

Spring 2012

Back to the Future (reviewing David Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011))

William D. Araiza

Brooklyn Law School, bill.araiza@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Litigation Commons](#), and the [Other Law Commons](#)

Recommended Citation

28 Const. Comment. 111 (2012-2013)

This Book Review is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Book Reviews

BACK TO THE FUTURE

REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM. By David Bernstein.¹ Chicago, University of Chicago Press. 2011. Pp. viii, 194. \$45.00 (Cloth).

*William D. Araiza*²

“If you think *Roe*³ is right, why do you think *Lochner*⁴ is wrong?”

Constitutional law professors love playing this card with students. We like to think it forces them to confront how their policy preferences influence their legal analysis. And it *is* a nice trick: *Roe v. Wade*⁵ responds to many (though not all⁶) students’ policy intuitions about the desirability of a broad abortion right, while *Lochner v. New York*⁷ is often taught as the paradigmatic anti-canonical case, a dark stain on the Supreme Court in the tradition of *Dred Scott v. Sanford*⁸ and *Plessy v. Ferguson*⁹ (the

1. Foundation Professor of Law, George Mason University School of Law.

2. Professor of Law, Brooklyn Law School. The reviewer wishes to acknowledge the financial support provided by the Brooklyn Law School Dean’s Summer Research Stipend Program. Thanks also to Sara Bernstein and Kristie LaSalle for fine research assistance.

3. *Roe v. Wade*, 410 U.S. 113 (1973).

4. *Lochner v. New York*, 198 U.S. 45 (1905).

5. *Wade*, 410 U.S. at 115.

6. Some studies suggest that young people may be less committed to abortion rights, or at least to the morality of abortion, than suggested by the standard story that holds that younger groups are inevitably more liberal on social issues. See, e.g., ROBERT P. JONES ET AL., COMMITTED TO AVAILABILITY, CONFLICTED ABOUT MORALITY: WHAT THE MILLENNIAL GENERATION TELLS US ABOUT THE FUTURE OF THE ABORTION DEBATE AND THE CULTURE WARS, 8–10 (2011) available at <http://www.publicreligion.org/research/?id=615> (polling data suggesting a “decoupling” of young people’s attitudes toward same-sex marriage and abortion).

7. *Lochner*, 198 U.S. at 45.

8. 60 U.S. 393 (1857).

latter of which is sometimes paired with *Lochner* as the one-two punch of the evil Gilded Age Court).

But not so fast. David Bernstein has done admirable work in debunking the melodramatic aspects of *Lochner*, and of the *Lochner* era more generally. His recent book, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*, while breaking little new analytical ground beyond his voluminous scholarship on the issue,¹⁰ recapitulates his impressive revisionist scholarship about *Lochner* and its eponymous era. His careful research makes clear that the *Lochner* era was not one in which a hopelessly reactionary Court in the service of the economic elite continually used woodenly formalistic reasoning to stymie needed social reform. Instead, he paints a much more balanced picture of the contending forces of the period.

To begin with, Bernstein views the Court's conservatives as sincerely concerned with individual liberty, both in terms of results and philosophy. For example, consider *Meyer v. Nebraska*, the 1923 case where the Court struck down a state law prohibiting the teaching of German.¹¹ Bernstein notes that *Meyer* relied heavily on economic due process precedents, including *Lochner* itself. Thus, to the extent that modern substantive due process cases rely on *Meyer*,¹² a fair case could be made that *Roe* was in fact the spawn of *Lochner*. He also observes that *Meyer* was authored by Justice McReynolds, whose notorious racism and anti-Semitism makes him, at least among the *cognoscenti*, probably the most unattractive villain of the pro-*Lochner* Four

9. 163 U.S. 537 (1896).

10. See generally David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) [hereinafter, Bernstein, *Retrospective*]; David E. Bernstein, Bolling, *Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005) [hereinafter Bernstein, Bolling]; David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) [hereinafter, Bernstein, *Revisionism*]; David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003); David E. Bernstein, *Book Review: Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960 (2001) [hereinafter Bernstein, *Feminist*]; David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

11. 262 U.S. 390 (1923); see also *Bartels v. Iowa*, 262 U.S. 404 (1923) (companion case to *Meyer*).

12. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (citing *Meyer* but concluding that "the more pertinent beginning point" for the Court's substantive due process analysis is *Griswold*); *Roe v. Wade*, 410 U.S. 113, 153 (1973); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing *Meyer* but explaining it as a First Amendment case).

Horsemen.¹³ To gild the lily, one could add to Bernstein's analysis the observation that McReynolds' prose from the follow-on case to *Meyer*, *Pierce v. Society of Sisters*,¹⁴ especially his rejection of the state's authority to "standardize" children,¹⁵ bears for contemporary liberals an uncomfortable resemblance to Justice Brennan's language in *Michael H. v. Gerald D.* about the protection due process affords to the freedom "not to conform."¹⁶

Contrast this picture of the conservative wing of the Court with the picture Bernstein paints of their Progressive opponents, on and off the Court. Rather than viewing them as heroic defenders of the downtrodden, Bernstein sees them as statist who would allow government a free hand to protect white, male, unionized labor at the expense of less favored workers, outlaw private (i.e., Catholic) education, and otherwise trample on individual liberties in the service of broader social goals. Indeed, Bernstein paints the Progressive cause in even darker terms: in Progressives' views, less-capable workers are deemed unworthy of protection if minimum wage laws lead to their exclusion from the job market (pp. 53–54), women are intentionally excluded from that market (pp. 58, 62, 65, 66), and most menacingly, mental "defectives" are susceptible to the state's power to sterilize them for the good of society (pp. 96–98). If Bernstein's description of the conservatives can be summed up by McReynolds's protection of parents' liberty to avoid state "standardization" of their children, his description of the Progressives can be summed up by Holmes' cruel aphorism in *Buck v. Bell*: "Three generations of imbeciles is enough."¹⁷

13. He was also notoriously cruel to his law clerks. See, e.g., Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 733–738 (2003); see also TODD PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 66–68 (2006).

14. 268 U.S. 510 (1925).

15. *Id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

16. 491 U.S. 110, 136, 141 (1989) (Brennan, J., dissenting).

17. *Buck v. Bell*, 274 U.S. 200, 207 (1926). Indeed, the earlier parallel between Justice McReynolds' language in *Meyer* and Justice Brennan's language in *Michael H.*, see text accompanying *supra* notes 14–16, finds a mirror image in the comparison between Justice Holmes and Justice Scalia: in *Lochner*, Holmes insisted that the Court not strike down laws as violating substantive due process unless the statute "would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York*, 198 U.S. 45, 55 (1905) (Holmes J., dissenting), language that would fit comfortably in a due process opinion written by Justice Scalia, see, e.g.,

But the standard *Lochner* story may be invalid for a second reason as well, one that Bernstein does not accept. A second question raised by *Lochner* is whether *Roe* necessarily follows from it, or, by contrast, whether *Roe* and modern due process cases can be understood as having a different parentage. Under an alternative view to Bernstein's, modern substantive due process owes (or should owe) at least as much to equality concerns as to liberty.¹⁸ If this view is accepted, then the *Lochner-Roe* connection is broken, or at least mitigated. In that case, maybe there is an answer to the law professor's gotcha question. Maybe you *can* agree with *Roe* but disagree with *Lochner*.

This Review follows, approximately, the structure of Bernstein's book. Part I reviews the story of *Lochner v. New York*: its facts, the opinions and the question of its jurisprudential foundation. Part II considers *Lochner*'s implications, both for what are now called "civil rights" or "civil liberties" and for minorities. Part III considers the modern implications of the absorption of many *Lochner*-based precedents into equal protection or equal protection-like categories¹⁹—in particular, what that absorption means for *Lochner*'s status as the father that modern substantive due process jurisprudence refuses to acknowledge.²⁰

I. THE *LOCHNER* CASE

A. THE FACTS

Bernstein's description of *Lochner* does much to dispel the notion that the New York Bakeshop Law reflected a simple story of oppressed workers seeking legislative aid against

Lawrence v. Texas, 539 U.S. 586, 593 (2003) (Scalia, J., dissenting).

18. See *infra* Part III.

19. By "equal protection-like" I mean in particular the content-neutrality rule in free speech and the requirement of discrimination in free exercise claims. The former in particular is noteworthy, as the content-neutrality rule derived from a case that was decided as an equal protection case. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); see also *Simon & Schuster v. Members of the N.Y. State Crime Victims Compensation Bd.*, 502 U.S. 105, 124, 125 (1991) (Kennedy, J., concurring) (noting this history, and tracing it to *Carey v. Brown*, 447 U.S. 455 (1980)).

20. E.g., *Roe v. Wade*, 410 U.S. 113, 117 (1973) ("We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*"; *Griswold v. Connecticut*, 381 U.S. 479, 481-482 (1965) ("Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation . . ." (citation omitted)).

powerful capitalists. Bernstein argues that, as is sometimes the case with regulatory legislation, the powerful sectors of the relevant industry supported the law, with an eye to restricting the competition posed by newer, smaller entrants into the market. In this case, Bernstein argues that the large bakeries supporting the law already satisfied its sanitary rules and maximum working-hours provisions, and thus had little to fear from it (p. 27). Conversely, Bernstein argues that the forces opposed to the law were small bakeshops, in particular those owned by recent Jewish, Italian and French immigrants (p. 24).

In setting up the conflict this way, Bernstein returns to a theme that he has expressed before: that ostensibly pro-labor regulatory legislation, such as laws permitting or even requiring closed-shop arrangements, are often really attempts by entrenched groups to secure benefits for themselves by limiting the operation of the free market.²¹ Bernstein has made this point when arguing that pro-union legislation harmed African-Americans who were shut out of those unions because of racism, and thus were shut out of economic opportunities when legislation benefitted union members at the expense of non-union workers. In *Rehabilitating Lochner* he suggests similar effects, if not similar malicious motivation, with regard to laws regulating the terms of work performed by women (pp. 58, 62, 65, 66).²² The heroic picture of Progressive legislatures protecting oppressed workers from rapacious capitalists becomes instead an anti-heroic one where powerful interests groups (now including unions) band together to preserve their monopoly privileges against the striving of less powerful underclass groups.

But problems lurk within this story, even as Bernstein tells it. First, a single piece of legislation may have many different effects, some nefarious and others quite benign. For example, Bernstein cites bakery owners who supported the law in part

21. See DAVID BERNSTEIN, ONLY ONE PLACE FOR REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 111–18 (2001) [hereinafter, BERNSTEIN, ONLY ONE PLACE].

22. See also Bernstein, *Feminist*, *supra* note 10, at 1971 (describing the view of “some reformers” during the *Lochner* era that that “saw women workers as an obstacle to their goal of persuading society that employers should be required to pay male heads of households a wage sufficient to support their families” and writing that “[t]he National Consumers’ League opposed . . . any . . . reform that might tempt women to enter the workforce”); *id.* at 1985 (“[P]rotective [labor] legislation was often promoted by labor unions that excluded women to prevent them from competing for jobs held or sought by union members”).

because they hoped its sanitary provisions would improve the reputation of bakeries, thus leading consumers to patronize them rather than baking their own bread (p. 27). Presumably, government has a legitimate interest in increasing the public's confidence in an industry-based food distribution network, apart from either any discriminatory effects the law might have or any restrictions on liberty of contract it might impose. Concededly, this justification does not mitigate the law's impact on equality or liberty rights. But it does blur the previously-clear picture of the bakeshop law as purely special interest legislation, unless legislative encouragement of industrial growth is itself special interest legislation.²³

Second, the underlying facts justifying legislation are often hard to discern conclusively. Bernstein's own research reveals this. He notes that, in the run-up to the bakeshop law, New York had been roiled by accounts of unsanitary conditions in bakeshops. In particular, he recounts the story of a "dying Jewish baker . . . carried from a cellar bakery on the Lower East Side" in 1894 (p. 25). Based on that event, the bakery union chief convinced a newspaper to run a series of muckraking articles investigating and exposing conditions in bakeshops. But Bernstein expresses some doubt about the accuracy of the reporting, based on the reporter's sympathies and the timing of the article. He also cites two government reports that came to contradictory conclusions about the veracity of the reporter's conclusions (p. 25).

How is a legislature to know which facts most closely approximate reality? More relevantly, how is a court to know? The difficulty courts have in discerning both legislative motivations and underlying policy facts has led, in the modern

23. If such motivations are illegitimate, then presumably broad swaths of the common law designed to further entrepreneurship and risk-taking would be similarly problematic. See, e.g., CORBIN ON CONTRACTS § 11-56 ("The decision [in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex.) 151 (1854) (limiting damages available for breach of contract to those that are foreseeable or avoidable)] was clearly based on the policy of protecting enterprises in the then-burgeoning industrial revolution); Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1096 (2000) (writing, in the context of a discussion of *Hadley*, that "the rule of certainty, like the rule of foreseeability, encourages entrepreneurial risk taking"); Jan Gordon Laitos, *Continuities From the Past Affecting Resource Use and Conservation Patterns*, 28 OKLA. L. REV. 60, 83 (1975) ("The central concept of tort liability [in the nineteenth century] reflected society's favor for production . . . By reducing legal risks through the liability concept, tort law tended to encourage entrepreneurs to venture for productive ends.").

era, to the extreme deference courts exhibit when considering claims of infringements of non-fundamental rights and discrimination against non-suspect classes. Of course, Bernstein is an academic, not a legislator or a judge; based on his historical investigation he might be able to draw more confident conclusions about these issues. But even he is forced to introduce some ambiguity into his narrative. For example, as noted above he cites two different government studies that reached different conclusions about the health risks of bakeshops.

It is probably the case that both public health and anti-newcomer sentiment motivated the New York legislature, just as it is probably the case that the law both advanced public health and disparately impacted newcomers. How great were those effects and what was the legislature's predominant motivation (even assuming legislative motivation is relevant)?²⁴ The difficulty in answering those questions makes judicial review—like that in *Lochner*—difficult. In turn, this difficulty counsels in favor of either narrowing the set of situations where courts will perform careful review, or abandoning the careful review *Lochner* exhibited in favor of more deferential judicial scrutiny. But *Lochner*, by insisting on at least some degree of real judicial review every time a regulation impaired one's ability to act in

24. Bernstein argues that the Court during this period did not inquire into underlying legislative purpose (p. 15). While there is language in the caselaw supporting this conclusion, commentators have sometimes described opinions during this period as turning on considerations of congressional motive. See, e.g., Rosiland Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 663 (2011) (suggesting that the Court considered congressional motive in the child labor cases, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), where the Court rejected, respectively, federal bans on interstate shipment and taxation of child labor-manufactured goods as illegitimate attempts by Congress to regulate manufacturing). Ultimately, the distinction here may turn on whether the term “motive” implies some level of subjective motivation or a “purpose” abstracted out from the necessary effect of the law at issue. See, e.g., *Bailey*, 259 U.S. at 38 (“Although Congress [in the ostensible tax it levied on child labor-manufactured items] does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.”); see also *Lochner v. New York*, 198 U.S. 45, 64 (1905) (“It is impossible to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power . . . are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed . . .”).

the marketplace, opened up the specter of judicial review of every instance of what we now call "economic and social regulation."²⁵

B. A LACK OF DEFERENCE?

Lochner's insistence on more than *pro forma* judicial review in every case of contractual liberty requires an examination of the deference with which the Court acted. Justice Peckham's opinion for the Court has been roundly criticized for its failure to defer to the legislature's determinations. Such deference could take one of two, or possibly three, forms. First, it could take the form of Justice Holmes's presumption that such legislation was constitutional, given his understanding that the Due Process Clause simply did not protect substantive rights such as the right to contract. In a sense, the Holmes approach is not deference at all, as it reflects a bright-line rule that the Constitution simply does not speak to the claim at issue.

A second approach, one that is deferential in the true sense of the word, is reflected by the modern rational basis standard used to decide cases where non-fundamental rights are alleged to be unconstitutionally infringed. This approach, while similarly yielding predictable government wins, at least leaves open the theoretical possibility that a law could be so arbitrary that it violates the substantive guarantee of liberty found in the Due Process Clause. Finally, a third approach, the one associated with Justice Harlan's *Lochner* dissent, defers to government determinations that the public interest requires an infringement on liberty, but does so only after something more than perfunctory judicial review.

Did Justice Peckham really refuse to defer? His opinion for the Court reads at times like a breezy rejection of the legislature's findings: he relied on "the common understanding" that "the trade of a baker has never been understood as an unhealthy one,"²⁶ and then complained that upholding the New York law would render susceptible to state regulation every profession, since, "unfortunately . . . labor, even in any department [sic], may possibly carry with it the seeds of unhealthiness."²⁷ On the other hand, he also wrote that he

25. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 766 (1977) (using this term).

26. *Lochner*, 198 U.S. at 59.

27. *Id.*

reached his conclusion about the health risk of being a baker “in looking through statistics regarding all trades and occupations.”²⁸ Indeed, Bernstein elsewhere argues that Peckham “clearly relied on—but, to the detriment of his reputation, did not explicitly cite—the studies discussed in the appendix to *Lochner*’s brief showing bakers had similar mortality rates to many ordinary professions that the legislature did not regulate.”²⁹ But even had Peckham explicitly cited those studies he still would have been susceptible to the criticism that he was choosing for himself which studies to rely on and which to discredit. By contrast, Harlan explicitly cited studies that supported the view that baking was unhealthful work.³⁰ Based on that evidence, he concluded that the law was not “beyond all question a plain, palpable invasion of rights secured by” the Constitution.³¹ The charge of failure to defer appears solid.

More generally, Bernstein’s careful analysis of the differing deference levels in the various *Lochner* opinions helpfully illuminates two distinct disagreements on the Court. One, between Holmes and the eight Justices comprising the Peckham majority and the Harlan dissent, centered on the existence of an unenumerated right to contract, and, indeed, on whether the Due Process Clause protected any substantive rights whatsoever. The other faultline exposed by *Lochner* concerned the amount of deference legislatures were due when they regulated in ways that impaired contractual liberty. Both of these divisions were moving targets: by 1925, Justice Holmes was willing to recognize, based on the Court’s interpretation of the Due Process Clause in other contexts, that the Clause provided at least some protection for the freedom of speech.³² Similarly, Bernstein notes that in the second decade of the twentieth century the Court became significantly friendlier to government regulation, but then

28. *Id.*

29. See Bernstein, *Retrospective*, *supra* note 10, at 1498.

30. See *Lochner*, 198 U.S. at 71 (Harlan, J., dissenting). Bernstein elsewhere notes that the studies Harlan cited did not appear in New York’s brief. Bernstein, *Retrospective*, *supra* note 10, at 1499.

31. *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

32. See *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (“The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used. . . .”); see also *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (recognizing, based on precedent, that the Due Process Clause provided substantive guarantees that included the First Amendment right to freedom of speech).

increased its scrutiny again with the ascension of several Harding appointees (pp. 48–49).

Here again Bernstein performs a useful service by performing a more fine-grained analysis of the *Lochner* Court. In particular, by considering Harlan's dissent he does much to dispel the black-and-white narrative that too often passes as the truth about *Lochner*. However, his carefulness in delineating the different phases of the *Lochner* era has the ironic effect of watering down the force of his argument about the Court's mode of analysis during this period, and the implications of its approach. Simply put, it is harder to paint a coherent picture of how much the Court deferred to legislative judgments (and thus how strictly it protected the right to contract), and how its approach impacted minorities and other outsiders, given the Court's evolution from its early-phase stringent review to its middle-phase (relatively) lenient review, and then back again.³³

Obviously, it's not Bernstein's fault that the Court didn't apply a consistent analytical approach during this period, even if that ambiguity does muddy his underlying narrative. More importantly for our purposes, the question of how much the *Lochner*-era Court really deferred to marketplace regulation becomes less important once the economic regulation cases provided the foundation for the Court's non-economic liberty jurisprudence. To the extent the marketplace cases generated *Meyer* and its progeny, the impact of that generative process persisted, even if the stringency of the Court's underlying economic due process analysis waxed and waned.

C. LIBERTY OR EQUALITY?

In *Rehabilitating Lochner*, Bernstein makes a powerful argument that *Lochner* was based on liberty rather than equality concerns. To many ears this may sound obvious. However, Bernstein rightly chooses to spend time addressing the argument, most fully developed by Michael Les Benedict and Howard Gillman, that *Lochner*-era jurisprudence focused less on protecting individual liberty than on ensuring that government not enact so-called "class legislation."³⁴ Anxiety about class

33. Indeed, Bernstein speculates that *Lochner* itself included statements that not all members of the five-Justice majority agreed with (pp. 34–35). Thus, even the case itself arguably stands for less than what it appears to at face value.

34. See generally Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation*

legislation—that is, legislation that bestowed benefits and burdens unequally, and in particular legislation that granted monopoly privileges—was surely a major concern of the Fourteenth Amendment. Bernstein acknowledges that avoidance of class legislation was a major concern of the original framers (who expressed it as a concern about faction),³⁵ antebellum constitutional thinkers and the framers of the Fourteenth Amendment (pp. 14–15).³⁶ But in his other writing, Bernstein argues that the class legislation prohibition was never interpreted stringently by the Supreme Court.³⁷ Indeed, he contrasts the Supreme Court with some state high courts, which he argues enforced equality guarantees strictly.³⁸

It is difficult in a short review to evaluate which side has the better of the debate, in large part because, as Bernstein himself notes, class legislation restrictions constituted part of the Court's understanding of due process. This should not be surprising: our current practice of rigidly separating substantive rights, protected under due process, from equality rights, protected under equal protection, was likely alien to the Fourteenth Amendment's drafters, or at least not their primary understanding.³⁹ For confirmation, one need only look to the Civil Rights Act of 1866, which protected not a particular level of contract and property rights, but the same level of protection as that a state granted white citizens.⁴⁰

For our purposes, it is unnecessary to resolve this dispute. Regardless of *Lochner's* basis, the fact remains that the *Meyer* line of cases began to diverge from any explicit concern with

of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 L. & HIST. REV. 293 (1985); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

35. See, e.g., GILLMAN, *supra* note 34, at 22 (“[t]he distinctions *Lochner* era judges attempted to draw between valid public-purpose legislation . . . and invalid class legislation . . . had their origins in a similar set of distinctions elaborated by the framers of the Constitution”).

36. Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1373–74 (1990); see also Melissa L. Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 MICH. L. REV. 245, 251–68 (1997).

37. See Bernstein, *Revisionism*, *supra* note 10, at 15–21; Bernstein, *Feminist*, *supra* note 10, at 1963.

38. See Bernstein, *Revisionism*, *supra* note 10, at 18–20.

39. A vestige of this understanding may remain today in the fundamental rights strand of equal protection. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

40. See, e.g., Jacobus tenBroek, *Equal Under Law* 237 (1965) (concluding that the Equal Protection Clause required full—that is, substantive—protection for these rights).

class legislation or equality. Certainly these cases can be understood as dealing with unequal or discriminatory legislation. Indeed, that fact may allow their legitimate reconceptualization as cases about discrimination.⁴¹ But language about class legislation is largely absent from the actual opinions. Thus, one can remain agnostic about the liberty vs. class legislation debate in *Lochner* while still recognizing that, somehow, *Lochner's* progeny became based on substantive liberty rather than on the requirement that all legislation be general.

II. *LOCHNER'S* IMPLICATIONS

The middle chapters of *Rehabilitating Lochner*—Chapters 4 and 5, and to a great degree Chapter 6—consider *Lochner's* implications for, respectively, sex equality, racial equality, and what we now call “civil rights” or “civil liberties.” Bernstein makes important claims in these chapters, which are all the more significant because they challenge the standard view that *Lochner*-era jurisprudence inevitably favored powerful interests at the expense of the powerless. These claims deserve a closer look.

A. CIVIL LIBERTIES AND *LOCHNER*

What did *Lochner* mean for the rights we today call “civil rights” or “civil liberties?” Bernstein is persuasive in arguing that *Lochner* was the doctrinal font for the Court's gradual embrace of such rights in the 1920's and 1930's. He notes that Justice McReynolds's opinion in *Meyer v. Nebraska*⁴² relied heavily on economic due process cases as support for the proposition that the Due Process Clause protects a parent's right to direct his child's upbringing.⁴³ More generally, *Lochner*-era Justices favoring the right to contract also played important roles in expanding civil liberties. For example, Justice McReynolds, in

41. See *infra* Part II(A).

42. 262 U.S. 390 (1923); see also *Bartels v. Iowa*, 262 U.S. 404 (1923) (companion case to *Meyer*).

43. Later opinions upholding constitutional rights claims did not rely as heavily on economic due process as the foundation. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60-67 (1932) (relying on history and general statements in early cases about the possibility that “due process” included specific Bill of Rights guarantees to incorporate the Sixth Amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming, without deciding or giving extended discussion, that due process liberty included the freedom of speech). But see 268 U.S. at 666 n.9 (citing, among other cases, the statement in *Coppage v. Kansas*, 236 U.S. 1, 17 (1915), that liberty and property are “human rights”).

writing *Meyer*, used expansive language about the scope of individual liberty,⁴⁴ while Justice Sutherland wrote important civil liberties opinions in the criminal procedure⁴⁵ and press freedom⁴⁶ areas. Conversely, Justices Holmes and Brandeis were, at best, reluctant converts to the cause of substantive due process liberty.⁴⁷

So it seems like an open and shut case that *Lochner* is the font of the Court's first protections of civil liberties, and thus of the Court's modern individual rights jurisprudence. But the picture is at least slightly more complicated. As Bernstein himself has noted in his previous scholarship on the *Lochner* era, many of those early civil rights cases dealt with government action that had severe disparate impacts on minorities. The statute struck down in *Meyer* was the product of anti-German xenophobia during the World War I era,⁴⁸ while the law at issue in *Pierce v. Society of Sisters* clearly aimed at Catholic education,⁴⁹ the hangover from the bitter nineteenth century disputes between Protestants seeking to inculcate their religious values via public education and Catholics seeking to preserve

44. See *Meyer*, 262 U.S. at 399 ("While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

45. See *Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* was the case dealing with "the Scottsboro Boys," African-American young men who were victimized by a racist criminal justice system in the South.

46. See *Am. Press v. Grosjean*, 297 U.S. 233 (1936); ARTHUR HELLMAN, WILLIAM ARAIZA AND THOMAS BAKER, *FIRST AMENDMENT LAW: FREEDOM OF SPEECH AND RELIGION* 820 (2nd ed. 2010) (noting Sutherland's position).

47. See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."); *Gillow*, 258 U.S. at 671 (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used"); see also p. 101 (describing Holmes' recognition that due process protects the freedom of speech as "grudging").

48. See Bernstein, *Bolling*, *supra* note 10, at 1273 ("The *Meyer* law had been motivated by nativist hysteria attendant to World War I.").

49. See Bernstein, *Bolling*, *supra* note 10, at 1274 (describing the law struck down in *Pierce* as "inspired by anti-Catholic sentiment"). For an alternative view, see Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J. L. & FAM. STUD. 87, 105-09 (2010) (arguing that the Oregon referendum leading to the law struck down in *Pierce* was not heavily motivated by anti-Catholic animus).

their values via parochial education.⁵⁰ The major speech cases of the era all dealt (as they usually do) with the speech of dissenters, usually unpopular ones at that.⁵¹ For their part the criminal procedure cases dealt with criminal defendants, hardly the most popular group in any polity. This fact was especially true during this era, as the key cases that began using the Due Process Clause to incorporate the Bill of Rights' criminal procedure provisions dealt with racist southern criminal justice systems and African-American defendants.⁵²

Indeed, as Bernstein briefly notes (p. 104), the Court in the famous footnote four of *United States v. Carolene Products*⁵³ transformed *Meyer*, *Pierce* and similar cases⁵⁴ into cases that stood for the proposition that "similar considerations [requiring more stringent judicial review than normal] enter into the review of statutes directed at particular religious or national or racial minorities."⁵⁵ Bernstein is more than grudging here: referring to footnote four's treatment of the *Meyer* line of cases, he writes as follows: "The Court creatively reinterpreted—that is, intentionally misinterpreted—*Meyer* and *Pierce* as decisions invalidating laws because the laws discriminated against minorities" (p. 104).

50. See, e.g., Meir Katz, *The Economics of Section 170: A Case for the Charitable Deduction of Parochial School Tuition*, 12 RUTGERS J.L. & RELIGION 224, 259 n.134 (2011) (noting this phenomenon in the late nineteenth and early twentieth centuries); Christopher C. Lund, *The New Victims of the Old-Anti-Catholicism* 4–7, 10–11 (Wayne State University Law School Working Paper No. 10-13), available at <http://ssrn.com/abstract=1943646> (same); see also *id.* at n.1 (citing sources); Bernstein, Bolling, *supra* note 10, at 1274 (discussing *Farrington v. Tokushige*, 273 U.S. 284 (1927), a case dealing with a Hawaii law restricting foreign-language education, which Bernstein describes as "designed to shut down Japanese-language schools in Hawaii").

51. E.g., *Gillow*, 268 U.S. at 252 (considering a free speech challenge to a New York law aimed at agitation in favor of the overthrow of private property); *Herndon v. Lowery*, 301 U.S. 242 (1937) (finding First Amendment protection for Communist literature calling for a separate state for African Americans living in the South).

52. E.g., *Powell v. Alabama*, 287 U.S. 45 (1932) ("Scottsboro Boys" case). Note, however, that pro-*Lochner* Justices Butler and McReynolds dissented in *Powell*, albeit on a narrow ground. See Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492 n.18 (2009) (citing cases); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 764 (1991) ("The vast majority of the Court's first constitutional interventions in state criminal procedure involved the Jim Crow 'justice' southern states meted out to black defendants.").

53. 304 U.S. 144, 152 n.4 (1938).

54. See *id.* (citing *Meyer*, *Pierce*, and also *Bartels v. Iowa*, 262 U.S. 404 (1923), the companion case to *Meyer*, and *Farrington*, which dealt with a similar restriction on foreign-language schools in the very different context of Hawaii, where the Court, relying on *Meyer*, *Pierce* and *Bartels*, struck down the law).

55. *Id.*

The stridency of Bernstein's criticism seems a little unfair. Bernstein does not develop the argument in *Rehabilitating Lochner*, but in other scholarship he has argued that the *Meyer* line of cases and others (most notably *Adkins v. Children's Hospital*⁵⁶ and *Buchanan v. Warley*⁵⁷) are based on an approach in which, once a court identifies a protected liberty interest that the law infringes, discriminatory motives or goals are insufficient to provide a police power justification for the infringement.⁵⁸ Thus, his argument with regard to footnote four's treatment of *Meyer* seems to be that footnote four focused on the fact of discrimination, rather than on the insufficiency of discriminatory motives as justification for an infringement on liberty rights.

In theory this is a real distinction. Under Bernstein's understanding of how the *Lochner*-era Court analyzed cases like *Meyer*, a crucial first step was the identification of a liberty right. If no liberty right was at stake, that was the end of the case—the government won. But if such a liberty right did exist, the government could not justify its infringement by claiming a discriminatory motive.⁵⁹ By contrast, under footnote four's formula, discrimination against a “discrete and insular” minority triggered closer judicial scrutiny. Not only was there not any preliminary inquiry into the existence of a liberty interest, but the entire focus of the analysis moved away from the government's police power-based reasons for infringing on a liberty interest and toward to the government's justifications for the discrimination itself. In sum, the focus shifts from liberty interests to anti-discrimination *simpliciter*.

But this distinction may be more theoretical than real, at least if due process is to do the work Bernstein thinks it should. Consider *Bolling v. Sharpe*,⁶⁰ the companion case to *Brown v.*

56. 261 U.S. 525 (1923) (striking down a District of Columbia ordinance mandating a minimum wage for women).

57. 245 U.S. 60 (1917) (striking down a Louisville, Kentucky, ordinance prohibiting real estate sales that would lead to residential integration).

58. See Bernstein, *Bolling*, *supra* note 10, at 1270–73.

59. See, e.g., *Buchanan*, 245 U.S. at 80–82 (noting, and rejecting, the city's race-based reasons for the ordinance); *Adkins*, 261 U.S. at 552–53 (noting, and rejecting, the government's arguments about women's incapacity to contract as justifications for the law); see also Bernstein, *Bolling*, *supra* note 10, at 1272 (“In *Buchanan* the Court held that denial of property rights for African Americans could not be based on weak race-related police power rationales. In *Adkins*, the Court held that women could not be denied liberty of contract based solely on weak gender-related police power rationales.”).

60. 347 U.S. 497 (1954).

Board of Education,⁶¹ in which the Court struck down school segregation in District of Columbia schools. As Bernstein has elsewhere argued,⁶² *Bolling* is a confused opinion. The absence of an Equal Protection Clause binding the federal government required the Court to rely on the Fifth Amendment's Due Process Clause. While that Clause had long been understood as including some restriction on discrimination,⁶³ *Bolling's* reliance on due process inevitably raised the specter of resurrecting *Lochner*-era jurisprudence, especially given how the *Lochner*-era Court had combined concepts of liberty and equality.

Bernstein has argued that *Bolling* would have been a more coherent opinion had the Court forthrightly relied on the *Meyer* line of cases to recognize a liberty to attend a non-segregated public school, and then, following *Lochner*-era analysis, had rejected racially discriminatory justifications for the law.⁶⁴ But this approach requires recognizing a liberty interest in attending a non-segregated *public* school. That move seems to be a stretch. As Bernstein himself notes, it is susceptible to the objection that "once a *Lochnerian* Court acknowledged that access to a government-provided service could be construed as a *liberty* right, the entire classical/libertarian edifice of *Lochner* would be lost."⁶⁵ His response—that "a libertarian might argue that to subsidize one group is the economic equivalent of taxing its competitors"—and thus that "[t]o subsidize whites' education more than blacks' education . . . is, by economists' lights, the equivalent of taxing blacks more than whites"⁶⁶ seems, at least at first glance, to erase any boundaries on what we call liberty rights. If discriminatory access to public education violates the victim's liberty, then presumably so does discriminatory access to a government contract⁶⁷ or broadcasting license,⁶⁸ or discriminatory access to any government service at all.⁶⁹ If

61. 347 U.S. 483 (1954).

62. See generally Bernstein, *Bolling*, *supra* note 10.

63. See generally *id.*

64. See, e.g., *id.* at 1282.

65. *Id.* at 1283 (emphasis in original).

66. *Id.*

67. E.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

68. E.g., *Metro Broad. v. FCC*, 497 U.S. 547 (1990).

69. E.g., *Kotch v. Bd. of Riverboat Pilot Comm'rs*, 330 U.S. 552 (1947) (government appointment as riverboat pilot); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (discriminatory access to a city water hookup).

anything becomes a liberty interest, then searching for a liberty interest becomes a purely formalistic exercise.⁷⁰

The upshot is that if Bernstein is going to argue that the *Bolling* Court could have reached the same result via the standard *Lochner*-style approach to discriminatory deprivations of liberty, then presumably most, if not all, modern equal protection fact patterns can be understood in this way as well. Perhaps more to the point, if one is willing to expand the notion of liberty as Bernstein is in his discussion of *Bolling*, then the *Lochner* Court's own precedents—*Meyer*, *Pierce*, *Farrington*, *Buchanan* and *Adkins*—can be legitimately understood as cases focusing on the discrimination, not on the liberty interest.

Hence my suggestion that Bernstein is perhaps too harsh in his evaluation of *Carolene Products*'s reconceptualization of the *Lochner*-era civil rights cases. In addition to the analysis sketched out above, the rhetoric of those cases rests easily within a basic concern for equality, separate from the status of the regulated conduct as a liberty interest. For example, *Adkins*' concern for the equal dignity of women fits easily within modern equal protection doctrine's aspiration to eradicate stereotypes about women's capabilities while recognizing government's legitimate authority to compensate women for past discrimination and account for real differences between the sexes.⁷¹ Similarly, Justice McReynolds' refusal in *Pierce* to allow the government to "standardize" its children⁷² can be reasonably

70. It is true enough that there remains a distinction between the *Lochner* Court's second step—considering the police power justifications for the law—and modern equal protection doctrine's approach of considering the government interests behind the challenged classification. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (testing the state's gender-based classification against its highway-safety justifications). But this may be a distinction without a difference. The type of police power argument that government may have made, say, in *Adkins*—that women are incapable of contracting as effectively as men, and thus need the government's assistance—closely tracks the type of argument a modern government-defendant would make when defending a classification against an equal protection challenge. For example, a modern government-defendant defending a law classifying based on gender might well argue that women are truly different from men, and merit different treatment. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001) (accepting this type of argument). Of course, there still has to be some positive justification for the law, rather than simply a claim that the two groups are similarly situated. This is simply a restatement of the fundamental rule that every law must have a justification. But if Bernstein is correct that the *Lochner*-era Court gave legislatures broad latitude to legislate for the public good, then the deference with which the modern Court applies this rule would not differ greatly from how the *Lochner* Court would apply the analogous rule that a law must be within the government's police power.

71. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 547 (1996).

72. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

read as reflecting a concern about dissenting or minority approaches to basic issues such as child-rearing and family structure.⁷³

Such a reconceptualization would not make the *Pierce* line of cases incoherent or anomalous. For example, approximately sixty years after *Meyer*, Justice Brennan in *Michael H. v. Gerald D.*—another due process case—spoke of the freedom “not to conform.”⁷⁴ Tellingly, such freedoms have also been vindicated via the Equal Protection Clause.⁷⁵ And approximately sixty years before *Meyer*, the Civil Rights Act of 1866 guaranteed to all individuals the “same rights” to contractual and other liberties,⁷⁶ an equality right whose constitutionalization all agree was at least one of the major goals of the Fourteenth Amendment.⁷⁷ Indeed, even during the *Lochner* era the Court was already experimenting with this reconceptualization. For example, in *Nixon v. Herndon*,⁷⁸ seemingly an equal protection case,⁷⁹ the Court cited *Buchanan* as an example of invidious race discrimination, without any mention of the liberty interest *Buchanan* originally focused on.⁸⁰

73. This concern can work its way through the doctrine either via due process, as with *Pierce* and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (considering a challenge to a California law conclusively presuming paternity to the husband of a woman bearing a child), or equal protection, as with *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down, as violating equal protection, a law that denied food stamp benefits to members of unrelated communal homes). See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455 (1985) (Marshall, J., concurring in the judgment) (agreeing that a city's denial of a zoning exemption to a group seeking to establish a group home for mentally retarded persons violated equal protection, but arguing that the level of scrutiny to be accorded the government action should depend in part on the fact that the action infringed on the right to establish a residence in a given area). See also *supra* note 39.

74. See *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting); see also text accompanying *supra* note 16 (repeating this parallel).

75. See *supra* note 73.

76. Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27.

77. E.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 26–27 (2d ed. 1997); WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 104 (1988); TENBROEK, *supra* note 40 at 224–25.

78. 286 U.S. 73 (1932) (striking down a Texas law authorizing state political parties to exclude whoever they wished from primary voting, as violating the Fourteenth Amendment when applied by the state Democratic Party to exclude African-Americans).

79. See *id.* at 89 (“The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.”).

80. See *id.* at 89 (“Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Buchanan v. Warley*, 245 U. S. 60, 77 [(1917)]. The Fourteenth Amendment, adopted as

Thus, it is not self-evident that Justice Stone's "creative[] misinterpret[ation]" of the *Meyer* line of cases was illegitimate, as suggested by Bernstein's dismissal of that move. Creative, yes—even aggressive. Bernstein is right that the *Lochner*-era civil rights opinions were doctrinally focused on due process. But the fact that due process doctrine rejected discrimination as a legitimate police power objective means that equality considerations would enter into the Court's analysis, at least in cases that were ripe for recasting in footnote four as equal protection cases. This recasting is not necessarily illegitimate, if by 1938 the Court had come to realize that the *Meyer* line of cases, the Court's then-nascent protection for speech, association and voting rights, and indeed, the protection of all Bill of Rights provisions it decided to incorporate, were correct exactly because they presented appropriately-cabined situations where more intrusive judicial review was called for, while avoiding such review every time government regulated the marketplace.⁸¹

Bernstein is also correct when he states, immediately after the "intentionally misinterpreted" sentence above,⁸² that footnote four "was the Court's first of several attempts to preserve [the *Meyer*] line of cases by disentangling them from their roots in the now-obsolete liberty of contract line of cases" (p. 104). But by itself that does not prove that the Court's action was illegitimate. It is not unknown for the Court to "disentangle" holdings it deems correct from an underlying context or foundation it finds problematic.⁸³ Concededly, such attempts are potentially problematic, exactly because they provoke the response that the Court is simply picking the results it wants to preserve and pruning away the context of surrounding undesirable results in an unprincipled way.⁸⁴ But given the

it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." (parallel and additional citations omitted)).

81. As implied by *Carolene Products*, such careful review is justified in these situations because of either the likelihood of a political process breakdown or, in the case of specific Bill of Rights provisions, the greater legitimacy of judicial enforcement of specifically-worded constraints on government action. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

82. See *supra* text accompanying note 53.

83. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (arguing that it is preserving the "central holding" of *Roe* while correcting other doctrinal mistakes *Roe* made).

84. See, e.g., *id.* at 979, 993 (Scalia, J., concurring in the judgment in part and dissenting in part) (making a similar objection to the joint opinion's treatment of *Roe*).

foundation of the Fourteenth Amendment's framers' concern with both liberty and equality, not to mention later justices' attempts to determine the scope of due process rights by recourse to equality concerns,⁸⁵ Stone's reconceptualization of these cases deserves at least more study than the quick dismissal Bernstein provides.

Regardless of one's views about this question, the point remains that *Lochner* did ultimately make footnote four possible, by paving the way for cases like *Meyer* and in turn their eventual reconceptualization as equality cases. This insight raises a further, more practical question about *Lochner* and minorities: how good was *Lochner* itself for the minorities that its progeny eventually were understood to protect?

B. *LOCHNER* AND MINORITIES

Bernstein argues forcefully that *Lochner*, and the muscular protection of substantive due process rights it represents, was good for minorities. As explained above, he draws a clear line connecting *Lochner*, the *Meyer* line of cases and the Court's ultimate protection of free expression and criminal procedure rights. His argument is hard to refute: even if, as suggested above, the non-economic due process cases can legitimately be reconceptualized as cases about discrimination, the fact remains that the opinions themselves relied on *Lochner* and its progeny. In this way, Bernstein is right to conclude that *Lochner* eventually redounded to the significant benefit of minorities.

However, Bernstein pushes the argument further. First, he argues that economic due process itself helped minorities by providing a means for courts to strike down discriminatory government action that impeded the core *Lochner* right to contract. In *Rehabilitating Lochner*, Bernstein presses the point that *Lochner*, by leading to the striking down of the Louisville, Kentucky, residential segregation ordinance in *Buchanan v. Warley*,⁸⁶ provided an important tool for African-Americans to gain a residential and thus social foothold in major cities.

85. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (arguing that due process protects the "freedom not to conform"); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting that a holding about the due process right of gays and lesbians to engage in consensual non-commercial sexual intimacy also furthers equal protection values).

86. 245 U.S. 60 (1917).

This is a provocative claim. To his credit, Bernstein does not over-argue it. Thus, he writes:

Giving *Buchanan* its due does not absolve the Supreme Court of its acquiescence to Jim Crow in other contexts. Nor does it remotely suggest that the pre-New Deal Court's civil rights jurisprudence was superior to that of later Supreme Courts which, like American society more generally, became increasingly egalitarian on race. But, given that advocates of racial equality were a distinct minority among Progressives, the practical alternative to the early twentieth century's liberty of contract jurisprudence was not the Warren Court's liberalism but the indifference or hostility to the rights of African Americans shown by most Progressive legal elites (p. 85).

Still, Bernstein insists that "*Buchanan*'s implicit protection of [African-American] migration to urban areas, north and south, proved a crucial turning point in African American history"⁸⁷ (p. 83).

This claim seems to me unproven, at least in *Rehabilitating Lochner*. Indeed, the structure of the sentence quoted above suggests that Bernstein himself may not consider the claim fully proven: the way he writes the sentence, what proved to be "a crucial turning point in African American history" was the *implicit* protection provided by *Buchanan*. It's not clear how an implicit effect can confidently be stated as providing "a crucial turning point" in history. More generally (if still technically), as a historical matter the great migration of African-Americans to the north was already under way by 1917.⁸⁸ If *Buchanan* had come out the other way would that phenomenon have reversed? Probably not, although it's certainly plausible that it might have been mitigated, or that the arriving African-American populations would have found themselves even more socially isolated than they ended up being.

