AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 4: The Early National Era—Equality/Gender

Martin v. Commonwealth, 1 Mass. 347 (MA 1805) (expanded)

William and Anna Martin were Loyalists who fled the United States in 1776, never to return. The Attorney General of Massachusetts immediately filed a lawsuit to have the Martin lands forfeited to the state. Massachusetts law permitted state officials to confiscate the property of any loyalist who left the state during the Revolution. The Supreme Judicial Court, for that reason, allowed the confiscation. Massachusetts took possession in 1781. Twenty years later, James Martin, Anna Martin's son and heir, challenged that decision. He claimed that the state statute did not permit forfeiture of the interest a women had in various properties. A wife, as a "femme covert," James Martin argued, could not be charged with violating her duties to the state of Massachusetts. Anna Martin had both a legal and a moral duty to follow her husband, William Martin, when he left the United States.

The Supreme Judicial Court of Massachusetts agreed that Anna Martin did not forfeit her property interests when she left the United States. Judge Sedgwick maintained that the Massachusetts legislature did not intend to confiscate lands from women who merely followed their husbands. Although Martin *was based on an interpretation of Massachusetts law, note how the justices referred to broader principles. Anna Martin could not have violated her duty to Massachusetts, they claimed, because married women had no distinctive duties to Massachusetts. On what basis did the Justices reach that conclusion? Consider* Martin *in light of James Wilson's discussion of separate spheres. How might Wilson have resolved* Martin*? How would you have decided* Martin v. Commonwealth*?*

JUSTICE THACHER

[omitted]

JUSTICE SEDGWICK

The present *United States,* which had been, previously, the acknowledged colonies of *Great Britain,* on the 4th of July, 1776, by their representatives, declared themselves independent of the mother country, and justified themselves by certain acts of aggression and oppression which were deemed proper to be proclaimed and explained to the world. . . . In this new and untried assumption, the *Attorney-General,* with sentiments which are equally just and liberal, admits the right of each individual to consult his own conscience in deciding on the part which it was his duty to adopt. While those generous spirits who united in defending, at every risk, the liberties and independence of their country, were, in the opinion of their fellow-citizens, entitled to deserved applause, those who, from timidity, or doubt, or principles of duty and conscience, adhered to their former allegiance, were guilty of no crime for which a punishment could be justly inflicted; and if, from such opinions and impressions, they withdrew from the country, all the evils to which they could justly be subjected would be a complete dissolution of their connection with the country from which they voluntarily withdrew, and the natural consequences thereof. They could not be punished for treason, for they had never united with the new independent society. . . . If they chose to unite with the majority, they became subject to the laws, and were bound to obedience. If they elected to withdraw, the support of the conflict, in which we were engaged, required that they should be permitted to do nothing which would weaken our means of defence. If they *did*

withdraw, they abandoned whatever might be made the means of the defence of the country, and, especially, such property as might aid in that defence. . . . .

