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# PATTERNS OF INEQUALITY - PARADIGMS FOR EQUALITY

Rebecca E. Zietlow\*

*Gender Equality: Dimensions of Women's Equal Citizenship* (Linda McClain & Joanna Grossman eds., Cambridge U. Press 2009). Pp. 450. \$94.99.  
Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard U. Press 2009). Pp. 273. \$39.95.  
Deborah Hellman, *When Is Discrimination Wrong?* (Harvard U. Press 2008). Pp. 205. \$41.50.

One of the paradoxes of the second half of the twentieth century is that despite advances in human and civil rights laws, the gap between the “haves” and the “have nots” continues to expand. In the United States, Supreme Court decisions and federal statutes established that racial segregation and gender discrimination are now illegal.<sup>1</sup> One would expect to see material improvements in the lives of women and people of color of both genders. Yet the gap between the wealth of people of color and whites has widened,<sup>2</sup> and the gender pay gap remains the same as it was in 1970.<sup>3</sup> Internationally, the 1948 Universal Declaration of Human Rights contains protections against discrimination and guarantees of basic economic benefits.<sup>4</sup> Even though developed nations act upon this commitment by providing foreign aid and other assistance, the gap between the standard of living in developed and underdeveloped nations is still

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1. See e.g. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex discrimination violates the Equal Protection Clause of the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (race segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (1964) (prohibiting recipients of federal funds from discriminating on the basis of race); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1964) (prohibiting employers from discriminating on the basis of race, ethnicity, gender and religion); 1972 Education Amendments, 20 U.S.C. §1681 (1972) (prohibiting educational facilities that receive federal funds from discriminating on the basis of sex).

2. Thomas Shapiro, Tatjana Meschede & Laura Sullivan, *The Racial Wealth Gap Increases Fourfold* (Inst. on Assets and Soc. Policy 2010) (available at <http://iasp.brandeis.edu/pdfs/Racial-Wealth-Gap-Brief.pdf>) (reporting that the wealth gap between whites and African Americans increased from \$20,000 in 1984 to \$95,000 in 2007); Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002* (Pew Hispanic Ctr. 2004) (available at <http://pewhispanic.org/files/reports/34.pdf>) (asserting the net worth of Hispanic households relative to white households has dropped from 9.2% in 1996 to 8.9% in 2002).

3. Robert Longley, *Pay Gap Widening, Census Data Shows*, <http://usgovinfo.about.com/od/censusandstatistics/a/paygapgrows.htm> (last accessed Sept. 24, 2010).

4. Universal Declaration on Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

staggering.<sup>5</sup> The contrast between ideals and reality casts doubt on the extent to which law can remedy deeply entrenched societal inequality. At the very least, this paradox suggests flaws in the paradigms which shape our human and civil rights law. This review discusses three books which critically analyze the basic concepts underlying these laws, and outlines reforms to make them more effective for addressing inequality both domestically and internationally. In *When Is Discrimination Wrong*, Deborah Hellman examines the premises underlying United States antidiscrimination law and suggests a new way of thinking about discrimination that would more effectively address the harm targeted by antidiscrimination measures such as the Fourteenth Amendment Equal Protection Clause and Title VII of the 1964 Civil Rights Act.<sup>6</sup> In *Gender Equality: Dimensions of Women's Equal Citizenship*, the authors suggest an alternative paradigm for equality law, the rights of citizenship, and argue that citizenship provides a basis for addressing root causes of women's inequality, including gender motivated violence and economic disempowerment.<sup>7</sup> In *The Birthright Lottery: Citizenship and Global Inequality*, Ayelet Shachar points out that citizenship can substantially limit rights by drawing lines of exclusion. Shachar argues that birthright citizenship contributes to both global inequality and inequality within the domestic realm.<sup>8</sup> These provocative, eye-opening works are important additions to the ongoing debate over reformulating equality law in the twenty-first century.<sup>9</sup>

In *When Is Discrimination Wrong*, Deborah Hellman examines United States antidiscrimination practices to determine when differentiating based on traits is morally and legally culpable, and therefore subject to legal sanctions.<sup>10</sup> Hellman advocates the principle that "all people are equally important from the moral point of view and so are equally worthy of concern and respect."<sup>11</sup> According to Hellman, differentiation becomes discrimination when that differentiation demeans another person by treating another person as if he was not of equal moral worth.<sup>12</sup> The book describes Hellman's theory of how law should go about determining whether a person has been demeaned, and is therefore a target of unlawful discrimination.

