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COMMENTS ON MICHEL ROSENFELD'S
*THE IDENTITY OF THE CONSTITUTIONAL SUBJECT:
SELFHOOD, CITIZENSHIP, CULTURE,
AND COMMUNITY*

*Deborah Hellman**

First let me say how flattered I am to be included among such distinguished commentators and how much I enjoyed and learned from reading Professor Rosenfeld's book.

I begin my comments with a critique of Professor Rosenfeld's conception of what equality requires in U.S. constitutional law. I recognize that his views on equality are somewhat peripheral to the overarching themes and claims of the book. However, this critique allows me to suggest an alternative conception of equality that accords better, I think, with Rosenfeld's ideas about global constitutionalism, in particular his emphasis on the need to accommodate both the universal and the particular. I will end my comments by showing how the other key contribution of the book—the constitutional models—helped me to better understand U.S. constitutional law related to equal protection.

In chapter 2, Professor Rosenfeld explores how the processes of metaphor and metonymy operate in the articulation of constitutional rights and uses the example of the constitutional right of *equality* to make this point.¹ He introduces the discussion of equality jurisprudence by saying: "At the more concrete level of particular constitutional rights . . . this dialectic [between metaphor and metonymy] strives to promote equilibrium between the pole of identity and the contrary pole of difference."² Here I don't want to take issue with his descriptive analysis of the way that U.S. constitutional law uses metaphor and metonymy. Rather, I want to emphasize that his discussion of how they operate in equality jurisprudence presupposes a particular conception of what equality in fact requires that I found unconvincing.

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¹ See MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* 61–65 (2010).

² *Id.* at 61.

Rosenfeld begins with the following assertion: "Viewed from a formal standpoint, constitutional equality requires properly accounting for relevant identities and relevant differences. Consistent with this, ideal constitutional equality would fully account for, and optimally integrate, all relevant identities and differences."³ What exactly does he mean here? Is this a descriptive claim about U.S. constitutional law and what it requires? Or is it a normative claim about how we ought to think about the demands of equality? The key word appears to be "formal." To think about equality formally requires, according to Rosenfeld, treating like cases alike and different cases differently. But is that correct? The directive to treat like cases alike seems more connected with the ideal of legality or the rule of law than it does with the concept of equality. As a starting place for thinking about equality, one might begin with the premise that everyone should be treated the *same*, rather than the claim that we should attend to relevant similarities and differences. Frederick Schauer argues for this view, claiming that equality demands, at least *prima facie*, that like cases and different cases both be treated alike.⁴ Neither view—*attend to relevant differences* or *treat everyone the same*—is obviously what equality requires from a "formal standpoint," and the claim that one or the other view is correct would surely require an argument.

My objection to Rosenfeld's assertion that recognizing relevant differences is the proper starting place leads to my more general critique of his way of thinking about the demands of equality. He sees conceptions of equality as following three stages.⁵ He describes them as a "progression,"⁶ but, again, I wasn't sure if Rosenfeld was making a descriptive claim about the way that thinking about equality has taken place in U.S. constitutional law or instead a claim about the natural or inevitable way that thinking about these questions always and everywhere proceeds. The reference to Hegel in the text near to the passage I quote appears to suggest the latter, an assertion I find unlikely. Here are his descriptions of the passage from first to second and then second to third stage conceptions of equality:

The evolution from the first to the second stage is marked by the passage from race-based subordination to colorblindness, and from the tutelage of women to equality between the sexes regardless of gender differences. Finally, the third stage is marked by a more encompassing and finely tuned equality that accounts for differences without

³ *Id.*

⁴ See FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003).

⁵ See ROSENFELD, *supra* note 1, at 62 ("In general, the evolution of equality rights can be reconstructed as comprising three different stages.").

⁶ *Id.*

exploiting them to institute patterns of domination or subordination.⁷

Is he correct descriptively or normatively?

Let's take his claim as a descriptive claim first. While there is surely something correct about it with regard to the examples of race and sex Rosenfeld describes, it is less clear that our thinking about what equality demands has followed this trajectory in other instances. Think of the Americans with Disabilities Act and its requirement of reasonable accommodation of disability.⁸ This command seems quintessentially "third stage." But is it accurate to say that our law has progressed through a first and second stage before reaching this enlightened point? Has our law ever instantiated the view that equality requires the same treatment of disabled and nondisabled persons or have these differences always seemed relevant?

