Introduction

"[T]he best nations are always those that accord women the greatest amount of liberty . . ." – Charles Fourier, 1808

This is a book about what constitutions do to women and what women want to do to constitutions. It begins with the premise that a country's constitution, even where it may appear neutral, impacts disparately or differently with respect to gender. It examines how this occurs; at the way constitutions frame women's membership of, or absence from, the constitutional community; and how constitutional provisions can promote, or alternatively, present obstacles to gender equity and agency. It draws from the ways in which women have assessed their country's constitution, both during its formation and in its operation, specifically from the perspective of women's interests. It considers women's proposals for constitutional amendment, and the opportunities they have taken, or forged, to be part of the constitutional process, even where they lacked representation in the formal institutions of constitution making.

As Kenneth Wheare observed many years ago of modern constitutions, "practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as their system of government was concerned."[1] New constitutions have been coming off the drawing board in historically unprecedented numbers in recent times; indeed, more than half of the world's constitutions were framed since the 1970s. The abolition of apartheid in South Africa and the end of the Cold War saw the emergence of many; others have followed regime change, most recently,

[1] Kenneth C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1951), at 8–9.

in Afghanistan and Iraq. In addition, many Western countries have undergone constitutional reform, through the incorporation of bills of rights, devolution of governance, and the creation of new constitutional courts, among others.

In this era of "fresh starts," one of the most striking things to observe is the extent to which gender awareness has been reflected in the provisions of new constitutions. "[N]ewness and gender," writes Fiona Mackay of the new Scottish Parliament, "are mutually reinforcing factors."[2] However, as encouraging as this may be, we do not yet have an example where a full gender "audit" has been applied to a whole constitution, or where the commitment to gender equity and agency has been central to the process of design. In this book, then, I imagine such a "fresh start." It is a radical idea, to be sure, but no less so than the ideas that motivated many new constitutions in the past.

The sense that a country's existing system of government no longer serves the interests of its people, or that it produces inequalities and injustices instead of the common welfare, is accepted now as a legitimate motive for constitutional change, either total or partial. So, too, is the idea that the consent of the people – *all* the people – is a precondition of constitutional legitimacy. I ask a simple question: if gender equity and agency were your goal, and if women's full membership of the constitutional community were assumed to be necessary for constitutional legitimacy, how would you frame a constitution? The answers, it is hoped, will throw light on the gendered impact of constitutions already in operation.

Gender *equality* is a familiar concept to many. Theorists are also well accustomed to drawing a distinction between formal and substantive equality. Formal equality offers the same rights, conditions, and opportunities to women and men. It treats women and men as alike, as deserving of equal and similar treatment. It finds expression in the type of constitutional provision that prohibits gender discrimination or that states simply that no right can be denied on the grounds of gender or sex. The concept of substantive equality, in contrast, recognizes that formal equality can produce unequal results; where similar treatment is offered to persons who are not similarly situated, further disadvantage for the disadvantaged may be the outcome.

[2] Fiona Mackay, "The Case of Scotland," in Marian Sawer, Manon Tremblay, and Linda Trimble, eds., *Representing Women in Parliament: A Comparative Study* (London: Routledge, 2006), at 183.

Substantive equality also encompasses positive programs to ameliorate disadvantage. It thus entails "positive" rights, as opposed to "negative" rights. Negative rights are, essentially, freedoms *from* interference or intrusion. They constrain government, prohibiting or limiting the exercise of governmental power. Positive rights, in contrast, are rights *to* something – to resources, services, and ameliorative measures – the fulfillment of which can be asserted against government. Substantive equality and positive rights may, in fact, be "discriminatory" in that they may entail the denial of services or resources to others, treating people differently, and thus breaching the test of formal equality. None of this will be news to feminist theorists.

But equity and agency – the themes of this book – go further. They mean more than equality, either formal or substantive, and more than rights, either negative or positive. Equity involves justice and fairness, recognition and respect. Agency entails inclusion, access to, and effective participation in, decision making, both in the political-legal sphere and with respect to one's person. Both equity and agency involve more than rights or prohibitions on discrimination. Both are implicated in the *architecture* and design of a constitution: in the way power is structured, the way the arms of government relate to each other, the demarcation between political/public and private, the separation and distribution of powers, processes of appointment to office, and so on. They involve questions about jurisdiction, representation, and citizenship, among others.

Along with equality, both equity and agency are central to membership in the constitutional community, that is, the body of persons who come under, and enjoy the protection and opportunities offered by, a constitution. Even further, membership of the constitutional community entails a sense of ownership and belonging. "Belonging" may sound warm and comfortable, but the concept must also include the critic or advocate of change. A member of a constitutional community will be entitled to make claims about and against the constitution with confidence that these will be recognized as arising from a legitimate stake in the matter. Women have struggled for decades, even centuries, to "belong" and be recognized in either sense. Constitutional rights are important in all of this, but, as I will argue throughout, rights are merely one way of defining membership, and only one of the things to look for in auditing a constitution from the perspective of gender.

