Exploring A New Paradigm for Women's Rights

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A Review of GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP
Linda C. McClain & Joanna L. Grossman, Eds.¹

By Rebecca E. Zietlow²

Nearly forty years after the Supreme Court recognized gender as a suspect class under the Equal Protection Clause of the Fourteenth Amendment,³ and almost half a century after the 1964 Civil Rights Act guaranteed women the right to work free of sex discrimination,⁴ women still find gender equality to be an elusive goal. Sure, we have made progress. A significantly higher percentage of women have entered the workforce, including professional and corporate positions, since these measures were enacted. On the other hand, there are far too many areas where progress is either frustratingly slow or even non-existent. Most strikingly, women still earn only about 75% of what men earn for comparable work (approximately the same percentage as what they earned 30 years ago),⁵ and statistics of household income after divorce reveal that women as a class remain economically vulnerable.⁶ Domestic violence plagues the lives of women in almost epidemic proportions,⁷ and women still lack full autonomy over their reproductive choices.⁸ Women are still far more likely than men to be the primary caretakers of their children, and this impacts our ability to succeed in the workplace.⁹

Our lack of progress suggests that the Equal Protection based model of equality law is inadequate for addressing gender inequality in our society. The book GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP, edited by Joanna Grossman and Linda McClain, presents an alternative paradigm for women’s rights, that of equal citizenship. This intriguing collection of essays provokes the reader to consider legal issues confronting women not just as a question of equal treatment between men and women. Instead, the books asks the question of whether women are entitled to essential positive rights that are necessary to enable the belonging of women as full citizens in our society. Grossman and McClain have gathered a group of distinguished authors who provide an in-depth discussion of some of most salient issues in equality law today.

The rhetoric of second class citizenship has served as a rallying cry for rights movements, including those who have advocated for women’s equality, throughout our history. However, the United States Supreme Court has rejected the attempts of advocates to frame rights claims as

² Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law.
⁵ http://usgovinfo.about.com/od/censusandstatistics/a/paygapgrows.htm.
⁷ See ELIZABETH SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).
rights of citizenship.\textsuperscript{10} Instead, gender equality is a matter of equal protection law. Since 1971, the Court has held that the Equal Protection Clause prohibits classifications based on gender stereotypes, and requires the government to treat men and women equally.\textsuperscript{11} While this is indeed progress, there are several major problems with this paradigm. The first is that the Equal Protection Clause only prohibits policies that intentionally discriminate on the basis of gender, not those that have only a discriminatory impact on women.\textsuperscript{12} Second the remedy for these violations is limited to ending the intentional discrimination.\textsuperscript{13} The Court has interpreted the Equal Protection Clause not to require the state to take affirmative measures to eliminate barriers to equality.\textsuperscript{14} Third, the Court has found that the Equal Protection Clause only applies to state action,\textsuperscript{15} and has further held that the government has no obligation to protect women, not only from private discrimination, but even from private violence.\textsuperscript{16} Thus, this approach is inadequate to address many of the most deeply rooted problems of women in our society, including violence, poverty and the lack of adequate representation in the power structure of government and the private sector.

A more fundamental problem with the Equal Protection paradigm is that there are some real differences between men and women, and that those differences that are not biological stem from deeply entrenched inequality in our society. The courts have not done a good job at determining whether a difference is a stereotype or whether it is real.\textsuperscript{17} Moreover, many of the worse problems experienced by women simply do not fit the Equal Protection paradigm because they are experienced primarily, or even exclusively, by women. For example, the fact that domestic violence is experienced primarily by women is a manifestation of women’s subordination in our society, but treating male and female victims the same will not eradicate this problem. Another obvious example is the fact that only women bear the burden of childbearing and childbirth, and there is simply no analogous condition experienced by men.\textsuperscript{18} For forty years, the law has required that men and women have equal access to parental leave and part time work, but this has failed to remedy the earnings gap experienced by men and women who work outside of the home. For all of these reasons, the Equal Protection paradigm is inadequate to address the inequality that women still experience in our society.

