



2014

A Tale of Two Rights

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94 B.U.L. Rev. 893-912 (2014)

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A TALE OF TWO RIGHTS

ROBIN WEST*

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INTRODUCTION

Are individual rights a danger to civil society? For almost forty years now, critics of individual rights have argued that such rights damage, rather than support, our national aspirations for equality, community, and democracy. According to civic republicans, these rights insulate the rights holder from communal criticism and legal recourse for the harmful consequences of his rights-protected actions; atomize the rights holder's sense of self, thus limiting his circle of concerns to only his immediate entitlements; and isolate him from the suffering and well-being of his neighbors and co-citizens.¹ Critical legal theorists add that, while an individual's rights may enhance his liberty, they may also compromise the equality of others and rhetorically legitimate – or even valorize – the subordinating consequences of the individual's rights-protected behavior.² According to both groups of critics, individual rights,

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¹ See JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013) (“In recent years, communitarian, civic republican, and progressive thinkers and politicians have argued that our constitutional system takes individual rights too seriously, to the neglect of responsibilities, virtues, and the common good.” *Id.* at 1.); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (“No aspect of American rights discourse more tellingly illustrates the isolated character of the rights-bearer than our protean right of privacy.” *Id.* at 48.); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998) (“The priority of the subject can only mean the priority of the individual, thus biasing the conception in favor of individualistic values familiar to the liberal tradition. Justice only *appears* primary because this individualism typically gives rise to conflicting claims.” *Id.* at 11.); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (“And by acting toward each other as if we believe all this and that it must be believed, we coerce each other into remaining passive observers of our own suspended experience, hiding together inside the anonymity of artificial self-presentations that perpetually keep us locked in a state of mutual distance.” *Id.* at 1581.).

² See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399-404 (1988) (“[A] non-communitarian conception of rights must inevitably come to regard the quest for

whatever good they do, also cast democratic processes and democratic outcomes – including those that promote equality – as a source of oppression from which individuals must be protected. These are now familiar charges, made over the past half century by Marxists, legal realists, critical-rights theorists, and civil republicans all. Individual rights, according to their critics, come at some cost to equality, community, democracy, or all three.³ For all of these reasons, on balance, individual rights harm rather than benefit civil society, and do violence to our democratic aspirations.

In this Article I hope to complicate these familiar critiques of individual rights. Throughout I contrast two emerging rights paradigms and their effects on our shared civic life, institutions, and projects. The first paradigm is exemplified most vividly by some of our most modern constitutional rights. I argue that these rights do indeed pose a threat to civil society. The second paradigm, however, is rooted not in the Constitution, but in our civil-rights traditions. Our modern civil rights, in contrast to most modern constitutional rights, not only support but are necessary for civil society. Consequently, civil rights pose no threat to civil society, and indeed constitute its legal architecture. I conclude that we should not respond to the critique of rights by jettisoning rights or the idea of rights, but by refocusing and expanding upon our civil-rights traditions.

In Part I of this Article I identify and criticize a cluster of constitutional rights, which I argue do tremendous and generally unreckoned harm to civil society, and do so for reasons poorly articulated in earlier critiques. At the heart of the new paradigm of constitutional rights that I believe these rights exemplify is a “right to exit.” On this conception of individual rights, a constitutional right is a right to “opt out” of some central public or civic project. This understanding of what it means to have a constitutional right hit the scene a good two decades after civic republicans and critical legal theorists mostly had formed their respective critiques of individual rights. Consequently, such thinkers failed to incorporate the notion of constitutional rights into their critiques. The particular exit rights that I enumerate – that is, the rights to exit

substantive equality itself as a threat to rights, and not as an indispensable foundation of true liberty and autonomy.” *Id.* at 401-02.); *Introduction: Revitalizing Rights*, RIGHTS, at xi, xiii (Robin West ed., 2001) (“Rights have constituted obstacles . . . to the creation or maintenance of humanistic, egalitarian, diverse, environmentally healthy and just communities.” *Id.* at xiii.); cf. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1385-94 (1984) (“The distinction between negative and positive rights reflects and perhaps is based on a fundamental aspect of our social life. We fear that others with whom we live will act so as to crush our individuality, and thus we demand negative rights.” *Id.* at 1392.).

³ Horwitz, *supra* note 2, 396-97 (“History thus shows us that rights are a double-edged sword, and for most of our constitutional history, in fact, a single-edged sword.”); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1405-21 (2009) (“[A]pparent gains in justice wrought through legal change are sometimes offset by what might be called the ‘legitimation costs’ of the same legal breakthrough.” *Id.* at 1406.).

from the benefits and responsibilities of public projects, including public education, publicly funded policing, civil rights commitments, and public health projects – harm civil society in profound ways not appreciated by rights critics in the 1970s and 1980s. The harm these rights do, to borrow language from the title of Thomas Mann and Norman Ornstein’s recent book,⁴ has turned out to be even worse than it might have seemed in the heyday of our rights critiques. I urge a reinvigorated rights critique that centers on these new rights and new harms.

In Part II I discuss a countertrend: the expansion of civil rights beyond those enumerated in the Civil Rights Act of 1964. Some of our most newly created civil rights, generally created by Congress and state legislatures rather than announced by courts, in effect extend to individuals various rights *to enter* civil society, or some civil project close to its core. I call these civil rights “rights to enter” – these include, for example, the right to a high quality and public education,⁵ the right to purchase health insurance at affordable costs,⁶ the right to a safe home and neighborhood free of gun violence,⁷ the right to nurture a newborn or sick family member while not losing one’s job,⁸ the right to marry

⁴ THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

⁵ As reflected, for example, in the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.) (“The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education” *Id.* § 1001, 115 Stat. at 1439); Race to the Top, Notice of Proposed Priorities, 74 Fed. Reg. 37,804, 37,804 (July 29, 2009), which is funded in the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 14005-14006, 123 Stat. 115, 282-84; as well as in numerous state constitutions, *see, e.g.*, ARIZ. CONST. art. XI, § 1, cl. A; MINN. CONST. art. XIII, § 1; VA. CONST. art. VIII, § 1.

