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ARTICLE

DEMOCRACY AND FEMINISM

*Tracy E. Higgins**

Although feminist legal theory has had an important impact on most areas of legal doctrine and theory over the last two decades, its contribution to the debate over constitutional interpretation has been comparatively small. In this Article, Professor Higgins explores reasons for the limited dialogue between mainstream constitutional theory and feminist theory concerning questions of democracy, constitutionalism, and judicial review. She argues that mainstream constitutional theory tends to take for granted the capacity of the individual to make choices, leaving the social construction of those choices largely unexamined. In contrast, feminist legal theory's emphasis on the importance of constraints on women's choices has led to a neglect of questions of citizenship and sovereignty within a democratic system. By comparing mainstream constitutional theory and feminist theory, Professor Higgins highlights the existing limitations of both. She argues both that mainstream constitutional theory must take into account feminist arguments concerning constraints on individual choice and that feminist theory must take seriously the mainstream debate over democratic legitimacy. Integrating these distinct concerns, she suggests a framework for constitutional interpretation that reflects a feminist conception of citizenship under conditions of inequality.

> [T]here remains something that seems right in the claim that women have been operating at an unfair disadvantage in the political process, though it's tricky pinning down just what gives rise to that intuition.
>
> John Hart Ely, Democracy and Distrust[1]

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[1] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 164 (1980).

At the heart of much constitutional law and theory is a familiar and basic inquiry: How do we mediate the tension between respect for majoritarian will and the protection of individual autonomy? This question, as many have observed,[2] persists because we have a dual loyalty: a democratic commitment to respect the political will of the people and a liberal commitment to respect the rights of the individual. Though in conflict, these commitments are interdependent. The individual must be protected in particular ways to enable him to act within a democratic system as a citizen/sovereign. At the same time, the exercise of popular sovereignty must be respected as an aspect of the freedom of the individuals that comprise the sovereign. Thus, at the most general level, constitutional theory asks: How can popular sovereignty be both constrained and unconstrained?

Despite the enormous amount of feminist legal scholarship that has been produced over the last two decades, relatively little has addressed these central questions of constitutional interpretation. For example, little feminist work exists on theories of judicial review[3] or methods of constitutional interpretation[4] such as originalism, interpretivism, or translation. In short, not only does feminism have no theory of the state, as Catharine MacKinnon has observed,[5] but it also lacks both a theory of the Constitution and a well-defined theory of political legitimacy within the framework of democracy.

Feminists have not been uninterested in the Constitution and its interpretation. On the contrary, feminists have written at length on specific areas of constitutional doctrine, such as the First Amendment[6]

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[2] *See, e.g., id.* at 7–8; Stephen Holmes, *Precommitment and the Paradox of Democracy, in* CONSTITUTIONALISM AND DEMOCRACY 195, 196–97 (Jon Elster & Rune Slagstad eds., 1988); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499–1500 (1988).

[3] One important exception is Mary Becker's work. *See* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993).

[4] The scholarship of Robin West is an exception here. *See* Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 534–39 (1988); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 780–92 (1992); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 672–77 (1990); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992); *see also* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994) [hereinafter WEST, PROGRESSIVE CONSTITUTIONALISM] (collecting the above-cited works and elaborating an interpretation of the Fourteenth Amendment).

[5] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 157 (1989) ("Feminism has no theory of the state.").

[6] *See, e.g.*, Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1979–94 (1995); Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 605–16 (1993); Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1994).

and the Due Process[7] and Equal Protection[8] Clauses of the Fourteenth Amendment. But regarding theories of constitutional interpretation, feminists have been uncharacteristically silent.[9] When feminists have considered constitutional interpretation, we have generally done so critically rather than constructively. By this I do not mean to suggest that the criticism has not been constructive. Rather, the approach feminists generally have taken is to criticize the endeavor of constitutional interpretation and its results instead of offering affirmative feminist theories of constitutional interpretation.[10]

Two related reasons, taken together, may account for the dearth of feminist scholarship concerning theories of constitutional interpretation and their role in resolving the tension between individual rights and majoritarianism. First, the self presupposed by our constitutional scheme[11] — either as a participant in the democratic process or as a resistor to the encroachment of majoritarian will — does not match the varied feminist descriptions of women's selves under conditions of inequality.[12] Second, and consequently, the concept of majoritarian

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[7] *See, e.g.*, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 509–14 (1992); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299 (1993).

[8] *See, e.g.*, Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1542–54 (1995); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1324–28 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 347–80 (1992).

[9] Or at least quiet. Some exceptions deserve mention, however. *See* WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, *passim* (arguing for a feminist reconceptualization of ordered liberty); Becker, *supra* note 7, *passim* (criticizing the Bill of Rights from the perspective of women and other outsiders); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480–507; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987–1013 (1984); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580–91 (1986). Nevertheless, relative to both the rest of feminist legal scholarship and the rest of constitutional scholarship, the intersection of the two constitutes a surprisingly small part of each.

[10] Sometimes feminists purport to do both. *See, e.g.*, Catharine A. MacKinnon, *"Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773, 1774–75 (1997) (questioning the legitimacy of the Constitution but purporting to "hold [it] to its promise" through interpretation).

[11] This self is largely the self described by liberalism — autonomous, individual, enjoying the capacity to form both a sense of justice and a conception of the good. *See* JOHN RAWLS, POLITICAL LIBERALISM 29–35 (1993). Of course, not all liberal theorists make the strong assumption of individual agency or autonomy that many commentators attribute to them and that this Article critiques. Indeed, the "liberal self" is something of a moving target in that liberals have responded to critiques by communitarians and feminists and have qualified their conception of the self accordingly. *See id.* This Article is less concerned with the various incarnations of the liberal self than with the particular conception that seems to underlie much mainstream constitutional interpretation.

[12] *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (theorizing observed differences in moral reasoning between men and women); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987) (rooting observed gender differences in women's oppression); *see also* DEBORAH

will as both an expression of and threat to individual liberty — and the related problem of structuring government in a liberal democracy — serves as a poor framework for analyzing the range of threats to women's liberty and equality under patriarchy.[13] As a result, feminist legal theory and constitutional theory have developed with limited cross-fertilization and sometimes at cross purposes.[14]

This Article argues that mainstream constitutional theory's assumption of individual agency yields a distorted conception of women as citizens. Feminist legal theory has revealed this distortion by exposing women's inequality, but it has failed to articulate a theory of political legitimacy. Responding to the limits of both mainstream and feminist theories, this Article proposes a specifically feminist conception of democratic citizenship. Part I begins with a discussion of the connection between individual rights and popular sovereignty as understood within mainstream constitutional theory and argues that, having identified autonomy and equality as foundational in some sense to legitimate democratic outcomes, much of mainstream constitutional theory largely takes for granted the fulfillment of both of these conditions. In short, such theories rest on a particular conception of citizenship that lacks a critique of power beyond that exercised by the state. To illustrate the implications of this limitation for constitutional doctrine, Part I closes with a discussion of the relationship between democracy and equality as conceptualized in the Supreme Court's recent decision in *United States v. Virginia* (*VMI*).[15] The Part concludes that, because both the majority and dissenting opinions adopted a view of citizens as free, self-defining individuals, both failed to address fully the hierarchy of power at play in the case.

Part II considers feminist legal theorists' departure from mainstream formulations of central constitutional problems, particularly the countermajoritarian dilemma. Beginning with an overview of feminist constitutional critiques, Part II explores the ways in which feminism's account of women's condition has informed those critiques. It acknowledges feminist theory's important contribution to constitutional analysis, particularly in the context of equal protection. However, it suggests that feminist theorists' inattention to the tension between fun-

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L. RHODE, THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (1990) (presenting a range of accounts of sexual difference and exploring their implications for law).

[13] The term "patriarchy" as used here refers to the system of gender hierarchy of which law is an important part. This Article discusses certain implications of this hierarchy but leaves to others the debate over its origins and scope.

[14] Feminist legal scholars have argued in other contexts that the liberal self does not correspond to women's experience. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 34–35 (1988) (applying this insight to tort law); Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4–42 (1988) (comparing masculinist and feminist assumptions about the self and exploring their implications for jurisprudence).

[15] 116 S. Ct. 2264 (1996).

damental rights and popular sovereignty has resulted in a failure to generate a feminist theory of democratic legitimacy. This failure, in turn, has complicated feminists' task of distinguishing legitimate uses of public power that enhance women's equality from illegitimate uses that reinforce subordination.

Parts III and IV respond to this theoretical deficit by turning to feminist thought outside the context of constitutional analysis. Part III discusses various contexts in which feminism has confronted questions of its own political legitimacy in the face of conflicting political commitments among women, the group that feminism purports to represent. Drawing an analogy between feminist legal theory and mainstream constitutional theory, Part III explores the various ways that feminists account for dissent among women and within feminism. The Part then explores theories of social construction and incomplete agency as a means of explaining the divergence between feminism's approach to its own countermajoritarian difficulty and the approach of mainstream constitutional theory. Finally, Part IV applies feminist theory developed in other contexts to the problem of constitutional democracy. It argues for a specifically feminist conception of freedom and democratic citizenship premised on incomplete agency, and discusses their implications for the balance between popular sovereignty and fundamental rights.

I. DEMOCRACY, INDIVIDUAL WILL, AND THE STATE

Constitutionalism — the pre-commitment to certain core principles or rights in a state otherwise governed by popular sovereignty — is essentially antidemocratic in its impulse. The very purpose of a constitution is to remove certain possibilities from the ordinary range of democratic governance, tying the hands of the People.[16] Enforcement of constitutional principles by an unelected judiciary exacerbates the tension between constitutionalism and democracy.[17] This tension has been endlessly theorized and its parameters carefully explored within

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[16] Stephen Holmes explains:

> [There is a] quarrel . . . between democrats who find constitutions a nuisance and constitutionalists who perceive democracy as a threat. Some theorists worry that democracy will be paralyzed by constitutional straitjacketing. Others are apprehensive that the constitutional dyke will be breached by a democratic flood. Despite their differences, both sides agree that there exists a deep, almost irreconcilable tension between constitutionalism and democracy. Indeed, they come close to suggesting that "constitutional democracy" is a marriage of opposites, an oxymoron.

Holmes, *supra* note 2, at 197.

[17] However, to the extent that the constitutional text operates to constrain legislatures, causing them at times to ignore the dictates of the popular sovereign in favor of the constitution, the countermajoritarian difficulty does not depend upon the enforcement of a constitution by an unelected judiciary. *See* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 900 (1990).

the legal academy for decades.[18] Defining and limiting the circumstances under which judicial usurpation of popular sovereignty is justified has been a central concern of the Supreme Court and constitutional lawyers since *Marbury v. Madison*[19] and shows no sign of abating. Just last Term in *VMI*, in which the Court struck down the male-only admissions policy of the Virginia Military Institute (VMI), Justice Scalia in dissent expressed indignation over what he saw as an example of such usurpation of the democratically-expressed will of the People.[20] Thus, the debate continues and, perhaps appropriately, may never reach definitive resolution.

The purpose of this Article is not to enter this debate on its own terms but rather to expose the way in which it has limited legal thinking about citizenship and democracy.[21] This Part sketches, in a necessarily brief and stylized manner, the tension between popular sovereignty and constitutional protection of fundamental rights. It then elaborates a conception of citizenship — of citizens as fully self-determining — that seems to underlie the mainstream debate. This Part concludes with a discussion of the opinions of Justice Scalia and Justice Ginsburg in *VMI*. It argues that, despite reaching opposite conclusions regarding the constitutionality of VMI's male-only admissions policy, both opinions reflect liberal assumptions about citizenship and individual capacity. Consequently, neither opinion offers an adequate account of the connection between VMI's mission and Virginia's failure to guarantee its women citizens equal protection of the laws.

A. *Agency and Constitutional Theory*

In its classic formulation, the problem of democratic constitutionalism is to balance the threat of usurpation of popular sovereignty (itself an aspect of individual freedom) against the need to safeguard the individual from majoritarian tyranny.[22] Invoking this tension, Professor

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[18] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–33, 128–33, 199–207, 233–43 (2d ed. 1962); HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 78–83 (1943); Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 97 (1980).

[19] 5 U.S. (1 Cranch) 137, 176–80 (1803).

[20] *See VMI*, 116 S. Ct. at 2291–92 (Scalia, J., dissenting); *see also* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting) (criticizing the Court for "imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil").

[21] This Article often uses the terms "popular sovereignty" and "democracy" interchangeably. It should be acknowledged, however, that they are not necessarily the same; popular sovereignty can be understood as one account of democratic governance. Thus, this Article uses the term "democracy" in the narrower sense of majoritarian rule.

[22] *See, e.g.*, BICKEL, *supra* note 18, at 16–19; *see also* William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166, 1170–72 (1972) (offering an account of early nineteenth-century conceptions of judicial review as a majoritarian constraint on elected representatives).

Frank Michelman describes American constitutionalism as "rest[ing] on two premises regarding political freedom: first, that the American people are politically free insomuch as they are governed by themselves collectively, and, second, that the American people are politically free insomuch as they are governed by laws and not men."[23] Much of constitutional theory has endeavored to work out the tension between these two premises. In short, the debate stems from a particular commitment to both democracy and constitutionalism and from the resulting challenge of reconciling countermajoritarian judicial decisionmaking with that normative commitment.[24]

Constitutional constraints on popular sovereignty create varying degrees of angst for constitutional theorists, depending upon the role they assign to that sovereignty in establishing the legitimacy of governmental action. For some, the constitution's own legitimacy derives from its status as the product of a democratic process.[25] For others, the legitimacy of majoritarian rule depends upon constitutional limits protecting individuals from the reach of the democratic process.[26] Those who root the legitimacy of the constitutional order in popular sovereignty — the democrats — worry intensely about the threat posed by constraints on popular will, particularly when an unelected judiciary enforces those constraints. Yet, even the most ardent demo-

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[23] Michelman, *supra* note 2, at 1499–1500 (citations omitted).

[24] Robert Bork explains:

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principal is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. . . . The freedom of the majority to govern and the freedom of the individual not to be governed remain forever in tension.

ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990).

