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Feminist Fundamentalism as an Individual and Constitutional Commitment

Mary Anne Case

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FEMINIST FUNDAMENTALISM AS AN INDIVIDUAL AND CONSTITUTIONAL COMMITMENT

MARY ANNE CASE*

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* Arnold I. Shure Professor of Law, University of Chicago Law School. This paper is part of the author's broader project on Feminist Fundamentalism, which also includes a version published under the title of *Feminist Fundamentalism and Constitutional Citizenship*, in *DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 107 (Joanna Grossman & Linda McClain eds., 2009), as well as chapters on *Feminist Fundamentalism on the Frontier between Government and Family, Responsibility for Children*, in *WHAT IS RIGHT FOR CHILDREN?* (Martha Fineman ed., 2009) and the Utah Law Review 2009 Symposium Issue on Frontiers of Family Law, *Feminist Fundamentalism and the Baby Markets*, in *BABY MARKETS: MONEY, MORALS AND THE NEOPOLITICS OF CHOICE* (Michele Goodwin ed., 2010), *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in *CONSTITUTING EQUALITY* (Susan Williams ed., 2009). Portions of this paper, and of the broader project, were presented at conferences on Children in the Discourses of Religion and International Human Rights and All in the Family: Islam and Women's Rights at the Emory School of Law, Working From the World Up: Equality's Future at the University of Wisconsin, Women's Equal Citizenship at Hofstra Law School, The Road to Equality: Are We There Yet? at the Thomas M. Cooley Law School, State, Governance and Citizenship Relations at Keele University and Constitutionalizing Women's Equality at the University of California, Berkeley; at Law and Society 2008 and LatCrit 2007; as part of the series Chicago's Best Ideas and Global Feminisms at the University of Chicago; and at Faculty Colloquia at the University of Alabama Law School, Georgetown Law School, the University of Iowa Law School, Rutgers Camden Law School, Seton Hall Law School, the University of North Carolina Law School, the University of Chicago and the Princeton University Program in Law and Public Affairs. I am grateful to organizers and participants in those events, particularly Amy Baehr, Ava Baron, Maxine Eichner, Martha Ertman, Martha Fineman, Jose Gabilondo, Joanna Grossman, Sally Goldfarb, Michele Goodwin, Dirk Hartog, Beth Hillman, David Hollander, Pnina Lahav, Jamie Mayerfeld, Linda McClain, Larry Rosen, Kim Lane Scheppelle, Mike Seidman, Gerald Wetlauffer, Wibren van der Burg, and Viviana Zelizer; as well as to Emily Buss, Gily Coene, Peggy Cooper Davis, Jim Dwyer, Chris Eisgruber, Robby George, Nan Keohane, Cass Sunstein, Marjolein van den Brink, and Walter Wadlington for their brainstorming help; to Jake Glazeski, Lyonette Louis-Jacques, Deborah Megdal and Margaret Schilt for their reference assistance; and to the Arnold and Frieda Shure Fund and Princeton University's Crane Fellowship in Law and Public Affairs for support.

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At a time when so many different religious fundamentalisms are coming to the foreground and demanding legal recognition, I want to vindicate something I have come to call feminist fundamentalism, by which I mean an uncompromising 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. As I shall argue, both individuals and nation states can have feminist fundamentalist commitments.

I. FUNDAMENTALISM AND PERFECTIONISM DEFINED

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.”¹ 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, much like a believer who, even when the alternative is martyrdom, would refuse to deny the faith and sacrifice to what s/he believes are false idols; or, less dramatically, like a believer who would rather go hungry than eat forbidden food. A few examples may make this clear: 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.”² Nothing would induce me to submit, graciously or otherwise, to the leadership of my husband, and to avoid doing so I 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.³ My refusal to veil has consequences for, among other things, my freedom of movement. One

1. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (holding unconstitutional the exclusion of male students from a state sponsored nursing school).

2. See REPORT OF COMMITTEE ON BAPTIST FAITH AND MESSAGE (June 9, 1998) <http://www.utm.edu/martinarea/fbc/bfm/1963-1998/report1998.html> (amending the Baptist Faith and Message so as to make clear that among the “generally held beliefs of Southern Baptists concerning family” was the concept that “[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”).

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

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. For example, I cannot so much as enter Iran, because I will not veil.

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. Moreover, many committed feminists, like many devout religious believers, would neither 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. 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. 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.

For me, the hallmark of fundamentalism is an unwillingness to compromise and that of perfectionism is a willingness to impose on others. Another way of formulating the distinction is that perfectionism speaks in the second or third person—it is about what “you” or “they” should or must do, not just about what “I” or “We” (as in “We, the people of the United States”) must do. It is possible, I think, to be both fundamentalist and perfectionist, neither perfectionist nor fundamentalist, fundamentalist without being perfectionist, or perfectionist but not fundamentalist. With respect to any commitment or set of commitments, 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. Consider, for example, a vegan invited to a meal at which the host serves paella, a rice dish made with meat and shellfish. The host’s proposed solution is that the vegan guest can just scoop out the pieces of meat and shellfish from the dish. A fundamentalist vegan is someone for whom just scooping them out is not an acceptable option. Some fundamentalist vegans are perfectly comfortable sitting down to a meal at which others are eating meat, so long as their own portion is completely untainted. But one who is also a perfectionist might insist that only vegan food be served to

everyone at the table. And one with perfectionist, but not fundamentalist, tendencies might consider it an acceptable compromise if everyone's portion of rice were flavored with shellfish stock, but no other meat or fish were included in the meal.

