upon the nobility of the individual voter, Wilson reflected, however, that “I am far from insinuating that every citizen should be an enthusiast in politicks, or that the interests of himself, his family, and those who depend on him for their comfortable situation in life,

⁵⁰ “Reflections on Marriage,” *Pennsylvania Magazine* (Philadelphia), Sept. 1775, 408, later published as “Letters on Marriage,” in *The Works of the Rev. John Witherspoon*, (2d. ed., 4 vols., Philadelphia, 1802), IV, 161-83. See also Jan Lewis, “The Republican Wife: Virtue and Seduction in the Early Republic,” *William and Mary Quarterly*, 44 (Oct. 1987), 689, 709.

⁵¹ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 88.

⁵² See Rowland Berthoff, “Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820-1870,” *Journal of American History*, 76 (Dec. 1989), 753-808. Berthoff, however, overemphasizes the persistence of classical republican themes in mid-nineteenth-century justifications for the exclusion of women from politics.

⁵³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, MA, 1991).

should be absorbed in Quixote speculations about the management or the reformation of the state.” As he would frequently note, government was not, after all, the object of society. “There is a golden mean in things and there can be no incompatibility between the discharge of one’s [*sic*] publick and private duty. Let private industry receive the warmest encouragement; for it is the basis of publick happiness.” Government, then, was both good and necessary, and so was private enterprise, but neither attracted Wilson’s full attention. Instead, Wilson recommended “a little relaxation. . . . It may consist in reading a newspaper, or in conversing with a fellow citizen. May not the newspaper convey some interesting intelligence, or contain some useful essay? . . . May not the conversation take a pleasing and an improving turn?”⁵⁴ This, then, was the very stuff of life: the reading of newspapers and conversation among friends. Wilson was describing the bourgeois public sphere, and, at a time when literacy rates for women were increasing,⁵⁵ it was a realm that included women.

The public sphere or civil society,⁵⁶ as Wilson described it and Habermas more recently has explained it, is the realm of society that was created when ordinary people emerged from their homes to engage in conversation. Habermas defines it as “the sphere of private people com[ing] together as a public,”⁵⁷ and although these are not the precise words that Wilson used, they convey his understanding too of the relationship between domestic and civil society.⁵⁸ As Habermas recognized and several historians have noted more recently,

⁵⁴ Wilson, “Speech on Choosing the Members of the Senate by Electors,” in McCloskey, ed., *Works of Wilson*, II, 787-88. Wilson liked these ideas so much that he repeated them in his *Lectures on Law*. Stephen A. Conrad notes that this passage “captures the essence of Wilson’s polite theory of republicanism” in which “the essential opportunities for a true republicanism in America can be realized only in the fundamental sphere of the social life of the People ‘out of doors.’” Conrad, “Polite Foundation,” 384.

⁵⁵ Kenneth A. Lockridge, *Literacy in Colonial New England: An Enquiry Into the Social Context of Literacy in the Early Modern West* (New York, 1974).

⁵⁶ As Stephen A. Conrad has pointed out, Wilson used the terms “civil society,” “People,” and “state” interchangeably. See Conrad, “James Wilson’s ‘Assimilation of the Common Law Mind,’” *Northwestern University Law Review*, 84 (Fall 1989), 218-19.

⁵⁷ Habermas, *Structural Transformation of the Public Sphere*, 27.

⁵⁸ See Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 238-40. Habermas uses the term “civil society” to encompass the “realm of commodity exchange and social labor”; Wilson uses the term “private industry” instead.

women participated in the public sphere.⁵⁹ Much like Wilson, Habermas has suggested that the notion of humanity that was cherished by the rising bourgeoisie of the eighteenth century was born and nourished in the family, which served as a model for all other relationships in society. The family, he wrote, “seemed to be established voluntarily and by free individuals and to be maintained without coercion; it seemed to rest on the lasting community of love on the part of the two spouses; it seemed to permit that non-instrumental development of all faculties that marks [sic] the cultivated personality.” The family, then, contributed to society precisely the ingredients that defined humanity itself: “voluntariness, community of love, and cultivation.”⁶⁰