\textsuperscript{10} See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (rejecting the claim that the right to practice law is a privilege or immunity of citizenship); U.S. v. Morrison, 529 U.S. 598 (2000) (rejecting claim that freedom from gender motivated violence is a right of citizenship).
\textsuperscript{11} See, e.g. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).
\textsuperscript{12} See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) .
\textsuperscript{17} Compare Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981); (upholding a statutory rape law that only applies to male perpetrators because girls can get pregnant) to Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that a government health plan that did not cover pregnancy related disability did not make a gender based distinction).
\textsuperscript{18} Feminists have long debated how the equality paradigm should address the fact that women are far more likely than men to do the work associated with raising children, and thus far more likely to experience a negative impact on their career success and earning potential. See Katharine T. Bartlett, Feminist Canon, in J.M. BALKIN & SANFORD LEVINSON, EDS., LEGAL CANONS (2000).
Another way to think about women’s inequality is to try to address the barriers to women’s full realization as members in our society. Citizenship is a good place to start. Citizenship defines the line between insiders and outsiders in a society, but citizenship also entails a set of pre-requisites for belonging to that society. The Framers of the Fourteenth Amendment, with its citizenship clause, considered citizenship to be a font of fundamental human rights. The authors of the essay in this book seize on this tradition to advocate for a more substantive vision of women’s equality. As McClain and Grossman explain in their introduction, “This conception includes the complete rights, benefits, duties and obligations that members of any society expect to share and aspires to goals of inclusion, belonging, participation and civic membership.” The essays in this book are intended to further the dialogue over the meaning of citizenship and belonging. McClain, Grossman, and the other authors in this book, are not the first to consider citizenship as a new paradigm for equality rights. However, this book is the most comprehensive discussion of the meaning of that paradigm for women’s rights.

The first section of GENDER EQUALITY addresses gender and “constitutional citizenship,” the extent to which the constitution has played a role in fostering women’s equal citizenship. Here, it is important to differentiate between citizenship as a category for immigration purposes and the concept as a font of rights. One can be a citizen of a country for the purposes of immigration law and still lack the preconditions that are necessary for full participation in that country’s government and economy. Far too often, women in our society have been treated as “second class citizens” who lack the pre-requisites to full economic and political participation. Rogers Smith begins the volume by analyzing four recent gender equality cases of the Supreme Court to illustrate the marginality of citizenship claims to the Court’s gender equality jurisprudence. Two of these cases contain references to women’s rights as citizens. In the one case about citizenship as an immigration category, Ngyuen v. US, the Court held that it does not violate the Equal Protection Clause for the United States to differentiate the citizenship rules governing a child born outside this country to a US citizen and non-US citizen depends on whether the citizen parent is a man or a woman. In US v. Virginia, the Court held that women have the right to be trained as “citizen soldiers” at the Virginia Military Institute, and that VMI’s exclusion of women therefore violated the Equal Protection Clause. As Smith points out, however, neither of these cases will have an impact on many women. In two other cases, the Court addressed issues that affect a large number of women, domestic violence and combining work outside the home and child care responsibilities. In both cases, the Court disregarded

20 GENDER EQUALITY, supra note 1 at 2.
23 Rogers Smith, Gender at the Margins of Contemporary Constitutional Citizenship, GENDER EQUALITY, supra note 1 at 23.
24 Id. at 27-28.
25 Id. at 25.
26 Id. at 25, 29.
arguments that rights of citizenship were at stake. As Smith (and other authors in this book) elaborate, both of these issues are arguably essential to women obtaining full citizenship. Nonetheless, the Court turns a blind eye to these claims.

In the second essay, Kerry Abrams point out that even the first meaning of citizenship, a classification for immigration purposes, is heavily gendered in our law. For example, eligibility for permanent residence is mostly based on employment status, and US regulations favor jobs that are predominantly held by men. These regulations mean that a woman’s eligibility for a green card is far more likely than a man’s to depend on her marital status and thus they foster the dependency of women on their working husbands. This framework creates an environment conducive to abuse, since those women are both isolated and dependent on this husband’s good favor. Although the law contains exceptions for of domestic violence, the danger is that those protections create a perverse incentive for women to become victims. Immigration law also shapes marriage because it discourages divorce and because it requires documentation to prove the marriage that influences marriages to be similar to the American model. Thus, United States immigration regulations perpetuate inequality by encouraging traditional family roles in which women are subordinate to their husbands.

In their essays, Gretchen Ritter, Beverly Baines and Mary Ann Case explore the ability of constitutional law to transform women’s status in our society and ameliorate our status as second class citizens. Early advocates of women’s rights invoked the American tradition of civic republicanism and the Bill of Rights as a source of rights to civic inclusion. However, in the Twentieth Century, leaders of the women’s rights movements embraced a model of rights based on liberal individualism and the Equal Protection Clause. Perhaps our limited success in achieving equality can be traced back to this strategy. Gretchen Ritter calls on advocates for women’s equality to return to strategy of our foremothers. That tradition of popular sovereignty is based in the Bill of Rights and a more substantive notion of equality and citizenship. As Ritter puts it, “‘A politics that is responsive to the needs and concerns of a diverse society cannot merely be based on a stripped down liberal individualism – it must expose and appreciate the way that social embeddedness and community values shape us all.’”

