

Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice

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FOREWORD

BEYOND EQUALITY: POWER AND THE POSSIBILITY OF FREEDOM IN THE REPUBLIC OF CHOICE

Angela P. Harris†

INTRODUCTION: My name is Martha Fineman and I have the distinct honor and privilege of presenting to you Professor Angela Harris, who is going to do our keynote address.

Angela Harris is a Professor of Law at the University of California at Berkeley. She writes in the fields of feminist theory and critical race theory. Several of her articles are being included in many anthologies. In fact, my students this year benefitted greatly from reading her preeminent article, which she published in 1990, *Race and Essentialism in Feminist Legal Theory*.¹ We learned a great deal in discussing that article.

Her recent book projects include *Gender and Law: Theory, Doctrine and Commentary*, and she published this with Katharine Bartlett.² She also produced *Race and Racism: Cases and Resources for a Diverse America*,³ coming out soon we hope. Also I want to mention that her article examining the past century of race law will be published by the California Law Review for its millennium issue. So we have a lot to look forward to in addition to this talk this afternoon.

As I said, it's my great pleasure to introduce Professor Angela Harris. I have admired her work for a long time and learned a great deal from reading her, and I expect that today her presentation on *Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice* will further enlighten us all.

MS. HARRIS: Thank you for that gracious introduction, Martha, and I want to give Martha Fineman extra thanks for making sure that I got invited to this conference and could come back to Ithaca. And I want to thank the conference organizers for honoring me,

† Professor of Law, University of California at Berkeley (Boalt Hall).

¹ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

² KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (2d ed. 1998).

³ JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (West Group 2000).

by inviting me to make this address. It really is a wonderful, wonderful honor.

I also want to give special thanks to Courtney Tedrowe for setting up baby-sitting for me so that I could participate in the conference today; Erin Stauffer for doing the baby-sitting; and Kathy Abrams for providing a house for the babysitting. I ate a fortune cookie last week, and the cookie had two different fortunes in it, but both of them said exactly the same thing, so I figured it was probably a sign. And both of the fortunes said "behind every able man is another able man." Interpreting this in a gender-inclusive way, I took this to mean that no one's accomplishments occur in a vacuum, and child care is one of those humble accomplishments that takes an enormous amount of labor—of woman power particularly—and usually ends up being totally invisible. So I want to thank you all for making the institutional arrangements that enabled my freedom today.

So the title of my talk is *Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, and I want to say, first to give my disclaimers, that I'm very much at the beginning stages of thinking about this. So I appreciate in advance your willingness to go into my somewhat rambling presentation to think these things through with me. And I'm especially glad Linda McClain is here because it sounds like she's already begun to think more deeply about some of the things that I've just started to get to. So I'm excited about the discussion we'll have afterwards.

In *Saenz v. Roe*,⁴ decided on May 17, 1999, the U.S. Supreme Court held unconstitutional a California statute that limited the maximum welfare benefits available to newly arrived California residents to the amount payable by the state of the recipient's prior residence.⁵ The Court's holding wasn't surprising given its previous opinions on welfare benefits and the right to travel. Some of you who are students may have read *Shapiro v. Thompson*,⁶ which is one of those cases. What was surprising in *Saenz* was the way the Court described the source of the constitutional right. Justice Stevens, writing for the Court, stated that the California statute was unconstitutional because it abridged the right of a newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state.⁷ In other words, the Court founded its holding on the Privileges or Immunities Clause of the 14th Amendment.⁸

⁴ 526 U.S. 489 (1999).

⁵ See *id.* at 511.

⁶ 394 U.S. 618 (1969).

⁷ See *Saenz*, 526 U.S. at 502-06.

⁸ See U.S. CONST. amend. XIV, § 1.

Now it's interesting that this case should be decided in 1999 on the eve of the new century. It was in 1873, thirty years before the dawn of the present century, that the Supreme Court killed off the 14th Amendment's Privileges or Immunities Clause in the notorious *Slaughter-House Cases*.⁹ As I'm sure you all know, the 14th Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁰ And the purpose of the 14th Amendment was to ensure that the natural, civil, and political rights of the individual would be within the power of the national government to protect.

