Introduction: Gender, sexual orientation, and equal citizenship

Michel Rosenfeld*

Citizenship is firmly anchored in the deepest layers of modern constitutionalism. Although it traces back as far as Ancient Greece, citizenship acquired its distinct modern meaning as equal citizenship at the time of the French Revolution.¹ Equal citizenship is premised on the assumption that all human beings are essentially inherently equal and emerges beyond mere abstraction by reference to what it originally stood against. Equal citizenship was enlisted in the struggle against feudal hierarchy and in the thrust to overcome relegation as the King’s subject within the realm of the absolute monarchy. Accordingly, equal citizenship was designed to promote above all two kinds of equality: equality as opposed to (feudal) status and equality in terms of the citizen’s right to self-government (as opposed to the subject’s duty to submit to the will of the monarch). Equality of status and equality in the right to self-government thus provide a baseline for, and a minimum concrete content to, equal citizenship.

Consistent with this, how can one account for the fact that women who constitute half of humanity were deprived of equal status and of an equal right to self-government from the onset of French Revolution,² and that those deprivations or some of their

* Justice Sydney L. Robins Professor of Human Rights and Director, Program on Global and Comparative Constitutional Theory, Benjamin N. Cardozo School of Law, New York City. mrosnfld@yu.edu.

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² Insisting that the French Revolution had failed women, Olympe de Gouges drafted the Declaration of the Rights of Woman and the Female Citizen in 1791 in response to the 1789 Declaration of the Rights of Man and of the Citizen. Whereas the first article of the 1789 Declaration provides that “Men are born and remain free and equal in rights. . . .” its 1791 counterpart declares: “Woman is born free and remains equal to man in rights. . . .” De Gouges drew attention to the fact that women were fully punishable but deprived of rights. In her words, “[w]omen have the right to mount the scaffold: they must also have the right to mount the speaker’s rostrum.” See Camille Naish, Death Comes to the Maiden: Sex and Execution 1431–1933 137 (1991).
consequences, as detailed in the contributions to this Symposium, continue to this very day? As will be briefly examined below, there are two competing narratives on why women have been excluded from equal citizenship, and each of these narratives leads to a different conception of equal citizenship for women.

1. Competing narratives on women’s exclusion from equal citizenship

In a nutshell, the first of these narratives is premised on the notion that the Enlightenment, through its commitment to reason and equal liberty for all and through its affinity for liberalism and republican self-government, settled once and for all in principle that equal citizenship should extend to all human beings. Actual human beings, however, inevitably fail to live up to principle, and thus liberalism and republican self-government were only partially realized, leaving vast clusters of illiberalism and of lack of access to democratic self-governance because of denial of even the most basic political rights. Women were of course the major victims of illiberalism and exclusion from democratic politics. The solution over time, according to this narrative, would be achieved through gradual eradication of the relevant clusters of illiberalism and through piecemeal removal of existing obstacles to full political participation. In the end, women would be entitled to the same citizenship as men, or, in other words, to an equal citizenship that is identical to that long enjoyed by men.

The second narrative, which has been elaborated by feminist theorists, in contrast, is grounded in the conviction that the whole Enlightenment project, liberalism, and republican self-government are based on differentiation between men and women. According to this narrative, the abstract universalism projected by the Enlightenment vision serves to mask the division of labor between men and women and the subjection of the latter to the former which were indispensible to launching liberal pursuits and republican self-government. In this vision, moreover, men and women are different, and the deployment of the Enlightenment project has stacked these differences against women. To overcome this and to achieve full equality, it will not do to shed or hide differences to gain acceptance as being the same as men. Instead, the road to equal citizenship requires emphasis and redeployment of the differences in question so as to end subordination and achieve liberation. According to this narrative, therefore, women’s citizenship must be differentiated from that of men in order to become fully equal to that of the latter. In sum, the first narrative aims at identity-based equal citizenship whereas the second narrative insists on an equal citizenship that properly accounts for differences between the sexes.