27 Id. at 31.
28 Id. at 31-34.
29 Smith argues that this is not necessarily a bad thing because claims of citizenship rights are better suited to the political process than to courts. Id. at 34-38.
30 Kerry Abrams, Becoming a Citizen: Marriage, Immigration, and Assimilation, in GENDER EQUALITY, supra note 1 at 39.
31 Id. at 40.
32 Id. at 55.
33 Id. at 49.
34 See Gretchen Ritter, Women’s Civic Inclusion and the Bill of Rights, in GENDER EQUALITY, supra note 1 at 60; Beverly Baines, Must Feminists Indentify as Secular Citizens? Lessons From Ontario, GENDER EQUALITY, supra note 1 at 83; Mary Anne Case, Feminist Fundamentalism and Constitutional Citizenship, GENDER EQUALITY at 107.
35 Ritter, supra note 34 at 61.
36 Id. at 81.
37 Id. at 82.
38 Id.
Beverly Baines explores the extent to which religious values affect women’s claims to equality in society.\(^39\) While many feminists argue that religion is antithetical to feminist values, Baines argues that society should foster the co-existence of women’s rights and religious tradition.\(^40\) She describes the attempts of some religious leaders in Ontario to convince the civil courts to recognize the jurisdiction of sharia courts in family law.\(^41\) While feminists are leery of this development, Baines also argues that there is a danger in society becoming overly secularized.\(^42\)

By contrast, Mary Anne Case has no trouble weighing women’s rights against religious values. Case advocates what she calls “feminist fundamentalism,” “an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as a religiously or culturally based commitment.”\(^43\) Case argues that our society’s commitment to equality rights is also a fundamental commitment. Claims for equality can derive independent force “from the fact of their imbeddedness in or centrality to our particular culture.”\(^44\) Case cites several examples of both lawmakers and individuals rejecting policies and practices, including religious practices, which have a detrimental impact on women’s equality, on the grounds that they violate this fundamental commitment.\(^45\) To Case, women’s claims to equality is a fundamental right of belonging in our society.

The second section of GENDER EQUALITY discusses political citizenship and gender. Part of the meaning of citizenship is engagement in society. Under the tradition of civic republicanism, a good citizen is an active citizen. Here, the authors discuss the extent to which gender affects women’s participation as citizens. In the first essay, Kathryn Abrams frames women’s anti-war activism as an act of citizenship, contrasting this activism with the traditional role of female “good citizens” as passive supporters of the troops.\(^46\) Abrams explores the ways in which anti-war activists have invoked their gender roles in their anti-war protests, from the role of the suffering mother to the “girlie feminism” of CODEPINK.\(^47\) As Abrams points out, the creative approach of these activists “may help to pluralize the images that we hold of citizenship.”\(^48\)

In her essay, Nancy J. Hirschmann discusses the relationship between disability, abortion, and stem cell research and argues that all these issues implicate women’s citizenship.\(^49\) Hirschmann explains that while opponents of abortion rights treat women’s bodies as a means to an end (bringing the fetus to full term), opponents of stem cell research treat the disabled as a means by denying them potentially life-saving treatments and thus subordinating their rights to

\(^{39}\) Baines, supra note 34.
\(^{40}\) Id. at 84.
\(^{41}\) Id. at 90.
\(^{42}\) Id. at 101.
\(^{43}\) Case, supra note 34 at 107.
\(^{44}\) Id. at 101.
\(^{45}\) Id. at 125-129.
\(^{46}\) Kathryn Abrams, Women and Antiwar Protest: Rearticulating Gender and Citizenship, GENDER EQUALITY, supra note 1 at 131.
\(^{47}\) Id. at 138.
\(^{48}\) Id. at 150.
\(^{49}\) Nancy, Hirschmann, Stem Cells, Disability, and Abortion: A Feminist Approach to Equal Citizenship, GENDER EQUALITY, supra note 1 at 154.
those of the fetus.\textsuperscript{50} Thus, women have good reason to identify with the disabled – both are being treated as inferior.\textsuperscript{51} Hirschmann insists that the citizenship status of women and the disabled should elevate their rights above those of the fetus.\textsuperscript{52} However, in the recent abortion rights case of Carhart v. Gonzalez, the Court devalued women’s claims to citizenship and autonomy and elevated the status of the fetus in its rhetoric.\textsuperscript{53} Similarly, in the immigration context, some courts have considered claims that fetuses are persons with rights to citizenship.\textsuperscript{54} Hirschmann claims that these attempts not only endanger the rights of the disabled and reproductive rights of women, but also threaten our claims to full citizenship.\textsuperscript{55}