Illustrations of the distinction I am drawing between perfectionism and fundamentalism can be found in ongoing debates concerning, for example, civil marriage, veiling and sex segregation, abortion, and the teaching of values in public schools. Note that, perhaps not so coincidentally, in each of these examples, there are not only feminist perfectionist and feminist fundamentalist positions, but also religious perfectionist and religious fundamentalist positions.⁴ 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. It is worth asking more generally what possibilities for non-religious fundamentalist positions other than feminist ones there are. I am fairly confident that the framework I am setting out here can fruitfully be applied to pacifism and to animal rights and that there is a fruitful connection to what is more often called "freedom of conscience."

In much the same way as the various feminist positions I describe are not necessarily anti-religious or even non-religious (in the sense that these positions can also be defended by religious arguments), many religious fundamentalist and perfectionist positions are not necessarily anti-feminist or non-feminist. 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, and bans on abortion can not only be reconciled with some other people's feminist commitments, they can also be endorsed as feminist and defended with feminist arguments by them.

My own unwillingness to compromise gives me something in common with 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.⁵ In each case, these women were

4. See generally Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONTINUING EQUALITY 93 (Martha Fineman ed., 2009) (discussing feminist fundamentalist, Catholic perfectionist, and Catholic fundamentalist approaches to the German abortion compromise).

5. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 [hereinafter *Ludin*] (holding unconstitutional, in the absence of a statute of general applicability, a case by case determination by administrators that a public school teacher could not wear hijab in class; R (Begum) v. Headteacher and Governors of Denbigh High Sch., [2006] UKHL 15 [hereinafter *Begum*] (appeal taken from Eng.) (upholding the school's decision to prohibit student's wearing a jilbab while

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.⁶ It was this unwillingness to compromise that the local school system claimed made her “unsuitable” as a teacher.⁷ 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 to meet the Islamic requirement of hijab, or modest covering of women’s bodies.⁸ 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.”⁹ Hoffman stressed the “expectation of accommodation, compromise, and, if necessary, sacrifice in the manifestation of religious beliefs” he saw in the jurisprudence of the European Court of Human Rights.¹⁰ It may therefore be worth reflecting on the extent to which compromise itself could be a particular fundamental local value of both the German and the British constitutional order, such that there could be, somewhat paradoxically, an uncompromising commitment to compromise. Central to my argument on behalf of feminist fundamentalism is that asking women like me, or like United States Air Force Colonel Martha McSally, whose litigation against the United States military’s requirement that she don hijab while in Saudi Arabia I will discuss below, to veil, given our particular feminist fundamentalist commitments, should be seen as *in pari materia* with asking devout Muslim women not to veil. It seems to me that too little attention has been paid in the discourse around these matters to two things. First, 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. 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.

providing students a uniform hijab option).

6. *Ludin, supra* note 5.

7. *See id.*

8. *See Begum, supra* note 5, ¶ 25.

9. *See id.* ¶ 50.

10. *See id.* ¶ 54.

II. SEX EQUALITY IS A PARTICULAR AS WELL AS A UNIVERSAL VALUE

One of my chief purposes in pursuing a feminist fundamentalist project is to disrupt the oft-perceived dichotomy between feminist or liberal universalism on the one hand and local cultural commitments on the other by insisting that we in the liberal, feminist, constitutional West have our localized, cultural commitments, too, which are at least as important to us, as worthy of respect, and as entitled to protection, as the local cultural commitments of others are to them. 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 the norms of Western constitutional cultures 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.

The fundamental commitments of the United States and of the other Western constitutional democracies I have studied as a comparativist include equality and freedom with respect to sex and gender. 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 hunter-gatherers of Papua New Guinea. Very few cultures over the history or territorial expanse of the world have embraced commitments to sex equality, the integration of the sexes and freedom from enforced sex roles and they remain at risk.

Although widely shared in the liberal constitutional West, these and related commitments can be spelled out in importantly different ways 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. Thus, for example, a feminist fundamentalist perspective on the French legal system would have to take account of both *parité* and *mixité*, as well as the interaction of these specifically French feminist commitments with other fundamental French values. As French President Nicolas Sarkozy said, “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.”¹¹ That the French mix is somewhat different from the American, or, for that matter, the Dutch, the British, the Canadian, or the German, leads France, famously, to answer the question of whether Muslim girls may wear hijab in public school classrooms differently than these other nations have, although each of these nations, like France, is also committed to the equality of the sexes.

The diversity of responses among the signatories to the European Charter of Human Rights, all of whom share fundamental commitments to sex equality and freedom of religion, to the question of hijab by Muslim teachers and students in state-sponsored schools is a useful illustration of how common and widely shared fundamental commitments can work themselves out differently among different constitutional cultures, just as among different denominations within a faith tradition. (One of my difficulties with the litigated cases generated by these diverse responses to hijab in schools 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, but that does not affect the usefulness of the example as an illustration.) In France, 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 historically in opposition to Catholicism and not originally in opposition to the display of Muslim particularity.¹² 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.¹³ But the petitioner in the Turkish case,

11. Jane Kramer, *Round One: The Battle for France*, THE NEW YORKER, Apr. 23, 2007, at 30.

12. See, e.g., Patrick Weil, *Why the French Laïcité is Liberal*, 30 CARDOZO L. REV. 2700, 2704 (2009). The French situation is a complicated one and, for feminists, a potentially historically problematic one, because *laïcité* rests on the French revolutionary repudiation of communitarianism in favor of a 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 the commitment to neutral, fungible individuals. But that is for the French to work out, although my own feminist fundamentalist commitments lead me to wish that the French would 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 (unpublished manuscript) (on file with the author).

13. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. (2008) (upholding Turkey’s ban on wearing hijab in public universities). The ECHR’s decision did not end controversy over hijab in Turkey. See, e.g., *Beyond the Veil*, THE ECONOMIST, June 12, 2008, available at http://www.economist.com/node/11541234?story_id=E1_TTVQTNPQ (reporting that the Turkish legislature, prompted by the Prime Minister’s Islamist party, legislatively authorized headscarf wearing by university students; but on June 5, 2008 the Turkish Constitutional Court overturned the legislation as unconstitutional).

Leyla Şahin, completed her education, still veiled, in a university in Austria, which has no comparable commitment to secularism. More recently, as discussed above, the British House of Lords, invoking, not secularism, but the British value of reasonable compromise, sided with the governors of a state 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.¹⁴ The ECHR had previously upheld the prohibition on veiling by a teacher in a Swiss public school, accepting the Swiss court's determination, *inter alia*, that the Koranic precept mandating veiling was "hard to square with the principle of gender equality."¹⁵ In Germany, controversies about veiling in schools also centered on teachers, not students: the German Federal Constitutional Court ruling that allowed the German states some leeway in regulating the wearing of the veil by public school teachers and other representatives of the state¹⁶ generated an ongoing debate in the federal and local German parliaments concerning the desirability 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, with feminist arguments on all sides.

III. WHAT'S CITIZENSHIP GOT TO DO WITH IT?

It has become increasingly fashionable for scholars to describe any and all questions of sex equality as dimensions of women's equal citizenship. A connection to citizenship comes particularly readily to mind when the issue is one related to education in public schools, as it is in the European cases involving the veiling of teachers and students.¹⁷ After all, as the European Court of Human Rights acknowledged in upholding the German Federal Constitutional Court's approval of a ban on home schooling by Christian parents who objected, *inter alia*, to sex education in schools, a central function of public schools is "the education of responsible citizens to participate in a democratic and pluralistic society."¹⁸ For this reason, the United States Supreme Court held it permissible for public schools in

14. See *Begum*, *supra* note 5, ¶ 64.

15. *Dahlab v. Switz.*, 2001-V Eur. Ct. H.R. 447 (2001).

16. See *Ludin*, *supra* note 5.

17. The United States also has cases involving bans on veiling by teachers, which, perhaps to the surprise of some U.S. commentators on the European bans, uphold such bans, focusing on the obligation of religious neutrality in public schools and often relying on earlier restrictions on the wearing of habits by Catholic nuns in public schools. See, e.g., *Cooper v. Eugene Sch. Dist.*, 723 P.2d 298, 313 (Or. 1986), *appeal dismissed*, 480 U.S. 942 (1987) (upholding as applied to Muslim teacher's headscarf a ban dating from 1895 on public school teacher's wearing religious garb).

18. See *Konrad v. Germany*, 35504/03 Eur. Ct. H.R. (2006).

Massachusetts to require that those who taught in them be United States citizens.¹⁹

In Turkey, a majority Muslim country with an entrenched constitutional commitment to Atatürk's secularism, Şahin's attempt to attend university classes wearing a headscarf was rebuffed in part through reliance on a constitutional provision explicitly framed in terms of citizenship: according to the Turkish Constitution's Article 42, "Citizens are not absolved from the duty to remain loyal to the Constitution by freedom of instruction and teaching."²⁰ More generally, in European countries where Muslims are in the minority, whether a woman wearing hijab can study or teach in a public institution will understandably be seen to implicate the question of her acceptance as a full citizen on grounds of both religion and sex. Similarly, as advocates for gay rights so often remind us, access to both marriage and the military, the feminist fundamentalist implications of which I will discuss below, have historically been seen as markers of full citizenship.

I want, however, to offer some resistance to the reflexive tendency to speak simply in terms of citizenship when such matters are at issue. It is important to remember that non-citizens, too, in the United States and elsewhere, have the opportunity, indeed often the right, to engage in activities I analyze herein in connection with feminist fundamentalism—for example, to enroll in public schools,²¹ to marry, to adopt and raise children, to enter the civil service,²² even to enlist in the military. Liberty and the equal protection of the laws are guaranteed by the text of the U.S. Constitution's Amendments V and XIV to all "person[s]," not only to citizens.²³ In other nations as well, individuals who demand legal respect for their individual feminist fundamentalist commitments are not limited to making such demands only in their capacity as citizens or only of the nations in which they are citizens. And any constitutional culture in which feminist fundamentalism is entrenched applies its protections and its strictures to more than simply its citizens.

Where I see questions of feminist fundamentalism and of citizenship in

19. *Ambach v. Norwick*, 441 U.S. 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.").

20. TURK. CONST. art. 42.

21. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding unconstitutional the denial of public education to illegal alien children).

22. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634 (1973) (striking down a categorical state ban on aliens in civil service).