But a larger problem confronts Bernstein's claim that *Lochner*, via *Buchanan*, hastened African-Americans' full geographic and social integration into American life. This larger

87. See also Bernstein, *Retrospective*, *supra* note 10, at 1505–06 (*Buchanan* "allowed hundreds of thousands of African Americans to leave impoverished rural plantations for a better life in cities.").

88. See, e.g., Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 897–98 (1998) ("Black migration northwards, which had appreciably increased in the 1890's and 1900's, exploded in 1916 owing to World War I."); *id.* at 900.

problem in turn casts doubt on *Lochner*'s more general benefits for minorities. If *Buchanan* prevented cities from enacting laws like the Louisville segregation ordinance, then it must also be recognized that residential segregation continued unabated throughout the *Lochner* period. Northern cities were not suddenly integrated because of *Buchanan*. If the response to this observation is that that segregation arose from private choices rather than government action, the reply is that such private choices themselves would likely have been constitutionally protected by the same *Lochner* doctrine. Indeed, a case of a white seller refusing to sell to a black buyer in defiance of a non-discrimination ordinance would feature the mirror image of the rights claim vindicated in *Buchanan*. More generally, restrictive covenants, famously struck down in *Shelley v. Kraemer*⁸⁹ and *Barrows v. Jackson*,⁹⁰ featured private party contracts that the *Lochner* Court presumably would have respected.⁹¹

Concededly, the key issue in *Shelley* and *Barrows* was the Court's conclusion that judicial enforcement of the covenant constituted state action—not, at least technically, a rejection of property owners' claims that they had the right to contract to dispose of their property as they wished.⁹² Nevertheless, it is hard to believe that the *Lochner* Court, so committed to respecting a sphere of private freedom of action, would have adopted the same state action analysis as that of the very different, Roosevelt-dominated, Court in *Shelley* and *Barrows*. Indeed, *Plessy v. Ferguson*'s stubborn insistence that any badge of inferiority connoted by the Louisiana train segregation statute

89. 334 U.S. 1 (1948).

90. 346 U.S. 249 (1953).

91. See *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (suggesting the meritlessness of a claim that judicial enforcement of a racially restrictive covenant by a District of Columbia court violated the Fifth or Fourteenth Amendment); see also Klarman, *supra* note 88, at 942 n.336 (noting state court decisions holding that such judicial enforcement did not constitute state action).

92. Of course, the Court's broad understanding of state action in *Shelley* had the potential effect of converting private contractual decisions into state action. In this sense, *Shelley*'s state action analysis effectively restricted private parties' contractual freedom by rendering that freedom subject to the requirements of the Fourteenth Amendment, at least to the extent a contracting party sought a court's aid in vindicating the terms of the contract.

Commentators have noted the potentially broad effect of *Shelley*'s analysis on private parties' freedom to contract as they wish. See, e.g., ALLAN IDES & CHRISTOPHER MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 20–21 (5th ed. 2010); Martin Dolan, Comment, *State Inaction and Section 1985(3): United Brotherhood of Carpenters and Joiners of America v. Scott*, 71 IOWA L. REV. 1271, 1280–81 (1986).

flowed from African-Americans' own perceptions, and not the state itself,⁹³ suggests that the *Lochner*-era Court was not committed to a broad conception of state action.⁹⁴ Thus, instances of private discrimination with regard to real estate transactions not only continued to exist after *Buchanan*, but presumably enjoyed constitutional protection based on the same freedom of contract doctrine that underlay *Buchanan* itself.

If this analysis is correct, it follows that legislative action attacking such private discriminatory choices—not just in real estate, but more generally throughout the economy—would also be suspect under *Lochner*-style reasoning. In particular, employment non-discrimination and other similar laws likely would have been attacked during this era as inconsistent with *Lochner*'s presumptive protection for the rights of individuals to decide with whom they wished to deal.⁹⁵ If a law prohibiting employers from demanding that would-be employees not join a union unconstitutionally violated both groups' freedom of contract,⁹⁶ then presumably a law requiring employers, shop-

93. See *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

94. It is true that the Court was willing to find state action in legislation that authorized political party action. See *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down, as state action violating the Fourteenth Amendment, a Texas law authorizing state political committees to set their own membership qualifications, as implemented by the state Democratic Party in a racially discriminatory way); *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating a predecessor statute to the one struck down in *Condon*, which explicitly barred African-Americans from participating in a Democratic Party primary, but not discussing the state action issue). The *Herndon* statute's explicit government discrimination makes it understandable why the state action issue was not explicitly discussed. It is worth noting that where that issue mattered, in *Condon*, the Four Horsemen dissented. See *Condon*, 286 U.S. at 90 (McReynolds, J., dissenting).

95. See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 384 (2003) ("Anti-discrimination laws did not exist during the *Lochner* era but would certainly be challenged as abridgments of freedom of contract today if *Lochner* survived."); Klarman, *supra* note 88, at 939 n.323 ("The same substantive due process notions that invalidate residential segregation ordinances can be invoked to invalidate civil rights statutes on the ground that the state should not interfere with the contractual freedom of employers or owners of places of public accommodation."). With regard to places of public accommodation it is at least possible that their common law foundation might save their constitutionality, to the extent that foundation implied a legitimate police power justification for them. See generally Joseph Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

96. *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state law prohibiting discharge of an employee for joining a union); *Adair v. United States*, 208 U.S. 161 (1908) (striking down similar federal law).

keepers and real property owners not to discriminate would be similarly vulnerable, even in light of the fact that the *Lochner* Court upheld much social and economic regulation. It was only when the right to contract fell from favor that the due process argument against such laws became, if not frivolous, then at least a likely loser.⁹⁷

Second, as a practical matter it's not clear what effect *Lochner* had on minorities. In *Rehabilitating Lochner* Bernstein cites only a state court case from Georgia, invalidating a law prohibiting black barbers from cutting white children's hair, as an example of "liberty of contract reasoning" that was used in a way to further the interests of African-Americans⁹⁸ (p. 85). To his credit, Bernstein recognizes that civil rights lawyers of the era did not have the resources to litigate such claims aggressively. He also suggests that groups such as the NAACP were not inclined to rely on liberty of contract reasoning, since "by the 1920's the NAACP's leadership had an economically 'Progressive' outlook, and was therefore hesitant to rely on 'conservative' constitutional doctrines like liberty of contract" (p. 85).

These observations betray more ambiguities with Bernstein's thesis that, for minorities, the liberty of contract was, if not perfect, at least the best thing they had going.⁹⁹ Most notably, if the lack of resources meant that civil rights groups were not able to enforce African-Americans' contractual liberty rights then one can at least argue that a better strategy would have been for them to enlist the aid of government, via anti-discrimination statutes. Of course, Bernstein is correct in his implicit suggestion that aggressive non-discrimination legislation was not forthcoming in the 1920's.¹⁰⁰ In that sense, there's merit

97. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258-59 (1964) (rejecting a due process challenge to the public accommodations provisions of the Civil Rights Act of 1964 by applying a very deferential rational basis standard); *id.* at 275, 277 (Black, J., concurring) ("In the past this Court has consistently held that regulation of the use of property by the Federal Government or the States does not violate either the Fifth or the Fourteenth Amendment.").

98. Bernstein does cite one other case, dealing with ethnic Chinese merchants in the Philippines, where liberty of contract reasoning was used to assist an ethnic minority. (p. 85 n.93, citing *Yu Cong Eng v. Trinidad*, 271 U.S. 50 (1926) (invalidating a Philippines law requiring that business records be kept either in English or Spanish)).

99. Bernstein has developed this thesis in more detail elsewhere. See BERNSTEIN, *ONLY ONE PLACE*, *supra* note 21.

100. On the other hand, by the 1920's some states had enacted public accommodations laws. See, e.g., Singer, *supra* note 95, at 1374 (noting that states started

in his claim that *Lochner* might have been the best tool minorities had. But again, to the extent that such legislation would have been threatened by exactly that same liberty of contract doctrine, it may be the case that had *Lochner* survived into the civil rights era it would have impeded African-Americans' civil rights legislative agenda.¹⁰¹

This insight perhaps suggests why the NAACP leadership "was . . . hesitant to rely on 'conservative' constitutional doctrines like liberty of contract"¹⁰² (p. 85). Alternatively, perhaps that hesitancy was based more on the needs of a tactical alliance with anti-*Lochner* northern Progressives. But if this latter speculate is accurate, it starts to blur the clarity of Bernstein's picture of a Progressive movement largely hostile to minorities.¹⁰³ In sum, either the NAACP leadership concluded that liberty of contract would ultimately redound to African-Americans' detriment, or they calculated that an alliance with northern, anti-*Lochner*, Progressives was more important than any marginal advantage they could win by relying on *Lochner*. Either possibility creates at least some tension with Bernstein's overall narrative.

These arguments by no means completely refute Bernstein's claim that, given the available options, *Lochner* was the strongest tool minorities (and particularly African-Americans) possessed. Still, the vulnerability of anti-discrimination legislation to liberty of contract reasoning makes it plausible to conclude that equality advocates were ultimately correct to downplay reliance on *Lochner*. At the very least, the fact that the NAACP leadership—hardly unsophisticated advocates—disdained that reasoning suggests that there must have been a good reason for them to believe that *Lochner* was not the right path to take. Indeed, the fact that *Carolene Products* ultimately

enacting such laws in the immediate post-Civil War period).

101. In other writing Bernstein appears to agree with this assessment. See BERNSTEIN, ONLY ONE PLACE, *supra* note 21, at 113–14.

102. Similarly, at least some women's rights groups during this era favored protective legislation for all workers, a position inconsistent with support for an extension of *Lochner*'s contractual liberty right to women. See, e.g., JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 187, 198 (2001) (cited in Bernstein, *Feminist*, *supra* note 10, at 1975).

103. In a footnote Bernstein does acknowledge that some pro-civil rights Progressives favored unions despite the latter's racism, on the theory that unionization represented the best long-term hope for African-Americans' economic prospects (p. 52 n.108).

provided a formula for protecting African-Americans' equality rights while simultaneously preserving government's latitude to enact anti-discrimination laws that regulated marketplace choices ultimately confirms the correctness of their choice to reject *Lochner*.

III. BACK TO THE FUTURE

The above critiques notwithstanding, there is much merit in Bernstein's suggestion that *Lochner* is the ultimate precursor to the modern substantive due process privacy cases. Indeed, *Lochner*, by opening the way for the *Meyer* line of cases, the cases protecting free speech, and the cases incorporating the criminal procedure provisions of the Bill of Rights, can be understood as (very) indirectly paving the way for footnote four's reconceptualization of these cases as, respectively, cases protecting minorities, protecting the political process, and recognizing the legitimacy of judicial protection of textually-based constitutional rights.

The progression from robust judicial protection of unenumerated rights to a more nuanced recognition that some groups require special judicial protection from the legislative free-for-all is being replayed in the modern era. The modern privacy cases—most notably the abortion cases and *Lawrence v. Texas*¹⁰⁴—have been subject to criticism that has never really abated since *Roe*. That criticism has led commentators sympathetic to those cases' results to argue for a recasting of those rights as sounding in equality. This phenomenon has been most pronounced in the abortion context: ever since *Roe*, commentators sympathetic to the abortion right have argued that that right was better understood as flowing from the Constitution's commitment to women's equality.¹⁰⁵ In the context of sexuality, Justice O'Connor's concurrence in *Lawrence* argued that the Texas law banning same-sex sodomy was more

104. 539 U.S. 558 (2003).

105. Most notably, before ascending to the Court Justice Ruth Bader Ginsburg argued forcefully for understanding the abortion right as a right based in women's equality. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). She has continued to express this view on the Court, albeit within the limits of the current doctrine's housing of the abortion right in substantive due process. See, e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 168, 184–85 (2007) (Ginsburg, J., dissenting) (using equality language to describe the importance of the abortion right).

appropriately struck down as a violation of equal protection, rather than as a violation of the majority's loosely-defined right to private, consensual, non-commercial sexual conduct between adults.¹⁰⁶ The current fight over same-sex marriage rights is replaying this debate, with some courts and commentators sympathetic to the rights claim arguing that it should inhere in equality guarantees rather than in an alleged "fundamental right to marriage."¹⁰⁷

Thus, just as in the *Lochner* era, a substantive right recognized by courts has come under attack, and has generated calls, not for reversing the results of all the cases decided under that doctrine, but instead for their reconceptualization as equality cases. The same arguments made in favor of this change in the 1930's are heard today. It is argued that judicial recognition of substantive rights is subjective, lacks a legitimate grounding in judicial competence, and amounts to judicial policymaking.¹⁰⁸ On the other side of the ledger, advocates for an equality approach claimed during the *Lochner* era and claim today that such an approach respects legislative value choices and simply requires the legislature to provide to the disfavored group what it provides for the favored group.¹⁰⁹

106. See *Lawrence*, 539 U.S. at 577–78 (O'Connor, J., concurring in the judgment).

107. E.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); See also, e.g., Nelson Tebbe & Debra Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (arguing that the best doctrinal vehicle for same-sex marriage rights is the fundamental rights strand of equal protection).

108. But see Carlos Ball, *Why Liberty Judicial Review is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011) (arguing that equal protection review is no more cabined or objective than due process review); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (describing a new, dignity-based, approach to rights protection).

109. See, e.g., *Ry. Express Agency v. City of New York*, 336 U.S. 106, 111, 112–13 (Jackson, J., concurring) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292, 300 (Scalia, J., concurring) ("Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to

It remains to be seen how such calls for an equality approach will be resolved. We are a long way from 1938, when the Court could confidently presume that it had the competence to determine when “prejudice against discrete and insular minorities” really existed, and thus justified more searching judicial review.¹¹⁰ But the larger point remains: what *Lochner* teaches us is that a judicial doctrine can generate progeny that morph into new doctrines, once the results under the original doctrine are better understood with the passage of time.

At least this is one way a student could answer the opening question.¹¹¹

school for 10 hours a day, none of which horrors are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”).

110. See, e.g., William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. 519, 521–23 (2005) (noting the Court’s inconsistent and unsteady application of footnote four’s formula); see also Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (critiquing the usefulness of footnote four’s “prejudice against discrete and insular minorities” formula).

111. See text accompanying *supra* notes 3–4.

STOP THE FIGHT FOR WOMEN'S EQUALITY

**GENDER EQUALITY: DIMENSIONS OF WOMEN'S
CITIZENSHIP**, (Linda C. McClain¹ & Joanna L. Grossman,²
eds.). New York, Cambridge University Press. 2009. Pp.
450. \$99.00.

*Miranda McGowan*³

Many civil rights scholars despair that the Equal Protection Clause's success in securing women and minorities' formal equality has come at the price of achieving substantive equality for individuals without regard to their race or sex.⁴ In the service

1. Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law.

2. Professor of Law, Hofstra University.

3. Professor of Law, University of San Diego School of Law.

4. See, e.g., R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1080 (2001) (arguing that "[r]acial inequality is integral rather than peripheral to basic social processes, woven into our cultural fabric rather than placed on top of it," but "equal protection doctrine, however formulated" is unable "to transcend or overcome that inequality"); Guy-Uriel E. Charles, *Toward A New Civil Rights Framework*, 30 HARV. J. L. & GENDER 353, 353 (2007) (arguing that "the civil rights movement is dead and . . . a racial malaise has set in" because "we have reached a point of equilibrium that is destined to rigorously enforce formal equality but never reach actual racial parity"); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 (1988) (writing that "the very terms used to proclaim victory [in the civil rights movement] contain within them the seeds of defeat" and "[e]qual opportunity law may have also undermined the fragile consensus against white supremacy"); Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 954 (1993) (arguing that "the pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice" and noting that "[b]lackness continue to inhabit a very different America than do whites"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) (castigating equal protection doctrine because "for as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law"); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 487-88 (2004) (arguing that "the suspect classification label has made it more, rather than less, difficult for government to remedy

of “formal equality,” for example, the Court has barred race-conscious measures to remedy past societal discrimination⁵ or to achieve integration.⁶ Intentional discrimination alone violates the principle of formal equality—policies or practices with substantial disparate impact on the basis of race, sex, or national origin do not. Indeed, the principle of formal equality can prevent government officials from discarding ability tests because they have a disparate impact on the basis of race.⁷

the effects of hostility toward racial minorities in employment, voting, and other arenas” and acts “as a barrier to programs designed to redress race discrimination”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 3 (1991) (arguing that the Supreme Court’s use of colorblindness or formal equality fosters “white racial domination”); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 375 (2007) (explaining that “[s]ince the Supreme Court’s decision in *Washington v. Davis*, the limits of the intent standard in remedying persistent racial inequities have been a leading preoccupation” among civil rights scholars); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387 (1987) (discussing how “[t]he intent requirement is a centerpiece in an ideology of equal opportunity that legitimizes the continued existence of racially and economically discriminatory conditions and rationalizes the superordinate status of privileged whites”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1143 (1997) (explaining that “today doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification, while doctrines of discriminatory purpose offer only weak constraints on the forms of facially neutral state action that continue to perpetuate the racial and gender stratification of American society”); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 955–56 (1989) (arguing that the Court’s adoption of the discriminatory intent standard in *Washington v. Davis* signaled “a withdrawal from the front lines of social change” and entails “a degree of infidelity” to the 14th Amendment’s purpose of ending the second-class citizenship of African Americans); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (arguing that the equal protection doctrine offers little assistance to African Americans hoping for an end to racial subordination because the “interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . [, and] the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks”).

5. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (striking city’s policy of requiring city contractors to award a proportion of subcontracts to minority owned businesses because the city had not demonstrated that the paucity of minority owned contractors was created by any “identified” acts of “discrimination”).

6. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725, 747–48 (2007) (finding that school district’s use of race to reduce racial concentration in schools and ensure that racially concentrated housing patterns did not prevent nonwhite students from attending district’s most desirable schools violated the 14th Amendment’s Equal Protection Clause).

7. The reasoning is that officials intentionally base their decisions to discard such tests on race because such tests fail to produce sufficient numbers of racial minority groups eligible for a position or for a promotion. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) (finding “the City chose not to certify the examination results because of the statistical disparity based on race—[that is,] . . . how minority candidates had performed when compared to white candidates. . . . [and] [w]ithout some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot

Finally, the Fourteenth Amendment Equal Protection Clause regulates just state action, not private actors, leaving many things that contribute to women's inequality outside the reach of the Constitution and Congress to remedy.

In the 1970s, Kenneth Karst foresaw equality's limitations. "[T]he formal guarantee of equal civil rights, necessary as it was to achieving the full inclusion of all Americans in the national community, [will] take us only partway toward" full inclusion.⁸ He urged courts and civil rights lawyers to think in terms of guaranteeing equal citizenship status for all Americans. The principle of equal citizenship requires that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."⁹

As this definition implies, citizenship encompasses more than formal membership in a society. According to Karst, "citizenship . . . begins [with] the formal recognition of" equality, but it "is also a principle of substance."¹⁰ As surely as formal barriers deny equal citizenship to individuals, so too do "substantive inequalities," which "effectively bar people from full membership."¹¹ The state is not the only culprit in creating castes of citizens—nongovernmental institutions have played (and continue to play) a significant role in "segregating American public life," and excluding members of some groups from full inclusion in that public life.¹²

More recently, Reva Siegel has argued that the Nineteenth Amendment might be a more powerful weapon than the Fourteenth Amendment's Equal Protection Clause for securing substantive equality for women. She has documented that the Nineteenth Amendment's purpose was to guarantee women's equal status as citizens. It disrupted two powerful barriers to that equal status that persisted under the Fourteenth Amendment. First, the public/private distinction insulated most acts by private citizens from Fourteenth Amendment liability and many from federal regulation.¹³ Second, federalism prohibited Congress from regulating marital and familial relationships.

take adverse employment actions because of an individual's race").

8. KENNETH L. KARST, *BELONGING TO AMERICA* 5 (1989).

9. *Id.* at 3.

10. *Id.* at 9.

11. *Id.*

12. *Id.* at 12.

13. *United States v. Morrison*, 529 U.S. 598, 621 (2000); *see also* (pp. 25–26) (Rogers M. Smith essay); (p. 383) (Elizabeth M. Schneider essay).

Professors Karst and Siegel (and others) believe that reframing issues of women's equality as issues of women's inferior status as citizens could avoid some of the conceptual and constitutional hurdles that have blocked progress toward substantive sex equality. Specifically, women could argue, first, that private persons, not just state actors, undermine their citizenship status; second, that policies with disparate impact are just as pernicious as disparate treatment; and, third, that individuals have the right to demand certain positive entitlements in addition to negative liberties to secure their equal status as citizens.

In *Gender Equality: Dimensions of Women's Citizenship*, twenty prominent feminist scholars explore what equal citizenship for women would mean, what elements such a concept would contain, and whether it could successfully further the quest for substantive equality. The editors of this volume of essays—Professors Linda McClain and Joanna Grossman—argue that a troubling gap persists between the discourse or “formal commitments” to women's equality and the persisting material inequalities of women's lives (p. 1). Equality suffers from a number of drawbacks. First, women's claims for equality often get hung up on beliefs that women are different from men in ways that are relevant to their attaining equal pay, equal participation in all types of work, and equal representation in leadership positions in business and politics.¹⁴ Whatever the cause, women still shoulder the lion's share of caretaking responsibility for children and home. They also dominate pink-collar service jobs, while performing only a small proportion of science and technology jobs. If women are different than men, equality will not take women very far.