Finally, in their essays, Anne Peters, Stefan Suter and Eileen McDonaugh consider women’s participation in the political realm, and the implications of our under-representation to our citizenship rights.\textsuperscript{56} All three explore the persistent under-representation of women in legislatures in the United States. In 2006, only 15.20\% of US legislators were women, placing us 83\textsuperscript{rd} worldwide out of 118 representative democracies.\textsuperscript{57} They point out that voters’ failure to elect women may be due to discrimination, and consider the use of quotas to remedy it.\textsuperscript{58} Other countries, including Switzerland, use quotas.\textsuperscript{59} However, the authors argue that quotas may not be acceptable in our country due to their un-democratic nature and their inconsistency with individualist liberalism.\textsuperscript{60} However, the benefit of quotas is that heightened representation by women may raise female aspirations.\textsuperscript{61}

Eileen McDonaugh explores the roots of women’s relative failure to obtain political office in the United States, and argues that this representation gap is due to our country’s failure to adopt public policies consistent with traits that are generally associated with women, like providing social citizenship rights to public benefits and support.\textsuperscript{62} She points out that states that act like “women” by providing those benefits have a higher percentage of female representatives than those, like the United States, which emphasize “masculine” issues like the economy and war.\textsuperscript{63} According to McDonaugh, unlike the United States, most comparable democracies have a “set of gendered public policies that define citizenship not only on the basis of negative individual rights, but also on the basis of gendered positive group rights.”\textsuperscript{64} When a democratic government acts to affirm positive group rights, that teaches the public that “women’s maternal

\begin{thebibliography}{99}
\bibitem{50} Id. at 159.
\bibitem{51} Id. at 160.
\bibitem{52} Id. at 165.
\bibitem{53} Id. at 171.
\bibitem{54} Id. at 172.
\bibitem{55} Id. at 171.
\bibitem{56} See Anne Peters and Stefan Suter, \textit{Representation, Discrimination and Democracy: A Legal Assessment of Gender Quotas in Politics}, GENDER EQUALITY, supra note 1 at 174; Eileen McDonaugh, \textit{Citizenship and Women’s Election to Political Office: The Power of Gendered Public Policies}, GENDER EQUALITY, supra note 1 at 201.
\bibitem{57} Peters & Suter, supra note 56 at 177; McDonaugh, supra note 56 at 202.
\bibitem{58} Peters & Suter, supra note 56 at 184.
\bibitem{59} Id. at 176.
\bibitem{60} Id. at 187.
\bibitem{61} Id. at 196.
\bibitem{62} McDonaugh, supra note 56 at 202.
\bibitem{63} Id. at 205.
\bibitem{64} Id. at 225.
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group difference signifies connection with the state, not dis-connection.”65 Essentially, to increase women’s representation in our political structure, we need our representatives to adopt policies that provide for the needs of women.

The third section of GENDER EQUALITY examines the relationship between gender and social citizenship. Social citizenship rights are positive entitlements to benefits or policies that make an affirmative effort to ameliorate the social and economic conditions of women. In our society, social citizenship rights are often considered to be a luxury, to be achieved only after civil and political rights.66 Here, the authors argue that social citizenship rights are not a luxury but instead the preconditions for the exercise of civil and political rights because they establish the foundation for the exercise of those rights. The United Nation's Universal Declaration of Human Rights includes social citizenship rights, but they do not fit well within our tradition of liberal individualism.67 The authors in this section argue that in order for women to achieve equality, we must expand our panoply of rights to include social citizenship rights. The expansion of social citizenship rights would benefit society in general, but especially women, who are more likely than men to lack economic resources.