At a deeper level, the Privileges or Immunities Clause was about freedom: specifically, the freedom of six million or so people of African descent. The Reconstruction Congress was aware that the southern states were attempting to reestablish slavery both through active state action, as with the Black Codes,¹¹ and by simply failing to protect black peoples' rights. The civil rights to own property, to make and enforce contracts, to appear in court, and even the natural right to make a living were being endangered by private violence and terror, and the states were failing to do anything about it. By making it clear that the national government had the authority to protect the natural and civil rights of the freed slaves, the Privileges or Immunities Clause would provide federal legal protection to those rights where state legal protection did not exist.

And the language in the Privileges or Immunities Clause required the courts to think about and specify these natural, political, and civil rights. What rights were inherent to being a citizen of the United States? At the time, of course, there was already a rich existing literature on natural rights and other kinds of rights.¹² So the Privileges or Immunities Clause was an exercise in considering the relevance of that literature to the project of emancipation. At an abstract level, the language in the Privileges or Immunities Clause required the courts to think about the institutional conditions precedent for freedom. What is freedom? What kinds of protections, what kinds of institutional arrangements, what kinds of social structures are necessary to facilitate freedom?¹³

⁹ 83 U.S. (16 Wall.) 36 (1872).

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ See 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 279-81 (Walter L. Fleming ed., 1906).

¹² See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 13-39 (1988) (describing ideas about liberty, equality, and federalism in political discourse around the time the Fourteenth Amendment was drafted).

¹³ See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 2 (1996) ("A look at text, context, history, ethical aspirations, precedent and constitutional structure suggest that the Fourteenth Amendment's Privi-

As we know, though, and as both the majority and dissent in *Saenz* recognized, this jurisprudence was killed off by a hostile Supreme Court before it ever really began. The holding of the *Slaughter-House Cases* in 1873 was that the Privileges or Immunities Clause did not protect the natural and civil rights of the individual, for these rights were granted to the states to protect. Rather, the privileges and immunities of national citizenship consisted only of specifically federal rights, like the right to travel interstate or to petition the federal government for the redress of grievances.¹⁴ The practical effect of this holding was to turn the Privileges or Immunities Clause into a historical curiosity—at least until May of 1999. The jurisprudential effect of the *Slaughter-House Cases* was to usher in a century that we're now leaving: a century of American jurisprudence in which equal protection, and not privileges and immunities, has been the touchstone of the oppressed. The post-Reconstruction Supreme Court killed off the Privileges or Immunities Clause, but it left more or less intact the Equal Protection Clause. And ever since the revival of civil rights activism in the 1940s, the Equal Protection Clause has been at the center of almost every legal effort by subordinated groups to challenge their subordination.

So that's the wind-up for telling you what I want to talk about today. I want to remind us first of the road not taken: the road not taken because the Supreme Court knocked a big tree across the path. And then I want to say a couple of words and, upon saying them, see how we might think differently if we were able to leave the language of equality aside for a bit. Those words are *freedom* and *class*. Now, they're dangerous words, and I'll acknowledge some of those dangers in a minute, but I think that they're worth exploring.

What I'm not going to do is unveil to you a new jurisprudence based on *Saenz*. I'm not at all sure such a jurisprudence is possible—or even to be wished for by progressives.¹⁵ I would guess, rather, that equality is going to be the only legal game in town for quite a while. But because it's 1999 and I feel the irresistible urge to be millennial, and because we, as critical theorists, have spent a long time now exploring the nooks and crannies of equality, as well as equality's limitations, I thought it might be useful just to imagine a little bit. Imagine what it would be like if we weren't trapped inside the box of equality.

leges or Immunities Clause was designed to make the Constitution what its preamble promised—a guarantee of liberty.”).

¹⁴ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77-78.

¹⁵ As Michael Curtis has noted, many of those who responded with delight when the Court decided *Saenz* were right-wing activists hoping for a return to judicial activism on behalf of liberty of contract and traditional property rights. See Curtis, *supra* note 13, at 2 (describing interest of free-market foundation in *Saenz*).

