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NEGOTIATING GENDER AND (FREE AND EQUAL) CITIZENSHIP: THE PLACE OF ASSOCIATIONS

Linda C. McClain*

It is a great honor to be part of this symposium devoted to considering the import of the work of John Rawls for law. I consider myself a liberal feminist, and my understanding of liberalism owes much to Rawls's inspiring work. I am also honored to have been on a panel on "Equal Citizenship: Gender" with Susan Moller Okin, from whose pathbreaking work on justice, gender, and families I have learned much.¹ Her work was an important opening salvo in what remains, as she puts it, an "unfinished debate" between Rawls and feminists about justice and gender, and it prompted Rawls to make more explicit both the place of families in a well-ordered society, as well as the place of justice within families.²

One focus of my own participation in this debate is to work out a liberal feminist account of the place of families in what I call a formative project of fostering the capacities for democratic and personal self-government.³ In a previous symposium in this series of conferences on constitutional theory, *The Constitution and the Good Society*, I addressed the question of the domain of sex equality, arguing that sex equality is a component of civic virtue and a public

* Professor of Law, Hofstra University School of Law. This Article grew out of my presentation for the "Equal Citizenship: Gender" panel at the Conference on Rawls and the Law, held at Fordham University School of Law, November 7-8, 2003. I thank my co-panelists, Tracy Higgins, Susan Moller Okin, and Marion Smiley, as well as conference participants, for helpful discussion of the issues raised in this Article. Thanks also to Nora Demleitner, Jim Fleming, and Gila Stopler for valuable comments. Thanks to my research assistant Tali Harel and to law librarian Cindie Leigh for help with sources. A research grant from Hofstra University supported this Article.

1. Susan Moller Okin, *Justice, Gender, and the Family* (1989).

2. Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *Fordham L. Rev.* 1537 (2004). Rawls addresses Okin's criticisms of his treatment of families in John Rawls, *Justice as Fairness: A Restatement* 162-68 (Erin Kelly ed., 2001), and in John Rawls, *The Idea of Public Reason Revisited*, 64 *U. Chi. L. Rev.* 765 (1997) [hereinafter Rawls, *Public Reason*]. Tragically, Professor Okin died just as I was finishing this Article. Regrettably, this debate, to which she contributed so much, will remain doubly unfinished. The insightful work she did during her life, however, will continue to inform it.

3. I explain this approach in a book, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (under contract with Harvard University Press).

value relevant to the regulation of families.⁴ In the present Article, I will focus on the place of associations both within political liberalism and in the feminist liberalism I espouse. I will use the term “associations” to refer to institutions of civil society other than families: religious institutions, cultural institutions, and the array of voluntary nongovernmental organizations that are found in society. Just as feminists question whether Rawls’s *A Theory of Justice* adequately attended to justice within families, thus missing the problem of sex inequality, so they also worry that his treatment of associations and, in particular, religious and cultural institutions, in *Political Liberalism* may hinder women’s equal citizenship. Here, too, Okin’s critique of Rawls’s political liberalism is instructive.⁵

This Article begins by recapitulating how Rawls presents the place of associations. I focus on his view that associations underwrite a stable political order and foster the basic good of self-respect, even as the principles of justice shape the domain of associational life. Political liberalism distinguishes between the domain of the political and the domain of civil society, yet it posits a relationship of mutual support, or of reciprocally constituting domains. What implications does this distinction, as well as this relationship of support, have for the issue of gender and free and equal citizenship? Does Rawls’s attention to this issue offer a satisfactory response to feminist concerns? In taking up criticisms of Rawls’s response by Okin, as well as by liberal feminist Martha Nussbaum,⁶ I offer a reading of Rawls that is more optimistic as to grounding support for the freedom and equality of women within political liberalism and to drawing on political liberalism in a liberal feminist account of the place of associations.

The second aim of this Article is to bring these liberal, and liberal feminist, ideas about associations into dialogue with a body of significant, recent feminist work on the relationship between cultural and religious traditions and associations and women’s freedom and equality. Some of this work directly responds to Okin’s provocative essay, *Is Multiculturalism Bad for Women?*,⁷ which argued that liberal theorists attracted to group rights for religious and cultural minorities within liberal societies seemed to overlook the tension between affirming such rights and feminism’s goals of ending the subordination and unequal status of women. Other work emerges out of the study of efforts by groups of women around the world to challenge

4. See Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *Fordham L. Rev.* 1617 (2001).

5. See Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 *Ethics* 23 (1994).

6. See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 270-83 (2000) (discussing Rawls, *Public Reason*, *supra* note 2).

7. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *Is Multiculturalism Bad for Women?* 9 (Joshua Cohen et al. eds., 1999).

dominant interpretations of religion and culture with alternative interpretations that better support women's freedom and equality.

This feminist work contends not only that Okin, but also many other liberals, liberal feminists, and human rights advocates, too starkly frame the choice for women as rights *or* religion, or rights *versus* culture and community.⁸ This places equal citizenship and associational membership at odds. Instead, these feminists counter with a model that would insist on rights *and* religion and culture, reconciling women's demands for equality and liberty with their demands for meaningful self-government within religious and cultural associations. Such a model raises difficult questions about governmental regulation of associations and about how a society best addresses the tension between associational self-government and the personal self-government of individuals within associations.⁹ In this Article, I identify a dialogue between this feminist approach and a liberal feminism informed by political liberalism as a fruitful next step in considering the place of associations in fostering free and equal citizenship and addressing these important questions about their proper regulation.

I. THE PLACE OF FAMILIES AND ASSOCIATIONS IN POLITICAL LIBERALISM

A. *Growing Up Under Just Social and Political Institutions*

Rawls's political liberalism posits that if we as members of society "grow up under a framework of reasonable and just political and social institutions, we shall affirm those institutions when we in our turn come of age, and they will endure over time."¹⁰ He refers to this as a process of "moral learning," whereby "citizens develop a sense of justice as they grow up and take part in their just social world."¹¹ This process of moral learning helps to ensure what he calls "[s]tability for the right reasons"—that is, stability is not merely a *modus vivendi*, but, over time, "citizens acquire a sense of justice that inclines them not only to accept but to act upon the principles of justice."¹² It was precisely Rawls's reliance upon the role of civil society in the process

8. See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399 (2003); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community, and Women's Equality* (2003) (unpublished manuscript, on file with author); see also discussion *infra* Part II.

9. Nussbaum, for example, who identifies her approach as both universalist and a form of political liberalism, would address this tension by making the promotion of human capabilities a compelling state interest and evaluating families and associations based on how well they do in developing the human capabilities of their members. See Nussbaum, *supra* note 6, at 275-76.

10. John Rawls, *The Law of Peoples* 7 (1999).

11. *Id.* at 44.

12. *Id.* at 45.

of moral learning that led my co-panelist Susan Moller Okin to ask how one vital component of civil society—the family—could serve as a school for citizenship if principles of justice had no place within it and if its actual practices were unjust.¹³

One much-discussed feature of Rawls's political liberalism is his premise that it is possible to have a stable political order that rests upon a shared *political* conception of justice, rather than on a shared, or unitary, *comprehensive* doctrine, such as a shared religion. Rawls argued that, given the “fact of reasonable pluralism, constitutional democracy must have political and social institutions that effectively lead its citizens to acquire the appropriate sense of justice as they grow up and take part in society.”¹⁴ Political liberalism maintains that a reasonable political conception of justice can be supported by an “overlapping consensus of reasonable comprehensive doctrines.”¹⁵ As Rawls envisions this supporting role played by comprehensive doctrines, many of which arise out of associations:

Comprehensive doctrines of all kinds—religious, philosophical, and moral—belong to what we may call the “background culture” of civil society. This is the culture of the social, not of the political. It is the culture of daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams, to mention a few. In a democratic society there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the educated common sense of citizens generally. Society's main institutions, and their accepted form of interpretation, are seen as a fund of implicitly shared ideas and principles.¹⁶

Thus, the “background culture” of civil society undergirds a shared political conception of justice. Moreover, it facilitates persons developing into free and equal citizens. In *Political Liberalism*, Rawls posits that the “background institutions of civil society” provide persons with “those basic freedoms and opportunities . . . that enable us to become free and equal citizens in the first place.”¹⁷ He speaks of the “prior and fundamental role” of society's basic institutions “in establishing a social world within which alone we can develop with care, nurture, and education, and no little good fortune, into free and equal citizens.”¹⁸

Whether or not Rawls's vision of a “freestanding political conception”¹⁹ of justice, supported by and yet separate and apart from

13. See Okin, *supra* note 1.

14. Rawls, *The Law of Peoples*, *supra* note 10, at 15.

15. John Rawls, *Political Liberalism* 44 (1996).

16. *Id.* at 14.