In spite of the Supreme Court’s failure to articulate the case for a constitutional right to education, it has often referred to education as one of the state’s central purposes, thus effectively casting it as a civil right. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”).

⁶ The Affordable Care Act rests squarely, if implicitly, on a civil right to health care. *See Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

⁷ U.S. CONST. amend. XIV, § 1; Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.); Ku Klux Klan Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986 (2012); *see* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991) (“No citizen shall be subject to uncheckable violence by anyone other than the state” *Id.* at 129.).

⁸ The Family and Medical Leave Act implicitly recognizes such a right. *See Family Medical Leave Act*, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended in scattered sections of 5 and 29 U.S.C.).

whom one loves regardless of sex,⁹ and the right to work and school environments free of discriminatory animus.¹⁰ All of these civil rights, imperfectly recognized in various statutes, invite participation in some core sphere of civil society: education, insurance markets, neighborhoods, family, marriage, or employment. These civil “rights to enter,” which stand in contrast to constitutional “rights to exit,” exemplify both an old idea that dates back to the early days of the republic, and a new idea that invites participation in a radically transformed civil society. Not only are these rights not harmful to civil society, they are integral to it.

Now, what is the relation between these two kinds of individual rights? Generally, civil rights to enter are clearly not buttressed by constitutional rights to exit, and increasingly are threatened by them. First, both our historical and more modern civil rights to enter civil society – the various civil rights won in the nineteenth century by freed slaves and wives, and in the twentieth century by racial and religious minorities; women; the disabled; the elderly; school children; gay, lesbian and transgendered citizens; laborers; economically struggling parents; and the victims of hate crimes and private and domestic violence – are not constitutional rights at all, and for the most part the courts have declared as much.¹¹ Although there exists a *civil* right to these societal benefits, there is no clearly defined constitutional right to an adequate public education, to a police force, to some measure of health care, to be free of private discrimination in employment, to safe and fairly remunerated labor, or to help with child care while employed. All of these rights, however, are at least arguably *civil rights*. And some of them are *core* civil rights. But increasingly the Constitution not only fails to protect these civil rights but also threatens to undermine them, insofar as it grants individuals and corporations the right to exit precisely those civil projects and legal institutions that civil rights seek to guarantee others the right to enter. Civil rights and constitutional rights are thus decidedly not co-constitutive of a unified constitutional tradition, or of an articulable American identity, or a distinctively American conception of the nature of rights. Rather, civil rights and constitutional rights are on a collision course.

⁹ CONN. GEN. STAT. ANN. § 46b-20a (West Supp. 2013) (codifying the right to marriage for opposite- and same-sex couples); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012 & Supp. 2013) (same); WASH. REV. CODE § 26.04.010 (2012 & Supp. 2013) (same).

¹⁰ Civil Rights Act of 1964, tit. IX, 20 U.S.C. § 1681 (2012) (prohibiting discrimination on the basis of sex in education programs that accept federal funds); *id.* tit. VII, 42 U.S.C. § 2000e to 2000e-17 (2012) (prohibiting discrimination in the workplace).

¹¹ See, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748, 756-70 (2005) (holding that there is no constitutional right to a police force); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194-203 (1989) (same); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that there is no constitutional right to education); *The Civil Rights Cases*, 109 U.S. 3, 11-14 (1883) (holding that there is no constitutional right to be free from discrimination by private actors).

In both Parts I suggest that the almost ten-year-old constitutionally grounded, individual right to bear arms, particularly when combined with the broadened understanding of self-defense embodied in “stand your ground” laws, jointly constitute a paradigmatic, and maybe *the* paradigmatic, “exit right.” By contrast, the civil rights to physical security, and to state protection against private violence that interrupts it, are at least as old as the Constitution itself, and exemplify the civil rights paradigm I try to describe: the right to state protection against private violence is the quintessential and foundational “right to enter.”¹² I conclude with the observation that, while the constitutional right to own and use a gun and the civil right to protection from the state against private violence, are in obvious tension, the constitutional right to gun ownership recognized by the Supreme Court does not necessarily foreclose the possibility of a civil right to decent effective gun-control laws.¹³ Perhaps if we could spark a renewed civil rights movement, aimed at legislative activism rather than judicial activism, we might inspire a lawful and politically salient civil response to the threats to our safety and the tears to our social fabric that are occasioned by the Court’s newfound constitutional right to own and use lethal weapons. The same may also be true more broadly. My general conclusion is that the way to repair the damage done to civil society by constitutional exit rights might be simply to reinvigorate our civil rights agenda.

I. RIGHTS TO EXIT

Over the last thirty years a fair number of the constitutional rights courts articulated, litigants asserted, or scholars advocated, either in the Constitution or in the law, are rights of individuals or corporations to *opt out* in some way of obligations otherwise imposed on citizens, be it by democratically authorized social or public projects, common law, intimate or private associations, or social institutions. Such constitutional exit rights do not simply expand individual liberty by recalibrating the boundary between the state’s

¹² In his classic definition of civil rights contained in his essay, *Rights of Man*, Thomas Paine identified the right to protection by the state against physical violence as the classic, core instance of a civil right:

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

THOMAS PAINE, *RIGHTS OF MAN* 68 (John Seelye ed., Penguin Books 1984) (1791-92).

¹³ The Court in *District of Columbia v. Heller* explicitly observed the constitutionality of a wide range of gun control measures, considerably more than we currently enjoy. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

police power and the individual's sovereign sphere of action. Instead, they provide the right to establish a separate sovereignty free of the influence or power of the state. The right confers the power to exit some core goal, project, or commitment of civil society.