Thus, Joanna Grossman asks the question of why the Pregnancy Discrimination Act of 1978 has failed to bring about gender equality in the workplace.68 She explains that while the PDA is based on an equality model, it does not sufficiently promote the integration of pregnant women into the workplace.69 She argues that “the social citizenship tradition demands some protection for a pregnant women’s right to work despite the potential physical limitations of pregnancy.”70 According to Grossman, a social citizenship approach to pregnancy in the workplace would require employers to include and accommodate pregnant women if they are able to work with accommodation.71 Grossman’s solution would take into account the extent to which our economy depends on women performing the labor (no pun intended) or childbearing. She would require affirmative measures to aid women in obtaining the resources we need to do this work and still obtain equality in the workplace because as citizens, we have the right to that equality.72

Martha Fineman also asks the question of why women have failed to achieve equality after forty years worth of legal reform.73 Fineman argues that our equality law fails to address inequalities within the family that result not from intentional discrimination, but from deeply

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65 Id. at 230.
66 See McCluskey at 268.
69 Id. at 234.
70 Id. at 235.
71 Id. at 248.
72 Id.
73 Martha Fineman, Equality: Still Elusive After All These Years, GENDER EQUALITY, supra note 1 at 251.
embedded societal norms. According to Fineman, the ideal of equality has been undermined by “the ascendancy of a narrow and impoverished understanding of autonomy.” Dependency, not autonomy, is the natural state of many people in our society, and this reality has a profound impact on women, and on our ability to achieve equality. Women are not only often dependent on men, but we are also far more likely to be responsible for caring for others, such as children, and the elderly, who are dependent on them. Because women perform a large share of the unpaid work of caring for dependents, women are more likely to be financially vulnerable. Thus, a system of rights based on the ideology of autonomy is simply inadequate to address the needs of women. Unfortunately, the ideal of women’s equality has been undermined by what Fineman calls “the ascendancy of a narrow and impoverished understanding of autonomy.” To counteract this development, it is necessary to acknowledge that “autonomy is only possible when one is in a position to be able to share society’s benefits and burdens.”

In 1996, our country took a huge step backwards from our New Deal commitment to social citizenship rights by enacting the Personal Responsibility Act, which ended the entitlement to welfare benefits and gutted our safety net. The PRA is an example of the pattern identified by Martha McCluskey – the government reducing its commitment to provide for its citizens, thus making us more dependent on private power. McCluskey focuses on another aspect of economic policy, tax reform. Recently, Congress amended our tax law to end the “marriage penalty.” This new reform helps affluent married couples who both work outside of the home. However, those reforms do little to help middle class and poor households. McCluskey argues that this new model of government is based on the authoritarian family, which requires submission and sacrifice from its citizens, where efforts to expand equality are considered to be harmful. In this model, government support is depicted as harmful because it interferes with that hierarchy. As government support for the poor decreases due to tax and welfare reform, the poor are increasingly dependent on private aid, and women are increasingly dependent on the institution of marriage for financial support. The economic impact of these policies on women has been devastating. As McCluskey points out, between 1989 and 1999, the number of women filing for bankruptcy rose 600%. To remedy this problem, it is necessary to recognize that economic rights are “the core that gives (civil and political rights) substance” and challenge the opposition to economic equity as a movement against political and civil

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74 Id. at 254.
75 Id. at 258.
76 Id. at 257.
77 Id. at 254.
78 Id.
79 Id. at 258.
80 Id. at 266.
82 See Martha McCluskey, Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform, GENDER EQUALITY, supra note 1 at 267.
83 Id. at 282.
84 Id. at 275.
85 Id.
86 Id. at 273.
87 Id. at 284.
citizenship. Thus, a more progressive tax code, and not marriage tax reform, would be most helpful to women’s equality.

In Section Four of the book, the authors consider sexual and reproductive rights and citizenship rights. This section pushes the envelope of citizenship rights beyond the types of rights that are conventionally considered to be rights of citizenship. As the authors point out, sexuality and reproductive rights are essential aspects of identity for women. Thus, women need to have some control over our sexual and reproductive lives in order to achieve the autonomy necessary to fully participate as citizens.

In their essays, Brenda Cossman and Maxine Eichner address the relationship between women’s sexuality and their identity as citizens. Cossman discusses the sex toy business, and its potential to enhance women’s sexual freedom. She argues that the new visibility of vibrators and the sex toy industry celebrate women’s sexuality and contribute to our self-actualization as sexual beings. However, this freedom is limited. Women are expected to engage in “good” sexual citizenship, that is, to be part of a committed heterosexual relationship, preferably marriage. Some states have outlawed the use of vibrators and courts have considered the constitutionality of those laws. According to Cossman, what is at stake in those cases is the state’s right to regulate morality after the Court struck down a ban on homosexual sodomy in Lawrence v. Texas. Since autonomy over one’s sexuality is so essential to one’s identity, “sexual practices have become a significant terrain on which the terms of contemporary belonging are contested and constituted.”