Little wonder, then, that Wilson would insist that government was created to protect society and domestic society in particular, for it was the source of all that was most valuable in life. Moreover, when any government subverted that end, or even when it failed to protect society, then the people might abolish, alter, or amend their government “at whatever time, and in whatever manner, they shall deem expedient.”⁶¹ Here Wilson synthesized Locke and the Radical Whigs into his Scottish Common Sense philosophy. Although government may be necessary to protect society and provide for its security, it is government as well that presents the greatest threat to happiness. Here, once again, Wilson’s political thought anticipated that of Habermas, who argues that the bourgeois public sphere defined itself historically in opposition to the authoritarian early modern state. Indeed, political consciousness developed as people began to insist, “in opposition to [the] absolute sovereignty” of a monarch, that the only

⁵⁹ See in particular Dena Goodman, “Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime,” *History and Theory*, 31 (1992), 1-20; Keith Michael Baker, “Defining the Public Sphere in Eighteenth-Century France: Variations on a Theme by Habermas,” *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA, 1992), 198-207. Both Goodman and Baker critique Joan Landes’s use of Habermas to explain women’s supposed exclusion from the public sphere. See Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithaca, 1988), in particular her claim that “the exclusion of women from the bourgeois public was not incidental, but central to its incarnation. . . .” *Ibid.*, 7. See as well Dena Goodman, *The Republic of Letters: A Cultural History of the French Enlightenment* (Ithaca, 1994), esp. 3-11. For evidence of women in the postrevolutionary American public and an explanation of why they were there, see Lewis, “Politics and the Ambivalence of the Private Sphere”; and Elizabeth Regine Varon, “‘We Mean to be Counted’: White Women and Politics in Antebellum Virginia,” (Ph.D. diss., Yale University, 1993).

⁶⁰ Habermas, *Structural Transformation of the Public Sphere*, 46-47.

⁶¹ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 77.

basis for law was the human values, what Habermas calls “general and abstract laws,”⁶² that they had learned within the family.

It is for this reason that thinkers such as Wilson did not worry as much about the conflicts between individuals as those between society and the state. In part, they reflected the continuing republican obsession with the threat of governmental tyranny and a difficulty in thinking about the “people” in anything other than corporate terms. In this context, a “right” was a corporate liberty, secured from the state.⁶³ Yet Wilson’s thinking incorporated liberal influences as well, in particular Locke filtered through a Scottish lens. As a consequence, his vision of society and of the rights that might be enjoyed in it was much richer than that of republican thinkers or even Locke. The primary focus always was upon society, for it was only there that individuals could become fully human.⁶⁴

Just as Wilson’s larger political and social philosophy synthesized republican and liberal themes, so also did his views on women. Although in other instances Wilson rejected the English jurist Blackstone as an authority,⁶⁵ he cribbed Blackstone’s description of the common law principle of coverture: “The most important consequence of marriage is, that the husband and the wife become, in law, only one person: the legal existence of the wife is consolidated into that of the husband.”⁶⁶ Yet if the common law doctrine of coverture reflected and perpetuated the dependent social relations of feudal society and helped assure the preservation of property in the male line of descent,⁶⁷ Wilson gave that doctrine a sentimental gloss. He rhapsodized it as “sublime and refined.” For Wilson, coverture was not so much a legal fiction or even a mechanism for the transmission of property. Rather, it was the ideal of marriage itself. “By that institution the felicity of Paradise was consummated; and since the unhappy expulsion from thence, to that institution, more than to any other, have mankind been indebted for the share of peace and harmony

⁶² Habermas, *Structural Transformation of the Public Sphere*, 54.

⁶³ See, in particular, Wood, *Creation of the American Republic*, Part 1.

⁶⁴ See for example, Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, I, 227: “Society is the powerful magnet, which, by its unceasing though silent operation, attracts and influences our dispositions, our desires, our passions, and our enjoyments.”

⁶⁵ See for example, *ibid.*, 77-79. See also Conrad, “Wilson’s ‘Assimilation,’” 197-215.

⁶⁶ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, II, 601.

⁶⁷ Basch, *In the Eyes of the Law*, 45-54.

which has been distributed among them.”⁶⁸ In other words, if peace and harmony were to be found anywhere, it was in marriage. Hence, the doctrine of marital unity—that two persons would function as one—became the cornerstone of society. Like a number of democrats at the time,⁶⁹ Wilson was willing to countenance divorce for marriages that had failed. As he put it, “When . . . the impression of happiness must be obliterated from every succeeding part of the conjugal history, why should any more blackened pages be added to the volume?”⁷⁰ Wilson’s principal concern was not the orderly transmission of property but the happiness of society.