First a little bit about that box of equality. The discourse of equality, as we've all come to realize, is both powerful and constraining. Consider, for example, the language of the Civil Rights Act of 1866,¹⁶ a statute that survived the Supreme Court's assault during the Reconstruction period. The 1866 Act, which is now embodied in 42 U.S.C. §§ 1981-1982, declares that all citizens of the United States shall, without regard to color, have the same right to contract, sue, give evidence, take, hold, and convey property, and to the equal benefit of all laws for the security of person and property as is enjoyed by white citizens.¹⁷ Now, this has been a powerful tool for a group of people who were formerly property. It also became a tool not only for African Americans, but for Latinos and Latinas, Jews, "gypsies," and all persons from the groups that the nineteenth-century drafters understood to be races.¹⁸

But the statute has its limitations as well, and as many of you have pointed out for some years now, the language of equality in general has some serious problems.¹⁹ First, it preserves white citizens and the rights that they have in stone. The measure of what other people get is what white citizens get, and the rights that white citizens have are the only rights that are protected. Thus, whiteness remains an unexamined norm.²⁰ Second, the language of equality draws us into the long and vexed debate about difference. You're only entitled to equality if you are similarly situated—if you're exactly like a white citizen, only not white. But what if you're not similarly situated? Do you get the "same" treatment, or are you entitled to "different" treatment? Is different treatment equality or is that special treatment? The sameness/difference debate obscures questions of power;²¹ it also tends to mask the recognition that "sameness" and "difference" are relational, not absolute, concepts.²²

Third, the language of equality has drawn us into a long debate over which differences are natural or immutable or rooted in biology,

¹⁶ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1994)).

¹⁷ See *id.*

¹⁸ See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 612-13 (1987) (for purposes of § 1981, nineteenth century rather than twentieth century conceptions of race control); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (same analysis for § 1982 claim).

¹⁹ For a classic critique of equality discourse as obscuring issues of power and subordination, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 218 (1989) (criticizing sameness/difference discourse because it masks relations of power).

²⁰ This represents a "discrimination" as opposed to "privilege" model of equality. See STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 27-30 (1996).

²¹ See MACKINNON, *supra* note 19, at 218.

²² See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 52 (1990) (noting that difference is "relational, not intrinsic").

and which differences are a mere matter of "choice," which means that they're presumptively unprotected. So what is gay and lesbian sexuality, for instance? Is it a mere life-style choice? Is it embedded in our genes and hence immutable?²³ Why do we have to engage in this debate at all? Because the logic of equality has taken us there.

Fourth, the language of equality has drawn us into a long debate over the essential character of groups rather than into how those groups are treated. For example, the lower courts spent a long time floundering when Latinos wanted to use §§ 1981 and 1982 to protect themselves from discrimination. Are Latinos and Latinas a race? What constitutes a race? That became the question that was asked and answered instead of the question, do these groups suffer from certain forms of discrimination that we associate with color prejudice?²⁴

Above all, the language of equality seduces us away from the realities of social power, and into an imaginary land where groups of people can be laid side by side to see if they're similarly situated, and then they can be made equal. Equality discourse, then, inherently brings us into a vexed relationship with history.

So at the end of the millennium, some people are thinking that the rhetoric of equality has been exhausted and they're looking around for alternatives. Linda McClain, for example, is working on a project about the material preconditions for self-government.²⁵ I want to encourage all of us to think about those issues as well. But how I get there is through a couple of words: freedom and class. So let me talk about those words, first acknowledging their dangers and then making a pitch for their potential.

The dangers of the rhetoric of freedom are obvious. Freedom in this society officially means negative freedom, not positive freedom. Freedom from something rather than freedom to do something. More specifically, in contemporary political life, equality is "our" word. Freedom is "their" word: a conservative word. Freedom stands for economic laissez-faire: what's good for Microsoft is good for America, free markets unhindered by inefficient social welfare programs. Quickly now: Freedom from political correctness, government off our backs, no new taxes. I agree with Linda McClain that this thin

²³ See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

²⁴ See Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975); see also Alex M. Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L.J. 1 (1992).

²⁵ See Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221 (2000).

conception of freedom is not all there is within real liberalism, but the thin conception does have an extremely potent political force.

