Introduction

The Idea and Practice of Feminist Constitutionalism

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What is feminist constitutionalism? Basically, it is the project of rethinking constitutional law in a manner that addresses and reflects feminist thought and experience. We use this term in contrast with the "constitutional law and" approach – constitutional law and gender or constitutional law and feminist theory – because we aspire to explore the *relationship between* constitutional law and feminism by *examining, challenging, and redefining the very idea* of constitutionalism from a feminist perspective. Feminist constitutionalism demands that we not only revisit classical topics from new perspectives but, more importantly, pose new questions, introduce new topics, and take responsibility for changing the focus of constitutional discussion and debate. We embrace the questions raised by studies of gender or feminism "and" constitutional law even as we urge scholars to move beyond them.

We acknowledge the importance of constitutional law for feminist analysis. Constitutional law is foundational to most of the world's legal systems. It shapes fundamental assumptions regarding citizenship, rights, and responsibilities. Feminists who critique law must understand that legal systems cannot really be transformed without addressing their constitutional foundations. Historically, the second-class status of women in law derived from constitutional structures and assumptions. For instance, in the Anglo-American countries – Great Britain, the United States of America, and Canada – women were denied the right to vote in the nineteenth and early twentieth centuries in part because constitutional norms were phrased in masculine terminology (e.g., "men," "he") or given a gendered interpretation (e.g., "persons" as referring to "men").

It is timely for constitutionalists – scholars, jurists, lawyers – to attend to the contributions that feminism offers to the traditional domains of constitutionalism. Basically, constitutionalism engages with the institutions of government, the rights of individuals and groups, and the formulation of limitations on institutional power. It was traditionally associated with formalized rules often expressed in written texts,

but has developed through the years to include constitutional conventions and traditions.[1] Feminist constitutionalism engages with all these aspects of discipline, exposing their hidden assumptions and challenging their claims to gender neutrality. Let us briefly enumerate the central themes derived from this endeavor.

Equality Jurisprudence – A basic tenet of feminism is engagement with different understandings of the right to equality. For women, as well as for other disadvantaged groups, the first struggles for equality were focused on claiming formal equality while objecting to reliance on stereotypes. Despite many victories, these struggles remain relevant today, especially when addressed from a global perspective. Moreover, it is clear that formal equality forms only one aspect of the multifaceted aspiration to achieve gender equality. Feminist challenges to laws that rely on biological differences between the sexes,[2] to the hidden biases of supposedly neutral investigations of equality,[3] and to the discriminatory nature of subordination and sexual harassment[4] should be integral to constitutionalism's endeavors.

Center and Periphery in Constitutional Law – Feminism calls on constitutional discourse to attend to issues that shape the reality of life for women. These issues will reshape the way in which we traditionally define constitutional law. More specifically, constitutional law should address reproductive rights, social rights, the regulation of group rights of minorities (that endorse discriminatory community practices), and more – not as "side issues" but rather as central issues deserving equal respect and attention with the "big questions" of national security and separation of powers. The scope of thinking on "national security," to continue this point, might be broadened to include not only borders and armed forces, but also security at home and in the streets, a security that mandates protection from physical abuse, knives, sexual offenses, and emotional, medical, and nutritional want, and not only from guns, bombs, or missiles.

Revisiting Constitutional Assumptions and Categories – Feminism invites scholars of constitutional law to be critical of the assumptions that underlie their theories. One such assumption is the traditional distinction between the public and private realms so inherent to liberal constitutionalism. Indeed, the critique of the public–private distinction is a long-standing theme of feminist writings.[5] However, it is important to address it in a manner that transcends reforms of ordinary legal rules and policies (e.g., opposing the traditional unwillingness to deal with domestic violence). To be effective, we must address this criticism at the constitutional

[1] *See, e.g.*, Ernest A. Young, *Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2007–2008).

[2] *See, e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

[3] *See also* Martha L. Minow, *Foreword: The Supreme Court, 1986 Term – Justice Engendered*, 110 HARV. L. REV. 10 (1987).