[25] Examples of such theorists range from Henry Monaghan, Robert Bork, and Justice Scalia, who trace authority to the framers, to Akhil Amar, emphasizing the overriding importance of political majorities, to Ely, Michelman, and Cass Sunstein, each of whom posits an increasingly "thick" view of the preconditions necessary for legitimate democratic governance, but who nevertheless premise constitutional authority on the will of majorities. *See* BORK, *supra* note 24, at 143–46; ELY, *supra* note 1, at 73–104; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 123–61 (1993); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461–75 (1994); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24–27 (1986); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375–76, 395 (1981); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56 (1989); *see also* Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293, 298–300 (1996) (characterizing the tension between democrats and rights-foundationalists as reflecting an irreducible tension in our constitutional structure).

[26] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 190–92 (1986); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 19–20 (1995); Sager, *supra* note 17, at 959–61.

crat is unwilling to relinquish constitutional constraints altogether,[27] for the security of certain rights (those foundational to democratic participation) is necessary to the proper functioning of democracy.[28]

Rights-oriented theorists, on the other hand, view the constraints on popular sovereignty as securing, rather than undermining, the legitimacy of state power. For such theorists, the preservation of fundamental liberties animates and legitimates our constitutional order. However, even for rights-based theorists, constitutional constraints are not unproblematic.[29] Because meaningful political participation is itself an important component of individual liberty,[30] judicial override of majoritarian will can be understood as compromising the individual liberty of those engaged in collective self-governance. In certain contexts, then, judicial review is simply the lesser of two evils.

Despite these different orientations, both rights-based and democracy-based theorists rely, at least implicitly, on the political efficacy of individuals as citizens. This political efficacy, in turn, depends upon the individual's ability to define her preferences free from politically relevant constraints. This assumption of agency — of citizens' freedom and ability to define their own ends — is therefore essential to all mainstream constitutional theory.[31] For rights foundationalists, the self-determining individual stands at the core of liberal commitments to neutrality. The constitutional framework preserves his autonomy against the will of the majority, and his freedom to act on his own vision of the good defines liberal constitutionalism's central value. For democrats, the capacity of individuals to reflect on their own interests and on the public good, and then to act in concert to govern them-

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[27] Indeed, none is willing to relinquish judicial enforcement of those constraints. *See* Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1924 (1991) (describing the suggestion that "[j]udicial review is undemocratic" as "unthinkable" (internal quotation marks in first quotation omitted)). *But see* Becker, *supra* note 3, at 986–1018, 1047–50 (arguing against binding judicial review for gender-based classifications). For further discussion of Becker's position, see *infra* p. 1680.

[28] Among those listed above in note 25, Michelman and Sunstein find a very broad range of rights foundational to well-functioning democracy. *See* SUNSTEIN, *supra* note 25, at 133–45, 162–94; Michelman, *supra* note 25, at 17–55.

[29] The near universal condemnation of the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), demonstrates this point. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (characterizing *Lochner* as a "spectre" that "has loomed over most important constitutional decisions").

[30] *See, e.g.*, James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 253, 288–97 (1993) (discussing the importance of both deliberative democracy and deliberative autonomy as components of liberty in our constitutional structure).

[31] The use of the term *agency*, instead of the more common *autonomy*, is intended to denote not simply freedom from external constraints, but an internal capacity to develop and act on conceptions of oneself that are not defined by oppressive notions of gender. Moreover, *autonomy*, as specifically used in liberal theory and in constitutional theory influenced by liberalism, may carry meanings not intended here. *See, e.g.*, Fleming, *supra* note 26, at 36–39 (deriving a right to "deliberative autonomy" defined primarily as independence from state-imposed constraints).

selves, provides the foundation for legitimate state action. The political participation of free and equal citizens signifies continuing consent to the power of majorities — consent upon which state power depends.[32] Thus, the role of individual agency is different for democrats than for rights-foundationalists but is no less essential; it is conceived as a component of the democratic process rather than as a constraint on that process.

Despite the centrality of agency to conceptions of citizenship in constitutional theory, the conventional framework for analysis tends to underestimate or ignore two types of power that undermine that agency. First, by focusing on state action, mainstream constitutional analysis places too little emphasis on inequalities created by private power and their impact on democratic governance.[33] Second, this analysis largely fails to take seriously the claim that individuals are socially constructed. That is, social conditions not only limit the ability of individuals to act upon their own vision of the good but also define the very content of that vision.[34]

This inattention to social construction does not mean that constitutional theorists are naive in their understanding of power or in their theoretical conceptions of the self. On the contrary, most mainstream theorists acknowledge the significance of social inequality beyond that created by state action.[35] Many such theorists also acknowledge that individuals are socially situated.[36] Nevertheless, the domination of the

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[32] The fiction of consent permits the reconciliation of freedom and constraint in a democracy. As Benjamin Barber explains, "[b]y consenting to the substantive rules to which he will subordinate his will, the liberal individual obeys without compromising his freedom." Benjamin R. Barber, *Liberal Democracy and the Costs of Consent*, *in* LIBERALISM AND THE MORAL LIFE 57 (Nancy L. Rosenblum ed., 1989). *But see* CAROLE PATEMAN, THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 71, 71–72 (1989) (calling into question the validity of consent theory under conditions of inequality).

[33] For example, many view arguments for a right to economic security and a minimum level of education as unsupportable within our existing constitutional scheme. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36 (1996) (stating that, although economic justice might require significant redistribution, the United States Constitution does not). Theorists who consider such rights implicit in the Constitution often deem them unenforceable by courts. *See, e.g.*, SUNSTEIN, *supra* note 25, at 138–39 (citing freedom from desperate conditions as constitutionally required but not judicially enforceable).

[34] Nancy Hirschmann offers this definition of social construction:

> [Social construction is] the idea that human beings and their world are in no sense given or natural but the product of historical configurations or relationships. The desires and preferences we have, our beliefs and values, our way of defining the world are all shaped by the particular constellation of personal and institutional social relationships that constitute our individual and collective histories.

Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 51 (1996).

[35] *See, e.g.*, DWORKIN, *supra* note 33, at 36 (noting that economic justice would require substantial redistribution); SUNSTEIN, *supra* note 25, at 138 (acknowledging the importance of freedom from desperate conditions).

[36] Michelman and Sunstein offer the most subtle arguments with respect to socially defined constraints. Michelman acknowledges the degree to which individuals are socially situated and defined by community. Nevertheless, he does not generally explore the intersection of that situat-

mainstream debate by the democratic will/fundamental rights framework has tended to relegate these considerations to the background. Thus, among democrats, even those theorists who have taken the broadest view of the preconditions for political participation have largely limited their attention to external constraints on meaningful political participation. This reluctance to engage questions of internal constraints is understandable. Questioning the individual's formation of preferences, rather than simply her ability to effectuate them politically, undermines a commitment to popular sovereignty as the primary legitimating principle of government action. Under such analysis, political outcomes can no longer be justified simply by collective choice in their favor, but must be measured against some conception of appropriate substantive constraints on that choice.

Although incorporating internal constraints renders popular sovereignty problematic, it does not justify a shift to a rights-based analysis. Rights foundationalists have paid even less attention to internal constraints than have democrats. Instead, they often define the formation of individual preferences — the individual's own conception of the good — as the core of autonomy and privacy that must be safeguarded.[37] The very logic of rights-based theories inspired by liberalism seems to preclude — or render irrelevant — a more complex conception of the self.

In sum, most mainstream constitutional theory simply posits a "clear line between inner and outer, self and other, subject and object: desires come from within, restraints, from without; desires are formed by subjects, by selves, they are thwarted by objects, by others."[38] This inattention to internal constraints on identity and preference formation permits democrats to justify state action as the legitimate expression of popular will. It allows rights foundationalists to justify limitations on the reach of the state as a means of defending the domain of the self. Nevertheless, whether expressed as the confidence of democrats in the political process or the focus of rights foundationalists on the threat of state power, this assumption of individual agency oversimplifies the relationships between citizenship and democracy by ignoring the interdependence of identity and public power.

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edness and systemic power differences. Moreover, his reconciliation of freedom and constraint through conversation presupposes a significant degree of agency. *See* Michelman, *supra* note 25, at 29–33. Sunstein confronts more directly the limitations imposed by the internalization of unjust norms and acknowledges that "[w]hen there is inadequate information or opportunities, decisions and even preferences should be described as unfree or nonautonomous." SUNSTEIN, *supra* note 25, at 176.

[37] *See, e.g.*, Fleming, *supra* note 30, at 288–89 (developing a theory of constitutional interpretation based on the capacity of individuals to deliberate on their conceptions of the good).

[38] Hirschmann, *supra* note 34, at 49.

B. *Agency, Citizenship, and Equal Protection: An Example*

The Supreme Court's decision in *VMI* illustrates the connections among constitutionalism, democracy, and mainstream assumptions about identity. Although the case generated opinions exemplifying the different poles of the mainstream debate over democracy and the scope of fundamental rights, both the majority opinion and the dissent reflect a shared assumption about individual agency. Consequently, neither Justice Ginsburg's nor Justice Scalia's opinion offered a searching analysis of the social meaning of VMI or the appropriate role of the state in shaping norms of equality. Eschewing such analysis in favor of more familiar answers from within the logic of the democracy/fundamental rights debate, both Justice Ginsburg and Justice Scalia disserve the principles of equality and participation, albeit in different ways.

Justice Scalia, dissenting in the case, defended the power of the people of Virginia to maintain a publicly-supported institution designed to educate men as "citizen-soldiers."[39] He accused the Court of inscribing its own values in a wholly undemocratic fashion and ignoring the significance of the "decision of the people of Virginia to maintain such an institution."[40] Taking the position of a strong democrat,[41] Justice Scalia argued that "[t]he virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly."[42] He noted that "[t]he people may decide to change [a] tradition . . . through democratic processes; but the assertion that [the] tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law."[43] Justice Scalia also made clear his confidence in the ability of women to exercise power through that democratic process. He explained that it is difficult "to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they

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[39] *See* United States v. Virginia (VMI), 116 S. Ct. 2264, 2294 (1996) (Scalia, J., dissenting).

[40] *Id.* at 2292. A majority of Virginians seem to disagree with Justice Scalia on the institutional question. *See Virginians Favor Settling VMI Case in Court, Not in General Assembly*, U.S. NEWSWIRE, Jan. 15, 1991, *available in* LEXIS, Nexis Library, US File (reporting that a majority of state residents polled believed that the controversy over the school's admissions policy should be settled in the federal courts, not the state legislature).

[41] Of course, Justice Scalia is not fully committed to this position. In other cases, he has been far less willing to defer to legislative judgment in the equal protection context. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring in part and concurring in the judgment) (expressing the view that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction" no matter what degree of political support such a measure might enjoy).

[42] *VMI*, 116 S. Ct. at 2291–92 (Scalia, J., dissenting). Justice Scalia warned that "[t]hat system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution." *Id.* at 2292.

[43] *Id.* at 2293.

constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns."[44]

By invoking women's political authority as a justification for VMI's all-male status, Justice Scalia's opinion reflects a conception of public power and popular sovereignty that defines individual preferences as exogenous. He simply assumes that, given preexisting preferences, women (like any other interest group within the polity) are free to exercise their power unproblematically through the democratic process. Yet, the preferences of the citizens of Virginia are not independent of institutions such as VMI, which define as their mission the education of men as citizen-soldiers.[45] The existing power structure contributes to the entrenchment of particular preferences, which in turn influence the functioning of the democratic process. In Justice Scalia's analysis, however, that influence remains unexamined.

Justice Scalia's unwillingness to inquire into the conditions of women's political participation may stem from a belief that such an inquiry, although relevant, is unnecessary because women do enjoy equality.[46] An alternative explanation is that he views any inquiry into the interdependence of agency, power, and democratic functioning as simply beyond the scope of constitutional analysis. Whatever his underlying assumption, Justice Scalia's analysis ignores the significance of gender inequality to democracy and therefore underprotects women as citizens.[47]

Justice Ginsburg's majority opinion makes an assumption similar to Justice Scalia's about individual preferences and agency, but the problems arising from that assumption in her analysis are more subtle. Justice Ginsburg rejected the state's argument that the exclusion of women from VMI was necessary to accomplish its stated goal of educational diversity. First, she cited the lack of evidence in the record that educational diversity was in fact the purpose in creating and maintaining VMI,[48] and emphasized that the state could not simply rely on a post hoc rationale for discrimination.[49] Second, she suggested that, to the extent that the "adversative" training of citizen-

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[44] *Id.* at 2296 (second alteration in original). This claim echoes Justice Scalia's argument concerning the political power of gays and lesbians in *Romer v. Evans*, 116 S. Ct. 1620 (1996), also decided this Term. *See id.* at 1634 (Scalia, J., dissenting) (insisting that, because gays and lesbians "care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide").

[45] *See VMI*, 116 S. Ct. at 2269.

[46] Justice Scalia's list of women's successes in the legislative arena suggests that this is his view. *See id.* at 2296 (Scalia, J., dissenting).

[47] *See infra* p. 1681.

[48] *See VMI*, 116 S. Ct. at 2277–79.

[49] *See id.* at 2277. In his concurring opinion, Chief Justice Rehnquist also rejected the post hoc rationale. *See id.* at 2289–90 (Rehnquist, C.J., concurring).

soldiers was the true *raison d'etre* of the school, that opportunity could not be restricted to men based on the stereotypical assumption that women are generally uninterested in — or ill-suited to — such training.[50] The Equal Protection Clause was designed to restrict precisely this type of overbroad stereotype.[51] Lacking an "exceedingly persuasive" reason for the male-only policy, the state had violated the plaintiffs' right to equal protection.[52]

Once this violation was established, VMI had two options: it could choose to admit women, or it could remain all-male but become a privately-supported institution.[53] Although Justice Ginsburg contemplated only the former, both of these options are consistent with the requirement of gender neutrality in this context.[54] Nevertheless, each of the options illustrates a shortcoming of the majority's analysis. The private-funding option poses a difficulty that is straightforward. That VMI could avoid constitutional problems by remaining exactly the same institution as long as it received no public funding perfectly illustrates a standard critique of our constitutional structure: by emphasizing state power, it leaves private power undisturbed.[55] The other option — admitting women to VMI — presents a difficulty that may be fully felt only in future cases. By imposing a strong requirement of state neutrality with respect to gender, the majority's reasoning does not simply treat private power as irrelevant to equal protection but potentially disempowers the state from acting to reallocate that power in a gender-specific way.