23. U.S. CONST. amends. V, XIV. *But see, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (critically examining the Supreme Court's historic turn away from Amendment XIV's textual guarantee of the "privileges or immunities of citizens" toward the equal protection clause as a source of constitutional rights).

the strict sense most clearly intersecting is in the immigration and naturalization decisions made by nation states committed to feminist fundamentalism, by which I mean those for whom the equality of the sexes is a core constitutional value. One of the most prominent recent such cases involves, yet again, a veiled Muslim woman in Europe. Born in Morocco, Faisa Silmi moved to France eight years ago upon her marriage to a French national of Moroccan descent, with whom she subsequently had three children.²⁴ Wanting, she said, to have the same nationality as her husband and children, Silmi applied for French citizenship, but, despite her fluency in the French language and her continued legal residency in France, she was turned down on grounds of “insufficient assimilation” in a decision that was ultimately affirmed in July 2008 by France’s highest administrative court, the Conseil D’Etat.²⁵

Press reports of the decision against Silmi focused on the fact that, since arriving in France, Silmi had, at her husband’s request, habitually worn a niqab, or face veil, as part of a very strict form of hijab associated more with the Arabian peninsula than with Morocco.²⁶ But the record does not support her claim to the press that she had been excluded from citizenship “simply because of what [she] choose[s] to wear.”²⁷ Nor does it support her lawyers’ attempt to frame her rejection as based on the threat her religious practices were seen to present to the French value of *laïcité*. Rather, the record highlights “in particular the equality of the sexes” as one of “the essential values of the French community” she had failed to “make her own.”²⁸ And the record goes far beyond her veil to describe her as “living in total submission to the men of her family, which is manifest, not only in her clothing, but in the whole of her daily life” as well as in the statements she made to officials indicating that she finds such submission “normal and that the very idea of challenging this submission never even crossed her mind.”²⁹ As to *laïcité*, the official report indicates that Silmi “spontaneously admitted [to government authorities] that she had no idea whatsoever about *laïcité* or about the right to vote.”

According to the New York Times, the “ruling on Ms. Silmi has received almost unequivocal support across the [French] political spectrum, including among many Muslims.”³⁰ Among the supporters was Minister

24. See generally Conseil d’Etat [CE] [highest administrative court], June 27, 2008, Rec. Lebon 2008, Section du Contentieux, 286789 [hereinafter *Silmi*].

25. *Id.*

26. See Karen Bennhold, *A Veil Closes France’s Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1.

27. See generally *Silmi*, *supra* note 24.

28. *Id.*

29. *Id.*

30. See Bennhold, *supra* note 26, at A1.

for Urban Affairs Fedela Amara, a practicing Muslim of Algerian descent and a founder of the movement *Ni Putes, Ni Soumises* (“Neither Whores, Nor Doormats”) which works to improve the treatment of Muslim women in France by, among others, the men in their own community.³¹ According to Amara, Silmi’s niqab, which Silmi herself had told authorities she wore “more out of custom than religious conviction” was “not a religious insignia but the insignia of a totalitarian political project that promotes inequality between the sexes and is totally lacking in democracy.”³²

While I might not go so far in my condemnation of the niqab, I am in full support of the general approach France took toward the question of Silmi’s citizenship application. In my view, a liberal culture should be at least as free as a traditional one to defend and preserve its fundamental values by denying an application for citizenship from someone who has not “ma[d]e [his or] her own” those fundamental values.³³ Answering the many objections that can be raised to this view would far exceed the scope of this paper, but I will at least acknowledge a few of them. First, I acknowledge it to be unfortunate that, just as women who are visibly pregnant have historically been more readily subject to policing of sexual prohibitions than the men who got them pregnant, a woman like Silmi, who veils, is more readily made the target of objections to the gender norms her veiling can be seen to embody than are the men who may have imposed that veiling on her or at the very least share her views as to its desirability. Of course, every effort should be made to examine the citizenship applications of men, no less than of women, veiled or not, to determine the extent to which they have adopted values such as sex equality as their own. In Silmi’s case, her husband already had French citizenship, which only leads to a series of further objections. Yes, I must acknowledge that there are already French citizens who have not internalized their nation’s commitment to sex equality, but this does not seem to me a reason for France to exercise its discretion to increase their number. To the contrary, precisely because citizens have the right to shape and change their nation’s fundamental commitments, nations are entitled to be cautious about those to whom they extend this right, especially nations like France, that would have far more contenders for residence and citizenship than they could possibly accommodate were they to open their borders and that must perforce be choosy. As it happens, Silmi is already a resident of France; no one is proposing to separate her from her husband and children, and

31. See FADELA AMARA & SYLVIA ZAPPI, *BREAKING THE SILENCE: FRENCH WOMEN’S VOICES FROM THE GHETTO* 24 (2006) (describing the motivations for and activities of the movement).

32. See *Silmi*, *supra* note 24.

33. *Id.*

perhaps, in time, the opportunity for greater exposure to the values of her country of residence will lead her indeed to make those values her own.