Rights, however, have long been prioritized, and the rights paradigm is deeply entrenched in much thinking about constitutionalism. The identification of equality rights certainly has the advantage of being uncomplicated. Although provisions for constitutional rights may be expressed in various ways, they can at least be identified clearly on the page. But how do we know what to look for in a search of constitutional structures, powers, and processes? How do we know what will and what will not contribute to equity and agency?

One way to answer such questions is to look at existing constitutional provisions, and trace the jurisprudence that has followed from their operation in practice. This includes legal judgments and opinions, as well as practical outcomes in the application of the law. Exploring outside the law will also provide guidelines. In political science literature, there are valuable studies of women's participation in the constitutional community, for example, in political office. History, both recent and more distant, will also give us examples of what women want to do with constitutions. On many occasions in the past, women have taken a position on their country's constitution, both during its framing and afterward.

History

Contrary to what is often assumed, there is a substantial history of women's involvement in or engagement with constitutional design. Although women were long absent from, or underrepresented in the formal processes of constitution making or amendment, they have not been silent. Women's constitutional demands are recorded in observations by individual women and discussions among women's groups at the time of their country's constitution framing, in submissions and petitions from women to constitutional conventions or drafting committees, in feminist criticisms of draft constitutions, in feminist analyses of constitutional provisions in practice, and in proposals and campaigns for constitutional amendment. Even where the specific proposals have not been capable of direct incorporation into the particular form of legal instrument that is a constitution, such interventions build a picture of the type of interests women want to see constitutionally incorporated or addressed.

The modern form of written national constitution was conceived in America, in the post–Revolutionary period. There were no women at the

Philadelphia Convention of 1787, where the U.S. Constitution was drafted, and no women were eligible to vote for, or stand as, delegates to the state ratifying conventions.[3] This is scarcely surprising. Nowhere in the world were women politically empowered at that time (and it would be historically anachronistic to expect otherwise).

This is not to say, however, that women had no views about the new American Constitution, although few left an account of their position on either the process of drafting or the content of the prospective or new Constitution. In March 1776, anticipating a declaration of independence and thus the necessity for a new "Code of Laws" for America, Abigail Adams famously wrote to her husband (John Adams, drafter of the Massachusetts Constitution and future U.S. president) with a reminder to "Remember the Ladies, and be more generous and favourable to them than your ancestors." She continued: "Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could."[4]

Because Adams did not set out what she meant by "unlimited power" or "tyranny" (and her husband apparently did not ask for details[5]), we cannot say whether she had a constitutional scheme in mind, but these comments are suggestive of theories of limited government, built on a belief in the tendency of power to corrupt. Such ideas were prominent at the time and were important principles behind the design of the U.S. Constitution in 1787. Adams's adaptation of these generalized ideas to the relations between men and women, as well as her implicit assumption that power is not gender neutral, are characteristic of the way in which women were later to build feminist constitutional claims by applying the "universal" discourse of constitutionalism to their particular circumstances as women.

In 1788, during the debates surrounding the ratification of the newly completed U.S. Constitution, another woman from Massachusetts, Mercy Otis Warren, wrote an antifederalist pamphlet entitled "Observations on the New Constitution, and on the Federal and State Conventions."[6] Warren

[3] Akhil Reed Amar, "Women and the Constitution" (1994–1995) 18 *Harvard Journal of Law and Public Policy* 465.

[4] Abigail Adams, quoted in L.H. Butterfield et al., eds., *The Book of Abigail and John: Selected Letters of the Adams Family, 1762–1784* (Cambridge, MA: Harvard University Press, 1975).

[5] John Adams's response is also well known: "As to your extraordinary Code of Laws . . . [w]e know better than to repeal our Masculine Systems." Ibid.

[6] Reprint (Boston: The Old South Association, Boston, 1955). The pamphlet was first published anonymously (a common practice) under the nom de plume "a Columbian Patriot." For many

deplored the absence of a Bill of Rights from the Constitution and argued that the Constitution's scheme for complex and centralized government resembled an aristocracy, rather than a republic. These arguments were typical of the antifederalist campaign in America at the time. To these, however, Warren added an interesting, and perhaps original, defense of the culture of "mediocrity," in which modest ambitions, small communities, and family loyalties, built around the middle ground between the "ferocity" of nature and the "corruption" of civilization, would engender private happiness and public virtue.[7] Although more than one writer has suggested that a recognizably feminist perspective lies in Warren's work,[8] nothing in her analysis of the draft Constitution suggests, however, that she herself identified a particular woman's position or that she advocated, or even anticipated, the development of women's political rights or agency.