17. *Id.* at 41.

18. *Id.* at 43.

19. *Id.* at xlvii.

comprehensive doctrines, offers a realistic model has been a subject of considerable discussion. Even many liberals reject the quest for a “political” liberalism—that is, one that maintains that it is possible to have a stable political order without a shared vision of the good. That is not a debate I wish to take up or add to here. Instead, my focus is on the tensions inherent in the idea of the “background” role that civil society plays in supporting the political order and fostering free and equal citizenship.

On the one hand, Rawls does not insist upon “congruence” between the values and virtues of the political order and those of civil society. Indeed, he observes that they are not identical and envisions a “division of labor” among the political and other domains so that each has a conception of justice and set of principles and values appropriate to it.²⁰ On the other hand, political liberalism also posits some continuity—or congruence—between the realm of civil society and the political realm, which allows the former to be a “fund of implicitly shared ideas and principles”²¹ that make political stability possible. Thus, Rawls writes: “[A] freestanding political conception [of justice] does not . . . say that political values are separate from, or discontinuous with, other values.”²² Rather, political liberalism aims to specify the “political domain and its conception of justice in such a way” that overlapping consensus is possible, and “citizens themselves . . . view the political conception as derived from, or *congruent with*, or at least not in conflict with, their other values.”²³ In other words, there is a “liberal expectancy” of some congruence.²⁴ Thus, there may be some affinity between Rawls’s idea of the place of associations in underwriting constitutional democracy and the claims of proponents of civil society that the institutions of civil society are “seedbeds of civic virtue.”²⁵

Political liberalism can harbor such a “liberal expectancy” precisely because it does not leave the shape of civil society entirely to chance. Rather, political liberalism requires that a political conception of justice should shape the “social world,” or just social world, including the “background culture” of civil society, so that it will foster free and equal citizenship and support for a political conception of justice. Thus, Rawls urges readers of *Political Liberalism* to think of the principles of justice as “designed to form the social world in which our

20. Rawls, *Public Reason*, *supra* note 2, at 789-90.

21. Rawls, *Political Liberalism*, *supra* note 15, at 14.

22. *Id.* at 10.

23. *Id.* at 11 (emphasis added).

24. On “congruence” and the idea that Rawls’s work has this “liberal expectancy,” see the helpful discussion in Nancy L. Rosenblum, *Membership and Morals* 50-58 (1998).

25. For discussion, see McClain, *supra* note 4; Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301, 303 & *passim* (2000).

character and our conception of ourselves as persons, as well as our comprehensive views and their conceptions of the good, are first acquired, and in which our moral powers must be realized, if they are to be realized at all."²⁶

In a sense, the political domain and the domain of the social world are mutually constituting, but the principles of justice, at the outset, place constraints on the form the social world may assume. Again, there is a tension between affirming separate domains and insisting upon political liberalism's need to shape the associational domain. Thus, on the one hand, Rawls argues that associations, such as churches and universities, require principles "plainly more suitable" for their own shared aims and purposes than the principles of justice. However, he states: "[B]ecause churches and universities are associations within the basic structure, they must adjust to the requirements that this structure imposes in order to establish background justice."²⁷ For example, these associations "may be restricted . . . by what is necessary to maintain the basic equal liberties (including liberty of conscience) and fair equality of opportunity."²⁸ As Rawls elaborates in *The Idea of Public Reason Revisited*:

A domain so-called, or a sphere of life, is not, then, something already given apart from political conceptions of justice. A domain is not a kind of space, or place, but rather is simply the result, or upshot, of how the principles of political justice are applied, directly to the basic structure and indirectly to the associations within it.²⁹

Rawls's clarification, in *The Idea of Public Reason Revisited* and in *Justice as Fairness: A Restatement*, about the place of justice in families and associations arose in response to feminist critique of his apparent inattention to this question. Rawls offers the example of how principles of justice should shape one basic social institution, the family, but also suggests that a similar analysis would apply to associations and other parts of the "nonpolitical domain" included in the basic structure. His response, however, leaves at least some sympathetic feminist critics, such as Okin and Nussbaum, dissatisfied. Nussbaum, for example, contends that "Rawls's approach seems to me to stop somewhat short of what justice requires."³⁰ What are the reasons for this dissatisfaction? Is it justified? I share some of their concerns, but my own reading is more sanguine than theirs in that the remarks Rawls offers may support a robust embrace of the freedom

26. Rawls, *Political Liberalism*, *supra* note 15, at 41. Thus, the "just background of that social world is given by the content of the political conception so that by public reason all citizens can understand its role and share its political values in the same way." *Id.* at 43.

27. *Id.* at 261.

28. *Id.*

29. Rawls, *Public Reason*, *supra* note 2, at 791.

30. Nussbaum, *supra* note 6, at 274.

and equality of women. The debate between Rawls and feminists must, regrettably, remain (as Okin puts it) “unfinished.” But I take a more optimistic view of the direction in which the debate between Rawlsian liberals and feminists might travel.

Rawls writes in *The Idea of Public Reason Revisited* that it is a “misconception” to think that the principles of justice “do not apply to the family and hence those principles do not secure equal justice for women and their children.”³¹ He identifies as one possible source of this misconception the ideal that “[t]he principles of political justice are to apply directly to [the basic structure of society], but are not to apply directly to the internal life of the many associations within it, the family among them.”³² But this question of how the principles of justice apply to society’s main institutions is “not peculiar” to families, Rawls observes, but “arises in regard to all associations, whether they be churches or universities, professional or scientific associations, business firms or labor unions.”³³ For example, he asserts that it is “[not] desirable, or consistent with liberty of conscience or freedom of association” that the principles of political justice would apply to the internal life of churches, just as he assumes that “[w]e wouldn’t want political principles of justice—including principles of distributive justice—to apply directly to the internal life of the family.”³⁴

Political liberalism does not insist upon complete congruence between principles of political justice and the “internal life” of associations. At the same time, the principles of justice “protect the rights and liberties” of persons even when they are members of associations, and thus place certain constraints on associational self-government. Thus, as applied to the family, “political principles do not apply directly to its internal life, but they do impose essential constraints on the family as an institution and so guarantee the basic rights and liberties, and the freedom and opportunities, of all its members.”³⁵ Rawls’s justification for this distinction rests on political liberalism’s commitment to toleration of reasonable comprehensive views and for persons’ freedom to exercise personal self-government.

In her contribution to this symposium, Okin contends that this answer about the place of justice within the family and its distinction between the direct and indirect application of the principles of justice is unsatisfying to feminists such as herself, to whom it is not at all evident that we would not want families to be regulated internally by principles of distributive justice.³⁶ As her other work indicates, Okin would similarly ask the question “Why not?,” with respect to religious

31. Rawls, *Public Reason*, *supra* note 2, at 788.

32. *Id.*

33. *Id.* at 789.

34. *Id.* at 789-90.

35. *Id.* at 789.

36. Okin, *supra* note 2, at 1550-51.

and cultural associations.³⁷ She suggests that Rawls's characterization of "all the main historical religions" (with the exception of certain kinds of fundamentalism) as "reasonable comprehensive doctrines" is quite problematic in view of the sexism that is "rife" in the basic texts of Judaism, Christianity, and Islam.³⁸ She also contends that political liberalism's commitment to toleration leads it to tolerate forms of discrimination against women that would not be tolerated if they were based on race or ethnicity.³⁹

Are Okin's concerns warranted? I agree with her that there is need for further feminist engagement with political liberalism on such issues as the reach of the principles of justice into social institutions. Feminist criticism, like that of Okin's, about justice, gender, and the family has helped to clarify important points about the place of families. Less adequately addressed in feminist criticism are the implications of Rawls's discussion in *The Idea of Public Reason Revisited* for feminist reflection on the place of associations. What potential does political liberalism harbor for an account of associations that attends to the ways not only in which they may help but also hinder persons negotiating gender and citizenship?