Second, equality can only be assessed according to some baseline. For women, that benchmark is male. Feminists resist using men as a benchmark for many reasons. Difference feminists do so because they believe that women are different from men and that some of women's traits are better. Some disparage the goal of being like men as impossible or unpalatable—Joan Williams has argued that men's superior economic status has depended on women's contributions to home and children.¹⁵ Those contributions have made it possible

14. For most purposes it does not matter whether these differences are biological or constructed so long as they exist.

15. JOAN WILLIAMS, *UNBENDING GENDER* 3, 5 (2000).

for most men to be “ideal workers”—workers who can put work before home and family, secure in the knowledge that their partners will manage the house, children, their social life, and emergencies. Ideal workers often miss out on the joys of home and family life.¹⁶

But when a woman shoulders the role of “the ideal worker,” she will sacrifice things that most men will not. According to 2010 Census data, high-earning women are about as twice as likely as high-earning men never to have married.¹⁷ Such a woman is also more than twice as likely to be divorced or separated than a similar man.¹⁸ If she is married and has children, she probably cannot leave the children home with dad while she returns to work.¹⁹ Instead, a high-earning mother will outsource the care and love of her children to paid help or extended family members—and she will have to cope with the accompanying guilt of having done so. Most women find the costs of being an ideal worker too high.²⁰ Consequently, many women put lofty career goals on hold for at least a while. But this choice also

16. *Id.* at 4.

17. The exact statistic is that in 2010, 15.2% of women and 9.4% of men (over the age of 15) who earned \$100,000 or more have never married. U.S. Census Bureau, *Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin*, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2010, tbl.A1, <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html> (last visited Oct. 6, 2011). That gap has narrowed since 2006, when 17% of women and 8.3% of men over the age of 15 who earned \$100,000 had never married. U.S. Census Bureau, *Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin*, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2006, tbl.A1, <http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html> (last visited, Oct. 6, 2011).

18. The exact figures are 13.5% of women earning \$100,000 or more are divorced, while 6% of such men are. See U.S. Census Bureau, *Marital Status of People 15 Years and Over: 2010*, *supra* note 17, at tbl.A1.

19. In 2010, there were about 154,000 stay-at-home dads, according to U.S. Census data; in comparison, there were about 5,020,000 stay-at-home moms. In other words, moms comprise about 97% of parents staying at home with children. Among families with earnings over \$100,000, the proportion of moms to dads in the stay-at-home parent population remains about the same—about 97% are women and 3% are men. U.S. Census Bureau, *Married Couple Family Groups With Children Under 15 by Stay-At-Home Status of Both Spouses*, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2010, tbl.FG8, <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html> (last visited Oct. 6, 2011). But, between 2006 and 2010, the number of stay-at-home dads doubled in those high-earning families. In 2006, there were only 18,000 men in such families staying at home with children, while 1,234,000 women stayed at home (that is, 98.6% of parents staying home were moms). U.S. Census Bureau, *Married Couple Family Groups With Children Under 15 by Stay-At-Home Status of Both Spouses, and Race and Hispanic Origin of the Reference Person*, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2006, tbl.FG8, <http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html> (last visited, Oct. 6, 2011).

20. WILLIAMS, *supra* note 15, at 38.

costs dearly. Women who interrupt their careers for even a year to stay home with young children suffer a permanent pay cut of about 11%, while those who take off three years will take a permanent pay cut of nearly 40%.²¹

Third, the United States Constitution limits equality's utility in several different ways. Fourteenth Amendment rights shield individuals from government action, not from private action.²² Indeed, the Rehnquist and Roberts Courts have read the Fourteenth Amendment's "state action" requirement to restrict Congress's power to punish private conduct that makes it harder for others to exercise their civil rights.²³ Also, the Fourteenth Amendment prohibits only state action that *intentionally* discriminates against women. The Court defines intentional discrimination narrowly—an action undertaken *because* of its discriminatory effect on women.²⁴ Even when if it is obvious that some policy will disadvantage women, a legislature may enact the measure unless the legislature's very purpose was to disadvantage women.²⁵

Finally, women cannot brandish the Fourteenth Amendment to demand government benefits. Most formal barriers to women's equality fell decades ago. The main impediments today—persisting job segregation, the lack of paid parental leave (and the fathers' tendency to take less, if any, of it), affordable,

21. Miranda O. McGowan, *Engendered Differences* 28 (Mar. 17, 2009) (unpublished manuscript) (citing Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV. (Mar. 2005, at 43, 46), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361196).

22. *United States v. Morrison*, 529 U.S. 598, 621 (2000). Some Supreme Court decisions support reading the 14th Amendment to extend to some private actions. For example, *United States v. Guest* upheld a criminal indictment of two private individuals for violating 18 U.S.C. § 241, which prohibited conspiracies between "two or more persons . . . to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." 383 U.S. 745, 747 (1966) (quoting 18 U.S.C. § 241 (1964)). The Supreme Court held that the indictment pled sufficient "state action" when "[o]ne of the means of accomplishing the object of the conspiracy, according to the indictment, was 'By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts.'" *Id.* at 756.

23. See *Morrison*, 529 U.S. at 621.

24. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979).

25. The Supreme Court's decisions in both *Morrison* and *Ricci v. DeStefano* have cast doubt on Congress's powers to address either race- or sex-based disparate impact. *Ricci* held that a city violated Section 703(a)(1) of Title VII, 42 U.S.C.A. § 2000e-2(a)(1), when it threw out the results of an employee-promotion test because it had a disparate impact based on race. 129 S. Ct. 2658, 2673–74 (2009). The city's decision, the Court reasoned, was *because* of race, and therefore was intentional discrimination in violation of Title VII. *Id.* at 2674.

high quality childcare, and reasonable accommodations for pregnancy—will only fall if government takes affirmative steps and private individuals make different choices.

In short, formal, legal equality is necessary but not sufficient to attain substantive equality (p. 2).²⁶ Substantive equality requires dismantling major structural impediments to women's full participation in all spheres of civic life. *Harrison Bergeron*, Kurt Vonnegut's dystopic story of equality run amok, is a good example.²⁷ Vonnegut satirizes a society that elevates equality of outcomes above all other values. Heavy weights encumber ballerinas' legs, beautiful people wear hideous masks, headsets blurt nonsense into the ears of intelligent people, and heavy chains shackle the strong. The deadlock between formal equality and substantive equality has many thinking that those looking to the Fourteenth Amendment's Equal Protection Clause for help should look elsewhere. Is "citizenship" the right place to look?

Having full status as a citizen entitles a person to equal status as other citizens and full inclusion into society. The authors of these essays suggest that women's rights proponents should consider insisting on women's rights to be full-fledged citizens of their countries and the world community, rather than pushing for women's "equality."²⁸ They offer several reasons why citizenship might be a more fruitful frame for demanding substantive equality for women. In particular, some of the essays in this volume argue that citizenship gives women grounds to argue that laws with disparate impact undermine women's citizenship as surely as laws that facially discriminate; that private acts of discrimination as well as discriminatory state action impinge on women's citizenship; and that citizenship gives women grounds to demand positive entitlements as well as freedom from government restraints. This review surveys these arguments and then discusses the limitations of staking women's claims to equal status on citizenship. The concept of citizenship may reflect gender stereotypes to such a degree that it could cause as much mischief as it avoids. Citizenship rights may also

26. See also (p. 255) (Martha Albertson Fineman essay) ("[F]ormal equality is inevitably uneven equality because existing inequalities abound throughout society, and a concept of equality that is merely formal in nature cannot adequately address them.").

27. See generally Kurt Vonnegut, *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7 (2010).

28. Not all of the contributors to this volume agree. See, e.g., (p. 252) (Martha Albertson Fineman essay) (questioning whether the concept of "equal citizenship" is helpful as citizenship confines the universe of persons who are meant to be equal, and citizenship itself connotes equality).

vary from country to country, such that citizenship might prove more useful to achieving substantive equality in some countries than in others.

Some of the essays in this volume express doubt that recasting the women's movement in terms of citizenship will further the cause of substantive gender equality. This review will discuss how the doubters might have the better end of the argument. First, to profitably reframe women's claims as claims for equal status as citizens, feminists would have to persuade people to accept their concept of citizenship. That concept has no accepted meaning. The essays themselves reveal different and contested meanings. Second, gender stereotypes infect current concepts of citizenship. To reframe arguments for parity as claims for equal citizenship status could be to fall prey to those stereotypes. Third, recasting the feminist movement as a movement for women's equal status as citizens requires more than a simple change in vocabulary or rhetoric. The current impediments to achieving substantive equality have their foundations in differences in ideology that sharply divide Americans, and resolving these conflicts will not be easy whatever the rhetoric. Finally, and as Martha Fineman writes in her chapter, the concept of equality may not have run its course. Equality has achieved a great deal in a relatively short time, perhaps because the basic idea of equality lies at the foundation of the rule of law—that like cases should be treated alike.²⁹

This review essay will proceed as follows. Part I summarizes *Gender Equality's* main working definition of citizenship and the aspects of citizenship and gender equality explored in each section of the book. Part II critically examines whether citizenship could propel the movement for substantive gender equality, with examples from *Gender Equality* to illustrate how arguments from citizenship could help this cause. Part III explains how gender stereotypes infuse the concept of citizenship. Drawing on research into cognitive frames, this section explains that a shift to citizenship could actually impede progress toward substantive gender equality. Part IV concludes on a more hopeful note. For citizenship to lose its gendered cast, stereotypes about families and familial roles must change. Such roles have changed dramatically over the past 40 years. They continue to do so. Arguments for *women's* equality can take

29. JOHN RAWLS, A THEORY OF JUSTICE 208 (rev. ed. 2005) ("The rule of law also implies the precept that similar cases be treated similarly.").

much of the credit for these changes. The fight from here on out, however, will have to be for *gender* equality, not just women's equality. Norms of masculinity must change, and gender equality proponents will have to persuade men that they will benefit in the process.

I. EQUAL CITIZENSHIP STATUS

Gender Equality organizes twenty essays on citizenship into several different dimensions—constitutional citizenship, democratic citizenship, social citizenship, sexual and reproductive citizenship, and global citizenship.

In this book's introduction, Professors McClain and Grossman describe T. H. Marshall's³⁰ concept of citizenship as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed" (p. 8).³¹ This focus on status, argue Professors McClain and Grossman, "provides an opening to investigate not just formal assertions of equal status but also more substantive questions about whether community members truly have the same rights and opportunities, or participate on equal terms" (p. 8). "[E]qual citizenship conveys" the "goal[] of equal status for all members of society and its ideals of inclusion, membership, and belonging" (p. 1).³² Citizenship embraces the whole range of "rights, benefits, duties, and obligations that members of any society expect to share" and the goals of "inclusion, belonging, participation, and civic membership" (p. 2).

This general concept implies three conditions that determine whether individuals possess equal status as citizens of a nation. Citizens must possess, *first*, equal civil rights, (for example, the right to contract and hold property); *second*, equal political rights, (for example, the right to vote or serve on juries); and *third*, equal social rights.

30. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950).

31. Quoting T.H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS* BY T.H. MARSHALL 84 (1964); see also KARST, *supra* note 8, at 3 ("The principle of equal citizenship, as I use the term, means this: Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member . . . the principle forbids the organized society to treat the individual as a member of an inferior or dependent caste or nonparticipant.").

32. See also KARST, *supra* note 8, at 3 (emphasizing that the principle of equal citizenship "centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community").

The twenty chapters in this collection cover many disparate topics related to these categories. The brief summary provided here necessarily flattens the subtleties of each chapter's arguments. These twenty essays are grouped into the five parts of the volume—constitutional citizenship, political citizenship, social citizenship, sexual citizenship, and global citizenship. Each chapter of *Gender Equality* is interesting in its own right, and all of the chapters are worth reading by those who care about women's equality in the United States and worldwide.

Constitutional citizenship refers to civil and political rights and the "role that constitutions play in fostering women's equal citizenship and forbidding" sex discrimination (p. 15). This section's essays explore why citizenship has played such a minor role in the Supreme Court's sex equality jurisprudence (p. 23) (Rogers M. Smith essay); how the immigration and naturalization process in the United States continues to reflect and reinforce traditional gender norms and roles (p. 39) (Kerry Abrams essay); whether the American bill of rights was built on communitarian principles as well as liberal individualist ideals (p. 60) (Gretchen Ritter essay); and whether it is possible for a country to promote gender equality if it also permits individuals to practice religions that, for example, give women and men different rights in marriage and divorce (p. 83) (Beverley Baines essay) or require women to wear distinctive and modest garb (p. 107) (Mary Anne Case essay).

Political citizenship refers to political rights. The chapters in this section discuss how traditional models of citizenship are primarily built around masculine activities and how arguing for equal citizenship status might change that. For example, one chapter explores whether reframing abortion as implicating women's citizenship status could transform the abortion debate from the current, seemingly intractable conflict between women and fetuses' rights (p. 154) (Nancy J. Hirschmann essay). Two chapters in this section explore why so few women hold political office. One of them investigates whether sex quotas for political office increase the number of women representatives and meaningfully improve women's "representation" (p. 174) (Anne Peters & Stefan Suter essay). The other describes the author's study of why some countries elect significantly more women to high political office than others (p. 201) (Eileen McDonagh essay). Three women-led anti-war movements are another chapter's subject. This chapter uncovers the traditional gender stereotypes that underlie concepts of good citizenship. These

stereotypes, the chapter explains, both facilitate and undermine these movements' tactics and effectiveness (p. 131) (Kathryn Abrams essay).

Social citizenship refers to the "material preconditions for effective participation in society" (p. 17). Joanna Grossman writes of the "importance of paid work to women's full participation in society..." (p. 239). American law denies women full social citizenship, she argues, because it denies women the right to reasonable accommodation of the physical limitations being pregnant sometimes impose on them. Another describes how the American tax system tends to decrease women's status as citizens (p. 267) (Martha T. McCluskey essay). Martha Fineman's chapter describes how she is less optimistic about citizenship's possibilities for gender equality (p. 251). She is concerned that citizenship's orientation toward activities in the public sphere will distract from what she considers to be the main determinant of women's inequality—the status quo's failure to recognize humanity's essential vulnerability. Ignoring vulnerability has pushed the issue into the private realm, where women shoulder the lion's share of the burden of caring for those vulnerable people.

Sexual and reproductive citizenship refers to questions about the legitimacy of government interest in regulating families, sexuality, and reproduction. One chapter describes how "sexual outlaws" (gay men and lesbians, sexually assertive single women) "have demanded inclusion" in mainstream life and have "begun to revise and expand the meaning of citizenship by claiming their rights" (p. 291) (Brenda Cossman essay). "In so doing, they have contributed to the politicization of the... private sphere" (p. 291), which may have encouraged some Christian organizations to encourage married partners to celebrate their sexuality and become more adventurous. Another chapter questions whether queer theory has been too quick to celebrate sexual transgression as always liberating, and gender theory to condemn sex as invariably oppressive (p. 307) (Maxine Eichner essay). Two chapters focus on reproduction. One argues that the usual view of infertility as a private, medical problem that implicates only negative liberties ignores how crucial parenthood is to citizenship. Parenthood accords people full "'recognition' by one's fellow citizens" and "full membership in the civic community" (p. 327) (Mary Lyndon Shanley essay).³³

33. Quoting JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR*

The decision whether or not to have children is crucial to individual identity and our concept of the “good life” (p. 327). The second discusses the importance of reproductive rights to women’s citizenship (p. 345) (Barbara Stark essay), describing their codification in international treaties and conventions (p. 346–50), and noting how bearing the next generation of citizen has traditionally been considered to be the role of women citizens (pp. 345–46). In particular, this chapter considers the effect of both pro- and anti-natalist policies on women’s status and the implications of laws permitting or banning sex selective abortions.

Global citizenship, the volume’s final section, explores how international human rights norms have sometimes undermined women’s status as citizens and sometimes sparked successful feminist movements. For example, Regina Austin examines three documentaries about the murders of more than 300 women over a twelve-year period in Ciudad Juarez, a city on the United States/Mexico border (p. 359). Rampant criminality—drugs, prostitution, human smuggling, and a high rate of emigration of women from their homes and families in Mexico’s interior—made the women of Ciudad Juarez vulnerable to their serial murder (pp. 362–64). Many of the women who were killed were newcomers and suspected prostitutes. Police gave low priority to investigating their murders. Border crime stretched the city’s criminal justice system nearly to the breaking point and powerful drug lords and human smugglers corrupted it with bribes and threats. Austin describes that these women’s families demanded justice for their loved ones by portraying these women’s murders as a denial of citizenship—the right to safety, to justice, to move freely within Mexico, and the right “to peace . . . for families” (p. 371).³⁴

How domestic violence stopped being just a private, family issue and became a human rights issue” that impairs women’s full participation in society is the subject of other chapters in this section. One argues that framing domestic violence as depriving women of full citizenship is crucial to its eradication (p. 378) (Elizabeth M. Schneider essay). Another documents the progress toward achieving women’s equal rights as citizens in Muslim countries where citizenship rights are filtered through a religious law that conceives of men’s and women’s roles as

INCLUSION 100 (1991).

34. Alteration in original.

essentially different (p. 390) (Anisseh Van Engeland-Nourai essay). The final chapter describes how global human rights norms have supported grassroots efforts to push for women's equal status as citizens in many different countries (p. 409) (Deborah M. Weissman essay). This chapter warns feminists that the United States has on several occasions used the denial of women's rights or the abuse of women as an excuse for invading a country or to increase the United States' power and influence in that country (p. 420–25). Feminist human rights activists must take care not to unwittingly become tools of United States foreign policy.

Having briefly summarized the essays in this collection, let me now discuss this collection's main thesis—that staking women's claims to equality on their rights as citizens could alleviate some of the perennial problems in the fight for women's equality.

II. DO CLAIMS BASED ON EQUAL CITIZENSHIP STATUS AVOID THE LIMITATIONS OF ARGUMENTS FOR EQUALITY?

Professors McClain and Grossman argue in their introduction to this collection that at least three main legal barriers have stymied progress toward women's equality in the United States, and basing women's claims on citizenship could remove these barriers. *First*, only intentional discrimination based on a person's sex violates the Equal Protection Clause. Policies with disparate impact do undermine a group's citizenship rights and their status as citizens.

Second, the Equal Protection Clause applies only to the state or state officials, so women cannot sue private persons for constitutional violations. This state action requirement also denies Congress the authority to remedy private discrimination,³⁵ unless state officials have a hand in the discrimination³⁶ or the discrimination substantially affects interstate commerce.³⁷ Private persons can, however, affect the citizenship status of others, much as private acts can impose badges and incidents of slavery.³⁸

35. *United States v. Morrison*, 529 U.S. 598, 621 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

36. *United States v. Guest*, 383 U.S. 745, 755–56 (1966).

37. *Morrison*, 529 U.S. at 609.

38. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968).

Third, the Fourteenth Amendment guarantees, at most, freedom from state interference with individual choice. The Court has been reluctant to rule that the Fourteenth Amendment creates entitlements to state services.³⁹ Claims of equal citizenship status might, however, provide a basis for claiming entitlements to certain state services or policies.

None of the chapters in this volume discuss where textual authority might be found in the Constitution for the guarantee of equal citizenship status. A few possibilities include the Nineteenth Amendment, as Reva Siegel has documented how this amendment was intended to guarantee women's equal citizenship status,⁴⁰ and the citizenship clause of the Fourteenth Amendment, which could empower Congress to legislate to remedy the unequal citizenship status of some groups. The Thirteenth Amendment's ban on slavery has been interpreted to include badges and incidents of slavery, and unequal citizenship status might represent such a badge.

A. WOMEN'S CLAIMS FOR EQUAL CITIZENSHIP STATUS COULD MAKE POLICIES WITH DISPARATE IMPACT AGAINST WOMEN CONSTITUTIONALLY VULNERABLE

In the first essay Rogers Smith points that the Supreme Court rarely discusses women's citizenship in its sex equality cases. Citizenship lies at the margins of women's equality jurisprudence, Smith argues, because laws with disparate impact are usually constitutional. Using the lens of equal protection, the Court sees the harms to women resulting from policies or laws with disparate impact as being caused by some factor other than their sex. According to Smith, most discrimination is invisible to the Court, as most formal barriers to women's equality have been demolished (pp. 23–24). Many laws, policies, and practices with disparate impact, however, still impede women from full-fledged citizenship.

Smith presents *United States v. Morrison* as his main example of the Court's refusal to acknowledge how disparate

39. There are limited exceptions to this rule, most prominently, the state's obligation to provide an indigent person with assistance of counsel. State and federal courts must also waive most court filing fees if a person is too poor to pay them.

40. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968 (2002) [hereinafter Siegel, *She the People*] ("I argue for reading the Fourteenth and Nineteenth Amendments together because the two Amendments are linked in subject matter concern: each secures constitutional protection for values of equal citizenship.").

impact undermines women's citizenship. In that case, the Court nullified major parts of the Violence Against Women Act (VAWA), which had given women a "[f]ederal civil rights cause of action for victims of crimes of violence motivated by gender" (p. 25).⁴¹ Citing the *Civil Rights Cases*⁴² for the proposition that the Equal Protection Clause prohibits discriminatory state action, Chief Justice Rehnquist held that Congress lacked power under Section 5 of the Fourteenth Amendment to create such a cause of action against private individuals. His citation to the *Civil Rights Cases* was notable, as the Court had not relied upon it as authority for almost 40 years. Chief Justice Rehnquist conceded that the congressional record had indeed demonstrated "pervasive bias in various state justice systems against victims of gender-motivated violence" (p. 26).⁴³ But, VAWA's cause of action did not remedy constitutional violations by *these* state officials—it made an end run around them. Smith argues that VAWA protected women's status as citizens by combating private violence against women, thereby increasing women's freedom, autonomy, full civic participation, and ability to engage in citizenship activities pp. (26–27). No Justices in *Morrison*, however, so much as mentioned that VAWA would "combat behavior that had long contributed to women's subordination in their civic roles" (p. 27).

Nor does *Nevada v. Hibbs*⁴⁴ mention citizenship. *Hibbs* is the late Chief Justice's other opinion about Congress's power to promote sex equality. There, in an apparent about-face, Chief Justice Rehnquist upheld the Family and Medical Leave Act (FMLA) as validly enacted under the Fourteenth Amendment. FMLA gave parents the right to 12 weeks of unpaid leave from work to care for a newborn child.⁴⁵ The Chief Justice was persuaded that Congress had solid evidence that states had continued "to rely on invalid gender stereotypes in . . . the administration of [familial] leave benefits."⁴⁶ Smith objects that FMLA's meager, unpaid leave provisions can hardly be expected to change the fact that women still carry "disproportionate responsibilit[y] for family and household care" (p. 32). Smith argues that were Congress to legislate to guarantee women's

41. Quoting 42 U.S.C. § 13981(a) (1994).

42. The *Civil Rights Cases*, 109 U.S. 3 (1883).

43. Quoting *United States v. Morrison*, 528 U.S. 598, 617–18 (2000).

44. *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

45. *Id.* at 724 (citing 29 U.S.C. § 2612(a)(1)(C) (1993)).