United States antidiscrimination law focuses either on the intent of the actor<sup>13</sup> or the harm caused by the action.<sup>14</sup> Hellman's theory shifts the focus away from intent and

5. See Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* 24-27 (Harvard U. Press 2009).

6. See Deborah Hellman, *When Is Discrimination Wrong?* (Harvard U. Press 2008).

7. See *Gender Equality: Dimensions of Women's Equal Citizenship* (Linda C. McClain & Joanna L. Grossman eds., Cambridge U. Press 2009).

8. See Shachar, *supra* n. 5.

9. See e.g. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 Colum. L. Rev. 2001 (1996); Erin R. Melnick, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change*, 75 Ind. L.J. 711 (2000); Mary Romero, *Bursting the Foundational Myths of Reproductive Labor under Capitalism: A Call for Brave New Families or Brave New Villages?* 8 Am. U. J. Gender Soc. Policy & L. 177 (2000).

10. Hellman, *supra* n. 6, at 2-3.

11. *Id.* at 6.

12. *Id.* at 40.

13. Discriminatory intent is required to prove race or sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. See *Washington v. Davis*, 426 U.S. 229 (1976); Hellman, *supra* n. 6, at 139.

14. Discriminatory impact may be sufficient to prove a violation of Title VII of the 1964 Civil Rights Act.

impact. She argues that discrimination should be illegal regardless of whether it was intended, and even if the harm would have occurred absent the discrimination.<sup>15</sup> The touchstone of Hellman's approach to discrimination is respect for human dignity. Thus, she is influenced by rights concepts from international law and the recently adopted Canadian Charter of Rights, which establishes an enforceable right to human dignity.<sup>16</sup> Context and culture are important to determining whether a person's action is demeaning.<sup>17</sup> Most importantly, a person can only demean another person if he exercises power or influence over her.<sup>18</sup> Hellman's approach is deep and methodical. Her theory is both sensible and sensitive to how discrimination operates in the real world.

Hellman effectively critiques the alternatives to her approach. Relying on "merit" to make decisions can simply perpetuate the unjust status quo, since merit is defined by individual employers and other decision makers to conform to their own expectation about the parameters of the job.<sup>19</sup> Relying on accuracy and rationality is problematic because many non-moral decisions are accurate, and too many accurate decisions are not moral.<sup>20</sup> As our current discrimination law recognizes, generalizations linking characteristics to certain traits are often accurate, but just as often the basis for discrimination.<sup>21</sup> Like Catharine MacKinnon and Charles Lawrence,<sup>22</sup> Hellman argues that discrimination is wrong whenever it happens, regardless of whether the actor intended to discriminate. Given the pervasive nature of unconscious bias in our culture, the requirement of conscious intent masks a great deal of discrimination in our society.<sup>23</sup> Hellman is correct when she argues that the real policy is most apparent in the discriminatory results of a policy.<sup>24</sup> As she argues, "[t]o determine what the real rule is we need to know whether race was a factor, not whether the employer intended race to be a factor."<sup>25</sup> Of course, the challenge is determining whether bias affected a decision when it should not have.<sup>26</sup>

Hellman is effective at unpacking the reasons why we have antidiscrimination law, and in critiquing our law's approach to discrimination. The problem is the lack of neutrality in the liberal states. Her theory begs the question of how to effectively implement her "demeaning" test. In one of the most effective chapters of the book, Hellman explains that merit cannot justify discriminatory action because merit itself is

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See *Griggs v. Duke Power*, 410 U.S. 424, 431-432 (1971).

15. Hellman, *supra* n. 6, at 18, 139.

16. *Id.* at 51.

17. *Id.* at 25.

18. *Id.* at 35.

19. A good example of this is when a male employer believes that doing a good job entails working late hours in the office, a difficult task for employees who are primary caretakers of their children. See *id.* at 111. (citing Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford U. Press 2000)).