To the extent that it is committed to state neutrality, the majority has no clear basis for distinguishing VMI from an educational program that treats men and women differently in order to promote equality. The majority did leave open the possibility that gender-based classifications may be used "to advance full development of the talent and capacities of our Nation's people."[56] Yet, it declined to elaborate the parameters of such uses of gender. For example, it is unclear under the majority's analysis whether New York City's recently established girls' high school for math and science is an uncon-

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[50] *See VMI*, 116 S. Ct. at 2279–80. Justice Ginsburg emphasized that the goal of creating citizen-soldiers "is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men." *Id.* at 2282.

[51] *See id.* at 2280.

[52] *Id.* at 2282.

[53] The private funding option is implicit in the majority's careful limitation of its analysis to state-supported institutions. *See id.* at 2280 (noting that "[s]tate actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'" (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982))).

[54] *See id.* at 2274 (noting that "[p]arties who seek to defend *gender-based government action* must demonstrate an 'exceedingly persuasive justification' for that action" (emphasis added)).

[55] *See infra* Part II.A (discussing feminist critiques of the state action requirement).

[56] *VMI*, 116 S. Ct. at 2276.

stitutional departure from gender neutrality or an innovative public policy advancing the full development of the talents of girls in New York.[57]

Neither the majority opinion nor the dissent in *VMI* adequately confronted the interdependence of public and private power in the regulation of gender. Whereas Justice Scalia ignored the influence of prior state action on the expression of gender-specific preferences in the democratic process, the majority focused solely on the need to limit such state entrenchment of gender norms. In so doing, the majority opinion calls into question the ability of the state to reshape those norms to promote gender equality.

As *VMI* illustrates, the traditional formulation of the central constitutional problem as one of justifying judicially enforced constraints on popular sovereignty fails adequately to capture the power structure of patriarchy. By emphasizing the legitimacy and limitations of state-sponsored power, mainstream constitutional theory turns away from private inequality and powerlessness except at the margins.[58] Although reducing inequality may be deemed a precondition for democracy,[59] the framework of constitutional theory precludes (or at least discourages) an integrated critique of power. In contrast, feminist theorists concerned with constitutional interpretation tend to criticize ways in which public and private power intersect to facilitate women's subordination.[60] Thus, feminists have taken as their political objective the broad goal of creating the conditions for women's equality rather than the narrower one of creating the preconditions for democracy.[61]

II. Feminism and Constitutional Theory

Whereas mainstream constitutional theory rests on a conception of citizenship but lacks a critique of power, feminist legal theory presents a critique of power but lacks an affirmative conception of citizenship. Responding to rights foundationalists, feminists have devoted considerable attention to a substantive critique of the Constitution's catalogue

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[57] The New York program, called the Young Women's Leadership School, is located in District 4 in East Harlem. It is the only public all-girls school in New York City. The school currently serves 55 seventh grade students and will expand to include eighth and ninth grade students next year. *See* Jacques Steinberg, *Just Girls, and That's Fine with Them*, N.Y. TIMES, Feb. 1, 1997, at B1.

[58] *See supra* p. 1665.

[59] *See supra* p. 1665.

[60] *See* MACKINNON, *supra* note 5, at 157–70; WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 114–21.

[61] Feminists may have chosen this objective because "men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life." MACKINNON, *supra* note 5, at 161.

of fundamental rights.[62] Responding to democrats, feminists have argued that, given women's historical exclusion from the public sphere,[63] our constitutional scheme fails on its own terms if its legitimacy depends upon popular will.[64] Notwithstanding the importance of these critiques, feminist legal theorists generally have not taken up the task of formulating an affirmative theory of constitutional legitimacy. Consequently, feminism has not offered a theory that adequately distinguishes VMI's policy from more egalitarian uses of gender classifications or that limits the role of the Court in reviewing such initiatives.

This Part attempts to account for this pattern of feminist scholarship first by describing the categories of questions that *have* concerned feminist constitutional thinkers. These include most generally a criticism of mainstream theorists' emphasis on state action and disregard of private power, and the further development of this critique in connection with the Constitution's equal protection guarantee and its protection of individual liberties. This review of feminist constitutional critiques suggests that feminists may have declined to join the debate over democracy and fundamental rights because the terms of the debate fail to engage many important concerns of women as individuals and as citizens. This Part suggests, however, that the very failure of traditional conceptions of constitutional legitimacy argues in favor of developing a feminist theory of trustworthy democracy. The Part concludes by returning to Justice Scalia's challenge to judicial review in *VMI* and asks whether the Court's invalidation of the school's admissions policy in the face of popular support calls into question *feminist* political legitimacy. In short, it asks whether feminism itself is antidemocratic.

A. *Feminist Constitutional Critiques*

1. Limits on Public but Not Private Power Fail to Protect Women. — In feminist constitutional analysis, integrated theories of power are often formulated as critiques of the public/private dichotomy. Such critiques are probably the best known and most developed aspect of feminist constitutional analysis and serve as a foundation for

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[62] *See, e.g.*, MACKINNON, *supra* note 5, at 184–234 (challenging First Amendment and privacy rights and equal protection doctrine as inadequate to protect women); WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 129–43 (arguing for a broader conception of liberty); Law, *supra* note 9, at 987–1013 (targeting equal protection doctrine).

[63] *See, e.g.*, CAROLE PATEMAN, THE SEXUAL CONTRACT 1–18 (1988) (discussing the limitations on women's public participation and their connection to the social and sexual contract); *see also* Letter from Abigail Adams to John Adams (Mar. 31, 1776), *in* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR 10–11 (Alice S. Rossi ed., 1988) (entreating him to "Remember the Ladies"); Letter from John Adams to Abigail Adams (Apr. 14, 1776), *in* THE FEMINIST PAPERS, *supra*, at 11 (responding that "I cannot but laugh").

[64] *See* PATEMAN, *supra* note 32, at 71–89.

more specific doctrinal analyses.[65] This analysis has usefully challenged the traditional primacy of public power in our constitutional scheme by suggesting that, from the standpoint of the oppressed, the source of power is less important than its distribution. In so doing, however, feminist theorists have often neglected important differences in the exercise and meaning of public and private power and have therefore failed to construct a feminist conception of citizenship. This section explores the strengths and limitations of such feminist constitutional critiques.

In the sometimes arcane language of feminist legal theory, the public/private dichotomy has two distinct but related meanings. "Private" sometimes refers to the sphere of home and family (to which white, educated, middle-class women have often been confined). Under this definition, the counterpart "public" refers to the public sphere of the market and the state.[66] In other contexts, feminist theorists adopt the standard definition of the public/private line, according to which "private" refers to all nonstate action ranging from private employment to home life, and "public" refers to the realm of governmental action.[67]

Both versions of the public/private problem have been important to the development of feminist constitutional analysis. Critiques of the public/private dichotomy centering on the assumption that women's proper place was the private sphere of home and family informed the earliest constitutional litigation concerning women's rights.[68] Feminist lawyers attacked the legitimacy of legislative classifications that excluded women from public activities ranging from lawyering,[69] to bartending,[70] to voting.[71] Their goal was to extend the general guarantee

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[65] *See infra* section II.A.2.

[66] The most important example of the incorporation of this definition in U.S. constitutional law is Justice Bradley's infamous concurrence in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). According to Justice Bradley, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.* at 141 (Bradley, J., concurring). The notion that women were out of place in the public sphere also informed the Court's approach to gender-specific labor legislation, leading it to uphold such legislation while striking down labor legislation protecting all workers. *Compare* Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding a maximum hours limitation for women), *with* Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down a maximum hours limitation for bakers).

[67] Feminist theorists normally use the terms public and private in this sense when criticizing the state action requirement. *See, e.g.*, WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 111, 119–20 (criticizing the state action requirement and emphasizing the contribution of private violence to women's inequality).

[68] *See Bradwell*, 83 U.S. (16 Wall.) at 137–39 (rejecting Myra Bradwell's argument that denying her admission to the Illinois bar violated her rights under the Privileges and Immunities Clause of the Fourteenth Amendment).

[69] *See id.*

[70] *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (rejecting an Equal Protection challenge to a Michigan statute restricting women's employment as bartenders).

[71] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171–73 (1875) (rejecting a Privileges and Immunities Clause challenge to Missouri's gender-based restrictions on voting).

of equality to women who had been hampered by state regulation of their roles. Thus, to the extent that women suffered under official disadvantage in their quest to enter the professions and to work on equal terms with men, the objective of feminist advocacy and constitutional litigation was to open the public sector of the market by eliminating state regulation.[72]

This early and enduring impulse in constitutional litigation reflected a strategy to remove the state from the business of regulating gender roles, particularly in ways that maintained women's subordinate status.[73] By championing a norm of gender neutrality, this strategy also reflected the assumption that state inaction with respect to gender would best ensure women's equality. Although dating back almost a century to Myra Bradwell, this approach found its fullest realization in the legal initiative led by Ruth Bader Ginsburg on behalf of the American Civil Liberties Union in the 1970s.[74] Ginsburg challenged legislative classifications that differentiated between men and women, often choosing as plaintiffs men who were disadvantaged by the classification.[75]

Despite its success, this strategy may have overestimated the value of gender neutrality and underestimated the possibilities for affirmative state intervention on behalf of women.[76] Indeed, its limitations became evident when, despite the gradual elimination of state-sponsored barriers to women's participation in the public sphere, the economic and political subordination of women continued. This persistent inequality in the face of formally equal treatment by the state has led many feminists to conclude that strengthening constitu-

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[72] Of course, this idealization of the feminine and the relegation of women to the sphere of home and family has not affected all women in the same way. Many African-American women, poor women, immigrant women, and others have been relegated not to the home but historically to slavery or to the lowest echelons of the work force. Nevertheless, for all women, the public/private distinction helped to create and maintain gender-based segregation in work — both inside and outside the home.

[73] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (invalidating a requirement for women — but not men — to prove the dependency of their spouses in order to receive fringe benefits in military service); Reed v. Reed, 404 U.S. 71, 75–77 (1971) (invalidating an Idaho probate law that established a mandatory preference for men over women as administrators of estates).

[74] For an interesting discussion of Ruth Bader Ginsburg's strategy in these early cases, see Law, *supra* note 9, at 979–80.

[75] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 208–10 (1976) (finding that an Oklahoma law establishing a higher drinking age for men than for women violated the equal protection rights of the male plaintiff).

[76] Even in hindsight, it is difficult to conclude that the strategy was a mistake. Formal equality was probably the only basis upon which the Supreme Court would have extended heightened scrutiny under the Equal Protection Clause to gender. Nevertheless, this approach was controversial from the start, generating the contentious "special treatment/equal treatment" debate. *Cf.* Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 105 (discussing the debate but arguing that the differences between the positions were more a matter of emphasis than an actual disagreement).

tional limits on state action is simply inadequate to protect women against the forces that most undermine their liberty and equality.

The conception of the public/private line as demarcating the boundary between state and nonstate action is central to this critique. Constitutional constraints on state action enhance women's equality only when subordination is a direct product of such action.[77] Moreover, the Supreme Court has been extremely reluctant to view state responsibility broadly, resisting arguments based on state complicity in private subordination.[78] Thus, manifestations of inequality ranging from the systematic economic disadvantage that women experience due to their disproportionate responsibilities within the family[79] to the persistent threat of gender-based violence in the home and the workplace and on the streets,[80] have not been understood as a product of state action and therefore are not considered appropriate candidates for constitutional adjudication.[81]

2. Limits on State Action Prevent States from Fostering Women's Equality. — Feminists have argued that limiting constitutional constraints to state action leaves women unprotected in important ways.[82] That is, constitutional protections as currently understood are too narrow to secure women's liberty and equality. In addition, feminist theorists have begun to address the possibility that these constitutional constraints may limit state regulation of private sources of inequality

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[77] *See* WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 119–20 (using the example of sexual violence to illustrate that limits on state action improve women's equality only when the action directly subordinates women).

[78] *See, e.g.*, Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989) (holding that a state's failure to protect a child from private violence did not violate his Due Process rights). *But see* Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (holding that judicial enforcement of a racially restrictive covenant constituted state action for the purposes of the Fourteenth Amendment).

[79] *See generally* ARLIE HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT 277–84 (1989) (exploring the implications of an unequal allocation of responsibilities within the home); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 3–6 (1989) (arguing for the inclusion of the family within a broad theory of justice).

[80] *See, e.g.*, MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 8–22 (1989) (discussing the fear of sexual violence that pervades many women's lives); *see also* MACKINNON, *supra* note 5, at 167–79 (discussing the relationship between the pervasive threat of sexual violence and nonconsent as an element of rape); Catharine A. MacKinnon, *A Rally Against Rape*, *in* FEMINISM UNMODIFIED, *supra* note 12, at 81, 81–84 (positing a connection between gender inequality and women's experience of rape); Catharine A. MacKinnon, *Sex and Violence: A Perspective*, *in* FEMINISM UNMODIFIED, *supra* note 12, at 85, 85–92 (integrating rape, sexual harassment, pornography, and battery in a general theory of sexual violence).

[81] Robin West observes: "[T]he Constitution does not prohibit the abuse of private power that interferes with the equality or freedom of subordinated peoples. The Constitution simply does not reach private power, and therefore cannot possibly prohibit its abuse." WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 164.

[82] *See supra* section II.A.1.

and oppression.[83] Viewed in this way, constitutional limits may be too broad to permit women to exercise political power to promote equality.