Second, let's look at the claim normatively. His treatment of the stages as a progression seems to suggest that the better way to think about what equality requires is in a third-stage way that "accounts for differences without exploiting them to institute patterns of domination or subordination."⁹ In part, I think Rosenfeld is right but not for the reasons that his account highlights. Domination and subordination are surely antithetical to equality, almost by definition. However, given the emphasis on relevant differences, the real work of this assertion lies in the first part—that equality, rightly conceived, requires that one "accounts for differences" or, as he also puts it, "to each according to his or her (different) needs."¹⁰ In order to assess whether Rosenfeld is correct about this, let's look at how this view would resolve disputes about what equality requires. Take for example the case of health insurers charging higher rates to domestic abuse victims—even those who have left their batterers.¹¹ Insurers defended this practice on the grounds that women who are being beaten up by their husbands or boyfriends are more likely to need health care than the average person. In fact, women who have recently left their batterers are most at risk. Given the insurer's aim—and prior to recent health care legislation, arguably its duty as well—is to charge actuarially accurate rates, this difference is, from the insurer's perspective, relevant. Nonetheless, something seems gravely wrong with this practice. While articulating what is wrong with it may have something to do with subordination, it does not seem to have anything to do

⁷ *Id.*

⁸ 42 U.S.C. § 12112 (2006).

⁹ ROSENFELD, *supra* note 1, at 62.

¹⁰ *Id.*

¹¹ For an in-depth discussion of this practice, see Deborah Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355 (1997).

with the relevance or irrelevance of the difference. Indeed, assessing whether the difference is relevant or not—if a conception of relevance is untethered to the predictive power of the proxy—must relate to some other value like subordination. If so, the relevance or irrelevance of differences is not doing any real work.

In order to actually use the conception of relevant differences to do some work, one needs, of course, some sort of theory about what makes differences relevant or not. So-called “luck egalitarians”¹² offer such a theory but in so doing they create distinctive problems of their own. In their view, society must compensate people for differences that result from brute bad luck but not for traits or states that one bears some responsibility for. So, for example, if a smoker is dying of lung cancer and has no health insurance, society may not be required to provide it because the smoker is dying from a disease she bears responsibility for bringing about. On the other hand, if she is afflicted with breast cancer due, at least in significant part, to a genetic predisposition to this disease (brute bad luck), then society must care for her. Similarly, if one lacks ability through no fault of one’s own—one is not smart or had a bad education, etc.—then society should attempt to make up for this difference. However, if one simply squandered one’s natural talents though laziness so that now one lacks ability, then society has no obligation to accommodate or compensate this individual. While this distinction has some intuitive appeal, it seems to require that we determine of any given untalented individual whether he is just stupid (and therefore we should accommodate his differences) or lazy (in which case we should not). But as Elizabeth Anderson points out, this very project is demeaning to the stupid person, saying to him that his lack of intellectual gifts requires some sort of recompense.¹³ As Anderson explains, according to this view “[p]eople lay claim to the resources of egalitarian redistribution in virtue of their inferiority to others, not in virtue of their equality to others,” and therefore this view “violates the fundamental expressive requirement of any sound egalitarian theory,”¹⁴ i.e., that it express equal concern and respect for all. Perhaps we ought not to try to identify relevant from irrelevant differences, either in the first stage’s unsophisticated fashion or in the third stage’s more nuanced fashion. Perhaps instead we should focus on the requirement that we treat each person with equal respect—which Rosenfeld gestures at by saying that we should attend to differences without using them to subordinate—and see where that gets us.

¹² See generally Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999) (discussing the views of prominent “luck egalitarians”).

¹³ See generally *id.*

¹⁴ *Id.* at 306.

I would like to suggest such an alternative conception of what equality requires, one that does not focus on whether differences are relevant or not. I hope to show how this conception of equality meshes well with Rosenfeld's claim that thinking about global constitutionalism requires a focus simultaneously on the universal and the particular and thus fits into his overarching vision and project.

I propose an *equal respect* conception of the constitutional command of equality. In other words, the state must act in ways that show respect for the equal worth of persons. Clearly this formulation is vague. Unpacking and defending the view would take more time than I have here. In my book, *When is Discrimination Wrong*,¹⁵ I try to do just that. For now, let me explain the ways in which I think this view accords better with Rosenfeld's theory of constitutionalism than does the conception of equality as attending to relevant differences. As I am not a comparative constitutional scholar, I will draw on the work of our host Julie Suk. Suk explains that the European Union permits, and some countries within it require, that employers provide mandatory maternity leave.¹⁶ In contrast, she speculates that U.S. constitutional law would likely prohibit mandatory maternity leave.¹⁷ To explain this difference, she speculates that it results in part from the fact that "[t]he American legal order tends to be more skeptical of paternalism than European legal orders on many different issues."¹⁸ This difference in the two societies matters because the background norms about paternalism alter the social meaning of mandatory maternity leave for each society. In the United States, where paternalistic interventions in the market are less common, a law requiring mandatory maternity leave is perceived as singling out women for the paternalistic protection by the state.¹⁹ The message is, at least in part, that *women* can't make their own decisions well and that women, in particular, can't fend for themselves in the workplace. In European countries like France and Sweden (the two Suk discusses) in which paternalistic protections of workers are much more common, mandatory maternity leave doesn't carry this demeaning message.²⁰ Rather, it is understood as a normal and legitimate response to a collective-action problem.²¹ If maternity leave isn't mandatory, some women may go back to work right away—perhaps in order to distinguish themselves—and their example will exert pressure on others to also do so.²²

¹⁵ See generally DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008).

¹⁶ Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 4 (2010).