3 See infra, notes 35 and 37.
4 See Martha Minow, Justice Engendered, 101 HARV. L. REV. 10 (1987) (arguing that U.S. Supreme Court sex discrimination jurisprudence posits men’s experience as the “norm” against which women are measured).
2. Citizenship within and beyond the nation-state

To compound the above mentioned clash of narratives, equal citizenship has been typically linked for over two centuries to the nation-state—a link that seems logically contingent though historically justified. Indeed, the nation-state has proven the optimal locus of social, political, and economical organization in the time span between the French Revolution and (at least) the end of World War Two. In other words, self-government by and for a community of equal citizens requires a common locus for social, economic, and political interaction, and at the time of the French Revolution no space beyond that carved out by the nation-state would have been conceivable for the purpose in question. Logically, however, there seems to be no difference whether the locus at stake happens to be the local community, the city-state, the nation-state, a supra-national entity such as the European Union (EU), or the world at large. Moreover, the nation-state traditionally bestowed upon its equal citizens a common identity that furnished the glue necessary to make collective self-government viable. In more recent times, however, a combination of internal and external changes unleashed at the end of World War Two, and having greatly accelerated since the end of the Cold War, have jolted the moorings of the nation-state and increasingly thrown into question the latter’s ability to sustain a sufficient identitarian basis for the meaningful pursuit of equal citizenship.

The effect of these changes is perhaps most obvious in the context of external developments, such as the advent of supranational citizenship now in force in the EU. The capacity for self-government of an EU citizenship has been questioned on the basis of a perceived lack of common demos, language, culture, political parties, or press. At the same time, globalization and mass migration have brought significant numbers of persons with markedly alien cultures, mores, and religions to traditionally fairly homogeneous nation-states, thus transforming the latter internally into multi-national, multi-religious, and multicultural polities in which common identities become frayed amidst often escalating identitarian struggles. This internal process is well illustrated by the numerous contemporary controversies surrounding relatively recent Muslim immigration, particularly regarding Muslim women in Western democracies, which are addressed in several of the contributions that follow. Moreover,

5 See Christopher Persson, supra note 21, at 228.
6 See Michel Rosenfeld, The Identity of the Constitutional Subject 216 (2010).
7 Arguably, since at the highest levels of abstraction equal citizenship should extend to all adults throughout the globe, self-government on a worldwide basis should be preferable, all other things remaining equal.
8 For an analysis of how international, supranational and national norms combine to shape equal citizenship for women, see Judith Resnik, Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production, 10 INT’L J. CONST. L. (I·CON) 531–550 (2012).
9 See Treaty of Lisbon, art. 8 (2007) (“every national of a member state shall be a citizen of the [EU]”).
these internal changes raise a series of challenges that were not addressed in the paradigmatic case of equal citizenship in the context of a single nation with a distinct and well-defined identity that is well integrated within a single state. Must immigrants with alien and at times unsettling (from the standpoint of the traditionally established dominant culture) mores be granted citizenship? If so, under what conditions? Should such immigrants first assimilate sufficiently into the dominant culture? Or, should the mores of such immigrants be placed on a par with those of the dominant majority for purposes of instituting a common citizenship that is materially (as opposed to purely formally) equal within the multicultural polity? Furthermore, is such common citizenship at all plausible in a multicultural setting defined by competing and at times clashing identities?

Even based on these brief observations, to the extent that all polities are made up of men and women, the exclusion of women from equal citizenship looms in principle both illogical and contradictory. In contrast, the requisite identitarian basis for common collective self-government by and for equal citizens seems in all cases to be contingent, whether or not it happens to be perceived as such. As a consequence of this, the right of women to inclusion within the precincts of equal citizenship ought to, again in principle, transcend all context dependency. Conversely, the identitarian bases of every single instance of historically grounded equal citizenship appear bound to be inescapably context dependent. Moreover, the context dependence in question is likely to become manifest in two distinct ways: in terms of whom shall be identified as an equal citizen—e.g., the fellow city dweller, the fellow national, or the fellow participant in an integrated political economy; and, in terms of what identity (or identities) ought to figure in the actual configuration of the relevant identitarian make-up that binds together those slated to interact as equal citizens—be it an ethnic identity, a common language or culture, a common history, or a common religious tradition. In short, for equal citizens to actually join in a common project of self-government, they must share an identity that frames the problems they confront and that enables them to circumscribe a suitable horizon of plausible solutions.