46. *Id.* at 730.

“full citizenship stature”⁴⁷ it could justify “a massive restructuring of” the provision of “child care, housework, and marketplace employment” (p. 33). Women still shoulder most childcare and housework, and that fact, Smith argues, limits their economic, political, and social status (pp. 32–33).

However much laws and policies with disparate impact undermine women’s status as citizens, Smith doubts that the Court is the right institution to attack such laws and policies (pp. 34–35). He worries that disparate impact challenges would mire the Court in a deep morass of policymaking (p.36), much like the one the Court fell into in the 1970s. Then, district courts found themselves running school districts, mental hospitals, and prisons. The same institutional constraints on court power and democratic legitimacy that hampered the courts’ success in running those institutions, Smith argues, would likely plague courts today if they routinely evaluated the constitutionality of laws with disparate impact.

Smith may be too quick to conclude that disparate impact would ensnare courts in policymaking inconsistent with their role. In his article, “In Defense of the Anti-Discrimination Principle,” Paul Brest argued that the “anti-discrimination principle” encompassed one kind of state-sponsored discrimination that had fallen beneath the radar screen of the Court’s intentional discrimination jurisprudence: policymakers’ selective indifference to the burdens their policies impose on people of color.⁴⁸ Brest could have added women, too. Because of legislatures’ selective indifference, they may overlook the costs that laws with significant disparate impact impose on women and other minority groups.

Scrutinizing laws with disparate impact, moreover, does not inevitably force the court to intrude on legislative turf. The Court could, for example, strike laws with significant disparate impact on the basis of race or sex if a legislature has not specifically considered the law’s disparate impact and concluded that, despite its disparate impact, the law was still a rational way to achieve particular policy aims. Such a test would be similar to clear statement rules that the Court has adopted in its sovereign immunity cases.⁴⁹ Were the Court to strike a law with disparate

47. Quoting *United States v. Virginia*, 518 U.S. 515, 532 (1996).

48. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

49. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56 (1996) (quoting

impact on such grounds, a legislature could re-enact the law after laying the factual groundwork to support the legislation's importance despite the costs of its disparate impact, or it could consider different policies with less disparate impact. Sending a law back to the legislature does two useful things. It spotlights the law's disparate impact, which gives interest groups an opportunity to weigh in on the law's costs to their group; and it forces the legislature to face up to the law's disparate impact, its costs, and either to justify the disparate impact in light of other benefits or to consider different alternatives.⁵⁰ In all cases, the Court's action forces the legislature to consider the harms to the group in its deliberations.

Even if the Court did not agree that the principle of equal citizenship status called the constitutionality of laws with disparate impact into question, that principle might moderate the Court's growing hostility to disparate impact claims. Two years ago, the Court held in *Ricci v. DeStefano* that the City of New Haven violated the Equal Protection Clause by intentionally discriminating against white firefighters when it discarded a promotion test because it had a racially disparate impact on African Americans and Latinos.⁵¹ When the City discarded the test because too few African Americans and Latinos passed the test, its decision was based on race. The Court's analysis in that case called into question the constitutionality of any government attempts to avoid using policies, tests, and practices with disparate impact; indeed, Title VII's prohibition against disparate impact by private companies could also be constitutionally vulnerable. But the principle of equal citizenship status might persuade the Court to back away from declaring disparate impact law unconstitutional.

Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989)) (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”).

50. Paul Brest made a similar suggestion to cure the *Palmer v. Thompson* situation—where there is evidence that discriminatory animus motivated the legislature, but the law formally has no disparate impact. Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUPR. CT. REV. 95. He argued that the Court should strike laws when evidence demonstrates that discriminatory animus motivated a law’s passage. *Id.* at 130–31. True, a legislature might just reenact the legislation and try to conceal its discriminatory animus better the second time around. Forcing the legislature to reenact the law still forces it to articulate race or sex neutral purposes for its action (which it might lack), and a reenacted law lies under a cloud of suspicion of illicit motivation if no new compelling reasons for its passage can be cited. *Id.* at 125–27.

51. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678–79 (2009).

Joanna Grossman argues that the United States' indifference to laws and policies with disparate impact on pregnant women undermines women's full social citizenship (p. 240). Pregnancy, she argues, can sometimes temporarily interfere with a woman's ability to work. Title VII guarantees pregnant women only formal equality—an employer may not assume that pregnancy or impending motherhood limits a woman's ability or commitment to work. Employers also shoulder a relatively light duty to reasonably accommodate the work limitations pregnancy or childbirth may impose—employers must only accommodate such limitations if and to the extent that it already reasonably accommodates other temporary disabilities.⁵² Many employers do in fact provide such leaves to employees who are temporarily disabled from work. Some lower courts, however, have further limited the usefulness to pregnant women of this reasonable accommodation aspect of Title VII. Some have held employers only to a duty of reasonable accommodation of pregnancy if they accommodate temporary disabilities due to off-the-job injuries.

Many pregnant women want only relatively minor accommodations—temporary relief from heavy lifting, changes in work schedules to accommodate morning sickness or to relieve women from late shifts, etc.—not a leave from work entirely (pp. 245–46). Federal statutes provide no help, Grossman contends because they do not give a woman the right to reasonable work accommodations (pp. 245–46). Many lower courts have also read Title VII's accommodation requirement to bar claims by women that neutral policies have a disparate impact on pregnant workers (pp. 246–47). Only the most stringent work requirements, such as a policy that denies all workers any leave during the first year of employment, have fallen to disparate impact challenge.⁵³

Grossman argues that the lack of pregnancy accommodations undermines women's full status as citizens. Work has a “multifaceted” relationship to citizenship (p. 237). A

52. 42 U.S.C. § 2000e(k) (2011) (providing that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”).

53. *U.S. E.E.O.C. v. Warshawsky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1991). *But see Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (dismissing a disparate impact challenge to a policy that limited an employee's leave to three days within the first ninety days of employment).

person's work affects her self-conception, the conceptions others have of her, her relationships, her dignity. Work also gives her the means to exercise her independence and a forum where she can discuss politics and national and world events with others (p. 237). "[A]ccess to decent, paid work is one measure of a society's commitment to equality and its success in integrating all citizens as full participants in society" (p. 237). As Judith Shklar has written, "We are citizens only if we 'earn'" (p. 237).⁵⁴

Equal access to paid work has increased women's status as citizens by making economic independence possible and permitting women to choose to work either outside or inside the home. Yet, claims of pregnancy discrimination have soared over the last decade and a half.⁵⁵ Courts have limited Title VII's protections for pregnant workers further by refusing to permit most women's disparate impact challenges. More data about pregnant workers would strengthen this chapter's argument that women's equal status as citizens depends on pregnancy accommodations, such as how commonly pregnant women need light-duty assignments or how commonly pregnancy complications require women to take temporary leave from work. Statistics indicating pregnant women's vulnerability to firing or demotion certainly suggest discriminatory intent toward pregnant workers. But such discrimination could reflect employers' stereotypes about a mother's commitment to work, rather than annoyance over a minor work accommodation.

Kerry Abrams's chapter, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, argues that federal law governing permanent United States residency primarily benefits men. Skilled workers—people with formal training or post-secondary degrees—receive most employment-based green cards, and most skilled immigrant workers are men. The majority of women receive green cards derivatively through their husbands, and the United States does not automatically award spouses green cards. A green-card-holding spouse must sponsor his or her spouse. Sponsorship is optional, and it imposes a heavy support obligation on the sponsoring spouse that survives divorce. A spouse must swear that he or she can support his or her spouse at least at a level one and a quarter times the federal poverty line

54. Quoting SHKLAR, *supra* note 33, at 67.

55. U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997—FY 2010*, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Aug. 15, 2011).

(p. 53). No income earned by the sponsored spouse counts toward this amount.

The structure of sponsorship makes sponsored spouses vulnerable to exploitation and coercion. The threat not to sponsor can keep a wife in an abusive relationship. A husband can refuse to sponsor his wife and either leave her in the home country or force her to live illegally in the United States. Congress recognized that immigration law puts many women at the mercy of their husbands, and the Violence against Women Act of 1994 created exception to spousal sponsorship if a person can prove that her spouse has “battered” her or “subjected” her “to extreme cruelty” (p. 55).⁵⁶ VAWA’s requirement subjects women to further indignities, Abrams argues, by extending residency to women because of their victimhood, not their value as potential citizens (pp. 56–57).

United States immigration law reinforces women’s inferior status in other ways, Abrams argues. It encourages green card recipients to perform traditional gender roles within marriages. Green cards’ skilled work requirement disproportionately screens out many foreign women who were denied equal educational opportunities in their home countries. The spousal support obligation encourages a traditional model of marriage, which increases dependent spouses’ vulnerability. The sponsoring spouse’s income alone counts toward the obligation. None of a recipient spouse’s own earnings count.

Abrams proposes three solutions. First, the United States should eliminate the sponsorship requirement—spouses of persons who receive employment-based green cards should automatically be eligible to apply for a green card without spousal consent. Second, the United States should either eliminate the support requirement or base the support requirement on total family income. The latter would encourage spouses to work outside the home for pay, which would decrease their dependency. Finally, she argues that childcare should qualify as a skilled work category, and employers should be able to sponsor an immigrant if they can prove they are unable to find an American to provide childcare.

Abrams’ first suggestion gives the most pause. In many cities, it is claimed that finding a nanny is hard, and Abrams’ suggestion implies that this is her assumption. Is it the case,

56. Quoting 8 U.S.C. § 1430(a) (2008).

however, that American women shun the task of taking care of others' children? Quite the opposite would seem to be true, if preschool and kindergarten teachers are any guide. Finding a nanny at minimum wage is certainly tough, as the average wage for nannies in major metropolitan areas such as New York, Los Angeles, and Washington, D.C. is over \$16 per hour. At first blush, it might sound high, but it works out to about \$33,280 per year on a forty-hour week—barely a living wage in these communities.⁵⁷ It is certainly not so high that it indicates a profound shortage of nannies, particularly as those who cannot afford full-time, one-on-one care for their children have other childcare options, such as in-home daycare, institutional daycare, and preschool.

B. CITIZENSHIP PROVIDES A BASIS FOR DEMANDING POSITIVE ENTITLEMENTS

More American women vote than men, but women hold only 15% of the seats in the House of Representatives (pp. 201, 202) (Eileen McDonagh essay) and seventeen of the 100 seats in the Senate.⁵⁸ No woman has ever been president, and only two women, the late Geraldine Ferraro and Sarah Palin, have been on her party's presidential ticket. Among democracies, the United States ranks eighty-third out of 118 countries in the proportion of women who hold public office (Table 9.1, p. 203). Only in Ireland, Greece and France do women hold a smaller proportion of their national legislature's seats (p. 203). Rwanda leads the world—in 2006, women held almost 49% of the seats in its national legislature (p. 203). Sweden comes in second with 45%; the other Scandinavian countries follow in fourth, fifth, and sixth place—Norway, Finland, and Denmark respectively (p. 203). The Netherlands holds seventh place (p. 203).

Two chapters in this volume address women's representation in national office. *Representation, Discrimination, and Democracy: A Legal Assessment of Gender Quotas in Politics*, by Anne Peters and Stefan Suter, discusses sex-quotas for political office, which about 100 countries throughout the world have implemented (p. 176). "Sex quotas" vary from

57. International Nanny Association, *2011 International Nanny Association Salary and Benefits Survey*, <http://www.nanny.org/document.doc?id=7> (last visited Nov. 20, 2011) (reporting results of 2010 salary survey).

58. JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP IN THE 111TH CONGRESS: A PROFILE 2 (December 27, 2010), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%29PL%3B%3D%0A>.

voluntary “soft targets” to specific constitutional provisions reserving some parliamentary seats for women only, and they are not equally effective. *Citizenship and Women’s Election to Political Office: The Power of Gendered Public Policies*, by Eileen McDonagh, explores why some western democracies have a strikingly higher proportion of women holding national political office than others (p. 201). Both chapters agree that gender quotas help ensure women’s equal status as citizens, because such policies communicate that women belong in positions of power (pp. 199–200, 207).

Peters and Suter, however, argue counterintuitively that quotas have only modestly increased the number of women serving in national parliament: “The average level of representation for women in political bodies in countries with electoral quotas is only slightly higher than the worldwide average of 18.4 percent of female parliamentarians” (p. 197).⁵⁹ Peters and Suter explain that quotas come in several different varieties. Not all are, well, *quotas*. Furthermore, quotas are most effective in parliamentary systems with proportionate representation. The most effective quotas, furthermore, specify the minimum percentage of women to be included on a party candidate list and specify women’s placement on such lists (p. 198). Enforcement, finally, makes or breaks quota schemes (p. 198). France’s 50% quota, for example, requires parties to submit “zippered” candidate lists—a list that alternates male and female candidates⁶⁰—or have their public campaign-funding cut. Similarly, Spain has a 40% quota and specifies that women comprise at least 40% of candidates in each tranche of 5 posts on a list. Noncompliant lists will not be placed on the ballot (p. 177 n.19).

The heart of Peters and Suter’s chapter scrutinizes whether sex quotas improve “representation” in electoral bodies. Here,

59. McDonagh concurs: “[T]he net gain of gender quotas for democracies is a percentage increase of 3.929 percent” (p. 224).

60. The efficacy of France’s quota seems surprising in light of McDonagh’s statistic that women held only 12% of the seats in the national legislature in 2006. France, however, first adopted a quota system in 2000, and it did not initially require party candidate lists to alternate men and women (a “zippered” list). Consequently, parties placed many women candidates near the bottom of candidate lists, and few were elected. “The number of female deputies [in the French National Assembly] increased” from 10.9% in 1997 to just 12.3% in 2002. Priscilla L. Southwell & Courtney P. Smith, *Equality of Recruitment: Gender Parity in French National Assembly Elections*, 44 SOC. SCI. J. 83, 85 (2007). In 2007, France changed its scheme to ensure women’s placement on parties’ lists (p. 177 n.16).

the authors interestingly and usefully parse the meaning of “representation.” They argue that if women representatives actually represent women’s interests, concerns, and needs better than men, then quotas create “substantive” representation (p. 190). Quotas could also create “parity” of representation if proportionate sex representation is inherently good in and of itself (p. 192). Finally, quotas could create “symbolic” representation by creating the image that women belong in power (p. 194). The “absence of women [political leaders] reinforces strong . . . assumptions about [women’s] inferiority,” Peters and Suter argue (p. 194). More women in “elected assemblies . . . more powerful[ly] and more visib[ly] assert[s] women’s equality with men than changing the composition of the professions.” Women who visibly possess political power not only counter traditional stereotypes but also “raise female aspirations,” encourage other women to enter politics, and broaden women’s “career and life choices.” (p. 194).

“Substantive representation” is a nonstarter according to Peters and Suter. It is not true “that women . . . have specific interests and needs” that women politicians also possess (p. 190). There is no “women’s” position on most issues, and the “gender gap” between men and women’s positions is usually small (pp. 194–96). Second, the related idea that women have different leadership styles (more bottom-up than authoritarian), skills (more empathetic and better listeners), and values (more cooperative and altruistic) (p. 190) “ressurrect[s] dormant gender stereotypes” (pp. 191–92). This rationale undermines women political leaders—powerful women are “deviant,” and softness is weakness (p. 191).

Furthermore, parity standing alone violates the principle of democratic accountability. It is incoherent to suggest that a woman can be held accountable for who she is.

Generally, a woman cannot be held accountable for what she is, but for what she does. But how can elected women carry an additional responsibility to represent women? Is there a mandate of difference attached to women politicians, even in the absence of mechanisms to establish special accountability? (p. 193).

Requiring women to carry the additional responsibility of representing women unfairly burdens women leaders. It also violates the idea that leaders should be accountable to all citizens (p. 193).

Peters and Suter are much more positive about symbolic representation. Sex parity in power achieves more than proportionate representation. “Underneath the deceptive simplicity of the arrangements for parity democracy lies the much more complex function of representation. Because politics is . . . about self-image . . . gender parity has a powerful” symbolic meaning (p. 194). Substantial numbers of women in national leadership reflects women’s equal status and “potentially” could multiply “the rights and the position of all women” (p. 194). Indeed, all by themselves, debates about gender quotas improve women’s status simply by elevating the issue of women’s leadership to national importance (p. 194).

Eileen McDonagh studies the issue of women’s representation from a slightly different angle. She describes her regression analysis that shows that Western democracies without strong social welfare policies tend to elect fewer women to higher office. The proportion of women elected to public office, Professor McDonagh argues, depends on whether a country associates maternal characteristics with good government. Countries that have had women monarchs and those that have strong social welfare policies have elected more women to national public office. According to 2006 data, western democracies that lead in the proportion of women elected to office include Sweden (45%),⁶¹ Costa Rica (39%),⁶² Norway (38%),⁶³ Finland (37.5%),⁶⁴ Denmark (37%),⁶⁵ the Netherlands (37%),⁶⁶ and Spain (36%).⁶⁷ The United States has had no monarch, woman or otherwise, it is one of only two industrialized democracies that has not had “any form of social or biological citizenship” in the form of welfare provisions, gender quotas, or a hereditary monarchy in which a woman can ascend to the throne.⁶⁸ Women hold 16% of the seats in

61. See Inter-Parliamentary Union, *Women in National Parliaments*, <http://www.ipu.org/wmn-e/arc/classif311206.htm> (last visited Sept. 22, 2011) (providing 2006 statistics).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. McDonagh also lists France, but France adopted gender quotas after her study was completed. See *supra* note 60.

Congress.⁶⁹ Japan is the other such country. There, women held about 11% of the seats in its national legislature.⁷⁰

Social welfare policies, McDonagh argues, signify women's legitimate place in power and in politics (pp. 221–22). They also “free women to enter the paid workforce” and “provide public sector jobs that disproportionately employ women.”⁷¹ Women's increased participation in paid work changes their political interests and makes them ardent supporters of the very same policies that enabled them to work outside of the home.⁷² Their changing political views, in turn, create an ideological gender gap among parties that can be exploited by promoting more women candidates (p. 222).

C. PRIVATE PERSONS—AS WELL AS PUBLIC POLICIES— UNDERMINE WOMEN'S EQUAL CITIZENSHIP STATUS

As the earlier discussion in Part A explained, the *Civil Rights Cases* held that Congress had the power to pass laws preventing discrimination by state actors, but not by private persons, because only state action violated the equal protection clause of the Fourteenth Amendment.⁷³ In the 1960s, the Court skirted this restriction on Congress's remedial power by construing Congress's commerce power generously enough to cover discrimination in public accommodations⁷⁴ and its section five, Fourteenth Amendment powers generously enough to cover private conspiracies to deny an individual's civil rights because of his race.⁷⁵ *United States v. Morrison*, however, revived the *Civil Rights Cases*'s limitations on both Congress's section five and its commerce clause powers.

69. See Inter-Parliamentary Union, *supra* note 61.

70. Japan is missing from McDonagh's table on the percentage of women elected to the national legislature in 2006. I derived this figure from 2011 statistics provided by the Inter-Parliamentary Union. According to that data, the United States ranked 91st out of 187 countries and Japan ranked 126th. See *id.*

71. Frances Rosenbluth et al., *Welfare Works: Explaining Female Legislative Representation*, 2 POL. & GENDER 165, 165 (2006).

72. “[W]elfare state policies that free women from previously held family duties provide increased opportunities for women to work outside the home in any field. Such policies also induce women to involve themselves in politics in order to protect the broad gender equity gains that welfare state policies achieve. Generous welfare state policies thus provide the motive and opportunity for women to enter legislative politics.” Frances Rosenbluth, *Welfare Works: Explaining Female Legislative Representation*, 2 POL. & GENDER 165, 182 (2006).

73. The Civil Rights Cases, 109 U.S. 3 (1883).

74. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

75. United States v. Guest, 383 U.S. 745, 747–48 (1966).

The Equal Protection Clause's "state action" requirement, however, does not constrain congressional powers provided by the other Reconstruction amendments. Private people, for example, can impose "badges and incidents" of slavery on others.⁷⁶ The Fourteenth Amendment's citizenship clause could also be given substantive bite. So interpreted, private persons could undermine another's citizenship status, just as private acts create badges and incidents of slavery. Such an interpretation could give Congress the power to make it illegal for private individuals to undermine the citizenship status of others. This part of the Fourteenth Amendment could be interpreted to give Congress the power to pass legislation like the Violence against Women Act. Reva Siegel has argued that the 19th Amendment might also be a basis for Congress to pass this and similar legislation.⁷⁷ A few of the essays in this volume discuss how actions traditionally deemed "private" undermine women's equal status as citizens.

For example, Elizabeth Schneider argues, Americans have not fully appreciated how domestic violence undermines women's citizenship rights (pp. 378–79, 384–85). Domestic violence prevents a woman from belonging fully to our society and polity by imprisoning her in the home—an abuser often interprets a victim's leaving the house as a threat to his control over her. "Whether it is being able to get an education, go to work, participate in civic or self-help activities, exercise the right to vote, or attend a meeting, the various forms of citizenship and aspects of broader participation in civil society are important to women but enormously threatening to the battering relationship" (p. 384).

The United States has made significant progress since the nineteenth century when violence was accepted as a husband's prerogative over his wife, Schneider says (pp. 379–80). Now, it constitutes a crime just the same as other batteries and crimes against persons. Criminalization should not be a society's only response to domestic violence, Schneider argues, because

76. *Cf. Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 413 (1968) (holding that refusal of whites to sell or rent houses to blacks would deny them a civil right in violation of 42 U.S.C. § 1982 and thus create a badge or incident of slavery); *The Civil Rights Cases*, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting).

77. Siegel, *She the People*, *supra* note 40, at 1036 ("The Nineteenth Amendment is thus powerful precedent for federal regulation that enforces equal citizenship norms in matters concerning family life . . . [and it shows] . . . that the nation has not always adhered to a tradition of localism in matters concerning the family.").

criminalization requires women who want to end the violence in their relationship to destroy their relationship, too (pp. 382–83). Children make it practically impossible to end a relationship completely, as parental visitation rights may require a woman to continue to engage with an abusive ex (p. 382).