More deeply, the rhetoric of freedom, specifically freedom of choice, is the standard American rhetoric used to obscure injustice itself. As Joan Williams has argued, for example, the language of a woman's choice is used to make invisible the constraints of our sex/gender system.²⁶ You can work a million hours a week and never see your kids, or you can quit your interesting, challenging job and stay at home with those kids for twenty years. Congratulations, it's your choice. The language of choice is also used to make invisible the constraints of life under capitalism. This message is familiar to us from consumer society. We have five hundred television channels. Isn't that great? We have more choice than ever before! You can have Pepsi, Coke, Cherry Coke, Classic Coke, R.C. Cola, Jolt, Pepsi One, Storm, Diet Coke, or caffeine-free Diet Coke. So what if they're all based on the same formula and the same two companies own them all? You get to make a choice. Aren't you glad you live in America?

So freedom is a dangerous word. And let me also say something about the dangers of my other word, class. Class often gets raised in the context of debates about identity politics and it usually comes up in one of two ways. First, class is often used as a rhetorical club with which to beat identity politicians over the head. The idea is that the politics of racial, sexual, and gender identity is divisive and alienating, whereas the politics of class is unifying and has mass appeal. Therefore, the reason why the revolution hasn't happened in the United States is that the women all became women's libbers, that the black people all became Panthers, and then the gay people had to have their own movement, too. And then we experienced the disuniting of America, to use Arthur Schlesinger's term.²⁷ That's one way in which the rhetoric of class is used.

The second way that class rhetoric can be dangerous in progressive debates is when it's used within the equality framework as a tool for winning the oppression sweepstakes. Here we emphasize that growing up poor or working class in this country brings with it a kind of personal suffering that is similar to the suffering of people of color, or gay or lesbian people, yet Americans are unwilling to pay much attention to this kind of suffering. I'm open to that part of the argument, but it often gets turned into the competitive argument that affirmative action, for example, should be abolished because African-American middle-class kids are actually just as privileged or more priv-

²⁶ See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

²⁷ Arthur M. Schlesinger, Jr., *THE DISUNITING OF AMERICA* (1998).

ileged than working-class white kids. And this draws us into a long-suffering competition about who is more of a victim.

So I know that these words and the rhetoric they invoke are dangerous, but what I want to do is set aside for a moment the roles these words play in the rhetoric of equality and consider them within the framework of privileges and immunities. To return to that framework, what are the institutional conditions of freedom? I want to suggest that both the question of institutional conditions and the idea of freedom allow us to transform the problem of class into the problem of capitalism, which is in dire need of effective critique these days.

What are the economic institutional conditions under which we live today? Here is one relevant quotation:

The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connexions everywhere.

The bourgeoisie has through its exploitation of the world-market given a cosmopolitan character to production and consumption in every country. . . . All old-established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries, whose introduction becomes a life and death question for all civilised nations, by industries that no longer work up indigenous raw material, but raw material drawn from the remotest zones; industries whose products are consumed, not only at home, but in every quarter of the globe. In place of the old wants, satisfied by the productions of the country, we find new wants, requiring for their satisfaction the products of distant lands and climes. In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations. And as in material, so also in intellectual production. The intellectual creations of individual nations become common property. National one-sidedness and narrow-mindedness become more and more impossible, and from the numerous national and local literatures, there arises a world literature.²⁸

You might think this is a description of the new globalization. In fact, these paragraphs were first published in London, in February 1848. That was an excerpt from an essay by Karl Marx and Frederick Engels called the *Manifesto of the Communist Party*.²⁹ If you've never read it before, you might be surprised that Marx and Engels devoted a lot of the essay to description, describing the processes of creative destruction that we associate with capitalism. And as the quote I read suggests, they're aware of both the standard and the subversive benefits

²⁸ Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, in KARL MARX AND FREDERICK ENGELS: SELECTED WORKS 38-39 (International Publishers 1972) (1848).

²⁹ See *id.*

and possibilities of capitalism. They understand, for example, that capitalism has made possible a higher standard of living than you could ever have imagined for human beings before its invention. They understand that capitalism works because it brings us stuff that we want and stuff that we need.