[4] CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[5] Frances E. Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

level because it is constitutional law that shapes the understanding of the public and private and elaborates the principles that apply to this distinction.[6] The way the public–private distinction applies in other spheres is the product of constitutional foundations. Another assumption that feminist critique exposes is the hierarchy attached to protection of first-generation rights such as "liberty"[7] and "speech."[8]

Rights and Institutions – Promoted by feminist theories, feminist constitutionalism must embrace the two fundamental dimensions of constitutional law – institutions and rights. In contrast to the temptation to associate gender issues in constitutional law with specific rights-promoting struggles, it is vital to understand that a comprehensive discussion of constitutional law should also embrace institutions. In this context, for example, we must study electoral laws while focusing on parity and representation. More broadly, we must critically assess the role that judicial review of legislation had and might have in promoting the rights of women. Without this institutional feature (judicial review) certain path-breaking precedents (such as *Roe v. Wade*)[9] could not have been possible.[10]

Global and Comparative Law – Feminist constitutionalism poses a global challenge to legal scholarship. Shaping it should be based on the experience of women in different countries. This accumulated experience helps in uncovering endemic or grave problems and persistent challenges. This is not to say the problems and challenges are similar everywhere. However, the broader perspective helps in uncovering themes that the local focus often blurs. The use of comparative law can also shed light on differences between countries with old and new constitutions and thus on the role of constitution-making for gender justice. In general, old constitutions (such as the U.S. Constitution), in a manner that reflects their time, do not tend to mention gender equality expressly, whereas new constitutions (such as Canada's 1982 Constitution Act, which included the Charter of Rights and Freedoms, and the 1996 South African Constitution) have done that and thus give robust support to equality arguments at the national level. Feminism has the potential to contribute to the study of comparative constitutional law, which so far has not focused enough on gender issues (aside from the interesting example of abortion rights, which often

[6] *See, e.g.*, Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade (1983)*, in FEMINISM UNMODIFIED (1987).

[7] The constitutional understanding of liberty tends to focus on formal freedoms and disregard social subordinations that limit the autonomy of women in their actual lives.

[8] According to Catharine MacKinnon, pornography should not be regarded as speech. *See* CATHARINE A. MACKINNON, ONLY WORDS (1993). Her challenge to the conventional understanding of "speech" should be acknowledged as important even by those who ultimately do not accept it.

[9] *Roe v. Wade*, 410 U.S. 113 (1973).

[10] At the same time, feminist constitutionalism critically enquires into the way such doctrines are developed. Although the protection of women's choice in *Roe v. Wade*, for example, has been a positive and important development in its outcome, it raised concerns due to its reliance on the right to privacy, a right that also has problematic implications for women, as we mentioned earlier.

calls for a comparison between U.S. case law and the decisions of the German Constitutional Court).[11]

Integrating Diversity Theories – Feminism has the potential to bring into the constitutional arena the richness of feminist thought about diversity. Feminist constitutionalism would insist that research and adjudication be antiracist, anti-homophobic, anticlassist, anti-ageist, and reflective of claims for ableism as well as for respect of ethnic, cultural, and religious views that are consistent with gender equality. The discourse of feminist constitutionalism about diversity is not monolithic. Feminists do not pretend to know all there is to know about diversity, but rather they proclaim their openness to instruction from the writings and practical expertise of the full range of diversity theorists. Thus feminism aspires not only to understand diversity theories and to critique them from the perspective of gender, but also to hold constitutionalism accountable if it fails to take the same steps.

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This book presents a snapshot of the current state and potential contributions of feminist constitutionalism. The contributors offer a spectrum of approaches and topics that delineates the scope of this field and its richness. Following this Introduction and a preface by Catharine MacKinnon, the book is divided into six parts: Feminism as a Challenge to Constitutional Theory; Feminism and Judging; Feminism, Democracy, and Political Participation; The Constitutionalism of Reproductive Rights; Women's Rights, Multiculturalism, and Diversity; and Women between Secularism and Religion. We offer here a brief description of the contributions in each part.

