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TOWARD A FORMATIVE PROJECT OF SECURING FREEDOM AND EQUALITY

Linda C. McClain†

INTRODUCTION

This Symposium offers an occasion to pursue two important tasks: (1) identifying normative and constitutional foundations for an affirmative governmental responsibility to engage in a “formative project” that would foster persons’ capacities for democratic and personal self-government;¹ and (2) exploring the mix of normative and empirical inquiries necessary to shape the proper goals and parameters of such a project. These tasks are relevant to my larger project of attempting to develop a synthetic, or feminist and liberal, normative account of rights, responsibilities, and governmental promotion of good, self-governing lives.² That account argues for governmental responsibility to foster the preconditions for securing free and equal citizenship for all. It would make the issue of sex inequality, or women’s subordination, a central concern of law and political philosophy, and would also attend to other systemic, unjust forms of subordination. This approach would also endorse liberal commitments to autonomy, toleration, and respect for diversity, and would find a place for civic republican concerns to foster the capacity for democratic self-government.

† Professor of Law, Hofstra University School of Law; Faculty Fellow in Ethics, Harvard University Center for Ethics and the Professions, 1999-2000. I presented earlier versions of this Article at the Cornell Law School Symposium, Discrimination and Inequality: Emerging Issues; at a faculty workshop at Boston University School of Law; at the Feminism and Legal Theory Project’s Workshop on Discrimination and Inequality, held at Cornell Law School; and at the Georgetown-Maryland/PEGS Discussion Group on Constitutional Law’s How Empirical Should Constitutional Theory Be?, held at Georgetown University Law Center. Thanks to the participants and to Jim Fleming for helpful comments. I would also like to thank Hofstra University and Harvard University for generous research support.

¹ See MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT 6, 319-24 (1996). This notion of a formative project draws upon Michael Sandel’s discussion of “a formative politics” that “cultivates in citizens the qualities of character self-government requires.” Id. at 6.

² In another article, I gave content to promoting good lives in terms of promoting capacities for self-government, so that good lives are, in an important sense, self-governing ones. See Linda C. McClain, TOLERATION, AUTONOMY, AND GOVERNMENTAL PROMOTION OF GOOD LIVES: BEYOND “EMPTY” TOLERATION TO TOLERATION AS RESPECT, 59 OHIO ST. L.J. 19 (1998). I suggested affinities between my own approach and certain prominent strands of liberal, feminist, and civic republican thought concerning the responsibilities of government to undertake a formative project. See id. passim.
Civic republican theorist Michael Sandel employs the term "formative project" and speaks of a "formative politics" as "a politics that cultivates in citizens the qualities of character self-government requires." Although this might imply that civic education is the primary aim of such a project, he also calls for greater attention to "the political economy of citizenship," which focuses on the kinds of economic arrangements that are hospitable to self-government. Although I draw on this civic republican conception of a formative project, I also seek to develop a synthetic account that employs important liberal and feminist conceptions of such a project. Similarly, I seek to develop a more explicitly feminist conception of political economy of citizenship than Sandel does, one that puts gender, and its intersection with race and class, at the center of analysis. Nonetheless, this civic republican recognition of public responsibility to foster self-government, including economic arrangements conducive to such self-government, serves as a useful starting point for a more capacious notion of a formative project.

This Article initiates an exploration of this project via three avenues of inquiry. Part I considers the "empirical turn" in recent legal scholarship, exemplified in the work of Chief Judge Richard Posner. This trend is quite relevant to the investigation in light of persistent feminist critiques of a lack of empiricism in constitutional law and theory specifically, as well as in law generally. This Part also examines what one can learn about the proper aims and contours of a formative project through a brief survey of some persisting problems of inequality, as diagnosed in familiar feminist critiques of equality doctrine and, more generally, constitutional law.

Part II canvasses promising sources for grounding a formative project, including strands of constitutional theory that suggest that the Constitution authorizes a formative project. Part III situates the call for a formative project in the specific context of economic inequality and the persisting poverty of women and children. Here, it evaluates two helpful and strikingly divergent arguments for public responsibility to address such inequality: Bruce Ackerman and Anne Alstott's new book, *The Stakeholder Society*, and Martha Fineman's recent work on rewriting the social contract.

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3 Sandel, supra note 1, at 6, 319-24.
4 Id. at 125.
I select these two examples because they suggest some of the resources for fashioning a formative project that are available in feminist, liberal, and civic republican thought. Read together, these works' respective strengths and weaknesses highlight difficult issues warranting further attention: (1) the interplay between independence and dependency, and between personal and public responsibility; and (2) the challenge of embracing both a strong principle of governmental noninterference in people's lives to secure their autonomy and equality, as well as a strong principle of affirmative governmental responsibility to secure those goods. In this respect, these proposals point to vital elements in a formative project to secure equality and self-government in a pluralistic constitutional democracy. This Article does not attempt to resolve important and inevitable questions of institutional design, such as how best to design or to rethink social institutions to carry out a formative project and how best to enlist various levels, branches, and tools of government to do so. This project should be done in a careful, contextual way. As with the other types of difficult questions that this Article addresses, these queries invite various types of empirical inquiry and call for normative judgments or, contra Richard Posner, "theory."

I

THE "EMPIRICAL TURN," FEMINIST CRITIQUES, AND A FORMATIVE PROJECT

The "empirical turn" in recent legal scholarship has received considerable publicity and attention in light of Chief Judge Richard Posner's recent calls for the turn to natural and social science in constitutional adjudication, and his provocative assertion that moral theory has "nothing to offer law." He has urged constitutional theorists, and the legal profession as a whole, to redirect their attention to a "more fruitful" endeavor: "exploring the operation and consequences of constitutionalism," such as by studying the difference various constitutional doctrines make in practice, as well as the impact of "intrusive judicial review" on legislators. Posner suggests that these professionals "redirect [their] research and teaching efforts toward fuller participation in the enterprise of social science, and by doing

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this make social science a better aid to judges’ understanding of the social problems that get thrust at them in the form of constitutional issues.\textsuperscript{10} Although differing from Posner in recognizing the impossibility of separating normative and empirical inquiry, Michael Dorf recently echoed Posner in his call for the Supreme Court to “[e]xplicitly pay[ ] greater attention to the likely consequences of its decisions and to the empirical assumptions underlying its doctrines.”\textsuperscript{11}

The charge of a lack of empiricism is a persistent theme in feminist critiques of constitutional law and theory.\textsuperscript{12} These critiques target not only specific constitutional doctrines and rights, but also liberal constitutionalism’s general assumptions about the self and the possibility of self-government. These works raise many questions, including the role that “facts” about sex and gender have played in constitutional adjudication about sex equality itself, such as the equal protection doctrine, as well as about other matters implicating sex equality, such as the scope of due process liberty or First Amendment freedoms. They also question how attentive jurists and constitutional theorists have been to empirical questions about sex inequality, and the consequences of specific legal doctrines and the delineation of rights and responsibilities. How do self-government and related notions of autonomy and responsibility feature in persons’ conceptions of a good life for them?

A number of arguably empirical questions are of central concern to my project. For example, what are the preconditions for meaningful democratic and personal self-government? How might government play a role in fostering those preconditions? Do our current conceptions of constitutional rights and responsibilities adequately support such a formative project? What are the residual effects of historical forms of legally sanctioned discrimination, unjust social hierarchies, or caste systems upon the ability of members within targeted groups to engage in meaningful self-government\textsuperscript{13} and to exercise

\textsuperscript{10} \textit{Id.} at 12 & n.20. One of Posner’s targets in that essay is Ronald Dworkin. \textit{See id.} at 7 (referring to Ronald Dworkin, \textit{In Praise of Theory}, 29 Ariz. St. L. J. 353 (1997)).

\textsuperscript{11} Michael C. Dorf, \textit{The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation}, 112 Harv. L. Rev. 4, 8 (1998) (arguing that the common law method of adjudication “is an increasingly ineffective means” of addressing the problems of a rapidly changing world).

\textsuperscript{12} \textit{See infra} Part I.A.

what Peggy Davis describes as a right to participate in civil society? Do the constitutional protections of freedom of association and privacy foster a healthy civil society in which diverse conceptions of the good life may flourish, even as associations serve as “seedbeds of virtue” and inculcate democratic habits and values? Or do these protections immunize from governmental regulation a realm of private power that often hinders persons’ self-constitution and allows such vices as intolerance, localism, and groupism to flourish?

In addition to these empirical questions, related interpretive and normative inquiries exist: What are the best theoretical justifications for an account of constitutional law that authorizes governmental attention to eradicating or ameliorating the residual effects of discrimination? To the extent that ongoing discrimination and unjust social hierarchies threaten the well-being and the capacity for self-development of members of certain groups, what constitutional theories sustain or challenge a governmental attack on those obstacles to full citizenship? What sort of approach protects civil society as an important realm of self-constitution, freedom of association, and public deliberation, while also sufficiently regulating civil society to ensure that it does not unduly hinder persons’ self-constitution and that it supports important public values, at least to some degree and in some of its forms?

This Article argues for governmental responsibility to undertake a formative project to secure free and equal citizenship, which seems to follow as an appropriate solution to lingering problems of inequality.

A. Posner’s Empiricism Versus Feminist Empiricism

This nation has suffered from “a long and unfortunate history of sex discrimination” and sex inequality. Interpretations of the Constitution based on putative “facts” about the respective capacities and roles of men and women have perpetuated this inequality. In light of this history, one should not be surprised that, like Posner, a number of feminist legal thinkers have critiqued the relationship between empiricism and constitutional law and theory.


See Peggy Cooper Davis, Neglected Stories 254-38 (1997). But see Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 10 YALE J.L. & HUMAN. 251, 251-58 (1999) (arguing that newly freed slaves’ right to marry was an important aspect of freedom and acceptance into civil society, but came at a cost because of its disciplining and regulating effects).

For consideration of these questions, see Linda C. McClain & James E. Fleming, Some Questions for Civil Society-Revivalists, 75 CHI.-KENT L. REV. 301 (2000).

There are two distinct forms of this feminist critique. The first form targets the U.S. Supreme Court's use of supposed "facts" about men and women to justify similar or different treatment. This critique is especially apt with respect to the Court's early equal protection jurisprudence about sex. Familiar examples of this use of "facts" include Justice Bradley's appeal to the law of nature and the Creator to define women's proper role and destiny in his concurrence in *Bradwell v. Illinois*\(^\text{17}\) and the Court's assumptions about the disabling effects of women's physiology and maternity in *Muller v. Oregon*.\(^\text{18}\) This critique also targets the Court's acceptance of legislative generalizations about sex differences, proper gender roles, and women's special domestic responsibilities, despite contemporary "facts" or social science evidence to the contrary.\(^\text{19}\)

Language about the need to be vigilant against using archaic stereotypes about women and men to justify discriminatory governmental regulation accompanied the Court's shift from rational-basis scrutiny to intermediate scrutiny of gender classifications. The requirement articulated in both *Mississippi University for Women v. Hogan*\(^\text{20}\) and *United States v. Virginia*\(^\text{21}\) (VMI) that government offer an "'exceedingly persuasive justification'"\(^\text{22}\) for sex-based treatment suggests to some commentators and members of the Court that the standard of review may be moving toward strict scrutiny.\(^\text{23}\) Despite this

\(^{17}\) 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

\(^{18}\) 208 U.S. 412, 421 (1908).