20. Hellman, *supra* n. 6, at 115.

21. See *id.* at 118-119 (citing *Frontiero*, 411 U.S. at 690) (stating administrative convenience does not justify differentiating on the basis of sex because of the danger that this will lead to decision making based on stereotypes).

22. See *id.* at 55 (acknowledging the influence).

23. *Id.* at 141-142.

24. *Id.* at 149.

25. Hellman, *supra* n. 6, at 150.

26. *Id.* at 155.

not neutral but socially constructed.<sup>27</sup> Unfortunately, Hellman does not follow this point to its logical conclusion, which is to question the neutrality of decision makers. She does not adequately account for the fact that the decision makers that would apply her “demeaning” test would represent precisely those powerful actors who have not themselves suffered from being demeaned by others. Hellman admits that “if what is – objectively - demeaning is (just) what the majority thinks is demeaning, this standard is likely to reproduce the oppression of minorities.”<sup>28</sup> She believes that the “modest objectivity” of the decision maker will solve this dilemma.<sup>29</sup> I am concerned, despite Hellman’s protests to the contrary,<sup>30</sup> that the “demeaning” test invites the sort of subjectivity that is harmful to members of groups that have historically lacked power, who are exactly the people that are most likely to be plaintiffs in discrimination suits. If the test for evaluating discrimination becomes even more subjective, those plaintiffs are even more likely to lose, however valid their claims may be.

The book *Gender Equality: Dimensions of Women’s Equal Citizenship*, edited by Joanna Grossman and Linda McClain, also explores antidiscrimination law.<sup>31</sup> Instead of attempting to fix the prevailing, Equal Protection based approach as Hellman does, this book presents an alternative paradigm for women’s rights, that of equal citizenship.<sup>32</sup> The book starts by recognizing that advances in women’s equality in the last fifty years, while significant, have also been limited.<sup>33</sup> The gender gap still plagues women who work outside the home,<sup>34</sup> and statistics of household income after divorce reveal that women as a class remain economically vulnerable.<sup>35</sup> Domestic violence plagues the lives of women in almost epidemic proportions,<sup>36</sup> and women still lack full autonomy over their reproductive choices.<sup>37</sup> Women are still far more likely than men to be the primary caretakers of their children, and this impacts their ability to succeed in the workplace.<sup>38</sup> The essays in *Gender Equality* ask the reader to consider legal issues confronting women not just as a question of equal treatment between men and women. Instead, the authors argue that women are entitled to essential positive rights that are necessary to enable the belonging of women as full citizens in our society.

The rhetoric of second class citizenship has served as a rallying cry for rights movements, including those who have advocated for women’s equality, throughout our

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27. *Id.* at 93-113.

28. *Id.* at 72.

29. *See id.* at 75.

30. *See* Hellman, *supra* n. 6, at 79-80 (arguing that it is not particularly hard to be objective in determining whether a practice demeans another person).

31. *See generally* *Gender Equality*, *supra* n. 7.

32. *See generally id.*

33. *See id.* at 1-13.

34. Robert Longley, *About.com, US Government Info, Why Women Still Make Less Than Men*, <http://usgovinfo.about.com/od/censusandstatistics/a/paygapgrows.htm> (last accessed Oct. 14, 2010).

35. *See* Martha Albertson Fineman, *Child Support Is Not the Answer: The Nature of Dependencies and Welfare Reform*, in *Child Support: The Next Frontier* 209 (J. Thomas Oldham & Marygold S. Melli eds., U. Mich. Press 2000).

36. *See generally* Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (Yale U. Press 2000).

37. *See e.g. Gonzalez v. Carhart*, 550 U.S. 124 (2007) (upholding restrictions on abortion rights).

38. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371 (2001).