The Supreme Court's Second Amendment jurisprudence is exemplary of this trend, particularly its decision in *District of Columbia v. Heller* granting to individuals a constitutional right to bear arms for in self-defense.¹⁴ It is easy to lose track of how radically antiliberal such cases are. According to our entire liberal tradition – including Hobbes,¹⁵ Locke,¹⁶ Rawls,¹⁷ and Nozick¹⁸ – as well as the drafters of the Fourteenth Amendment's Equal Protection Clause¹⁹ and the Enforcement Act of 1871,²⁰ the simple yet powerful image of the state as a watchman lies at the core of the social contract. In exchange for relinquishing our natural rights to violent self-help, which is destructive of communal life, the watchman promises to protect us and our property from private violence. Without that social contract, "the life of man [is] nasty, brutish, and short,"²¹ primarily due to the potential for unchecked lethal violence of all upon all.²² By entering into the social contract, laying down arms, and trusting the sovereign watchman to guard against private violence, the individual loses liberty but gains security.

The individual retains, of course, carefully drawn rights of self-defense, delineated in each state's criminal code. Legal rights of self-defense predate not just *Heller*, but the Second Amendment itself. But before *Heller* and prior to the widespread enactment of "stand your ground" laws, those common law rights were narrowly drawn precisely to prevent society from slipping into a vengeful and revenge-driven Hobbesian state of nature. Only if an individual reasonably believes that he is in imminent danger of serious bodily harm and has no opportunity to escape may he use force in self-defense – and even then, he may only use force necessary for self-defense.²³ Outside of these constrained

¹⁴ *Id.*

¹⁵ THOMAS HOBBES, *LEVIATHAN* 92 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

¹⁶ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 70-71 (Thomas P. Peardon ed., Macmillan Publ'g Co. 1952) (1690).

¹⁷ JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971).

¹⁸ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 23 (1974).

¹⁹ U.S. CONST. amend. XIV, § 1. See generally ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); Heyman, *supra* note 7.

²⁰ Ku Klux Klan Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986 (2012).

²¹ HOBBES, *supra* note 15, at 89.

²² *Id.*; see also LOCKE, *supra* note 16, at 71 ("[M]en being partial to themselves, passion and revenge is very apt to carry them too far and with too much heat in their own cases, as well as negligence and unconcernedness to make them too remiss in other men's.").

²³ For example, to justify a homicide on self-defense grounds in Maryland, the accused must establish (1) that he had reasonable grounds to believe that he was in apparent

and last-resort rights, the obligation and the power to protect the individual against violence and theft are committed to the state. This is the essence of the civil contract that underlies liberal society. As I discuss below, the foundational civil right of the individual to look to the state for protection, as well as the obligation of the state to provide such protection (often called the first duty of the state²⁴) are not just essential to, but constitutive of, civil society.

Against this backdrop the right that the Court recognized in *Heller* is not just a threat to the coherence and strength of a state's capacity to protect individuals against violence, but also threatens the contractual arrangement at the heart of civil society. After *Heller* the individual *may* turn to the state for protection against violence, but he has no *obligation* to do so. He may choose instead to take up arms, stand his ground, and protect himself against such violence. Under *Heller* he has a constitutional right to use lethal force and own lethal weapons to protect himself against violence or theft, whether in his home or elsewhere.²⁵ Under the various "stand your ground" laws enacted post-*Heller*, the individual now has the right to use that force regardless of whether he has an opportunity to retreat.²⁶ When coupled with the resulting stand your ground laws, *Heller* essentially grants a right to privatize the policing function of the civil state.

Viewed in social contract terms, this expansion of our constitutional rights follows logically, if tragically, from the Supreme Court's famous declaration in *DeShaney v. Winnebago County Department of Social Services*²⁷ that the individual has no constitutional right to expect, and the state has no duty to provide, a police force.²⁸ The state may be morally obligated to do so under the terms of the social contract, as philosophers of the liberal state have understood it. And it may even be highly desirable for the state to take that obligation upon itself. But the state is under no constitutional duty to do so, and the individual has no constitutional right to expect it. In *Heller*, the Court simply recognized the consequences for the social contract recognized in dicta in *DeShaney*. If the state is not constitutionally obligated to provide protection against private violence, then the individual must be allowed to reclaim broad and natural rights to lethal self-defense that he relinquished in exchange for that obligation.

imminent or immediate danger of death or serious bodily harm from his assailant; (2) that he in fact believed that he was in such danger; (3) that he did not provoke the conflict; and (4) that the force used was neither unreasonable nor excessive. *Roach v. State*, 749 A.2d 787, 793 (Md. 2000).

²⁴ See, e.g., Heyman, *supra* note 7, at 509.

²⁵ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

²⁶ See, e.g., IOWA CODE § 704.1 (2013); MICH. COMP. LAWS § 780.972(1) (2009).

²⁷ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194-203 (1989).

²⁸ *Id.* at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

After *Heller*, then, the individual has the constitutional right to exit the social compact. It is important to note, however, that the state breached first.

So what harm has this constitutional right done to civil society? After *DeShaney* we have no constitutional right to a police force. We do, however, have a natural right to defend ourselves – a right that many states have broadened substantially through “stand your ground” laws. And after *Heller* we now have a constitutional right to the weaponry necessary to exercise that right to self-defense. Civil society is weakened when the scope of fully legal lethal violence is broadened. Unsurprisingly, this travesty has led to not just an increase in domestic violence,²⁹ but also to a spate of high profile killings deemed legal under stand your ground laws.³⁰ The world that *DeShaney* and *Heller* conceive is one in which the sovereign has given up its monopoly on legal violence and abdicated its responsibility to protect the citizen against private lethal aggression.