States generally fail to give abused women adequate legal help to protect themselves from their abusers, Schneider argues (p. 382). The Constitution does not require them to provide legal aid to battered women to help them obtain restraining orders or negotiate family law disputes with abusive spouses, such as divorce settlements and custody disputes (pp. 387–88). Immigrants and women of color have particular trouble getting police to protect them at all, Schneider says (p. 382). Police, indeed, have no legal duty to protect them, as courts will not hold state officials liable for failing to protect women from their abusers, even when a woman has a civil protective order (p. 382). Demonstrating that domestic violence affects women's equal citizenship status, Schneider argues, could at least "create greater pressure for . . . state-funded legal representation" (p. 388) for women who need protective orders or help with family law issues such as divorce or custody. It might also create a positive right to police protection from abusive spouses.

Mary Anne Case approaches the public/private issue from a slightly different angle. She rejects the liberal tolerance of distinctive religious dress for women and supports bans on Muslim women wearing headscarves and burqas in public (pp. 107–08). Several different European countries have banned veils and burqas in some public places. France's 2004 ban on girls wearing headscarves to public school is the most famous. (The prohibition extends to other religious garb such as yarmulkes, turbans, or large crosses, as well). In the fall of 2010, France went even further and banned full-face veils in public.⁷⁸ France has also denied citizenship to a woman because she wore a burqa-like garment called a niqab. France's justification was that this woman was insufficiently assimilated into French culture (pp. 113–14). Accounts differ about the degree to which this woman was isolated. Case writes that this woman left her apartment only when her husband or a male relative accompanied her. In a *New York Times* interview, however, this woman, Faiza Silmi, said that she "leave[s] the house when [she]

78. Steven Erlanger, *France: Full-Face Veil Ban Approved*, N.Y. TIMES, Oct. 8, 2010, at A8.

please[s],” has her own car, and shops on her own.⁷⁹ Germany prohibits public school teachers from wearing headscarves. Denmark has recently prohibited Muslim judges from wearing headscarves when they are on the bench,⁸⁰ and some parts of Belgium ban girls from wearing headscarves to school.⁸¹

These public displays of religious belief undermine the citizenship status of all women, Case contends (pp. 120–21). State toleration of the public veiling of women implicitly indicates the acceptability of women’s submission and inferiority to men; that toleration communicates the state’s equivocal commitment to gender equality. Other norms, such as religious freedom, trump feminism (pp. 118–19). Consequently, Case argues, countries that are dedicated to women’s equality can justify prohibiting women from wearing distinctive religious dress in public (pp. 114–15).

The belief that women and men are equal forms a central part of the identity of some individuals and some societies, much as religion does in others, Case argues (p. 110). Such persons and countries are “feminist fundamentalists” (pp. 107, 110). Their beliefs should carry as much weight as religious beliefs. Feminism is a fragile, new cultural norm that is not universally recognized—far from it. The belief that men and women are equal will survive only if countries actively protect it. Just as countries with official religions pass laws ensuring proper respect for the official religion, Case says feminist countries can ensure that citizens’ public actions do not disparage feminism (p. 122).⁸²

Case may take her argument too far. A nation that tolerates the covering of women in public might communicate higher regard for some principles besides feminism, such as official tolerance of religious diversity or government neutrality with regard to matters of conscience, but it does not always do so.

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

80. Thomas Buch-Andersen, *Row over Denmark Court Veil Ban*, BBC NEWS, May 19, 2008, available at <http://news.bbc.co.uk/2/hi/7409072.stm>. “[T]he ban will include crucifixes, Jewish skull caps and turbans as well as headscarves,” but “the move is seen as being largely aimed at Muslim judges.” *Id.*

81. “700 schools in the northern region of Flanders, including some in Brussels” ban schoolchildren from wearing headscarves to school. *Belgian schools ban Muslim headscarf: tribunal*, AFP, Sep. 11, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5jOauREYO-pnsKGlhSblF0ys0679A>.

82. Case also argues that countries should be permitted to reject citizenship applications by individuals who plainly disagree with the proposition of sex equality. To ensure that such policies do not disproportionately screen out women, countries should probe male applicants’ commitment to sex equality.

Policymakers could believe that bans undermine women's equality if male family members prohibited uncovered women from leaving the house or attending school. (Over forty girls were expelled from school because they refused to remove their headscarves in school following the 2004 French ban.)⁸³ Indeed, permitting veiling might be the best way to promote feminism. It permits girls from religiously conservative families to attend public school with children from many other backgrounds. A school has the opportunity to teach a girl who wears a headscarf about principles of sex equality and to practice those principles as well. Girls lose contact with other children and teachers who believe girls are equal to boys if they are kept at home to take correspondence classes or sent to Muslim schools.⁸⁴ Bans have caused some girls to end their education prematurely.⁸⁵ Some evidence suggests that French girls who are forced to remove their headscarves subsequently drop out of school at sixteen when attendance is no longer required.⁸⁶ Without a high school education, such girls are doomed to menial work, depriving them of the material means to shrug off subordinating cultural beliefs and don the mantle of equality.

83. See *School Ban on Scarves Wins Praise*, N.Y. TIMES, Mar. 16, 2005, available at <http://www.nytimes.com/2005/03/15/world/europe/15iht-paris.html> (reporting that *Le Monde* had published a report by the "Freedom Committee, a Muslim group supporting schoolgirls who defied the law," and explaining that that report said that "47 [girls] had been expelled from school and 533 had agreed under pressure to shed their head scarves").

84. Similarly, France's denial of citizenship to women who subscribe to traditional Muslim norms of conduct and dress make these women more vulnerable to exploitation by their husbands and male relatives, as Kerry Abrams describes in her chapter. Such a woman cannot leave her husband without losing her right to live in France, which may mean that not only must she return to her home country but she may also lose her children, who may have French citizenship.

85. France mandates school attendance until 16, Florence Lefresne, *Contribution to EIRO thematic feature on Youth and work - case of France*, EIRONLINE, (May 3, 2007), <http://www.eurofound.europa.eu/eiro/2005/12/tfeature/fr0512101t.htm>, so parents cannot withdraw girls from French public schools without their receiving some alternative form of education, either in a private school or through correspondence courses.

86. Kimberly Conniff Taber, *Isolation Awaits French Girls in Headscarves*, WOMEN'S E-NEWS (Mar. 5, 2004), <http://oldsite.womensenews.org/article.cfm/dyn/aid/1738/context/archive> (reporting that an "investigation by *Le Monde* newspaper in February [2004] showed that it was rare for the girls who left public school because of the headscarf to continue any sort of schooling beyond age 16, when it is no longer required"). It proved frustratingly difficult to determine from English language newspapers just how many girls have sought alternative education as a consequence of the ban on headscarves. French schools expelled about 47 girls—hundreds of other Muslim girls apparently complied with the ban. See *School Ban on Scarves Wins Praise*, *supra* note 83. That figure, however, does not reveal how many girls voluntarily opted for correspondence courses or private schools. There is some evidence that girls who opted for correspondence courses quit within 2 years. See Taber, *supra*.

In Germany, six states have banned public school teachers from wearing headscarves, and two other German states have banned civil servants as well as public school teachers from doing so.⁸⁷ Berlin, for example, “categorically bars all public school teachers[,] . . . police officers, judges, court officials, prison guards, prosecutors, and civil servants working in the justice system, from wearing visible religious or ideological symbols or garments” except for “small pieces of jewelry.”⁸⁸ These policies have ended many women’s careers.⁸⁹

The European Court of Human Rights has upheld such bans as applied to students and teachers. One case upheld the firing of an experienced preschool teacher who had converted to Islam and started wearing a headscarf to school. “[T]he ordinance did not target the plaintiff’s religious beliefs,”⁹⁰ the court held. It was designed, rather, to “protect others’ freedom and security of public order.”⁹¹ The children in the teacher’s classes—aged 4 to 8—were “easily influenced” by a “powerful external symbol,” the court reasoned. The teacher’s headscarf violated religious freedom of her pupils and their parents and the government’s policy of official religious neutrality.⁹²

Interestingly, most of the German states used reasons much like Case’s to justify their bans: wearing headscarves reflects beliefs that women were subordinate to men, which was inconsistent with the constitution of these states.⁹³ (The French, in contrast, cited their religious neutrality principle of *Laïcité* as the primary motivation for their headscarf ban.)⁹⁴ Many of the German women who lost their jobs as a result of the ban disputed that the headscarf represented their subordination to men. One teacher implored:

They should ask our colleagues, directors, school inspectors, the parents, the pupils what kind of persons we are. All of them . . . can attest for sure that I am not oppressed and that I

87. HUMAN RIGHTS WATCH, DISCRIMINATION IN THE NAME OF NEUTRALITY: HEADSCARF BANS FOR TEACHERS AND CIVIL SERVANTS IN GERMANY 1 (2009), available at http://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf.

88. *Id.* at 2.

89. *Id.* at 41.

90. *Id.* at 21 (citing *Dahlab v. Switzerland*, 2001 Eur. Ct. H. R. 1 (2001)).

91. *Id.*

92. *Id.*

93. *See id.* at 27–30 (explaining why various German states have adopted their bans).

94. Patrick Weil, *Why the French Laïcité Is Liberal*, 30 CARDOZO L. REV. 2699, 2700–01 (2009).

do not wear the scarf because of oppression. . . . One cannot just simply assert this [that the headscarf indicates a woman's oppression] like this.⁹⁵

Another protested:

Many women with headscarves are not like this [i.e., oppressed or subordinate] and one cannot completely condemn a religion because of some being like this. . . . I am an example for integration . . . going out, striving for a job, finished my studies, did not marry young and only after completion of my university education. . . . I chose my husband freely, not under compulsion, I knew him long before, like it all should be. I was also not forced to wear the headscarf—I am practically a model of what they look for. They have now a promotional program for migrant women to study to become a teacher. Hello? Here I am, take me!⁹⁶

Many Muslim women complained the ban did not empower them; it lowered their social status. As one woman put it, “As long as we were cleaning in schools, nobody had a problem with the headscarf.”⁹⁷ The ban made German citizens (even ones who were German-born converts) feel like outsiders. “One has the feeling ‘we don’t want you’ Where should I go? I belong here. . . . I would never have thought that would be possible.”⁹⁸

Equality and religious neutrality cannot completely explain Germany and France’s bans. Anxiety about and discomfort with increasing numbers of Muslim immigrants motivated these bans, too. That fact is most apparent in Germany—five of the eight states that ban religious clothing make an exception for Christian symbols and clothing.⁹⁹ These symbols do not violate the religious neutrality of the state because they “are in line with and preserve values expressed in their state constitutions,”¹⁰⁰ which embody *Christian* values. Case could respond that feminist fundamentalism would prescribe a different result. A nun’s habit, for example, embodies the values of the Catholic Church, which is not an institution committed to the equal status

95. HUMAN RIGHTS WATCH, *supra* note 87, at 42.

96. *Id.* at 42–43 (alterations in original).

97. *Human Rights Watch*, Germany: Headscarf Bans Violate Rights: State Restrictions on Religious Dress for Teachers Targets Muslim Women (Feb. 26, 2009), <http://www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights>.

98. HUMAN RIGHTS WATCH, *supra* note 87, at 41 (alterations in original).

99. *Id.* at 25–26.

100. *Id.* at 27.

of women, as women are ineligible for positions of authority and leadership within the Church.

Feminist fundamentalism as a principle for action has no necessary stopping point. Headscarves and burqas may be particularly visible markers of a world-view in which women are inferior to men, but they are not the only markers. Indeed, why single out headscarves? Amish people prescribe modest dress for women (though men wear distinctively old fashioned clothes, as well). Mennonites and Orthodox Jews instruct women to dress modestly and distinctively, while Mennonite and Orthodox men wear clothes that, if not fashionable, do not call attention to themselves to the same extent. Indeed, as Beverly Baines points out in a different chapter, “all major religions” and “not just Islam . . . proselytize and/or practice sexual hierarchy” (p. 95).

Living in San Diego, I see every day women who have paid thousands of dollars for painful (and potentially life-threatening) surgery to enlarge and firm their breasts, smooth their faces, and slenderize their thighs. They wear skin-tight, low cut shirts and short skirts and dresses to spotlight the results.¹⁰¹ In Minnesota, I often saw young women wearing short skirts and high heels as they bar hopped on nights with temperatures in the ‘teens; their dates wore sensible shoes, slacks, and coats. French women teeter among uneven cobblestones in high-heeled shoes,¹⁰² which over time shorten their Achilles tendons, making flat shoes painful and making sports activities difficult.¹⁰³

This irony is not lost on French Muslim women and girls. One French schoolgirl insisted, “People say that it’s the women

101. “And what about the ‘degrading prison’ of plastic surgery?” Martha Nussbaum demanded in an online column in the *New York Times*. Martha Nussbaum, *Veiled Threats?*, N.Y. TIMES (July 11, 2010), <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/>. “Every time I undress in the locker room of my gym,” she writes, “I see women bearing the scars of liposuction, tummy tucks, breast implants. Isn’t much of this done in order to conform to a male norm of female beauty that casts women as sex objects?” *Id.*

102. I exaggerate. French women do not teeter—they expertly and gracefully negotiate the hazards of uneven cobblestones. *Cf. Seeking protection in downturn, French workers strike nationwide*, N.Y. TIMES (Jan. 29, 2009), <http://www.nytimes.com/2009/01/29/world/europe/29iht-29francestrikeFW.19774970.html> (noting that during a transit strike, “Parisians coped with the temporary adversity in true French style. Women biked in high heels, and men biked in business suits and ties”).

103. January W. Payne, *On Your Feet*, WASH. POST (May 8, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050401940.html> (ill-health effects of high heels include “bunions, stress fractures, joint pain in the ball of the foot, Morton’s neuroma, ‘pump bumps’ (enlargement of the bony area on the back of heel), corns and calluses, hammertoe, toenail problems and tight heel cords (shortening or tightening the Achilles tendon)”).

who wear the veil that are submissive. . . but I think it is those women [who do not wear headscarves] who are submissive, because it is what men want, women half naked.”¹⁰⁴ This girl cut off her hair when the ban went into force. Some Muslim women adopt the headscarf in order to avoid the oppressive male gaze. One French Muslim woman in her twenties said,

I have accepted hijab so that I can be appreciated for my intellect and personality rather than my figure or fashion sense. When I face a classmate or colleague I can be confident that my body is not being scrutinized, [or that] my bra-strap or pantyline [is] visible. I have repudiated the perverted values of our society by choosing to assert myself only through my mind.¹⁰⁵

Another young Muslim woman pointed out how “ironic” it was “that the French allow people to be topless on the beach but not covered head to toe in class.”¹⁰⁶

The principle of feminist fundamentalism is not necessarily limited to clothing. Women who drop out of the workforce to care for their young children reinforce the stereotype that this task is uniquely women’s work, making women generally less desirable to employers.¹⁰⁷ Women who choose to work as nurses, preschool teachers, and elementary school teachers solidify the stereotype that women, not men, are naturally caring. And why focus only on women? Certainly men who choose to work in highly sex-segregated industries such as technology, construction work, firefighting, mining, or truck and car repair also reinforce the stereotype that these jobs are men’s work.

Furthermore, Case’s feminist fundamentalism denies women respect and agency to determine how highly they rank equality with men in comparison to other values. Women who

104. Elizabeth C Jones, *Muslim Girls Unveil Their Fears*, BBC NEWS (Mar. 28, 2005), http://news.bbc.co.uk/2/hi/programmes/this_world/4352171.stm (alteration in original).

105. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 764 (2006) (alteration omitted) (quoting woman featured in Mod. Religion, Women & Islam, *Are You Ready to Meet the Woman Who Can Get by Without Her Looks*, <http://www.themodernreligion.com/index2.html> (quotation now available at *Women in Islam: Are you ready to meet the woman who can get by without her looks?*, ISLAMIC BULLETIN (Dec. 2001), http://www.islamicbulletin.com/newsletters/issue_22/women.aspx)). Her point may not be just hyperbole. While of course anecdotal, a visiting colleague of mine who teaches at the Sorbonne told me that women Ph.D. candidates often dress provocatively for their oral exams and their dissertation defenses.

106. *Id.* at 766 (quoting a woman interviewed by the authors).

107. See *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

wear headscarves and burqas cannot be easily dismissed as having false consciousness. The actual young French women who refused to shed their headscarves at school make the claim of false consciousness difficult to defend. The girl who shaved her head said of the school officials, "They drove me crazy and tried to brainwash me so much that I got fed up and I did it - I shaved my hair off," believing that it would free her from the intrusive male gaze.¹⁰⁸ This act both isolated her and focused more attention on her, however. She said that with her head shaved, "I feel alone [now]; I feel like a monster. It's like being naked on the street."¹⁰⁹

Beverley Baines also addresses how the public sphere and the private sphere bleed into one another (p. 83). Many Muslims, she explains, believe that Sharia (Islamic law) should govern family law disputes, even in secular societies. Muslims in Ontario, including some women who identified themselves as feminists, urged the provincial government to recognize the legal validity of decisions made by Sharia family law arbitrators. Baines denies that these feminist Muslim activists suffered from false consciousness.

In 2006, the Ontario legislature refused to recognize Sharia arbitration decisions under the Family Statute Law Amendment Act, which denies legal enforcement for the rulings of religious arbitrators, but does not outright ban these arbitrations (p. 85). The debate over Ontario's recognition of these religious family arbitrations, Baines says, represents on one level the familiar clash between freedom of religion and women's equality that Case describes in her chapter (p. 84). Most (non-Muslim) feminists had fought legal recognition for these religious arbitrations because "private bargaining in family law tends to yield inferior results for many women; and women may not be truly free in their choice to arbitrate" (p. 94). On another level, however, these values do not inevitably clash—Muslim feminists argued that "sex equality and religious freedom are equally compelling values" (p. 84). Their arguments in favor of state recognition of these arbitration panels, Baines explains, resemble those of "intersectional feminists, who refuse to choose between their race and/or sexuality and their feminism" (p. 84).

108. Elaine Sciolino, *France Turns to Tough Policy on Students' Religious Garb*, N.Y. TIMES (Oct. 22, 2004), http://www.nytimes.com/2004/10/22/international/europe/22france.html?_r=1.

109. *Id.*

When religion and women's equality conflict, many feminists would argue, as Case does, that the state should let women's equality prevail. It would be discrimination to ratify a decision premised on the belief that men and women possess different legal entitlements. Muslim feminists disagree. The standard feminist position, they argue, infantilizes religious women and denies them agency to make their own decisions. Some Muslims honestly believe that people who secure secular divorces "place their spiritual and social lives in dire peril" (p. 86).¹¹⁰ Muslim women are competent enough, they argue, to choose to be treated unequally in the present life (as measured by Western norms) to serve God and secure their place in the afterlife (p. 102). Their argument fell on deaf ears in Ontario, as the Premier and the legislature believed Canadian law and Sharia law fundamentally conflicted and could not coexist. The Muslim feminists' argument simply made no sense in the context of the Canadian Constitution, which forbids religious accommodation when religion conflicts with sex equality (p. 104).

Baines argues that Ontario's refusal denies Muslim women (and, presumably, men) citizenship—they cannot follow their religion and Canadian law. In her view, this denial is unnecessary because human dignity, not equality, lies at the heart of the Canadian Charter (p. 106). Citizens have overlapping commitments to God and to the state, and recognizing and adapting law to the "messiness of overlapping commitments" is "more consistent with protecting human dignity" (p. 106). Whether or not Baines is right about the essential values of the Canadian Constitution, Baines is right to point out the irony of denying women the agency to determine their priorities for themselves in the name of feminism.

These two chapters by Case and Baines reveal a problem with using "citizenship" as a new frame to achieve parity for women: citizenship is too general a concept to resolve specific controversies.¹¹¹ Case presents a view of citizenship in which the government is committed to the equal status of men and women above all other values; it must ensure that the actions of some individuals do not undermine other individuals' equal status.

110. Quoting Syed Mumtaz Ali & Anab Whitehouse, *The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada*, 13 J. INST. MUSLIM MINORITY AFF. 156, 170 (1992).

111. GEORGE LAKOFF, *THE POLITICAL MIND* 115 (2008).

Baines, in contrast, believes that women's equality is a worthy goal because it ensures that a state does not arbitrarily deny on the basis of sex the fundamental liberty of citizens to determine their own lives. That fundamental liberty of citizens includes the freedom of an individual to value her religion above the equal provision of some legal rights. Who is right? "Citizenship" provides no answer.

This next Section will now turn to discussing other problems with using citizenship as a frame to promote women's substantive equality.

III. EQUAL CITIZENSHIP STATUS IS A WORTHY GOAL BUT AN UNLIKELY TOOL FOR ACHIEVING SUBSTANTIVE EQUALITY

The chapters by Case and Baines suggest that citizenship might be, as Professors McClain and Grossman put it, both too general a concept and "too contested" to transform the debate about women's equality. This Section will describe some additional reasons why equal citizenship status may not be the best tool for achieving women's substantive equality. First, gender stereotypes permeate citizenship, so a fight for equal citizenship status is simply a different battle than that for women's equality. Unless we wring sex stereotypes out of citizenship, a quest for equal citizenship status will produce something different than equality. Given that women and womanly things historically have suffered from second-class status, full citizenship status for women may still leave women stuck in second-class. Neutering the concept of citizenship is no easy task, either.

Second, citizenship defines a relationship between a person and a state. Consequently, citizenship rights come with attendant obligations, a fact that most of the essays of this volume overlook. Generally put, the more obligations that a citizen shoulders, the better her claim to demand positive rights from the state. In a country that obliges a citizen to do relatively little, shifting from the rhetoric of equality to that of citizenship is unlikely to change people's attitudes about the positive entitlements the state should provide to its citizens.

A. CITIZENSHIP'S MEANING IS CONTESTED AND CONTEXTUAL

1. Citizenship is gendered

Kathryn Abrams's chapter on three modern women's anti-war movements (p. 131) reveals a stumbling block in the way of the drive for equal status as citizens: gender stereotypes pervade the concept of citizenship. Her essay cautions that the concept of citizenship alone cannot do much work for feminism.