history.<sup>39</sup> However, the U.S. Supreme Court has rejected the attempts of advocates to frame rights claims as rights of citizenship.<sup>40</sup> Instead, gender equality is a matter of equal protection law.<sup>41</sup> In the 1960s and 1970s, Congress enacted several statutes intended to further women's equality,<sup>42</sup> and, since 1971, the Court has held that the Equal Protection Clause prohibits classifications based on gender stereotypes.<sup>43</sup> While this is indeed progress, several major problems exist within this paradigm that have limited this progress. The Equal Protection Clause only prohibits policies that intentionally discriminate on the basis of gender,<sup>44</sup> and does not require the state to take affirmative measures to eliminate barriers to equality.<sup>45</sup> Moreover, the Court has held that the government has no obligation to protect women, not only from private discrimination, but even from private violence.<sup>46</sup> Thus, the equal protection based approach is inadequate to address many of the most deeply rooted problems of women in our society, including violence, poverty, and the lack of adequate representation in the power structure of government and the private sector. Many of the worse problems experienced by women, discussed in this book, simply do not fit the equal protection paradigm because they are experienced primarily, or even exclusively, by women. For example, the fact that domestic violence is experienced primarily by women is a manifestation of women's subordination in our society, but treating male and female victims the same will not eradicate this problem. Another obvious example is the fact that only women bear the burden of childbearing and childbirth, and there is simply no analogous condition experienced by men.<sup>47</sup>

*Gender Equality* presents another way to think about women's inequality and addresses the barriers to women's full realization as members in our society. The rights of citizenship arguably entail a set of prerequisites for belonging in society, and thus provide a basis to advocate for a more substantive vision of women's equality. As McClain and Grossman explain in their introduction, "[t]his conception includes the complete rights, benefits, duties, and obligations that members of any society expect to share and aspires to goals of inclusion, belonging, participation, and civic membership."<sup>48</sup> The essays in the book present a multifaceted view of citizenship, from the role that citizenship plays in women's political empowerment<sup>49</sup> to the relevance of

39. See generally Gretchen Ritter, *Women's Civic Inclusion and the Bill of Rights*, in *Gender Equality*, *supra* n. 7, at 61.

40. See e.g. *Bradwell v. Ill.*, 83 U.S. 130, 139 (1872) (rejecting the claim that the right to practice law is a privilege or immunity of citizenship).

41. See e.g. *U.S. v. Va.*, 518 U.S. 515, 532-534 (1996).

42. See e.g. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241(1964) (codified at 42 U.S.C. §§2000d-2000d-7 (1994)); Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 (2006).

43. See e.g. *Frontiero*, 411 U.S. 677; *Reed v. Reed*, 404 U.S. 71 (1971).

44. See *Personnel Adminstr. Mass. v. Feeney*, 442 U.S. 256, 277 (1979)

45. See e.g. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

46. See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005).

47. Feminists have long debated how the equality paradigm should address the fact that women are far more likely than men to do the work associated with raising children, and thus far more likely to experience a negative impact on their career success and earning potential. See Katharine T. Bartlett, *Feminist Canon*, in *Legal Canons* 266 (J.M. Balkin & Sanford Levinson eds., N.Y.U. Press 2000).

48. *Gender Equality*, *supra* n. 7, at 2.

49. See Kathryn Abrams, *Women and Antiwar Protest: Rearticulating Gender and Citizenship*, in *Gender*

citizenship to what are traditionally considered to be “private” issues, including women’s sexuality and reproductive rights and the impact of domestic violence on women’s ability to exercise their rights as citizens.<sup>50</sup> *Gender Equality* also explores the significance of citizenship rights in the international sphere and with regard to immigration laws,<sup>51</sup> and the relationship between those rights and social and cultural norms, both domestically and internationally.<sup>52</sup> Finally, the book explores social citizenship as a source of the economic rights that women need to participate as full citizens in our society.<sup>53</sup>

*Gender Equality* is a diffuse group of essays, but they contain several discernible themes. First, the problems identified in this book are not caused by intentional discrimination. Instead, the book focuses on issues of deeply embedded inequality, primarily based on social customs and practices that are not intentionally discriminatory. Second, while the government plays a role in creating the unequal conditions, by and large those conditions are not caused by state action. Third, the authors are calling for affirmative measures to remedy this inequality and substantive rights that go well beyond equal treatment. Finally, many of the issues discussed in this book are experienced either entirely or primarily by women, with no comparable corollary experienced by men. *Gender Equality* is more ambivalent about the effectiveness of liberal individualism as a paradigm for women’s rights. As illustrated by a number of these essays, individual autonomy has always been a goal of feminists. Under common law tradition, we did not have an identity of our own.<sup>54</sup> Instead, our legal identity was subsumed in that of our husbands.<sup>55</sup> So much of the activism of women’s rights advocates over the years has been targeted at achieving independence from our husbands and fathers (hence the term

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*Equality*, *supra* n. 7, at 131; Eileen McDonagh, *Citizenship and Women’s Election to Political Office: The Power of Gendered Public Policies*, in *Gender Equality*, *supra* n. 7, at 201; Anne Peters & Stefan Suter, *Representation, Discrimination, and Democracy: A Legal Assessment of Gender Quotas in Politics*, in *Gender Equality*, *supra* n. 7, at 174.