For example, the Supreme Court has moved increasingly toward an interpretation of equal protection as a guarantee of neutral treatment by the state with respect to race and, to a lesser extent, gender.[84] In other words, the Equal Protection Clause guarantees that the state will treat citizens as individuals rather than as part of race- or gender-defined groups. Women have successfully invoked this interpretation of equal protection as a means of challenging differential treatment by the state.[85] The most recent example is, of course, the Court's decision in *VMI*. Nevertheless, the victory in *VMI* may come back to haunt feminist lawyers. In the context of race, the Supreme Court has interpreted the equal protection requirement strictly even with respect to legislative measures adopted by a majority that benefit rather than harm minority groups.[86] Extending this analysis to gender-based classifications[87] may ultimately hurt women by restricting their exercise of legislative power in gender-specific ways to foster women's equality.[88]

Feminists have also criticized the Constitution's protection of individual liberty as fostering gender inequality when that protection is

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[83] Some familiar examples of such regulation on the federal level include: Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994); the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994); and the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902, 1902–55 (1994). On the state and local level, examples include statutes regulating pornography, *see, e.g.*, Indianapolis, Ind., Code § 16-3 (1984) (creating a cause of action based on trafficking in pornography), and reforms of domestic violence and sexual assault statutes, *see, e.g.*, Minnesota Domestic Abuse Act, MINN. STAT. § 518B.01 (1992) (reforming standards for orders of protection for victims of domestic violence). The Indianapolis antipornography statute was struck down as unconstitutional by the Seventh Circuit in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

[84] As Robin West explains, the "guiding assumption [of this model of formal equality] is that all persons — women, men, blacks, whites, and others — are more or less the same with respect to the traits and issues that affect or should affect political decision making." WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 53.

[85] *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (jury service); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (spousal benefits); Reed v. Reed, 404 U.S. 71, 76 (1971) (executors of estates). *But see* Michael M. v. Superior Court, 450 U.S. 464, 472–73 (1981) (opinion of Rehnquist, J.) (statutory rape); Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (pregnancy benefits).

[86] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494–95 (1989) (Opinion of O'Connor, J.).

[87] *See* United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (requiring an "exceedingly persuasive" justification for sex-based classifications).

[88] This has not yet happened, and the Court's commitment to something less than strict scrutiny for gender-based classifications suggests that affirmative action based on gender may survive *Adarand*. However, it is difficult to imagine even Justice Scalia (who suggested in *VMI* that if the level of scrutiny of gender classifications is to change, it should be lowered rather than raised, *see id.* at 2295–96 (Scalia, J., dissenting)) supporting affirmative action for women but not racial minorities.

confined to state action. As Robin West argues, "[A]t least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, [the Constitution] also aggressively *protects* the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination."[89] West and others focus on the protection of familial privacy as potentially undermining women's liberty.[90] For women, recognition of a constitutional right of privacy has meant a qualified protection of decisional autonomy in the area of reproduction.[91] West argues, however, that "if patriarchal control of women's choices and patriarchal domination of women's inner and public lives occur in the very private realm of home life[,] then the Constitution, above all else, protects the very system of power and control that constrains us."[92]

Thus, beyond criticizing the accepted catalogue of negative liberties as inadequate to protect women's liberty or ensure our equality, feminists have argued that the particular set of rights may actually reinforce women's inequality. Once again, the system of constitutional guarantees of negative liberties not only fails as a sword in the hands of women, it operates as a shield to patriarchy.

B. *Feminist Alternatives*

1. Dominance Analysis. — Existing interpretations of equal protection and individual liberties, coupled with the state action limitation, offer inadequate constitutional protection for women and may frustrate legislative initiatives targeting private inequality. The challenge for feminist constitutional theorists, therefore, is to offer an alternative interpretative theory that protects women's constitutional rights while permitting constructive legislative uses of gender-based categories. Dominance analysis provides the most promising basis for such a theory.[93]

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89 WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 165.

90 *See id.* at 114–21; *see also* MACKINNON, supra note 5, at 184–94 (offering a critique of the right of privacy as a foundation for abortion rights).

91 *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846, 879–901 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), but holding that the medical emergency definition, informed consent requirements, 24-hour waiting period, parental consent provision, and reporting requirement of the statute at issue were valid).

92 WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 119. *But see* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 207–20 (1995) (noting that courts have not invoked the constitutional right of privacy to defend marital rape exemptions or to shield domestic violence from state intervention).

93 Catharine MacKinnon offered the earliest and fullest articulation of dominance analysis. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1–7 (1979); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED, *supra* note 12, at 32, 32–45; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281–1328 (1991) [hereinafter MacKinnon, *Reflections*]. Others have contributed significantly to the development of the approach. *See, e.g.*, Mary E. Becker,

Dominance analysis first emerged as a response to the "equal treatment/special treatment" debate over pregnancy and parental leave.[94] The Supreme Court's interpretation of equal protection as requiring the state to treat the same those similarly situated had created a dilemma for feminist advocates. Women could argue for the same treatment as men, on the theory that gender differences do not matter.[95] However, doing so has sometimes meant having gender-specific needs ignored.[96] Alternatively, women could argue for special treatment, taking into account gender differences.[97] But, under this analysis, such differences could also justify treatment disadvantaging women.[98]

Offering a way out of this dilemma, dominance analysis examines the role of law in reinforcing gender inequality.[99] In the context of judicial review, dominance analysis asks whether the challenged legislative category contributes to women's subordination.[100] If it does, it should be struck down under an antisubordination interpretation of equal protection. If, however, the legislative category promotes gender equality, it should be upheld as a legitimate use of state power.[101] Appealing in its simplicity, dominance analysis also fits well in the Supreme Court's scheme of intermediate scrutiny for gender-based

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Prince Charming: Abstract Equality, 1987 SUP. CT. REV. 201, 202–12 (discussing difference, dominance, and the problem of pregnancy); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1279–1337 (1987) (discussing dominance and comparability of sex differences).

[94] *Compare* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352–70 (1984–1985) (arguing that pregnancy should be understood in a gender-neutral, functional way), *with* MacKinnon, *Reflections*, *supra* note 93, at 1308–09 (arguing for dominance rather than neutrality as a criterion for evaluating gender-based classifications).

[95] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 17 (1975) (striking down a statute establishing a lower age of majority for females than for males); Reed v. Reed, 404 U.S. 71, 77 (1971) (invalidating a mandatory preference for men over women as administrators of estates); Williams, *supra* note 94, at 352–54.

[96] *See* Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974) (rejecting a challenge to California's exclusion of pregnancy-related medical expenses from its employee's insurance plan); *see also* Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 536–64 (1983) (criticizing *Geduldig* and arguing the necessity of special accommodations for pregnancy to ensure workplace equality).

[97] *See* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 22–28 (1985) (arguing for treating sex differences as significant, but limiting that significance to discrete episodes of pregnancy); Krieger & Cooney, *supra* note 96, at 536–64.

[98] *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (holding that sex differences justify different rules for consenting to sexual intercourse for young men and women); *Geduldig*, 417 U.S. at 497 (upholding a state insurance scheme that excluded pregnancy from covered conditions).

[99] *See, e.g.*, MacKinnon, *Reflections*, *supra* note 93, at 1298–1300.

[100] *See id.* at 1318–19 (discussing the application of dominance analysis to laws depriving women of reproductive control).

[101] *See, e.g.*, *id.* at 1307–08 (using dominance analysis to defend the constitutionality of laws protecting the rights of victims of sexual assault).

classifications.[102] If the Court assumes that some gender-based classifications are legitimate while others are not, dominance analysis offers a criterion for drawing the line.[103]

Although dominance analysis begins to address the basic deficiencies of mainstream equal protection doctrine, the approach suffers from two distinct but related shortcomings. First, determining whether a legislative classification contributes to or undermines women's equality has become increasingly difficult. The issue raised in the *VMI* case itself — the legitimacy of state-supported single-sex schools — is a good example of the difficulty. Although most feminists would probably agree that the particular characteristics and history of the Virginia Military Institute suggest that its gender-based admissions policy undermined women's equality, they would probably disagree about other all-male institutions.[104] Feminists also disagree about the efficacy and legitimacy of state-sponsored all-female schools.[105] This disagreement among feminists is part of a broader de-

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[102] Although the Supreme Court has never explicitly adopted dominance analysis, Justice Ginsburg suggests in *VMI* that an antisubordination rationale might guide the application of heightened scrutiny. *See* United States v. Virginia, 116 S. Ct. 2264, 2276 (1996).

[103] The analysis has also been extended beyond the equal protection context to modify the interpretation of individual liberties. Some of MacKinnon's arguments about the limitations of privacy doctrine can be interpreted as applications of dominance analysis to the scope of personal privacy. *See, e.g.*, MACKINNON, *supra* note 5, at 184–94 (discussing abortion as a right of privacy); *see also* WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 165 (discussing the right of privacy in the home). For example, in the context of First Amendment doctrine, feminist theorists and critical race scholars have used a form of dominance analysis to defend restrictions on narrow categories of speech based on harm to subordinated groups. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 71–110 (1993) (discussing the equality implications of free speech doctrine); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357–60 (1989) (arguing for narrow restrictions on racist speech based on an anti-subordination rationale).

[104] Some feminists support the creation of all-male public schools designed to address the educational problems of inner-city students. For example, feminist law professor Susan Estrich filed an amicus brief in support of Virginia in *VMI* to argue for the importance of single-sex public education for both girls and boys. *See* Brief of Kenneth E. Clark et al. as Amici Curiae in Support of Respondents at 9–13, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941) (describing the advantages of single-sex education and supporting local experimentation with such programs). *See also* Michael McGough, *Romeboys: The Case for Single-Sex Schools*, NEW REPUBLIC, Dec. 16, 1991, at 13, 16 (citing feminist work on adolescent development to support single-sex education for both boys and girls).

[105] The amicus briefs in *VMI* provide a good illustration of this divide. A number of the briefs are signed by feminist scholars or cite feminist scholarship to support or to criticize single-sex education. *Compare* Brief of Kenneth E. Clark et al. as Amici Curiae in Support of Respondents at 9–13, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941) (supporting single-sex public education for both girls and boys), *with* Brief of The American Association of University Professors et al. as Amici Curiae in Support of Petitioner at 22–28, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941) (disputing the evidence supporting single-sex education, especially for boys and men).

bate within society about the wisdom and effectiveness of gender-specific programs in schools and elsewhere.[106]

Second, dominance analysis as applied to gender-based categories is insufficiently rooted in democratic theory. That is, under dominance analysis, the often difficult task of assessing the impact and meaning of gender-based classifications is assigned to the judiciary rather than to the legislature. When dominance analysis is employed to protect a numerical minority, such as an ethnic or racial group, good reasons exist for empowering the judiciary to review legislation for abuses by the majority. Even if the members of such a group vote in a cohesive way, they will not prevail in the democratic process when their interests conflict with the majority's.[107] In contrast, women are in a position to exercise considerable power through the majoritarian process.[108] As Justice Scalia observed in *VMI*, women are not a "'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon.'"[109] Thus, the argument for judicial review of gender-based legislation is more attenuated than for judicial review of legislation concerning other subordinated groups. If the impact of gender-based legislation is contested and difficult to resolve, perhaps the gender-balanced electorate rather than an overwhelmingly male and politically unaccountable judiciary should determine the legitimacy of such legislation. To conclude that the judiciary rather than the electorate should define the limits of the use of gender-based classifications requires two assumptions: that the oppression of women as citizens prevents them from protecting their interests in the democratic process, and that judges will protect those interests more effectively. Although both assumptions may be valid, they deserve examination.

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106 Applying dominance analysis outside the context of equal protection doctrine has also generated controversy. For example, the issue whether the regulation of pornography fosters or undermines women's expression has divided feminists for almost two decades. *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304–07 (1995) (describing the sex wars of the 1980s and comparing them to current divisions within feminism concerning women's sexuality); Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY xviii–xx (Carole S. Vance ed., 1992) (describing the rise of the antipornography movement and the divisions that it created within feminism). Thus, regarding increasingly subtle and controverted gender-based effects, dominance analysis does not yield a clear result.

107 The Supreme Court observed in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 n.4.

108 The claim that women may exercise legislative power in a majoritarian process does not depend on the assumption that women will always vote in unison. If they do act in a concerted way, however, they will not systematically be outvoted.

109 United States v. Virginia, 116 S. Ct. 2264, 2296 (1996) (Scalia, J., dissenting) (quoting *Carolene Products*, 304 U.S. at 153 n.4.

2. *The Appeal and Risks of Democracy.* — Even if courts were to embrace dominance analysis as a framework to interpret the Constitution,[110] given the disagreement over its application, feminist constitutional theorists would have to consider whether privileging courts over legislatures is warranted. Mary Becker argues that the case for judicial review under a flawed Constitution that is interpreted by an overwhelmingly male judiciary is very weak in a state where women comprise a majority of the electorate.[111] She invites feminists to consider whether women might be better off under a system of nonbinding judicial review (or even no judicial review) that assigns the interpretation and protection of constitutional guarantees to executives and legislatures, which are more directly accountable to women voters.[112] Becker also argues that judicial review tends to quell experimentation in legislative solutions to social problems.[113] Such experimentation is particularly important in areas where society lacks consensus, including a substantive vision of gender equality.[114] Robin West also asks whether "a more restrained Court, and a less vigorously enforced Constitution, [would] be an improvement over our present constitutional institutions, from an explicitly progressive political viewpoint."[115] This question is a legitimate one in a polity in which women potentially wield considerable power.[116] Perhaps women would be better off struggling in the fray of the majoritarian process than relying on the enlightenment of the countermajoritarian Court.

Nevertheless, despite the appeal of policy experimentation and the potential for women's exercise of their political power, this approach

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[110] Notwithstanding Justice Ginsburg's suggestion in *VMI* that gender-based categories might be constitutional if based on inherent differences or used for remedial or benign purposes, *see VMI*, 116 S. Ct. at 2279–84, the Supreme Court has moved steadily away from dominance or antisubordination analysis in the context of race. *Compare* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564–65 (1990) (holding that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible"), *with* Adarand Constructors, Inc. v. Pena, 115 S. Ct 2097, 2113 (1995) (holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny").

[111] *See* Becker, *supra* note 3, at 980–81.