Part I, which illustrates the potential contribution of feminist theorizing to feminist constitutionalism, opens with Jennifer Nedelsky's *Gendered Division of Household Labor: An Issue of Consitutional Rights*. Nedelsky focuses on the division of household labor and its impact on shaping core values in society. This division excludes women from the political domain, thus depriving this domain of the knowledge and experience of women and ultimately detracting from good social policy making. It also deprives women of access to various rights, such as access to education, health care, and employment. Nedelsky complements her argument by considering the road to transforming the current division of labor. She believes this task can be done only by redefining core values; moreover, it should not be left to state-based institutions alone but rather should evoke open public discourse in various arenas, including classrooms, corporate retreats, international organizations, and more.

The second chapter, *Feminist Fundamentalism and the Constitutionalization of Marriage* by Mary Anne Case, focuses on the institution of marriage and its historic contribution to the subordination of women. Case addresses this criticism in the

[11] This case study opens Vicki Jackson and Mark Tushnet's casebook of comparative constitutional law. *See* VICKI C. JACKSON AND MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (2nd ed., 2003).

context of the new debates regarding the recognition of same-sex marriage. As long as the institution of marriage is closed and protected only for heterosexual couples, the chances for reforms that will transcend nonegalitarian traits are low. Accordingly, Case argues that allowing same-sex couples to marry would help to distance the concept of marriage from its patriarchal past. Such a reform would have benefits, not only for gay and lesbian couples, but for all who value liberty and equality on the basis of sex.

Rosalind Dixon and Martha Nussabum's chapter, *Abortion, Dignity, and a Capabilities Approach*, offers a new perspective on the regulation of the controversial area of reproductive freedom. The chapter adopts as its starting point the concept of the right to human dignity, as interpreted according to the capabilities approach. As a result, it aims at drawing a ceiling as well as a floor on the basic rights of access to abortion, and then deals with the concretization of these rights with regard to the public funding of abortion and health care.

Part II of the book addresses some of the contributions feminism holds for the study of the judiciary and judicial decision making. In *Her-meneutics: Feminism and Interpretation*, Daphne Barak-Erez evaluates the potential contribution of feminist interpretation to the practice of constitutional law. Traditionally, stereotypes and discriminatory practices have left their mark on constitutional and legal traditions and interpretations. Barak-Erez argues that feminism has a role to play in rectifying these influences, and that feminist interpretation has the potential to be an effective tool in achieving gradual legal change. She reviews several understandings of feminist interpretation, as shaped by the different streams of thought in legal feminism, and ultimately promotes an approach based on presenting the "woman question" – which calls for avoiding interpretive choices that have disproportionate effects on women.

The next chapter, *Intuition and Feminist Constitutionalism*, by Suzanne Goldberg, examines the role that intuition and intangible rationales play in judicial decision making in the context of gender and sexuality. The chapter demonstrates that judges' reliance on these intangible rationales is problematic. Such reliance enables judges to make decisions in a way that masks their personal biases and to engage in stereotyping. At the same time, Goldberg acknowledges that there is some merit to the use of intuition. Ignoring intuition could lead to skewed results and to an overemphasis on empirical research, which can also be subject to manipulation. Ultimately, she suggests that judges need to make better use of data that work against their intuition and to offer extensive explanations when their rulings break from empirical evidence.

Another view on feminism and judging comes from the study of women on the bench. *Women Judges, "Maiden Speeches," and the High Court of Australia* by Heather Roberts exemplifies this area of study. This chapter utilizes the speeches made at the swearing-in ceremonies of women judges in the High Court of Australia

as a prism to explore perceptions regarding the participation of women in the Australian legal community in general and in the Australian judiciary in particular. It points to differences between those who mentioned their identity as women jurists and those who refrained from doing so, and shows how these speeches reflect a continuing pressure faced by women judges to distance themselves from the perception of their "otherness" on the bench.