Indeed by recognizing divorce as the remedy for marriages gone wrong, Wilson was protecting the institution from what he considered more dangerous interventions. Marriage was a civil contract, and like other civil contracts, it could be dissolved under certain circumstances.⁷¹ But this was the only option available. An aggrieved party could not summon the government to her support, nor could the community routinely call a husband or wife to account.⁷² Wilson made the doctrine of marital unity a bulwark to protect the family from the state. In so doing, he transformed a wholly patriarchal vision of the family, in which a father ruled as a king over the dependents in his household, into a liberal one, in which the privacy of the sentimental family must be protected from the interventions of the state. “The rights, the enjoyments, the obligations, and the infelicities of the matrimonial state” all were “removed” from the “protection or redress” of the state. Instead, the state must stand aside, adopting the stance of “a candid and benevolent neighbour,” who

⁶⁸ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, II, 598.

⁶⁹ Norma Basch, “From the Bonds of Empire to the Bonds of Matrimony: The Emerging Right of Divorce in the Context of Independence,” in *Devising Liberty: Creating the Conditions of Freedom in the New American Republic*, ed. David T. Konig (forthcoming).

⁷⁰ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, II, 603.

⁷¹ Contrast his view to that of Blackstone who, as Norma Basch has explained, dispelled “the notion that marriage is a contract like any other; marriage once contracted is a status.” Basch, *In the Eyes of the Law*, 48.

⁷² Community intervention had been routine in the Puritan colonies of New England. See, for example, John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York, 1970), 82-106; and Nancy F. Cott, “Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records,” *Journal of Social History*, 10 (Fall 1976), 20-43. For changing standards, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, 1985), 17-21.

must “presume, for she wishes, all to be well.”⁷³ The social order, then, rested upon a sort of wish-fulfillment: families that were presumed to be happy.⁷⁴

Yet if Wilson’s social and political theory held out little hope for women who were suffering at the hands of their families, it implicitly promised them the full array of civil liberties. To be sure, the doctrine of women’s civil rights would come into conflict with the older doctrine of coverture and, as Linda Kerber has suggested, when it did, the more restrictive interpretation of women’s citizenship might prevail.⁷⁵ The men who created the new national and state governments after the Revolution barely discussed the question of female citizenship. Hence, even when, as in the case of James Wilson, they seemed to expand the sphere of women’s civil liberties, the Framers offered very little guidance about how those rights should be defined or enforced.

Nonetheless, during the first three-quarters of the nineteenth century, the constitutional foundation for women’s citizenship—that is, women’s entitlement to civil, but not political rights—was made increasingly secure. Although these conclusions must be offered cau-

⁷³ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson*, II, 603-04. Note also Morton J. Horwitz’s observation that “nineteenth-century political, social, and economic thought . . . sought to establish a separate, ‘natural’ realm of non-coercive and non-political transactions free from the dangers of state interference and redistribution.” Horwitz, *The Transformation of American Law, 1870-1960* (1977; 2d ed., New York, 1992), 11.

⁷⁴ I have explored the roots in republican thought of this assumption that marriages must be free of conflict in “The Republican Wife,” 689-721. If liberals would be more willing than republicans to confront the reality of conflict in the economy and society—Madison’s *Federalist* Number 10 is the key text here—they continued to assume that families were intrinsically free from conflict.

⁷⁵ Kerber, “The Paradox of Women’s Citizenship,” 349-378 (quotation at 371). As Kerber has demonstrated in her illuminating analysis of *Martin v. Massachusetts*, when the doctrine of coverture came into conflict with the liberal faith in an individual’s ability to make her own choices, judges had no clear guide. They might, as did the Supreme Judicial Court of Massachusetts in 1805, decide that the principle of coverture took precedence, and that a woman married to a Loyalist had effectively no choice but to abandon her country and her property and accompany her husband when he left Massachusetts for England. But before they made that ruling they had to consider Attorney General James Sullivan’s argument that a married woman could be “an inhabitant in every sense of the word. Who are the members of the body-politic? are not all the *citizens*, members; infants, idiots, insane, or whatever may be their *relative* situations in society?” Like James Wilson, Sullivan was a liberal, who believed that women were members of the original social compact that established government.