Maxine Eichner agrees with Cossman that the terms of full citizenship in society “have been conditioned on citizens conforming to a specific set of sexual norms.” Her chapter discusses what feminist and queer theory tell us about the link between sexuality and social citizenship. Some feminists, such as Catharine MacKinnon, argue that sexuality is a means of subordination of women by men. Queer theory grows out of the response to MacKinnon’s theory of “sex positive” feminists who argue that sexuality can be a positive experience for women. According to queer theory, everyone’s sexuality is affected by power. They advocate an open approach to sexuality in order to maximize sexual freedom. Eichner builds on the insights of both schools of thought. Theorizing sexual citizenship should build on the advances from the post-structuralist concept of power, in recognizing the role that discourse plays in constructing and replicating norms of sexual citizenship.

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88 Id. at 276.
89 Id. at 282.
90 Brenda Cossman, Sexual Citizens: Freedom, Vibrators and Belonging, GENDER EQUALITY, supra note ___ at 289; Maxine Eichner, Feminism, Queer Theory, and Sexual Citizenship, GENDER EQUALITY, supra note ___ at 307.
91 Cossman, supra note 90 at 290.
92 Id. at 296.
93 Id. at 304 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).
94 Id. at 305.
95 Eichner, supra note 90 at 307.
96 Id. at 311.
97 Id. at 315.
98 Id. at 323.
The other two authors in this section, Mary Lydon Shaney and Barbara Stark, focus on women’s need to control our reproduction. Both authors frame women’s reproductive right as rights of citizenship. We conventionally view reproductive rights as liberty rights, barring state intervention in women’s rights to choose contraceptives and abortion. However, both Stark and Shaney point out that women’s control over their reproductive capacity goes well beyond the right to choose not to have a child. For many women what is at stake is our right to choose to have children, and our ability to do so. Shaney makes a compelling argument in favor of viewing the right to bear children as a right of citizenship because procreation is so essential and important to life. She points out that during slavery, mothers were often separated from their children, and that as a result, after the Civil War the right to have a family was recognized “as a badge of civil freedom.” Shaney argues that women need state intervention to facilitate that right. She focuses on the problem of women’s infertility, and the fact that in our society, infertility is disproportionately experienced by poor women. Many women are forced to take jobs which expose them to chemicals which harm their reproductive capacity. Others are forced to wait until later in life due to lack of financial resources and their lack of access to health care. Thus, Shaney argues that our government has an affirmative duty not only to protect women from exposure to environmental conditions that cause infertility, but also to affirmatively provide women suffering from infertility with the material resources that they need in order to bear children.

Stark provides us with a skeptical critique of what happens when the state gets involved in natalist policies. As Stark points out, women are denied the right to have children in countries, such as India and China, which have imposed anti-natalist policies. In countries that pursue pro-natalist policies, women are too often treated as breeders, the means to achieve an end. Stark provides a cautionary note that is somewhat in tension with Shaney’s thesis, pointing out that whenever states implement either pro-natalist or anti-natalist policies, women tend to bear the brunt of those policies.

The final section of the book considers women’s citizenship rights on a global scale. In international law, citizenship plays a crucial role as a font of fundamental human rights. However, it can also create barriers, and exclude non-citizens from those rights. Women are the most likely to be excluded by barriers of citizenship. Indeed, Regina Austin argues that women of color are the most likely people to be stopped at borders, searched at airports, and generally viewed with suspicion by the government authorities who are responsible for policing those  

100 Shaney, supra note 99 at 328.  
101 Id. at 333.  
102 Id.  
103 Id. at 334.  
104 Id. at 327.  
105 Id. at 330.  
106 Id. at 343.  
107 Stark, supra note 99 at 350.  
108 Id. at 356.  
109 Id. at 350, 356.
Again, the authors ask us to consider citizenship, not as a means of exclusion, but as a source of rights to facilitate women’s inclusion in our society. In this respect, international law has gone well beyond our domestic law. For example, the Convention on the Elimination of Discrimination Against Women (CEDAW) bars gender stereotypes of all kinds, requires men to play a role in caretaking, and requires men to enforce that role. CEDAW’s affirmative stance on women’s rights stands in stark contrast to the state action doctrine of domestic law, which exonerates the state from responsibility to protect women from violence even when they have obtained protective orders from the state. Thus, women potentially have much to gain from a global movement in citizenship rights.