Kerri Froc examines judicial decisions dealing with a "cluster" of rights violations in *Will "Watertight Compartments" Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms*. Froc studies cases involving arguments about gender discrimination coupled with a violation of another civil liberty. She not only argues that in such cases judges should recognize the more severe, complex, and intractable suffering, but also criticizes the "watertight compartments" approach to rights wherein judges analyze each of the rights violations separately. Froc advocates an integrated approach, contending that an experience of subordination implicating more than one right is not simply a collection of rights violations, but rather may result in a rights violation that is unique.

In her chapter on *Constitutional Adjudication and Substantive Gender Equality in Hong Kong*, Kelley Loper offers a case study of judging equality claims. Loper points to the shortcomings of equality jurisprudence in Hong Kong, which acknowledges the right to equality while making it difficult to challenge laws influenced by traditional patriarchal cultural practices and socioeconomic policies. With regard to policies that impact migrant and immigrant women, for example, the judgments generally fail to consider their gender dimensions and focus instead on distinctions based on residence status and immigration categories. These judgments reveal the potential and limits of Hong Kong's equality jurisprudence for achieving substantive gender equality.

Part III of the book focuses on women's political participation and questions of institutional design related to it. In *The Gendered State and Women's Political Leadership: Explaining the American Puzzle*, Eileen McDonagh and Paula A. Monopoli study the large gap between the percentage of women in the population and their representation in the U.S. House of Representatives. McDonagh and Monopoli employ a policy feedback model, explaining that the gendered character of the state's political institutions and public policies teaches the public who should be considered suitable as officeholders in the public sphere of governance. More specifically, they point to the masculine bias inherent in the founding documents of the American state and its constitutional formulation. Their study argues that these teach voters to associate the state with masculine traits such as war and autonomous behavior patterns. Against this backdrop, McDonagh and Monopoli examine a range of public policies and illustrate the masculine specificity of those associated with the United States in contrast to the hybrid character of public policies that typify most comparable democracies.

The next chapter, *On Parity, Interdependence, and Women's Democracy*, by Blanca Rodríguez-Ruiz and Ruth Rubio-Marín analyzes the constitutional implications of legal measures directed at imposing gender parity and gender electoral quotas. Rodríguez-Ruiz and Rubio-Marín examine a variety of possible perspectives, including the more traditional rights perspective. They argue for a different perspective – that of citizenship in a representative democracy. Their analysis refers to case studies from several countries, including France, Italy, Switzerland, Colombia and, most recently, Spain. Eventually, Rodríguez-Ruiz and Rubio-Marín propose a new model for dealing with the parity challenge – the distinct parity democracy model.

In *Women's Involvement in International Constitution-Making*, Elizabeth Katz studies women's participation from the perspective of women's involvement in the constitutional-drafting process. Katz presents four case studies – Afghanistan, Colombia, Kenya, and Nicaragua – that serve as the basis for analyzing the important elements for ensuring effective participation. In general, she concludes that women's participation in the constitutional-drafting process has made a difference. In addition, she demonstrates that even where their wishes may not have been fully incorporated into the constitutional text, women's participation in the constitutional-drafting process paves the way for future discussions and improvements.

The theme of women's mobilization for action recurs in Carolina Vergel Tovar's *Between Constitutional Jurisdiction and Women's Rights Organizations: Women, War, and the Space of Justice in Colombia*. Tovar focuses on a path-breaking decision of the Colombian Constitutional Court on the protection of internally displaced women. This decision declared that the overwhelming majority of victims of displacement have been women and ordered the government to create special programs to assist them. Tovar situates this decision in the context of the political mobilization of women.

The third part concludes with *The Promise of Democratic Constitutionalism: Women, Constitutional Dialogue, and the Internet* by Tsvi Kahana and Rachel Stephenson. Kahana and Stephenson adopt an approach known as democratic constitutionalism, which generally advocates for replacing judicial supremacy by various forms of popular participation, in comparison with the more traditional approaches of judicial-supremacy constitutionalism and legislative supremacy constitutionalism. Their objective is to evaluate the impact of this approach on women. They argue that democratic constitutionalism provides important opportunities for the direct participation of women in the project of constitutional interpretation. It does so by focusing on the special possibilities offered by the various uses of the internet owing to its faceless, fluid, and textual nature.