First, it is striking that in *The Idea of Public Reason Revisited*, Rawls refers to a "gender system" and observes that "surely that system is subject to critique by the principles of justice."⁴⁰ A basic aim of political liberalism is to derive political principles of justice that specify a "single social system," the "basic structure" of society; "[i]ts basic principles of political justice specify all its main parts and its basic rights reach throughout."⁴¹ Feminist criticism of *A Theory of Justice*, it is fair to say, helped Rawls to focus on the problem of sex inequality and how certain assumptions about justice within that single social system, or the basic structure, were unwarranted. Thus, Rawls recognizes that "gender-structured institutions" may require reform. He writes:

The crucial question may be what precisely is covered by gender-structured institutions. How are their lines drawn? If we say the gender system includes whatever social arrangements adversely affect the equal basic liberties and opportunities of women, as well as those of their children as future citizens, then surely that system is subject to critique by the principles of justice. The question then becomes whether the fulfillment of these principles suffices to remedy the gender system's faults. The remedy depends in part on

37. *Id.*; see also Okin, *supra* note 5.

38. Okin, *supra* note 2, at 1555-56 (citing Rawls, *Political Liberalism*, *supra* note 15, at 170).

39. *Id.* at 1557.

40. Rawls, *Public Reason*, *supra* note 2, at 793.

41. *Id.* at 791.

social theory and human psychology, and much else. It cannot be settled by a conception of justice alone.⁴²

Rawls describes the family as “a crucial case for seeing whether the single system—the basic structure—affords equal justice to both men and women.”⁴³ Moreover, he specifies some remedies, permissible within political liberalism, to address injustice within families related to the gendered division of labor.⁴⁴ As Okin points out, these remedies affirm some of the suggestions his feminist critics have proposed as to how to make families more just social institutions.⁴⁵

Might further reflection have led Rawls to focus upon whether associations foster the “gender system” in ways that warrant remedy? What might Rawls have delineated as permissible remedies for injustices linked to the “gender system” in other associations, such as religious and cultural institutions, that exist within the single social system? In responding to Okin, Rawls refers to Mill’s recognition that the family of his day was “a school for male despotism: it inculcated habits of thought and ways of feeling and conduct incompatible with democracy.”⁴⁶ Rawls goes on to observe: “If so, the principles of justice enjoining a reasonable constitutional democratic society can plainly be invoked to reform the family.”⁴⁷ Because Okin squarely raised her criticism about injustice within families in terms of the impact of such injustice on a crucial assumption within Rawls’s theory—that families will be sites of moral learning that will undergird the political order—Rawls could clearly see that this problem required a remedy. In addition to unfairness to women, these injustices also “tend to undermine children’s capacity to acquire the political virtues required of future citizens in a viable democratic society.”⁴⁸ Had Rawls reflected further upon the matter, might he have made a parallel move to recognize that certain cultural and religious associations—rather than being examples of reasonable comprehensive doctrines—may teach and perpetuate messages of gender hierarchy and male authority at odds with fostering the capacities for personal and democratic self-government? And if this would serve to perpetuate an unjust “gender system,” what sort of remedies might a Rawlsian liberalism support?

These tantalizing questions must remain unanswered, at least with respect to Rawls’s own work. I believe, however, that it is possible to draw support from Rawls’s idea of a “gender system” in need of remedy in order to develop an account of how associations fit into

42. *Id.* at 793.

43. *Id.* at 792.

44. *Id.* at 792-93.

45. Okin, *supra* note 2, at 1565.

46. Rawls, *Public Reason*, *supra* note 2, at 790.

47. *Id.* at 790-91.

48. *Id.* at 790.

“the basic structure” that “affords equal justice to both men and women.” For example, the idea of a “gender system” might be extended to focus on how cultural, religious, and legal enforcement of a norm of heterosexuality limits women’s and men’s freedom and equality. If so, then a proper ordering of political values might well condemn such measures as the Defense of Marriage Act and the more recently proposed “federal marriage amendment.”⁴⁹ Similarly, feminist scholars might fruitfully consider how a proper ordering of political values brings into focus the intertwining of the “gender system” with ethnic, racial, and economic systems as well (i.e., other divisions of labor within society reflecting historical injustice, and also adversely affecting equal basic liberties and opportunities).

Second, the helpful method Rawls suggests in *The Idea of Public Reason Revisited* is reflection on how the “ordering of political values” should apply to institutions within the basic structure. Thus, he indicates in his discussion of the family as “part of the basic structure” that among these values are “the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and finally, the value of the family in securing the orderly production and reproduction of society and of its culture from one generation to the next.”⁵⁰ Rawls then states: “*These values provide public reasons for all citizens.*”⁵¹ I find this statement to be critically important because it grounds “the freedom and equality of women” as a part of public reason, *not* merely part of one of many contested reasonable comprehensive doctrines. As I have written elsewhere, feminists working within a political liberal framework may usefully employ this commitment to women’s freedom and equality to explain why governmental measures to foster such freedom and equality are justifiable and consistent with toleration.⁵² As Okin points out, there is also enormous potential in Rawls’s statement in the introduction to *Political Liberalism* that “[t]he same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women.”⁵³

49. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)). The proposed federal marriage amendment, known as the “marriage bill,” introduced by Representative Marilyn Musgrave, reads: “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor any state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” H.R.J. Res. 56, 108th Cong. (2003); *see also* S.J. Res. 26, 108th Cong. (2003).

50. Rawls, *Public Reason*, *supra* note 2, at 793.

51. *Id.* at 793-94 (emphasis added).

52. *See* Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 Ohio St. L.J. 21 (1998).

53. Rawls, *Political Liberalism*, *supra* note 15, at xxxi. For discussion, *see* Okin, *supra* note 2, at 1565.

These two statements about women's freedom and equality, together with Rawls's recognition that the "gender system" may be subject to critique by the principles of justice, securely ground the place of sex equality within a political conception of a well-ordered society. To be sure, the questions surrounding the place of women and men in society—particularly as they relate to proper gender roles and identities in the domains of sexuality, family, marriage, and work—continue to be matters as to which there is considerable disagreement. In our constitutional order, however, at least since the doctrinal shifts in equal protection law commencing in the 1970s, the requirements of equal citizenship bar state support of the sort of gender hierarchy of male authority/female deference within families and other spheres of civil society that made up the system.⁵⁴ Similarly, civil rights laws of the 1960s put limits on both public and private forms of discrimination that were part of this "gender system."

If the political conception of the place of gender in the social system has changed from hierarchy to equality, so that—as I have argued elsewhere⁵⁵—sex equality is a political value as well as a constitutional norm, what implications does this have for notions of proper gender ordering in the "social world"? What implications does this have for what sort of freedom of association is compatible with this political value, or how to order this political value and other important political values?

How political liberalism might answer these questions seems to turn on three distinctions. The first, already discussed, is its insistence that

54. See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a statute that granted a husband, as "head and master" of property he jointly owned with his wife the sole right to dispose of the property without his wife's consent violated the Fourteenth Amendment's Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a statutory scheme providing that husbands, but not wives, may be required to pay alimony upon divorce violated the Fourteenth Amendment's Equal Protection Clause because a gender-neutral classification would serve as well as a gender classification (which carried the baggage of gender-role stereotypes) to carry out the state's compensatory and ameliorative purposes); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding that a sex-based distinction between widows and widowers, in which Social Security Act survivors' benefits were payable to a female wage earner's widower only if he was receiving at least half of his support from her, while they were payable to a male wage earner's widow regardless of dependency, violated due process and equal protection); *Stanton v. Stanton*, 421 U.S. 7 (1975) (holding that a statute—under which girls attained majority, and ceased receiving child support, when they became eighteen, but boys did not until they became twenty-one—could not survive an equal protection attack); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that statutes presuming, solely for administrative convenience, that spouses of male members of the military are dependents for the purpose of obtaining certain benefits, but that spouses of female members are not, unless they are dependent for over one-half of their support, violate the Fifth Amendment's Due Process Clause); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that statutes providing that, between persons equally qualified to administer estates, males must be preferred to females violates the Fourteenth Amendment's Equal Protection Clause).