Under closer scrutiny, and particularly taking into account the clash of narratives on equal citizenship for women evoked above, however, identitarian issues permeate all relevant relationships, including those between men and women, homosexuals and heterosexuals, and those within the mono-ethnic, mono-national, and monocultural polity as well as those in the multi-ethnic, multinational, and multicultural one. In multicultural polities, and particularly in those with recent waves of immigration of large numbers of people with cultures that are glaringly at odds with the traditional ones that are firmly embedded within the relevant socio-political context, the identitarian dimensions of citizenship come to the forefront as they become vigorously

12 The French Revolution promoted a constitutional model based on demos and a highly abstract and individualistic concept of citizenship. Notably, the 1789 Declaration refers to “man” and to “citizen,” not to “Frenchmen” and “French citizens.” Viewed more closely, however, the French model relies on a particular language, French, the well-functioning particular state consolidated under the French absolute monarchy, and the emerging French nation, which at the time was still a work in progress. See ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, supra note 6, at 157.
contested. And as mentioned above, the heated controversies over the Islamic veil in numerous European democracies provide a prime example of this phenomenon. In contrast, in a culturally homogeneous polity the identitarian dimensions of citizenship may remain below the surface, but are nonetheless necessarily present. To take but the most obvious example, in a mono-linguistic polity, no one may be focusing on the fact that the national language plays an indispensable role in the deployment and functioning of equal citizenship. Once we move to a multi-linguistic polity where politics and public affairs are conducted exclusively in the majority language, however, those belonging to a minority language may well acutely feel significantly left out and relegated to the status of second class citizens.

In the context of the first narrative above and of its emphasis on identity, the extension of full citizenship rights to women should not raise any identitarian issues. All polities are inevitably made up of men and women, and therefore questions of sex or gender should have no bearing on entitlement to equal citizenship. Under this conception, even if women happened to have been completely deprived of political rights, granting them equal citizenship would only require the removal of existing impediments to grant them access to the same status as the one already enjoyed by men. In any event, whether extended to women ab initio or after a protracted struggle for removal of all obstacles preventing women from being on a par with men, the nature, scope, and content of equal citizenship would be invariably the same for men and women.

When it comes to the second narrative with its marked stress on difference, in contrast, the question of equal citizenship for women is inevitably intertwined with identitarian issues that go all the way up and all the way down. Both the exclusion of women from equal citizenship, which as pointed out above, is essential under this second narrative for purposes of launching equal citizenship for men, and the struggle for meaningful differentiated equal citizenship for women must properly account for the differences in identity among the sexes. This is particularly salient in the context of reproductive rights as amply illustrated in Reva Siegel’s contribution to this Symposium. On the one hand, the differences in identity stemming from women’s special role in the reproductive process have been invoked as a basis for denying them equal citizenship. On the other hand, equal citizenship for women requires a proper factoring of women’s role in the reproductive process, thus requiring, among other things, recognition of a right to abortion for purposes of affording women the same control over their own body as men enjoy over theirs. More generally, differences in identity that set women apart from men have figured prominently in the construction of collective identities.

14 Cf. Bradwell v. Illinois, 83 U.S. 130 (1872) (holding that a professionally qualified woman could be constitutionally barred by a state from practicing law on the ground that a woman’s proper role is that of wife and mother).
16 See, e.g., NIRA YUVAL-DAVIES, GENDER AND NATION (1997).
In line with this second narrative, the identitarian markings of women play a pivotal role in the establishment of the nature, scope and content of equal citizenship. Moreover, the role in question is dual: First, even in the most culturally homogeneous of polities women bear their own distinct cultural identity; and second, at the same time, as attested by the controversies occasioned by the Islamic veil in non-Muslim countries, women often symbolize the alien cultures from the outside that are perceived as a threat to the culture, unity, and integrity of the (formerly) homogeneous polity. In short, in this conception, women are at once subjects and objects of identitarian differences relating to sex or gender and the principal bearers of foreign identities prone to precipitating cultural identitarian conflicts. Thus, the clash between the sexes and the clash among cultures appear likely to become disproportionately inscribed on the bodies of women.

3. Equal citizenship: Predicated on identity or difference?

At a minimum consistent with either of the two narratives briefly outlined above, all men and women in the relevant political unit ought to be equal citizens. In addition, though determination of the unit in question is context dependent, two distinct traditions have been predominant: the first accords priority to the *ethnos*, by presupposing the existence of a pre-political nation bound together by a common ethnicity, language and culture; the second, in contrast, places greater emphasis on the *demos*, with the nation emerging (as was supposedly the case in France) in the very process of democratization (which in France took place within the confines of an already existing state established during the absolute monarchy). At the very least, fellow citizens must all have a right to formal equality and be equally equipped for the exercise of self-government, which pared to the essential requires combining an equal right to vote and equal eligibility to compete for elective public offices.