Part IV turns to the gender-specific rights controversies surrounding reproductive rights (also seen in the contribution of Dixon and Nussbaum in Part I), opening with Jennifer S. Hendricks' discussion of *Pregnancy, Equality, and U.S. Constitutional Law*. Hendricks embraces pregnancy as the model for the parental relationship – because of the way it combines a biological tie and a caretaking relationship.

Hendricks shows that this model has guided the jurisprudence of the U.S. Supreme Court in the way it dealt with the parental claims of unwed fathers. She examines the effect of understanding pregnancy as a parental relationship on the analysis of abortion law. While acknowledging that it also has the potential to undermine the right to abortion, Hendricks argues that denying the relational component of pregnancy distances abortion discourse from women's reproductive experiences, and undermines women's legal claims in other contexts.

Abortion law in the United States is also the subject of Nicole Huberfeld's chapter titled *Federal Spending and Compulsory Maternity*, dedicated to the funding aspects of this body of law. Huberfeld focuses on decisions that allow the states as well as the federal government to burden the privacy right to obtain abortion by withholding funds in public health-care programs, particularly Medicaid. She criticizes this case law and points to the disconnect it creates between the acknowledgment of women's reproductive rights and the actual denial of the same rights in the Spending Clause jurisprudence.

In *Challenges for Contemporary Reproductive Rights Advocacy: The South African Example*, Rachel Rebouché examines the distinction between reproductive rights and their realization. Rebouché starts by describing the regulation of abortion during apartheid and moves on to understand the processes that enabled the incorporation of reproductive rights in the new South African Constitution. In fact, South Africa is the only country to recognize a constitutional right to reproductive freedom. Against this background she discusses current law, which was largely influenced by the experience of the U.S. reproductive rights activism, without taking full account of the unique domestic conditions. More specifically, the analysis focuses on the treatment of parental involvement in minors' abortion decisions as an example of the unintended consequences of the advocacy strategy that led to the law. Rebouché concludes by suggesting considerations that contemporary reproductive rights reform projects might incorporate in pursuit of an approach that would be more responsive to the actual needs of women making decisions about abortion.

Part V discusses current tensions around women's rights in a world of multiculturalism and diversity. It opens with *Constitutional Rights of Women in Customary Law in Southern Africa: Dominant Interventions and "Old Pathways,"* by Chuma Himonga. This chapter calls for revisiting the idea of using custom, tradition, and culture to protect women's rights. The analysis starts by describing and critiquing the prevailing methods of implementing the rights of women in Southern Africa in areas such as customary marriage, polygamy, and succession rights. Humonga highlights the limitations of these interventions, which justify the considering of alternative approaches. She proposes an approach based on engagement with customary law within a dialogic human rights analytical framework. Her model would emphasize the aspects of customary law that protect women, use its language, and take into account the importance of family in the customary decision-making process.

In *Minority Women: A Struggle for Equal Protection against Domestic Violence*, Puja Kapai focuses her culturally sensitive analysis on the challenge of fighting domestic violence in a way that will be accessible to women of ethnic minority and immigrant communities. Kapai seeks to critically examine the basic assumptions inherent in preventive and interventionist measures against domestic violence. She highlights factors such as cultural values of obedience and self-sacrifice, language barriers, financial dependence, immigration status, spatial isolation, and racial discrimination. Kapai advocates taking a varied and systemic approach that will be responsive to the realities of ethnic and immigrant women.

Watch GRACE Grow: African Customary Law and Constitutional Law in the Equality Garden by Jewel Amoah offers an intersectional analysis of equality claims, using the acronym GRACE to represent an African girl child whose Gender, Race, Age, and Culture intersect to impact on her experience of Equality. Amoah's premise is that the different aspects of GRACE's identity change her experience as well as the way she is perceived in her environment. Her experience occurs at the point at which the elements of her identity intersect. The discussion embraces legal pluralism, and argues that the development of customary law in accordance with equality principles in general, and gender equality in the constitution in particular, is vital for the prospects of GRACE to achieve and enjoy equality.