The first two authors in this section, Regina Austin and Elizabeth Schneider, discuss the state’s failure to protect women from violence. Austin focuses on the series of murders of women working at the maquiladoras in Juarez. She points out that the state was reluctant to investigate those murders, which may be due to the misogynist culture of the maquilas. Schneider argues that freedom from violence, including domestic violence, must be recognized as a right of citizenship. She explains, “Citizenship has a broader meaning for women who experience violence. Often the home is a prison, so getting outside the home is a manifestation of freedom.” Domestic violence has a severe impact on women’s autonomy and mobility, both of which are universally recognized as essential to citizenship. Violence prevents too many women from being active in civic society. Unfortunately, while international law has evolved towards recognize the connection between citizenship and freedom from gender motivated violence, our domestic law has so far failed to do so. In the United States, legal reforms have primarily criminalized domestic violence. According to Schneider, while criminalization is far better than the non-recognition approach of the past, it fails to recognize the fact that domestic violence is a means of power and control that touches every aspect of women’s lives. (p. 381) Schneider argues that if our law recognized the link between domestic violence and citizenship, every aspect of family law would be re-thought, including divorce, child custody and child protective services.

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110 Regina Austin, *Women’s Unequal Citizenship at the Border: Lessons From Three Non-Fiction Films About the Women of Juarez*, GENDER EQUALITY, supra note 1 at 359.
111 See Stark, supra note 99 at 345.
112 See Elizabeth Schneider, *Domestic Violence, Citizenship, and Equality*, GENDER EQUALITY, supra note 1 at 378; Deborah Weissman, *Gender and Human Rights: Between Morals and Politics*, GENDER EQUALITY, supra note 1 at 412.
113 Austin, supra note 110 at 362.
114 Id. at 376.
115 Schneider, supra note 112 at 384.
116 Id. at 387.
117 Members of the Reconstruction Congress recognized this when they enacted laws criminalizing private interference with individuals attempting to exercise their rights of citizenship. See Zietlow, Enforcing Equality, supra note __ at 58. In US v. Guest, the Court upheld the use of one of those statutes to prosecute private individuals who interfered with the right to travel of someone they believed to be a civil rights advocate. U. S. v. Guest, 383 U.S. 745 (1966). However, in US v. Morrison, the Court failed to make the connection when it struck down the civil rights remedy in the Violence Against Women Act. U.S. v. Morrison, 529 U.S. 598 (2000).
118 Id. at 381.
119 Id. at 387.
The last two essays in the book, by Anisseh Van Engeland-Nourai and Deborah Weissman consider the challenges of recognizing women’s rights as citizenship rights in the international realm. Van-Engeland-Nourai argues that although women have a constitutional right to equal citizenship in many Muslim countries in practice, far too often women in those countries are treated as second class citizens. This is due in part to the fact that in Muslim countries, citizenship is a group, not an individual concept, and that communalism favors men over women. Most problematically, in many Muslim countries principle of equal citizenship are subordinated to sharia law, which views women as the bearers of tradition and cultural values and therefore subordinate to men. Nonetheless, many Muslim women are attempting to empower themselves and other women, some by engaging in civic politics, and others by fighting the status quo through interpretation of Islamic law.

The conflict between religious law and principles of equality has led many women to rely on international human rights law to combat local cultural and religious practices that subordinate women. As Weissman points out, human rights norms create space for women to advocate for equal rights. However, Weissman also points out the downside of relying on international norms – the danger that the United States will use those norms to exercise hegemony over other countries. Several times during our history (most recently in Iraq and Afghanistan), the United States has used the poor treatment of women in other countries as a justification for invading those countries. Subsequently, women were not treated well under US occupation. Weissman sees this as evidence that the US goal of advancing human rights is not always social justice, but instead to spread liberalism and free market capitalism. She points out that enforcing human rights under conditions of economic inequality can also hurt women. Thus, Weissman sounds a cautionary note about the potential for international rights of citizenship.

This is a diffuse group of essays, but they contain several discernible themes. First, the problems identified in this book are not caused by intentional discrimination. Instead, the book focuses on issues of deeply embedded inequality, primarily based on social customs and practices that are not intentionally discriminatory. Second, while the government plays a role in creating the unequal conditions, by and large they are not caused by state action. Third, the authors are calling for affirmative measures to remedy this inequality, and substantive rights that go well beyond equal treatment. Finally, many of the issues discussed in this book are experienced either entirely or primarily by women, with no comparable corollary experienced by men. Thus, these issues simply do not fit within the Equal Protection paradigm, and cannot be

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120 Anisseh Van Engeland- Nourai, On the Path to Equal Citizenship and Gender Equality: Political, Judicial and Legal Empowerment of Muslim Women, GENDER EQUALITY, supra note 1 at 390; Deborah Weissman, Gender and Human Rights: Between Morals and Politics, GENDER EQUALITY, supra note 1 at 409.