55. McClain, *supra* note 4.

the principles of justice apply directly to the basic structure, by constraining associations from violating citizens' basic rights and liberties and freedom of opportunities, but do not directly apply to the "internal life" of associations. The second is the distinction between "reasonable pluralism" and pluralism as such (and "reasonable" and "unreasonable" comprehensive doctrines). The third is the distinction between government's authority to eliminate and remedy involuntary, as distinguished from voluntary, gendered divisions of labor. Okin and our co-panelist Tracy Higgins, for example, find Rawls's use and application of all of these distinctions troubling, for they conclude that they allow religiously grounded forms of sex inequality.⁵⁶

A full discussion of these distinctions, and, particularly, how Rawls distinguishes "reasonable" and "unreasonable" comprehensive doctrines, is beyond the scope of this Article. The crucial issue at hand is feminist fear that political liberalism's toleration of "reasonable" comprehensive views will extend too far and include religious and cultural traditions that justify sex inequality and, because of gender role conceptions, limit persons' development of their capacities for personal and democratic self-government.

In light of political liberalism's embrace of "the freedom and equality of women" as a political value, may a comprehensive doctrine that denies such freedom and equality be "reasonable," or must it be deemed "unreasonable"? *Political Liberalism* rules out of bounds "a conception of the good requiring the repression or degradation of certain persons on, say, racial, or ethnic, or perfectionist grounds, for example, slavery in ancient Athens, or in the antebellum south."⁵⁷ Okin points out this passage and asks why political liberalism would not similarly condemn doctrines requiring the repression or degradation of persons on the grounds of sex.⁵⁸

This is an important question, and I believe that the answer is that political liberalism would condemn such doctrines. First, given that political liberalism recognizes the freedom and equality of women as a political value, surely these doctrines would and should be considered unreasonable. Second, in *The Law of Peoples*, Rawls himself indicates that the idea of basic human rights places limits on a religion's ability to "claim as a justification for its subjection of women that it is necessary for its survival."⁵⁹ Rawls draws on analogies to the argument that "a religion cannot claim as a justification that its intolerance of other religions is necessary for it to maintain itself."⁶⁰ In both cases, "[b]asic human rights are involved, and these belong to

56. Okin, *supra* note 2, at 1552-62; Tracy Higgins, *Why Feminists Can't (or Shouldn't) Be Liberals*, 72 *Fordham L. Rev.* 1629 (2004).

57. Rawls, *Political Liberalism*, *supra* note 15, at 196.

58. Okin, *supra* note 2, at 1557.

59. Rawls, *The Law of Peoples*, *supra* note 10, at 111.

60. *Id.*

the common institutions and practices of all liberal and decent societies.”⁶¹ From this argument, I infer that even though political liberalism recognizes that associations may have principles of justice distinct from the political conception of justice, the political conception may not tolerate certain views of justice generated or sustained by associations.

What is the scope of the idea of the “subjection of women”? Would forms of gender socialization raise concerns similar to those raised by repression or degradation? What if, as some scholars contend, the practical effect of education in Christian fundamentalist and Catholic schools is to teach female students that “they are by virtue of their gender, inferior human beings”?⁶² One study concludes:

Fundamentalist schools deliberately and systematically inculcate in their students the belief that females are inferior to males, that a woman’s only purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs and leaders of their community, or even to assert opinions about matters beyond home life. To think otherwise is sinful: “sexual equality denies God’s word.”⁶³

If this research is credible, and such education takes a toll on young women’s capacities, can these religious traditions be “reasonable” ones?

Political liberalism’s concern for children’s developing the capacity to be fully cooperating members of society would surely lead to some constraints on associations’ perpetuating these sorts of messages, whether this took the form of educational campaigns by government to promote sex equality or curriculum requirements to do so. Surely, political liberalism could not endorse government’s financially supporting such messages, for example, through a voucher program. For instance, Gila Stopler argues that, just as states may require that a religious educational institution’s participation in a voucher program is contingent upon its not teaching messages of hatred based on, for example, race, ethnicity, national origin, or religion, states should also include sex in this list.⁶⁴ Indeed, she proposes that given the harmful impact of certain forms of religious socialization upon girls’ capacity for citizenship, schools receiving vouchers should be required to include education for equality between the sexes. In other writing, I support this sort of education as a component of public schools’ mission. It seems credible to extend this requirement once private

61. *Id.*

62. Stopler, *supra* note 8, at 63.

63. *Id.* (quoting James G. Dwyer, *Religious Schools v. Children’s Rights* 39 (1998)).

64. *Id.* at 67.

schools take on public funding and, thus, arguably, advance public purposes.⁶⁵

A tougher case is posed by religious doctrines that affirm a basic equality of women and men before God, but interpret this equality to encompass complementary, and different, natures and capacities of women and men that warrant different social roles and levels of authority.⁶⁶ Are these “reasonable” or “unreasonable”? In Part II, I suggest that one useful way to explore these questions about the place of women’s freedom and equality in “reasonable” comprehensive doctrines is through looking at the efforts of feminists working within particular cultural and religious traditions to challenge understandings of those doctrines that hinder, rather than foster, women’s freedom and equality.

Issues of gender complementarity also implicate Rawls’s distinction between the place for voluntary and involuntary gendered divisions of labor within the family as well as, I infer, associations. What is a “voluntary” gendered division of labor? What distinguishes it from an “involuntary” one? There may be more room for feminists to work with this distinction than Okin allows. Rawls argues that political liberalism can seek to reduce the involuntary gendered division of labor within the basic structure to zero, but that it “may have to allow for some traditional gendered division of labor within families—assume, say, that this division is based on religion—provided it is fully voluntary and does not result from or lead to injustice.”⁶⁷ For example, he writes: “If the gendered division of labor in the family is indeed fully voluntary, then there is reason to think that the single system realizes fair equality of opportunity for both genders.”⁶⁸

Rawls’s example of a “voluntary” division of labor as one “based on religion” comes with two important qualifications. First, Rawls’s definition of “voluntary” is more demanding than a simple affirmation of one’s religion. Rather, in a footnote, he explains that the decision must be voluntary in the sense of being “reasonable”—that is, “doing the rational thing when all the surrounding conditions are also fair,”

65. McClain, *supra* note 4, at 1653-64. On the idea of harnessing religious educational institutions to advance public purposes by government’s attaching certain anti-discrimination requirements to the receipt of public funds, see Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital and Substantive Morality*, 69 *Fordham L. Rev.* 1573 (2001).

66. See Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 *S. Cal. L. Rev.* 189 (2002). As Blenkhorn writes, “most Muslims believe that women and men are spiritually equal before God, but that women are socially inferior to men due to distinct, asymmetrical domestic duties.” *Id.* at 194. Arguments about gender complementarity within various denominations of Christianity draw on biblical verses about the husband’s being the “head” of the household and the wife’s owing obedience.

67. Rawls, *Public Reason*, *supra* note 2, at 792.

68. *Id.*

or in the case of religious conviction, “affirming one’s religion is voluntary when all of the surrounding conditions are reasonable, or fair.”⁶⁹ Although Rawls does not pursue it in the text, this indication that the “subjective conditions of voluntariness”⁷⁰ must be present gives, in my view, considerable room to argue about how the gender system that shapes the surrounding conditions calls into question assumptions about “voluntariness.” For example, if socialization of girls and women into a particular religion’s teachings has the effect of impairing their capacity for exercising personal self-government, or what some scholars call “autonomy competency,” then this would appear to call into question whether a gendered division of labor is voluntary.⁷¹ By analogy, feminists have done helpful work on the constraints on women’s “choice” in the context of their respective investments in work and family.⁷² This work illuminates how unjust social conditions that are not supportive of the important task (and political value) of reproduction and social reproduction make it more rational for women to opt out of paid employment.⁷³

A second qualification Rawls offers is that the gendered division of labor does not “lead to injustice.”⁷⁴ This qualification offers room for challenges to unjust results. A more systemic argument is also available. In *Political Liberalism*, Rawls explains that the “role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place.”⁷⁵ However, “[u]nless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves.”⁷⁶ Addressing this tendency requires “special institutions to preserve background

69. *Id.* at 792 n.68.

70. *Id.*

71. Stopler, *supra* note 8, at 57 (drawing on the idea of “autonomy competency” in Diana T. Meyers, *Self, Society, and Personal Choice* (1989)).