Despite this, the fact that both Adams and Warren wrote comments on the constitutional processes of the time suggests that other educated women were likely to have taken a close interest in the debates.[9] In the late eighteenth century, principles of equality among *men* were still new and radical, as were claims for men's rights to representation. Women's claims to an equal share in the political sphere were just beginning to be articulated. The publication of Mary Wollstonecraft's *Vindication of the Rights of Woman* in England in 1792 (and in Boston in that same year) laid the foundation for such claims. However, even if this work had appeared a few years earlier, the likelihood of its influencing either the Constitution makers at Philadelphia or the delegates to the state ratifying conventions is low. Nevertheless, Wollstonecraft's work would inspire and give substance to the constitutional campaigns of women in the decades to come.

years, it was attributed to a man, leading antifederalist Elbridge Gerry. Mercy Otis Warren was also the author of a three-volume history of the American Revolution.

[7] These ideas interestingly resemble the constitutional theories of Jean-Jacques Rousseau, for example, as set out in his *Constitutional Project for Corsica*, 1765.

[8] Janis L. McDonald, "The Need for Contextual Revision: Mercy Otis Warren, A Case in Point" (1992) 5 *Yale Journal of Law and Feminism* 183.

[9] This is also suggested by the fact that women contributed to the revolutionary cause by joining boycotts and protests, collecting material for the war effort, and sustaining the domestic economy while the male members of their families were absent. A number of publications give such women the name "founding mothers." These include Linda Grant De Pauw, *Founding Mothers: Women in America in the Revolutionary Era* (Boston: Houghton Mifflin, 1975); Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York: Alfred A. Knopf, 1996); Cokie Roberts, *Founding Mothers: The Women Who Raised Our Nation* (New York: William Morrow, 2004).

Around the same time in revolutionary France, women's rights and their recognition in the French Constitution were also under discussion.[10] Once ideas of masculine equality, as well as claims for equal representation and liberation among men began to circulate, it was inevitable that women would begin to apply these to their own circumstances.

In 1791, Olympe de Gouges wrote a *Declaration of the Rights of Woman and the Female Citizen*, an edited, gender-sensitive version of the revolutionary "Rights of Man and the Citizen." Taking the text of the latter, de Gouges inserted or added the words "woman" or "female" in place of "man" or "male." In Article 11, she also added a defense of women's reproductive autonomy.[11] Her postscript includes a "Form for a Social Contract between Man and Woman," effectively a manifesto of equality in marriage, couched in contractarian terms. Contractarianism, a theory of government derived most influentially from the seventeenth-century writings of John Locke, was in vogue in the late eighteenth century and underlies the modern theory of constitutionalism. Among other things, it treats the consent of all parties as the necessary foundation of legitimate authority and government. Again, we see in de Gouge's analysis the adaptation of purportedly universal theories to the particular circumstances of women, and to the social and political relations between the sexes. This analytical process remains central to a gender audit of constitutions today.

In nineteenth-century United States, women drew analogies between their own subordination and the subordination of Americans under oppressive British rule. They would draw further analogies between their own circumstances and those of slaves. Many women were active abolitionists, and many abolitionists became women's rights advocates. They analogized their experience of domestic servitude with the enforced servitude of slavery; they also drew attention to the dual exploitation of slave women who were sexually used by their masters as well as exploited for their labor. Their campaigns contributed ultimately to a constitutional outcome. According to Akhil Amar, women were both "in large part the agents and the subjects of the Thirteenth Amendment,"[12] which was ratified at the close of the Civil

[10] Noelle Lenoir, "The Representation of Women in Politics: From Quotas to Parity in Elections" (2001) 50 *International and Comparative Law Quarterly* 217, at 219.

[11] Article 11: "The free communication of thoughts and opinions is one of the most precious rights of woman. . . . Any female citizen thus may say freely, I am the mother of a child which belongs to you, without being forced by a barbarous prejudice to hide the truth."

[12] Amar, "Women and the Constitution," *supra* note 3, at 467.

War in 1865, prohibiting slavery and (nonpunitive) involuntary servitude. American women derived further ideas for constitutional amendment from such parallels.

The great constitutional manifestos of liberation, the revolutionary rhetoric of independence, freedom, and equality, were all borrowed by early feminists in support of their cause. Although it cannot be claimed that a feminist reading of the U.S. Constitution was anything other than a minority perspective, what this did, early in the growth of modern constitutionalism, was to acknowledge the reality that constitutions are not gender neutral or "sexless." It recognized that women's interests and needs can be given constitutional expression.