[112] Arguing against binding judicial review, Becker raises several different problems with reliance on judicial power. First, she cites the possibility of judicial bias, noting that "[f]ederal judges are members of a small elite professional class and are overwhelmingly white men." *Id.* at 987. Consequently, "[t]hey are likely to decide open cases in light of their own experiences, perceptions, needs, and interests and those of other members of their class." *Id.*

[113] *See id.* at 990–91. Becker quotes Justice Brandeis's warning that "in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles." *Id.* at 990 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1931) (Brandeis, J., dissenting)). She notes that "[w]hen the Court closes off certain approaches as unconstitutional, it may make exceedingly difficult or preclude the development of appropriate solutions." *Id.* at 991.

[114] *See id.*

[115] WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 290.

[116] This question is particularly salient in light of the Court's narrow interpretation of equal protection and its limitations on the permissible scope of gender- and race-specific classifications. *See supra* section II.A.2.

has risks. Although the threat of judicial bias is indisputable,[117] relying uncritically on women's access to political power is problematic. Indeed, that Justice Scalia advocates such reliance in his *VMI* dissent should give pause to feminist democrats.[118] Proclaiming the virtues of democratic process, Justice Scalia excoriated the Court for reading into the Constitution the biases of our age and thereby limiting the scope of democratic evolution of social norms.[119] He championed the workings of democracy and noted that women, in fact, are in a position to exercise considerable power in the process.[120] Thus, he argued that the continuing state support of VMI must be presumed to reflect that power. To suggest otherwise, he asserted, would constitute paternalism.[121] With this logic, Justice Scalia claimed VMI for the women of Virginia even while denying them the right to enter. He made the protection of that institution a matter of respecting women's rights as citizens.

Why are many feminists less sanguine than Justice Scalia about the promise that democracy holds for women? The feminist critiques of fundamental rights and equal protection suggest one answer. If the Constitution, as it is currently construed, is inadequate to secure women's liberty and equality, then the political process cannot be assumed to offer women equal opportunities for exercising power. More specifically, if existing constitutional rights fall well short of addressing the most important constraints on women's autonomy and equality,[122] then women incompletely protected by those liberties cannot be considered fully constituted citizens within our democracy. Relatively less free than men under the same catalogue of individual rights, women are therefore less capable of protecting their interests through the democratic process. In short, women are failed *both* by fundamental rights *and* by democracy.[123]

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[117] *See, e.g.*, Shirley S. Abrahamson, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209, 1209–21 (1993) (discussing the discovery of gender bias in the courts, gender-biased discourse, and the effects of feminist values on some appellate judges); Christine M. Durham, *Gender Equality in the Courts: Women's Work Is Never Done*, 57 FORDHAM L. REV. 981, 981–83 (1989) (same); Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2188–93 (1993) (presenting a statistical comparison of the gender makeup of different courts).

[118] *See* United States v. Virginia, 116 S. Ct. 2264, 2292 (1996) (Scalia, J., dissenting).

[119] *See id.* at 2291–92.

[120] *See id.* at 2296 (citing "a long list of legislation" disproving the proposition that women lack political power or require special protection in the legislative process).

[121] *See id.*

[122] *See supra* pp. 1671–74.

[123] This explanation serves as a partial response to process perfectors who insist that women, unlike discrete and insular minorities, do not require special protection against encroachment by majoritarian decisionmaking. For the most famous of such accounts, see ELY, *supra* note 1, at 164–70.

Framing the dilemma as a choice between reliance on courts to realize a particular vision of equality and reliance on the democratic process to protect women's interests returns feminists to a version of the sameness/difference debate that dominance theorists intended to resolve.[124] On one hand, feminists can assume that equality already exists within the democratic process and concentrate on mobilizing women's power in that arena. Yet to do so contradicts a sense that women do not enjoy equal power. On the other hand, feminists can assume that women suffer systematic disadvantage in the democratic process and rely on judicial review to constrain the power of that process. Yet to do so risks empowering courts to enforce a vision of equality that is at odds with feminist political commitments. In order to avoid the consequences of either extreme, feminist legal theorists must develop a theory that both enables women's meaningful democratic participation and preserves the scope of democratic action.

3. Toward a Feminist Theory of Trustworthy Democracy. — Feminists have not understood the dilemma of constitutional democracy — to be ruled by ourselves collectively and to be ruled by law[125] — as a reflection of competing formulations of women's freedom. For women, being ruled by law (constitutional commitment enforced through judicial review) has often meant being ruled by men, both privately and publicly.[126] Although the alternative, to be ruled by ourselves collectively, holds the promise of power for women, it has been realized only inconsistently. In short, the tension between fundamental rights and democratic self-governance changes when viewed through the lens of gender inequality. Consequently, the tension between democracy and constitutionalism reflected in the traditional formulation of the countermajoritarian difficulty does not offer a particularly useful framework for analyzing the implications for women of the allocation of power in the liberal state.

Notwithstanding these limitations of mainstream constitutional theory, feminists should not dismiss the influence of this discourse in shaping our basic constitutional framework. As the preceding overview of feminist constitutional analysis suggests, arguments for judicial protection of constitutional rights have met with limited success when measured against the goal of women's equality, broadly defined. Moreover, if the Supreme Court moves away from an antisubordination analysis of equal protection and toward a norm of gender-blindness, judicial review may interfere with women's efforts to protect

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[124] *See supra* section II.B.1.

[125] *See* Michelman, *supra* note 2, at 1500.

[126] As Catharine MacKinnon observes: "The Constitution . . . with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general, reflect that; and that government need and should right only what government has previously wronged." MACKINNON, *supra* note 5, at 163.

themselves.[127] For these reasons, feminists may increasingly come to rely on arguments from popular sovereignty to assess and to defend women's exercise of power in the democratic process. Feminists must therefore consider more systematically the preconditions for trustworthy democracy in order to ensure that majoritarian institutions adequately reflect women's status as citizens. In short, feminist legal theorists should develop a conception of citizenship to accompany their well-developed critique of power.

From a feminist standpoint, then, what are the preconditions for women's effective political participation? An initial answer might be simply suffrage for women.[128] Yet, although women have enjoyed the franchise for over seventy-five years,[129] few feminists (indeed perhaps few women) would conclude that women as a group have experienced the full measure of their potential political power.[130] Women have begun to vote at a rate equal to men only within the last thirteen years.[131] The concept of a "gender gap" — evidence of a gender-defined pattern of voting — has emerged only in the last several elections.[132]

If equal access to the ballot is necessary but not sufficient to establish the legitimacy of democratic outcomes from a feminist standpoint, what else is required? What material and social preconditions would have to be met before Justice Scalia could persuade feminists to defer to democratic outcomes? Returning to the *VMI* case, suppose that a referendum were organized, permitting the women of Virginia and South Carolina to decide the issue of coeducation at VMI and the Citadel.[133] Even if the voting were restricted to women, polls indicate that the outcome would be in doubt.[134] By no means does a clear

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127 *See supra* pp. 1674–76.

128 *See* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP 3 (1991) (noting the centrality of voting to an individual's status as a citizen). The idea that voting is central to citizenship, and even personhood, can be traced to Aristotle. *See* ARISTOTLE, THE POLITICS 87 (Carnes Lord trans., 1984).

129 American women obtained the right to vote in 1920 through the enactment of the Nineteenth Amendment, which provides: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

130 Even Ely concedes that women have operated under constraints in their exercise of the franchise. *See* ELY, *supra* note 1, at 164 (noting that "women have been operating at an unfair disadvantage in the political process," but expressing uncertainty regarding the reasons for this disadvantage).

131 *See* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 669 (1996) (noting that, with the exception of the 1952 presidential election, women's rate of participation in national elections did not equal men's until 1984).

132 *See id.* at 669–70. For a discussion of the paradox of women as a majority class without majority power, see JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 160–204, 209–10 (1994).

133 I am indebted to Jack Balkin for this formulation of the question.

134 The most recent available poll of Virginians on the status of VMI, conducted by the Virginia Commonwealth University in 1990, demonstrates that Virginians are divided on this issue.

majority of women in either state support admitting women to the schools.[135] Given that feminists, too, have divided over the issue of coeducation,[136] under what circumstances would they be willing to accept the judgment of the voters of Virginia?

In light of Professor Becker's (and Justice Scalia's) support for experimentation in social policy regarding gender equality, how should feminists interpret and respond to the considered support among women for the traditions of VMI and the Citadel? Does that support simply represent an alternative conception of gender equity? A commitment to diversity in education? Under what circumstances are feminists obliged to accede to or support the democratically expressed choices of women as citizens? Would, as Justice Scalia suggests, rejecting those choices constitute paternalism?[137]

These questions raise the difficult and persistent issue concerning the gap between feminism as a political movement and the group that feminists purport to represent — women. To return to the *VMI* example, consider a different referendum on the status of the school. Would feminists vote to authorize the women of Virginia to decide the issue of coeducation definitively, without the possibility of judicial review? If not, what does this conclusion suggest about the relationship between feminism and women, or between feminist theory and democracy? In order to answer these questions, feminist constitutional theorists must develop an affirmative account of democratic citizenship in which women's political participation is meaningful and reliable.

III. AGENCY AND FEMINIST THEORIES OF THE SELF

The preceding Parts have suggested that mainstream and feminist constitutional theorizing suffer from distinct but related shortcomings. Mainstream constitutional theory offers a conception of citizenship, but, as feminist constitutional analysis reveals, it lacks a critique of

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The poll reported that 44% of respondents believed that the school should become coeducational, 40% believed that it should remain all-male, and 16% expressed no opinion. The poll provided no gender breakdown. *See Poll: VMI Should Admit Women*, UPI, Feb. 13, 1990, *available in* LEXIS, Nexis Library, UPI File.

[135] In South Carolina, polling data from 1994 revealed that almost two-thirds of state residents favored maintaining the all-male status of the Citadel. Among the group of respondents favoring the status quo, men and women were fairly evenly represented. *See Most S. Carolinians Want Citadel to Remain All-Male, Poll Shows*, ST. LOUIS DISPATCH, Apr. 3, 1994, at 2B.

[136] For example, Elizabeth Fox-Genovese testified at trial on behalf of VMI. She specifically testified in favor of the adequacy of the Virginia Women's Institute for Leadership at Mary Baldwin College. *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, 282–98 (1996) (discussing Professor Fox-Genovese's testimony). In contrast, Professor Carol Gilligan filed a brief opposing the all-male policy. *See* Brief of The American Association of University Professors et al. as Amici Curiae in Support of Petitioner at 3–20, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941).

[137] *See* United States v. Virginia, 116 S. Ct. 2264, 2296 (1996) (Scalia, J., dissenting).

power. In turn, feminist legal theory offers a critique of power but, as Part II argues, it lacks a conception of citizenship. Both are incomplete. Parts III and IV begin to develop a feminist theory of citizenship and democratic legitimacy that responds to both the limitations of mainstream constitutional theory and the shortcomings of feminist constitutional critique.

Despite their relative inattention to the issue of democratic legitimacy in constitutional theory, feminist theorists have grappled with their own version of the tension between democratic will and fundamental rights. The problem arises because feminism seeks both to represent women in their complexity and diversity and to defend a particular substantive agenda.[138] On one hand, like mainstream democrats, most feminist theorists premise the legitimacy of political norms, either explicitly or implicitly, on the assent of those bound by such norms.[139] On the other hand, like rights-based theorists, feminists are committed to respecting claims that are foundational to women's liberty and equality.[140] As to these claims, individual preferences should not be indulged, and competing visions have no place.

Feminism's commitment to both an often controversial substantive agenda and respect for women's conflicting accounts of their experience creates a feminist analogue to the countermajoritarian dilemma.[141] The first section of this Part examines this tension in more

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[138] For a discussion of this debate in the context of international human rights, see generally Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 89–126 (1996) (arguing that feminism must take cultural defenses seriously, especially defenses articulated by women).

[139] Feminists make this assumption explicitly perhaps less often than constitutional theorists, yet it is implicit in every feminist argument in favor of the inclusion of marginalized voices and in every criticism of mainstream jurisprudence as premised on masculine imperatives. *See, e.g.*, Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764–68 (1990) [hereinafter Matsuda, *Pragmatism*] (advocating attention to the voices of the oppressed); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7–10 (1989) (discussing multiple consciousness as an aspect of jurisprudential method); *see also* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 867–88 (1990) (discussing feminist explanations for what it means to be "right" in law, including the rational/empirical position, standpoint epistemology, and postmodernism).

[140] *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 160–64 (1988) (identifying exclusionary tendencies in feminist theory and calling for greater recognition of differences among women); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47–48 (1988) (same).

[141] Summarizing the dilemma, Deborah Rhode asks: "Who can claim to represent the interests of women when women themselves disagree about what those interests are, when their perceptions may be constrained by systemic inequalities, and when their concerns vary substantially across race, ethnicity, class, sexual orientation, and so forth?" Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1189 (1994).

Even MacKinnon, the feminist most often criticized for espousing a rigid feminist orthodoxy, acknowledges the problem of accounting for dissent within a political theory premised on listening to women. *See* MACKINNON, *supra* note 5, at 115–16 (discussing the problem of "[a]uthority of interpretation"). She does not resolve the problem, however, and has been criticized for failing to

detail, notes several responses, and suggests parallels to constitutional theory. The second section attempts to explain why feminists have analyzed the countermajoritarian dilemma as a problem of social structure rather than of political institutions.

A. *Authority and Legitimacy of Feminist Claims*

Feminist theory and political advocacy entail two commitments that are sometimes in conflict: a commitment to the authority of women as individuals to define and describe their own experience and a commitment to transforming that experience through politics.[142] The first commitment has been central to feminism both substantively and methodologically. Substantively, feminists have emphasized the importance of including and strengthening women's voices in public and private life in order to enhance women's power.[143] Methodologically, feminism has sought to derive its substantive agenda directly from a process of women articulating their experiences and defining them as political.[144] Early in second wave feminism,[145] this process entailed consciousness-raising, a method in which small groups of women share their experiences and come to understand them as connected politically.[146] Although consciousness-raising has become more metaphor than method, this commitment to women's articulated experience remains central to standpoint epistemology — the idea that the enlightened perspectives of marginalized people ought to be treated as having particular authority.[147]

The second commitment, to the transformation of women's experience through politics, bears a complex relationship to feminism's rep-

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take seriously competing feminist visions. *See, e.g.*, *Open Letters to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177, 177–90 (1991) (criticizing MacKinnon's failure to respond adequately to critiques by women of color).