IV. FEMINIST FUNDAMENTALISM IN THE UNITED STATES CONSTITUTIONAL ORDER

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, although I am just old enough to have developed them as my personal commitments before the United States Supreme Court enshrined them in constitutional jurisprudence.³⁴ Through a consistent line of Supreme Court cases over my lifetime, we in the United States have developed an orthodoxy with respect to sex equality. Central to this orthodoxy is that “fixed notions concerning the roles and abilities of males and females” are anathema when embodied in law.³⁵

Even Chief Justice Rehnquist, a latecomer to sex equality as a constitutional priority and ordinarily an opponent of expanding federal power over the states,³⁶ reaffirmed in *Nevada Dep’t of Human Resources v. Hibbs*³⁷ 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,”³⁸ Rehnquist held that Congress can impose on the states as employers the Family and Medical Leave Act, which allows persons of both sexes to get leave for what Martha Fineman³⁹ would call their inevitable or derivative

34. See Mary Anne Case, *No Male or Female, but All are One*, in *TRANSCENDING THE BOUNDARIES OF THE LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 83 (Martha Fineman ed., 2011) (describing the development of the author’s feminist jurisprudential commitments).

35. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). For an explication of the development of this orthodoxy, see 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).

36. For a discussion of the evolution of Rehnquist’s views on sex equality, see Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 *UTAH L. REV.* 381, 388-89 (2009) [hereinafter Case, *Feminist Fundamentalism on the Frontier*].

37. 538 U.S. 721, 728 (2003).

38. *Id.* at 731.

39. See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 8 (Routledge, 1995) (defining inevitable dependency as “the status of need for caretaking embodied in the young, many of the elderly and disabled, as well as the ill”).

dependency, i.e., for their own illness and that of close family members, as well as for the care of their young children.

My use of religiously inflected terms such as orthodoxy, heresy, and anathema in this context is deliberately intended to press a further analogy to the discourses of religion: just as, for example, the new constitution of Iraq provides that “No law that contradicts the established provisions of Islam may be established,”⁴⁰ so in the United States, no law that contradicts the equality of the sexes may be established. It is this which causes me to call sex equality a fundamentalist (in my sense of the term) and not just a fundamental commitment of the United States constitutional order. Together with racial equality and the non-establishment of religion, the equality of the sexes is among the very few commitments the existing United States constitutional order makes fundamentally binding on government whenever it acts or speaks. This is an orthodoxy that it is incumbent on government to follow-through on in all fields—in its hortatory pronouncements, in its funding decisions, and in its necessary interventions into the family and the private sphere, such as its custody and adoption decisions. 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, the position of Justice Bradley in *Bradwell v. Illinois* that “[t]he natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life . . . [.]”⁴¹ notwithstanding that such a position may still be fervently held by many people of faith. Moreover, government as decision maker 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.’”⁴² 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

40. IRAQ CONST. § I, art. 2, First, A.

41. *Bradwell v. State*, 83 U.S. 130, 141 (1892) (Bradley, J., concurring).

42. See Joel Achenbach, *A Report from the Front Line of the “Culture War,”* WASH. POST, Sept. 26, 1993, at G1.

husbands and confined to the domestic sphere as Justice Bradley urged, the resolution would violate existing U.S. constitutional equality norms. “Lifestyles advocated by the [feminist] community” can no longer be “incompatible with the” official community standards of any unit of government in the United States.⁴³ “Welcome to Cobb County, Where a Woman’s Place is in the Home” would be a combination welcome mat/no trespassing sign with 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 as well as hortatory and regulatory means is an appropriate activity for the federal government, it is still constitutionally constrained to promote only egalitarian marriage.

Justice Souter, in dissent from his colleagues’ decision upholding a program of government funded vouchers parents could use to pay for religious schools, 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 taught in any schools adopting the articles of faith of the Southern Baptist Convention.”⁴⁴ 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 required to refrain from promoting a message of inequality between men and women. Unfortunately, when one moves beyond those institutions bound directly by the Constitution or 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.

What it might mean in practice for sex equality norms to operate as a

43. See Case, *Feminist Fundamentalism on the Frontier*, *supra* note 36, at 391; Achenbach, *supra* note 42, at G1.

44. *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting) (voicing concerns that “[r]eligious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition”); see REPORT OF COMMITTEE ON BAPTIST FAITH AND MESSAGE, *supra* note 2 (“A wife is to submit herself graciously to the servant leadership of her husband . . .”).

necessary constraint on state action is particularly tricky when that state action involves children.⁴⁵ But, as has been clear for some time when it comes to state laws governing matters such as alimony and child support, 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 for a girl those who believe and will teach their children that females are inferior to and ought to be subservient to males than it would select for a black child adoptive parents who believe non-whites are inferior to and should be subservient to whites. That such beliefs are sometimes justified with reference to religious faith should not immunize them from scrutiny. 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, when repressive religious beliefs are pitted against secular feminist ones, the religious beliefs often 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. 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.⁴⁶ 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

45. See generally Mary Anne Case, *Feminist Fundamentalism and the Baby Markets*, in *BABY MARKETS: MONEY, MORALS AND THE NEOPOLITICS OF CHOICE* (Michele Goodwin ed., 2010); Case, *Feminist Fundamentalism on the Frontier*, *supra* note 36 (discussing issues such as education, child custody, and adoption).

46. *Roberts v. Roberts*, No. HI-471-4, 2002 WL725513, at *2, *7-9 (Va. Cir. Ct. Apr. 15, 2002).

to the children by [their father] are different from the values being taught to the children by [their mother].”⁴⁷ 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.”⁴⁸ But, even with respect to these values, the judge insisted only that, “[w]hichever 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.”⁴⁹ That is not to say that the parent who most favors sex equality should always prevail, simply that a court must not remain viewpoint neutral as between sex equality and its opposite; it must put a thumb on the scales in favor of the parent who would give a daughter the same encouragement, liberty, and opportunity as a son.