72. Joan Williams, *Unbending Gender* (2000).

73. To take one recent example involving the gendered division of labor within the family, a recent *New York Times Magazine* had a cover story entitled *Q: Why Don't More Women Get to the Top? A: They Choose Not To*. The premise of the story was that highly educated women were part of a new revolution of “opting out” of careers because they put more value on staying home to raise their children. But at least some of the women profiled seemed to make choices that were less than “fully voluntary” in the sense that Rawls uses the term. For example, two women who were mothers tried unsuccessfully within their places of employment to negotiate a work schedule that would have allowed them to combine mothering responsibilities and their job. Their proposals were ignored or met with indifference; only then, with some considerable regret, did they leave their jobs. See Lisa Belkin, *The Opt-Out Revolution*, *N.Y. Times*, Oct. 26, 2003, § 6 (Magazine), at 42.

74. Rawls, *Public Reason*, *supra* note 2, at 792.

75. Rawls, *Political Liberalism*, *supra* note 15, at 266.

76. *Id.*

justice.”⁷⁷ This diagnosis of a tendency toward injustice shifts a focus from voluntary and involuntary to a more systemic need for regulation. Although Rawls does not develop such an argument in the context of the “single social system’s” tendency toward an unjust “gender system,” liberal feminists certainly could pursue this line of argument and explore what sorts of special institutions might be appropriate and how they might shape the basic structure within which associational life occurs.

B. *The Place of Associations in Fostering Self-Respect of Persons and Peoples*

The place of associations in a political liberal order is not confined to their role in undergirding a political consensus and fostering members’ capacities for democratic self-government. Rawls also speaks of the place of associations and associative ties in helping members of society to realize the important good (in Rawls’s terminology, the “primary good”) of self-respect.⁷⁸ This function of associations appears to relate particularly to aiding persons’ development of their capacity to form, act on, and revise a conception of a good life. As Rawls wrote in *A Theory of Justice*:

It normally suffices [to provide a basis of self-respect] that for each person there is some association (one or more) to which he belongs and within which the activities that are rational for him are publicly affirmed by others. In this way we acquire a sense that what we do in everyday life is worthwhile. Moreover, associative ties strengthen the second aspect of self-esteem, since they tend to reduce the likelihood of failure and to provide support against the sense of self-doubt when mishaps occur. To be sure, men [sic] have varying capacities and abilities, and what seems interesting and challenging to some will not seem so to others. Yet in a well-ordered society anyway, there are a variety of communities and associations, and the members of each have their own ideals appropriately matched to their aspirations and talents. . . . What counts is that the internal life of these associations is suitably adjusted to the abilities and wants of those belonging to them, and provides a secure basis for the sense of worth of their members.⁷⁹

Under what conditions will associational life foster self-respect? Just as political liberalism views the political domain and the “background culture” of civil society as mutually supporting each other, so, too, the principles of justice specify that persons should be accorded the “social bases of self-respect,” such as “the equal basic rights and liberties, the fair value of the political liberties and fair

77. *Id.* at 267.

78. John Rawls, *A Theory of Justice* § 67, at 386-88 (rev. ed. 1999).

79. *Id.* at 387-88.

equality of opportunity.”⁸⁰ In other words, the political conception of justice shapes the domain of the “background culture” of civil society by ensuring that persons within civil society have these social bases of self-respect. As noted above, in explaining the idea of distinct domains, Rawls stresses that “[t]he principles defining the equal basic liberties and opportunities of citizens always hold in and through all so-called domains.”⁸¹ With respect to feminist concern about injustice within families, Rawls responds: “The equal rights of women and the basic rights of their children as future citizens are inalienable and protect them wherever they are. Gender distinctions limiting those rights and liberties are excluded.”⁸² Rawls intends this qualification to apply to associations as well.

In *The Law of Peoples*, Rawls applies the idea of self-respect to peoples. Here, too, he indicates the interplay between the political domain and the “background culture” of civil society in fostering self-respect. He argues that the self-respect of “liberal peoples” “rests on the freedom and integrity of their citizens and the justice and decency of their domestic political and social institutions,” as well as on “the achievements of their public and civic culture”—all things “rooted in their civic society.”⁸³ Indeed, one argument Rawls offers against imposing sanctions on “decent nonliberal peoples” is that it will “wound” their self-respect.⁸⁴ He contends that it is “surely . . . a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life,” for “in this way political society is expressed and fulfilled.”⁸⁵ Thus, he argues for “due respect” by liberal peoples of decent nonliberal peoples, and contends that a decent nonliberal society that receives this respect “may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own.”⁸⁶

But what makes a society a “decent” nonliberal one? Rawls defines “decent nonliberal peoples” in a way that insists that all members have human rights, including the right to life, to liberty, to property, and to formal equality “as expressed by the rules of natural justice.”⁸⁷ As I discuss in the next section, Rawls gives particular attention to the requirements that the basic human rights of women not be violated and that women are represented in the political process.

It bears mentioning two different, but related, lines of possible

80. Rawls, *Political Liberalism*, *supra* note 15, at 82 (citation omitted).

81. Rawls, *Public Reason*, *supra* note 2, at 791 (citation omitted).

82. *Id.*

83. Rawls, *The Law of Peoples*, *supra* note 10, at 47-48.

84. *Id.* at 61.

85. *Id.*

86. *Id.* at 61-62.

87. *Id.* at 65.

feminist criticism of political liberalism's link between participation in associational life and the good of self-respect. First, feminists might argue that this account ignores the fact that associations that do not affirm and foster the freedom and equality of women may hinder, rather than facilitate, women's acquiring the good of self-respect. Second, feminists might contend that Rawls's account does not seem to recognize the role of associations in affording a space in which persons might find the self-respect denied them in other associations or in society's basic institutions. Further, such associations might facilitate the articulation of dissenting views about what justice requires and lead to social and, ultimately, legal and political change.

My view is that political liberalism attempts to address the first problem through the idea that the principles of justice shape—and put constraints upon—the nonpolitical domain, or the “background culture of civil society” in a way that seeks to facilitate persons acquiring self-respect. As to the second line of feminist criticism, political liberalism recognizes, even if it does not elaborate upon, this important transformative and political aspect of associational life, that is, of the “background culture of civil society.”⁸⁸ As I have explained elsewhere, my own liberal feminist view of the place of associations recognizes that “civil society contributes to liberal democracy by affording oppositional space to ‘enclaves of protected discourse and action,’ which allow social actors to seek to correct the injustices of an ongoing democracy by bringing about social change.”⁸⁹ As the next part explains, this change may pertain to the norms and practices of associations, as well as to laws and the polity.

II. RIGHTS VERSUS OR RIGHTS WITHIN RELIGION AND CULTURE?: FEMINISTS DEBATE THE PLACE OF ASSOCIATIONS

Feminist debates in recent years over a perceived tension between protection of associational life and securing women's freedom and equality arise in many contexts. For example, in her book, *The Claims of Culture*, Seyla Benhabib identifies several examples, in the United States and in other countries, of potential conflict between “claims to cultural difference and universalist human-rights norms”: the assertion (in the United States) by cultural or ethnic minorities of cultural defenses to criminal charges; the dilemma of reconciling (e.g., in India) generally applicable laws affording women certain rights and protections with personal and family laws, based on religion, that perpetuate gender hierarchy; and efforts by governments (e.g., in France) to restrict the wearing of religious dress in public institutions

88. See Rawls, *Public Reason*, *supra* note 2, at 774-75 & nn.28 & 30.

89. McClain & Fleming, *supra* note 25, at 321-22 (using the phrase “enclaves of protected discourse and action” found in Jane Mansbridge, *Using Power/Fighting Power: The Polity, in Democracy and Difference* 58 (Seyla Benhabib ed., 1996)).

to promote civil solidarity and governmental neutrality toward religion.⁹⁰ An increasingly visible example is women living under Muslim laws seeking to interpret—as well as transform—such laws in ways supportive of their greater freedom and equality.⁹¹ Benhabib posits that so many of the dilemmas regarding the limits of multiculturalism implicate the “status of women in distinct cultural communities” in part because “women and their bodies are the symbolic-cultural site upon which human societies inscript their moral order.”⁹²

In Part I, I argued that participation in associations may foster persons’ developing into free and equal citizens, with the capacity for personal and democratic self-government, but that the claims of associational life may also hinder such self-government. In recent years, this tension has seemed especially acute when constraints on women’s citizenship appear to find justification in religious and cultural traditions. And notwithstanding the portrait of associations as generating civic virtues, sometimes the values inculcated in associations may be in conflict with democratic values. This raises the question about the extent to which the values and virtues of associations warrant toleration, in our constitutional order, even if they conflict with democratic values and virtues.