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By the record before us, it appears that *William Martin* and *Anna Martin,* the father and mother of the plaintiff in error, are *jointly* charged with the several acts which are alleged in the libel of the *Attorney-General* as incurring the forfeiture for which he sued; that since the 19th day of April, 1775, they had levied war and conspired to levy war against the provinces, or colonies, or *United States;* that they had adhered to the king of *Great Britain,* his fleets and armies, and had given to them aid and comfort; that, since that time, they had, without the permission of the legislative or executive authority of any of the *United States,* withdrawn themselves therefrom into parts and places under the acknowledged authority of the king of *Great Britain:* all these are charged as done jointly by the husband and wife; and we are called upon, by matter apparent on the record, and by one of the errors expressly assigned, to say whether a *feme-covert,* for *any* of these acts, *performed with her husband,* is within the intention of the statute; and I think that she is not. In construing statutes, the great object is to discover from the words, the subject matter, the mischiefs contemplated, and the remedies proposed, what was the true meaning and design of the legislature. In the relation of husband and wife, the law makes, in her behalf, such an allowance for the authority of the husband, and her duty of obedience, that guilt is not imputed to her for actions performed jointly by them, unless of the most heinous and aggravated nature. For instance; the law says, whoever steals shall be punished, and yet if a wife participates in a theft with her husband she is not punishable. Innumerable other instances might be given. She is exempted from punishment, not because she is not within the letter of the law, if she had sufficient will to be considered as acting voluntarily and as a moral agent, but because she is viewed in such a state of subjection, and so under the control of her husband, that she acts merely as his instrument, and that no guilt is imputable to her. Compare this with the case under consideration. In a case of great political interest, in which men of great powers and equal integrity, as is said by the *Attorney-General,* divided; and where a *feme-covert* is not expressly included, shall we suppose her to be so by general words? Can we believe that a wife, for so respecting the understanding of her husband as to submit her own opinions to his, on a subject so all-important as this, should lose her own property, and forfeit the inheritance of her children? Was she to be considered as criminal because she permitted her husband to elect his own and her place of residence? Because she did not, in violation of her marriage vows, rebel against the will of her husband? So hard and cruel a construction against the general and known principles of law on this subject, could be justified by none but strong and unequivocal expressions. So far is this from being the case in this statute, that it seems to me there are no words by which it can fairly be understood that such was the intention of the legislature; but the contrary. The preamble of the statute has described the persons whom it intended to bring within it. It is that member who "withdraws himself from the jurisdiction of the government, and thereby deprives it of the benefit of his personal services." A *wife* who left the country in the company of her husband did not *withdraw* herself; but was, if I may so express it, withdrawn by him. She did not deprive the government of the benefit of her personal services; she had none to render; none were exacted of her. "The member who so withdraws, incurs," says the preamble, "the forfeiture of all his property, rights, and liberties, holden under and derived from that constitution of government, to the support of which he has refused to afford his aid and assistance." Can any one believe it was the intention of the legislature to demand of *femes-covert* their *aid and assistance* in the support of their constitution of government? The preamble then goes on to particularize the violation of our rights by out former sovereign, and proceeds to declare that it thereupon "became the indispensable duty of all the *people* of said states forthwith to unite in defence of their common freedom, and *by arms* to oppose the fleets and armies of the said king; yet, nevertheless, divers of the *members* of this, and of the other *United States* of *America,* evilly disposed, or regardless of their duty towards their country, did withdraw themselves," &c. Now it is unquestionably true that the *members* here spoken of as "evilly disposed" are included in the *people* abovementioned. What then was the duty of these evilly-disposed persons, for a violation of which they were to be cut off from the community to which they had belonged, and rendered aliens to it? It was "to unite in defence of their common freedom, and *by arms* to oppose" an invading enemy. And can it be supposed to have been the intention of the legislature to exact the performance of

this duty from *wives,* in opposition to the will and command of their husbands? Can it be believed that a humane and just legislature ever intended that wives should be subjected to the horrid alternative of, either, on the one hand, separating from their husbands and disobeying them, or, on the other, of sacrificing their property? It is impossible for me to suppose that such was ever their intention. The conclusion of the preamble speaks of those who withdrew as thereby "aiding or giving encouragement and countenance to the operations" of the enemy. Were *femes-covert,* accompanying their husbands, thus considered by the legislature? I believe not. So far from believing that *wives* are within the statute, for any acts by them done jointly with their husbands, that a fair construction of the whole *act* together, does, to my judgment, clearly exclude them. . . .

JUSTICE STRONG

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Upon the question whether the estates of *femes-covert* were, by this statute, liable to confiscation, I am of opinion that they were not. The *act* was intended to take the estates of those persons who had voluntarily withdrawn themselves from the country, and joined the fleets and armies of *Great Britain,* with whom we were then at war. Could a *feme-covert,* in any reasonable sense of the words of the *act,* do this? I think not. The law considers a *feme-covert* as having no will; she is under the direction and control of her husband; is bound to obey his commands; and in many cases which might be mentioned, indeed, in all cases, except perhaps treason and murder, cannot jointly with her husband act at all; or at least so as to make herself liable to punishment. She could not even have conveyed this very estate during the coverture; her husband could not have conveyed it so as to have bound her; and therefore I think that she could not forfeit it by any thing which she did or could do against this statute; and that no act of her husband could incur the forfeiture of her estate. I am clearly of opinion that the statute does not extend to *femes-covert.* . . .

CHIEF JUSTICE DANA

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On the whole, I am clearly of opinion that the judgment ought to be reversed, because there was not a second continuance; and because *femes-covert,* having no will, could not incur the forfeiture; and that the statute never was intended to include them; and oblige them either to lose their property or to be guilty of a breach of the duty, which, by the laws of their country and the law of God, they owed to their husbands.

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