Before readers protest that I am proposing massive government intervention into constitutionally protected family 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 recognized parents in the best interests of the child. Although difficult and controversial borderline questions will arise, to limit analysis of what Kathleen Sullivan has called “[c]onstitutional immunity for a private sphere [that] fosters normative pluralism”⁵⁰ to adult women’s choices—including the choice to accept sex-role differentiation or even subordination to men—rather than attending as well to the choices imposed on young girls, tends to oversimplify the divide between private and state action, and to underestimate the United States’ constitutional obligation to carry through on its own fundamentalist commitment to sex equality, even as it stops short of perfectionism when it comes to opposing the choices consenting adult women may make to accept traditional sex-roles or their own subordination to the men in their lives.

47. *Id.* at *9.

48. *Id.*

49. *Id.* at *8-9.

50. See Kathleen Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 755 (2002) (analyzing the distinction between private and state action as it concerns constitutional protection for women’s equality).

V. DEFENDING AN INTEGRATIONIST VISION OF SEX EQUALITY

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 equality; the replacement of Justice O'Connor with Justice Alito was more generally conceded to be such. The Bush Administration, in addition to supporting federal government funding of sex-education that reinforces conventional gender roles,⁵¹ publicized guidelines saying that public schools can have single-sex components, not even separate but equal, but just separate.⁵² And, in recent state constitutional same-sex marriage decisions, there is the threat of reintroduction of a concept of state-approved sex-roles, as I will discuss further below.⁵³ This is particularly troubling for one with my feminist fundamentalist commitments.

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 do not want to suggest that veiling or that physical segregation of the sexes is per se incompatible with the equality of the sexes.

Indeed, 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

51. See, e.g., Joanna Grossman, *The Bush Administration's Push for Single-Sex Education: An Attempt to Erode Federal Gender Equality Guarantees?*, FINDLAW (June 11, 2002), <http://writ.news.findlaw.com/grossman/20020611.html> (raising concerns about the Office of Civil Rights' intention to "amend relevant law to take a more 'flexible' approach to regulation of single-sex educational programs").

52. *Id.*

53. See Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010) [hereinafter Case, *Same-Sex Marriage Litigation*] (analyzing same-sex marriage decisions and arguing that "recognition of same-sex marriage and elimination of enforced sex roles are inextricably" linked).

women in complementary roles rather than in parallel universes.⁵⁴

However, I see no way around the conclusion that both veiling and sex segregation 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 call it, of the two, may be deeply unsatisfying to both integrationists and separationists,⁵⁵ even assuming *arguendo* that it were practically sustainable. It may be easier to see in the case of the Virginia Military Institute (“VMI”)⁵⁶ 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 Bertold 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.⁵⁷ But, especially in a world in which modesty norms are not imposed equally on both sexes, veiling does seem itself to embody a fixed notion about women’s place 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 observed.⁵⁸

Like the dissenters in the German veil case, I also do not mean to essentialize the veil, nor to take any position at all as to what the veil means to its wearers, but to stress that the question presented when representatives of the state in their representative capacity wish to wear it is about what the

54. Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 765, 774-75 (2002) (commenting on Kathleen Sullivan’s *Constitutionalizing Women’s Equality* and offering a different analysis of the history of the constitutionalization of women’s equality).

55. See Jeremy Waldron, *Autonomy, Authority, and Freedom—Part 1: “Autonomy and Culture,”* Princeton University Podcasts Oct. 20, 2006, http://coblit.codeen.org:3125/www.princeton.edu/WebMedia/podcast/20061020raz_pt1.mp3 (referring to modern multicultural circumstances in which there are “remnants of various cultures living side by side” and the individual has to “find footing” in both the traditional and modern cultures). 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, *Community Standards and the Margin of Appreciation*, 25 HUM. RTS. L.J. 10 (2005).

56. See *United States v. Virginia*, 518 U.S. 515, 519 (1996) (mandating the admission of women to previously all-male state-sponsored military academy).

57. Judge Bertold Summer, Remarks Following Presentation on the Ludin Case at Freie Universitaet Berlin (May 26, 2004). See *Ludin*, *supra* note 5.

58. See, e.g., *Ludin*, *supra* note 5, dissenting opinion.

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 some 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 a view about slavery, white supremacy, or nostalgia for pre-Civil War or pre-*Brown* race relations inconsistent with the fundamental commitments of the government these civil servants serve. 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.

Veiling may get the bulk of the attention in Europe to date, but, more worrisomely, it often functions as a combination stalking horse and Trojan horse for the far more serious threat that other attempts to use the legal order to re-impose sex roles and separate spheres are to the fragile integration and equality in liberty of the sexes in Europe. These include, for example, demands to excuse schoolgirls from everything from swim class to field trips to contact with boys; to create public sex-segregated spaces for adult males and females; to excuse adult men from physical contact with female business colleagues; and to limit professionals such as physicians and nurses from serving both sexes.⁵⁹

Justice Ruth Bader Ginsberg may have had a similar creeping danger in mind when, responding in *United States 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:

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 deprivation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men."⁶⁰

Because I am so committed to, and so alive to the fragility of, an

59. See, e.g., Ian Johnson, *A Course in Islamology: Everyday Dilemmas of Muslim Life in Berlin*, THE BERLIN JOURNAL, Fall 2005, at 46, 47 ("[W]omen may not take overnight trips without a male blood relative accompanying them."); Sylvia Poggioli, *In Europe, Muslim Women Face Multiple Issues*, NPR (Jan. 20, 2008), <http://www.npr.org/templates/story/story.php?storyId=18234876&ft=1&f=1004> (exploring the differing views and challenges of Muslim women in Western society).