As Benhabib observes, Okin’s “opening salvo” in the debate over multiculturalism and women’s rights, *Is Multiculturalism Bad for Women?*, “raised hackles” (even among feminists) in part for its provocative way of putting the question.⁹³ Just as Okin worries that political liberalism’s toleration of “reasonable comprehensive doctrines” allows for religious and cultural practices that discriminate against women, her essay contends that a liberal impulse to extend “group rights” to religious and cultural minorities may also lead to tolerating religiously and culturally sanctioned forms of sex inequality.⁹⁴ She addresses liberal defenders of group rights who maintain that special protections may be necessary for cultural minorities. She claims that when a culture “endorses and facilitates the control of men over women in various ways,” to accord group rights to such a culture is “antifeminist,” because such rights “substantially limit the capacities of women and girls of that culture to

90. Seyla Benhabib, *The Claims of Culture* 86-100 (2002).

91. See Sunder, *supra* note 8; Louise Halper, *Negotiations of Law and Gender: Living Shari’a in Iran* (Oct. 2003) (Working Paper No. 03-18), available at <http://ssrn.com/abstract=453523>.

92. Benhabib, *supra* note 90, at 83-84 (drawing on the list of cultural practices that most often lead to “clashes of intercultural evaluation” found in Bikhu Parekh, *Rethinking Multiculturalism* 264-65 (2000)).

93. *Id.* at 100-01; Okin, *supra* note 7.

94. Okin, *supra* note 7, at 11.

live with human dignity equal to that of men and boys, and to live as freely chosen lives as they can."⁹⁵

Okin is particularly critical of the role of religious and cultural traditions in bringing women's sexuality and reproductive capabilities under men's control and in rendering women "servile to men's desires and interests."⁹⁶ According to Okin, some cultures, namely, Western liberal cultures, have moved further from their patriarchal pasts than others. Thus, although "[m]ost cultures are patriarchal, . . . many (though not all) of the cultural minorities that claim group rights are more patriarchal than the surrounding cultures."⁹⁷

To liberals who stress the need for protecting cultures so that members within them have a "rich and secure cultural structure"⁹⁸ within which to develop self-respect and the capacity to make choices about how to live their lives, Okin responds that pervasive cultural practices discriminating against and controlling women threaten the capacity of women to question the social roles that a particular culture instills and enforces upon them. In other words, the force of gender socialization and discrimination renders impossible, or very difficult, the liberal goal of revisability—that is, questioning one's inherited social roles and exiting oppressive associations. Instead, putting the point bluntly, Okin contends:

In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the [former] culture have a clear interest in its preservation. Indeed, they *might* be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women—at least to the degree to which this is upheld in the majority culture.⁹⁹

Okin's essay invites attention to the place of *individuals* within associations and on tensions between personal self-government and associational self-government. Her critique has garnered considerable criticism, even among feminist scholars, for its stark framing of the issue as "feminism versus multiculturalism" and for its allegedly monolithic and static conceptions of religion and culture.¹⁰⁰ Some feminist scholars view her work as emblematic of a strand of Western feminist argument that interprets the condition of immigrant or Third

95. *Id.* at 12.

96. *Id.* at 16.

97. *Id.* at 17.

98. *Id.* at 20 (citation omitted).

99. *Id.* at 22-23.

100. Several of the other essays in the book based on Okin's essay raise these sorts of criticisms.

World women as a form of “death by culture,” while failing to recognize serious forms of sex inequality closer to home.¹⁰¹ Moreover, feminist legal scholar Leti Volpp argues that this “excessive focus” by Okin and other Western liberal and liberal feminist scholars upon “minority and Third World sex-subordinating cultural practices” has other detrimental effects, such as positioning “other” women as “perennial victims,” thus denying “their potential to be understood as emancipatory subjects,” and diverting attention away from structural forces that shape cultural practices.¹⁰²

In this Article, I am not attempting to delve fully into all of the controversy over Okin’s essay, and I will not take up in detail the specific responses Okin has offered to her critics.¹⁰³ Rather, I would like to focus on what this disagreement among feminists may illuminate about how to view the place of associations in securing or hindering equal citizenship. I also consider how some of the basic features of political liberalism, as discussed above, might usefully contribute to thinking about this issue.

It would be unfortunate if Okin’s blunt statement of the issues diverted attention from what I believe is an important underlying point: Religious and cultural traditions often serve as justifications for restricting women’s self-determination and for various forms of gender-based inequality.¹⁰⁴ Moreover, forms of sex discrimination rooted in social attitudes and religious and cultural understandings can persist notwithstanding formal legal guarantees of rights to liberty and equality.¹⁰⁵ (As a helpful example of why Western feminists should be alert not just to forms of sex inequality abroad but also to those at home, the *New York Times* recently featured a story about the persistence of sex-selection abortion in India because of a preference for sons over daughters and another story about the persistence in the United States over the last sixty years of higher divorce rates among couples with only girl children than couples with

101. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 Colum. L. Rev. 1181, 1185-95 (2001). For an elaboration of how the idea of “death by culture” underlies some Western feminist analysis of problems experienced by non-Western women, see Uma Narayan, *Dislocating Cultures* 84-88 (1997) (discussing the role of “culture” in purporting to explain dowry murders in India).

102. Volpp, *supra* note 101, at 1204-05 (also identifying directing attention away “from issues affecting women that are separate from what are considered sexist cultural practices”). For a helpful, earlier discussion of feminist debate over universalist versus cultural relativist approaches to human rights, see Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 Harv. Women’s L.J. 89 (1996).

103. See Susan Moller Okin, *Multiculturalism and Feminism: No Simple Questions, No Simple Answers* (2003) (unpublished manuscript, on file with author).

104. See also Benhabib, *supra* note 90, at 100 (criticizing Okin’s essay in certain respects but observing that “[c]ertainly Okin was right in raising these issues”).

105. See Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 Colum. J. Gender & L. 154 (2003).

only boy children.¹⁰⁶) My co-panelist Tracy Higgins's report on her human rights mission to Ghana found that despite the enactment of laws affirming formal equality for men and women in the areas of property and inheritance laws, social resistance to such equality and traditional attitudes about the sexes hinders the enforcement of such laws.¹⁰⁷ The transition in Afghanistan from a condition of extreme repression of women (justified by an appeal to religion) to a new constitutional order with formal guarantees of equality may afford another example. How will the constitution's guarantees of freedom from discrimination and of equal rights and duties before the law reconcile with the provision that "no law can be contrary to the sacred religion of Islam" and that laws protecting the family (especially the child and mother) shall not be contrary to "the sacred religion of Islam"?¹⁰⁸

Recognizing that some cultural and religious practices and teachings appear to justify sex inequality, and thus may hinder rather than foster women's personal self-government, is an important component of a feminist analysis of the place of associations. As discussed above, whether the appropriate distinction is between reasonable and unreasonable comprehensive doctrines, or a different limiting principle, affirming the freedom and equality of women as a political value justifies certain protections of women even when they are members of associations (for example, the important liberal right to exit oppressive communities). A further useful step, however, is one being urged by a variety of feminist scholars seeking to move away from a "rights versus culture" framework to one of "rights within culture," or rights within religious and cultural communities. For example, Uma Narayan acknowledges the use of "culture" to justify various forms of gender inequality, but goes on to argue that there is often considerable internal contestation of the meaning of "culture," including readings more supportive of women's equality and liberty.¹⁰⁹ Thus, some feminist scholars argue for a right to remain *within* a cultural or religious community *and* to affirm sex equality and autonomy.

The model these feminist scholars advance recognizes a positive value to being within a community and the constitutive role of membership in shaping the self, even as it insists on bringing into that sphere limiting principles of equality and freedom. This feminist work

106. Compare David Rhode, *India Steps Up Effort to Halt Abortions of Female Fetuses*, N.Y. Times, Oct. 26, 2003, § 1, at 3 with David Leonhardt, *It's a Girl! (Will the Economy Suffer?): Couples With Boys Are Divorcing Less*, N.Y. Times, Oct. 26, 2003, § 3, at 1.

107. Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 Fordham Int'l L.J. 259, 295-311 (2001).