Abrams notes that all anti-war protesters face an uphill battle for credibility. War protesters always risk appearing cowardly or disloyal¹¹² because patriotic feelings run at their highest when war imperils a nation (pp. 132–33). At such a time, a person's "*obligations* to the government, rather than . . . rights against it," take center stage (pp. 132–33).¹¹³ Anti-war protesters can establish credibility by claiming that some special characteristic about their group gives them authority to protest. One winning strategy is for protesters to assert that they have made some "individual sacrifice" to support "the war effort" (p. 133). Former soldiers have the greatest credibility as protesters, as they are turning against the cause that made them heroes (pp. 133–34).

Women anti-war protesters usually cannot assert authority as former solidiers because American law formally excludes them from combat (p. 134).¹¹⁴ Instead, women protesters traditionally have drawn on their relationships to men who have been injured or killed during the war. Women who have lost a son or husband to war, for example, can use their sacrifices as evidence that they had "resolute[ly] and patriotic[ally]

112. See, e.g., E.J. Montini, *What Some Moms Did During Their Summer Vacation*, ARIZ. REPUB., Aug. 16, 2005, at 10B (reporting that "There have been counterprotests [to Cindy Sheehan's month-long vigil outside of President Bush's Crawford Ranch]. Sheehan has been accused of being unpatriotic and even treasonous").

113. Emphasis added.

114. Though American law still prohibits women from serving in combat, Lizette Alvarez, *G.I. Jane Stealthily Breaks the Combat Barrier*, N.Y. TIMES, Aug. 15, 2009, at A1, the United States military has creatively worked around these formal restrictions. *Id.* The nonconventional wars in Afghanistan and Iraq, moreover, have blurred the line between combat and non-combat positions. *Id.* ("[T]he Afghanistan and Iraq wars, often fought in marketplaces and alleyways," have given women the opportunity to "prove[] their mettle in combat" as the "number of high-ranking women and women who command all-male units has climbed considerably along with their status in the military."). Women have flown combat aircraft and served on combat ships since the 1990s when Congress lifted that gender ban. Michele Norris, *Roles for Women in U.S. Army Expand*, NAT'L PUB. RADIO (Oct. 1, 2007), <http://www.npr.org/templates/story/story.php?storyId=14869648>.

surrender[ed] . . . their family members to military service” (p. 133). Women’s protests, in other words, often rely on derivative authority dependent on the protesters’ relationships with men. The reliance on these roles often calls to mind stereotypes about wives and mothers, and these stereotypes often color women’s credibility as protesters. Sometimes these stereotypes strengthen women’s protests, and sometimes they weaken them.

Abrams describes three women’s antiwar movements that have played on their womanhood to claim unique authority to “expose the error of war” (p. 134). Those three are Cindy Sheehan’s month-long vigil outside of George W. Bush’s ranch in Crawford, Texas, in protest of the Iraq war, Code Pink’s protest of both the war in Afghanistan and in Iraq, and the weekly protests by Israeli Women in Black of the continuing Palestinian conflict.

Cindy Sheehan’s vigil illustrates all of Abrams’s main points. In 2004, Sheehan’s son, Casey, was killed in the Iraq war. President Bush met with her later that year at the White House. This meeting infuriated her. According to Sheehan, President Bush “wouldn’t look at . . . pictures” of Casey,¹¹⁵ and “[h]e didn’t even know Casey’s name.”¹¹⁶ After her meeting with Bush, Sheehan felt deeply insulted as a mother and on behalf of her son. She used President Bush’s slights to her and her son to legitimate her protest later that summer. When President Bush vacationed at his home in Crawford, Texas, in August of 2004, Sheehan camped outside its gates. She refused to leave until he met with her again. She demanded that he explain to her, “Why did [you] kill my son?”¹¹⁷ “[The President] said my son died in a noble cause, and I want to ask him what that noble cause is.”¹¹⁸ Was it so noble that “he [had] encouraged his daughters to enlist” to fight for it?¹¹⁹ She also wanted to “ask[] him to quit using Casey’s sacrifice to justify continued killing” in Iraq.¹²⁰ He should instead “use Casey’s sacrifice to promote peace.”¹²¹

115. Helen Thomas, *Reality of War Spoils Bush’s Vacation*, SEATTLE POST-INTELLIGENCER, Aug. 19, 2005, at B6.

116. Interview by Wolf Blitzer with Cindy Sheehan (Aug. 7, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0508/07/le.01.html>.

117. Editorial, *Smearing the Mom of a Soldier: How the Right Attacks Even the Grieving*, PHILA. DAILY NEWS, Aug. 11, 2005, at 15.

118. *Id.*

119. Montini, *supra* note 112, at 10B.

120. *Id.*

121. *Id.*

Sheehan's motherhood gave her real credibility. It gave her the prerogative to demand President Bush's (and the nation's) attention: her young son—her flesh and blood—had died in Iraq. She had "skin in the game," (p. 137) which the President did not. She had special knowledge about the real costs of the Iraq war that the President and his advisors lacked because *they* had not risked their children's lives.

Sheehan also used her motherhood to establish her credibility as a protester by camping out in a ditch in the Texas heat of August. The physical discomfort she endured recalled other sacrifices of physical comfort and physical appearance that mothers routinely make (pp. 144–45). (These uncomfortable conditions also reminded onlookers of the physical discomfort suffered by soldiers (p. 144).) Finally, her camping outside of President Bush's ranch effectively staked a claim to that land (p. 144). By refusing to leave, she defended her right to hold it. Historically women have neither staked nor defended claims to land. Her "occupation" also symbolized the American troops' occupation of Iraq. Her occupation of that land grabbed the media's (and America's) attention (p. 144).

But Ms. Sheehan's motherhood and womanhood planted some significant landmines in her path, as well (pp. 143–44). Her plain speaking manner and frequent cursing made her look coarse, angry, and intimidating (pp. 143–44). Sheehan's husband filed for divorce during her protest, making her look like a neglectful wife (p. 147). Worse yet, Sheehan had also left her other children behind at home, making her look like a bad mother (p. 147). She was criticized for neglecting these womanly duties for a political cause (p. 147).

Sheehan's use of her motherhood and the criticisms she received because of her roles as wife and mother call to mind the separate spheres ideology of the nineteenth century. That ideology placed tremendous roadblocks in the way of women's gaining the right to vote. Women have always been citizens of the United States, but women could only exercise their citizenship derivatively as daughters, wives, or mothers for the first 130 years of America's history. The law forbade them to vote because their husbands and fathers had the prerogative to represent their interests. When the Fifteenth Amendment granted black men the right to vote, Congress relied on this male prerogative to deny women the vote. Before they could receive the right to vote, women would have to overthrow "laws and

customs that restricted women's roles in marriage and the market," according to Reva Siegel.¹²²

Opponents of women's suffrage feared that giving women the vote would "attack[] the integrity of the family" as wives overthrew their husbands' authority to represent them in the public sphere.¹²³ Women might even oppose their husband's political views (perish the thought!). Women who asserted a role in politics, opponents argued, "denie[d] and repudiate[d] the obligations of motherhood."¹²⁴ Allowing women to vote "would . . . utterly destroy[]" "the family"¹²⁵

These claims sound comically cataclysmic and far-fetched today. But the criticisms that Cindy Sheehan received echo this rhetoric. When her protest conformed to traditional gender roles these stereotypes helped her cause, as her motherhood gave her credibility and authority to protest the war. But when her devotion to her cause led her to neglect her traditional roles as a woman and mother, she was criticized for her neglect, and her protest suffered. Sex roles, in short, still affect women's roles as citizens.

The persistence of these gender stereotypes implies that the fight for equal citizenship status for women cannot make a simple end run around the pitfalls of the women's equality movement. Unless citizenship is neutered, women's "citizenship status" will reflect stereotypes (or put less negatively, generalizations) about women. Whether these stereotypes reduce or increase women's status is hard to say, but that these stereotypes will affect it is not hard to figure. A fight for equal citizenship status will therefore produce different results than a fight for sex equality, which in the United States has focused on erasing sex stereotyping.

If sex stereotypes are the only barrier to the usefulness of women's equal citizenship status, then citizenship status is no worse than equality, which is also dogged by sex stereotypes. Certainly, sex stereotyping in the United States has lessened dramatically since the turn of the twentieth century. The arguments against women's right to vote provoke laughter. In thirty years, our current views of womanhood and motherhood may seem silly, too.

122. Siegel, *She the People*, *supra* note 40, at 1035.

123. *Id.* at 978.

124. *Id.*

125. *Id.*

There is, however, an additional problem with the concept of citizenship that does not affect the concept of equality. Sheehan's story and the arguments about women's suffrage show that the concept of citizenship is closely related to the concept of family. As I will now explain, this close relationship makes draining gender typing from citizenship difficult. I will argue that citizenship will continue to reflect sex stereotypes so long as sex stereotyping still pervades our concept of family. It does not mean that citizenship can never be sex neutral, but it does suggest that the rhetoric of citizenship cannot undo mischief caused by sex stereotyping.

2. Citizens are part of a national family, so as family roles are gendered citizenship is, too

What does citizenship have to do with families? George Lakoff, a professor of linguistics at Berkeley, has studied how our minds process language and understand our experiences and the world around us. He argues that our early experiences as children map certain metaphorical frames into our brain circuitry.¹²⁶ Those metaphorical frames profoundly influence how we later perceive and describe people and things around us. Two of the earliest pleasures we encounter as babies, for example, are our parents' warm bodies and warm milk. Lakoff says it is no accident that we later speak of emotional states in terms of temperature.¹²⁷ "She is a warm person" means "she is affectionate." "He warmed to her" means "his affection for her grew."¹²⁸

The concepts of government and governance grow out of our family relationships, too, as these relationships are our first experiences with both. Parents govern their children, telling them what to do and what is good and bad for them and for the family. Parents expect things from children—children will speak to them respectfully, help with chores, eat what's served for dinner, use decent table manners, do their homework, etcetera. Parents use carrots and sticks to enforce their expectations and directives—expressing delight and paying attention to a child's good behavior, and expressing disapproval, ignoring children, and withholding rewards and privileges when they do something parents do not want.

126. LAKOFF, *supra* note 111, at 83–85.

127. *Id.* at 84.

128. "Affection is warmth" is not reciprocal. No one says, "The water got more affectionate," because we encounter temperature in many contexts that have nothing to do with physical contact. *Id.*

According to Lakoff, governments share the elemental structure of other institutions. Governments are “structured, publicly recognized social group[s] that persist[] over time. ‘Governing’ is setting expectations and giving directives, and making sure that they are carried out by positive or negative means.”¹²⁹

Families are the first institution to which we belong. Discipline from our parents is our first experience with governance. As a consequence, our concepts of “governance and family life co-occur;” they bleed into each other.¹³⁰ According to Lakoff, “[t]his co-occurrence gives rise to an extremely important primary metaphor: a Governing Institution is a Family.”¹³¹ This metaphor appears whenever we talk of institutions—people, for example, often speak of companies as families or their co-workers as being just like family.

When this metaphor applies to *the* government, the metaphor of family has a few basic variations, Lakoff explains. Two relate to our discussion of citizenship.

First:

The Institution [the Nation] is the Family
The Governing Individual [the Government] is a Parent
Those Governed [the Citizens] are Family Members¹³²

Second:

The Institution [the Nation] is Family
The Governing Individual [the President] is a Parent
Those Governed [the Citizens] are Family Members¹³³

This metaphor of government as “government as family” and “citizens as members of a family,” are what Lakoff calls primary metaphors.¹³⁴ Primary metaphors have “a much stronger basis in experience than other models,” or metaphors, and “our brains form that mapping more readily and much more

129. *Id.* at 85.

130. *Id.*

131. *Id.*

132. *Id.* at 86.

133. *Id.* Lakoff cautions that the fact that, in the metaphor of the government as family, “citizens are family members” does not mean that “citizens [are] dependent children.” Instead, citizens are just “family members with no further specifications.” *Id.* at 86, 88.

134. *Id.*

strongly.”¹³⁵ This deep mapping means that primary metaphors cannot be changed readily.

The consequence of these metaphors is that we understand “citizenship” through the metaphor of family. Families have gender roles, and, as the previous discussion of Abrams’s chapter and the women’s suffrage movement show, the primary metaphor of “citizens as family” is gendered, too. Our language and our understanding of history reflect that fact: George Washington is the father of our country; John Adams, Thomas Jefferson, Alexander Hamilton, James Madison, and Benjamin Franklin were among our “founding fathers.”¹³⁶ The Civil War pitted brother against brother. Platoons of soldiers are “bands of brothers.” The cabinet department in charge of domestic security (there domestic reflects family) is the “Department of Homeland Security.”¹³⁷ Thus, someone who thinks the family model wrongly invokes gender roles cannot just propose a new metaphor (such as nation as community or nation as team) and expect that new metaphor to stick.¹³⁸

The idea that we understand the concept of country and citizen through our concepts of family and family members helps to explain why anti-suffragists thought that the vote posed a fatal threat to the family as an institution. In the nineteenth and twentieth centuries, citizenship, civil rights, and stereotypes prescribed specific and distinct roles for men and women within families.¹³⁹

To the husband, by natural allotment . . . , fall the duties which protect and provide for the household, and to the wife the more quiet and secluded but no less exalted duties of mother to their children and mistress of the domicile.¹⁴⁰

Women were citizens, but in the eyes of the anti-suffragists women “did not need the vote because they were already represented in the government by male heads of household.”¹⁴¹ Their husbands or fathers had the duty to exercise women’s civil

135. *Id.*

136. *Id.* at 76, 87.

137. *Id.* at 76.

138. *Id.* at 88.

139. Siegel, *She the People*, *supra* note 40, at 979 (documenting how gender roles pervaded these ideas).

140. *Id.* (alteration in original) (quoting from an 1883 report from the House Judiciary Committee rejecting a constitutional amendment that would grant women the right to vote).

141. *Id.* at 981.

and political rights for them. The right to vote would “introduce domestic discord into the marital relation and distract women from their primary duties as wives and mothers.”¹⁴² “American traditions of individualism, ‘self-government,’ and ‘self-representation’” would invade the home and unseat the husband and father’s authority to represent his wife or daughter.¹⁴³

To refute the argument that the right to vote would destroy the family, suffragists first had to change law and norms governing family and marriage. Professor Siegel explains that the effort to overthrow “the common law of marital status” went hand in hand with the suffrage fight.¹⁴⁴ They “sprang from a common vision.”¹⁴⁵ Suffragists’ “vision of family life” in which women were individual legal agents just the same as their husbands conflicted absolutely with the common law.¹⁴⁶ They labored for decades to change the laws and norms surrounding families. They attacked marriage and property law, which deprived women of individual agency. They indicted “male privilege in the family and elsewhere,” denouncing women’s “physical coercion in marriage,” such as “domestic violence, marital rape, and ‘forced motherhood.’”¹⁴⁷ Suffragists also attacked and finally overthrew the legal structures that made women dependent on their husbands, such as “property rules that vested in the husband a right to his wife’s earnings and to the value of his wife’s household labor.”¹⁴⁸

Lakoff’s notion that “government as family” and “citizens as family” are primary metaphors explains why suffragists had to change the laws and norms governing family and marriage before they gained the right to vote. The argument that women’s equal citizenship status depended on their having the right to vote made no sense when husbands and fathers were duty bound to represent their interests. The nineteenth-century concept of women’s citizenship as derivative of their husband’s or father’s, indeed, denied women the *individual* right to vote. Only once women had independent agency within families—women could own their own property, make their own money, contract for

142. *Id.*

143. *Id.*

144. *Id.* at 993.

145. *Id.*

146. *Id.*

147. *Id.* at 992.

148. *Id.*

themselves, and possess their own bodies—did it seem unjust to deprive women citizens of the right to vote.

The suffrage movement fought for—and created—a new vision of “family that contemplated a far more prominent role for women in the nation’s economic and political institutions.”¹⁴⁹ Once suffragists changed the institutions of family and marriage then, they could argue that giving women the right to vote would *strengthen* families. Women citizens could participate in new forms of “social housekeeping”—helping to make “decisions about new ways government might provide for the health and welfare of families living in America’s growing cities.”¹⁵⁰ In short, suffragists gained the right for women citizens to vote by changing the role of women citizens to include the individual right to voting; to do that they had to change gender norms in families.

The suffragists did not try to erase all gendered ideas about citizenship or the family; nor is it likely that they could have. “Our minds already possess frames,” Lakoff writes. Successful policies and political arguments must therefore “fit *within* them.”¹⁵¹ Changes in marriage law and criminal law gave husbands and wives more equal rights, which changed gender norms, but did not erase them. As with family, so goes citizenship. The “social housekeeping” argument, for example, shows that even after women got the vote, a woman’s role as a citizen was still distinct from a man’s. As Professor Abrams’ chapter demonstrated, gender still shapes the concept of citizenship.

A successful strategy for women’s equal status as citizens cannot simply define citizenship as containing certain attributes and demonstrate that certain privileges and rights follow from that definition. If the “frame” of citizenship does not already contain those attributes, then, as the suffragist movement shows, the frame or the attributes embedded within it must change first. The fact that our concept of citizenship remains gendered reflects the fact that families and familial roles remain gendered (though certainly gender shapes family and family roles far less than it did ninety years ago).¹⁵²

149. *Id.* at 993.

150. *Id.*

151. LAKOFF, *supra* note 111, at 68.

152. This concept of frames is a bit circular. The idea that arguments for change must fit within frames could imply that change is well nigh impossible. For example, the legal changes to women’s rights to own property or to make contracts without their

The main argument running through most of this volume's chapters, thus, relies on a bootstrap. That argument is that "full citizenship status" requires a change in policies that have contributed to constructing and support sex *inequality* (such as limited and unpaid maternity and paternity leave, and gendered patterns of childcare). This argument is a bootstrap because citizenship roles reflect family roles, not the other way around. These gendered family roles cannot be changed by objecting that they deny women full status as citizens, because citizenship and citizenship status are defined in reference to these roles.

Citizenship, in the end, brings us right back to where we started: to the problem of sex equality. Sex still affects how we divide work within and outside of the home. Sex stereotypes drive this division of labor. Martha Fineman's chapter acknowledges as much. She describes how our American concept of family undergirds sex inequality. The American "prelegal notion of the family" inevitably subordinates women (p. 256). People in the United States, she says, generally believe that families are independent institutions, wholly distinct and separate from the state. Women's "unique reproductive roles and responsibilities . . . define them as essentially different and necessarily subordinate in a world that values economic success and discounts domestic labor" (p. 256). The idea that family is a prelegal, private institution is just wrong, Fineman contends. It is built on an even deeper lie—that individuals are autonomous. Human life is fragile, she explains. Each of us has been wholly dependent on others for our survival. Each of us is vulnerable to becoming so again (pp. 258–59). Recognizing essential human vulnerability reveals that achieving substantive equality

husbands' consent are inconsistent with the nineteenth century frame of family, in which the male head of household legally represents and subsumes the legal identities of his dependents. Change does occur and has occurred, however. Lakoff suggests that change occurs slowly and incrementally so that we gradually adjust frames rather than overthrowing them in one fell swoop. So, for example, some husbands abandoned their families, leaving behind a technically married woman who could not own her own property or make contracts on her own behalf. This practical problem required legal change. Another explanation may also be possible. Women could invoke other frames with which their inability to own property and make contracts was inconsistent. When women began working for wages, for example, their employment was inconsistent with the traditional role of wife. It may have cued other frames, such as "employee" and "slave." Employees trade their own individual labor for wages paid to them individually. The nineteenth century exception to that rule was slavery, in which owners received wages earned by their slaves' labor, and this frame increased in prominence as the Civil War approached. Clearly, it would not be acceptable to think of wives as their husband's slaves. If women were employees, however, then they earned their own wages, and this "counter-frame" required some adjustment in the frames of wife and family.

“require[s] state intervention, even . . . reallocation of some existing benefits and burdens” (p. 259). She is skeptical that we have wrung all progress from the concept of equality, and believes that most arguments for changes in family policy will have to depend on equality.

In sum, stereotyped family roles must change before stereotypes about citizenship roles will change, given that citizenship roles reflect family roles, and not the other way around. Until gender exerts less influence on family roles, Lakoff’s theory predicts that a majority of Americans will not perceive that women’s continued (though significantly lessened) economic dependence on men brands them as second-class citizens, or that their disproportionate exclusion from positions of corporate and political power does either.

As I write this review, however, the gendered concept of family is undergoing profound changes. Same sex marriage is one of the forces driving that change.¹⁵³ New York, one of the most populous states in the nation, has recently granted same sex partners the right to marry.¹⁵⁴ Some fear that same sex marriage threatens the family. They are partly right and profoundly wrong. They are partly right: as same sex marriage becomes acceptable, legal families will no longer be constructed along traditional sex roles. In same sex marriages, women head families and men care for small children. These changes will amplify changes that have been occurring for a while. Sex and gender have shaped the concept of family for a long time (and vice versa), and gendered families have been one very important cornerstone of American life.

The idea that same sex marriage threatens the family is profoundly wrong. Tens of thousands of same sex families show that individuals do not need to follow traditional gender scripts to commit to each other for life, and children can successfully be reared in families without these scripts, too.¹⁵⁵ A belief in the

153. Of course, gender roles within marriage have been eroding for decades. See generally Suzanne M. Bianchi et al., *Is Anyone Doing the Housework?: Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191, 191 (2000) (documenting how women did half as many hours of housework in the 1990s than they did in the 1960s while men’s hours doubled over the same period).

154. N.Y. DOM. REL. LAW § 10-a (1) (McKinney 2011) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”).

155. Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14(3) APPLIED DEV’L. SCI. 164, 166 (2010) (summarizing research that has shown that the sexual orientation of parents is not linked

equality of committed same-sex couples and different-sex couples simply belies the belief that sex roles are essential to family. The institution of family will persist after same sex marriage becomes routine, just as it did after women started voting.

That gender roles in marriage and family are eroding does not necessarily mean, however, that in two decades Americans will have paid parental leave, sex quotas in national office, or federal laws that criminalize domestic abuse or date rape. A further problem lurks about the use of citizenship to insist on policies and programs to improve the substantive equality of women. The concept of "full citizenship status" does not itself specify the rights required to have full citizenship status. Instead, as this next section will explain, the rights required for a person to have "full citizenship status" vary from country to country.