Heller is paradigmatic of the exit phenomenon I illustrate, but it is by no means the only example. Protection against violence is not the sovereign’s only obligation, nor is it civil society’s only core project. A second sovereign obligation is education, as recognized by the Court in *Brown*,³¹ as declared by virtually every state constitution,³² and as constantly reiterated by professional educators and state leaders. Here as well, though, the Court has been quite clear: Just as we do not have a constitutional right to a police force, likewise we do not have a well-articulated constitutional right to a high quality public education.³³

What does the Constitution grant? If anything, arguably, it grants the right only to a minimum level of education.³⁴ Thus, in a development that parallels the *DeShaney-Heller* arc, homeschooling advocates increasingly have urged courts to identify not a right to a public education but a right to avoid one – not a right to the benefits of this project so central to civil society, but a right to exit it.³⁵ Advocates of home schooling seek the right to pull their kids out of

²⁹ For an argument that draws on Lockean and Hobbesian social contract theory to argue that *DeShaney* is fundamentally confused on this point, see Laura Rae Dove, *A Constitutional Right to Police Protection and Classical Liberal Theory: Complement, Not Conflict*, 4 AKRON J. CONST. L. & POL’Y 37, 61-68 (2013).

³⁰ See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, at A1 (“In finding him not guilty of murder or manslaughter, the jury agreed that Mr. Zimmerman could have been justified in shooting Mr. Martin because he feared great bodily harm or death.”).

³¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³² See, e.g., ARIZ. CONST. art. XI, § 1, cl. A; MINN. CONST. art. XIII, § 1; VA. CONST. art. VIII, § 1.

³³ *DeShaney*, 489 U.S. at 194-203 (holding that there is no constitutional right to a police force); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (finding no constitutional right to education).

³⁴ *Rodriguez*, 411 U.S. at 37.

³⁵ For a general discussion of the homeschooling movement and its legal underpinnings,

public education and educate them at home, free from the oversight of public educators, using curricular material of their own making or bought online from for-profit cyber “charter schools.”³⁶ Although not yet judicially recognized, this claimed constitutional “right to home school” clearly exists in the realm of popular constitutionalism: advocates press for it, courts are leaning toward it, parents expect it, state legislatures increasingly acknowledge it, and cash-starved school boards act as though it already exists.³⁷ Parents’ seek this right, more often than not, out of a profound and genuine desire, backed by religious belief, to exit virtually all “public” aspects of society’s education project. Theirs is a desire *not to participate in*, and not to subject their children to, public schools that are open to all, funded with tax dollars, and staffed by professional educators who aim to instill norms of tolerance and liberalism, all toward the goal of educating future citizens. The homeschooling community, or at least the best organized part of it, seeks quite explicitly to exit this intergenerational social compact, by which one generation funds the education of the next in the interest of building a strong civil society. Their legal advocates and the occasional lower court have articulated the contours of a constitutional right to home schooling, under the First Amendment’s free exercise clause, the substantive due process prong of the Fourteenth Amendment, or both. Whatever the textual backing, the logic and rhetoric is that of *exit*: Parents should have the right to exit this core feature of the social contract and core function of the state in civil society.

see Rob Reich, *On Regulating Homeschooling: A Reply to Glanzer*, 58 EDUC. THEORY 17 (2008); Rob Reich, *Why Homeschooling Should Be Regulated*, in HOMESCHOOLING IN FULL VIEW 109 (Bruce S. Cooper ed., 2005); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008). For an example of the inclination of courts to recognize something like a right to homeschool, see *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

³⁶ For a full discussion of the online curricula used by the homeschooling movement, see DIANE RAVITCH, REIGN OF ERROR 180-97 (2013).

³⁷ In *In re Rachel L.*, 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008), a California appellate court refused to entertain an argument that the California Constitution granted parents a constitutional right to homeschool their children. As the court explained:

The trial court’s reason for declining to order public or private schooling for the children was its belief that parents have a constitutional right to school their children in their own home. However, California courts have held that under provisions in the Education Code, parents do not have a constitutional right to home school their children. Thus, while the petition for extraordinary writ asserts that the trial court’s refusal to order attendance in a public or private school was an abuse of discretion, we find the refusal was actually an error of law.

Id. at 79.

After a three month period of statewide revolt, the court reversed itself, holding that there is such a right based on the California Constitution and California state law, and strongly suggested the existence of a federal constitutional right as well. *Jonathan L.*, 81 Cal. Rptr. 3d at 592 (holding that parents have “a constitutional liberty interest in directing the education of their children” that can only be overridden by a compelling state interest).

The blossoming right to homeschool and the now established right to bear arms – the former a part of the “popular constitution,” and the latter a part of the adjudicated one – are the most visible and most significant of the new generation of exit rights. But they are by no means the only ones. Recently, catholic churches, hospitals, and schools have sought “exemptions” from not only the various mandates of the Affordable Care Act (ACA), but also the obligations imposed on employers by the Civil Rights Acts, on the ground that those acts violate these institutions’ First Amendment rights to free expression or free speech. On this theory the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* granted church affiliated employers far ranging “ministerial exemptions” from the mandates of the Civil Rights Acts, giving them the power to fire, hire, and promote any employee whom they designate a “minister” free from the constraints of the antidiscrimination norm at the heart of those laws.³⁸ The Catholic Church has long enjoyed a blanket exemption from those acts in order to retain its right to an all male priesthood.³⁹ But increasingly, secular employers, citing conscience-based objections, have sought similar exemptions from the insurance mandate in the ACA.⁴⁰ The textual bases of these various “conscience exemptions” differ, but common among them is a deeper impulse to recognize a right to exit the obligations imposed by popular legislation intended to safeguard the individual’s right, regardless of gender, race, or disability, to participate in employment and education free from discrimination.