142 Drucilla Cornell explains this dilemma as follows:

> If there is to be feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine "reality" that can be identified as such and correlated with the lives of actual women. Yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of color), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire.

Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 644–45 (1990).

143 *See, e.g.*, Matsuda, *Pragmatism*, *supra* note 139, at 1764–66.

144 *See, e.g.*, MACKINNON, *supra* note 5, at 83–105 (describing consciousness-raising as method).

145 "Second wave" feminism as used here means the modern feminist movement beginning in the late 1960s and early 1970s. The "first wave" of feminism in the United States culminated in the ratification of the Nineteenth Amendment.

146 *See* MACKINNON, *supra* note 5, at 83–105.

147 *See, e.g.*, Bartlett, *supra* note 139, at 872–77, 880–88 (considering "standpoint epistemology" but preferring "positionality"); Matsuda, *Pragmatism*, *supra* note 139, at 1764–68; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 142–44 (1987).

resentational claim. Feminism's substantive and methodological emphasis on women's voices reflects the notion that the group that feminism purports to (or at least aspires to) represent is not *feminists* but *women*.[148] Why this should be the case is not obvious. The core political commitments of feminists could define feminism as a movement in much the same way that a set of political commitments defines Republicans or Democrats. And yet, for feminists, that definition has never been sufficient. Rather, feminism as a political movement has explicitly sought to articulate claims on women's behalf. This representational claim could be understood as merely strategic, allowing feminists to claim all women as their political constituency. The better explanation may be that feminism represents not women themselves but the interests of women as defined by feminists.[149] This characterization highlights but does not resolve the basic problem: how does feminist theory account for divergence between the interests of women as defined by feminism and the interests of women as expressed by women themselves?[150]

Feminism's version of the tension between democracy and fundamental rights resides in the conflict between these substantive and representational commitments. On one hand, feminism's core value of gender equality reflects a set of principles that are relatively clear, at least at a high level of generality: freedom from violence and equal access to education, employment, and political participation, among others.[151] These commitments can be understood as foundational to a feminist vision of equal citizenship in much the same way that many mainstream constitutional theorists deem certain rights foundational to a well-functioning democracy. On the other hand, when feminists attempt to translate these political objectives into public policy, dissent arises among women and within feminism. Examples abound: the role of pornography in promoting sexual violence,[152] the value of single-sex

[148] For a discussion of this aspiration and the problems that it raises for feminist identity politics, see Elizabeth Grosz, *Sexual Difference and the Problem of Essentialism*, *in* THE ESSENTIAL DIFFERENCE 82, 82–95 (Naomi Schor & Elizabeth Weed eds., 1994).

[149] I am grateful to Sally Goldfarb for suggesting this distinction.

[150] This divergence should not be overstated. Despite the fact that a majority of women in the United States do not describe themselves as feminists, they do support many of the general commitments of feminism. *See, e.g.*, *Floridians Support Radical Feminist Ideas Study*, REUTERS, Mar. 21, 1995, *available in* LEXIS, Nexis Library, Reuna File (reporting the results of a statewide survey regarding substantive positions of feminism).

[151] This is not to suggest that feminists agree on any but the most general terms of that equality — that women should enjoy equality however defined.

[152] *Compare* Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 323–24 (1984) ("[P]ornography causes attitudes and behaviors of violence and discrimination . . . ."), *with* Carol Smart, *Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives*, *in* SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 184, 187 (Lynne Segal & Mary McIntosh eds., 1992) (critiquing the mode of MacKinnon's argument and indicating how "much feminist discourse has ignored the way in which fairly traditional moral ideas and rhetoric have entered feminist speech").

education,[153] the treatment of pregnancy under equal employment statutes,[154] and the scope of abortion rights[155] have all generated sharp disagreement both among women and among feminists.

Despite this tension, feminism's representational and substantive commitments are interdependent in that the authority of feminism to describe the experience of women collectively on the political level depends upon inclusion and consensus or, at a minimum, an acknowledgment of dissent.[156] The problem for feminism, then, is to strike a balance between the commitment to process and the need to define coherently the scope of the feminist agenda.

Feminist theorists have responded to the challenge in three basic ways. The first response has been simply to defend a particular orthodoxy in the face of dissent. Catharine MacKinnon's criticism of feminist opposition to pornography regulation is the best known, but by no means the only, example of such a response.[157] Abandoning the representational claim, such feminist orthodoxy roots its authority in a theory of what is best for women, not what women may want. Yet, to the extent that feminism makes claims on behalf of all women, this position entails a troubling attribution of false consciousness. Moreover, it generates opposition from feminists[158] that is particularly politically disabling.

The second and perhaps most common response to dissent has been an insistence upon the inclusion of marginalized perspectives.[159]

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[153] *See* sources cited *supra* note 104.

[154] *Compare* Williams, *supra* note 94, at 352–70, 380 (arguing for treating pregnancy the same as other temporarily disabling conditions), *with* Krieger & Cooney, *supra* note 96, at 516–18 (arguing for special accomodation), *and*. Kay, *supra* note 97, at 32–38 (taking an intermediate position).

[155] *See* Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, *in* FEMINIST NIGHTMARES: WOMEN AT ODDS 159, 159–61 (Susan Ostrov Weisser & Jennifer Fleischner eds., 1994).

[156] I have argued elsewhere that feminism's representational claim is both a strength and a vulnerability and must be made carefully and strategically. *See* Higgins, *supra* note 8, at 1563–73.

[157] *See, e.g.*, MACKINNON, *supra* note 12, at 198. MacKinnon's position on the problem of dissent is complex. On one hand, she acknowledges that the attribution of false consciousness to dissenters is not a satisfactory resolution. *See* MACKINNON, *supra* note 5, at 115–16. On the other hand, she is quick to reject criticism by other feminists of her agenda, especially in the pornography debate. *See* MACKINNON, *supra* note 12, at 199–200, 204–205 (criticizing feminist lawyers who defend pornography). The assumption that a pro-life position is inconsistent with feminism is another example of feminist orthodoxy. *See* McClain, *supra* note 155, at 159–61; *see also* Brief for Respondents at 24–31, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (No. 90-985) (equating antiabortion protesting with antiwoman animus).

[158] *See* Higgins, *supra* note 8, at 1569.

[159] For examples of such calls for inclusion, consider Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 191 (1990) ("If feminist legal theory is derived from a feminist method uninformed by critical lesbian experience, the theory will be incomplete."); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U.

In the context of political theory, this response is analogous to the communitarian ideal of local, democratic participation. This response resolves the problem of dissent only under the assumption that conversation can lead to consensus. Yet such an assumption underestimates important differences not only in women's experiences and perspectives, but in their political interests as well.[160] Although feminism has become more diverse, complex, and multidimensional as a result of the inclusion of marginalized voices, the hoped-for consensus has not emerged.[161]

Most recently, a third approach has emerged that can be seen as a hybrid of the first two. Influenced by postmodernism, this approach calls for a better process but surrenders any hope for consensus.[162] Acknowledging that certainty is impossible and dissent therefore inevitable, this response requires, at a minimum, a recognition of the coercion implicit in feminist claims to representation.[163]

Despite their resonance with the central dilemma of constitutional democracy, none of these feminist responses engages the problem of political legitimacy at the level of democratic institutions or offers a political solution to the dilemma of dissent. As in the example of the VMI referendum, to dismiss the views of the female supporters of VMI as simply false consciousness is suspect in terms of both democratic and feminist commitments to individual dignity. Relying on the emergence of consensus — especially consensus regarding a feminist agenda — is simply unrealistic no matter how complete or inclusive the process may be.[164] Moreover, to presume otherwise reflects a profoundly essentialist assumption about the commonality of women's nature and experiences. Recognizing the inevitable tension implicit in consciousness-raising itself — a tension between women's authority and false consciousness — is a good theoretical starting point but of-

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CHI. LEGAL F. 139, 139–40 (observing "how Black women are theoretically erased" and criticizing "a single-axis framework that is dominant in antidiscrimination law and that is also reflected in feminist theory and antiracist politics"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (attempting to introduce the "voices of black women"); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 150 (1989) ("We must now incorporate into our work the conflicts between the interest and priorities of white women and women of color . . . ."); and Minow, cited above in note 140, at 47–48 (warning against "treating particular experiences as universal").

[160] *See* Bartlett, *supra* note 139, at 883–84 (discussing competing points of view and the effort to reconcile differences among women and among feminists).

[161] For examples of disagreements within feminism, see sources cited in notes 152–155 and accompanying text.

[162] *See, e.g.*, Jane Flax, *The End of Innocence*, *in* FEMINISTS THEORIZE THE POLITICAL 445, 455–60 (Judith Butler & Joan W. Scott eds., 1992).

[163] *See, e.g.*, *id.*; Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131, 139 (arguing that, by depriving us of moral certainty, relativism limits the scope of our moral responsibility).

[164] The persistent division among women and among feminists over the issue of coeducation illustrates the elusiveness of consensus.

fers little in the way of a response to the women of Virginia who feel thwarted *by feminists* in the exercise of their political voice.

B. *Autonomy, Social Construction, and the Limited Self (Why Consent is Not Enough)*

In dealing with the problem of dissent, feminists have refused to accept women's descriptions of their own experience at face value or to relinquish the claim to represent women collectively. Despite their commitment to women's accounts of their experience — to listening to the voices of the oppressed — feminists have not relied on these accounts to legitimate the feminist political agenda in a straightforward way. In contrast to liberal theorists' qualified embrace of democracy and the self-determining subject as citizen, feminist theorists have focused more on the constraints on women's agency and therefore have been less willing to defer to democracy. Feminists, one might conclude, are distrustful of the People. This section explains this distrust as rooted in a feminist conception of the self that differs in important ways from the conception assumed by much of mainstream constitutional theory.

For many feminists, the self that lies at the heart of liberal constitutional theory, both the self that enjoys the individual liberties specified in our own Constitution and the self that participates in democratic decisionmaking through our majoritarian system, demonstrates a degree of freedom and agency that does not comport with women's selves under patriarchy.[165] Accordingly, some feminist theorists have begun to examine the implications for democratic theory of an alternative conception of the self, one that assumes that women's (and men's) preferences are socially constructed.[166]

Feminists committed to the concept of social construction have been centrally concerned with the interplay among politics, culture, and self, and have explored the ways in which culture defines gender identity.[167] Implicit in this conception is the notion that cultural

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[165] *See, e.g.*, Sherry, *supra* note 9, at 549 (describing the atomistic self of liberalism as reflecting a "fundamentally pessimistic perception of human nature and a sadly alienated perception of self"); *cf.* Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 85 (concluding that "[t]he liberal self at best reflects male experience of selfhood within the liberal tradition" and therefore "is not an accurate account of women's experience").

[166] Deborah Rhode argues:

> [T]o an important extent, women's preferences are socially constructed and constrained. The state does not simply respond to expressed desires; it plays an active role in legitimating, suppressing, or redirecting them. Attempts to challenge inequality through conventional democratic measures fall short when subordinate groups adapt or accommodate their preferences to the unequal opportunities available.

Rhode, *supra* note 141, at 1189.

[167] Feminist theorists sometimes express this relationship between identity and culture as the distinction between biological sex and culturally defined gender, a distinction perhaps first emphasized by Simone de Beauvoir in her claim: "One is not born, but rather becomes, a woman. No

norms — language, law, myth, custom — are not merely products of human will and action but define and limit the possibilities for human identity. Social construction posits a self that simultaneously determines and is determined by culture (including politics, law, and the constitutional order). Thus, feminists who employ social construction theory have been concerned not so much by the way patriarchy limits women (implying external constraints) but by the way it creates or defines women (implying internal as well as external constraints).[168]

Although this concept of internalized, socially defined constraints on women's identity has long been a part of feminist theorizing,[169] recent work on social construction theory by feminist legal theorists in particular bears upon the question of citizenship. This work has yielded a concept that I shall call "incomplete agency."[170] This term expresses the idea that, in a range of legal contexts, women's choices should be understood as neither fully free nor completely determined.[171] Taking into account the ways in which women are constrained differently from men has revealed situations in which facially neutral assumptions about responsibility and choice contribute to women's inequality. Although theorists have applied this concept most frequently in the context of women's freedom and coercion in sexuality,[172] incomplete agency has broad implications for feminist conceptions of citizenship.

Given the complex conception of the self that underlies much of feminist theory, there is no reason to expect that feminism's countermajoritarian dilemma — mediating between political inclusiveness and foundational political commitments — could be resolved by striking the appropriate balance between fundamental rights and de-

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biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature . . . ." SIMONE DE BEAUVOIR, THE SECOND SEX 267 (H.M. Parshley ed. & trans., Vintage Books 1989) (1949).

[168] *See* Hirschmann, *supra* note 34, at 52 (suggesting that patriarchal rules constitute "not only . . . what women are allowed to do but . . . what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are").

[169] Even a liberal theorist like Mary Wollstonecraft recognized the significance of social constraints on gender roles. She wrote: "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative." MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 43 (Carol H. Poston ed., W.W. Norton & Co. 1975) (2d London ed. 1792).

[170] The term "incomplete agency" is not meant to imply that complete agency is possible. Rather, it conveys the idea that women's agency is incomplete relative to men's agency or relative to the agency assumed by mainstream theory.

[171] This concept has also been described as "partial agency." *See* Abrams, *supra* note 106, at 346–48 (developing a theory of partial agency).

[172] *See id.* at 350–52; *cf.* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34–43 (1991) (discussing women's agency under conditions of oppression in the context of domestic violence).

mocracy. On the contrary, even an enhanced catalogue of rights may be insufficient to address the complexity of women's oppression as long as those rights are defined as rights against the state. Also, the possibility of internalized oppression[173] calls into question an understanding of the collectively articulated will of the people as an unproblematic expression of individual freedom. Hence feminism's distrust of democracy.