Given these rudiments of the logic of equal citizenship, the two focal points of the present Symposium should presumably raise no insurmountable theoretical issues if equality is conceived as anchored in identity rather than difference. Men and women ought to be in all respects equal in relation to citizenship; and sexual orientation should have no bearing whatsoever on equal citizenship as homosexuals and heterosexuals ought to be treated exactly the same. This is because sexuality appears to bear no palpable relationship to citizenship as a concept or to the exercise of all rights and obligations associated with the latter. There is no denying, of course, that there has

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17 Women are the “subject” of identitarian difference to the extent that they invoke them in the struggle for differentiated equality and its “object” when cast as different for purposes of rationalizing denying them meaningful equality.


19 *Cf.* UN International Covenant on Civil and Political Rights, art. 25 (“Every citizen shall have the right . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage. . .“).
been massive discrimination based on gender and sexual orientation\textsuperscript{20} with respect to equal citizenship. But conceptually, that discrimination seems little different than invidious exclusion on the basis of race or religion.

As made amply manifest in the case of systematic invidious racial discrimination, eliminating the lingering effects stemming from past deprivations can raise contentious persistent theoretical, constitutional and political issues.\textsuperscript{21} These issues have certainly spilled over into the equal citizenship arena as exemplified by the French experience with feminine quotas in political party lists to remedy the underrepresentation of women in elective office.\textsuperscript{22} On further reflection, however, these issues are far from being the only ones, or even necessarily the principal ones, surrounding the nexus between gender or sexual orientation and equal citizenship. Indeed, the conflicts that have stood in the way of finding any single or straightforward reconciliation between gender equality and sexual orientation equality, on the one hand, and equal citizenship, on the other hand, are manifold and overlapping. Moreover, some of these conflicts pertain specifically to gender or sexual orientation, whereas others concern equal citizenship generally, with sometimes disproportionate impact on gender and sexual orientation equality in as much as these two kinds of conflicts tend to aggregate.

4. Three conflicts and the dynamic of gender based and sexual orientation based equal citizenship

The principal conflicts involved are those between abstract and concrete conceptions of citizenship: between gender neutral and gender based conceptions of citizenship highlighted in the two above mentioned conflicting narratives and mirrored in an

\textsuperscript{20} See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (state of Colorado constitutional provision imposing a blanket prohibition against state or local government adoption of antidiscrimination laws prohibiting discrimination against homosexuals held to violate federal constitutional equal protection rights). In his opinion for the Court, Justice Kennedy emphasized that the challenged Colorado constitutional provision was tantamount to a deprivation of citizenship for homosexuals in as much as it eliminated them for all practical purposes from politics and lawmaking concerning issues they deemed to be of paramount importance.

\textsuperscript{21} See, e.g., Regents of University of California v. Bakke, 438 U.S. 265 (1978) (Justice Brennan concluding that race based quotas in university admissions for purposes of eliminating present effects of past discrimination were constitutional in contrast to Justice Powell who declared such quotas unconstitutional). For a discussion of the distributive and compensatory justice issues raised by the Bakke case, see Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry 167–172 (1991).

\textsuperscript{22} See The Feminine Quotas Case, French Constitutional Council decision 82-146 DC (Nov.18, 1982) excerpted in English in Norman Dorson et al., Comparative Constitutionalism: Cases and Materials 797–798 (2d ed. 2010) (holding gender based quotas unconstitutional). The French Constitution was amended in 1999 to allow for gender based quotas in political party lists, and a subsequent law requiring an equal number of men and women candidates for certain elections was for the most part upheld by the Constitutional Council in 2000-429 DC (May 30, 2000). For further discussion of gender based quotas in France, see Julie C. Suk, Gender Parity and State Legitimacy: From Public Office to Corporate Boards, 10 Int’l J. Const. L. (I·CON) 449–464 (2012).
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4.1 The conflict between abstract and concrete citizenship

The first of these three conflicts, that between the abstract and the concrete conceptions of equal citizenship, or that between its form and its content, opens up two distinct paths toward elucidation. The first of these paths travels along a synchronic axis, whereas the second one does so along a diachronic axis. In both cases, moreover, it is a persistent gap between the abstract and the concrete, the ideal and its realization, which makes room for the discrepancy in question.

