To change the world

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When the Tennessee legislature ratified the 19th amendment to the US constitution (18 August 1920), women were soon to have the right to vote throughout the USA. The amendment had been ratified by enough US states (36) to make it law (certified on 26 August 1920 by the US Secretary of State):

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.
> — Amendment XIX, *US Constitution* (1920)

The granting of suffrage to women is now seen as part of a process which made the "people" mentioned in the US constitution more like the people who lived in the USA. Male legislators in eight states had rejected the vote for women before Tennessee's ratification, and rejection by the legislatures of only 13 states was needed to block the amendment.[1] All eight states voting to continue discrimination against women were segregationist in some way or other, with Jim Crow laws to suppress blacks – all had segregated school systems. If the Tennessee legislature had rejected the amendment, then ratification would have been delayed or even stalled completely (one amendment, the 27th, took from 1789 to 1992 to be ratified).

So how close was the Tennessee vote?

> **VOTES FOR WOMEN**
> On August 18th, 1920, Tennessee became the 36th state to ratify the 19th Amendment to the U.S. Constitution, thereby giving women the right to vote. After weeks of intense lobbying by national leaders, Tennessee passed the measure by one vote…
> — *Historical marker*, Hermitage Hotel, Nashville, Tennessee.

1 Georgia, Alabama, South Carolina, Virginia, Maryland, Mississippi, Delaware, and Louisiana – Delaware had a Republican governor, and the other seven governors were Democratic.

When the vote was called in the Tennessee general assembly, those in favour of ratification knew they had 48 votes, and they needed 49 votes to have a majority. When the votes were cast, the 49th vote came from a member (Harry T Burn) who explained that his mother had left him a letter: “I know that a mother's advice is always safest for her boy to follow, and my mother wanted me to vote for ratification”. The motion passed 49 to 47. If Burn had voted against ratification, then woman suffrage would have certainly been postponed – my guess is that the amendment would have ultimately been ratified, but who knows when? All the eight states who rejected the vote for women later ratified the amendment (under pressure from women voters?), the last being Mississippi in 1984.

Suffragists had been making cogent arguments about the validity of their case for many years:

> WHEREAS, The men of 1776 rebelled against a government which did not claim to be of the people, but, on the contrary, upheld the “divine right of kings”; and
> WHEREAS, The women of this nation to-day, under a government which claims to be based upon individual rights, to be “of the people, by the people, and for the people,” in an infinitely greater degree are suffering all the wrongs which led to the war of the revolution; and
> WHEREAS, The oppression is all the more keenly felt because our masters, instead of dwelling in a foreign land, are our husbands, our fathers, our brothers and our sons; therefore,
> *Resolved, That the women of this nation, in 1876, have greater cause for discontent, rebellion and revolution, than the men of 1776.*
> — The National Woman Suffrage Association, *Ninth Annual Convention* (1876) [My *emphasis*]

In the end, however, philosophical arguments seemed to have less effect than practical action – or a mother’s letter that said “Hurrah and vote for suffrage! Don't keep them in doubt! I notice some of the speeches against. They were bitter. ... Don't forget to be a good boy...” The people of the state of Tennessee did not ratify the 19th amendment (many did not want woman suffrage, “They were bitter”), it was the state legislature, by a very small margin (“They were bitter”) but enough under the rules to make the result binding.

Burn was not alone in having adventitious influences such as his mother, and it has been so throughout US history. When we look at the early days of the USA perhaps we pay too much attention to the philosophical interpretations given by a Madison or a Jefferson, and perhaps we should pay more attention to ordinary people in those revolutionary times, people who agreed or disagreed with proposals from the more intellectually-inclined social engineers such as Madison, Franklin, or Hamilton. In the 1780s, people in the USA were talking about changing their world (they had just finished a war) and "Philosophers have only interpreted the world differently; [however] it is necessary to change it."[2] The US constitution was riddled with compromises, especially those around the contentious issue of slavery (which has no explicit mention), because the document was written by a committee.

After the committee had come to its compromise, supporters of the new constitution put all kinds of quasi-philosophical rationalizations to work to justify the most obscene provisions (such as treating slaves as worth three-fifths of a person). The people in the new states (the ex-colonies) needed an agreement that was not too objectionable to too many white men. Because it was necessary to change their world, practical considerations took precedence over moral, ethical, or other abstract considerations. Many of those who were against slavery considered the unity of the USA as being more important in the short term than their distaste of slavery, an institution which many saw as withering away in the longer term.

Even after the compromise passed, people were not satisfied. Too many people worried that their newly found freedom from Britain and their individual rights might be curtailed by the new centralized (federal) government. Twelve amendments were proposed, ten of which became the US Bill of Rights. Consider the sixth amendment to the US constitution, and wonder if "him" and "his" meant only the male gender:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

2 My translation of Karl Marx's 11th thesis from Feuerbach: "Die Philosophen haben die Welt nur verschieden interpretiert, es kömmt drauf an, sie zu verändern" (*Thesen über Feuerbach*, 1845) – Friedrich Engels (in 1888) changed the second clause to "es kömmt aber darauf an", so that the implied "however" (aber) was then explicit.

> obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
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> — Amendment VI, *US Constitution* (1791)

What does “confront” mean in this context? As the meanings given to words change over time, it would help to have some idea of how the word was used in that era. Fortunately, Samuel Johnson compiled his *Dictionary of the English Language* in 1755, which was not that many years before US independence, so his entry might be relevant:[3]

> To CONFRONT ...
>
> 1. To stand against another in full view; to face. ...
> 2. To stand face to face, in opposition to another. ...
> 3. To oppose one evidence against another in open court.
> 4. To compare one thing with another. ...

Definition 3 mentions legal processes (“in open court”) and so ratifiers might have interpreted that part of the amendment to mean that the accused could dispute witnesses’ evidence, and not have the evidence accepted without question – or that for the evidence could not be secret. Of course, some might have thought to confront meant a face-to-face meeting, a “confrontation”.

The legal system of the USA was based mainly on the system of English Common Law, and though there were certain differences in English language usages between the colonies (later, the USA) and England, it seems reasonable to say that Johnson’s dictionary is probably relevant for usage in both countries for some time after its publication. More likely than not, other amendments were deemed more important than the sixth, and the right of trial by jury was seen as the crucial clause in the portmanteau sixth amendment (“an impartial jury of the State and district” – where the jury was composed of white men). How many mothers had a hand we do not know.

How does this amendment apply to children? Not at all, one might think, but one would be wrong. In a case involving the sexual abuse of a child, US Supreme Court justice Antonin Scalia has written an illuminating piece on interpreting history in which he asserts the primacy of the written word over the humane treatment of people. In the abuse case the original trial court judge decided that the child claiming abuse should

3 Though Johnson had a low opinion of the Scots, I am not aware he had a similarly low opinion of the colonists in North America.

only testify in the presence of the two counsel (with the accused person, the judge, and the jury watching over closed-circuit television). The case was appealed, reaching the US Supreme Court (*Maryland v Craig*, 1990) which found the original trial constitutional even though the sixth amendment says the accused has the right to be confronted with witnesses against him – though we have seen that the meaning is not clear, and the child was "her". Scalia dissented.

Scalia's argument was:

> And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witnesses which the little girl found it difficult to endure. ... Now no extrinsic factors have changed since that provision was adopted in 1791. **Sexual abuse existed then, as it does now**; little children were more easily upset than adults, then as now; a means of placing the defendant out of sight existed then as now ... But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them. [My **emphasis**]
> — Antonin Scalia, *A matter of interpretation: Federal courts and the law* (1997)

Scalia is imputing to an aggregate a single mind. I think that the provision was designed to make all evidence open, and thus for Scalia to think that the reason was to apply pressure is to read into the amendment something that is not there. Scalia obviously disagrees with my reading of the amendment, so we take different philosophical positions. Who is correct in the philosophy is less important than how the world was changed, and why. Not only is there no clear way to decide on the designers' intents, because no single person made the decision, but also the ratifiers might not be at one with designers' intents (whatever they were). Those ratifying the amendments for the Bill of Rights had been presented with twelve possible amendments, of which the first two were not ratified (eventually the second of the original twelve became law as the 27th amendment). The ten that were ratified were taken as a block by each state, and some amendments were, no doubt, considered more important than others. In most cases, for the majority in states voting on ratification, we cannot know who thought what. So who – when ratifying the ten amendments – thought about the implications of children having to confront adults in trials? Not many.

It is true that “sexual abuse existed then”, but much of the abuse was by white males, and most of the abused were slaves or indentured servants. Slaves had *no* rights under the Bill of Rights, and they rarely if ever were able to prosecute white people.[4] Even if the sixth amendment gave criminal defendants the right to confront witnesses against them, it did not guarantee all persons the right to accuse white wrongdoers – the amendment only protected white people when they were accused by other white people. In 1791, most who had a hand in ratification regarded slaves as property, and therefore without intrinsic rights. Children had no rights themselves, they had no separate standing in law, and any rights they had came through their father (or their parents’ owner) – child labour was the norm for poorer families.