50. See Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging*, in *Gender Equality*, *supra* n. 7, at 289; Maxine Eichner, *Feminism, Queer Theory, and Sexual Citizenship*, in *Gender Equality*, *supra* n. 7, at 307; Nancy J. Hirschmann, *Stem Cells, Disability, and Abortion: A Feminist Approach to Equal Citizenship*, in *Gender Equality*, *supra* n. 7, at 154; Elizabeth M. Schneider, *Domestic Violence, Citizenship, and Equality*, in *Gender Equality*, *supra* n. 7, at 378; Mary Lyndon Shaney, *Infertility, Social Justice, and Equal Citizenship*, in *Gender Equality*, *supra* n. 7, at 327; Barbara Stark, *Reproductive Rights and the Reproduction of Gender*, in *Gender Equality*, *supra* n. 7, at 345.

51. Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, in *Gender Equality*, *supra* n. 7, at 39; Regina Austin, *Women’s Unequal Citizenship at the Border: Lessons from Three Nonfiction Films about the Women of Juarez*, in *Gender Equality*, *supra* n. 7, at 359; Anisseh Van Engeland-Nourai, *On the Path to Equal Citizenship and Gender Equality: Political, Judicial, and Legal Empowerment of Muslim Women*, in *Gender Equality*, *supra* n. 7, at 390; Deborah Weissman, *Gender and Human Rights: Between Morals and Politics*, in *Gender Equality*, *supra* n. 7, at 409.

52. See Beverly Baines, *Must Feminists Identify As Secular Citizens? Lessons from Ontario*, in *Gender Equality*, *supra* n. 7, at 83; Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, in *Gender Equality*, *supra* n. 7, at 107.

53. See Joanna L. Grossman, *Pregnancy and Social Citizenship*, in *Gender Equality*, *supra* n. 7, at 233; Martha Fineman, *Equality: Still Illusive after All These Years*, in *Gender Equality*, *supra* n. 7, at 251; Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in *Gender Equality*, *supra* n. 7, at 267.

54. Jesse Dukeminier et al., *Property* 312 (6th ed., Aspen 2006); see also Kelly Snyder, *All Names Are Not Equal: Choice of Marital Surname and Equal Protection*, 30 Wash. U. J.L. & Policy 561, 563-564 (2009).

55. Dukeminier, *supra* n. 54, at 312; Snyder, *supra* n. 54, at 563.

“women’s liberation movement”).<sup>56</sup> We have sought to control our own property,<sup>57</sup> to work outside the home so we can enjoy economic independence,<sup>58</sup> and to achieve control over our reproductive decisions.<sup>59</sup> We have come a long way in winning this control and achieving the autonomy of a model citizen in civic republican ideology.

However, *Gender Equality* reminds us about the limits of our autonomy and the limits of autonomy as a paradigm for our rights. Women who choose to bear children, and play an active role in raising those children, have found the workplace unaccommodating to our choice, and we have suffered economically as a result. Far too many women still lack autonomy altogether because they are victims of violence. We need more than autonomy. We need active state intervention to protect us from this violence, and we need positive rights to facilitate our integration into society as fully participating citizens. Thus, the autonomy based theory of liberal individualism is simply not adequate to give us what we need to achieve equality. We need the kind of support from society that men have historically received from their mothers and wives. This suggests the need for a more community-based theory of rights.<sup>60</sup> The most valuable contribution of this book is that it prompts us to theorize what these rights should be, using a different paradigm than the conventional approach to women’s rights.