¹⁷ See *id.* at 51–53.

¹⁸ *Id.* at 53.

¹⁹ See *id.* at 52–54.

²⁰ See *id.* at 52–53.

²¹ See *id.* at 53.

²² See *id.*

This example illustrates the way in which the universal conception of what equality requires—i.e., equal respect—takes different forms in different societies because their cultures and histories in part determine the meaning of various laws and policies. At the level of the universal, equality requires equal respect. At the level of the particular, this command permits mandatory maternity policies in France and Sweden but does not permit them in the United States. In France and Sweden, mandatory maternity leave is not insulting to women because the meaning of these policies is interpreted against a backdrop of frequent paternalistic interventions in the workplace. At the same time, in the United States, mandatory maternity policies would express something quite different, including, perhaps, disrespect for the equal worth of women.²³ This conception of equality thus achieves what Rosenfeld identifies as his aim—a conception of human rights that is “at once universal and plural.”²⁴

In this example, a universal right—to treatment as an equal—leads to different judgments about the permissibility of the same particular policy without compromise to our understanding of the universal requirement. In the latter part of the book, Rosenfeld wrestles with explaining how universal requirements can be instantiated in different or even conflicting forms at the level of the particular and settles on the idea of the “margin of appreciation standard,”²⁵ which seems to reflect an understanding that reasonable people applying the same standards can reach different conclusions. So long as these differences are not too great, a commitment to pluralism requires that we permit them. While I think this idea makes a lot of sense—indeed, it reminds me of the Rawlsian idea of the “burdens of judgment”—and should likely play a role in just the way he envisions, I do not think it will always be necessary to depend on it. Sometimes—and the universal command of equal respect is a good example—the same policy will in fact express something quite different in one context or culture than in another such that the same policy (mandatory maternity leave, for example) offends

²³ The fact that the cultural differences between the countries give rise to different interpretations of equality is a point that Rosenfeld himself emphasizes in the final chapter of the book. He notes that “[t]he French interpretation of constitutional freedom and equality is thus likely to differ from its American counterpart, and each of these will be influenced by its own constitutional identity.” ROSENFELD, *supra* note 1, at 252. However, it is not clear from his discussion at this point whether he is speaking merely descriptively (different regimes interpret the command of equality differently in part as a function of their different constitutional identities) or instead normatively. If the latter, is he endorsing the sort of claim that I support, namely that the particular features of the country’s culture make the same policy express something quite different in different contexts? This approach would explain how the same policy can violate the equality-as-equal-respect principle in one society but not violate it in another.

²⁴ *Id.* at 255.

²⁵ *Id.* at 257.

against equality in one context but not another and does so without recourse to the “margin of appreciation standard.”

I want to close by saying something about the various constitutional models he describes. I found this discussion insightful and provocative. While the conception of the United States as a “melting pot” with a particular emphasis on liberty is familiar, thinking of these qualities as informing a distinctively U.S. model of constitutionalism helps explain and even justify aspects of U.S. constitutional law that I have previously found troubling, in particular the Supreme Court’s treatment of affirmative action. To my mind, the use of racial classifications in ways that do not subordinate or demean should not be seen to violate the constitutional command of equality and thus I have always had trouble accepting the complaint of the white applicant or job seeker who loses a place at school or a job due, in part, to the preference given to minority applicants. While I remain convinced that the white applicant has not herself been wronged by these policies, Rosenfeld helped me to see the ways in which minority preferences are in tension with the distinctly American form of constitutional identity.

For example, in the opinion in *City of Richmond v. J.A. Croson Co.*²⁶ (where the Court rejects an affirmative action program used in city contracting), Justice O’Connor explains her reasons for doing so in the following way:

The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.²⁷

Noteworthy in this passage is the use of the term “dream,” which captures the idea Rosenfeld emphasizes of U.S. constitutional identity as one that is “a construct projected into the future.”²⁸ While Rosenfeld emphasizes the way in which this was true in 1789, perhaps it reflects an ongoing constitutional project—one in which we continue to understand ourselves as forging toward a conception of American citizenship in which individual differences like race will play no role. Understanding the Court’s affirmative action case law in this way also helps to make sense of the reprieve that is granted to affirmative action programs in the *education* context. Affirmative action in the education context offends less against the dream of melting into an American identity because it aids that process precisely through its educative function by

²⁶ 488 U.S. 469 (1989).

²⁷ *Id.* at 505–06. This part of the opinion was joined by four other Justices.

²⁸ ROSENFELD, *supra* note 1, at 159.

exposing members of different cultures to each other. Moreover, the twenty-five-year sunset provision found in *Grutter v. Bollinger*,²⁹ an unusual aspect of the Court's decision in that case, similarly meshes with the idea that we are not yet the people we hope to become. Rosenfeld's explanations of U.S. constitutionalism helped me to see the appeal of this viewpoint and thus broadened my understanding of my own constitutional culture. For that, and for the pleasure of engaging with a challenging and provocative book, I am very grateful.

²⁹ 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").