Women also learned that egalitarians and liberationists can be selective in their sympathies. The experience of being excluded as a woman from the delegates' seats at the World Anti-Slavery Convention in 1840 led Elizabeth Cady Stanton, a U.S. delegate, to turn the constitutional rhetoric of independence on itself. As Olympe de Gouges had done with the French Declaration of Rights, Stanton recast the text of the American Declaration of Independence as a "Declaration of Sentiments," inserting a woman's voice. Thus, her second paragraph begins by mirroring the famous line of 1776: "We hold these truths to be self-evident that all men and women are created equal." A recital of the "history of repeated injuries and usurpations on the part of man toward woman" follows, in the style of the original list of grievances against the English King.[13] Stanton's grievances include the denial to women of both the franchise and the legal rights to property. She concludes with a constitutional demand that women, having been "fraudulently deprived of their most sacred rights . . . insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States." The Declaration of Sentiments was adopted at the Seneca Falls Convention, convened by Stanton and Lucretia Mott in 1848. It had the aim of "discuss[ing] the social, civil, and religious condition of women."

[13] Interestingly, the Seneca Falls analysis goes beyond women's social and domestic disabilities, and gives an account of what would later be known, variously, as "false consciousness" or "internalizing of the oppressor," charging man with having "endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life." Mary Wollstonecraft's *Vindication of the Rights of Woman* makes a similar claim and was probably the origin of this type of analysis.

What exactly was included among the rights and privileges – or more specifically the "privileges and immunities" – of citizens became a major constitutional battleground following the ratification of the Fourteenth Amendment in 1868. Among the original provisions of the U.S. Constitution, Article IV, Section 2, states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1 of the Fourteenth Amendment now added a further guarantee:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

The amendment's historical purpose was to force the former slave states to recognize the legal citizenship of emancipated slaves, but its language is, at least on its face, broader than this. Women born in the United States would unequivocally be legal citizens. What followed, then, from being a citizen? In a sustained feminist analysis of the Constitution, women now campaigned to have rights that were denied to them recognized as among the "privileges" of citizens. Part of their campaign involved constitutional challenges through the courts.

In 1873, in *Bradwell v. Illinois*,[14] Myra Bradwell challenged a law that prohibited women from obtaining a license to practice as a lawyer in the state of Illinois. Bradwell asked the Supreme Court to recognize her constitutional right as a citizen under the Fourteenth Amendment to "the privilege of earning a livelihood by practicing at the bar of a judicial court."[15] She was unsuccessful. The Court did not deny that she was a citizen, but held that the right to practice a profession was not a "privilege" of citizenship. Justice Joseph P. Bradley, in a concurring opinion, also used the occasion to subject Bradwell to a judicial sermon on "the natural and proper timidity and delicacy which belongs to the female sex," which, he said, rendered women unfit for "many of the occupations of civil life." Their "paramount destiny and mission," he concluded, was as wives and mothers.

Bradley's was a commonplace, indeed, banal, view at the time. In itself, it is scarcely worthy of attention. More interesting than his conclusions

[14] *Bradwell v. Illinois*, 83 U.S. 130 (1872).
[15] Ibid., at 133.

about the woman's sphere is his assertion about its foundation. Gender roles, he said, were "the law of the Creator. And the rules of civil society must be adapted to the general constitution of things." What is striking here is Bradley's method of interpretation, subordinating the Constitution to a higher "constitution" designed by God. This may now seem archaic, a mere historical curiosity, but it draws our attention both to the significance of interpretive presumptions and to the potential for a conflict between traditional and modern principles in constitutional jurisprudence that is still relevant today.

As the campaign for womanhood suffrage expanded, a strategy of direct action or civil disobedience was adopted. Its aim was to force constitutional challenges to gender discriminatory laws. In the same year as *Bradwell*, Susan B. Anthony was tried and convicted for the federal crime of voting without the right to vote. Among the arguments advanced by Anthony's defense attorney, it was claimed that the right to vote was at the heart of the privileges guaranteed by the Fourteenth Amendment. Government by consent, freedom from tyranny, and the security of life, liberty, and property – the very fundamentals of republican government – depended on it:

> If there is any privilege of the citizen which is paramount to all others, it is the right of suffrage; and in a constitutional provision, designed to secure the most valuable rights of the citizen, the declaration that the privileges and immunities of the citizen shall not be abridged, must . . . be held to secure that right before all others. . . . If the clause in question [in the Fourteenth Amendment] does not secure those political rights [of voting and holding office], it is entirely nugatory, and might as well have been omitted.[16]

Compelling as this was in principle, there were several problems in the constitutional context that made this line of defense difficult. One lay in Section 2 of the Fourteenth Amendment. This provided for the reduction of numbers of members of the House of Representatives to which a state was entitled if (for reasons other than participation in rebellion or the commission of a crime) it disenfranchised any "*male* inhabitants of such State."[17]

[16] *An Account of the Proceedings of the Trial of Susan B. Anthony on the Charge of Illegal Voting at the Presidential Election in November 1872* (New York: Notable Trials Library, 1997).

[17] Emphasis added. The full section reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons