

## STOP THE FIGHT FOR WOMEN'S EQUALITY

**GENDER EQUALITY: DIMENSIONS OF WOMEN'S CITIZENSHIP**, (Linda C. McClain<sup>1</sup> & Joanna L. Grossman,<sup>2</sup> eds.). New York, Cambridge University Press. 2009. Pp. 450. \$99.00.

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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.<sup>4</sup> In the service

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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]lack 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 discrimination<sup>5</sup> or to achieve integration.<sup>6</sup> 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.<sup>7</sup>

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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.<sup>8</sup> 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."<sup>9</sup>

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."<sup>10</sup> As surely as formal barriers deny equal citizenship to individuals, so too do "substantive inequalities," which "effectively bar people from full membership."<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> Second, federalism prohibited Congress from regulating marital and familial relationships.

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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.<sup>14</sup> 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.<sup>15</sup> Those contributions have made it possible

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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.<sup>16</sup>

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.<sup>17</sup> Such a woman is also more than twice as likely to be divorced or separated than a similar man.<sup>18</sup> If she is married and has children, she probably cannot leave the children home with dad while she returns to work.<sup>19</sup> 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.<sup>20</sup> Consequently, many women put lofty career goals on hold for at least a while. But this choice also

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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 at 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%.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Even when 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.<sup>25</sup>

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,

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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](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).<sup>26</sup> 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.<sup>27</sup> 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."<sup>28</sup> 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

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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.<sup>29</sup>

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

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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's<sup>30</sup> 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).<sup>31</sup> 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).<sup>32</sup> 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.

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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).<sup>33</sup>

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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).<sup>34</sup>

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

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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,<sup>35</sup> unless state officials have a hand in the discrimination<sup>36</sup> or the discrimination substantially affects interstate commerce.<sup>37</sup> Private persons can, however, affect the citizenship status of others, much as private acts can impose badges and incidents of slavery.<sup>38</sup>

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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.<sup>39</sup> 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,<sup>40</sup> 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

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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).<sup>41</sup> Citing the *Civil Rights Cases*<sup>42</sup> 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).<sup>43</sup> 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*<sup>44</sup> 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.<sup>45</sup> 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."<sup>46</sup> 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

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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”<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> Were the Court to strike a law with disparate

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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.<sup>50</sup> 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.<sup>51</sup> 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.

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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.<sup>52</sup> 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.<sup>53</sup>

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

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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).<sup>54</sup>

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.<sup>55</sup> 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

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

55. U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination Charges EEOC & FEAs 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).<sup>56</sup> 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,

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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.<sup>57</sup> 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.<sup>58</sup> 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

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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).<sup>59</sup> 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 candidates<sup>60</sup>—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,

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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) “ressurect[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%),<sup>61</sup> Costa Rica (39%),<sup>62</sup> Norway (38%),<sup>63</sup> Finland (37.5%),<sup>64</sup> Denmark (37%),<sup>65</sup> the Netherlands (37%),<sup>66</sup> and Spain (36%).<sup>67</sup> 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.<sup>68</sup> Women hold 16% of the seats in

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

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.”<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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 accommodations<sup>74</sup> and its section five, Fourteenth Amendment powers generously enough to cover private conspiracies to deny an individual's civil rights because of his race.<sup>75</sup> *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.<sup>76</sup> 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.<sup>77</sup> 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

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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.<sup>78</sup> 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]

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<sup>78</sup> 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.<sup>79</sup> Germany prohibits public school teachers from wearing headscarves. Denmark has recently prohibited Muslim judges from wearing headscarves when they are on the bench,<sup>80</sup> and some parts of Belgium ban girls from wearing headscarves to school.<sup>81</sup>

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).<sup>82</sup>

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.

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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-pnsKGlhSbIF0ys0679A>.

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.)<sup>83</sup> 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.<sup>84</sup> Bans have caused some girls to end their education prematurely.<sup>85</sup> 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.<sup>86</sup> 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.

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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.<sup>87</sup> 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.”<sup>88</sup> These policies have ended many women’s careers.<sup>89</sup>

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,”<sup>90</sup> the court held. It was designed, rather, to “protect others’ freedom and security of public order.”<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> (The French, in contrast, cited their religious neutrality principle of *Laïcité* as the primary motivation for their headscarf ban.)<sup>94</sup> 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

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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](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.<sup>95</sup>

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!<sup>96</sup>

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.”<sup>97</sup> 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.”<sup>98</sup>

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.<sup>99</sup> 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,”<sup>100</sup> 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

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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.<sup>101</sup> 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,<sup>102</sup> which over time shorten their Achilles tendons, making flat shoes painful and making sports activities difficult.<sup>103</sup>

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

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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.”<sup>104</sup> 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.<sup>105</sup>

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.”<sup>106</sup>

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.<sup>107</sup> 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

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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](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](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.<sup>108</sup> 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.”<sup>109</sup>

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).