tiously, as there is much research to be done on this topic, women's membership in civil society would be defined in relationship to that of free blacks. Just as the issues of race and gender had been joined in James Wilson's language on representation offered to the Constitutional Convention, so too would they be linked in subsequent discussions in the nineteenth century. In fact, the understanding of women's civil rights emerged most clearly in discussions about attempts to limit the civil rights of free blacks. These discussions suggest that women were considered as members of civil society, entitled to representation and the rights of citizens, even if they could not themselves participate in government.⁷⁶

This understanding emerged as state courts began to define the rights of free blacks. For those states that wished to restrict them from voting, women served a useful purpose as an example of another class of adult citizens who could not vote. In 1838, for example, the North Carolina Supreme Court observed, "Surely the possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens."⁷⁷ Yet at the same time, women could be used to illustrate the sorts of civil rights that had to be extended to all citizens, whether they voted or not. A provision in the proposed Missouri constitution, which would have prevented free blacks and mulattoes from entering the state, kindled a heated controversy when Congress debated Missouri's admission into the Union in 1820. Opponents argued that since free blacks were neither aliens nor slaves, they surely were enti-

⁷⁶ This conclusion must be advanced cautiously, as most of these statements about women's civil rights were, like Wilson's, abstract and categorical, and were advanced to explain why free blacks should or should not have certain rights, not why women should or should not enjoy them. Moreover, although the passing of Married Women's Property Acts in various states, beginning with New York in 1848, would begin to chip away at the doctrine of coverture, the legal fiction of marital unity continues even today to cast a shadow over women; consider only the reluctance of the police to intervene in so-called "domestic disputes." Nonetheless, the fundamental civil rights of liberalism—freedom of assembly, freedom of religion, freedom of speech, freedom from the oppressions of the state, and perhaps the most fundamental right of all, to own oneself—are far from trivial, and the extension of them to women, even in the abstract, is of considerable significance. For the persistence of coverture, see Kerber, "Obligations of Citizenship," 34, 355n. For the concept of self-ownership, see Locke, *Two Treatises of Government*, II, 27.

⁷⁷ *State v. Manuel*, 4 *Devereaux & Battle*, 25-26 (NC, 1838), quoted in James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, 1978), 317. Significantly, the case was about whether free blacks were citizens; the court concluded that they were.

tled to the privileges of citizens, including the right to move from one state to another. Once again, women served as a point of reference for those who, while not holding political rights, nevertheless enjoyed the protections of citizens.⁷⁸ And in this case, the right under discussion was fundamental to liberalism, the right of a citizen to move freely within the nation.

Women, then, came to play a critical role in the way that democratic liberalism defined itself in practice. They became the referent for citizens who were not members of political society, that is, who could not vote or hold office. In this way, they helped legitimate not so much their own inequality as that of free blacks. In fact, when New Jersey women lost the vote in 1808, so did free blacks.⁷⁹ In other words, although the category of female citizenship—as members of civil but not political society—was contested,⁸⁰ it was more stable than that of free blacks, and hence could be used in attempts to stabilize the status of free blacks.

Such efforts to stabilize the position of free blacks could not entirely succeed, however, because they rested upon the assumption that all members of society were members of that imagined community known as the nation. Although white men could accept the general principle that women were part of the nation, the notion that blacks were to be included too was considerably more problematic.

⁷⁸ Kettner, *Development of American Citizenship*, 312-14.

⁷⁹ Klinghoffer and Elkis, "'Petticoat Electors,'" 74. Before 1820 free blacks also lost the right to vote in Connecticut and Pennsylvania, while in New York they had to meet a property requirement no longer demanded of whites. See Horton, *Free People of Color*, 151.

⁸⁰ See for example, Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (Ithaca, 1978); and Berthoff, "Conventional Mentality." Although Berthoff suggests that state constitutional debates between 1820 and 1870 reveal the persistence of republican notions of the political incapacity of both women and blacks, it is possible to interpret his material in another way. In a more republican political culture, the exclusion of women and blacks from the polity would not have occasioned much debate; after all, women were barely mentioned in the constitutional debates of the revolutionary period, and it was slavery, not the status of free blacks, that attracted most attention. That there was debate at all suggests the problematic nature of female and black citizenship, leading some to argue for a fuller inclusion for both, and others to justify the status quo or even, in the case of free blacks, to argue for the rescission of those civil rights they already enjoyed. For another argument that American doctrines of female citizenship incorporated a republican assumption of female dependency, see Joan R. Gundersen, "Independence, Citizenship, and the American Revolution," *Signs*, 13 (Autumn 1987), 59-77.