They also understand that the cycles of capitalist production and consumption create new relationships of interdependence among nations and regions of the world. We've been talking about this a lot in left contemporary discourse, about the fact that global businesses and global cultural practices don't stand a chance against corporate money and the glamour of first world consumption patterns. We've also been talking about this a lot on the production side. As soon as workers in one country start demanding a living wage, then production moves to a poorer country where workers can't demand quite so much.

But Marx and Engels also recognized some of the beneficial possibilities of capitalism. Consider the last part of the quote again, that the intellectual creations of individual nations become common property. As Marshall Berman suggests, if we replace the word "literature" with the word "culture" in the quote, we have an even more powerful idea.³⁰ As he puts it, what a world culture means is that

history slips through the owner's fingers. So that poor people get to possess culture—an idea, a poetic image, a musical sound, Plato, Shakespeare, a Negro spiritual . . . even if they can't own it. Culture stuffs people's heads full of ideas. As a form of "common property," modern culture helps us to imagine how people all around the world could share all the world's resources someday.³¹

So capitalism has made it possible not only to buy the world a Coke, but it's also made possible Subcomandante Marcos in Chiapas using pop culture, high culture and post-modern irony to resist oppression—and a following around the planet via the Internet.

So why worry? We're constantly being told about the wonders of American-style capitalism. The American economy is booming, inflation and unemployment are both low. Everyone can invest in the stock market and become rich. The Internet is going to bring us new forms of democracy, more freedom than has ever been possible before, and it's going to make a lot of people very wealthy. In fact, we go to other countries like Russia and tell them how to run their economic systems so that they can be like us. The Cold War is over and Marx's side lost.

³⁰ Marshall Berman, *Unchained Melody*, THE NATION, May 11, 1998, at 11.

³¹ *Id.* at 15.

Well, one obvious answer might be inequality. Inequality is not just an accidental byproduct of capitalism. It's capitalism's major product. And in contemporary America, that inequality seems to be increasing. The richest Americans keep getting an increasing share of the nation's wealth, while the rest of us are competing for an ever smaller share of the pie. The good news for welfare reform seems to be that more people are actually entering the workforce than anyone thought possible, but the bad news is that their salaries put them below the poverty line. And we know that more and more people are going without health insurance or benefits.³² So that's one way to answer the claim that capitalism is a good system: an answer phrased in terms of equality. But we can also phrase an answer in terms of freedom.

There's a way in which under existing capitalism, capitalism as we experience it from day to day, provides the motor for the disciplinary exercise of power. And here I'm using discipline in Foucault's sense. Capitalism, and here I mean not just market work, but also the structure of social norms that currently existing capitalism perpetuates, encourages us all to regulate ourselves, to subject ourselves to the discipline of the free market. This becomes the motor for the negotiation of identity that Devon Carbado was telling us about.³³ And we should use the word "negotiation" advisedly because one of the conditions of currently existing capitalism is that one's opportunity to bargain with one's employer about the basic terms and conditions of one's work is extremely limited. Again, as Marshall Berman puts it:

The crucial reality is the need to sell your labor to capital in order to live; the need to carve up your personality for sale—to look at yourself in the mirror and think, "What have I got that I can sell?"—and an unending dread and anxiety, that even if you're O.K. today, you won't find anyone who wants to buy what you have or what you are tomorrow, that the changing market will declare you (as it has already declared so many) worthless, that you will find yourself physically as well as metaphysically homeless and out in the cold.³⁴

Those of you who are students and are participating in interviews for jobs well know about this process of self-discipline and discipline by the market. The unrelenting discipline of the market becomes our own internal self-discipline, and is marketed to us in the language of choice, consent and negotiation. This, I think, is part of the reason why we Americans are so deeply resentful of people like welfare moms

³² See generally Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997).

³³ See Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

³⁴ Berman, *supra* note 30, at 15-16.

who seem to be getting a ticket out. I think, and here I'm borrowing from William Connolly, that the ceaseless self-discipline of actually existing capitalism fuels our resentment and our willingness to impose harsh standards of responsibility on vulnerable others.³⁵ In the republic of choice, we're all responsible for ourselves. We're responsible for every choice we make, no matter how deeply constrained those choices are, and we're taught to understand the responsibility of that choice as freedom. Yet we feel that responsibility as oppressive. We are free, yet everywhere in chains.