C. *Distinguishing Ontology and Advocacy*

Thus far, this Article has cited the divergence between mainstream and feminist conceptions of the self as a way of accounting for both feminist criticism of our existing constitutional structure and feminists' relative inattention to questions of democratic legitimacy. Before exploring the implications of incomplete agency for democratic governance, it is important to clarify what does *not* follow from this type of empirical or ontological claim.

Liberal theorists' assumptions about the self, which inform much of mainstream consitutional theory, have been criticized both descriptively and politically. As a descriptive matter, feminists and others have argued that the assumption that the self is autonomous and largely self-creating does not accurately describe individuals' — especially women's — experiences. This type of criticism represents either an empirical claim derived from evidence of actual lives or an ontological claim about human nature that may not be verifiable.[174]

In its limited form, this descriptive critique of liberalism's assumption of autonomy may or may not be valid. The critique presupposes that liberalism endeavors to or is obliged to represent accurately the nature of the individual. And yet, as Benjamin Barber argues, the historical priority of the individual can be understood as an "artificial device," a political tool.[175] He explains that "[t]he fiction of the individual preceded the reality: in fact, the fiction created the reality, for it was meant not as a defense of preexisting individuals against encroaching authority, but a justification for the forging of individuals from socially constructed subjects."[176] In short, liberalism's emphasis on individualization may constitute a normative claim about the value of individuation rather than a descriptive claim about the self.

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[173] The term "internalized oppression" is preferable to "false consciousness" because it simultaneously emphasizes the importance of internal constraints on identity and avoids the suggestion that "true consciousness" is possible.

[174] Robin L. West has made both types of claims. *Compare* West, *supra* note 147, at 93–108 (focusing on phenomenological differences between the lives of women and men), *with* West, *supra* note 14, at 2–3 (making a more abstract and essential claim about women's and men's senses of self).

[175] Benjamin R. Barber, *Liberal Democracy and the Costs of Consent*, *in* LIBERALISM AND THE MORAL LIFE 54, 60 (Nancy L. Rosenblum ed., 1989).

[176] *Id.*

Social construction theory's descriptive critique of liberalism — that it inaccurately or inappropriately represents the individual as autonomous — does not respond directly to an argument for a liberal constitutional structure. Rather, it stands simply as an alternative to liberalism's assumptions of agency and atomism. The empirical or ontological status of both claims — liberal autonomy and incomplete agency — is part of a broader contest within social theory concerning how best to theorize individuals and social organizations.[177] Incomplete agency is not, on its own, a political critique of liberalism.

Ultimately, the ontological debate over the nature of human beings may be impossible to resolve; however, it is also only obliquely related to the debate over the structure of the state. Although some feminists argue that a communitarian vision better reflects the feminist idea of self in relationship,[178] recognizing that the individual is embedded in culture need not entail advocacy of collectivist social organization.[179] Even commitment to an ontology that denies the possibility of an atomistic society does not preclude arguments in favor of liberalism.[180] Indeed, many feminists advocate reinterpreting liberty precisely to maximize the autonomy and power of *individual* women in the face of constraints.[181]

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[177] *See* C. FRED ALFORD, THE SELF IN SOCIAL THEORY 1–23 (1991) (discussing the debate over the nature of the self in contemporary social theory).

[178] *See, e.g.*, Sherry, *supra* note 9, 589–91 (associating communitarianism with Carol Gilligan's description of women's moral reasoning).

[179] For arguments in favor of adopting a theory of the public that explicitly incorporates affective bonds and desire, consider Sherry, cited above in note 9, at 580–91; and Iris Marion Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, *in* FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER 57, 73–76 (Seyla Benhabib & Drucilla Cornell eds., 1987).

Chantal Mouffe warns:

> [F]eminists should be aware of the limitations of such an approach and of the potential dangers that a communitarian type of politics presents for the struggle of many oppressed groups. The communitarian insistence on a substantive notion of the common good and shared moral values is incompatible with the pluralism that is constitutive of modern democracy . . . .

Chantal Mouffe, *Feminism, Citizenship, and Radical Democratic Politics*, *in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 162, at 369, 378; *see also* Linda C. McClain, *'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1173–76 (1992) (defending liberalism in the face of feminist calls for care and connection).

[180] Jean Cohen observes:

> [A]bstract concepts such as legal personality, fundamental individual rights, privacy, and decisional autonomy are not equivalent to an ontological description of the self or a particular concept of agency. The principle that individual privacy rights protect decisional autonomy (choice) regarding certain personal or intimate concerns can go quite well with a recognition of the intersubjective character of processes of personal identity formation . . . .

Jean L. Cohen, *Democracy, Difference, and the Right of Privacy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 187, 197 (Seyla Benhabib ed., 1995).

[181] For example, feminist critiques of privacy doctrine call for a focus on individual women as distinct from the family — the unit protected by the right of marital privacy. *See* WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 114–21, 127.

For feminist political and legal theorists, the proper target is not the accuracy of liberalism's assumptions about the self but the political implications of the inaccuracy of those assumptions. To assess these political implications, feminists must have more than an empirical or ontological argument about how individuals are constituted. Instead, feminists must argue that the combination of incomplete agency (as an empirical or ontological claim) and liberal constitutionalism (as a political scheme) perpetuates women's inequality. Moreover, the choice is not simply between an atomistic, liberal-legal society and one that values connection and filial bonds. As Charles Taylor argues, even in "a modern, impersonal society," we make "important choices about how zealously we entrench in legislation, or enforce through judicial action, various facets of equality which justice might dictate. What do we entrust to the spirit of social solidarity and the social mores which emerge from it? In certain societies the answer may be: very little."[182] Thus, the empirical and ontological dispute should not dictate assumptions about legal and constitutional structure but instead should inform an analysis of alternative structures.

IV. Citizenship and the Problem of Incomplete Agency

This Article began by highlighting the limitations of mainstream constitutional theory's focus on the tension between democratic will and fundamental rights. It then argued that, although feminist legal theory has addressed the limitations of constitutional guarantees of liberty and equality, it has largely ignored questions of democratic legitimacy and citizenship. Part III suggested that, notwithstanding their inattention to the countermajoritarian difficulty of mainstream constitutionalism, feminists have struggled with issues of authority and dissent in other contexts. Out of this struggle a concept of incomplete agency has emerged. This Part explores the implications of incomplete agency for constitutional theory and particularly for citizenship and democratic process. It first considers the degree to which an assumption of incomplete agency undermines consent-based justifications for democracy and what the rudiments of an alternative conception of freedom might be. After sketching such an alternative conception, this Part examines its implications for democracy and constitutionalism, and suggests a framework for a specifically feminist conception of the role of the state.

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[182] Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE, *supra* note 175, at 159, 161–62; *see also* Sherry, *supra* note 9, at 569 (discussing Roberto Unger's efforts to bridge "the liberal dichotomy between individual and society").

A. *From Social Contract to Social Construction*

Mainstream constitutional theory rests heavily on consent theory. Government is legitimate because it is democratic, and democracy is legitimate because it is consensual.[183] Critics, including many feminists, have challenged the conception of consent underlying this traditional view by asking: How can a citizen meaningfully consent if her nature and beliefs are themselves a product of the system to which she consents?[184] Although this critical view precludes simple reliance on existing preferences as a source of state power, it does not reject the value of political participation. Rather, it simply means that consent cannot serve as the source of the state's legitimacy nor define the boundaries of state power.

Although social construction calls into question the foundational role of consent in democratic theory, it does not undermine self-determination altogether as an aspect of freedom. Indeed, despite feminist theory's emphasis on the ways in which women (and men) are determined by patriarchy, feminists are far from willing to relinquish the possibility of freedom.[185] Instead, feminists have been centrally concerned with freeing women to define their own lives rather than accept the definition imposed on them by others.[186] Thus, the debate over agency suggests not the impossibility of freedom but rather the need to develop a feminist conception of freedom. To develop such a conception, feminists must distinguish between the descriptive claim that individuals are embedded within and shaped by culture, on one hand, and the possibility of creating agency as an aspect of citizenship, on the other.

In contrast to our constitutional scheme, such a model would not simply take individual agency for granted or assume that it exists prepolitically.[187] Although state limitations on individual freedom would

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[183] *See* Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 180, at 95, 95 (defining democractic legitimacy as "the authorization to exercise state power [through] the collective decisions of the members of a society who are governed by that power").

[184] *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY 3–6 (1984) (discussing the conflicts inherent in liberal democracy, especially regarding consent theory); PATEMAN, *supra* note 32, at 71 (criticizing liberal theory as "gloss[ing] over the ambiguity, inherent in consent theory from its beginnings, about which individuals or groups are capable of consenting and so count as full members of the political order").

[185] Nancy Hirschmann argues that "the notion that the context for women's desires and preferences is, for the most part, a patriarchal one does not mean that women are simply 'unfree.'" Hirschmann, *supra* note 34, at 48. Recognizing that social construction is inescapable for men and for women, she argues for a conception of freedom that reflects relative power. *See id.* at 57.

[186] *See, e.g.*, *id.* at 63–64; *see also* West, *supra* note 14, at 61–70 (suggesting that such a definition might have a profound and transformative effect on law and jurisprudence).

[187] Although these assumptions characterize our constitutional scheme, they are not necessary to liberal constitutionalism. Indeed, certain conceptions of liberalism have given fuller attention to the preconditions for meaningful freedom than I suggest here. For example, John Dewey suggests:

continue to be relevant to the assessment of agency, they would comprise only one of several different types of constraints. As feminists have long suggested in their critique of the public/private dichotomy, both private exercise of power and state action threaten equal citizenship.[188] But beyond these external constraints, both public and private, a theory of freedom that takes social construction seriously would also address internal constraints.[189] Such internal barriers, whether deemed false consciousness or internalized oppression, limit individuals' ability to function as citizens in the way that traditional democratic theory presumes they must: by exercising their democratic function in pursuit of their own interests and their own conception of the general good. Simply stated, the assumption of incomplete agency raises the possibility that individuals may not be the best judges of their own interests or those of the community.

The problems that incomplete agency presents for liberal constitutionalism become apparent when cultural constraints operate in a way that systematically disempowers certain groups relative to others. Under such circumstances, the critical problem with overstating the agency of the individual is not that human nature is misdescribed but that the political consequences of that misdescription are visited unequally on different groups. Thus, for feminists, the assumption that the self is adequately protected by negative liberties so as to enable her full participation in both public and private life is problematic not because it is inaccurate but because it implies a level of agency that, under patriarchy, may be more accurate for men than for women.[190] This analysis does not imply that existing freedoms are meaningless for women. Rather, such freedoms simply do not endow women with equal capacity as citizens.[191]

> Liberalism knows that social conditions may restrict, distort, and almost prevent the development of individuality. It therefore takes an active interest in the working of social institutions that have a bearing, positive or negative, upon the growth of individuals who shall be rugged in fact and not merely in abstract theory. It is as much interested in the positive construction of favorable institutions, legal, political, and economic, as it is in the work of removing abuses and overt oppressions.

John Dewey, *The Future of Liberalism*, *in* DEWEY AND HIS CRITICS: ESSAYS FROM THE JOURNAL OF PHILOSOPHY 695, 697 (Sidney Morgenbesser ed., 1977). However, Dewey's description of liberalism differs from the one that is reflected in American constitutional democracy.

[188] *See supra* Part II.A.1 (discussing the public/private distinction).

[189] *Cf.* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 24–27 (taking account of the significance and limits of women's perspectives); West, *supra* note 14, at 37–42 (discussing men's and women's different experiences of oppression).

[190] As Carol Weisbrod explains, "[o]nly if the consequences of subordination or suppression are viewed as essentially moderate — as a remediable injustice rather than a total annihilation of the autonomous self — can one go in the direction of immediate public participation by women within liberalism . . . ." Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 990 (1990) (footnote omitted).

[191] *Cf.* Hirschmann, *supra* note 34, at 57 (emphasizing the importance of relative power in understanding social construction).

Social construction theory argues, therefore, for the inclusion of internal constraints in a feminist conception of freedom. Yet, classifying those constraints as akin to distinct exercises of private or public power is misleading in that it suggests that social construction can be limited or escaped altogether in a well-functioning political system. Moreover, to the extent that internal barriers are understood simply as psychological constraints and are associated particularly with women's condition, this model risks pathologizing those constraints.[192] For these reasons, internal constraints might best be described as diffuse cultural constraints, structural and widespread rather than individualized and specific. Understood as such, they are no less relevant to an understanding of individual agency, although they do present a more difficult problem in linking freedom to questions of political structure.

If social construction is inescapable, then freedom cannot be characterized as the condition existing after constraints are eliminated. Rather, freedom is better understood as a manifestation of power relations than as a condition measured with respect to the exercise of state power. In this sense, power dictates freedom not because the powerful escape social construction but because in our society power is socially constructed as freedom. Power and freedom are linked in individual experience in a way that defines individual agency.[193]

Whereas for the liberal, freedom is a pre-existing condition that is largely antecedent to democracy, for the feminist, freedom is a created condition, produced rather than merely preserved by democracy. Freedom must be defined and defended as a set of social conditions, not as the absence of political or social constraints.

B. *Incomplete Agency and Constitutional Theory: the Role of Democratic Participation*

According to much of mainstream democratic theory, the legitimacy of the democratic process itself depends upon limiting the reach of that process, ensuring a sphere of freedom in which the individual can make and act on political and personal choices.[194] Conversely, once the constitutional structure ensures that sphere of liberty, the expression of individual choices through the democratic process lends legitimacy to state action constraining freedom. The assumption of incomplete agency presses the limits of this formulation by suggesting

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192 For a discussion of this problem in connection with Battered Women's Syndrome, consult Littleton, *supra* note 189, at 33–47.

193 This relationship between power and freedom is defined not only by gender but also by race, class, education, and other factors. Thus, as Hirschmann notes, "some women are better placed to support patriarchy — and accordingly freer — than are some men by virtue of race, class, or other privileging factors . . . ." Hirschmann, *supra* note 34, at 57.

