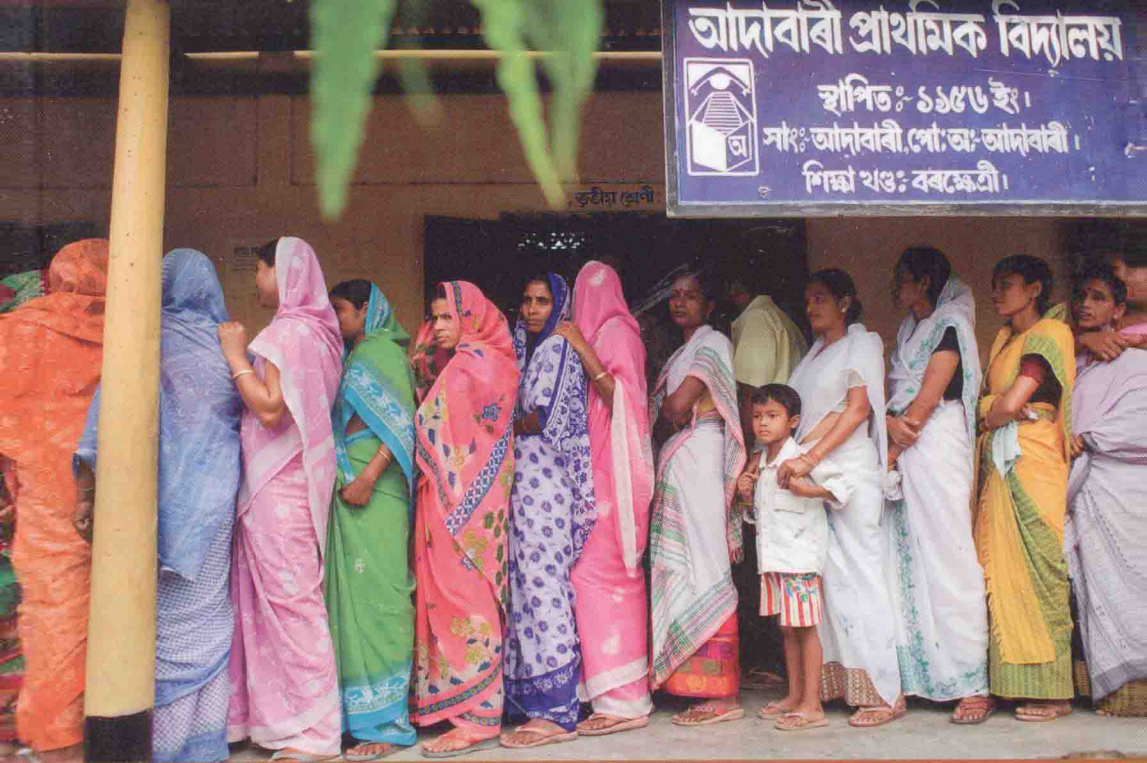

Feminist Constitutionalism

Global Perspectives

Edited by Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana

CAMBRIDGE

Feminist Constitutionalism

GLOBAL PERSPECTIVES

Edited by

BEVERLEY BAINES
Queen's University, Ontario

DAPHNE BAREK-EREZ
Faculty of Law, Tel-Aviv University

TSVI KAHANA
Queen's University, Ontario

Foreword by

CATHARINE A. MACKINNON
University of Michigan & Harvard Law School

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521137799

First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Feminist constitutionalism : global perspectives / [edited by] Beverley Baines,
Daphne Barak-Erez, Tsvi Kahana.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-521-76157-4 (hardback) – ISBN 978-0-521-13779-9 (paperback)
1. Women's rights. 2. Constitutional law. 3. Feminist jurisprudence.
I. Baines, Beverley, 1941– II. Barak-Erez, Daphne. III. Kahana, Tsvi, 1967–
K3243.F456 2011
342.08′78 – dc23 2011020197

ISBN 978-0-521-76157-4 Hardback
ISBN 978-0-521-13779-9 Paperback

FEMINIST CONSTITUTIONALISM

Constitutionalism affirms the idea that democracy may not lead to the violation of human rights or the oppression of minorities. This book aims to explore the relationship between constitutional law and feminism. The contributors offer a spectrum of approaches and the analysis is set across a wide range of topics, including both familiar ones like reproductive rights and marital status and emerging issues such as new approaches to household labor and participation of women in constitutional discussions online. The book is divided into six parts: I) feminism as a challenge to constitutional theory; II) feminism and judging; III) feminism, democracy, and political participation; IV) the constitutionalism of reproductive rights; V) women's rights, multiculturalism, and diversity; and VI) women between secularism and religion. As a collection, the book seeks to examine, challenge, and indeed redefine the very idea of constitutionalism from a feminist perspective.