Here it was not so much the specific implications of that assumption that proved difficult for whites to accept as the fundamental principle itself. The first federal naturalization act of 1790, while liberal in other regards, offered citizenship to “free white” persons only. When white Americans drew the boundaries between themselves and other nations, their first impulse was to keep dark-skinned people out.⁸¹

Although Wilson’s social theory was not intrinsically racist—and he himself was an opponent of slavery—it was ill-equipped to deal with the increasing racism of the new nation.⁸² Because Wilson’s version of liberalism rested upon the family, it could easily integrate women into its social vision; indeed, they were necessary to it. The same was not true for free blacks. Political pronouncements such as, “We see those persons possess the greatest share of happiness, who have about them many objects of love and endearment,” had a certain amount of resonance in a society that was beginning to pay homage to the affectionate family.⁸³ It was not at all clear, however, that free blacks could as easily be integrated into a political society premised upon the affectionate family and the emotions of love and endearment.

Because of their social unacceptability to whites, free blacks presented a challenge to the liberal notion of social citizenship, that is, the sort of citizenship enjoyed by women. As a number of historians have shown, increasingly public life in the North as well as the South was being segregated. In the North, some public spaces, such as restaurants and hotels, were closed to blacks entirely, while others, such as theaters, churches, and various modes of transportation offered them only segregated spaces. In many places schools, also, were segregated. In the South, all of these places and more were off limits for

⁸¹ Kettner, *Development of American Citizenship*, 236. See also Walzer, *Spheres of Justice*. In this context, the termination of the slave trade may be considered not only an attack upon slavery but as an attempt to prevent the entry of any more Africans into the nation. See James Oakes, “The Rhetoric of Reaction: Justifying a Proslavery Constitution,” unpublished paper presented at Symposium of Bondage, Freedom, and the Constitution, Benjamin N. Cardozo School of Law/Yeshiva University, February 20, 1995.

⁸² For the growth of racism in this period, see Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill, 1968), 429-569.

⁸³ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of Wilson I*, 237. See Lewis, “Republican Wife”; and Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution Against Patriarchal Authority, 1750-1800* (New York, 1982).

free blacks.⁸⁴ Indeed, much of the public sphere—that is, civil society itself—was closed to free blacks. In this context, blacks' civil rights became problematic.

Again and again in the antebellum period, as James H. Kettner has shown, courts in the North and South both would confront the dilemma presented by black citizenship. In general, northern courts would accept the doctrine of free black citizenship, although on occasion begrudgingly. Southern courts until about the second third of the century often were prepared to acknowledge free black citizenship as well, but as the slave system became more entrenched and challenges to it from outside mounted, southern jurists shifted their approach. Increasingly they looked for a new way to define free blacks—as more than slaves, but less than citizens. A South Carolina court dubbed free blacks “subjects” instead of “citizens.” A Kentucky judge termed them “quasi citizens, or at least denizens.” One in Georgia called them “our wards,” while Mississippi offered the term “*alien strangers*,” and Louisiana suggested “strangers to our Constitution.” Other states settled upon “degraded race” or “third class.”⁸⁵ Understanding full well what citizenship meant, even in the absence of full political rights, Southern courts flailed about looking for a category that was different—and less—than that occupied by women.

The worst blow to free blacks came, of course, with the *Dred Scott* decision in 1857. Ruling for the majority, Chief Justice Roger B. Taney argued that blacks, whether slave or free, could not be citizens of the United States.⁸⁶ A little over two decades and more than half a million lives later, that decision would be reversed, with the Four-

⁸⁴ Ronald T. Takaki, *Iron Cages: Race and Culture in Nineteenth Century America* (New York, 1979); Leon Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961); Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York, 1974), 321-27.

⁸⁵ This paragraph is drawn from Kettner, *Development of American Citizenship*, 287-324 (quotations at 319-20).