\(^{19}\) We can find an example of this use of unsubstantiated evidence in *Gossard v. Cleary*, 335 U.S. 464 (1948), overruled by *Craig v. Boren*, 429 U.S. 190 (1976). This case upheld the exclusion of women from bartending, except wives and daughters of male owners, on the rationale that bartending by women may "give rise to moral and social problems." *Id.* at 465-66. Notwithstanding "the vast changes in the social and legal position of women," the Court stated: "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." *Id.* at 466. For an example of an appeal to women's "special" domestic responsibilities, see *Hoyt v. Florida*, 368 U.S. 57 (1961), overruled by *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Court there referred to the legislature's concern for women's "special responsibilities" as affording a reasonable justification for an absolute exemption of all women from jury duty, unless they register a desire to be placed on the jury list. *Id.* at 62. The Court also noted that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."


\(^{22}\) *Id.* at 524 (quoting Hogan, 458 U.S. at 724); *Hogan*, 458 U.S. at 724 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

move toward stricter scrutiny, members of the Court have continued to struggle over the distinction between real differences between the sexes, which might justify sex-based regulation, and differences that are the product of broad generalizations, for which the government has failed to establish an empirical foundation.24

This territory is likely familiar to most participants in and readers of this Symposium and is the subject of extensive feminist commentary. Thus, I shall discuss only briefly the role of “facts” about sameness and difference in equal protection jurisprudence. Several comments, however, are appropriate to distinguish Posner’s proposed empirical approach to such questions from feminist critiques and current equal protection jurisprudence, and to suggest that a turn to greater empiricism should not follow Posner’s lead in these respects.

First, although Posner claims to eschew any normative framework in his approach to adjudication, his method appears to be a “Darwinian pragmatism”25 that judges societal practices by the criterion of “adapt[ability] to any plausible or widely accepted need of the societies in question.”26 Alternatively, his approach may be an “amoral instrumentalism.”27 Thus, taking up the VMI Court’s cautionary chronicle of now-repudiated historical practices rooted in assumptions about sex differences, Posner chides the Court for its air of moral superiority.28 He suggests that if the Court were less ignorant of history, it would see that this history not only explains those practices, but may also justify them.29 Additionally, Posner strongly rebukes the Court for ignoring evolutionary biology, its lessons about

24 Compare VMI, 518 U.S. at 540-42, 549-51 (finding no differences between the sexes sufficient to justify a state-funded all-male educational facility), with id. at 565 (Rehnquist, C.J., concurring) (entertaining the possibility that sufficient differences between the sexes exist to justify state-funded all-male educational facilities), and id. at 576-79, 585-86 (Scalia, J., dissenting) (asserting differences sufficient to justify a state-funded all-male educational facility). Consider also the role that “differences” played in the Court’s earlier upholding of the male-only selective-service registration in Rostker v. Goldberg, 453 U.S. 57, 76-81 (1981), and of the gender-based statutory rape law in Michael M. v. Superior Court, 450 U.S. 464, 468-73 (1981). Similar issues arise in Title VII jurisprudence. For example, in Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court accepted “a bona fide occupational qualification” defense as supporting the exclusion of women from employment as prison guards in a maximum-security prison. Id. at 335-37. According to the Court, a woman’s “very womanhood,” id. at 336, would diminish her ability to maintain order because male inmates, “deprived of a normal heterosexual environment, would assault women guards because they were women,” id. at 335.


26 Posner, supra note 8, at 1652.

27 Dorf, supra note 11, at 81.

28 See Posner, supra note 9, at 14.

29 See id. at 13-14.
real differences between the sexes, and the import of these differences for sex-segregated versus integrated military education.30

Applying his utilitarian calculus, Posner seriously doubts that excluding women from the Virginia Military Institute would have any nontrivial negative effects on their equality, but suggests that including women could produce considerable negative effects on the school. This calculus readily sacrifices the opportunities of the "exceptional" women who could flourish at the Virginia Military Institute in light of the assumed greater harm from their inclusion. Here Posner clearly disagrees with certain normative principles underlying equal protection jurisprudence: (1) the state bears the burden of justifying a classification based on sex and (2) individuals should be judged on their own merits, and generalizations or stereotypes about the sexes, even if true in many or most cases, fail to justify restricting opportunities for those who do not fit the generalization.31

Second, another troubling aspect of Posner's approach, which sharply contrasts with feminist theorizing about equality, is its truncated conception of the possibility of critiquing social practices. Repudiating moral theory as a ground for criticizing such practices because of the persistence of moral disagreement and suggesting that arguing over ends rather than means is futile, Posner nonetheless asserts that scholars can play a role in critiquing practices that "lack functionality, instrumental efficiency, or rationality."32 Upon a first reading, Posner's ideas might seem to have some critical force and might even appear to dovetail with both feminist critiques of patriarchy and some of the Court's equal protection decisions of the 1970s. Feminist litigators at that time patiently helped the Court to see that certain practices lacked rationality and were instead rooted in archaic stereotypes.

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30 See id. at 12-19. But see Dianne Avery, Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case, 5 S. Cal. Rev. L. & Women's Stud. 189, 301, 308-09 (1996) (reporting Carol Nagy Jacklin's expert testimony that there is "no evidence that the adversative model is better for males or for females" and that "[t]here are many different kinds of learning but in all of those different kinds of learnings no sex differences have been found").

31 As Deborah Merritt argues, Posner's real objection to the VMI case is not that the opinion lacks any grounding in empirical reality—for he ignores the extent to which the courts in VMI considered some of the empirical concerns he articulates—but that the Court's normative theory of equal protection differs from his. See Deborah Jones Merritt, Constitutional Fact and Theory: A Response to Chief Judge Posner, 97 Mich. L. Rev. 1287, 1288-90 (1999). In this Symposium, Mary Anne Case argues that the real "rule" at work in VMI—and in the Court's other equal protection jurisprudence concerning sex-based classifications—is not the intermediate scrutiny test, but an anti-stereotyping jurisprudence that centers on a search for perfect proxies (i.e., for a sex-respecting classification to stand, "the assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men"). Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1449-50 (2000).

32 Posner, supra note 8, at 1668.
about the sexes.\footnote{See Hon. Ruth Bader Ginsburg & Barbara Flagg, \textit{Some Reflections on the Feminist Legal Thought of the 1970s}, 1989 U. CHI. LEGAL F. 9, 14-18 (stating that, before the Court could turn away from existing precedent, it “needed basic education” and that the objective in the litigation strategy pursued by Ruth Bader Ginsburg in connection with the ACLU Women’s Rights Project was to “obtain thoughtful consideration of the assumptions underlying, and the purposes served by, sex-based classifications”)} These decisions, however, deviate from Posner’s notion of functional critique, because they hold that efficiency, or administrative convenience, will not suffice to immunize discriminatory practices from constitutional critique.\footnote{See \textit{Reed v. Reed}, 404 U.S. 71, 75-77 (1971) (striking down, under a rational basis test, a statutory preference for male administrators of the estates and rejecting an administrative convenience rationale for the preference).}

Moreover, the shift to intermediate scrutiny ensures that mere rationality will not suffice to justify a practice. Were these practices “adaptive” with respect to the needs of the society in question? They undoubtedly were, assuming one accepts as the benchmark the perpetuation of a society whose practices are rooted in patriarchy—male authority and dominance in the legal and political spheres, and in the family. The argument in the oft-quoted concurrence in \textit{Bradwell v. Illinois}, \footnote{83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).} which invokes the natural and divine order to explain and justify sex-based restrictions in employment, is a prime example of the argument that laws perpetuating patriarchy are adaptive.\footnote{See \textit{id.} at 141-42 (Bradley, J., concurring).} If a few exceptional women tried to defy these natural and divinely-ordained constraints, the needs of society were to prevail. Contemporary constitutional jurisprudence gives less credence to appeals to preserve the status quo, especially when the status quo reflects a legacy of sex-based discrimination and when legal measures upholding it may perpetuate such discrimination.\footnote{See, e.g., \textit{United States v. Virginia}, 518 U.S. 515, 531 (1996) (expressing skepticism about the Virginia Military Institute’s claims that admitting women would destroy the institution, in light of the history of similar claims about the dangers of integration of women into other educational and professional fields from which they were previously excluded); \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 887-98 (1992) (plurality opinion) (striking down the husband-notification provision of an abortion statute and observing that, while such a provision may reflect an earlier, common-law understanding of husbands’ prerogatives during marriage, this notion is offensive to present understandings of women’s constitutional liberty); \textit{Kirchberg v. Feenstra}, 450 U.S. 455, 456 (1981) (striking down a provision of Louisiana’s community property law that gave a husband, as “head and master” of the community property, the right to dispose of that property without his wife’s consent).}

Posner’s “functional criticism” lacks critical bite precisely because one needs to ask: Adaptive from whose point of view? And from what normative conception of the ends of society? Of marriage? Of the family? Contrary to Posner, we should not and cannot eschew moral theory in assessing questions of the “adaptiveness” of institutional practices.
Third, it is also a dangerous dead end to think that if we turn to a field like evolutionary biology to assess sex differences and sex-based regulation, as Posner invites us to do, we can avoid moral theory or normative judgment. A turn to this field of inquiry creates the problem that gender-role expectations will color scientists' "findings" about the sexes. But, even more troubling, the risk exists of blurring the distinction between "is" and "ought" and of not simply explaining, but excusing or legitimating men's recourse to such "adaptive" and "rational" tactics as rape, confining and policing women's sexuality,

38 See Posner, supra note 8, at 1646 (commending evolutionary biology as a "successful" natural science that is "both beautiful and useful").

39 For example, female (feminist) scientists have brought important criticism to bear on the evolutionary biology model of the promiscuous, aggressive male and the coy, choosy female and on other assumptions about male and female roles. See, e.g., SARAH BLAFFER HRDY, THE WOMAN THAT NEVER EVOLVED (1981); MEREDITH F. SMALL, FEMALE CHOICES (1993).