The theoretical foundations of modern equal citizenship are found in classical social contract theory dating back to the seventeenth and eighteenth centuries. Individuals who cannot achieve security or self-realization in a prepolitical state of nature enter into a mutual agreement—or, more precisely, two separate contracts or one dealing with two separate subject-matters. The first of these is the “contract of association.”

23 See Siegel, supra note 13 (arguing that the same concerted effort at controlling sexuality leads to denial of reproductive rights and to refusal to recognize same-sex marriage thus depriving women and LGBT persons of their full equal citizenship rights).

whereby the individual contractors in the state of nature bind themselves to join
together in a political society; the second is the “contract of government”26 by which
the mode of governance of the new political entity is settled. Moreover, the two facets
of equal citizenship seem best bound together in the case where association and gov-
ernment are covered by the same contract as is the case in Rousseau’s social contract
theory.

For Rousseau, the social contract is between each individual qua individual and
society as a whole (of which each individual is a part), with each individual acting in a
dual capacity. Each individual acts at once as a member of the governed body towards
the sovereign and as a member of the sovereign towards other individuals.27
Consistent with this conception, moreover, there needs to be a split within each con-
tracting individual between the privately oriented bourgeois and the publicly com-
mitted citoyen.28 This split inevitably leads to a conflict within each individual in the
newly constituted polity as private aims and public duties seem bound to be at odds
with one another at least some of the time. To resolve this inner conflict that confronts
each individual, Rousseau resorts to the “general will” that has been characterized as
a “highly voluntarist formulation of the traditional conception of the common good or
the common interest.”29 Rousseau’s general will is not the will of the majority or even
the will of all as a mere aggregate, but instead, in his own rather obscure formulation,
“the agreement of all interests” by means of “opposition to that of each.”30

What is clear from Rousseau’s conception is that the self-governing responsibilities
of the citizen require some suppression of the private person’s aims and interests. How
much is not clear, but Rousseau sounds quite ominous in admonishing the private
person who does not attend to his civic republican self-government obligations as fol-
lows: “Whoever refuses to obey the general will shall be compelled to do it by the whole
body: This in fact only forces him to be free.”31 Moreover, consistent with Rousseau’s
republicanism, it is clear that group affiliation and identity must give way to equality
among abstract individuals. As expressed in the famous dictum of Clermont-Tonnerre
in connection with the emancipation of the Jews during the French Revolution,
“[e]verything must be refused to the Jews as a nation and everything must be accorded
to the Jews as individuals . . . they must be individual citizens . . . . It would be repug-
nant to have groupings of non-citizens within the state, a nation within the nation.”32

It is with respect to the uncertainties concerning how many layers of the private
person must be removed to maintain the integrity of the public citizen and concern-
ing whether the removal involved can lead to neutrality among conceptions of the
good or group belongings (is French laïcité neutral as between Jews, Muslims, and

26 Id. at 3.
28 Id. at 14–16.
30 Jean-Jacques Rousseau, supra note 19, at 26 n 2.
31 Id. at 18.
Christians or does it unwittingly privilege the latter? \(^{33}\) that a seemingly unbridgeable gap between the abstract and concrete self-governing equal citizen opens up. Can gender neutrality be preserved through the requisite process of abstraction? And even if it could, would not the presence of the above mentioned gap allow for introducing and dissimulating gender biases in the process of abstraction leading to equal self-governing citizenship?

To the above synchronic gap, one must add a corresponding diachronic one. Enlightenment grounded liberalism is not only an ideology and philosophy, but also a movement with a distinct historical trajectory. \(^{34}\) As a movement, liberalism struggles against all kinds of illiberalism, stretching from authoritarianism to pockets of illiberalism that remain within a liberal state as a result of dichotomies between theory and practice. Accordingly, equal citizenship encompasses all humanity in theory from its very outset, but the men who fought against feudalism were not ready from a practical standpoint to abandon their traditional dominion over women or to recognize that women were entitled to the same equality as that claimed for men. Eventually, however, liberalism seems equipped to triumph over every cluster of illiberalism, thus eventually progressing to the achievement of gender based and sexual orientation based equality in practice.

