

Constitutional Pronouns

DARRELL A.H. MILLER*

INTRODUCTION

Ours is a Constitution of metaphors. Words standing in for other words. The first word of the First Amendment speaks only of Congress, but we use “Congress” to mean the President, the State of Alabama, and the local high school principal. The congressional power to create an “Army” also means an Air Force; “Senators and Representatives” in the Speech or Debate Clause also means staffers.¹

By definition, a pronoun is a word standing in for other words. A pronoun substitutes for “nouns or noun phrases. . . whose referents are named or understood in the context.”² “Named or understood in the context” does a lot of work in that definition. The Constitution’s pronouns—*we*, *they*, *he*—reveal something of our constitutional character, and are worth at least a moment of consideration. This short Essay, for the last issue of the *Duke Journal of Gender Law & Policy*, aims to do just that.

I. WE

The United States Constitution begins with a pronoun—“We.”

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.³

This is not the royal “we” of the Magna Carta,⁴ but it is a sovereign “we.” *We* ordain. *We* establish. But who, precisely, is *we*?

Identifying the referent for this pronoun is the stuff of innumerable political science and constitutional law courses. Does “the People of the United States” mean the people of a single undivided nation, or the people of several different sovereign states? When the Republic was young, John Jay, urging his fellow Americans to ratify the Constitution, drafted Federalist 2, which cautioned that a

Copyright © 2020 by Darrell A.H. Miller.

* Melvin G. Shimm Professor of Law, Duke Law School.

1. *Gravel v. United States*, 408 U.S. 606, 628–29 (1972).

2. *Pronoun*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 995 (11th ed. 2004).

3. U.S. CONST. pmb1.

4. MAGNA CARTA cl. 13 (G.R.C. Davis trans., British Museum 1963) (1215), <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (“We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.”).

people “united to each other by the strongest ties should never be split into a number of unsocial, jealous, and alien sovereignties.”⁵ This same Jay cited the Preamble in his decision in *Chisolm v. Georgia*⁶ as showing “the people acting as sovereigns of the whole country . . . establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform.”⁷ By contrast, James Madison, writing in Federalist 39, stated that the people’s assent “is to be given . . . not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.”⁸

Disputes over the proper referent for this passage have persisted through the decades. In *U.S. Term Limits, Inc. v. Thornton*,⁹ the disputes broke open. In *Thornton*, the Court had to decide whether a state could impose term limits on members of Congress, even though such limits were not part of the Qualification Clause in the Constitution.¹⁰ Justice Stevens, writing for the majority, took the Jay position, citing the *We* of the preamble to mean the People of the nation, not the People of the several states.¹¹ Justice Thomas dissented, citing the same Preamble, and the same pronoun, for the Madison position that the pronoun referent is the People through the several states—not the People of a single undifferentiated nation.¹²

And the debate goes on: just this last term, Justice Gorsuch seemed to endorse the Jay view, stating that “Our founding document begins by declaring that ‘We the People . . . ordain and establish this Constitution.’ At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people.”¹³ Justice Kagan, also this last term, cited the Preamble as reason to think that extreme political gerrymandering is a problem subject to judicial administration.¹⁴

How egalitarian is this *We*? In the early republic, not very. African Americans certainly were not included in this *We*.¹⁵ Nor were women, except in some derivative sense, perhaps. But, the Fourteenth Amendment, *Brown v. Board of Education*,¹⁶ the Warren Court revolution, the (stymied but influential) Equal

5. THE FEDERALIST NO. 2 (John Jay).

6. *Chisolm v. Georgia*, 2 U.S. 419 (1793).

7. *Id.* at 471 (Jay, C.J.); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1327 (1994) (“The Constitution presupposes that the American people form a sovereign whole, not divided into contending parts.”).

8. THE FEDERALIST NO. 39 (James Madison).

9. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

10. *Id.* at 783; U.S. CONST. art. I, § 2, cl. 1 & § 3, cl. 3.

11. *Id.* at 821 (“The Congress of the United States is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people.”).

12. *Id.* at 846 n.1 (Thomas, J., dissenting).

13. *Gundy v. United States*, 139 S. Ct. 2116, 2133 & n.31 (2019) (Gorsuch, J., dissenting).

14. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting) (“The Constitution begins: ‘We the People of the United States.’ . . . If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign.”).

15. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

16. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Rights Amendment, the elevation of one, then two, then four women to the High Court, *Obergefell v. Hodges*,¹⁷ all made the *We* more capacious.¹⁸ As Kathleen Sullivan notes: “When new groups were recognized as members of the popular sovereign, The People fundamentally altered their national identity and recommitted to their newly shared commitments.”¹⁹ The *We* came to contain multitudes.