40 A recent, controversial book offers an evolutionary biology explanation for the cause of rape and illustrates some of the problems mentioned in the text. See RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASIS OF SEXUAL COERCION (2000). Thornhill and Palmer argue that the "ultimate causes of human rape are clearly found in the distinctive evolution of male and female sexuality," that is, the "different adaptations of male and female sexuality that were formed by selection in human evolutionary history." Id. at 84. Specifically, they claim:

The evidence demonstrates that rape has evolved as a response to the evolved psychological mechanisms regulating female sexuality, which enabled women to discriminate among potential sex partners. If human females had been selected to be willing to mate with any male under any circumstances, rape would not occur. On the other hand, if human males had been selected to be sexually attracted to only certain females under certain limited circumstances, rape would be far less frequent. Indeed, if human males had been selected to desire sexual intercourse only with females who showed unmistakable willingness to copulate with them, rape would be an impossibility.

Id.

It is undeniable that men use sexual coercion against women, and this may even be a behavior with evolutionary roots, but the authors' remarkable conclusion implies that any man who does not rape manages not to do so only by resisting what he has been selected to do. This suggests that according respect to women's sexual agency simply goes against men's "nature." It also demands an explanation of why most men do not rape. Moreover, the authors draw heavily upon their research on male scorpionflies, who have a "notal organ" that appears to be specifically designed for rape, and they search for psychological mechanisms in human males analogous to this organ. Id. at 63-66. One prominent evolutionary biologist criticized Thornhill and Palmer's work as "irresponsible," "tendentious," and "sloppy." Erica Goode, What Provokes a Rapist to Rape? Scientists Debate Notion of an Evolutionary Drive, N.Y. TIMES, Jan. 15, 2000, at B9 (quoting Dr. Jerry Coyne of the University of Chicago). In another review, one scientist faulted its simplistic use of the idea of "adaptation" as seriously ignoring that "[w]e [have] evolved a complex mental life that makes us act in all sorts of ways" and as attempting to focus just on one possible reproductive strategy. FRANS B. M. DE WAAL, SURVIVAL OF THE RAPIST, N.Y. TIMES, Apr. 2, 2000, § 7 (Book Review), at 24-25. Furthermore, Thornhill and Palmer draw sharp criticism from experts on rape for their proposals to educate young women that dressing in a sexually attractive manner may attract rapists and to educate young men concerning the need to resist their sexually evolved desires to rape. See THORNHILL AND PALMER, supra at 179-83. For such
domestic violence, and sexual harassment. Some evolutionary biologists chide feminists and their reform agenda for ignoring or denying the truths of evolutionary biology. Yet when proponents of evolutionary biology attribute to it singularly powerful explanatory force, their view presents the risk of blind acceptance of overly simplistic accounts of harmful human behavior and prescriptions for its regulation, and may encourage pessimism or fatalism concerning the prospects for such regulation.

In contrast to Posner’s inadequate attention to point of view—or rather, his adoption of the point of view of society’s dominant interests—feminist theorists have forcefully argued for questioning and unmasking “neutrality” or “point of viewlessness” in politics and in law, and for challenging whose interests are actually served. As a feminist legal method, this approach is called “asking the ‘woman question,’” and feminist scholars urge that it can be extended to ask more generally about excluded and marginalized groups. Catharine MacKinnon is a preeminent advocate of this type of insistent un-

41 For Posner’s own reliance upon evolutionary biology, see Richard A. Posner, Sex and Reason 88-98 (1992) (explaining how many customs by which men confine, sequester, and control women are rational from the perspective of the male seeking to protect his genetic investment). See also David M. Buss, The Evolution of Desire (1994) (offering an account of reproductive strategies, discussing male jealousy as an adaptive strategy used to control female partners and deter them from infidelity, and characterizing domestic violence as an extreme or pathological form of that strategy); Robert Wright, The Moral Animal 99-102 (1994) (suggesting that inequality among men leaves poorer men without mates and more likely to resort to violence, theft, and rape). For popular press coverage of evolutionary biology, see Natalie Angier, Raising Aggression to an Art Form, N.Y. Times, Oct. 10, 1995, at C5 and Natalie Angier, Sexual Harassment: Why Even Bees Do It, N.Y. Times, Oct. 10, 1995, at C1. My point is not that evolutionary biologists defend these practices as morally good, but that, without critical attention to the question of point of view and to some norms of equality and antisubordination, it is easy to commit the naturalistic fallacy and to slip from explanation to justification, or to be skeptical about regulating the behavior because it is “natural.”

Posner seems to suggest that moral critique is appropriate only when a practice is not “adaptive,” see supra text accompanying note 32, and this may be a move that is hard—especially for the nonscientist—to avoid. See, e.g., Courtney Weaver, Heartburn, N.Y. Times, Feb. 13, 2000, § 7 (Book Review), at 16 (suggesting the difficulty of trying not to move from explaining behavior to excusing it once evolutionary psychologists characterize something like domestic violence as having an evolutionary function) (reviewing David M. Buss, The Dangerous Passion: Why Jealousy Is As Necessary as Love and Sex (2000)). But some proponents of evolutionary biology stress that human beings are potentially “moral” animals and stress the need for strong moral codes. See, e.g., Wright, supra, at 344, 361-63.

42 See, e.g., Thornhill & Palmer, supra note 40, at 123-52 (attacking the “feminist psychosocial analysis” of rape as erroneously viewing rape as culturally, rather than biologically, determined). For a discussion of the problems with their approach to rape and rape prevention, see supra note 40 and accompanying text.

43 See, e.g., MacKinnon, supra note 13, at 160-69.

masking and curiously serves as Posner’s leading example of contemporary and successful “moral entrepreneurship,” whose rhetoric and passion persuades people to change their ideas and behavior.\textsuperscript{45} MacKinnon indicts norms and practices that have been “adaptive” for patriarchy or “rational” from the standpoint of the ideology of male supremacy or separate spheres, but that perpetuate the unequal treatment of women.\textsuperscript{46} Calling for empirical investigation of the circumstances of women’s lives, MacKinnon invites a focus upon the construction of what “woman” means in a culture and upon the gender-specific injuries women suffer because they are women.\textsuperscript{47} Although she often denies that her project is about moralism or moral theory rather than about equality under law, important principles of political morality such as equal citizenship, the inviolability of persons, and autonomy animate her work.\textsuperscript{48}

B. Feminist Investigations of the Consequences of Constitutionalism

The foregoing discussion leads to the second type of feminist charge of a lack of empiricism: inattention to what Posner calls “the operation and consequences of constitutionalism.”\textsuperscript{49} For example, Posner questions the effects of having various constitutional doctrines, “the actual and likely effects of particular decisions and doctrines,” and the impact of active judicial review as opposed to judicial deference to legislatures.\textsuperscript{50} In contrast to Posner, feminist theorists focus on how this lack of empirical grounding serves to disempower women. One claimed source of disempowerment is the structure of certain constitutional rights themselves.

To take a familiar example, feminists often advance what I term the “illusion” critique of rights: Constitutional theorists justify rights

\textsuperscript{45} Posner, \textit{supra} note 8, at 1667.
\textsuperscript{46} \textit{See}, e.g., MacKinnon, \textit{supra} note 13, at 162 (“The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies.”); \textit{id.} at 215-34 (advancing a conception of gender as a system of social hierarchy, i.e., of inequality, and arguing that prevailing equality doctrine fails to recognize how law legitimates women’s second class citizenship).
\textsuperscript{47} \textit{See} Catharine A. MacKinnon, \textit{From Practice to Theory, or What Is a White Woman Anyway?}, 4 \textit{Yale J.L. \& Feminism} 13 (1991) [hereinafter MacKinnon, \textit{From Practice to Theory}]. For MacKinnon’s application of this method to questions of global comparisons of women’s condition and of the relevance of international human rights norms, see Catharine A. MacKinnon, \textit{Crimes of War, Crimes of Peace, in On Human Rights} 83 (Stephen Shute \& Susan Hurley eds., 1993).
\textsuperscript{48} \textit{See}, e.g., Catharine A. MacKinnon, “Freedom from Unreal Loyalties”: \textit{On Fidelity in Constitutional Interpretation}, 65 \textit{Fordham L. Rev.} 1773, 1774 (1997) (questioning the legitimacy of a constitution in which women were not originally participants).
\textsuperscript{49} Posner, \textit{supra} note 9, at 11.
\textsuperscript{50} \textit{Id.} at 11-13.
with universalist rhetoric about respect for personhood, privacy, and a realm of personal autonomy. But these rights are an illusion for women, and the rhetoric masks the role of rights in disempowering women when government leaves people alone in their private lives.\textsuperscript{51} In other work, I disagree with this feminist critique of privacy to the extent that it suggests that the constitutional right of privacy, or a principle of toleration, sanctions private violence against women or bars legal redress against such violence.\textsuperscript{52} I also indicate that grappling with this critique leads to useful feminist reconstructive work on privacy.\textsuperscript{53}

To what extent are such feminist critiques of liberal or mainstream constitutionalism themselves empirical? Some of MacKinnon’s critics contend that her claims about women’s lives and experiences are categorical and totalizing, subsume women into the category of victim, and insufficiently address differences among women.\textsuperscript{54} Yet a persistent theme in her writing is that theory should proceed from the ground up. Women’s experiences of, and resistance to, sex inequality give rise to theory about how patriarchy works, how male privilege masquerades as point-of-viewlessness in law, and how laws systematically preserve men’s entitlements and disempower women.\textsuperscript{55} MacKinnon clearly presents her case as an empirical one, at least to the extent that she accompanies her claims about the pervasiveness of sex ine-


\textsuperscript{52} See, e.g., Linda C. McClain, Inviolability and Privacy: The Castle, the Sanctuary, and the Body, 7 Yale J.L. & Human. 195, 241 (1995) (“[P]rotecting one location of inviolability, for example, the home as castle, may have to yield to protecting another, a woman’s body.”); McClain, supra note 2 (arguing for a more robust version of toleration in constitutional interpretation). But I endorse the feminist critique of privacy to the extent that it correctly inds the historical use of such concepts as marital privacy rhetoric by courts and lawmakers to shield the home from public exposure and to leave women without a remedy against intimate violence. See, e.g., Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117 (1996).

\textsuperscript{53} For my own approach, see Linda C. McClain, Reconstructive Tasks for a Liberal Feminist Conception of Privacy, 40 Wm. & Mary L. Rev. 759 (1999) (endorsing and building upon the liberal feminist conception advanced in Anita L. Allen, Coercing Privacy, 40 Wm. & Mary L. Rev. 723 (1999)). In Anita L. Allen, Uneasy Access (1988), and in many publications since then, Allen defends a liberal feminist conception of privacy, which squarely rejects the misuses of the conception of privacy that MacKinnon, Siegel, and other feminists have critiqued. See id. at 36. For a discussion of Martha Fineman’s reconstructive work on family privacy, see infra notes 146-59 and accompanying text.

\textsuperscript{54} See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585-86 (1990) (exposing the dangers of “gender essentialism” and introducing a “multiple consciousness” theory).