Because of the combination of the above described synchronic and diachronic gaps, gender based and sexual orientation (identity) based equal citizenship should eventually become instituted as a result of removal of illiberal barriers and the deployment of compensatory and remedial policies, such as affirmative action, designed to put women and gays in the position they would have been but for the evils of lingering illiberalisms tracing back to the launching of the liberal project. If this represented the full story concerning liberalism’s shortcomings in the achievement of gender and sexual orientation-based equality, then the path to eradication of all such shortcomings would be fairly straightforward and unproblematic from a theoretical standpoint. But this does not represent the full story, as the conflict between theory and practice clashes against the second principal conflict identified above and already detailed in the account of the conflicting narratives that it spawns, namely that between a gender-neutral and gender-based, or gender-specific, conceptions of equal citizenship.

### 4.2 The feminist challenge to the social contract and to gender neutral citizenship

As noted above, the second conflict in question stems from a feminist challenge to the approach tied to social contract theory as being inherently and inescapably gender-biased. This challenge mounted by Carole Pateman depicts the social contract as a

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\(^{34}\) See Michel Rosenfeld & András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free speech Rights in New Democracies, in The Migration of Constitutional Ideas* 142, 145 (Sujit Choudhry ed., 2006).
fraternal pact that leaves women out, thus casting the latter as a covenant necessarily made by and for the benefit of men.\textsuperscript{35} Consistent with this challenge, gender and sexuality cannot be abstracted away to arrive at purely sexless and genderless egos that could endow equal citizenship with a neutral form and content. Thus the seemingly sexless human being who figures as the typical social contractor is in fact a man who can associate with other men in the public arena because women are relegated to the duties of homemaker and mother in the private sphere.\textsuperscript{36} Even more profoundly—and this renders the framework for remedying invidious discrimination appropriate in the context of the first conflict discussed above inadequate in the present context—the very form of association epitomized by contractual relationships, namely that of atomistic individuals prone to bargaining at arm’s length, is typically masculine. Women presumably tend to relate differently, more on the basis of concern, care, intimacy, interdependence, and solidarity.\textsuperscript{37} Because of this, equal citizenship is not the same for men and for women, and its implantation depends on properly accounting for differences among the sexes.\textsuperscript{38} Moreover, if equal citizenship is gendered and differentiated, then representational democracy as the fulfillment of self-government must be reconceived and at least to some extent delinked from electoral democracy and an equal right to vote extended to both men and women as Nadia Urbinati underscores in her contribution to this Symposium.\textsuperscript{39}

The gender-based critique of the purported neutrality of the social contract metaphor reserves an important role to sexuality as a marker of equal citizenship and opens the door to references to sexuality in the elaboration of claims regarding denial of equal citizenship rights to LGBT persons. This issue is extensively addressed in Nicholas Bamforth’s contribution to this Symposium.\textsuperscript{40} Suffice it for now to note that the acceptance of the relevance of sexuality in the context of gender-related equal citizenship does not necessarily settle the matter when it comes to sexual orientation. Men and women are different, their differences relate in relevant part to sexuality, which thus figures significantly in the construction of an appropriate differentiated conception of equal citizenship. But does sexuality operate similarly in the context of


\textsuperscript{36} See Bradwell v. Illinois, 83 U.S. 130 (1872).

\textsuperscript{37} See Carol Gilligan, In a Different Voice: Psychological Theory and Women’s Development 12, 73–74, 112 (1982); see also Justice Ruth Bader Ginsburg’s statement in her opinion for the Court in United States v. Virginia, 518 U.S. 515 (1996): “The two sexes are not fungible. . . . Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration. . . .”

\textsuperscript{38} The ideology of the Enlightenment postulates the equality of all human beings as the baseline. This sets a three stage logical dialectic pursuant to which in stage one inequality is linked to difference (e.g., women are too frail to perform certain jobs reserved for men); in stage two, equality is correlated to identity (e.g., women should get same pay as men when their job performance is identical); and, in stage three equality, equality is paired with difference through overcoming the limitations of the preceding two stages (e.g., a woman must be granted a right to abortion to have control over her body just as man has over his).

\textsuperscript{39} See Nadia Urbinati, Why Parité is a Better Goal than Quotas, 10 Int’l J. Const. L. (ICON) 465–476 (2012).