II. THEY/THEM/THEIR

The Constitution leans heavily on the pronoun *they*. *They* and its cognates appear over fifty times in the Constitution, often, but not exclusively, to describe the structure of the legislative powers in a House of Representatives and a Senate assembled in Congress. The House is a *they*; the Senate is a *they*; the Congress is a *they*.

Coming so quickly after the stirring pronouncement that the Constitution was ordained by “We the People of the United States,” the switch to the third-person plural is somewhat jarring. A majestic statement about unity and nation-building, about *us*, quickly turning into a *them*.

But perhaps this should come as no surprise. As most historians note, the Founding generation was deeply skeptical of anything that smacked of unchecked “democracy”—which they associated with intemperance, demagoguery, and tyranny.²⁰ It should not come as a shock then that when the institutions of representative government are referenced, it is with a pronoun that stands at a step removed from the sovereign people. Other buffers between the people and the organs of government are similarly smothered in *they*—the Electoral College, the life-tenured Article III judiciary.

There’s a cost to this kind of pronoun. It perpetuates the idea that these buffers are not derived from the people, but constitute some kind of unaccountable elite. That it’s not *our* representatives in government, but some alien and abstracted *them*. The Tenth Circuit, for example, handed down a decision last year stating that Electors are under no obligation to express the wishes of the voters that selected them.²¹ Once selected, they are free to cast their electoral ballot in any way they choose.²²

17. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

18. See David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476–78 (2011) (discussing effect of the Equal Rights Amendment on equal protection jurisprudence as it pertains to gender).

19. Kathleen S. Sullivan, *The Civic Constitution*, 50 TULSA L. REV. 441, 443 (2015).

20. See, e.g., SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* xvii, 31–32 (2005); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL AND THE RISE OF PRESIDENTIAL DEMOCRACY* 16 (2005) (“The men of 1787 were very proud of being revolutionaries, but talk of democracy made them nervous.”).

21. *Baca v. Colorado Dep’t of State*, 935 F.3d 887, 955–56 (10th Cir. 2019) (“Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice President with discretion. And the state does not possess countervailing authority to remove an elector and to cancel his vote in response to the exercise of that Constitutional right.”).

22. *Id.*

It also confirms the famous public choice observation that “Congress is a ‘they,’ not an ‘it.’”²³ It makes accountability difficult to track, much less predict. It reinforces the sense of faction that the Framers feared, and which has come to create the kind of political paralysis and cravenness we see so often today. If the Constitution cannot unify a coordinate branch of government with a singular pronoun, how, then, can we expect the constituents of that body to unify across party to protect its constitutional prerogatives?²⁴

The tensions with the *We* of the preamble, though, don’t end with Congress or intermediary governing structures like the Electoral College or the federal judiciary. The nation itself is routinely referred to in the third-person plural. The United States, our United States that we’ve established, is a *they*. Article III states that “Treason against the United States, shall consist only in levying War against *them*, or in adhering to *their* Enemies”²⁵ Even after the convulsions of the Civil War, the United States is still referred to in the plural. The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to *their* jurisdiction.”²⁶

Notwithstanding, the plural may not reflect how people have come to experience the United States. A *Yale Law Review* author observed in 1900 that “the plural use of ‘United States’ is gradually passing, under stress of the ever-increasing sense of unity in the national life.”²⁷ A federal district court judge concurred two decades later, noting: “It is customary to speak of the United States of America in the singular, rather than the plural.”²⁸ A custom that had become “[m]ore particularly . . . true during the last 60 years.”²⁹ The Constitution may still describe the United States in the plural, but the citizens of the nation gradually have come to understand it in the singular.³⁰

III. HE/HIM/HIS

All pronoun references to the President, the Vice President, Senators and Representatives, and other officers are masculine. Some version of a male pronoun appears close to 50 times in the Constitution. Indeed, the qualifications for electors in the Fourteenth Amendment is specifically stated as “male.”³¹

23. Kenneth Shepsle, *Congress Is a “They” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

24. Darryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006).

25. U.S. CONST. art. III (emphasis added).

26. U.S. CONST. amend. XIII (emphasis added).

27. Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 189 (1900).

28. *Grays Harbor Stevedoring Co. v. United States*, 286 F. 444, 445 (W.D. Wash. 1923).

29. *Id.*; see also *United States v. Stephan*, 50 F. Supp. 738, 744 (E.D. Mich. 1943) (“Most of us, I think, when we say ‘United States of America’ today think of the singular. We would say ‘The United States is’ and not ‘The United States are.’” (quoting jury charge for treason)).