In this regard, I found the essays on social citizenship to be the most compelling section of *Gender Equality*. In those essays, the authors illustrate why women’s rights must integrate principles of equality with economic rights. Economic and gender subordination are linked in our society, which has long depended on the unpaid and underpaid labor of women and justified that exploitation as either the natural state of women or as resulting from women’s choices.<sup>61</sup> Arguably, we are owed substantial economic benefits to compensate us for that labor.<sup>62</sup> Unfortunately, the recent trend has been towards the opposite. Welfare reform has taken away the safety net for women who are now forced to take low wage, no benefit jobs without any opportunity for advancement in order to survive.<sup>63</sup> Court decisions have gutted the right to organize into unions,<sup>64</sup> which have also historically served as a means of women’s political and economic empowerment. In order for women to achieve full citizenship, we must advocate for economic policies that further economic equality in our society. Along with freedom from violence, day care, a robust right to organize, healthcare reform, and other measures to strengthen our weakened safety net are some of the most trenchant women’s

56. See generally Ana M. Novoa, *American Family Law: History - Whostory*, 19 Chicano-Latino L. Rev. 265 (1998).

57. See Trevor S. Blake, *You Get What You Pay For: A New Feminist Proposal for Allocating Marital Property upon Divorce*, 4 Geo. J. Gender & L. 889 (2003).

58. JoEllen Lind, *Symbols, Leaders, Practitioners: The First Women Professionals*, 28 Val. U. L. Rev. 1327 (1994).

59. Pamela Bridgewater, *Gonzales v. Carhart: Continuing the Class Critique of the Reproductive Rights Doctrine and Movement*, 59 S.C. L. Rev. 827 (2008).

60. See Nicole Buonocore Porter, *Why Care about Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. Kan. L. Rev. 355 (2010).

61. See Fineman, *supra* n. 53, at 258.

62. See generally *id.* at 263-264.

63. See generally McCluskey, *supra* n. 53, at 272-274.

64. See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 Mich. L. Rev. 518 (2004).

rights issues.

Finally, *Gender Equality* invites the reader to consider the means by which women can achieve the rights discussed in the book. At the outset, Rogers Smith reminds us that courts have been unresponsive to citizenship based arguments for women's rights.<sup>65</sup> I agree with Smith that those rights might more readily be obtained through the political process.<sup>66</sup> It would be interesting to consider the link between citizenship and advocacy for citizenship-based rights from a theoretical perspective. After all, civic republicanism entails an active citizenry, and political participation is an act of citizenship. Given the link between citizenship and political participation, are citizenship rights by their nature better suited for enforcement through politics instead of courts? There is good reason to believe this is the case.<sup>67</sup> Past experience shows us that we are not going to get these rights from courts.<sup>68</sup> As we move forward in our advocacy for women's rights, it is essential that we exercise the citizenship rights that we do have in the political process to achieve the economic rights that are a precondition for women to achieve full citizenship.

In *The Birthright Lottery*, Ayelet Shachar analyzes the negative, exclusionary side of citizenship. Shachar argues that birthright citizenship perpetuates the global inequality between citizens of wealthy and underdeveloped countries.<sup>69</sup> The country in which one is born is highly determinative of one's wealth, health, and welfare.<sup>70</sup> This is dramatically illustrated by the fact that, daily, people from less wealthy nations are literally dying to enter our country and benefit from our economic opportunities.<sup>71</sup> Birthright citizenship also contributes to social and economic inequality within our country because those immigrants that succeed in entering the physical borders are blocked from many of the benefits that those of us who are U.S. citizens enjoy simply by virtue of where we happened to be when we were born.<sup>72</sup> Thus, according to Shachar, birthright citizenship is problematic from two perspectives – it creates external barriers through the process of exclusion and internal barriers to success within our society.<sup>73</sup> *The Birthright Lottery* thus speaks to two developing strands of scholarship – those considering the meaning of citizenship to global human rights,<sup>74</sup> and those discussing citizenship as a paradigm for civil rights within the domestic realm.<sup>75</sup> Shachar sounds a cautionary note to those who would champion citizenship as a source of substantive

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65. Rogers M. Smith, *Gender at the Margins of Contemporary Constitutional Citizenship*, in *Gender Equality*, *supra* n. 7, at 25, 29.

66. *Id.* at 34-36.

67. I discuss this issue in more detail in Rebecca E. Zietlow, *Enforcing Equality: Congress, the Constitution, and Protecting Individual Rights* 160-168 (N.Y.U. Press 2006).