194 *See, e.g.*, SUNSTEIN, *supra* note 25, at 142 (arguing that "[c]onstitutionalism can thus guarantee the preconditions for democracy by limiting the power of majorities to eliminate those preconditions").

that freedom cannot be equated with simple autonomy.[195] If, as the preceding section suggests, our social context is constitutive of us and determines our choices (at least in part), constraints on the state alone cannot ensure freedom, nor can the exercise of individual will unproblematically legitimate the power of the state.[196]

So stated, the assumption of incomplete agency that follows from a conception of the self as socially constructed reinforces feminist critiques of the public/private distinction. If freedom does not preexist politics, little justification exists for distinguishing public power from private power as a potential threat to that freedom.[197] Thus, the assumption of incomplete agency supports feminist arguments that the guarantee of citizens' liberty must extend beyond state action.[198] For example, protecting women from domestic violence is as essential to securing their freedom as protecting their right to political participation.[199] Similarly, equality cannot be equated with state neutrality but must be evaluated against substantive conditions produced by both public and private power.[200]

An assumption of incomplete agency also reinforces dominance analysis. By positing that the citizen lacks full agency, a conception of the self as socially constructed justifies the exercise of judicial review of gender-based legislative categories notwithstanding women's potential political power. Effecting equality through judicial review rather than through the democratic exercise of that power poses no important threat to a majoritarian process that is already suspect in feminist terms.[201] More generally, under a theory of incomplete agency, constitutional rights secured against majoritarian will need not be justified

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[195] For a discussion of the implications of this assumption for feminist methodology, consider Higgins, *supra* note 138, at 121.

[196] *See* PATEMAN, *supra* note 63, at 83 (noting that "[c]onsent is central to liberal democracy, because it is essential to maintain individual freedom and equality; but it is a problem for liberal democracy, because individual freedom and equality is also a precondition for the practice of consent").

[197] *Cf.* Biddy Martin, *Feminism, Criticism, and Foucault*, *in* FEMINISM & FOUCAULT: REFLECTIONS ON RESISTANCE 3, 6 (Irene Diamond & Lee Quinby eds., 1988) (eschewing a view of "power as originating outside of and independent of concrete social interactions and their material effects"); Jana Sawicki, *Identity Politics and Sexual Freedom: Foucault and Feminism*, *in* FEMINISM & FOUCAULT, *supra*, at 177, 186–87 (advocating a Foucauldian analysis of power, which emphasizes the importance of multiple sites of oppression).

[198] For a discussion of feminist substantive critiques of the public/private distinction and liberty, narrowly defined, consult Part II.A.1 above.

[199] Robin West argues that the fear of sexual violence "badly cripples women's sense of ourselves and societal perceptions of us as autonomous, free, and independent agents. . . . [The repeatedly abused woman] quite literally lacks the capacity to be herself when she has been put under the sovereign will of a violent and violence-prone partner." WEST, PROGRESSIVE CONSTITUTIONALISM, *supra* note 4, at 116.

[200] *See supra* p. 1676–78 (discussing feminists' critiques of the concept of equal protection as antidiscrimination rather than antisubordination).

[201] *See* MacKinnon, *supra* note 10, at 1774 (noting that the "so-called 'majoritarian premise' . . . began by assuming about fifty-three percent of the population out").

by reference to the democratic process because democracy loses its legitimating power.

Despite its apparent compatibility with central feminist constitutional critiques, an assumption of incomplete agency also raises conceptual problems for these critiques. Just as the socially constructed self as citizen calls into question the legitimating power of the democratic process, this conception of self also undercuts the authority of any particular vision of gender equality, including feminist visions that inform dominance analysis. These applications of dominance analysis may be contested[202] and, according to social construction theory, must be treated as partial and contingent.[203]

Positing social construction suggests an important role for a deliberative democratic process in the transformative project of feminism. The furtherance of gender equality requires that disputed gender norms be measured against a standard that gives content to the notion of equality. As feminists have observed, that standard must be forged through public discourse concerning gender identity and the conditions of subordination.[204] Although courts have a role to play in this process, the transformative potential of more open, participatory, and egalitarian democratic institutions may be considerably greater.[205] Moreover, when it takes place in such a setting, this deliberative process can simultaneously generate legal standards and transform the self-understanding of individual citizens.[206]

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[202] *See supra* p. 1678 (discussing the difficulty of applying dominance analysis and the probable disagreement among feminists as to whether single-gender public schools are conducive to equality).

[203] As Katharine Bartlett explains, "[t]ruth is partial in that the individual perspectives that yield and judge truth are necessarily incomplete. No individual can understand except from some limited perspective." Bartlett, *supra* note 139, at 888.

[204] Jürgen Habermas describes this politics-as-consciousness-raising effect and the connection between private and public autonomy. *See* Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 784 (William Rehg trans., 1996). Linking discourse and rights, he explains:

> Rights can empower both men and women to shape their own lives autonomously only to the extent that these rights also facilitate equal participation in the practice of civic self-determination, because only the affected persons themselves can clarify the "relevant aspects" — the standards and criteria — that define equality and inequality for a given matter.

Id. at 780.

[205] For discussion of the functioning of such processes and their transformative potential, consider Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 180, at 67, 67–80, and Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 180, at 120, 120–33.

[206] Charles Taylor has called this idea "an exercise-concept" of liberty, that individuals must exercise their capacities if they are to be free. Charles Taylor, *What's Wrong with Negative Liberty*, *in* THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 175, 177 (Alan Ryan ed., 1979).

C. *Democracy and Institutional Roles: A Final Look at VMI*

Implicit in the assumption of incomplete agency is the idea that politics is recursive: political choices define preferences just as preferences define political choices. This notion of recursive politics suggests a response to John Hart Ely's confusion concerning women's political power. Ely's "intuition" — "that women have been operating at an unfair disadvantage in the political process" — is only "tricky [to] pin[ ] down" if one assumes that preferences are exogenous to politics.[207] Beginning with that assumption and ignoring diffuse, socially defined constraints, one may conclude, as Justice Scalia does in *VMI*, that the legislative process adequately protects women — that, apart from *stare decisis*, gender ought not be deemed a suspect classification.[208] This section explores how a model of recursive politics would alter the balance between judicial enforcement of equal protection and deference to majoritarian uses of gender categories.

A theory of recursive politics, together with a conception of freedom as a product of public and private power, undermines the assumption that the state best serves freedom by respecting private preferences. Instead, such a theory would permit or even require the state to assume a role in shaping such preferences or norms through a model of public discourse.[209] The critical question, then, is: How and under what circumstances should the state exercise this power to shape norms? This question has no easy answer. Much of feminist constitutional analysis and litigation has aimed to defeat state-sponsored conceptions of gender roles.[210] Indeed, Virginia's attempt to shape norms by training men as citizen-soldiers was at the heart of many feminists' objections to VMI. Presented with state-sponsored ex-

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[207] ELY, *supra* note 1, at 164.

[208] *See* United States v. Virginia, 116 S. Ct. 2264, 2295–96 (1996) (Scalia, J., dissenting) ("[I]t is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be . . . for reducing it to rational-basis review.").

[209] This notion that the state necessarily plays a role in shaping private preferences has begun to work its way into mainstream legal theory, as well as into feminism. *See, e.g.*, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1016–19, 1034–36 (1995) (arguing that government's inherent role in shaping social meaning must be limited but not barred by First Amendment doctrine); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996).

[210] This motivation informed the earliest cases, *see* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1872) ("[Bradwell's attorney] proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character is one of those [privileges and immunities of a citizen of the United States] which a State may not deny."), to the most recent, *see VMI*, 116 S. Ct. at 2269 ("agree[ing]" that the state may not "reserv[e] exclusively to men the unique educational opportunities VMI affords"); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) ("[G]ender . . . is an unconstitutional proxy for juror competence and impartiality.").

clusion on one hand and state neutrality on the other, neutrality has seemed the obvious choice.[211]

Mainstream constitutional theory seems to provide an easy answer. It defines the choice as binary: deference to politically expressed preferences versus state neutrality. This all-or-nothing approach permits a convenient agnosticism regarding more robust conceptions of gender equality. Operating within this liberal framework, both Justice Scalia and Justice Ginsburg expressed this agnosticism, albeit in different ways. Justice Scalia chose to defer to political choice, making respect for private preferences an axiom of political freedom. Absent either process failure or historical precedent, he argued, the Court should refrain from interfering with the effectuation of those preferences.[212] Justice Ginsburg and a majority of the Court chose the other alternative — neutrality. In so doing, they avoided any clear distinction between positive uses of gender classifications and negatives ones.[213] As a result, they limited the power of the state to shape prevailing norms in a gender-specific way.[214] The majority's approach, like Justice Scalia's, risks entrenching existing biases, not by granting them undue deference in the political process but by granting them greater power in the private sphere.

The agnosticism of the mainstream approach, however, is illusory. In fact, both uncritical deference to political will and simple insistence on state neutrality favor the status quo. Deference does so by discounting the extent to which existing inequality shapes democratic choices. Strict neutrality does so by denying the state an important role in re-shaping private biases, which derive from and perpetuate that inequality.

In contrast, a theory of recursive politics would, at the outset, render unavoidable a judgment about the specific use of gender in government decisionmaking and the relationship of this use to gender equality. In reviewing the use of gender-based classifications, the Supreme Court could not simply defer to the unexamined choice of the People, nor could it apply a general requirement of state neutrality. Instead, a recursive politics approach would oblige the Court to develop and defend a standard of gender justice against which to mea-

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[211] Justice Ginsburg's own legal career has reflected a strong commitment to this choice. *See supra* p. 1673 (discussing Ginsburg's litigation strategy at the American Civil Liberties Union).

[212] *See VMI*, 116 S. Ct. at 2296 (Scalia, J., dissenting).

[213] Although Justice Ginsburg's opinion acknowledged the possibility of benign uses of gender-based classifications, *see VMI*, 116 S. Ct. at 2276, the Court did not elaborate on this possibility.

[214] By failing to articulate a clear theory of the illegitimacy of the VMI policy, the Court called into question the use of gender classifications for liberatory purposes. Given the Court's recent approach to race-based classifications, *see* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (applying strict scrutiny to benign racial classifications in congressionally-created affirmative action programs), the Court will likely restrict gender-based classifications to cases involving biological difference.

sure gender-based classifications. Unlike the dominance model, however, such a standard would entail both a substantive conception of equality and a procedural conception of democratic functioning. In assessing political uses of gender, the Court could apply dominance analysis to invalidate legislative classifications the meaning and effects of which are clearly subordinating. In situations in which the meaning and effects are in doubt, the Court could more closely examine the functioning of the political process that generated the gender-based policy. The scope of the political process relevant to this inquiry may include not simply formal democratic deliberative bodies such as legislatures but also the public sphere of debate, deliberation, and contestation among individuals and groups within the polity.[215] Unlike Ely's process-based interpretation of equal protection, this model would require actual consideration of the political process rather than speculation about the disadvantage of groups within that process.[216]

In the example of *VMI*, the Court might have invalidated the male-only admissions policy through a substantive application of dominance analysis: the classification reinforced the subordination of the less powerful group — in this case, women.[217] In *VMI*, therefore, the Court would not have needed to consider the process question at all. No process would justify a clearly subordinating classification. In contrast, New York City's creation of an all-female high school for math and science presents a more difficult case. Although the validity of single-sex education may be disputed under a dominance model, the policy does respond to an identified social inequality and attempts to address that inequality by favoring the less powerful group, adolescent girls. However, because of the scarce resources of the school system

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[215] For one model of such a process, consider Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 180, at 120–33.

[216] The Court's consideration of Colorado's Amendment 2 in *Romer v. Evans*, 116 S. Ct. 1620 (1996), might serve as a model for this type of review. *See id.* at 1624–27 (considering the effect of Amendment 2 on the ability of gays and lesbians to participate effectively in the democratic process at all levels).

[217] Of course, this mode of analysis is not unfamiliar to equal protection doctrine. It represents a somewhat more expansive version of the Court's deference to benign racial classifications limited in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand*. *Compare* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564–65 (1990) ("We hold that benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." (footnote omitted)), *and* Fullilove v. Klutznick, 448 U.S. 448, 490–91 (1980) (plurality opinion) ("Congress . . . perceived a pressing need to move forward with new approaches . . . to achieve the goal of equality of economic opportunity. . . . Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives . . . ."), *with Croson*, 488 U.S. at 483–95 (rejecting the deferential standard of *Fullilove*), *and Adarand*, 115 S. Ct. at 2117 ("[F]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

and the composition of its student population, the city's choice to create the girls' school is not an unambiguous shift from a more powerful to a less powerful group.[218] Nevertheless, the impulse behind the effort is consistent with the aspiration of equal citizenship underlying the Equal Protection Clause. In this way, the Court could rather easily distinguish this case from *VMI*.

This theory of recursive politics need not imply an expanded role for the Court at the expense of popular sovereignty. As the example of the New York City school suggests, the reshaping of private preferences and social norms is a function uniquely suited to the political branches. Through participation in the legislative process itself, individuals' aspirations for liberty and equality can be questioned, tested, and redefined. Although the Court might at times initiate this process of reconsideration and would necessarily constrain the scope of the process, the transformation should take place at the level of politics.

CONCLUSION

Reconceived in this way, equal protection analysis anticipates a role for the Court in promoting equality through judicial review. At the same time, this analysis recognizes the importance of political efforts to transform social norms that have defined women as unequal to men. This understanding of equal protection more closely reflects feminism's simultaneous commitment to respecting and perfecting women's experience than liberalism's simultaneous commitment to being ruled by law and by men. From the standpoint of feminist constitutional theory, therefore, this version of the countermajoritarian difficulty captures a true dilemma rather than a false choice.

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218 The dropout rates for girls and boys in East Harlem (the district served by the school) are seventeen and nineteen percent, respectively. OFFICE OF EDUCATIONAL RESEARCH, THE CLASS OF 1995 FOUR-YEAR LONGITUDINAL REPORT 10 (1995). Moreover, although research indicates that, unlike for girls, the benefit for boys of single-sex education is very limited, several studies have shown that single-sex schools can improve the educational achievement of Black and Latino boys. *See* CORNELIUS RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 110–13 (1990); Cornelius Riordan, *Single-Sex Gender Schools: Outcomes for African and Hispanic Americans*, 10 RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION 117, 198 (1994).