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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](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).<sup>110</sup> 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.<sup>111</sup> 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.

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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 disloyal<sup>112</sup> 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).<sup>113</sup> 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 soldiers because American law formally excludes them from combat (p. 134).<sup>114</sup> 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]

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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,<sup>115</sup> and “[h]e didn’t even know Casey’s name.”<sup>116</sup> 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?”<sup>117</sup> “[The President] said my son died in a noble cause, and I want to ask him what that noble cause is.”<sup>118</sup> Was it so noble that “he [had] encouraged his daughters to enlist” to fight for it?<sup>119</sup> She also wanted to “ask[] him to quit using Casey’s sacrifice to justify continued killing” in Iraq.<sup>120</sup> He should instead “use Casey’s sacrifice to promote peace.”<sup>121</sup>

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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.<sup>122</sup>

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.<sup>123</sup> 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."<sup>124</sup> Allowing women to vote "would . . . utterly destroy[]" "the family"<sup>125</sup>

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.

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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.<sup>126</sup> 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.<sup>127</sup> "She is a warm person" means "she is affectionate." "He warmed to her" means "his affection for her grew."<sup>128</sup>

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.

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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.”<sup>129</sup>

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.<sup>130</sup> According to Lakoff, “[t]his co-occurrence gives rise to an extremely important primary metaphor: a Governing Institution is a Family.”<sup>131</sup> 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 Members<sup>132</sup>

Second:

The Institution [the Nation] is Family  
 The Governing Individual [the President] is a Parent  
 Those Governed [the Citizens] are Family Members<sup>133</sup>

This metaphor of government as “government as family” and “citizens as members of a family,” are what Lakoff calls primary metaphors.<sup>134</sup> 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

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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.”<sup>135</sup> 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.”<sup>136</sup> 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.”<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup>

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.<sup>140</sup>

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.”<sup>141</sup> Their husbands or fathers had the duty to exercise women’s civil

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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.”<sup>142</sup> “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.<sup>143</sup>

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.<sup>144</sup> They “sprang from a common vision.”<sup>145</sup> Suffragists’ “vision of family life” in which women were individual legal agents just the same as their husbands conflicted absolutely with the common law.<sup>146</sup> 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.’”<sup>147</sup> 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.”<sup>148</sup>

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

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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.”<sup>149</sup> 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.”<sup>150</sup> 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.”<sup>151</sup> 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).<sup>152</sup>

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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

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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.<sup>153</sup> New York, one of the most populous states in the nation, has recently granted same sex partners the right to marry.<sup>154</sup> 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.<sup>155</sup> A belief in the

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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.)<sup>156</sup> 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

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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.<sup>157</sup> This fact creates a feedback loop of gendered patterns of work inside and outside the home. Women's leaves permanently reduce their wages;<sup>158</sup> 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

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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.<sup>159</sup> The most successful of these policies require men to take some significant part of the leave or the family loses that leave time entirely.<sup>160</sup> 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 . . . .”<sup>161</sup> 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.<sup>162</sup> Recall, too, that McDonagh found that

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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](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."<sup>163</sup> 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)<sup>164</sup> the more robust their social citizenship rights.<sup>165</sup> 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.<sup>166</sup> 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

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

Marshall's theory would imply (and Janowski confirms) that United States citizens have mostly negative social rights and few positive social rights.<sup>172</sup> 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.<sup>173</sup> Democrats and Republicans continue to battle whether they will expire or be extended.<sup>174</sup>

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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](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](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.<sup>175</sup> 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.<sup>176</sup>

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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 large 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,<sup>177</sup> two main phenomena account for most of the wage gap between women and men in America: occupational segregation<sup>178</sup> and the unequal division of household labor and childcare.<sup>179</sup>

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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.<sup>180</sup> 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."<sup>181</sup> 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.<sup>182</sup> No surprise then that when men have children, their earnings increase,<sup>183</sup> while women's decrease.<sup>184</sup>

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."<sup>185</sup>

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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.”<sup>186</sup> When professional women become mothers they trade the stereotype that they are competent but unlikable for the stereotype that they are warm but *incompetent*.<sup>187</sup> (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.<sup>188</sup> 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.<sup>189</sup>

Occupational segregation and a gendered division of childcare and housework have persisted<sup>190</sup> despite women’s significant gains in educational attainment, which now equals or exceeds men’s.<sup>191</sup> They have also persisted despite women’s significant engagement in paid work and the prevalence of two-earner families.<sup>192</sup>

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.<sup>193</sup> 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

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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.



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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.<sup>194</sup>

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.

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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.