68. Smith, *supra* n. 65, at 34-36.

69. Shachar, *supra* n. 5, at 21-22.

70. *Id.* at 21.

71. *Id.* at 1-2.

72. *Id.* at 112-113.

73. *Id.* at 3.

74. See e.g. Yishai Blank, *Spheres of Citizenship*, 8 *Theoretical Inquiries in Law* 411 (2007); Berta Esperanza Hernández-Truyol & Matthew Hawk, *Travelling the Boundaries of Statelessness: Global Passports and Citizenship*, 52 *Clev. St. L. Rev.* 97 (2005).

75. See e.g. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 *N.Y.U. L. Rev.* 1047 (1994); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and Bingham's Theory of Citizenship*, 36 *Akron L. Rev.* 717 (2003).

rights, but she does not reject that tradition altogether. Instead, she argues that we must openly acknowledge the pitfalls of birthright citizenship and take affirmative steps to ameliorate the inequality that it causes.<sup>76</sup>

The ongoing political debate over immigration in our country generally presents two diametrically opposed solutions to the problem of illegal immigration – make it easier for illegal immigrants to become citizens or close the borders more tightly in order to block illegal immigration altogether.<sup>77</sup> The alternatives in the standard academic debate over the problem of global inequality are even more starkly opposed. While some argue that citizenship should be abolished altogether,<sup>78</sup> others argue that the only way to stem the tide of illegal immigration with its attendant social problems is to reinforce the restrictions imposed by citizenship and close the borders to immigration.<sup>79</sup> Shachar illustrates why so many people from underdeveloped nations wish to leave their homes and move to Europe, the United States, and other developed countries – the staggering differences in wealth and opportunity that characterize those nations. Her statistics are truly overwhelming.<sup>80</sup> The location where a person is born can literally determine whether she lives or dies, lives a comfortable life of plenty, or a life of desperation and poverty.<sup>81</sup> Moreover, in 97% of the world, one's citizenship is determined by the circumstances of one's birth, either the location of one's birth<sup>82</sup> (known as *jus soli*) or the citizenship of one's parents (known as *jus sanguinis*).<sup>83</sup> While naturalization is possible in many countries, including the United States, it is an extremely difficult process,<sup>84</sup> and the demand for visas establishing a legal right to remain in the United States and other developed countries far exceeds the availability of those visas.<sup>85</sup> Thus, birthright citizenship creates a barrier to the social and financial success of the vast majority of people on our planet.<sup>86</sup>

Because of the overwhelming financial implications of one's citizenship status, Shachar proposes considering citizenship as a form of property and birthright citizenship a manner of inheriting wealth.<sup>87</sup> Just as we tax the inheritance of wealth, Shachar advocates for a global tax that would be paid by citizens of wealthier countries to those who live in poverty stricken nations.<sup>88</sup> The tax would be paid once in one's lifetime, and

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76. Shachar, *supra* n. 5, at 3-4.

77. Compare Ryan D. Frei, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. Rich. L. Rev. 1355 (2005) with Justin C. Glon, "Good Fences Make Good Neighbors": *National Security and Terrorism—Time to Fence in Our Southern Border*, 15 Ind. Int'l. & Comp. L. Rev. 349 (2005).

78. See e.g. Shachar, *supra* n. 5, at 46 (citing Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 Ethics 48, 49 (1992)).

79. See e.g. *id.* at 49 (citing *Controlling Immigration: A Global Perspective* (Wayne A. Cornelius, Philip L. Martin & James F. Hollifield eds., Stanford U. Press 1994)).

80. See *id.* at 24-27.

81. *Id.*

82. *Id.* at 21.

83. Schachar, *supra* n. 5, at 7.

84. *Id.* at 128-133.

85. *Id.* at 82-83.

86. See generally *id.* at 83.

87. *Id.* at 85-87.