108. See Afg. Const. art. 2, 22, 54 (2003 Draft), available at http://www.constitution-afg.com/draft_const.htm.

109. Narayan, *supra* note 101, at 3-39.

focuses on the place of individuals within civil associations by insisting on their rights to be represented when courts or legislatures must consider what conception of a particular cultural or religious tradition should guide a law or a judicial opinion.¹¹⁰ Such feminists contend that, too often, when courts and legislatures confront claims based on religion, they view religion as static and unchanging and “defer[] to fundamentalist claims to discriminate in the name of religion or culture, thwarting the claims of dissenting women and other advocates of change.”¹¹¹ For example, Madhavi Sunder offers examples of such political actors interpreting and upholding “personal laws” and “customary laws” without listening to the voices of those within communities that seek to make such laws more just.¹¹² Similarly, Gila Stopler, focusing on Israel, which has personal religious laws, and the United States, which is constitutionally committed to the separation of church and state and to gender neutrality in its laws, contends:

In all these cases state power is used in the service of community leaders and the patriarchal and hierarchical norms these leaders seek to impose for their benefit, at the expense of the basic right to equality of the community’s weaker members as well as at the expense of their right to participate in the shaping of the community in which they live.¹¹³

Sunder argues that current human rights discourse offers women and other dissenters too stark a choice: rights or culture. Instead, women should have the right not just to exit religious communities, but also to participate in shaping those communities and to have their voices heard in defining those communities’ norms and values. She critiques current legal treatment of religion:

Premised upon an outmoded conception of religion as homogeneous and static, law presumes religious communities have a uniform view and refuses to confront actual plurality and contestation within a religious community. But . . . [a]ll over the world, women are contesting traditional customary and religious laws and demanding a right to participate in the process of making religious or cultural meanings. Seen in this light, current law is procedurally faulty because law does not recognize everyone equally within the community as having a say in these processes. . . . Women’s activism around the globe also challenges the normative premise of current law, which accepts (and expects) imposed identity and despotism within religion, so long as one has freedom in the public sphere. Departing from this traditional view, women are today making normative demands for a right to freedom and equality *within*

110. See Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 Harv. Int’l L.J. 381 (2000).

111. Sunder, *supra* note 8, at 1425.

112. *Id.* at 1425-33.

113. Stopler, *supra* note 8, at 35.

religion, as well as in the public sphere. But current law ignores these claims.¹¹⁴

Sunder offers as case studies of this “dialogical model,” which enables women to claim both rights and religion, the efforts of the group Women Living Under Muslim Laws (“WLUML”) and the human rights manual, *Claiming Our Rights: A Manual for Women’s Human Rights Education in Muslim Societies*.¹¹⁵ These groups find support for sex equality from a critical engagement with the internal norms of such religious and cultural traditions, and not solely from public values and norms from “outside” such traditions. For example, although she does not call herself a feminist, the recent Nobel Prize winner, Iranian human rights lawyer Shirin Ebadi, characterizes her mission as pressing the case that Islam is compatible with human rights, including treating women equally with men.¹¹⁶ Sunder highlights that WLUML stresses that it is only when women assume the right to “define for themselves the parameters of their own identity and stop accepting unconditionally and without question what is presented to them as the ‘correct’ religion, the ‘correct’ culture, or the ‘correct’ national identity that they will be able effectively to challenge the corpus of laws imposed on them.”¹¹⁷

New forms of association play a vital role in this work of fostering self-definition and the assertion of individual agency. This relates to the role of associations, discussed in Part I, in fostering self-respect, as well as alternative conceptions of justice both within associations and in the polity. For example, WLUML’s creation of a network that collects and disseminates information about the actual diversity of laws and customs throughout the Muslim world and its sponsorship of face-to-face meetings “help to break women’s isolation” and to “undermine the claims of fundamentalists that there is just one way of being Muslim.”¹¹⁸ These forms of associational life also serve a critical educational role in letting women know about other possible ways of being and doing. As one official within WLUML put it, “[we are] giving women the tool to be able to say that women’s rights are part of your own culture.”¹¹⁹

It may be apt to think of groups like WLUML as creating “counterpublics” or “deliberative enclaves of resistance,” in which members of the association are able to work out a sense of identity

114. Sunder, *supra* note 8, at 1432-33.

115. *Id.* at 1433-51 (citation omitted).

116. Elaine Sciolino, *A Prize, Laureate Says, ‘Good for Democracy,’* N.Y. Times, Oct. 11, 2003, at A6.

117. Sunder, *supra* note 8, at 1439-40 (quoting Farida Shaheed, *Controlled or Autonomous: Identity and the Experience of the Network, Women Living Under Muslim Laws*, 19 Signs 997, 1008 (1994)).

118. *Id.* at 1437.

119. *Id.* at 1438 (quoting Cassandra Balchin, assistant director of WLUML’s international coordination office in London).

and of rights that is not reflected in the dominant view of law and culture, but that may eventually lead to changes in that view.¹²⁰ As such, they play a facilitative role in fostering women's personal and democratic self-government. Similarly, Nussbaum contends that, in India, conventional families may do less well than women's collectives in fostering women's capabilities.¹²¹ Narayan's recounting of Third World feminism also highlights the critical role of association. She argues that although the experience of daughters of seeing gender dynamics of injustice and oppression within their own family and their parents' marriage was a source of a critical awareness, "it takes *political connections* to other women and their experiences" along with political analysis and attempts to construct solutions to "make women into feminists in any full-blooded sense."¹²²

There are analogies to the role played by associations and social movements in the United States. For example, feminist consciousness-raising groups served both to facilitate women's capacity to fashion a sense of identity different from the one prevalent in the dominant culture and to prefigure forms of association premised on greater equality.¹²³ Social movements may succeed in placing forms of inequality previously regarded as private on the agenda as matters of social and political justice.¹²⁴

As noted in Part I, civil society, or what Rawls calls "the background culture" of civil society, may generate new understandings of the requirements of justice, and these may bear both on norms governing associational life (as when a dissident group within a religion argues for a new interpretation), as well as on those governing the polity. Notably, both Rawls and Benhabib refer to the realm of civil society as a place of "moral learning." This entails not only learning such civic virtues as tolerance, but also, for Benhabib, the learning that takes place through cultural and political conflict in a "civic public space of multicultural understanding and confrontation."¹²⁵

What sort of model of associational life and of affirmative individual rights and governmental responsibilities would this emerging feminist model of rights within cultural and religious

120. See McClain & Fleming, *supra* note 25, at 318.

121. Nussbaum, *supra* note 6, at 277.

122. Narayan, *supra* note 101, at 11.

123. I am grateful to Amy Baehr for this suggestion.

124. See Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (2000) (relating the history, struggles, and successes of the battered women's movement); Phoebe Hoban, *Masks Still in Place, but Firmly in the Mainstream*, N.Y. Times, Jan. 4, 2004, § 2, at 34 (describing how the Guerrilla Girls—who call themselves "the conscience of the art world" and who accused the art world of sexism and racism and challenged the exclusion of women artists from museums—have "gone almost mainstream").

125. Benhabib, *supra* note 90, at 130-31.

communities entail? Would adopting a model of individual rights *within* culture and *within* community threaten the solidarity and strength of community life? Would it constitute the sort of direct application of principles of justice to the “internal life” of associations that political liberalism rejects? Could elements of political liberalism support this model? For example, if members of associations are engaged in a struggle to determine the appropriate conception of justice and set of principles and values that should apply to their associational life, may the state properly play a role to facilitate this process?¹²⁶ How might such a model, for example, shape laws and policies pertaining to regulating religious associations and other associations in the United States?¹²⁷ What would it imply about efforts to promote sex equality across borders, for example, in the same countries in the Middle East, in which interpretations of Islam are asserted—and contested—as a basis for restrictions on women’s liberty and equality?

Answering this difficult set of questions is beyond the scope of this Article. My hypothesis, however, is that a fruitful place to begin is with the place of individuals within civil society, and, in particular, with problems of how associational life may be a place in which individuals negotiate equal citizenship, a place that may foster as well as resist such citizenship. For example, Nussbaum argues that government has a responsibility to foster the capabilities and liberties of each person. She makes the intriguing comment that the human capabilities approach “does not assume that any one affiliative grouping is prior or central in promoting those capabilities.”¹²⁸ Thus, when she discusses the extent of governmental protection of freedom of religion, she stresses that the “protection of the central capabilities of citizens should always be understood to ground a compelling state interest,” which would justify limits to such freedom.¹²⁹ It would be fruitful to pursue further Nussbaum’s suggestion that, in determining governmental regulation of and protection of associations, we should

126. For example, Ayelet Shachar proposes a model of “transformative accommodation,” or joint governance by the state and by religious and cultural minority communities, designed to empower vulnerable members of such communities, such as women, by putting internal pressures on those communities to address entrenched inequalities. Ayelet Shachar, *Multicultural Jurisdictions* (2001).