\textsuperscript{40} See Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument, 10 Int’l J. Const. L. (ICON) 477–492 (2012).
gays and lesbians? In other words, is denial of equal citizenship to gays and lesbians due primarily to failure to account for relevant differences or to refusal to extend to them the same treatment accorded heterosexuals on account of differences that are irrelevant for purposes of equal citizenship? The answers to these questions are important as they would shed light on the proper role to be accorded sexual orientation in fashioning the type of representative democracy best suited to the realization of full equal citizenship. But the answers at stake are far from obvious, and they depend at least in part on whether one adopts an identity or a difference based narrative regarding sexual orientation. Does institutionalization of same-sex marriage, for example, boil down to an extension to gays and lesbians of the same institution traditionally reserved to opposite sex couples? Or does legalization of same-sex marriage amount to an equal accommodation of a different way of life embedded in a different culture?

4.3 The conflict between the functional and identitarian dimensions of citizenship

If the controversy over same-sex marriage is understood as deriving ultimately from a clash of cultures, then it feeds into the third of the three conflicts identified above, namely that between the functional and the identitarian dimension of equal citizenship. Does sexuality as it relates to sexual orientation directly affect the essential functional trappings of equal citizenship or does it above all concern the identitarian boundaries of the latter? Is same-sex marriage ultimately about the identity of the citizenry just like polygamy is in a polity in which the dominant cultural and religious identity is implacably committed to monogamy and hence subject to exclusion (rightly or wrongly) without reference to functional considerations?42

More generally, the functional and identitarian attributes of citizenship can come into conflict and as a consequence lead to disputes concerning the proper conception of equal citizenship in a given polity. In functional terms, equal citizenship has changed over time, and according to T.H. Marshall’s influential theory has evolved, becoming ever more encompassing of the various social classes within society. According to Marshall, civil rights were instituted in the eighteenth century; political rights in the nineteenth; and social rights, which may be defined as welfare rights, in the twentieth.43 Given that women did not obtain the vote in the U.S. till 1920 and in France till 1944, it is not surprising that feminists have criticized Marshall’s

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41 Cf. Reynolds v. United States, 98 U.S. 145 (1878) (freedom of religion rights of Mormons believing to be under religious obligation to engage in polygamy does not constitutionally require state from granting any exception from its laws that criminalize polygamy).

42 Logically, to the extent that citizenship cannot dispense from having an identitarian dimension, strictly speaking, all non trivial identitarian questions seem bound to have some functional effect. In view of this, the claim advanced in the above question should be understood as referring to no functional implications beyond those inextricably linked to identitarian issues.


44 See U.S. Const. Amend. XIX (1920).

theory. In fact, in many countries, the opposite order applied to women than the one presented by Marshall. Be that as it may and leaving history aside, functionally, contemporary effective equal citizenship requires the same autonomy, dignity, political participatory rights, and (minimum) welfare for every individual settled within the same polity. From an identitarian standpoint, on the other hand, the primary focus is on who is entitled to equal citizenship. Where the emphasis is on the demos, functional and identitarian citizenship may well overlap. But where emphasis is placed instead on the ethnos, the two dimensions of equal citizenship are very likely to clash. If permanent immigrants in a polity, who reside, work, pay taxes, and otherwise conduct their lives very much like the citizens among whom they dwell, then citizenship based exclusively on ethnic origin and jus sanguinis seems bound to unfairly deprive the functionally equivalent long term immigrants of equal citizenship.

What further exacerbates this third conflict and often conjoins it together with the other two, thus magnifying the complexity and contentious nature of the issues at stake, is that the identitarian dimension of citizenship can easily slip from the who to the what, from the subject of equal citizenship to that which ought to be particularly included as an essential component of its makeup. For example, if polygamy were an essential religious prescription and cultural practice for the overwhelming majority of citizens within a polity, ought it to figure in the bundle of goods attaching to citizenship? And if yes, should it be a protected civil right guaranteed by a constitutional right to freedom of religion? Or should identitarian attributes be added to an expanded conception of citizenship, enlarging Marshall’s list with the addition of cultural rights in the twenty first century?