3. Citizenship rights depend on citizens' obligations, and different nations hold their citizens to different obligations

As this review described earlier, T.H. Marshall, and other citizenship theorists who followed him, have divided citizenship rights into three classifications: civil rights (*e.g.*, to sue, contract, and own property), political rights (*e.g.*, to vote and hold office), and social or economic rights (*e.g.*, sufficient economic security to exercise civil and political rights). Marshall theorized that citizenship required rights from each.

The introduction to *Gender Equality* leans heavily on Marshall in describing how citizenship might provide a means for achieving greater substantive equality for women. (Marshall's theory of citizenship does continue to be the most influential.)¹⁵⁶ It argues that women's full citizenship status requires countries to ensure women's social rights, which means that states must grant its people certain positive rights. These rights may include long, paid parental leaves, quotas to ensure a proportionate number of women hold national political office, enhanced state protection for women from private violence, and the right to abortion. Without such rights, women will, for example, shoulder more housework and childcare, which will

with "child . . . outcomes," but rather that "family processes, such as parenting quality and attachment" better predict "child outcomes").

156. See THOMAS JANOSKI, *CITIZENSHIP & CIVIL SOCIETY* 6–7 (1998) (describing Marshall's influence on political theory).

prevent a disproportionate number of women from climbing the corporate ladder or serving in important positions of political power. Women will be rendered second-class citizens if a disproportionate number of women are housekeepers and men are national political and corporate leaders.

The introduction appears to portray Marshall as positing that countries necessarily have a duty to provide citizens with specific social rights. If that portrayal is right, then states must ensure certain positive rights to prevent women from being second-class citizens. A very good argument can be indeed made that robust social rights are necessary to guarantee women's full status as citizens.

Gender-neutral, unpaid leave simply has not equalized women's economic or social status in the United States because it has not equalized parenting responsibilities for infants and young children. More women than men take parental leave, and they take more of it, too.¹⁵⁷ This fact creates a feedback loop of gendered patterns of work inside and outside the home. Women's leaves permanently reduce their wages;¹⁵⁸ lower wages mean women take on far more than half of the work at home; these burdens on time and energy reduce women's interest in full time work, which further reduces their wages; and so on. As American society values paid work more than unpaid work in the home, women who stay home with children do not have the social status of men and women who work. It hardly bears mentioning that the United States' current scheme of unpaid leave hampers women from burnishing their resumes and making the connections a person needs to run for (much less win) political office. So stereotypes persist that men make more effective leaders.

The right for parents to take significant paid leave from work would disrupt the feedback loop of gendered decisions that tend to push women out of the workforce or into part time work

157. McGowan, *supra* note 21, at 27. Many different reasons contribute to this tendency. Men who shoulder an equal or more than equal share of housework and childcare suffer from stereotype backlash from their coworkers, friends, and acquaintances. *Id.* at 39. Rarely do people ask expectant fathers whether they plan to return to work after their new child is born. Women routinely entertain this question. *Id.* at 25. Wives often make less money than their husbands, making their salary easier to forgo. *Id.* at 26–27. Women also tend to assess their salaries in light of how much they are paying in childcare, while men don't.

158. Even a year off from work hurts a woman's career; she will lose on average 11% of her previous wages. Three years' leave to care for children reduces a woman's wages by nearly 40%. *Id.* at 28 (citing Hewlett & Luce, *supra* note 21, at 46).

when they have children. Paid parental leave encourages more men to take more and longer leaves.¹⁵⁹ The most successful of these policies require men to take some significant part of the leave or the family loses that leave time entirely.¹⁶⁰ In general, “Countries that offer leave benefits for fathers for long enough and with high enough wage replacement have quickly seen” the rate of men taking parental leave increase. “[C]lose to 90 percent of fathers are reported to take paid paternity leave in Denmark, Iceland, Sweden, The Netherlands, and Norway”¹⁶¹ Providing men and women with paid parental leaves of about nine months to a year also appears to reduce the “mommy penalty”—the reduction of women’s wages that often accompanies motherhood, especially when women take long breaks from work.¹⁶² Recall, too, that McDonagh found that

159. EILEEN APPELBAUM & RUTH MILKMAN, *LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA* 17 (2011) (California’s provision of “wage replacement during family leaves[] seems to be an effective incentive for men’s increased participation in caregiving, both for fathers who are bonding with new or newly adopted children and for those caring for seriously ill family members.”). With regard to paid leave for pregnancy or parenthood, only a few states—most notably California—require employers to reasonably accommodate the actual physical limits an individual woman’s pregnancy imposes on her. CAL. GOV. CODE § 12945(b)(1) (West 2005). Two states, California and New Jersey, also provide some paid parental leave to new parents funded by the state unemployment insurance system. The state of Washington has passed a similar insurance program for parental leave, but budget cuts have delayed its implementation until 2012. Sylvia Hsieh, *Delay in Paid Family Leave Act*, LAW. WKLY. USA (May 21, 2009); Rachel La Corte, *Some WA Programs Laws in Name Only*, SEATTLE TIMES (May 30, 2010). California and New Jersey pay out fairly low benefits, however, and for a total of 6 weeks (though two parents who do not work for the same employer can each take leave, for a total of 12 weeks of benefits). California’s scheme pays out 55% of a person’s weekly wages, up to a maximum benefit of \$987 in 2011. APPELBAUM & MILKMAN, *supra*, at 1. New Jersey provides two-thirds of a person’s average weekly wage for six weeks, up to a maximum of \$559 per week. State of N. J. Dep’t of Labor and Workforce Dev., *Wage Requirements—State Plan*, http://lwd.state.nj.us/labor/fli/worker/state/FL_SP_wage_requirements.html (last visited Sep. 30, 2011).

160. APPELBAUM & MILKMAN, *supra* note 160, at 17 (discussing how Sweden’s introduction of “‘lose it or use it’ days, which are additional days of [paid] leave that are granted to the family if and only if they are taken by the father” dramatically increased the number of men taking parental leave and the amount of leave they took). Appelbaum and Milkman also report that men in California are taking longer leaves now that that state provides some wage replacement. *Id.* at 18–19. Since California began offering wage replacement, the proportion of bonding leave claims filed by men has increased steadily over the life of the program, from 17% of bonding claims in 2004–05 to 26% of claims in 2009–10. *Id.* at 18 fig.3.

161. HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US* 34–35 (2011).

162. *Id.* at 35 (citing studies showing that countries with no paid leaves have the highest wage penalty for motherhood but that countries with paid leaves under a year have lower motherhood wage penalties).

countries with robust social rights also elected more women to national political office.

The introduction and this volume of essays emphasize Marshall's discussion of citizenship rights to the near exclusion of his discussion of citizenship obligations. Rights and obligations cannot be separated, however. Marshall himself said, "If citizenship is invoked in defense of rights, the corresponding duties of citizenship cannot be ignored."¹⁶³ For Marshall, citizenship rights and citizenship *obligations* are a two-way street. The more obligations citizens shoulder, the greater the state's obligation to provide rights to its citizen, and vice versa. States strike different balances between rights and obligations, and the balance a country strikes depend on its history and culture. A country's failure to provide citizens with generous social rights does not necessarily mean that it denies its people full citizenship rights. Some states that oblige their citizens to do relatively little may define citizenship rights to include mostly negative rights rather than positive rights.

Thomas Janoski, a political scientist, has studied different countries to find out how well actual governments fit with Marshall's framework. After studying over a dozen different democracies, Janoski found a great deal of variance in social rights among democracies. Some provided robust social rights (such as paid parental leave, a minimum guaranteed income, free healthcare) and others did not. Social rights correlated positively with citizen obligations. The more citizens were obliged to do (such as high taxes and compulsory military service)¹⁶⁴ the more robust their social citizenship rights.¹⁶⁵ Countries that imposed relatively heavy obligations on its citizens and provided them with lots of social rights, Janoski found, tended to have fairly equal wealth distribution as well.

The United States imposes relatively few obligations on citizens compared with other countries that provide lots of social rights. Scandinavian countries, for example, require young men to serve for 8 to 15 months in the military.¹⁶⁶ Individuals and couples in these countries pay much higher taxes, too. In 2010, the average tax wedge for a two-earner couple with two children

163. JANOSKI, *supra* note 156, at 53 (quoting T.H. Marshall).

164. *Id.* at 125.

165. *Id.* at 125–33.

166. *Id.* at 58 tbl.3.3.

was 34% in Denmark, 33% in Norway, and 38.5% in Sweden.¹⁶⁷ A comparable American family pays about 25% of its income in taxes.¹⁶⁸ The average tax wedge for individuals was 38% in Denmark, 37% in Norway, 43% in Sweden, and 30% in the United States.¹⁶⁹ As might be predicted from these tax rates, wealth is fairly equally distributed in Scandinavian countries.¹⁷⁰ It is not in the United States.¹⁷¹

Marshall's theory would imply (and Janowski confirms) that United States citizens have mostly negative social rights and few positive social rights.¹⁷² American citizens have no obligation to vote, and most do not. The military has drafted no one into service for almost 40 years. The military instead has entirely relied on a volunteer military, even though two long wars in the last 10 years have deployed well over a hundred thousand soldiers at a time. Unless a family member or friend has been deployed to Iraq or Afghanistan, the wars in Afghanistan and Iraq have barely touched daily civilian experience. Though we have spent trillions of dollars on these wars and amassed record budget deficits, President Bush left his 2001 tax cuts in place and tried to make them permanent.¹⁷³ Democrats and Republicans continue to battle whether they will expire or be extended.¹⁷⁴

167. The 2010 rates in Denmark and Sweden are much lower than they were in 2000. In 2000, a Danish two-earner couple with two children paid 39% of its income in taxes, while such a Swedish couple paid 46% of its income in taxes. OECD Statistical Extracts, *Comparative tables, Two-earner married couple, one at 100% of average wages and the other at 67%, 2 children, average tax wedge*, <http://stats.oecd.org/Index.aspx?DataSetCode=AWCOMP> (last visited Jan. 18, 2012).

168. *Id.*

169. OECD Statistical Extracts, *Comparative tables, Single person at 100% of average earnings, no child, average tax wedge*, <http://stats.oecd.org/Index.aspx?DataSetCode=AWCOMP> (last visited Jan. 18, 2012). As was true for married couples, the 2010 tax wedge for individuals in Sweden and Denmark is much lower than it was in 2000. In 2000, an individual in Denmark paid 44% of her income in taxes and 50% in Sweden. *Id.*

170. JANOSKI, *supra* note 156, at 136.

171. There are other important differences. Scandinavian countries tend to have a corporatist structure to their governments; that is, they formally include important social groups in governing. The United States, in contrast, is pluralistic: interest groups vie for political power, and no interest group is guaranteed a seat at the table. *Id.* at 109.

172. *Id.* at 106.

173. *Bush Wants Tax Cuts Made Permanent*, USA TODAY (Jun. 2, 2008), http://www.usatoday.com/news/washington/2008-06-02-bush-tax_N.htm (explaining that President Bush campaigned to make his tax cuts permanent, saying that allowing them to expire would be harmful to an already limp economy).

174. Jim Kuhnhehn, *Obama Unveils Deficit Reduction Plan, 'Buffett Rule' Tax on Millionaires*, HUFF. POST POL. (Sep. 19, 2011), http://www.huffingtonpost.com/2011/09/19/obama-deficit-plan-buffet-rule-taxes-medicare_n_969403.html.

The United States' refusal to adopt robust social policies like generous paid parental leaves does not necessarily represent hostility in the United States to women's full citizenship. The United States does not, for example, provide generous gender-neutral social rights, like a guaranteed minimum income or universal health care while withholding programs and benefits to help women balance home and work responsibilities.¹⁷⁵ The United States' failure to provide generous, paid parental leave likely reflects America's general pattern of providing thin social rights. This review essay cannot definitively answer why the United States provides its citizens with few positive rights compared with other countries.¹⁷⁶

175. The United States' treatment of injured war veterans provides a vivid example of its general ambivalence toward guaranteeing robust social rights. Injured veterans, as might be predicted, have many "social rights" when compared with the civilian population—paid health care and rehabilitation, generous payments for work disability, and educational benefits. Few are more venerated as citizens than those who have sacrificed their health on the battlefield. Year after year, however, Congress underfunds these programs and benefits. Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1084 (2010) ("Veterans programs and commitments are chronically underfunded, administration is poor, and bureaucracies are inefficient."); *id.* at 1125 (explaining that problems of chronic underfunding, poor administration, and poor integration of services "have been exacerbated by the current conflicts [in Afghanistan and Iraq], which were not adequately planned and budgeted for by the federal government"). At the height of the Iraq war, for example, wounded soldiers languished in Walter Reed Hospital. The hospital lacked adequate staff, supplies, and services. *Id.* at 1099 n.88. Wounded war veterans have sacrificed their health and bodily integrity for this country, and yet Congress does not feel obliged to fund these services fully. When the federal government's failure to create a system for paid parental leave is considered along with the federal government's treatment of war veterans, the United States looks more hostile toward guaranteeing positive social rights than hostile to women's full status as citizens.

176. Janoski argues that a country's balance between rights and obligations reflects the country's origin and history. *See* JANOSKI, *supra* note 156, at 142–72. Scandinavian countries, for example, have been homogeneous societies for most of their histories. They may welcome immigrants, but the United States is a nation of immigrants. Norway and Denmark both were occupied during World War II, which solidified their populations against their occupiers. The United States prevailed in WWII, which strengthened our country's might and economy and made the United States a very prosperous country in the 1950s. Sweden, Norway, and Denmark also have parliaments with proportional representation; we have a two-party, first past the post system. Working class parties have also formed political coalitions with either agrarian or liberal parties in Scandinavian countries, increasing the political power of lower income people; the working class, agrarians, and liberals often oppose each other in the United States. Compared to the United States, a much larger proportion of Scandinavian countries' population is over 65 and was throughout the twentieth century. Their embrace of robust social policies may reflect the fact that they have come to grips with humanity's vulnerability and interdependence—something that Martha Fineman contends the United States tends to deny. Each of these factors, Janoski argues, contributes to the Scandinavian countries' higher tolerance for taxation and compulsory military service and their preference for wealth equality and social services.

Given the United States' longstanding ambivalence to positive rights, framing policies as necessary to ensure women's full status as citizens probably will not help get these policies enacted. Americans seem not to understand positive rights as essential to individual citizenship. "Citizenship," thus, cannot be expected to deliver more positive rights than "equality" has.

In short, it is unrealistic to hope that much progress can be made on women's rights by reframing the fight from a battle for equal protection of the laws to one for women's equal status as citizens. Those who want greater substantive gender equality must persuade our fellow citizens to adopt policy changes that will change family and gender roles.

IV. CONCLUSION

Occam's razor suggests that if we want women and men to have equal social and economic status then we should argue that equality demands it. Equality has achieved enormous victories quickly. Forty years is an instant in the course of the history of human civilization, which has often relegated women into subservient roles.

Lakoff's theory about the relationship between our primary frames of family and our concept of citizenship fits with what we know about the barriers to women's equal pay and equal status in the United States. As I have discussed in detail elsewhere,¹⁷⁷ two main phenomena account for most of the wage gap between women and men in America: occupational segregation¹⁷⁸ and the unequal division of household labor and childcare.¹⁷⁹

177. These two paragraphs draw heavily upon McGowan, *supra* note 21, at 42–43.

178. The proportion of women in an occupation explains between approximately 20 to 30 percent of that wage gap. Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap?: An Update*, MONTHLY LAB. REV., Mar. 2003, at 9, 11. It is a linear relationship—the greater the proportion of women in an industry, the less they make. *Id.* at 13. Women working in predominately female occupations earn 25.9% less than those in predominately male occupations. *Id.* at 14. Men working in predominately female occupations earn 12.5% less than those in predominately male occupations. *Id.*

179. American women with children take significantly more leave from work (for parenting and other reasons) than women without children and men with or without children. Women take leaves that average a little over two years, while men take about three months. Hewlett & Luce, *supra* note 21, at 46 (finding that women in their study took leaves averaging 2.2 years); see also Claudia Goldin, *The Quiet Revolution That Transformed Women's Employment, Education, and Family*, AM. ECON. REV., May 2006, at 1, 16 (finding that among 1976 women college graduates, leaves averaged 2.08 years). The more children a woman has, the longer she remains out of the workforce. *Id.* at 17 (findings based on College and Beyond data that one child increased a woman's time off

Norms that relate to men and women's gender roles in the family contribute to both to the division of housework and childcare and to occupational segregation. First childcare: stereotypes that "children naturally have a special bond with [their] mothers . . . [and] men cannot nurture infants the way mothers can" strongly influence parents to divide paid work, housework, and childcare according to sex stereotypes.¹⁸⁰ Housework and childcare skew women's job preferences before they ever become pregnant. Women anticipate their future work as mothers, and when considering what careers to pursue, women, not men, "routinely think about how motherhood can be combined with a particular career."¹⁸¹ When men and women are later faced with the struggle to balance home and work life, women thus have fewer obstacles—both mental and actual—to cut back or adjust their work schedules.¹⁸² No surprise then that when men have children, their earnings increase,¹⁸³ while women's decrease.¹⁸⁴

Stereotypes about familial roles are so strong that women working outside the home pay for the perception that they are primarily responsible for the care of children, whether they are or not. A recent study found that "employed mothers in the United States suffer, on average, a 5 percent wage penalty per child even after controlling for other factors that affect wages."¹⁸⁵

by about 4 months (.36 years), two by 17 months (1.41 years), and three by 34 months (2.84 years)). Forty-three percent of highly qualified women with children (defined as those who had a graduate, a professional, or a high-honors undergraduate degree) have voluntarily left work for six months or more. Hewlett & Luce, *supra* note 21, at 44. Only 24% of highly qualified men have. Less than a sixth of those men who took time off did so to stay home with a child. *Id.* at 45.

180. Francine M. Deutsch, *Equally Shared Parenting*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI. 25, 26 (2001).

181. FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS* 149 (1999).

182. *Id.*

183. Claudia Goldin & Lawrence F. Katz, *Transitions: Career and Family Life Cycles of the Educational Elite*, AM. ECON. REV., May 2008, at 363, 367.

184. Two years leave, the average for women, decreases a woman's salary by 18% when she returns to work. Even a year's leave hurts—returning salaries are 11% lower. Longer leaves hurt more: leaves of 3 years or longer reduce a woman's wages by almost 40%. Hewlett & Luce, *supra* note 21, at 46. Women who leave the job market during those years may find that their earnings never "catch up" to men's. *Id.* at 46 (quoting Lester Thurow). Leaving work for over six months also makes it harder for women to return to full-time work. Only 74% of women who wanted to return to work could do so, and only 40% actually returned to full-time professional work. *Id.* Others took part-time jobs or became self-employed. *Id.*

185. Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 683 (2004) (citing Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2004)).

Women labor “under pressure from ambient stereotypes saying that mothers can’t be serious professionals.”¹⁸⁶ When professional women become mothers they trade the stereotype that they are competent but unlikable for the stereotype that they are warm but *incompetent*.¹⁸⁷ (Proof that you can’t have everything.) People commonly believe that working mothers are less competent than working fathers or childless women, but they perceive fathers as more competent than childless men.¹⁸⁸ This perception of working fathers and mothers is predictable given our cultural belief that women should be the primary caregivers and men should be the breadwinners.¹⁸⁹

Occupational segregation and a gendered division of childcare and housework have persisted¹⁹⁰ despite women’s significant gains in educational attainment, which now equals or exceeds men’s.¹⁹¹ They have also persisted despite women’s significant engagement in paid work and the prevalence of two-earner families.¹⁹²

This gloomy state of affairs does not have to persist, and I predict it will not. In the last 40 years, the fight for women’s equality has changed gender roles and family roles tremendously. Pinching, patting, ogling and wolf whistling at women workers was just good fun in the 1970s, while today enough of it will violate federal law. Women now hold jobs in many occupations that men dominated in the 1960s and the 1970s.¹⁹³ Both men and women workers have the federal right to take equal amounts of parental leave. In the 1970s, women alone fought for voluntary maternity leave with a right to reinstatement and against mandatory maternity leaves that

186. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 701 (2004).

187. *Id.* at 703–04.

188. *Id.* at 709 tbl. 1.

189. *Id.* at 706.

190. *See supra* Parts II.A & II.B.

191. In 2000, 30% of young women (25 to 29) had a college degree or more, while 28% of young men did. *The Graduates: Educational Attainment, 2000*, U.S. CENSUS BUREAU, 9-2, <http://www.census.gov/population/www/pop-profile/files/2000/chap09.pdf>.

192. Seventy-eight percent of mothers were employed in 2000. SUZANNE BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 45 (2006). Among people who worked, 78% were part of a dual-earner family. Rosalind Chait Barrett, *On Multiple Roles: Past, Present, and Future*, in *HANDBOOK OF WORK-FAMILY INTEGRATION* 76 (KAREN KORABIK ET AL., EDS. 2008). Looking at the data from a slightly different angle, in 2000, both spouses worked in about 54% of American marriages; among families with children under age 6, that figure increases slightly to about 58%. HARRIET B. PRESSER, *WORKING IN A 24/7 ECONOMY* 61 (2003) (citing 2000 Census data).

193. Occupational desegregation has stalled in the last 10 to 15 years.

forced them out of work during their pregnancies. All-male colleges and universities do not exist anymore; several Ivy League colleges, a few elite state universities, and military academies excluded women as recently as the mid 1970s.¹⁹⁴

Rogers Smith mused that men will have to be persuaded that women's equality works for them (p. 33). As the arguments generally stand, achieving equality for women has generally meant extinguishing many of the privileges of manhood (p. 33). For some men, these privileges are part of the natural order of the world. For others, they are merely privileges, but privileges that they greatly enjoy and may be loathe to relinquish. Men have to be persuaded that they have something to gain from sex equality, too. Thus, I have titled this review "Stop Fighting for Women's Equality." A battle for sex and gender equality must be waged instead, and men may indeed have something to gain from this battle. But citizenship is not going to win it.

194. The military academies began admitting women in 1976 after Congress authorized women's admission in 1975; Columbia College first admitted women in 1983, Dartmouth in 1972, Brown in 1971, Princeton and Yale in 1969. Harvard merged admissions with Radcliffe in 1977 and the two institutions formally merged in 1999.