127. It is beyond the scope of this Article to offer an argument about the issues of Free Exercise raised by this question. But for one argument critical of current constitutional law, see Stopler, *supra* note 8 (contending that current constitutional jurisprudence affords religions the “free exercise of discrimination” on the basis of sex, and that the Supreme Court’s affirmation of the Boy Scouts’ right to exclude homosexuals from membership, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), portends that this freedom to discriminate will extend more broadly to all associations).

128. Nussbaum, *supra* note 6, at 276.

129. *Id.* at 202.

focus on the *person* within the group and on how different groupings of persons do in protecting and promoting capabilities.

For example, I agree with Nussbaum that such an approach could endorse governmental support of associations dedicated to advancing women's educational attainments, economic self-sufficiency, and political efficacy. However, I disagree with her that Rawls's political liberalism might not support such associations because, if participation in them gives women a sense of empowerment that transforms their role within family life, government might be endorsing one form of family governance over the other.¹³⁰ I believe that a better interpretation of political liberalism is that, through such support, government permissibly seeks to remedy the effects of the "gender system" (discussed in Part I) and advances the political value of the freedom and equality of women. Similarly, in contrast to Nussbaum, I believe that these commitments within political liberalism—along with its commitment to reducing the involuntary gendered division of labor in society—would justify public education of children aimed at encouraging "the public perception that women are suited for many different roles in life, and are active members of the political and economic communities."¹³¹

Representation, as well as freedom to dissent, appear to be critical factors in the new model urged by Sunder and other feminists. But both of these factors are consistent not only with political liberalism but also with Okin's liberal feminist proposals. In her essay, *Is Multiculturalism Bad for Women?*, Okin urges that "policies designed to respond to the needs and claims of cultural minority groups must take seriously the urgency of adequately representing less powerful members of such groups."¹³² She continues: "Unless women—and, more specifically, young women (since older women often are co-opted into reinforcing gender inequality)—are fully represented in negotiations about group rights, their interests may be harmed rather than promoted by the granting of such rights."¹³³ In her more recent revisiting of the question, she reiterates the importance of representation. She further recognizes the difficult tension between democracy and liberal rights: What happens if women, "when consulted in truly non-intimidating settings, . . . produce good reasons for preferring to continue aspects of their traditional subordinate status over moving to a status of immediate equality within their group?"¹³⁴

130. *Id.* at 280-81 (discussing the example of women's collectives in India).

131. *Id.* at 282 (arguing that her capabilities approach would support such education, but Rawls would likely see it as "too much promotion of a definite conception of the good").

132. Okin, *supra* note 7, at 23.

133. *Id.* at 24.

134. Okin, *supra* note 103, at 29. Okin also argues that more democratic solutions, which might allow women, fully involved in the process, to affirm practices of

In *The Law of Peoples*, Rawls also stresses the importance of representation and the right of dissent. He posits that there could be decent nonliberal peoples, and one example he explores is a society that has a "decent consultation hierarchy."¹³⁵ He stresses both the need for a right to dissent and the place that the representation of women should play in such a hierarchy in order for it to be "decent." He also insists that such a society may not violate human rights. On the first matter, Rawls argues:

In political decisions a decent consultation hierarchy allows an opportunity for different voices to be heard—not, to be sure, in a way allowed by democratic institutions, but appropriately in view of the religious and philosophical values of the society as expressed in its idea of the common good. Persons as members of associations, corporations, and estates have the right at some point in the procedure of consultation (often at the stage of selecting a group's representative) to express political dissent, and the government has an obligation to take a group's dissent seriously and to give a conscientious reply. It is necessary and important that different voices be heard, because judges' and other officials' sincere belief in the justice of the legal system must include respect for the possibility of dissent.¹³⁶

Moreover, "should the judges and other officials listen, the dissenters are not required to accept the answer given to them."¹³⁷ As Rawls elaborates, "they may renew their protest, provided they explain why they are still dissatisfied, and their explanation in turn ought to receive a further and fuller reply."¹³⁸

Rawls also gives special attention to the "representation in a consultation hierarchy of members of society, such as women, who may have long been subjected to oppression and abuse, amounting to the violation of their human rights."¹³⁹ He proposes:

One step to ensure that their claims are appropriately taken into account may be to arrange that a majority of the members of the bodies representing the (previously) oppressed be chosen from among those whose rights have been violated. . . . [O]ne condition of a decent hierarchical society is that its legal system *and social order* do not violate human rights. The procedure of consultation must be arranged to stop all such violations.¹⁴⁰

inequality, might be appropriate in the case of patriarchal cultures or religions with a claim of recent oppression, but that a more liberal solution—insisting upon basic rights that may not be negotiated away—would be appropriate for patriarchal religions with no such claims. *Id.* at 28.

135. Rawls, *The Law of Peoples*, *supra* note 10, at 72.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 75.

140. *Id.* (emphasis added).

Finally, Rawls posits that the impact of allowing representatives to dissent may lead to change favorable to greater equality for women. Using the fictional example of "Kazanistan," an idealized Islamic people with a system of law that does not institute the separation of church and state, he asserts:

I further imagine, as an example of how dissent, when allowed and listened to, can instigate change, that in Kazanistan dissent has led to important reforms in the rights and role of women, with the judiciary agreeing that existing norms could not be squared with society's common good idea of justice.¹⁴¹

In this example, Rawls appears to reject the idea that religious or cultural comprehensive doctrines are univocal or static and unchanging. An important point in this passage is that allowing women to express their own views of justice may lead to a revision of a society's "common good idea of justice."

Of course, one might argue that it is wrong to leave the rights and role of women up for negotiation, rather than to entrench rights and liberties either as a matter of human rights or in a constitutional scheme.¹⁴² But this passage in Rawls must be read in light of his insistence (discussed above) both that a decent nonliberal people does recognize basic human rights and that religions may not justify the subjection of women necessary for such religion's survival. Thus, the passage may mean that, over time, evolution toward greater sex equality occurs because of the active role of dissent, or of what the feminists discussed above might call the efforts to secure rights within religion and community. Moreover, a "decent nonliberal society," by recognizing basic human rights and rights to representation and to dissent, provides conditions under which members of society may make such efforts at transformation without fear of punishment or rights violations by the legal system or the "social order."¹⁴³

CONCLUSION

In this Article, I have approached the question of the import of Rawls's political liberalism for the topic of equal citizenship and gender by examining political liberalism's account of the place of associations in underwriting a stable political order and fostering democratic and personal self-government. I have focused upon a set of feminist criticisms arising from political liberalism's distinction between the political and the nonpolitical domains and its provision that the principles of justice should not apply directly to the internal life of associations. In evaluating this criticism, I have stressed the

141. *Id.* at 78.

142. This seems to be a concern expressed in Drucilla Cornell, *At the Heart of Freedom* 153-54 (1998).

143. Rawls, *The Law of Peoples*, *supra* note 10, at 75.

way in which political liberalism views these domains as reciprocally constituting and mutually supporting. This feature of political liberalism leads to certain tensions, but it also rules out a sort of simplistic distinction between public and private life that would regard the realm of associational life as beyond the scope of the principles of justice. To the contrary, I have argued that certain commitments already manifest in political liberalism may be drawn upon—and built upon—to develop an account of the place of associations in the political order that recognizes both the ways in which associational life may foster as well as hinder free and equal citizenship. This recognition of the possible tension between associational and personal self-government, and the difficult questions about how government might address such tensions, is a fruitful avenue for further engagement between feminism and political liberalism. Moreover, I have suggested that this same tension is a significant focus in important feminist work on the place of women within cultural and religious communities that resists dichotomies between rights and religion or rights and community.

In sum, I believe that two forms of constructive engagement would be valuable paths for feminist analysis of the place of associations in securing and hindering the freedom and equality of women: first, continued constructive engagement by feminists with Rawls's work; and second, constructive engagement by liberal feminists, such as myself, with these promising forms of feminist argument that seek to negotiate rights *within* religion and culture. These two projects are vital ones both with respect to the issue of gender and citizenship in the United States and in the global context.