60. See *Virginia*, 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)).

integrationist vision of the sexes, I am in sympathy with efforts by European countries to put the brakes on the possibilities for 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 a substantial percentage 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 such restrictions. In this regard, I think it has not been stressed enough that a majority of French Muslims supported the ban on headscarves in French public schools;⁶¹ that the overwhelming majority of Turks, at all times since a ban on headscarves first was imposed by the Turkish constitutional order, are Muslims;⁶² and that not only the school's Muslim head and Muslim majority Board of Governors, but Muslim fellow-students of Begum, supported her school's ban on jilbabs.⁶³ In short, it would be wrong to see the hijab debates as simply pitting secular Western fundamentalist opponents of the veil against Muslims. I also understand the real danger that oppression makes any faith grow stronger, that there is a risk that women and girls will wear or feel compelled to wear the veil much more when it is forbidden. However, this is a practical problem dependent on specific circumstance, as to which I am willing to take local assessments of comparative risk quite seriously, in accord with the margin of appreciation.

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,⁶⁴ 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. As noted above, 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

61. *See, e.g.*, DOMINICK MCGOLDRICK, *HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE* 99 (2006) ("Opinion polls suggested that the ban was supported by . . . a small majority of Muslims.").

62. *See id.*, at 132.

63. *See Begum, supra* note 5.

64. *See, e.g.*, Jeffrey Fleishman, *German Muslims Object to Citizenship Tests on Political, Religious Issues*, N.Y. SUN, Apr. 13, 2006, available at <http://www.nysun.com/foreign/german-muslims-object-to-citizenship-tests/30903/> ("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.").

fundamental commitments.

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 also a righteous sense of grievance when challenged, I want to vindicate those, such as Tony Blair and Jack Straw in Britain,⁶⁵ who are not silenced in their articulation of disapproval by an unjustified demand for polite deference on the part of their religious opponents.

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. 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.⁶⁶ The discussion above about necessary state intervention concerning children suggests some of the reasons why. 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 education, this might not be possible to eliminate.

I want now to move very briefly to considering some individuals whose feminist fundamentalist commitments ought to be, I think, more recognized in the American legal order. 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;⁶⁷ and Col. Martha McSally, who engaged in a multi-year campaign ending in

65. See, e.g., Alan Cowell, *Blair Criticizes Full Islamic Veils as "Mark of Separation,"* N.Y. TIMES, Oct. 18, 2006, at A3 (joining the debate about veil wearing. Blair backed House of Commons leader, Straw, claiming the practice "makes other people from outside the community feel uncomfortable").

66. 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. For further discussion, see Mary Anne Case, *A Lot To Ask: Review Essay of Martha Nussbaum's From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 19 COLUM. J. OF GENDER & L. 89, 124 (2010).

67. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (rejecting Title VII sex discrimination claim by employee whose employer required her but prohibited her male co-workers to wear makeup).

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.

VI. FEMINIST FUNDAMENTALISM AS AN INDIVIDUAL COMMITMENT A. 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.⁶⁸ Among the big losers in the recent spate of state court 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,⁶⁹ 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,’”⁷⁰ 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.⁷¹

68. For further discussion, see Case, *Same-Sex Marriage Litigation*, *supra* note 53, at 1199.

69. See *Hernandez v. Robles*, 7 N.Y.3d 338, 359 (2006) (holding that a rational basis for the exclusion of same sex couples from marriage could be the legislature's intuition “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”).

70. I take this language from *Massachusetts 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).

71. 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 law so imprisons it and the couples who enter it. As I have been arguing since 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 existing domestic partnership schemes or ascriptive schemes. 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, 1665-66 (1993) (“[i]t seems to me that to the extent a case like *Braschi* can be read to discourage experimentation with all less traditional ways for couples to organize their lives and manifest their commitment to one another, it may be more oppressive for feminists, whatever their sexual preference, than gay marriage would be for anyone”); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1787 (2004-05) [hereinafter Case, *Marriage Licenses*] (describing the development of the laws of marriage so as to be

Only in a few states is marriage now open on the same terms to all couples regardless of sex. In California, the state supreme court decision opening marriage to same-sex couples (a result overturned by the passage of Proposition 8, which in its turn was challenged in federal court)⁷² went out of its way to reject the claim that sex discrimination was at issue in the state's prior exclusion of same-sex couples.⁷³ Other states that offer some formal legal recognition to same-sex couples have set up separate regimes for them—denominated civil unions or domestic partnerships—and put those regimes off-limits to the mine run of male-female couples.⁷⁴ 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, 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. While civil union or domestic partnership 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 in states that did not also open it on equal terms to male-female couples.

Note that, if states had opened either marriage to same-sex couples or civil unions to male-female couples, I myself, unlike some other feminist fundamentalists, would not be complaining about an affront to women's equality: 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

increasingly less constraining).