30. Minor Myers, *Supreme Court Usage & the Making of an “Is,”* 11 GREEN BAG 2D 457, 465 (2008) (finding that “the plural usage of ‘United States’ did not fall into disuse on the Supreme Court until more than a generation after the Battle of Appomattox Courthouse”).

31. U.S. CONST. amend. XIV § 2.

Use of the male pronoun to refer to all humans, according to linguist Dennis Baron, can be traced back as far as the Latinists of the sixteenth century and was widely accepted in the eighteenth century.³² Women seeking voting rights argued that, if the male pronoun was general to all sexes, its exclusive use in suffrage statutes could not pose any impediment to the suffrage of women.³³ Equally, they argued, it could not bar women from being able to take up elected office.³⁴ A note in the *Harvard Law Review* in 1910 summed up the chauvinism of the time, stating that “although the exclusive use of masculine pronouns in the constitutions in this country has never been regarded as excluding women, there has been little tendency to construe general provisions in their favors.”³⁵ The article went on to observe that contemporary courts had tended to construe any ambiguity against female office-holding.³⁶

That attitude did not seem to deter Sara Platt Decker of Denver, Colorado, however, who considered a run for Congress in 1909.³⁷ Speculation about a female congressional candidate sparked one opinion writer to object — “[s]trict adherents to the letter of the Constitution maintain that the presence of the masculine pronoun, and the absence of any other, obviously renders ineligible any person of the feminine persuasion.”³⁸ It seems, however, that this writer held a minority view. Jeanette Rankin, of Montana, became the first elected female congress member in 1916 – four years before ratification of the 19th Amendment.³⁹ And, although there was a bit of grumbling by sources to the *Washington Post* about pronouns and Montana’s new representative, her swearing in took place without much pronoun based objection.⁴⁰ By 1922, the idea that she could have been barred from office because of pronouns barely merited a sentence in Joseph Ragland Long’s treatise on American Government: “[T]he pronoun ‘he’ [in Article I] includes both sexes.”⁴¹

Today, the assumption that “he” means “he or she” has become so entrenched, that when former Senator and Secretary of State Hillary Clinton ran for President in 2015, no one in mainstream legal circles attempted to argue that she was ineligible for the Presidency. At most, Article II’s exclusive use of the male pronoun was used as a cudgel by scholars such as Dean Erwin Chemerinsky to demonstrate the “absurdity of originalism.”⁴²

32. Dennis Baron, *Gender Politics of the Generic “He”*, OUPBLOG (July 6, 2016), <https://blog.oup.com/2016/01/gender-politics-generic-he>.

33. *Id.*

34. *Cf.* *Atchison v. Lucas*, 83 Ky. 451, 464–65 (1885) (“It is true that, under the rule for the construction of statutes, a word importing the masculine gender may and often is extended or applied to females as well as males” but finding contrary intention with respect to female office-holding.).

35. Note, *Eligibility of Women for Public Office*, 24 HARV. L. REV. 139, 140 (1910).

36. *Id.*

37. Baron, *supra* note 32.

38. *Id.*

39. Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN’S RTS. L. REP. 181, 182 (2006).

40. Baron, *supra* note 32.

41. JOSEPH RAGLAND LONG, GOVERNMENT AND THE PEOPLE 41 (1922).

42. Steven Nelson, *Are Women Allowed To Be President?*, U.S. NEWS (Oct. 30, 2015, 4:28 PM), <https://www.usnews.com/news/articles/2015/10/30/are-women-allowed-to-be-president>.

At the time, Professor Michael Ramsey thought Chemerinsky's attacks preposterous, stating that "*no one* who takes originalism seriously thinks it even plausible that the Constitution might bar women from the presidency. This is a talking point by non-originalists who want to discredit originalism but don't bother to understand it."⁴³ Ramsey pointed to the fact that "it was the grammatical custom in the framers' era" to use the male pronoun for both sexes.⁴⁴

That may be true, but the exclusively male pronouns in the Constitution does pose a challenge in the modern "data-driven" era of originalism,⁴⁵ in which big data sets of contemporaneous words are mined for frequency, and conclusions about usage, understanding, and law based upon results. For if, as Justice Scalia says, "the Constitution was written to be understood by the voters; its words and phrases . . . used in their normal and ordinary as distinguished from technical meaning."⁴⁶ And if ordinary meaning is a simple count of how words are ordinarily used, then Chemerinsky's attack on originalism is not as clumsy as Ramsey has described.⁴⁷

I have not done the work myself, but I strongly suspect that if one were to mine all the usages of the words *he*, *him*, or *his* in datasets of eighteenth century documents, use of the pronoun to reference exclusively male antecedents would far surpass more general sex-neutral usage. If that's the case, then a more sophisticated, nuanced — and perhaps less objective — set of criteria would be required to show when and why original public meaning would allow this pronoun to connote both males and females. It may be that the exclusive male pronoun in the Constitution will require a significant refinement of what originalists think originalism to be (leading to the question of how different originalism is from non-originalism); or prompt some to abandon the project altogether.