121 Van Engeland- Nourai, supra note 120 at 390.

122 Id. at 393.

123 Id. at 398-402.

124 Weissman, supra note 120 at 411.

125 Id. at 412.

126 Id. at 419.

127 Id.

128 Id. at 427.
remedied by courts enforcing the Equal Protection Clause. We truly need a new paradigm for women’s rights, and citizenship is a good place to start.

The book is more ambivalent about the effectiveness of liberal individualism as a paradigm for women’s rights. As illustrated by a number of these essays, individual autonomy has always been a goal of feminists. Under common law tradition, we did not have an identity of our own. Instead, our legal identity was subsumed in that of our husbands. So much of the activism of women’s rights advocates over the years has been targeted at achieving independence from our husbands and fathers (hence the term “women’s liberation movement”). We have sought to control our own property, to work outside the home so we can enjoy economic independence, and to achieve control over our reproductive decisions. We have come a long way in winning this control, and achieving the autonomy of a model citizen in civic republican ideology. However, this book reminds us about the limits of our autonomy, and the limits of autonomy as a paradigm for our rights. Women who have chosen to bear children, and play an active role in raising our children, have found the workplace unaccommodating to our choice, and we have suffered economically as a result. Far too many women still lack autonomy altogether because they are victims of violence. We need more than autonomy. We need active state intervention to protect us from this violence, and we need positive rights to facilitate our integration into society as fully participating citizens. Thus, the autonomy based theory of liberal individualism is simply not adequate to give us what we need to achieve equality. We need the kind of support from society that men have historically received from their mothers and wives. This suggests the need for a more community-based theory of rights.\(^{129}\) The most valuable contribution of this book is that it prompts us to theorize what these rights should be, using a different paradigm than the conventional approach to women’s rights.

In this regard, while all of the sections in this book are informative and provocative, I found the essays on social citizenship to be the most compelling. In those essays, the authors illustrate why women’s rights must integrate principles of equality with economic rights. Economic and gender subordination are linked in our society, which has long depended on the un-paid and under-paid labor of women, and justified that exploitation as either the natural state of women or as resulting from women’s choices. Arguably, we are owed substantial economic benefits to compensate us for that labor. Unfortunately, the recent trend has been towards the opposite. Welfare reform has taken away the safety net for women, who are now forced to take low wage, no benefit jobs with no opportunity for advancement, in order to survive. Court decisions have gutted the right to organize into unions, which have also historically served as a means of women’s political and economic empowerment. In order for women to achieve full citizenship, we must advocate for economic policies that further economic equality in our society. Along with freedom from violence, day care, a robust right to organize, health care reform and other measures to strengthen our weakened safety net are some of the most trenchant women’s rights issues.

Finally, this book invites the reader to consider the means which women can achieve the rights discussed in the book. At the outset, Rogers Smith reminds us that courts have been

unresponsive to citizenship based arguments for women’s rights.  I agree with Smith that those rights might more readily be obtained through the political process. Some of the other authors also process issues. Kathryn Abrams details the strategies of anti-war activists, Mary Ann Case gives us examples of women practicing “feminist fundamentalism,” Gretchen Ritter tells us about the history of women using a citizenship based advocacy to achieve civil rights, and Weissman and Van Engeland-Nourai discusses the practical barriers to an international approach to women’s citizenship rights. Their accounts are helpful and informative. Still, it also would be interesting to consider the link between citizenship and advocacy for citizenship based rights from a theoretical perspective. After all, civic republicanism entails an active citizenry, and political participation is an act of citizenship. Given the link between citizenship and political participation, are citizenship rights by their nature better suited for enforcement through politics instead of courts? There is good reason to believe this is the case. Past experience shows us that we’re not going to get these rights from courts. As we move forward in our advocacy for women’s rights, it is essential that we exercise the citizenship rights that we do have in the political process to achieve the economic rights that are a pre-condition for women to achieve full citizenship.

130 Smith, supra note 23 at 25, 29.
131 Id. at 34.
132 Abrams, supra note 30 at 131.
133 Case, supra note 43 at 127-129.
134 Ritter, supra note 34 at 60.
135 Weissman, supra note 120 at 409; Van Engeland-Nourai, supra note 120 at 390.
136 I discuss this issue in more detail in ZIETLOW, ENFORCING EQUALITY, supra note 19 at 160-168.