Using logic that is strikingly similar to that employed in the context of challenges to the ACA mandates, the Court has also found that public-sector unions that represent member and nonmember workers alike in collective bargaining activities cannot require objecting nonmembers to pay special fees for the purpose of financing the union’s political and ideological activities.⁴¹ Justice Roberts implies in *National Federation of Independent Business v. Sebelius* that individuals can exempt themselves (albeit at the cost of paying a tax) from an obligation to purchase insurance that not only facilitates, but is essential to, a public health project.⁴² Moreover, states have a constitutional exit right to refuse to expand their poorer citizens’ access to health care, as

³⁸ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“The church must be free to choose those who will guide it on its way.”).

³⁹ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (applying “ministerial exception” to bar a Title VII claim for gender discrimination).

⁴⁰ See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

⁴¹ See, e.g., *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2291-96 (2012).

⁴² *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585-91 (2012).

required by the law.⁴³ In a long and complex body of law, courts have found that employers and sellers have various rights contractually to opt out of the obligations that tort, contract, and consumer law otherwise impose, by contracting with their employees or purchasers to arbitrate any disputes.⁴⁴

Today's exit rights paradigm did not come out of nowhere; it has a decidedly liberal, Warren Court-Berger Court pedigree. Decisions treasured by liberals of all stripes and of a somewhat older vintage grant substantive due process rights to avoid the obligations pressed upon citizens to respect life and the moral demands imposed by a community reflected in its laws. Thus pregnant women can "exit" their pregnancies, at least in the first trimester and so long as they pay for the abortion, exiting both their biological relation with an unwelcome fetus and their relation with a moralistic legislature seeking to ensure that they maintain that relation.⁴⁵ Dying persons can similarly exit their lives, to some degree, exiting not only their own life but also civil relations with their caretakers, relatives, and co-citizens.⁴⁶ The same logic of exit from civil society or civil projects is foreshadowed in these older cases. Thus, although we do not have constitutional rights *to* health care, assistance with parenting obligations, or a livable family wage – a proposition so obvious that the Court has never even had occasion state it – we do have a constitutional right to exit family obligations we cannot afford through abortion. Likewise, we do not have a constitutional right to hospice care, but we do have – at least according to the consensus among liberal constitutionalists – a right to die when our pain becomes unbearable.⁴⁷ For several decades now, Amish families have enjoyed the right to be entirely free of the duty to educate their teenagers, either in public or private or home schools.⁴⁸ And religious families since the

⁴³ *Id.* at 2607 ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.").

⁴⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (striking down a California judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts on the grounds that the Federal Arbitration Act preempts the rule).

⁴⁵ *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that the state may not regulate a pregnant woman's decision to have an abortion during "the stage prior to approximately the end of the first trimester").

⁴⁶ *Gonzales v. Oregon*, 546 U.S. 243 (2006) (upholding Oregon's physician-assisted suicide statute based on "the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'").

⁴⁷ See, e.g., Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41 (discussing Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110), 1996 WL 708956).

⁴⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972).

twenties have had the right to educate their children in private religious schools and schools that immerse their children in languages other than English.⁴⁹ In these early education cases, as in the modern homeschooling cases, there are no rights *to*, but there are robust rights *out of*, civic education. All of these older liberal rights, in various ways, permitted or encouraged exit, whether from pregnancy, from family, from life itself, from public education, from secular influences, or from the English speaking community. And all of these valorized liberal rights form the precedential background of today's decidedly illiberal exit rights: the much more modern rights to exit the social project of policing, of education in toto, of antidiscrimination, of public health, and so on.

All of these exit rights – both the older liberal ones and the newer libertarian ones – tolerate, permit, or overtly encourage exit from projects central to and maybe constitutive of civil society: a publicly funded police force, responsible to and for the community's safety; public education, paid for by tax dollars and staffed by professional public educators who teach a core of knowledge and critical thought essential for eventual public citizenship; parentage itself, its obligations, and the community's moral consensus that values it; health care for the elderly and sick, including obligations of hospice, paid for by insurance to which we all contribute; access to courts and to a common law for the redress for private wrongs; and fair labor and compensation in workplaces, ensured by a unionized labor force. Individuals now have constitutional rights to exit virtually all of these social projects.⁵⁰ And while they have roots in a handful of substantive due process cases that go back a century, their proliferation today is a decidedly contemporary phenomenon. They do not merely recognize the right to individual liberty. Rather, they identify separate spheres within which a state's freely acknowledged sovereign power simply does not reach. The individual homeowner is sovereign, with sovereign powers of violence both in his home and around his "ground" on which he "stands." The Church and its employers are sovereign, free of the obligations imposed by Congress not discriminate on the basis of suspect characteristics. The employer whose conscience is bothered is free of the obligation to comply with an insurance mandate or a civil rights law. The healthy individual is free of the obligation to purchase an insurance contract. The nonmember worker is free of the obligation to pay dues earmarked for political activity to the union that protects his bargaining power. The fundamentalist parent arguably has the right to exit the obligations as well as the web of rights of public education. Of

⁴⁹ *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-36 (1925).

⁵⁰ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (Medicaid expansion); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2291-96 (2012) (union fees); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (litigation); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194-203 (1989) (police force); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (public education); *Roe*, 410 U.S. at 164 (parentage).

somewhat older vintage, but of some consequence in this regard, pregnant women and dying citizens have the right to sever the bonds of civic association as well as earthly coils, through exercising constitutionally protected choices. Exit rights are fast becoming a central, if not the central, paradigm of constitutional meaning.