IV. SHE/HER/HERS

There are no female pronouns in the Constitution.⁴⁸ The only time the Framers ever considered putting a female pronoun at Philadelphia was once — and that was to make clear that both male and female humans held as chattel could not free themselves by fleeing to another state.⁴⁹ In other words, the only time the

43. Michael Ramsey, *Originalism and Female Presidents, Again*, ORIGINALISM BLOG (Nov. 3, 2015), <https://originalismblog.typepad.com/the-originalism-blog/2015/11/originalism-and-female-presidents-againmichael-ramsey.html>.

44. *Id.*

45. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PENN. L. REV. 261, 261–62 (2019).

46. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

47. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 292 (1987) ("[I]t is quite possible that the masculine pronouns in Article II were intended to apply generically to both sexes. However, contemporaneous usage tends to weaken this hypothesis.").

48. Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 4 (2000) ("In its original form and even in its current stage of development, the United States Constitution speaks only in the male gender.").

49. Walter E. Dellinger III, *1787: The Constitution and "The Curse of Heaven,"* 29 WM. & MARY L. REV. 145, 153 (1987).

Framers considered gender was as a way to acknowledge the subordinate status of both Black men and Black women.⁵⁰

A number of states, with easier-to-amend constitutions, have taken the step of equalizing or purging their basic law of gendered pronouns. California, Florida, Hawaii, New York, Rhode Island, Utah, and Vermont have amended their constitutions to make them gender neutral,⁵¹ but the work of inclusivity of the Federal Constitution has been the product of common law change and societal acquiescence, not textual revision.

CONCLUSION

I've offered these musings on constitutional pronouns as a divertimento, as it were, for legal academics, and as a celebration of this publication, now in its last issue. As much as I have in the past supported a holistic approach to the Constitution, including its pronouns, I don't advocate excessive reliance on them for legal meaning. Looking for irrefutable evidence of constitutional law from pronouns has a whiff of the scholastic about it. That caution goes for any object of a hyper-textual constitutional investigation—whether it's the use of definite articles (*the* freedom of speech; *the* right to keep and bear arms), the correspondences between its different nouns (Article III's "State" and the Second Amendment's "State"), or the distinction between "they" and "it." Using the text to understand other parts of the text is a valuable tool of constitutional interpretation, but it's only one. Too close a parsing, too much logic-chopping, too much Hercules and not enough Herbert,⁵² turns the Constitution from a legal structure for government into a symbolist poem.

That said, I'll end with one slight correction. I wrote previously that the Constitution of the United States never uses any feminine pronouns, and that is true. But some context is due. Not because it's relevant to what the Constitution meant then, but maybe, for what it aspires to be now.

On Monday September 17, 1787, as the Philadelphia Convention closed, George Washington sat down to draft his letter transmitting the Constitution to the President of the Congress.⁵³

In his letter, he acknowledged the great task the members of the Convention had undertaken, the difficulties of compromise, and ended his letter on a hopeful note. This is what he said:

We have now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

50. *Id.*

51. *See, e.g.,* Michael B. Hyman, *A His and Her Constitution*, CBA Rec. 6 (Sept. 22, 2008); Greg Johnson, *Welcome to Our Gender-Neutral Future*, 42 VT. B.J. 36, 37 (2016).

52. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 732 (2000).

53. Letter of George Washington to Congress, Sept. 17, 1787, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 583–85 (Max Ferrand ed., 1911) (spelling and punctuation modernized). The letter is credited to George Washington but is in the handwriting of Gouverneur Morris. *Id.*

* * *

In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety—perhaps our national existence . . .

That it will meet the full and entire approbation of every State is not, perhaps, to be expected; but . . . we hope and believe; that it may promote the lasting welfare of that Country so dear to us all, and secure her freedom and happiness, is our most ardent wish.⁵⁴

One can easily dismiss Washington's usage as an eighteenth-century rhetorical tic. Given all the sexism and racism of the Founders, and all the defects we find, and still find, with our Constitution, that's perfectly understandable. Yet, I can't help but pause over the fact that when they imagined our experiment in self-government, our United States, when they imagined our nation's future—it was a she.

54. *Id.*