72. See generally *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (striking down the results of Proposition 8 as violative of the federal constitutional guarantees of equal protection and due process).

73. See *In re Marriage Cases*, 43 Cal. 4th 757, 837 (2008) (holding that exclusion of same-sex couples from marriage impermissibly discrimination on grounds of orientation but not of sex).

74. See Case, *Marriage Licenses*, *supra* note 71, at 1775 (citing Vt. Stat. Ann. § 1204(a) (2004), 2005 Conn. Pub. Acts. No. 05-10) (offering the same benefits and protections of marriage to same-sex couples in civil unions but denying the availability of civil unions to heterosexual couples).

subordinated them.

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.”⁷⁵ 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 by employers and units of government only to those unmarried couples whose members were of the same sex have been met with the judicial response that because heterosexual couples can legally marry, they suffer no impermissible discrimination.⁷⁶ 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 or Defense of Marriage Acts, is that their ability to order their relations by enforceable contract has suffered setbacks in many states.

B. DARLENE JESPERSEN

A standard gambit of proponents of veiling or of the right to veil of Muslim women such as students and schoolteachers in Europe is to note that the West also imposes what can 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

75. See Amended Complaint of Petitioner at ¶ 11, *McSally v. Rumsfeld*, 01-2481 (D.D.C. 2001) [hereinafter *McSally Amended Complaint*] (arguing that military regulations requiring female personnel to wear an abaya when leaving the base in the Kingdom of Saudi Arabia violated *McSally*’s constitutional rights to religious freedom and equal protection on grounds of sex).

76. See, e.g., *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 610-11 (7th Cir. 2001) (upholding exclusion of unmarried heterosexual couples from employee benefits offered to married couples and same-sex domestic partners).

covering them, it exposes them.⁷⁷ From the time the Supreme Court decided *Price Waterhouse v. Hopkins*⁷⁸ in 1989 until very recently, I would have claimed that, in accord with its and my feminist fundamentalist commitments, the United States 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.⁷⁹ 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.⁸⁰ 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 will not 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.”⁸¹

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

77. 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.

78. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that it constituted impermissible sex discrimination for an accounting firm to suggest to a female candidate for partnership that she “dress more femininely, wear make up, have her hair styled, [and] wear jewelry”).

79. For an extended discussion of the Hopkins case and its implications, see generally 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).

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

81. *Id.* at 1108.

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.⁸²

C. MARTHA MCSALLY

While an U.S. Air Force fighter pilot stationed in Saudi Arabia, Colonel Martha McSally brought a court challenge⁸³ to regulations requiring all female U.S. 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. Before bringing suit, she had tried unsuccessfully but vigorously for a number of years to get these regulations changed within the military hierarchy.⁸⁴ 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 in Muslim garb and "by forcing her to communicate the coerced and false 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."⁸⁵

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

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

83. McSally Amended Complaint, *supra* note 75.

84. *Id.* ¶¶ 5, 23–25 ("The plaintiff in this case, Lt. Col. Martha McSally . . . has protested the regulations through her chain of command, to no avail.")

85. *Id.* ¶ 11.

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, 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.⁸⁶

Of the people I am calling feminist fundamentalists I've listed in this last portion of the paper, Martha McSally is the only one to have achieved victory, but I think it is instructive to note how and why she won. She did not win in the courts. Her case is also one of the Constitution outside the courts. McSally won by a unanimous vote of the Congress, which directed the United States military not to enforce or even suggest such a thing as veiling to female military personnel in Saudi Arabia. During the Congressional debate on the matter, as much attention was given to how this poor Christian woman should not be forced to portray herself as a Muslim as was given to her claim for equal protection on grounds of sex.

Focusing attention on McSally's free exercise of religion claim is interesting on several levels. First, it reveals a much broader and more serious problem with the "heads we win, tails you lose" formulation which so often works wonderfully well for Muslim fundamentalist proponents of veiling, who simultaneously demand that Muslim women in the west be fully accommodated in their desire to veil and be segregated and that non-Muslim women fully accommodate themselves to local norms of veiling and sex-segregation in Muslim countries. The problem is this: 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 its proponents are making a claim that is far more universalist and perfectionist than any typically made by their feminist opponents, and one that it is therefore perfectly appropriate, indeed necessary, for these opponents to resist vigorously.

Secondly, it is important to be clear that, judging by her subsequent conduct, the sex equality claim was at least as important to McSally herself as the free exercise claim. 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, even though to wear the male cap had been forbidden to women.⁸⁷ She subsequently published a law review article making clear

86. *Cf. id.* ¶ 27.

87. Carol Ann Alaimo, *Aviator's Choice of Headgear Causes a Stir Within Air Force*, ARIZ. DAILY STAR (Aug. 24, 2004), <http://www.accessmylibrary.com/article->

that her choice of cap was no accident, but a continuation of her struggle to eliminate all unnecessary distinctions between male and female soldiers, especially, but not exclusively, those that “demean or degrade servicewomen.”⁸⁸ So it seems that she took her feminist fundamentalist claim at least as seriously as her free exercise claim, and I hope the time soon comes when it is perfectly clear that the American legal system does as well.

1G1-121173890/tucson-ariz-aviator-choice.html.

88. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL’Y 1011, 1037 (2007) (arguing that the Department of Defense must eliminate double standards which are “demeaning or patronizing to women”).