These questions remain open in part because of the gap between abstract and concrete equal citizenship that frames the first conflict. Moreover, the third conflict which gives rise to these questions is often bound to add fuel to the second conflict as equal citizenship for women, whether on an assimilationist or a differentiated model, often clashes with cultural and religious rights asserted or promoted as essential to the realization of equal citizenship from an identitarian standpoint. To make matters even more daunting, these difficulties are compounded when women are on opposite sides of relevant issues as exemplified in the cases regarding Muslim women addressed in the contributions to Part III of this Symposium. Is a Muslim woman asserting a right to wear the Islamic veil predominantly an unwitting (if sometimes unaware) victim of a culture that denies equal citizenship to women, or is she above all asserting her freedom and identitarian commitments

47 Id. at 36.
48 This was the case in Germany which excluded several generations of Turkish immigrants from citizenship. In 2000, Germany adopted a law allowing for the first time residents of Turkish origin to acquire German citizenship. But in spite of this change, Germany has remained relatively closed to granting citizenship to immigrants. See Rosenfeld, The Identity of the Constitutional Subject, supra note 6, at 240.
against the unwarranted paternalism of a majority culture that refuses to accord her equal autonomy and dignity? Needless to add, these very questions are ultimately unduly reductionist as the realities at play are in most cases likely to be highly complex.

5. Equal citizenship for women and LGTB persons: Complex and contested

From this brief preceding overview, it is clear that whether the culprit is illiberalism or a male biased conception of equal citizenship, and whether sexual orientation should not matter, or matter in terms of sexuality and/or culture, women and LGTB persons both deserve full formal and material equal citizenship. What exactly such equal citizenship should consist of in either or both cases, however, is highly contested and is likely to remain so for the foreseeable future. In part this is due to the presence of competing conceptions of gender and sexual orientation based citizenship, depending on how one seeks to confront the bundle of relevant similarities and differences in play that pull between equality as identity and equality as difference.49 In part also, equal citizenship for women and gays is highly contested as a consequence of the complex and intrinsic dynamic within each, and among all three, of the principal conflicts identified above. Finally, what complicates matters even more is the relatively new found prominence of identitarian claims which call for expansion of the domain over which equal citizenship ought to extend. Some of the cultural and religious identities sought to be integrated within the precincts of citizenship in certain particular settings are undoubtedly illiberal under most conceptions of equality for women and gays. Should illiberal identities be cast aside? And if yes, who should decide between the permissible and impermissible identities that are competing to become integrated within the relevant boundaries of citizenship? Would it be better to systematically decouple identitarian concerns from the attributes of equal citizenship? Or would such a decoupling end up frustrating women and gays to the extent that gender differentiated equal citizenship arguably necessarily depends on gender based identitarian considerations whereas some conceptions of equal citizenship for gays seem better grounded on claims to cultural difference rather than on claims that sexual orientation is irrelevant for purposes of defining equal citizenship?

The various contributions to this Symposium tackle these complexities and advance the debate on many of the most salient issues that have emerged in the context of equal citizenship for women and gays. Significantly, although all the following contributions focus on gender and/or sexual orientation, the analysis they provide and the conclusions they draw often shed as much light on more general topics which they reframe through their special perspective as they do by placing their immediate subject in a broader theoretical and practical context. The general topics which

49 See supra section 3.
at once shape and are reshaped by the insights centered on gender and sexual orientation include: dignity,\textsuperscript{50} republicanism,\textsuperscript{51} paternalism, political participation and representation,\textsuperscript{52} judicial balancing, the relationship between the private and public spheres,\textsuperscript{53} the boundaries between secular and religious discourse,\textsuperscript{54} sexuality, reproduction as a gender based and cultural marker,\textsuperscript{55} and the redefinition of equality in the context of a multilayered plurality of overlapping legal regimes.\textsuperscript{56} As the contributions that follow jointly and severally amply establish, not only are gender and sexual orientation central to equal citizenship, but they also impel us to re-center our debate and to reexamine our conceptions of citizenship in general, and equal citizenship in particular.

\textsuperscript{50} This is the principal focus of Siegel’s article, supra note 13.

\textsuperscript{51} See Laborde, supra note 11.


\textsuperscript{53} See Suk, supra note 22.

\textsuperscript{54} See Cohen, supra note 52; Mancini, supra note 11; and Shachar, supra note 11.

\textsuperscript{55} See Siegel, supra note 13; and Julieta Lemaitre, By Reason Alone: Catholicism, constitutions, and sex in the Americas, 10 Int’l J. Const. L. (I·CON) 493–511 (2012).

\textsuperscript{56} See Frances Raday, Gender and Democratic Citizenship: The Impact of CEDAW, 10 Int’l J. Const. L. (I·CON) 512–530 (2012); and Judith Resnik, supra note 8.