The damage exit rights do to civil society is not insubstantial and cannot easily be quantified. Critical legal scholars and civic republicans have not successfully articulated this damage in their rights critiques. The problem is not that exit rights insulate subordination or inequality in a private sphere – although many of them do that – or that they tear at communitarian bonds – although most do. Rather, the distinctive harm done by the proliferation of exit rights is to both the reality and the aspiration of *e pluribus unum*. They create, in its stead, an aspiration, and to some degree a reality, of *e pluribus pluribus*. From many comes many. Many views may proliferate as to what the conscience requires with respect to discriminatory hiring practices. Many individuals may have access to legal and utterly lethal force because we have not collectively delegated that power to a central sovereign whom we all endow with a monopoly on legal violence. We need not work toward a core curriculum that recognizes an education required of all our children that will prepare them for the future. Instead we can educate our children independently toward individualized educational goals, not for citizenship in a civic society, but for, say, membership in a Kingdom of God, or a community of believers. We have constitutional rights, in other words, to defy the pull of our conscience or our obligation to civil society. By the light of these decisions, that is now what it means to be a rights-holding American.

II. RIGHTS TO ENTER

The heart of *e pluribus pluribus*, though, is not rights and not “individual rights.” The problem is the relatively new proliferation of constitutionally grounded exit rights. Obviously, though, not all rights are “rights to exit,” or even trend that way. One type of right, furthermore, is the diametrical opposite. Civil rights, virtually by definition, are not exit rights. At their core, and for good reason, civil rights have been called rights of participation, rights of inclusion, rights of membership, or most tellingly, rights of belonging. For my purposes, civil rights are rights to enter civil society – the same civil society from which all of our newfound Constitutional rights guarantee exit.

According to Tom Paine’s iconic essay, *Rights of Man*, civil rights are those natural rights we enjoy by virtue not only of our humanity – this is true of all natural rights – but by virtue of our membership in society.⁵¹ Moreover, unlike some of our more familiar natural rights, such as rights to the mind, to conscience, or to freedom of action, Paine argued that civil rights are those rights we cannot enforce without the aid of the law, state, and civil society.⁵²

⁵¹ PAINE, *supra* note 12, at 68.

⁵² *Id.*

According to Paine, civil rights have three defining attributes: they are (1) natural rights (2) that arise by virtue of one's membership in society, and (3) that cannot be enforced or protected on their own. They are, in modern parlance, natural and positive rights of societal membership; they are rights *to* law, rather than rights *to be free of* law. They are rights to enjoy access to those laws and social institutions that facilitate the full enjoyment of a flourishing life. Civil rights are, in other words, rights to enter civil society. By virtue of our antidiscrimination law, those rights cannot be denied to any person on the basis of race, sex, disability and so on. Antidiscrimination law protects our equal enjoyment of our civil rights. The civil rights thus protected, however, are those rights to enter and then fully participate in civil life.

And what are they? What are those natural rights we enjoy by virtue of membership in society, and which we cannot enforce on our own? Let me first answer the question positivistically by briefly listing those positive civil rights won over time. To the framers of the Civil Rights Act of 1866, those civil rights of protection, which cannot be denied on the basis of prior enslavement, included rights to contract, own property, write a will, and sue on account of injury.⁵³ The Enforcement Act of 1871 (Ku Klux Klan Act) added to that list the right to be protected against private violence such as lynchings.⁵⁴ The constitutionally doomed Civil Rights Act of 1875 famously added to the list the rights to enjoy public accommodations and transportation.⁵⁵ According to modern historians, in the 1930s and 1940s "civil rights" primarily denoted labor rights, including the right to safe and well-compensated labor, and eventually, the right to unionize and strike.⁵⁶ By mid-century, and by virtue of

⁵³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 ("[S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and endorse contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . .").

⁵⁴ Ku Klux Klan Act of 1878 § 2, 42 U.S.C. § 1985(3) (2012) (providing a cause of action against private parties who conspire to "depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws").

⁵⁵ Civil Rights Act of 1875, ch. 114, 18 Stat. 336, *held unconstitutional* by The Civil Rights Cases, 109 U.S. 3 (1883) (discussing rights to "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement").

⁵⁶ William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 59-60 (1999) ("Workers' rights to associate, assemble, unionize, and strike constituted First, Thirteenth, and Fourteenth Amendment claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures. . . . Finally, in the '30s, Congress embraced much of labor's exiled interpretations of the First, Thirteenth, and Fourteenth Amendments . . ."); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1669-74 (2001) (discussing the "centrality of labor" to

a civil rights movement that eventually led to the enactment of the Civil Rights Act of 1964, our civil rights included rights to nondiscriminatory education⁵⁷ and employment opportunities.⁵⁸ All of these civil rights fit well within Paine's understanding of civil rights. Civil rights to contract, property, and so forth are grounded in natural rights, but they are also clearly rights we have by virtue of membership in society and which we can enjoy only insofar as the state enforces them. And the same is true of rights to employment and educational opportunities, public transportation and so on. All of these rights are "rights to enter" some aspect of civil society – be it commerce, education, employment, or some public space, such as theatres, public transportation, and accommodations – and all of them depend on positive law for their full perfection.

The last third of the twentieth century and the first two decades of this one, have seen a major expansion of our civil rights to enter. We have extended our civil rights to enter to groups heretofore excluded, for example through the Age Discrimination and Americans with Disabilities Acts,⁵⁹ and possibly the Equal Employment Act as well. And, at the same time, we have expanded our conception of the civil society to which civil rights protect entrance. Consequently, today our civil rights include a host of familial rights, such as the right to be protected against domestic violence⁶⁰ and the right to not be deprived of a job by virtue of our caregiving responsibilities.⁶¹ They also include the right to a quality education regardless of poverty or disability.⁶² Most recently, our civil rights have come to include, at least arguably, rights to health insurance and to the health care that such insurance facilitates, rights to marry whomever we love, regardless of gender or sexual orientation, and rights to immigrate on fair and humane conditions.⁶³

Department of Justice's definition of civil rights in the late 1930s and 1940s, *id.* at 1669).