So one thing I want to suggest is we *can* think about these issues within the rhetoric of equality, but we might try thinking about them in the rhetoric of freedom. Is this freedom—not just the pressures that are placed upon us from the outside, the need to sell our labor power to someone to survive, but the disciplines that we impose on ourselves, the practices of self-surveillance, self-promotion, self-discipline, in order to fit ourselves within the rules that capitalism sets? If this is not freedom, what might freedom look like? What might be the institutional conditions of freedom? Which brings us back to the privileges and immunities of national citizenship.

Now, I do have a warning as we think about the privileges and immunities of citizenship which is about the other part of that phrase: the "citizenship" part. There is, as Linda McClain mentions, a lot of thoughtful work, including the civic republican literature, that tries to steer us towards thinking about the material preconditions of self-government.³⁶ But I think we have to examine those projects carefully before we sign on to them. One caution which Professor McClain articulated earlier is that we should worry about to what extent the notion of a republican citizen, the yeoman farmer, or the heroic artisan is actually a heterosexual male, and I think we're absolutely right to be worried about this. And I would add another caution to what she said. I wonder to what extent these projects of fostering citizenship and self-government are really trading on nineteenth-century notions of self-government that fail to take actually existing contemporary capitalism into account. And here I'm worried about both the production side and the consumption side of capitalism. On the production side, it seems to me that the classic notion of the deliberative citizen who exercises self-government may be based on a kind of pre-industrial conception of the property holder who can be politically independent and autonomous and deliberative, precisely because he is economically autonomous. In contrast, you might wonder who the self-governing citizen is in the economic universe that Marx describes and that, I have suggested, Foucault describes as well. In-

³⁵ See, e.g., WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE* 21-22 (1991).

³⁶ See McClain, *supra* note 25, at 1224.

deed, some recent economic developments such as GATT and the power of the World Trade Organization and the International Monetary Fund, suggest that states themselves are losing power vis-à-vis financial markets. What exactly will be left of the state by the time we've constructed our deliberative citizens?

On the consumption side, and this is a point that Dan Ortiz is making in a paper he's working on,³⁷ we live in a world that has been deeply shaped for generations now on choice as consumption and consumption as choice. To what extent, again, does our image of national citizenship and sturdy self-reliance, of self-governance, fail to take into account a world in which choice really means choosing between "less filling" and "tastes great?"

All right. So the point of this talk is really to engage in a thought experiment, to leave behind for a moment the pressing important questions of what equality is and how to achieve it, and to think about human flourishing within a different rhetoric, the rhetoric of freedom. And the point's been, of course, that equality enables some debates and disables others. The lasting tragedy of the *Slaughter-House Cases* is that we, as identity politicians, could have had both in our constitutional discourse: *both* the language of equal protection *and* the language of privileges or immunities. It's possible that *Saenz* suggests that someday in the coming century we will have both. It's also true that with work, some existing resources may take us there. I agree that projects such as Martha Fineman's use of the existing law of sex discrimination move in the right direction. Others have argued that international human rights law gives us some tools. But for now, I just want to leave you with a quote from the Old Man again:

The bourgeoisie cannot exist without constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society. . . . All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions are swept away, all new formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind.³⁸

Who are we really and how are we living really? How do we want to live in our ideal society? How can we get there? The rhetoric of equality can take us part of the way but not the whole way. I want to urge us as progressive people to begin colonizing the discourse of freedom and, as you do so, look back and remember those people for whom this discourse of freedom was initially crafted.

³⁷ Personal communication with Dan Ortiz.

³⁸ Marx & Engels, *supra* note 28.

But as we do so, we also have to keep our eyes set on actually existing capitalism, and we have to apply the lessons of critical theory about power. It's not just a matter of the workers versus the capitalists. As Marx pointed out, it's also the way in which capitalism shapes who we become and what our dreams are; which avenues for agency are open, and which are foreclosed. Thank you.