Scalia gives a wonderful example of how a sensible interpretation can be overcome by an ideology or philosophy of reading the words as they are written (without a practical analysis of what happened). Scalia claims the only significant things that have changed from 1791 to the present are: one, society's sensitivity to protect children from trauma (he writes, disparagingly, of “so-called” psychic trauma); and, two, society’s need to have a proper balance between those who have been falsely accused of abuse, and those who have been abused. Think about it. Scalia does not mention significant practical changes to US society such as the end of slavery, the onset of woman suffrage, or other humane extensions to those who are the “people” of the USA – and thus those who can prosecute and can be prosecuted. To talk of a humane society is to differ from Scalia, who believes words and rules overrule compassion. Indeed he thinks words and rules supersede truth and morality, philosophy superseding reality: for example, when talking about a death-penalty case he said “Mere factual innocence is no reason not to carry out a death sentence properly reached.”[5]

Truth and morality are superseded under the George W Bush administration’s radical change to jurisprudence, because they have been supplanted by the administration’s interpretation of words and rules. Not only are prosecution witnesses in “enemy combatant” cases often anonymous, but also the evidence is often not available to the accused because of a “State Secrets” claim. The enemy-combatant tribunal process assures little: neither a speedy and public trial by an impartial jury (or any jury), nor being informed of

4 “And does not the slave system, by denying the slave all legal right of testimony, make every individual owner an irresponsible despot?” (Harriet Beecher Stowe, *Uncle Tom’s Cabin*, 1852)

5 This is a well-known quote that has not been disputed by Scalia, but nobody seems sure where or when it was first made. I guess Scalia knows.

the nature and cause of the accusation. Of course – as the accused are not citizens – some Bush fellow-travellers argue the constitution does not apply to foreigners (including the sixth amendment). They depend on reading of "the people" to mean US citizens, just as at one time it meant white men or (perhaps) white people, so that rights in the constitution are only applicable to US citizens and not to foreigners (or, as they like to emphasize, "aliens").

Making such distinctions has a long tradition in US jurisprudence. US Supreme Court justice John M Harlan was morally outraged when Louisiana segregated accommodation in trains by race (*Plessy v Ferguson*, 1896) though his fellow justices considered the segregation to be acceptable as long as there were "separate but equal accommodations". In Harlan's outraged dissent from the majority decision he did not look at realities when he said "Our constitution is color-blind and neither knows nor tolerates classes among citizens", worthy sentiments but totally wrong. The constitution was not "color-blind" but "color-sighted", because a major component of the US constitution was the preservation of slavery to preserve the unity of the states. Following the path trod by the US declaration of independence, the 1787 constitution made distinctions on the basis of colour and race (though never using the words "colour" or "slave"). These inhumane distinctions were such a basic part of the constitution that they provoked a civil war in which the United States had the US constitution, and the Confederate States had their own constitution, based on their reading of the US version. The confederate version made explicit many distinctions that were implicit in the original – there were no New England sensibilities to consider. So, we read:

> [Article I, Section 2(3)] Representatives and direct taxes shall be apportioned among the several States which may be included within this Confederacy, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three-fifths of all slaves*. ...
> — *Confederate Constitution* (1861) [My *emphasis*]

The US constitution says "three fifths of all other Persons".

Apart from colour and race, the US constitution established many distinct classes amongst citizens. For example, only the class of people who were *born in the USA*, and who were at least "the Age of thirty-five Years " could be president (thus barring Arnold Schwarzenegger, even though he is old enough). John Jay, president of the Continental

Congress, had written to George Washington, presiding officer of the Constitutional Convention engineering the US constitution:

> Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Commander in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen.
> — John Jay, *Letter to George Washington* (25 July 1787)

This expression of nationalist paranoia was added to the document without discussion, and was subsequently ratified as part of the complete package. Like the letter from Burn's mother, Jay's letter changed US constitutional history. Jay was an important social engineer who wrote some of the *Federalist Papers*, and in his first contribution (2: "Concerning Dangers From Foreign Force and Influence") we can read a very clear exposition of what many ex-colonists believed, and something that has many contemporary overtones:

> I have often taken notice that providence has been pleased to give this one connected country to one united people - a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs,
> — John Jay, *Federalist Papers, 2* (31 October1787)

Papers 2-5 were all written by Jay, and all were on the topic "Concerning Dangers From Foreign Force and Influence", so it would seem that such considerations were held to be very important – quite rightly, after a war of independence. To those from outside the USA, modern arguments in support of the "natural-born" provision seem somewhat strained, because surely voters can take the place of a person's birth (and age) into account in making their decisions?[6] Incidentally, William Pitt (the younger) was 24 years old when he became British Prime Minister in 1783 – Pitt was sponsored by George III, who was not very popular in the ex-colonies.

6 Bill Clinton sold his birthplace in his presidential campaign: there was the film "The Man from Hope" (Democratic National Convention, 1992) – Clinton was from a place called Hope, Arkansas.

Only thirty years before Harlan's morally convenient blindness, an explicit class was added to the US constitution (after the US civil war) to try to stop the vote being withheld from ex-slaves or the descendents of slaves – males were not only implicitly preferred, but also they were the only people who could be explicitly counted:

> … But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* twenty-one years of age in such State.
> — Amendment XIV, *US Constitution* (1868) [My *emphasis*]

And fifty-two years later, Harry T Burn's mother's letter was the reason why that distinction, privileging the class of male persons, was removed from the US constitution.