\textsuperscript{55} See, e.g., MacKinnon, Reflections on Sex Equality, supra note 51, at 1282 (beginning with the observation that “[e]quality was not mentioned in the Constitution or the Bill of Rights”); MacKinnon, From Practice to Theory, supra note 47 (focusing on empirical studies of women’s lives and the gender-specific injuries women suffer).
quality and the genesis of feminist resistance (and feminist theory) with references to the prevalence of such phenomena as rape, domestic violence, sexual harassment, and incest.56

However, excluding for present purposes any problems with the specifics of this presentation, interpretive moves still exist by necessity, such as theorizing about the impact of male domination upon the construction of women's self-definition or self-construction, upon their desire, or upon the possibility of their sexual agency.57 MacKinnon's categorical claims about how society constructs women as sec-

56 This type of presentation is a staple feature of MacKinnon's work. See, e.g., MacKinnon, Reflections on Sex Equality, supra note 51, at 1293-94, 1301-03; MacKinnon, From Practice to Theory, supra note 47, at 15.

57 A similar mixture of empirical and interpretive claims about women's lives and experience attends MacKinnon's well-known writing and advocacy concerning pornography, in which she alleges serious problems of inattention to empirical reality by defenders of the First Amendment against "censorship." See, e.g., Catharine A. MacKinnon, Only Words 22-23 (1993) (comparing pornography to racism and harassment); Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1, 1-2 (1985) (defining pornography as a civil rights violation). Perhaps MacKinnon's most categorical and interpretive claim—that pornography silences women and creates or perpetuates the dynamic of sex inequality—is so hotly debated because it is the claim least amenable to decisive empirical resolution. See C. Edwin Baker, Of Course, More Than Words, 61 U. Chi. L. Rev. 1181, 1182 (1994) (book review) (characterizing MacKinnon's position that pornography silences women as her "most contentious position in recent years").

Does pornography impair women's ability to engage in democratic self-government? Some prominent liberal constitutional theorists have wrestled with the "silencing" claim and its normative implications, reaching different conclusions. See, e.g., Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 238 (1996) (rejecting silencing argument because a constitutionally-protected right to try to influence the moral environment does not include a right to be successful in influencing others or "a right not to be insulted or damaged by the fact that others have hostile or uncongenial tastes, or that they are free to express or indulge them in private"); Sunstein, supra note 15, at 261-70 (defending argument for regulation of materials that combine sex with violence against women); id. at 394 n.14 (finding it plausible that pornography sometimes plays a part in "silencing" women due to social attitudes, but that while the silencing argument is an important political argument against pornography, it should not be part of the First Amendment argument because of the threat of "excessive inroads on a system of free expression"); Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn. L. Rev. 291, 295-97, 307-08 (1989) (discussing MacKinnon's silencing claim and criticizing American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd per cur., 475 U.S. 1001 (1986), for disregarding the "subversions of liberty and equal protection consequent upon a choice not to regulate"); Pornography: An Exchange, N.Y. Rev. Books, Mar. 3, 1994, at 47 (letters by Catharine MacKinnon and Ronald Dworkin).

Additionally, does pornography's portrayal of sex so silence women that it renders a "more speech" remedy ineffective? For example, notwithstanding (or perhaps building on) her critique of a "porn-suppression" strategy because of the importance of "[f]ree-wheeling [s]ex [t]alk," Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097, 1099-1101, 1134-35, 1146 (1994) (typeface altered), Carlin Meyer is exploring how these media constraints make such a "remedy" difficult and problematic and subsequently calling upon feminists to turn their attention to the market. See Carlin Meyer, Media, Markets and Women's Liberation: Enlarging the Feminist Agenda (Nov. 1998) (unpublished manuscript, on file with author).
ond-class citizens and how women internalize this status invite attention to the interplay between human agency and social structure. Her claims thus offer an important resource for thinking about the proper aims and contours of a formative project. At the same time, in trying to work out these aims and contours in specific contexts, it is important to pay heed to the multiple and overlapping forms of disadvantage and discrimination that women suffer and how specific policy choices will affect differently situated women.58

Feminists not only criticize mainstream jurisprudence and constitutionalism for inattention to the reality of sex inequality in specific doctrinal areas, but also launch more global attacks on constitutional theory and the Constitution itself for inattention to the differences in women's and men's lives, experiences, values, needs, pleasures, and pains. Institutional components of this argument also exist. For example, Mary Becker notes women's lack of representation not only in the drafting of the Constitution but also in its interpretation, which is largely in the hands of an overwhelmingly white male judiciary.59 She provides prudential arguments against judicial review and in favor of seeking equality through politics.60 Additionally, Judith Baer charges that equal protection with respect to sex-based classifications has done more for men than for women and contends that "[t]oo often, 'you can't get there (to a constitutional resolution of a woman's claim) from here (a statement of the problem).’"61

Both Becker's and Baer's pessimism about the ability of the courts to serve as helpful sources of securing sex equality stems in part from concern for judicial bias, which ensues because male judges look at the world from a perspective held by men more than women and issue legal rules better adapted to the needs of men than those of women.62 They are also concerned about judicial inattention to, and ultimately the supposed doctrinal irrelevance of, differences in women's and men's lives, often rooted in the lingering effects of sex-role socialization, unconscious discrimination, and the legacy of historic

58 For a critique of the single-axis analysis of discrimination and a call to put multiply-burdened women at the center of feminist analysis, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.


60 See id. passim; Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 211 (1998); see also Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 202 (arguing that women should lobby for change rather than rely on courts to find one abstract standard to solve women's problems).


62 See, e.g., Becker, supra note 59, at 986-90.
discrimination. Although the democratic arena might appear to be a better forum in which to pursue what Becker calls "the kind of experimentation necessary if we are ever to figure out either what equality between the sexes might look like or how to get there," some formidable barriers to women's full and effective democratic participation still remain. Indeed, given this legacy of discrimination and marginalization, some political theorists argue that the underrepresentation of women in legislatures is not "fair" representation and that group-based remedies are necessary to enhance the representation of women and other historically marginalized groups.

Elsewhere I have taken a stand somewhat at odds with Becker's viewpoint, criticizing arguments for judicial minimalism and greater deference to the democratic process, while defending judicial enforcement of certain rights. I do not attempt to resolve the debate here. I recognize that good pragmatic and prudential reasons exist, as well as arguments rooted in concerns for institutional design, to look less frequently to courts and more often to legislatures to advance constitutional norms of equality and liberty and to engage in the kind of "democratic experimentalism" that multiple loci of decision making and deliberation allow. I nonetheless would favor a model that recognizes that both the Legislature and the Executive are important constitutional actors responsible for enforcing the Constitution but that courts play a necessary and proper role in upholding a uniform national regime with respect to certain rights. In this Article, I wish to endorse Becker's insistence upon the importance of turning to politics to secure gains in equality; as liberal feminist Wendy Williams long ago admonished, "to the extent that the law of the public world

63 Id. at 990. Becker also has noted obstacles to women's full and effective political participation, such as socialization, unconscious discrimination, the design of jobs for workers with wives, and, perhaps most significant, problems rooted in relationships between women and men, such as the need to obscure the conflict between women and men. See Mary E. Becker, Politics, Differences and Economic Rights, 1989 U. Chi. Legal F. 169.

64 See Melissa S. Williams, Voice, Trust, and Memory 3-22 (1998) (setting forth the argument for enhanced representation for marginalized groups, including women and African Americans).


67 This is the model of "provisional adjudication" that Michael Dorf advocates to encourage such "democratic experimentalism" in legislatures. Dorf, supra note 11, at 59-69 (internal quotation marks omitted); see Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998); see also Becker, supra note 59, at 986-92, 1047-50 (advocating experimentation and the elimination of judicial review).
must be reconstructed to reflect the needs and values of both sexes, change must be sought from legislatures rather than the courts."

Thus, given the value of a model of "democratic experimentalism" for attempting to secure freedom and equality, I argue that one dimension of government's formative project should be to address the obstacles to political participation and participation in public conversation that women and men face. A more complete account must look at the intersection of sex with race and class, because this intersection reveals significant differentials concerning African Americans' forms and rates of civic and political participation, which may indicate the role that mistrust of and cynicism toward government as well as poverty, play. When considering the scope of a formative project, I find instructive models of deliberative democracy and of civil society that stress the importance of participation in multiple and interlocking public conversations. These models recognize the necessary space for "counterpublics" or "deliberative enclaves" of resistance, in which losers in democracies "recognize and fight the ongoing injustice of their procedures and their outcomes." The possibility of this kind of social critique and transformation, whether through politics or other forms of collective action, is of vital importance to securing equality.

One core component of a formative project should therefore be the fostering of persons' capacities to participate in deliberative democracy.

Another instructive source to help determine the proper aims and contours of a formative project is the feminist critique that current law and legal theory fail to recognize and protect against gender-specific harms—harms that women exclusively or disproportionately suffer. This critique also alleges that the law may in certain ways even legitimize and perpetuate those harms. Robin West argues that one

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70 Jane Mansbridge, Using Power/Fighting Power: The Polity, in DEMOCRACY AND DIFFERENCE 46, 55-58 (Seyla Benhabib ed., 1996). For helpful models along these lines, see NANCY FRASER, JUSTICE INTERRUPTUS 69-98 (1997); Seyla Benhabib, Toward a Deliberative Model of Democratic Legitimacy, in DEMOCRACY AND DIFFERENCE, supra, at 67. I discuss the relevance of these models to a conception of civil society in McClain & Fleming, supra note 15.

71 See Abner S. Greene, Civil Society and Multiple Repositories of Power, 75 CHI-KENT L. REV. 477, 479 (2000) (arguing that Constitution has a core commitment to "multiple repositories of power," which requires that both power and its challengers be fractured and relegated to different modes of collective action).
reason for this failure is that mainstream legal and political thought assumes and values an atomistic and fundamentally separate self, a view that reflects men’s experience; in contrast, the concept of connection is central to women’s lives and values. The law, West contends, fails both to value and protect good forms of connection, and to protect against harmful forms of connection. She urges a shift to an instrumentalist jurisprudence, or a feminist instrumentalism, which would understand law as fundamentally an instrument “designed to minimize the harms we suffer in social life.”

Examining the relationship between law and gender-specific harms, West finds that the law is far from being instrumentalist in the way that she advocates, but instead perpetuates such harms in various ways. These ways include: partial regulation of gendered harms, leaving a good deal of the problem unaddressed; nonrecognition of gendered harms; legitimization of gender-specific harms; protection of the harm through protection of the conduct causing the harm; and the mandating of harm by punishing attempts by women to circumvent it.