88. Schachar, *supra* n. 5, at 96-97.

the obligations could be fulfilled by service in a developing nation.<sup>89</sup> Shachar points out the strong support for inheritance taxes in our liberal philosophical tradition.<sup>90</sup> She argues that the basis for inheritance taxes – that the rich inherit wealth by chance and not due to any effort on their part – applies equally well to the accident of birthright citizenship.<sup>91</sup> Therefore, she believes that it may be possible to elicit support for a global citizenship designed to diminish the global inequities caused by birthright citizenship.<sup>92</sup>

Shachar also discusses the impact of birthright citizenship on domestic policy. Here, she focuses primarily on the United States, where “all persons born or naturalized” within U.S. jurisdiction are citizens.<sup>93</sup> Domestically, birthright citizenship suffers from both over inclusion and under inclusion.<sup>94</sup> The theoretical justification for birthright citizenship is that those who are born within a jurisdiction will have roots to that jurisdiction.<sup>95</sup> The problem with the system is that it includes some people with no ties to the jurisdiction and excludes far too many who have ties, even life-long ties, to that jurisdiction.<sup>96</sup> Thus, children of illegal immigrants who are born within the United States are citizens, but those that are brought over as infants are not citizens.<sup>97</sup> This is so despite the fact that both have similar or identical ties to the country in which they live.<sup>98</sup> The division between citizens and non-citizens cannot be justified by principles of democratic self-governance because non-citizens often are as involved in their communities as are citizens.<sup>99</sup> Nonetheless, non-citizens are barred from political participation and from receiving most public benefits.<sup>100</sup> To remedy this disconnect, Shachar proposes an alternative approach to establishing citizenship – one that would focus on the connections between the individual and her nation.<sup>101</sup> To establish citizenship, one would have to establish ties with a country.<sup>102</sup> Birth within that country would be an important tie, but birth alone would not be determinative.<sup>103</sup> Residency, employment, payment of taxes, and other forms of community involvement would be relevant for establishing the right to become a citizen of the community in which one lives.<sup>104</sup> Shachar’s approach would thus emphasize the connection between citizenship and belonging. Establishing a real commitment to belong to a nation would establish one’s right to belong.

Shachar’s solutions make sense from a logical perspective. However, it is difficult to imagine a political landscape in which her proposals would be accepted, at least within

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89. *Id.* at 99.

90. Schachar, *supra* n. 5, at 89.

91. *Id.* at 96-97.

92. *Id.* at 101.

93. *Id.* at 116.

94. *Id.* at 112.

95. Schachar, *supra* n. 5, at 114.

96. *Id.* at 119.

97. *Id.* at 117-120.

98. *Id.* at 114.

99. *Id.* at 137.

100. Schachar, *supra* n. 5, at 111.

101. *Id.* at 166-167.

102. *Id.*

103. *Id.* at 171.

104. *Id.* at 167-168.

the United States. Although wealthier nations clearly already feel at least somewhat obligated to provide foreign aid to poor nations, that foreign aid has little political support domestically and thus perennially lags far behind the need for that aid. Imposing a tax on individuals would add an entire new personal dimension that would be strongly resisted by many people in our nation. Moreover, the view of citizenship as a morally neutral concept is pervasive. Notwithstanding Shachar's highly persuasive argument that our luck largely determines our access to wealth, the "pull yourself up by your bootstraps" belief in individual merit permeates our society, providing a philosophical justification for the unwillingness of many to sacrifice on behalf of others. At the same time, those in wealthier nations who believe that they are entitled to birthright citizenship would likely resist changes in citizenship rules that could disadvantage their children and grandchildren. Nonetheless, Shachar's book is valuable because it causes the reader to question the conventional paradigm of citizenship as a neutral factor in the realm of human rights law. Shachar is right on the mark when she argues that citizenship is an essential resource with substantial market value. More importantly, birthright citizenship is not a preordained characteristic of the natural order. Instead, it is a policy that countries undertake with very real consequences for both insiders and outsiders in their societies.

In conclusion, the authors of these books provide an important service by questioning the paradigms on which our equality law is based, both domestically and internationally. Given the deep rooted and epistemic nature of the problems discussed in these works, this discussion is clearly necessary. Most importantly, these works cause the reader to question the neutrality of the state and the general premises on which our equality law is based. To root out this inequality, it will be necessary to take affirmative measures to counteract the numerous ways in which our seemingly neutral laws reinforce the power of the "haves" at the expense of the "have nots." Finally, these books remind the reader that real progress does not come without a struggle, nor is litigation alone sufficient to create real social change. For advocates of equal rights, then, the next step is to determine how to build a political movement to effectuate this change.

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