⁸⁶ Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York, 1978), 335-64. After asserting that at the time the nation was created, blacks “had no rights which the white man was bound to respect,” Taney went on to list some of those rights that the recognition of black citizenship would necessarily confer. It is a veritable catalogue of the civil rights upon which participation in the public sphere depends: “. . . the right to enter every other State whenever they pleased . . . to go where they pleased at every hour of the day or night without molestation . . . the full liberty of speech in public and in private upon all subjects upon which . . . citizens might speak; to hold public meetings upon political affairs. . . .” *Ibid.*, 347, 355.

teenth Amendment; two years later, free black males were given the right to vote. Then, in another two years, in 1872, Virginia Minor would sue the clerk in her home town in Missouri who refused to register her to vote. Her case made it to the Supreme Court that, in denying her the right to vote, confirmed what had become the prevailing wisdom: "There is no doubt that women may be citizens. . . . There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of the general welfare. Each one of the persons associated becomes a member of the nation formed by the association." Here, finally, was the explicit application of consent theory to women—but for the purpose of denying them the right to vote. The only real question, the Court insisted, was "whether all citizens are voters."⁸⁷ The answer, the Court held, was no.

Less than a century after the ratification of the Constitution, then, the vision of the public sphere that it had embodied had faded badly. While it is certainly true, as a number of historians have pointed out, that over the course of this period, the meaning of political participation changed, so also did the context in which it was exercised. As the act of voting became increasingly important—and ever more widely shared⁸⁸—women's exclusion from that privilege of citizenship became all the more glaring. At the same time, free blacks, whose ranks were expanded ten-fold by the termination of slavery of slavery in the South at the end of the Civil War, were increasingly segregated from those places that constituted the public realm,⁸⁹ and

⁸⁷ *Minor v. Happersett*, 88 US 165-66, 170 (1875). For an analysis of this case, see Norma Basch, "Reconstructing Female Citizenship: *Minor v. Happersett*, in *The Constitution, Law, and American Life: Critical Aspects of the Nineteenth-Century Experience*, ed. Donald G. Nieman (Athens, 1992), 52-66.

⁸⁸ Michael E. McGerr, *The Decline of Popular Politics: The American North, 1865-1928* (New York, 1986), 5, 40-41; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, MA 1977), chap. 7.

⁸⁹ A number of students of Habermas have questioned whether the bourgeois public sphere that he posited could ever have or did include persons other than bourgeois white males. Michael Warner, for example, has argued that the limitations of literacy, which made it disproportionately a privilege of propertied white males, effectively excluded women, racial minorities, and poor white men from the public sphere created by print in the eighteenth century. See Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, MA 1990), 15-16, 48-49. More recently he has argued that the exclusion from the public sphere of those who were not white males was not simply contingent, for the way in which the public sphere represented the individual presumed a white male body. See

that sphere consequently took up less and less space. James Wilson's suggestion that persons "of every age sex & condition" should be counted was never, of course, an accurate description of social practices in the new nation. But it was also more than a Constitutional mechanism for apportioning representatives in the national government. It was also a close enough rendering of the public sphere that had emerged in American society in the eighteenth century to make it the sketch from which a more inclusive social and political vision might be imagined. Departing as it did from traditional formulas for representation, James Wilson's words made a radical and hopeful statement about what the new nation might be.

That vision of a broadly inclusive society and a government that worked always on its behalf was not realized then, nor has it been since. From the outset, female citizenship had been defined in relationship not so much to white male citizenship, but to that of blacks, both slave and free. Originally, women were the paradigmatic citizens of liberalism; that is, they constituted society, enjoyed its rights, and demanded its protection. Increasingly however, women came to stand for those who were members of society but who did not enjoy full political rights and could not represent themselves. At the same time, free blacks would come to stand for those who enjoyed, nominally at least, complete political rights, but who were excluded from full membership in society. In this manner, the gap between politics and society, which had narrowed considerably in the Revolutionary period as liberal theories of government and society were brought to bear, was forced wider.⁹⁰ As gender has been used to construct the political and social practices of race, and race to construct the practices of gender, the fleeting vision of a wide public sphere open to persons of every age, sex, race, and condition has faded, leaving barely a trace.

"The Mass Public and the Mass Subject," in Calhoun, ed., *Habermas and the Public Sphere*, 382-83. The presence of women in the public sphere, however, renders Warner's formulation somewhat problematic. See note 59 supra.

⁹⁰ For a different approach to this problem—the growing gap between society and politics—see Wood, *Creation of the American Republic*, 562.