In her chapter *Critical Multiculturalism*, Vrinda Narain addresses the accommodation of group difference within the framework of multiculturalism. Narain's perspective is critical and she insists that policies respecting this difference will promote gender equality. Her study focuses on the experience of Muslim women situated at the intersection of a religious community and a secular state, making them a compelling category of analysis. Muslim women experience discrimination along multiple axes – as women, as Muslims, and as Muslim women. Their situation illustrates the paradox of multicultural vulnerability where the commitment to protecting minority rights may result in the subordination of women. Against this background, Narain aspires to craft an understanding of multicultural citizenship that allows for the possibility of difference without exclusion.

Susan Williams continues to develop the theme of moderating between minority culture and women's rights in *Democratic Theory, Feminist Theory, and Constitutionalism: The Challenge of Multiculturalism*. Williams presents the two extreme choices faced by women in this context – departure from their cultural norms using "freedom of exit" and departure from the dominant culture's rules. She exposes the shortcomings of this choice, proposing as an alternative a dialogic model of democracy. The dialogue proposed is not only a dialogue between the minority and the larger community, but also an internal dialogue within the minority community. Williams is aware of the dangers attached to this proposal, which may lead to hierarchy and oppression if not implemented correctly. Therefore, for the purpose of promoting internal dialogue in the minority community, she proposes to provide the community with recognition and resources, and to make

accommodation contingent on the adoption of practices that encourage dialogue. Williams argues that employing her approach would yield long-term benefits for women by assuring their voices are heard and incorporated in the reshaping of equality rights.

Finally, Part VI continues the analysis of gender rights in circumstances of multiculturalism with a special focus on cultural claims that are situated in religion. *Secular Constitutionalism and Muslim Women's Rights: The Turkish Headscarf Controversy and Its Impact on the European Court of Human Rights* by Hilal Elver draws on the debate about the acceptability of Muslim women wearing a headscarf or *hijab*. Elver explores the Turkish headscarf controversy that led the country into political turmoil, and demonstrates the complex implications of this controversy on domestic and transnational legal order. The Turkish headscarf controversy is one of the earliest and most deeply complex cases of this sort – both because of the gap between the constitutional secularism of the country and the prevalent Muslim sentiment in the population at large and because of the Turkish reliance on secularism to prohibit headscarves, which became a model legal argument for European courts. More specifically, Elver evaluates the pivotal role of the decisions of the European Court of Human Rights that upheld national bans on headscarf use. Her analysis focuses on the role of judges as interpreters of human rights principles and constitutional order in domestic and international courts.

In *On God, Promises, and Money: Islamic Divorce at the Crossroads of Gender and the Law*, Pascale Fournier explores the legal implications of the custom of *Mahr* in divorce. Fournier reviews the interpretations of *Mahr* in Western courts (in Canada, the United States, France, and Germany), comparing them to the ways in which *Mahr* is conceived in its place of origin, represented by Egypt, Tunisia, and Malaysia, three countries that have incorporated Islamic law into their national legal frameworks. She describes the conflicting faces of *Mahr* – a bonus or a penalty – and explains the different legal implications that they convey. Fournier demonstrates how Islamic law travels with a multiplicity of voices, and shows how this complex hybridity is mediated in Western legal adjudication.

The last chapter, *Polygamy and Feminist Constitutionalism*, by Beverley Baines discusses another controversy in the intersection of religion and equality claims – polygamy. It highlights the dilemma posed by polygamy when it is evaluated from the dual perspective of both feminism and constitutionalism – because most feminists believe polygamy is harmful to women, whereas constitutionalists often advocate limiting the powers of liberal states, and therefore may seek decriminalization. In other words, polygamy provides a test case for the inclusivity of the concept of feminist constitutionalism. Baines proposes to deal with this conflict, not by formulas that compel a direct clash of values, which result in a zero-sum game and therefore are doomed to fail, but rather by listening to the voices of the women who live in polygamous relationships. This method is presented as a paradigm