⁵⁷ Civil Rights Act of 1964, tit. IX, 20 U.S.C. § 1861 (2012); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁵⁸ Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5 (2012).

⁵⁹ Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6106, 6106a, 6107 (2012); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

⁶⁰ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28 and 42 U.S.C.).

⁶¹ Family Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended in scattered sections of 5 and 29 U.S.C.).

⁶² *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 14005-14006, 123 Stat. 115, 282; No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.); Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1487 (2012)).

⁶³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29 and 42 U.S.C.); CONN. GEN. STAT. ANN. § 46b-20a (West Supp. 2013) (codifying the right to marriage for opposite- and

All of these contemporary civil rights fit Paine's definition: they are all natural rights grounded in our nature, but which we are owed by virtue of our membership in society. And we cannot enforce them on our own without the aid of the state, a considerable body of enabling law, civil society, and civil society's institutions. We enjoy the fruits of our contracts because of the law that enables us to contract at all, not because of a natural instinct to bargain. We cannot contract, own property, or write a will without contract law, property law, and estate law. We cannot acquire a quality education without a healthy dollop of law, pedagogy, administration and regulation; without law and educational institutions only a very few of us would discern those lovely Pythagorean theorems all on our own. We cannot labor fairly and freely without the wind of employment law and its enabling institutions at our back; our labor otherwise would be soul numbing and exploitative. We cannot enjoy a long and healthy life without the protections accorded by law and medicine, without them, our lives would be nasty and short, if not brutal. And we cannot enjoy a safe life – that is, physical security – either in our communities or in our homes, without the protection of the state against the private violence that disables it. These civil rights provide access to civil society, which we could not possibly enjoy without law: they are the rights to the law, legal institutions, and social structures that define the spheres of civil life.

Paine added one final definitional claim, in his brief but fecund discussion of the various differences between natural and civil rights. The right to protection by the state against private violence – the civil right to physical security – he argued, is the quintessential civil right.⁶⁴ It is owed to us by virtue of our membership in society, and it is not susceptible to enforcement by anyone on his own. To take those in order: A safe and long life is, in Sen and Nussbaum's compelling language, a natural "capability," the enjoyment of which is central to "human flourishing."⁶⁵ But the right we have to the protection of our security so that we can enjoy that natural capability, is held not by virtue of our humanity, but by virtue of our membership in society. It is a right that any liberal state must protect, in Sen and Nussbaum's modern formulation of exactly the same idea. Moreover, it is one that we clearly cannot enforce on our own: self-help alone will not keep any of us safe, as Hobbes understood all too well. We need the state. We need the positive protection of the law. With that protection, we can expect a safe life of ordinary duration, uninterrupted by private violence. We have, then, a civil right to the state's protection against civil violence. With it, we enter civil society and as an equal.

same-sex couples); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012 & Supp. 2013) (same); WASH. REV. CODE § 26.04.010 (2012 & Supp. 2013) (same).

⁶⁴ PAINE, *supra* note 12, at 68.

⁶⁵ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 148 (2001); Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30, 31 (Martha C. Nussbaum & Amartya Sen eds., 1993).

Without it, either we are slaves to whomever has legal violent power over us or we are out in the cold.

The centrality of the civil right to the state's protection against private violence is a constant thread in our various civil rights laws and traditions, spanning two centuries. It finds poignant but emphatic expression in the Ku Klux Klan Enforcement Act of 1871: freed slaves must have a right to the state's protection against lynchings and other conspiracies of violence in order to fully and equally participate in, or enter, civil society.⁶⁶ If the state militia will not provide it, then the national government must. To be subject to private violence that is unchecked by the state is to be subject to another master and hence denied equal membership; it is to be thrust back into a state of effective slavery. The same insight is echoed a century later in the Violence Against Women Act. Victims of domestic abuse must be protected against intimate violence, if they are to enjoy equal and full citizenship.⁶⁷ State protection against civil violence – recognized by the drafters of both acts over a hundred years apart – is a if not *the* fundamental civil right; it is the right on which participation in civil society is fundamentally dependent. Anyone deprived of that right is denied entrance. Anyone subject to unchecked private violence is outside the sphere of the law's protection.

We have a civil right to protection by the state against private violence. In exchange, we relinquish our natural right to self-help. We have a constitutional right, though, to exit just that contract, and take up our own arms toward the same end. The exit right threatens the civil right. The same is true of civil society writ large: we have civil rights to enter civil society and we have constitutional rights to exit it. Again the latter threaten the former. The threat, however, while serious, clearly does not stem from the very idea of rights, or even individual rights. The threat to both civil society and the civil rights that protect our rights to enter it comes from our recently constitutionalized rights to exit.

CONCLUSION

Let me sum up and then draw one moral. During roughly the same period that our Courts have constructed various constitutional rights to exit the obligations, burdens, and even the benefits of civil society, Congress, and to a lesser but still meaningful extent, state legislatures, have created a variety of civil rights to enter it. These rights are in considerable tension. We have no constitutional right to a police force, courtesy of *DeShaney*,⁶⁸ but we do have a civil right, emanating from a social compact and recognized in a host of civil rights laws over two centuries, to the state's protection against violence, in exchange for our forbearance of self-help. Perhaps they would be in equipoise,

⁶⁶ Ku Klux Klan Act of 1878 § 2, 42 U.S.C. § 1985(3) (2012).

⁶⁷ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28 and 42 U.S.C.).

⁶⁸ See *supra* notes 28-29 and accompanying text.

but for this: we also have had now for over a decade a constitutional right to own and use a gun – including in lethal acts of self-defense. So, we now have a constitutional right to exit the social compact from which the civil right to protection by the state against private violence is derived. Similarly, we do not have a constitutional right to a high quality public education, at least none that the Courts, rather than commentators, have seen fit to articulate. But we do have a civil right to one, again emanating from an inter-generational social compact. And, the state clearly has an obligation to provide it, in exchange for our duty to support and participate in it, as recognized in most state constitutions, in a host of federal laws from NCLB to IDEA to RTTT, and by the Supreme Court itself in *Brown v Board of Education*. Again, perhaps these would be in equipoise, but for this: We also have, according to some dicta in court opinions and highly impactful public advocacy, a constitutional exit right to quit the social compact that gives rise to the civil right. We may have a right, that is, to take our kids out of public schools and homeschool them. We do not have a constitutional right to nondiscrimination in the private sphere, although we obviously have civil rights to nondiscrimination in the private sphere, as codified in the Civil Rights Act of 1964. Yet here as elsewhere over the last few years, the courts have drawn ever broadening constitutional exit rights, by which some employers can avoid the burdens of nondiscrimination law, if the employer's corporate conscience is at odds with policy that emerges from the democratic process that is part and parcel with the social compact. We have no constitutional right to health or to health care, although we do have a very precarious civil right to one, regardless of our ability to pay. That civil right is the product of as clear a social compact as one can imagine: a contract by which healthy and sick, young and old, jointly undertake a public health project by pooling and spreading risks of disease, accident, and advanced age. As the young will one day be old and the healthy will one day be sick, all are burdened, but all are benefited. But the healthy individual might have a constitutional exit right to refuse to buy the health insurance that would facilitate that care, and states quite clearly have a constitutional right to refuse to extend the health care to its poorer citizens that stems most directly from the social compact – Medicaid. We have no constitutional right to a job, much less one that pays well and can be performed in safe conditions, although perhaps we should have a civil right to just that. But we apparently have a constitutional right to refuse to support with dues a union that represents us in attempts to secure one. And so forth. Our civil rights are more often than not to benefits derived from civil society and from the social compact that is at its heart – benefits, however, that are not protected by constitutional rights. Our newest generation of constitutional rights – exit rights – give individuals and corporations rights to exit the obligations and forego the rights derived from that compact and the civil society arises from that compact.

What to do, if we care about these rights, and the civil society they structure? The lack of constitutional rights to health, to safety, to education, to fair labor, to nondiscrimination and so forth is obviously detrimental to civil

society, but it is also obviously not fatal. And the Constitution, while it does not grant these positive rights, clearly does not forbid Congress from granting them. The new generation of exit rights the courts have fashioned, however, do have the potential to unravel civil society, depending on the extent to which they are embraced. Obviously, if enough healthy individuals exercise their constitutional right to not buy health insurance, the ACA is threatened. If enough homeowners and individuals arm themselves, and exercise their constitutional rights to lethal self-defense, the safety we garner by virtue of our publicly funded police force is badly compromised. If too many parents pull their children from the public schools and school them at home, the fiscal solvency of public schools and the citizen-focused norms of liberalism and tolerance integral to the public curriculum are undermined. More generally, and more rhetorically, if we accept the understanding of American identity, of constitutionalism, and of individualism at the heart of these rights of exit, their potency is magnified. If we accept an understanding of ourselves as fundamentally entitled, by virtue of the Constitution we have all sworn to uphold and all citizens are taught to revere, to exit from fundamental social projects, then not only those projects, but the idea of civil society itself, is seriously eroded.

The constitutional rights tradition, however, is not the only “rights tradition” game in town. It is not the only understanding of rights available to us. Civil rights are also a part of our history. They differ in some obvious and compelling ways. They have a dramatically different pedigree: civil rights, unlike constitutional rights, are (mostly, not entirely) a product of democracy rather than a constraint on it. They respect community, not just individuality, and they rest on a cooperative rather than competitive understanding of our contractual and quasi-contractual relations with our co-citizens. Most crucially, though, civil rights have a fundamentally different *point*: civil rights, unlike constitutional rights, invite participation in our civil society rather than threaten its demise. They have from the beginning been motivated by both norms of humanity and social inclusion. They protect and respect community rather than a relentless and often damaging individualism, and they structure and animate our civil society rather than target it.

My prescriptive suggestion is that if we value American civil society we should take a break from our constitutional rights tradition and renew our commitment to civil rights. Civil rights define a set of traditions and an ethical way of thinking and being that is worth understanding, deepening, and extending. If we could attend to our civil rights with the same meticulous scholarly, political, and ethical care we have devoted lately to constitutional rights and constitutionalism, we would likely find the beginnings of a path out of our currently dysfunctional morass. We could start, for example, by insisting that the quest for sensible gun legislation is a defining civil rights issue of our time, and not just a matter of good policy. We could articulate the content and boundaries of our civil rights to a high quality public education, decent jobs, and health care. Were we to do this, we would to some extent at

least even the playing field: the rights to homeschool, to “at will employment,” to not buy insurance, to opt out of union dues and nondiscrimination obligations, and to own and fire a gun would all have counters in *rights*, rather than only in the always somewhat ominous sounding “police powers” of the state. Rights to health, education, labor, safety and so on do, of course, emanate from the state’s police powers, and of course the state should employ that power toward good policy objectives. But they also emanate from our humanity and our membership in civil society, and they are rights we simply cannot enforce on our own. As such, they reflect, originate in, and ground civil society and the compacts at its core. When we neglect them, we neglect their fruit – the seeds of democracy.

This is, of course, only a partial answer to the problem of a dysfunctional Congress. It addresses the civil society part of the “perfect storm” that besets our government and that Yasmin Dawood describes so well.⁶⁹ But it is, I believe, a part of the answer. If we are going to redress the civil society deficit, one way to do it is through a reinvigorated commitment to our civil rights traditions. We should not hesitate to do so because we have over-read the import of the rights critiques of the last thirty years. Rights themselves are not the problem. Rights that target civil society and the social compact – and do so in the name of the Constitution – are.

⁶⁹ Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913 (2014).