West’s constitutional theory is a “progressive constitutionalism.” She calls for affirmative legislative responsibility to attack such problems as unjust hierarchies of private power that constrain persons’ meaningful liberty and equality. This progressive constitutionalism targets not only barriers to women’s ability to live good lives, but many forms of unjust private power such as racism and homophobia. Feminist and critical race scholar Dorothy Roberts endorses West’s affirmative ideal of liberty and its facilitative role for the state, but would expand this ideal by explicitly focusing on the link between liberty and racial equality and by putting race at the center stage of public deliberation over issues crucial to women’s well-being.

Linking West’s constitutional project to her call for an instrumentalist jurisprudence that centers on harm, West clearly signals that a vital project for legal theorists should be developing an adequate phenomenological account both of women’s and men’s lives and of the way in which
various forms of private power hinder a person's ability to live a meaningfully autonomous life.

A striking aspect of West's argument is the extent to which she regards a self-governing life as a good life and uses a liberal model of self as the benchmark against which to indict the injustice of the lack of autonomy in women's lives. West's ideal self, which I have called the "choosing, caring self," seems to be a hybrid of liberal and relational feminist ideals. Regardless of the definition, her turn to liberalism suggests that the problem is not that the liberal ideal of an autonomous self is hopelessly inapt as a model of "real life," but rather that society should strive to close the gap between the ideal and the empirical reality of most women's lives. I endorse this move as an important component of a formative project to secure equality as well as liberty.

What is the mix of empirical and normative claims in West's approach? Notwithstanding feminist suspicion of grand theory, West herself is an unabashed grand theorist. Her own phenomenology of women's lives, although rich and provocative, is more impressionistic and interpretive than truly empirical in the sense of being grounded in statistics and social science. Undoubtedly, some narratives of women's lives, including those drawn from literature and social science, undergird some of her most sweeping claims about the gendered harms that most women suffer. However, as I have argued elsewhere, a finer-grained analysis is necessary. Her work could benefit from more carefully engaging antiessentialist feminists' cautions that, given the complexity of women's experiences and their many varied or salient differences, claims about women as women should be provisional, contextual, and qualified. Additionally, West's monolithic account of how culture and law shape women should cede to a more nuanced theory that allows for how women shape culture, even as they are shaped by it, and that recognizes the possibility of transformation

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77 By using this phrase, I mean a model of self that regards persons as having certain capacities or moral powers, including the capacity to form, act upon, and revise a conception of the good.


79 Id. at 485-86.


81 West does cite to studies of women's fear of rape. See West, supra note 73, at 101. Moreover, she invokes Susan Glaspell's A Jury of Her Peers to illustrate her claims about marriage. See id. at 242-58.

82 See McClain, supra note 78, at 480-81. In my review, I illustrate this argument with respect to West's claims concerning women's experiences of gender-based harms in marriage. See id. at 497-511.
within law and culture. A nuanced theory could also attend to how
gender as a system establishes and polices both female and male iden-
tity and could expand its focus to harms that boys and men suffer
under such a system.\(^8\)

Regardless of whether or not West herself has undertaken the
kind of empirical work that her project demands, she usefully suggests
that legal theory, including constitutional theory, should consider em-
pirical questions such as what harms persons suffer, how such harms
hinder living a good or meaningfully autonomous life, and whether
existing law, including constitutional law, perpetuates, legitimizes, or
redresses such harms. While West focuses upon harms, I believe that
another promising approach, which might facilitate greater attention
to context and differences among persons, can be drawn from the
human capabilities literature. This literature seeks to identify impor-
tant human capabilities that allow persons to achieve certain “func-
tionings” that they have “reason to value.”\(^8\) From this step one can
argue that a good society should foster such human capabilities.\(^8\)
Using the capabilities approach, one can identify forms of group-based
inequality—class, gender, or race—that are manifest in inequalities of
capabilities and of freedoms and argue that a good society, committed
to fostering human capabilities, may need to make special efforts to
address such inequalities.\(^8\) Interpretive and normative questions in-
evitably follow whichever approach one takes. These queries include
determining what theories of the Constitution support a formative
project aimed both at addressing such harms or various forms of un-
just private power and social hierarchies, and at fostering those
human capabilities required to live good or meaningfully autonomous
lives.

C. Feminist Critiques of Constitutional Democracy's Liberal Self

The third and final feminist attack on constitutional theory’s lack
of empiricism targets the limits of liberal models of constitutional de-

\(^{83}\) For helpful feminist work recognizing this point, see Mary Anne C. Case, Disaggre-

\(^{84}\) AMARTYA SEN, INEQUALITY REEXAMINED 4-5 (1992).

\(^{85}\) Amartya Sen has taken and Martha Nussbaum has elaborated on this pioneering
approach to human development. See, e.g., SEN, supra note 84; THE QUALITY OF LIFE
(Martha Nussbaum & Amartya Sen eds., 1993).

\(^{86}\) See SEN, supra note 84, at 117-28, 141-48. For an examination of sex inequality
using the human-capabilities approach, see WOMEN, CULTURE AND DEVELOPMENT (Martha
mocracy. I include this argument for its guidance concerning the proper scope of a formative project to secure freedom and equality. In her article, *Democracy and Feminism*, Tracy Higgins echoes familiar feminist criticisms of liberal constitutionalism. These critics are opposed to the theory that posits an autonomous self and that assumes that constitutional rights, conceived of as negative liberties, permit the autonomous self to be self-governing and protect it against intrusive majoritarian action. Higgins pursues these themes and attempts to show how they translate into inadequate conceptions of constitutional democracy. In her view, liberal constitutionalism suggests that autonomous beings come to politics to vote their fully formed preferences, while what is truly needed is a "recursive" model of politics that is cognizant of the crucial role that participation in democratic self-government should play in helping women to fashion their desires and perfect their lives. Women differ from the autonomous liberal self because of the combined effects of unjust private power, gender socialization and false consciousness, and similar influences.

In this respect, Higgins faults Justices Ginsburg and Scalia in the VMI case for taking as given women's preferences concerning the desirability of attending all-male military academies or of keeping these institutions all male. She also criticizes the Justices for accepting these preferences as reflecting women's agency and for failing to examine the construction of such preferences. Higgins uses the term "agency" instead of "autonomy" to allude to the feminist claim that the liberal focus on autonomy obscures the issues of unequal power rooted in sex inequality and of the preconditions that must be met for women to have the capacity to act in the world as self-governing agents. Conceiving constitutional rights as primarily negative liberties against the state distracts attention from the fact that women must enlist the state to help attain equality and good lives.

As stated elsewhere, although I disagree with her assessment of liberalism and of negative liberty, I agree with Higgins and a broad array of legal scholars and political philosophers who argue that affirmative governmental action is an important element in securing equality and self-government. Proponents of a formative project

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88 See id. at 1660-61.
89 See id.
91 See United States v. Virginia, 518 U.S. 515, 542 (1996); id. at 588-89 (Scalia, J., dissenting).
93 See id. at 1667-70.
94 See id. at 1664 n.31.
must face difficult questions concerning how to foster human capacity or capability without veering too closely to a strong form of perfectionism that enlists government to enforce one conception of the good life. Consequently, Higgins herself recognizes, but does not attempt to resolve, a number of difficult empirical and normative issues raised by her proposed model of constitutionalism. That model would impose judicial and legislative obligations to advance a substantive principle of sex equality, including legislative efforts to shape women's preferences and choices to counter the effects of sex inequality. These issues include, for example, whose conception of a good life prevails, what happens if women disagree about the meaning of sex equality, and what are the proper means by which to secure equality. This project itself rests upon a normative conception of the aims of constitutional law and theory, and of the role of government in fostering sex equality and promoting women's agency.

II

DOES THE CONSTITUTION AUTHORIZE A FORMATIVE PROJECT?

All the feminist critiques discussed above suggest the importance of attention to the preconditions for responsible and meaningful democratic and personal self-government. Social constructionists might describe such a formative project as one that affords persons the material and cultural resources to participate in the dialectic of self- and cultural-construction. Liberals inspired by Rawls's political liberalism might characterize it more in terms of securing the preconditions for deliberative democracy and deliberative autonomy. Alternatively, deliberative democrats who embrace discourse-ethics models might speak in terms of the requirements of norms of universal moral respect and reciprocity and of an institutional design that allows for "a multiple, anonymous, heterogeneous network of many publics and public conversations." My own view is that a valuable starting point for a formative project, which resonates with diverse approaches, is the focus upon fostering human capacities and specifically the capacities to direct one's life in a meaningful sense and to participate in society. Another useful point of common ground is the recognition that the self is socially situated and that social structures or institutions may thus play a form-

96 See Higgins, supra note 87, at 1700.
97 See id. I examine some of these problems with perfectionism in McClain, supra note 2, at 124-31.
100 Benhabib, supra note 70, at 87.
ative role in both constraining and enabling self-government and choice. To this core, I would add both the need to focus more explicitly on human interdependency (as I discuss in Part III) and on problems posed by entrenched inequality. Working out a formative project would build on this core.

However, even if one could learn about the varieties of factors that help people become moral agents and act efficaciously in the world, and the factors that impair their capacity to do so, how would this information relate to the goals of constitutional theory? How does the concern for fostering human capacity map onto the concerns of constitutionalism? Does the Constitution authorize a formative project? The extent to which the constitutional text, history, and structure bar, permit, or even require such a project is a question of constitutional interpretation.

One could posit that our constitutional order presumes that citizens have the capacities to engage in responsible self-government and in social reproduction. Some communitarians and civic republicans contend that the Framers assumed that the institutions of civil society would foster those capacities and thus did not set up, as a part of the constitutional structure, a governmental formative project to create responsible citizens. As I discuss elsewhere, some scholars claim that liberal democracy depends upon civil society for orderly social reproduction, but that liberalism may be "lethal" to the "seedbeds of [civic] virtue," because its commitment to values such as toleration slides too easily into a neutrality that bars government from actively securing the conditions for ordered liberty: a virtuous, responsible, informed, and active citizenry. As I have written elsewhere, I reject this interpretation of the principle of toleration and I agree with accounts of "civic liberalism," which argue that government has a proper role to play in fostering civic virtue, or "the capacities and dispositions conducive to thoughtful participation in the activities of modern politics and civil society," and supporting public values.

101 See JOHN RAWLS, POLITICAL LIBERALISM 19, 103-04 (1993) (ascribing to persons, as citizens, "two moral powers": "a capacity for a sense of justice and for a conception of the good"); John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765, 788 (1997) (discussing the role of the family in "the orderly production and reproduction of society and its culture from one generation to the next").

102 McClain & Fleming, supra note 15, at 306 (discussing SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICA (Mary Ann Glendon & David Blankenhorst eds., 1995)); see also MARY ANN GLENDON, RIGHTS TALK 109-20 (1991) (asserting that "individual freedom and the general welfare alike depend on the condition of the fine texture of civil society").

103 See McClain, supra note 2.

104 STEPHEN MACEDO, DIVERSITY AND DISTRUST 10 (2000) (arguing for a "civic liberalism").
Some avenues of constitutional interpretation offer promising justifications for a governmental formative project. West's "progressive constitutionalism" interprets the Due Process and Equal Protection Clauses to place an affirmative responsibility on Congress to attack unjust hierarchies and abusive private power in order to foster "meaningfully free and autonomous" lives. Frank Michelman identifies in the late Justice Brennan's jurisprudence a "romantic" liberalism, a commitment to respect for individual human personality and to the value of the capacity for self-revision, which would support constitutional arrangements that foster such capacity and that remedy historically entrenched inequalities. Sotirios Barber looks to the ends listed in the Preamble of the Constitution, such as "promote the general welfare" and "secure the blessings of liberty," and states that "[a]spirational theorists ask how best to pursue the general welfare and other constitutional ends under existing and likely circumstances."

The civic republican tradition also provides some rich arguments concerning the importance of securing citizens' independence and of viewing property as properly regulated in order to further good public order. Indeed, in a provocative new article about the constitutional legacy of the New Deal, William Forbath seeks to retrieve "the social citizenship tradition" of constitutional interpretation, whereby republican concerns over the political economy of citizenship target class inequality and would support interpreting equal citizenship as entailing a right to "decent work."

I am interested in how these various forms of aspirational constitutional theory justify governmental responsibility to engage in a formative project. This project should address, among other things, the salient problems of sex inequality that the feminist critiques described above raise, as well as other forms of inequality. Assuming that these arguments do provide support for a formative project, important empirical questions should guide it. Some of those questions appear at the beginning of this Article, such as what are the preconditions for democratic and personal self-government, and how may gov-

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105 West, supra note 75, at 267.
107 Sotirios A. Barber, How Empirical Must Constitutional Theory Be? 3 (Dec. 5-6, 1998) (unpublished manuscript, on file with author). For a fuller account of this argument, see Sotirios A. Barber, On What the Constitution Means (1984). Similarly, Mark Tushnet views the principles of the Declaration of Independence, as well as the Preamble, as the basis for America's commitments to equality and basic liberties, and argues for taking the Constitution away from the courts in order to realize those principles through populist constitutional law. See Tushnet, supra note 66, passim.
ernment best aim to secure them.\textsuperscript{110} The feminist critiques described above also suggest relevant empirical questions concerning the conceptions of autonomy at work in constitutional justifications for liberty, or decisional autonomy, and for freedom of association. Feminist critiques about how private power constrains the enjoyment of constitutional rights also raise empirical questions, as do charges that formal rights are meaningless without the material preconditions to exercise and enjoy them.

Along these lines, unanswered questions exist about the constitutionally permitted parameters of governmental regulation to address barriers to free and equal citizenship resulting from unjust status hierarchies, residual effects of legally sanctioned discrimination, or abuses of "private" power. Congress has in the past acted to bar discrimination by passing civil rights statutes, and those legislative measures have survived constitutional challenge.\textsuperscript{111} Similarly, state and local antidiscrimination laws have survived challenges rooted in the First Amendment's freedom of association.\textsuperscript{112}

More recently, in the face of constitutional challenges to the civil rights remedy of the Violence Against Women Act of 1994 (VAWA),\textsuperscript{113} some legal scholars have argued that VAWA was a proper exercise of Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment and secure the equal citizenship of women,\textsuperscript{114} although Congress officially placed more reliance upon its authority to regulate commerce. Moreover, as federal courts upholding VAWA have pointed out, VAWA's enactment followed years of congressional testimony or "facts" concerning the detrimental impact of violence

\textsuperscript{110} See supra text accompanying notes 1-7.
\textsuperscript{113} 42 U.S.C. § 13981 (1994).
\textsuperscript{114} See Brief of Law Professors as Amici Curiae in Support of Petitioners, United States v. Morrison, Nos. 99-5, 99-29, 2000 U.S. LEXIS 3422 (May 15, 2000). I was a signatory to the cited brief. One of the arguments made in the cited brief is that the civil rights remedy was appropriate because "Congress found pervasive and entrenched patterns of sex discrimination in state criminal justice systems" with respect to crimes of violence disproportionately affecting women—a finding supported by numerous state gender-bias task forces and by the testimony of various state attorneys' general. \textit{Id.} at 18-23 (typeface altered). But it should be noted that one prominent law professor, Richard Epstein, co-authored an amicus curiae brief registering a dissenting view. See Brief of the Institute for Justice and the Cato Institute as Amici Curiae in Support of Respondents at 4, United States v. Morrison, Nos. 99-5, 99-29, 2000 U.S. LEXIS 3422 (May 15, 2000) (arguing that VAWA "is not an appropriate exercise of Congress's enforcement powers under the Fourteenth Amendment").
against women on their ability to participate in society. And most states not only supported Congress's enactment of VAWA, but gave testimony as to the inadequacy of their criminal justice systems to remedy this problem, due in part to patterns of gender bias and discrimination. One might have thought that the Court's earlier ability to consider "facts" concerning violence in women's lives, such as the Court's striking down of the husband-notification provision in Planned Parenthood v. Casey, would help it to give weight to such empirical findings as it determined the constitutionality of VAWA during this term.

The Court's decision striking down the civil rights remedy of VAWA bodes ill for interpretation of the Constitution as a source for securing, rather than hindering, women's equality. It also portends interpretation of principles of federalism and state action so as to suggest that gender-motivated violence is not a matter bearing on women's national citizenship. Indeed, writing for the majority, Chief Justice Rehnquist stated: "The Constitution requires a distinction between what is truly national and what is truly local," thus confining "the suppression of violent crime and vindication of its victims" to the police power of the state, and seemingly missing, if not denying,
any connection between violence against women and women's status as equal citizens under the federal Constitution.

This stunningly truncated view of congressional authority with respect to civil rights and of what matters are of "truly national" concern seems to confirm feminists' worst fears that the Constitution (at least as interpreted by the courts) too often hinders, rather than fosters, women's equality, in this instance under the guise of concern for federalism. However, it should be noted that the Court was closely divided, and that the dissenters strenuously and cogently rejected, as an unsound "categorical formalism," the Court's approach to Congress's authority under the Commerce Clause, which attempted to delineate "the local" from "the national," rather than to recognize the inevitable role of politics in mediating such a line. Moreover, the dissenters took exception to the majority's characterization of the factual findings about the impact of violence against women and suggested that the legislative record was "far more voluminous" than the record compiled by Congress and found sufficient in upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges.

What the opinion may also reveal is "the unfortunate consequence of a series of political decisions harking back to Reconstruction," which required Congress to rely on the Commerce Clause rather than on its power to enforce the Fourteenth Amendment or even to give effect to the Thirteenth Amendment. Nonetheless, one can find examples of apparently constitutional governmental regulations that address some of the obstacles to responsible citizenship and, in that sense, engage in a formative project. Additionally, to the extent that Congress or state legislatures do so, they may afford an example of enforcement of the Constitution outside the courts.

I believe that an inevitable movement occurs between normative and empirical constitutional questions. Consider, for example, the

\[120\] Id. at *77 (Souter, J., dissenting).
\[121\] Id. at *60.
\[122\] Jack M. Balkin, The Court Defers to a Racist Era, N.Y. Times, May 17, 2000, at A27.
\[123\] Some scholars argue that the Reconstruction Amendments arose out of this country's experience with the moral slavery and social death that were incidents of slavery; they have interpreted those amendments as measures designed to confer moral agency and to remedy the abridgement of basic human rights of enslaved persons, such as the rights of conscience, intimate life, and speech. See Davis, supra note 14, at 9-10; David A.J. Rich- ards, Women, Gays, and the Constitution 200-08 (1998). Analogous arguments could speak of how "private," gender-motivated violence impairs women's moral agency and abridges their exercise of constitutional rights, a problem made worse by gender bias in the criminal justice system.
functions and proper regulation of civil society. Suppose that girls reared in fundamentalist religious households in which a traditional—and in feminist terms, unjust—gendered division of labor exists are socialized into a worldview that holds that the proper role for girls is to become obedient wives and mothers. Will this scenario leave those girls with a diminished capacity for self-government and a constricted sense of self, both of which will have an impact on their later "choices"? If so, would this empirical fact justify governmental measures to discourage or even prohibit this gendered division of labor and socialization, notwithstanding the principle of religious toleration? Taking either of these steps would require a normative argument about balancing freedom of religion, freedom of association, and parental liberty against the government's interest in attacking sex inequality, fostering women's equal citizenship, and preparing children for citizenship by inculcating in them the capacity for critical, reflective thought.

Suppose one accepts the claim that "the justification for some measure of public authority" concerning children lies in the "basic fact" that "children are not simply creatures of their parents," but are "independent persons-in-the-making with their own basic interests and their own lives to lead," and that government and a democratic community should insist on "due regard" for that independence.

A symposium, of which I am a co-editor with James Fleming, explores these questions. See Symposium, Legal and Constitutional Implications of the Calls to Revive Civil Society, 75 CHI.-KENT L. REV. 289 (2000). In her recent book, political scientist Nancy Rosenblum conducted an empirical investigation of associations, studying them both in the context of constitutional justifications for freedom of association and liberal anxiety about whether or not such associations contribute to democratic self-government. See NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS (1998). She concludes that they contribute only indirectly toward democratic self-government but serve important functions with respect to personal self-government. See id. at 349-51.

Such measures might range from the outright prohibition of such a division, to linking marriage licenses to state counseling that urges an equal division of labor, to tax incentives and penalties, to public education campaigns.

One learns from the cases involving the scope of parents' constitutional rights to shape their children's education both that children are not wards of the state, but are entrusted primarily to the authority and guidance of their parents, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923), and that government may do a great deal to shape children into patriotic, responsible citizens. See, e.g., West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("National unity as an end which officials may foster by persuasion and example is not in question."); Meyer, 262 U.S. at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."). Elsewhere, I discuss the constitutional significance of the distinction between governmental coercion and governmental persuasion in the promotion of its ends. See McClain, supra note 2, at 42-65.

MACEDO, supra note 104, at 233, 243 (discussing justification for public schools).
Further empirical questions would arise, such as whether government can counter the effects of gender socialization short of intervening in the family form itself, through measures such as vigorous enforcement of equal-opportunity and antidiscrimination laws and liberal and feminist civic education. For example, could injecting messages about sex equality and girls' range of choices into the school curriculum help? Or would parents, faced with such a curriculum, choose private schools or home schooling? What are the likely costs to the family of governmental regulation or of such civic education? And even assuming a legislative body committed to a principle of sex equality within the home, is there a clear content for an optimal, equal, or minimally "just" division of household labor? This Article raises these difficult questions without answering them in order to illustrate the complexity of the work involved in considering the contours of affirmative governmental responsibility to address sex inequality.

III
PUBLIC RESPONSIBILITY FOR THE MATERIAL PRECONDITIONS FOR SELF-GOVERNMENT

One important dimension of a formative project is public responsibility to help members of society secure the resources or material preconditions for a good, self-governing life. Claims concerning how sex inequality—and other forms of inequality—shape preferences and cast doubt on supposed liberal assumptions about autonomy and choice are well-traveled feminist territory. An equally important issue warranting feminist attention is the issue of growing economic inequality and government's responsibility to address this inequality and provide the economic preconditions for democratic and personal self-government. This economic inequality is a serious obstacle to self-

130 See Talbot, supra note 126, at 34 (reporting that "[o]nly 6 percent of conservative Christians educate their children at home, . . . , though the numbers are growing," and that the trend among fundamentalist Christians is to retreat from, or "'quarantine themselves'" from the "majority culture" and shelter their children from outside influences).


132 See supra text accompanying notes 75-79. For a helpful discussion of this line of feminist critique, see Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 WM. & MARY L. REV. 805 (1999).

133 In this Symposium, Angela Harris also urges attention to the economic preconditions for freedom. See Angela P. Harris, Foreword: Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice, 85 CORNELL L. REV. 1181 (2000). For some helpful feminist works, see, for example, HARD LABOR (Joel F. Handler & Lucie White eds., 1999); Dorothy
government. This Article offers a preliminary comparison of two recent approaches to this topic, one emanating from liberal quarters and the other from feminist quarters. Juxtaposing these two approaches may illuminate some of the challenges to forging a synthetic, liberal feminist approach to the issue of government's affirmative responsibility for a formative project. I applaud both of these proposals for maintaining a fairly robust notion of toleration, or governmental noninterference with persons living out the lives they think best for themselves, yet insisting on a strong principle of governmental responsibility to secure the economic preconditions for living such lives.

In their recent book, The Stakeholder Society, Bruce Ackerman and Anne Alstott propose a solution to increasing inequality and America's drift away from equality of opportunity. They propose that each young American, upon reaching adulthood, receive $80,000 as "a stake in his country." Their central premise is that such a stake would further a conception of "economic citizenship" and affirm the liberal principle of equal concern and respect. Focusing on young persons on the verge of adulthood, they contend that, regardless of the economic circumstances of one's parents, "[a] ll Americans have a fundamental right to a fair share of the nation's resources as they accept the full responsibilities of adult life."

Ackerman and Alstott have a self-consciously civic republican vision that links private property ownership and citizenship and holds as a central value the fostering of persons' independence, which private property ownership secures, according to republican theory. Their vision is also liberal because, by their own description, stakeholding is a practical application of an emerging form of liberalism that does three things: "(a) takes individualism seriously, (b) recognizes that each individual's starting point in life is shaped by a confrontation with his economic and educational opportunities, and therefore (c) grants the state a potentially constructive role in the just distribution

E. Roberts, Welfare and the Problem of Black Citizenship, 105 YALE L.J. 1563 (1996) (book review) (posing as a dilemma the fact that, while a strong welfare state is required to make African Americans full participants in the political economy, the refusal of Whites to extend full citizenship rights to Blacks persistently blocks efforts to establish an inclusive welfare system). I discuss Martha Fineman's work infra notes 150-63 and accompanying text.

134 ACKERMAN & ALSTOTT, supra note 5.
135 Id. at 4-5.
136 Id. at 8-12.
137 Id. at 57.
138 See id. at 12 ("This is the time to make economic citizenship a central part of the American agenda . . . [enabling] all Americans to enjoy the promise of economic freedom that our existing property system now offers to an increasingly concentrated elite.").
of these opportunities." Moreover, this vision is liberal in insisting that, given that different people will make different choices, it is not government’s business to interfere with how one spends his or her stake.

The details of Ackerman and Alstott’s proposal or its mechanics are beyond the scope of this Article. But the authors’ assumption is that, in contrast to the many financial constraints that now limit young persons’ options, this stake will help youths to make a wide array of choices: investing in college or alternative forms of training, forming families, buying time out of the paid labor market to care for children (here, the authors’ examples most typically are of young mothers), purchasing first homes, and purchasing education and child care for their children. The liberal value of choice is an overarching theme in this proposal. Its centrality is most clearly seen in the way the authors deal with the problem of the “stakeblower”—the person who makes unwise decisions concerning the use of her stake: “[S]takeholding means recognition as a real citizen, whose pursuit of happiness is entitled to respect. Her choices, successes, and failures are her own.”

Accordingly, government has a limited, if any, continuing responsibility to the stakeblower. Government should certainly take steps to encourage responsible use of the stake, such as through education, yet a principle of personal responsibility requires holding persons accountable for their choices. What if, however, gender socialization, internalized oppression, or similar notions, shape a stakeholder’s choices and lead to unwise choices with dire consequences? From the outset, the authors make disclaimers that their concern is with economic inequality and “MONEY,” and thus the “book does not deal with the special problems posed by physical or mental handicaps, abusive and inadequate parenting, impoverished and segregated education, or pervasive racial and gender discrimination.”

Anticipating my discussion of Martha Fineman’s work, I suggest that one should also note that Ackerman and Alstott’s stakeholding vision does not deal with “inevitable dependency” and caretaking. On this final matter, the stakeholding approach clearly addresses the dilemma of combining domestic and market labor largely through individual solutions made possible by the stake, rather than through public responsibility and institutional restructuring. A common ex-

139 Id. at 24 (emphasis omitted). Libertarian objections to this liberal vision undoubtedly exist. See, e.g., RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 308-17 (1998) (discussing problems associated with redistribution of benefits).
140 See ACKERMAN & ALSTOTT, supra note 5, at 65-75.
141 Id. at 74; see also id. at 39-41 (arguing that fears of misuse are paternalistic and overblown).
142 Id. at 25.
ample they offer is that of a woman who, by means of her stake, can afford to stay out of the paid labor market in order to take care of her children. The authors assert that “[i]n the short term, stakeholding will enhance the power of women to make the most sensible accommodation to an unjust reality.” Perhaps in the long term “it will . . . convey a symbolic message of support for gender equality” and “give enterprising women the real resources they need to challenge traditional expectations and make their own way in the world.” It is striking that the authors acknowledge the possible feminist criticism that a woman’s choice to buy time out of the paid labor market might be the result of “false consciousness,” but then grant that “deep-seated gender-role expectations have irrevocably shaped women’s (and men’s) ideas about what women should want from life,” and also “support educational efforts to challenge these stereotypes.”

Their account of liberalism demands, however, that one not “dismiss the genuinely felt aspirations of today’s women as false consciousness” for “[n]o less than men, they deserve nothing less than the real freedom that stakeholding offers.”

An element of Ackerman and Alstott’s provocative proposal that I wish to embrace is its account of a liberalism that values individual autonomy while rejecting a presocial self and that affirms some conception of personal responsibility yet insists upon public responsibility—and the role of an activist government—to secure the preconditions for the exercise of personal responsibility. My own liberal feminist approach diverges from their proposal with respect to starting points. Their focus on how eighteen-year-olds can achieve independence artificially isolates one dimension of a larger project of social reproduction that asks many questions: How are persons formed in those first eighteen years? What educational institutions and other institutions of civil society may usefully foster that development? What is the proper interplay of familial and public responsibility for such social reproduction? Then moving beyond childhood and the eighteen-year-old’s initial achievement of some economic “independence,” what are government’s ongoing affirmative obligations to help shape that person’s capacities and to secure the economic, social, and legal preconditions necessary for that person to live a good, self-governing life?

Understandably, Ackerman and Alstott attempt to isolate what they believe to be the most important component in a reconceptual-

143 See id. at 69-70.
144 Id. at 208.
145 Id.
146 Id. at 61 (internal quotation marks omitted).
147 Id.
IZED POST-WELFARE STATE. HOWEVER, THE HUMAN-CAPABILITIES APPROACH TEACHES US THAT SIMPLY GIVING PERSONS THE SAME ECONOMIC RESOURCE WILL NOT GUARANTEE EQUALITY, BECAUSE DIFFERENCES ROOTED IN POVERTY AND RACISM AMONG PERSONS WILL AFFECT THEIR ABILITY TO UTILIZE THOSE RESOURCES.\textsuperscript{148} ALTHOUGH THE REPUBLICAN TRADITION THAT "PRIVATE PROPERTY SECURES INDEPENDENCE AND CITIZENSHIP" IS ONE USEFUL RESOURCE IN CONCEPTUALIZING PUBLIC RESPONSIBILITY, THIS NOTION IS PROBLEMATIC WITHOUT A CAREFUL RECONSTRUCTION OF THE IDEA OF INDEPENDENCE AND OF ITS ASSUMPTIONS CONCERNING GENDER AND CITIZENSHIP.\textsuperscript{149}

ENGAGING IN THIS RECONSTRUCTIVE WORK, MARTHA FINEMAN UNDERTAKES AN AMBITIOUS PROGRAM OF SUBJECTING SUCH CORE "FOUNDATIONAL MYTHS" AS INDEPENDENCE, AUTONOMY, AND SELF-SUFFICIENCY TO CRITICAL RE-EVALUATION.\textsuperscript{150} HER BASIC PREMISE IS THAT SOCIETY HAS USED THE FAMILY AS THE PRIMARY UNIT OF RESPONSIBILITY FOR MEETING DEPENDENCY PROBLEMS, BUT THAT THIS APPROACH IS INADEQUATE. THE FAMILY CARETAKING WORK PERFORMED LARGELY BY WOMEN IS A SUBSIDY WHICH BENEFITS NOT JUST THE RECIPIENTS OF THIS CARE, BUT ALL OF SOCIETY. I BELIEVE THAT KEY LIBERAL ACCOUNTS SUCH AS THOSE OF JOHN RAWL\textsuperscript{s}\textsuperscript{151} AND SUSAN MOLLER OKIN\textsuperscript{152} WOULD READILY CONCUR WITH FINEMAN ON THIS POINT, BECAUSE THE FAMILY DOES VITAL WORK TO PRESERVE SOCIETY OR SOCIAL REPRODUCTION: NURTURING, PROVIDING FOR, AND SHAPING PERSONS WHO WILL BE FUTURE CITIZENS AND MEMBERS OF SOCIETY. THIS LABOR IS, OR SHOULD BE, A PUBLIC VALUE OF GREAT IMPORTANCE, AND YET SOCIETY DOES NOT AFFIRMATIVELY SUPPORT THIS CARETAKING WORK. AS FINEMAN ELABORATES MORE FULLY IN HER BOOK, \textit{THE NEUTERED MOTHER}, ALL HUMAN BEINGS ARE DEPENDENT AT SOME POINTS IN THEIR LIVES; AT A MINIMUM AS CHILDREN AND, OFTEN, IN OLD AGE.\textsuperscript{153} THIS "INEVITABLE DEPENDENCY," IS ROOTED IN A BIOLOGICAL UNIVERSAL.\textsuperscript{154} WHEN PERSONS MEET THE NEEDS OF THIS DEPENDENCY, THEY REQUIRE RESOURCES TO DO SO AND THE EXPERIENCE "DERIVATIVE DEPENDENCY."\textsuperscript{155} BY PRIVATIZING RESPONSIBILITY TO MEET INEVITABLE DEPENDENCY AND BY FAILING TO ACKNOWLEDGE COLLECTIVE RESPONSIBILITY, SOCIETY RUNS THE RISK OF成人化.
tive responsibility to meet derivative dependency, society extracts an unfair and unacknowledged subsidy from caregivers.

Fineman's proposed reforms stem from recognizing this subsidy. She supports governmental and institutional reform to allow caregivers to combine market and family labor. Fineman also argues that serious and sustained national public conversation should occur about questions such as the following: "[h]ow should the need for resources for caretaking be satisfied so caretakers can act independently, make decisions and fulfill societal expectations in ways that best respond to their individual circumstances?," "[i]s it fair that the market and the state (which are totally dependent on caretaking labor and in no way self-sufficient or independent from caretaking) escape responsibility for dependency—continue to be freeloaders (or free riders) on the backs of caretakers and families?," or "Isn't it time to redistribute some responsibility for dependency, mandating that state and market bear their fair share of the burden?" A redefinition of independence and self-sufficiency might emerge from such a public conversation.

Fineman's starting point of dependency and caregiving usefully suggests the limits of a stakeholding approach principally aimed at independence. Fineman offers the following account of independence:

Independence is gained when an individual has the basic resources that enable her or him to act consistent with the tasks and expectations imposed by the society. This form of independence should be every citizen's birthright, but independence in this sense can only be achieved when individual choices are relatively unconstrained by inequalities, particularly those that arise from poverty. Independence, as well as justice, requires that those who are assigned a vital societal function are also provided with the wherewithal to do those tasks.

It is encouraging that Ackerman and Alstott's liberal approach, and Fineman's feminist approach converge on the constraining effects of

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156 See id. at 230-33. Nancy Fraser similarly argues for "a universal caregiver model," which would embrace a principle of gender equity and aim "to make women's current life-patterns the norm for everyone." FRASER, supra note 70, at 59-61. Fraser contends: "Women today often combine breadwinning and caregiving, albeit with great difficulty and strain. A postindustrial welfare state must ensure that men do the same, while redesigning institutions so as to eliminate the difficulty and strain." Id. at 61.

157 Fineman, Foundational Myths, supra note 6, at 25. In a thoughtful new book arguing for care as a core liberal political value, Mona Harrington similarly calls for a "new politics of conversation" to address "the care crisis," which would get "a wide range of disparate groups talking—to each other," to show "that the crisis affects everyone, although in different ways" and to "produce broad-based support for policies that take those differences into account." MONA HARRINGTON, CARE AND EQUALITY 176-81 (1999).

158 Fineman, Foundational Myths, supra note 6, at 25-26.
poverty and economic inequality, as well as on some principle of public responsibility.

Another ambitious component of Fineman’s approach, which the stakeholder approach parallels, is its incorporation of a robust notion of governmental noninterference with a person’s living out a self-defined conception of a good life. Fineman approaches this issue with her appeal for “privacy” for the family, reworking existing norms of constitutional privacy to recognize the importance of autonomy for the family unit. Her affirmative vision for families is privacy and subsidy, or, as she describes it, “collective responsibility” without “collective control.”

As a preliminary disclaimer, I concur with Fineman’s affirmative vision that the state should not seek to standardize families or to impose one model—the heterosexual nuclear family, for example—as the proper family while viewing all others as deviant. Important work by feminist legal theorists, especially critical race feminists like Peggy Davis and Dorothy Roberts, makes clear the legacy of institutional racism’s disrespect for the African-American family and for the privacy and autonomy rights of its members. That experience counsels keen attention to whether and how racism continues to shape the regulation of African-American families through supposedly race-neutral policies that disproportionately harm such families. Yet arguments for subsidy, rooted in the notion that reproduction and caregiving make a valuable social contribution, appear to invite the very sort of “quality control” oversight that Fineman seeks to avoid. For instance, Fineman’s analogy to the military as an example of subsidized social contribution is instructive, because the military has extensive “quality control” over its members’ performance, and the military itself is subject to governmental oversight. She recognizes the ongoing role for abuse and neglect statutes to protect children, but she is trying to secure a space for family self-governance by drawing upon constitutional jurisprudence that assumes that parents do act in the best interests of their children most of the time.

The scope of this Article precludes elaboration of this issue. However, I would urge an approach that holds firm, as Fineman’s does, to a principle of respect for familial autonomy. The approach should also recognize that if society embraces public responsibility to

159 Fineman, Family Privacy, supra note 6, at 1210.
160 See Davis, supra note 14 (discussing the historical development of family rights); Roberts, supra note 76 (addressing the reproductive rights of Black women).
161 As Nancy Fraser observes, three basic principles for public entitlements exist—“need, desert, and citizenship”—and each has its own associations and possible consequences. Fraser, supra note 70, at 49-51.
162 See Fineman, Foundational Myths, supra note 6, at 19.
163 See Fineman, Family Privacy, supra note 6, at 1221-24.
subsidize caregiving, there is a range of governmental action that falls short of "control" or "coercion" and that could facilitate and encourage parents and other caregivers in fostering children's capacities. As I have discussed elsewhere, a strong principle of toleration as respect is consistent with support for a range of governmental actions that foster important public values while pursuing a formative project aimed at inculcating the capacities for self-government. Some examples in this context could be public school curricula concerning responsible parenting and child development, adult education, premarital and prenatal counseling concerning childrearing, funding for good quality health care, pre-schools and extracurricular activities, and public education campaigns concerning children's well-being. Given the tenacious public support for the value of "personal responsibility," the most prudent strategy may be to argue for public responsibility to provide the preconditions for personal (and parental) responsibility, while also arguing that a principle of toleration of respect will allow a space for its exercise.

Just as the stakeholding approach seems to give central place to "choice" and to put issues of dependency and constraint on choice to the side, so Fineman's emphasis upon caretaking and obligation may give insufficient attention to the value of choice concerning a wide range of possible life projects, not all of which may involve caretaking. Undeniably, caretaking should be afforded a certain primacy due to its role in social reproduction, but meeting such obligations or even meeting the range of societal obligations and expectations cannot exhaust the scope of reconstructed independence. Part of an adequate liberal feminist conception of autonomy is the capacity critically to choose, assess, and revise our connections and commitments, perhaps the model of the "choosing, caring self." In any event, I would urge a model of self that is not simply an "encumbered self," lest women's autonomy be linked solely or predominantly with their societally-expected, if not dictated, caretaking responsibilities. While relations of dependency are inevitable, and caretaking should be an important public value and the subject of public responsibility, a full account of autonomy should treat caretaking as one of many types of activities that are important to a person living a good life.

164 See Andrew J. Cherlin, I'm O.K., You're Selfish, N.Y. TIMES, Oct. 17, 1999, § 6 (Magazine), at 44 (reporting that, in a New York Times survey asking people to rate 15 values, "[t]he value rated as 'very important' by the highest percentage of people [97%] was 'being responsible for your own actions' "). Elsewhere, I have criticized some invocations of the value of personal responsibility. See generally Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 342 (1996) (analyzing "the rhetoric of irresponsible reproduction [by] elaborating on the cluster of reproductive choices and behaviors that is deemed 'irresponsible' ").

165 McClain, supra note 78, at 480.
In sum, both the stakeholding and the subsidy approach invite attention to the political economy of citizenship. For the notion of the political economy of citizenship to be of the greatest use today, one must expand it to focus on the role played by care in creating persons capable of self-government and upon the types of resources necessary to provide care. Using gender as a primary category of analysis, and looking to its intersections with class and race, is a valuable way to gain this expanded focus.166 This requires the recognition of feminist deconstruction of the ideal worker as someone with no childcare responsibilities, thereby implicitly depending upon the off-site, and thus invisible, domestic labor of women.167 Feminist reconstructive work calls for bringing that which has been off-site and assumed to the foreground. The old gendered division of labor, with the male breadwinner and female homemaker distinction, no longer reflects most American families, although its legacy remains, in the form of women's disproportionate responsibility for caregiving (and cultural and institutional pressures to accept such responsibility) and in the assumption that families must shoulder the burden of social reproduction without help. If this is so, then a more capacious conception of the political economy of citizenship should ask what sorts of economic arrangements allow women and men to meet caretaking responsibilities while participating in other work in ways that foster self-government.

Here, however, we should supplement the republican concern for fostering self-government to include not only self-government by adults but also preparing children for self-government. Restated, a formative project would inquire about what institutional arrangements foster personal and democratic self-government, and would include within this inquiry attention to what institutional arrangements foster social reproduction.168 This formative project should also combine a republican concern for creating citizens capable of self-government with a more explicit commitment to protecting a realm of moral independence, and to providing the resources necessary for the exercise of responsibility.

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166 For helpful examples of this feminist work, see Patricia Hill Collins, Gender, Black Feminism, and Black Political Economy, ANNALS, AM. ACAD. POL. & SOC. SCI., Mar. 2000, at 41; Georgina Waylen, Gender, Feminism, and Political Economy, 2 NEW POL. ECON. 205 (1997).

167 For a discussion of the invisible domestic labor of women, see WILLIAMS, supra note 149.

168 I am attempting to develop these ideas in another work. See Linda C. McClain, Care as a Public Value: Linking Responsibility, Resources, and Republicanism, 77 CHI.-KENT L. REV. (forthcoming Fall 2001).
CONCLUSION

This Article has attempted to take preliminary steps toward delineating a formative project to foster the capacities of individuals for democratic and personal self-government, to secure free and equal citizenship, and to identify normative and constitutional foundations for governmental responsibility to pursue such a project. An abbreviated tour of salient feminist critiques of several lingering problems of inequality reveals useful information concerning some of the proper contours and aims of that project. Some pertain to democratic self-government, or securing effective political participation, while others address how lingering inequality poses obstacles to personal self-government. In this Article, I have put these issues on the agenda for a formative project, but leave an account of how such a project should address those problems for subsequent work.

Although the "empirical turn" in recent legal scholarship is useful to a degree, scholars should decline Posner's invitation to avoid reasoning or arguing over ends. The "empirical turn," as Posner describes it, may call for doing what "'works,','" but normative principles and even disagreement over them seem to be indispensable to a determination of "what counts as 'working.'" Similarly, feminist scholars may endorse the call for greater attention to the consequences of constitutionalism and to more empirical input into adjudication and law-making, but should reject as futile and even dangerous the quest for an empiricism unmoored from normative inquiry and messy moral disagreement. Questions such as what "facts" matter and to what conclusions they point implicate questions of value.