Beverley Baines is a Professor of Law, Gender Studies, and Policy Studies at Queen's University. Since 2005, she has served as head of the Department of Gender Studies. Since coediting *The Gender of Constitutional Jurisprudence* with Ruth Rubio-Marín in 2004, she has authored papers on sex equality jurisprudence under the Canadian Charter of Rights and Freedoms; the implications of long-term-care homes legislation for women; feminism and contextualism in the jurisprudence of former Supreme Court of Canada Justice Bertha Wilson; and the Charter conflicts posed for feminist sex equality proponents by religious freedom claimants in the contexts of polygamy (in Canada), faith-based family arbitrations (in Ontario), and multicultural accommodation (in Quebec).

Daphne Barak-Erez is a Professor of Law and Dean at the Faculty of Law of Tel-Aviv University, where she also holds the Stewart and Judy Colton Chair of Law and Security. She specializes in administrative law, constitutional law, comparative law, and gender law. She was awarded several prizes, including the Rector's Prize for Excellence in Teaching (twice), the Zeltner Prize, the Heshin Prize, the Woman of the City Award (by the City of Tel-Aviv), and the Women in Law Award (by the Israeli Bar Association). She is the author or editor of several books, most recently the author of *Outlawed Pigs* (2007) and the coeditor of *Exploring Social Rights* (2007), and she has more than one hundred published articles and book chapters.

Tsvi Kahana is an Associate Professor of Law at Queen's University. He is the coeditor (with Richard W. Bauman) of *The Least Examined Branch – The Role of Legislatures in the Constitutional State* (2006). He works in the areas of constitutional law, constitutional theory, and comparative constitutionalism. He is a former Executive Director of the Centre for Constitutional Studies at the University of Alberta.

Foreword

If feminism is what some of its purported academic adherents have made it over the last two decades or so, many of us have long been part of some other movement. The present volume goes far in reclaiming its promise as, in the words of Dean Daphne Barak-Erez, "a new interpretive perspective on human knowledge, including in the legal sphere,"[1] as well as a tool for intervening in legal practice.

Women have not, in general, written or agreed to constitutions. Powerful men have written them a long time ago as if women did not exist, after wars in the waging and peacemaking of which women often did not actively participate, by foreign experts who assumed that liberalism was enough for women, by the accretion of practices in which women have had more or less say. More recently, women have had some voice in constitutive processes, but nowhere near half of the clout. With exceptions, dominant men have largely interpreted constitutions, and have overwhelmingly confined debates they deem authoritative on them, to terms they set.

Constitutions are artifacts of a particular male legal intervention, defining nations and establishing states as they ground their governance. The idea is to write down the terms to which the men involved agree to hold one another. As such, they are the particular focus of certain legal actors, most specifically white upper-class liberal men in the Anglo-Saxon tradition, although others have taken them up. In these systems – not usually squarely criticized as colonialist since freedom fighters have embraced the form even as they have often altered the content – law is a real vehicle of social power. The constitution typically occupies the apex of its power pyramid, hence their intense interest in it and their lack of interest in questioning it *as* a form.

The skilled assistance of Lisa Cardyn with the footnotes is gratefully acknowledged. The support of The Diane Middlebrook and Carl Djerassi Visiting Professorship at the University of Cambridge Centre for Gender Studies provided time to write this Foreword.

[1] Chapter 4, this volume.

A feminist constitutionalism would be animated by alternate principles. It would face male supremacy strategically but squarely. It would require a substantive equality of women both as an overarching theme in the document and as an underlying reality in the social order, in active engagement with a society recognized as unequal based on sex and gender, necessarily in interaction with all salient inequalities. Remaining sensitive to context, it would not be sidetracked by essentialist questions as to whether women are the same as or different from men or cultural relativist questions as to whether each culture's particular form of female subordination should be respected simply because it is culturally specific. It would not assume that a private sphere defined around home and family or any other jurisdictional locality is a place of sex equality exempt from public rules. Respect and dignity for women would be accorded in appropriate ways across the social order that would be accepted and enforced in each setting, without favoritist exemption or other corruption or backing off on necessary changes. Whether the issue is the form of government or sexual access, forms of force – from socialization to threats to physical aggression – would not be rationalized as consensual where no effective freedom to dissent or power to affect the shape of options or outcomes exists. Collective power of some social groups over others would be challenged as what it is rather than rationalized as differing moral values or normative choices.[2] A feminist constitutionalism would ask whether the state and the law, its quintessential tool, are socially hegemonically male in ways that, at the least, call for investigation of the container as well as the content.

Should a feminist constitutionalism exist, or even a dialogue on constitutionalism that took feminist insights seriously, the present volume would certainly be part of it.[3] As things are, a number of the chapters here productively examine conventional constitutional subjects.[4] Taken as a whole, and particularly strongly in certain

[2] In terms of states, rather than constitutions, these four dimensions are discussed in detail in CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989), and applied to international law in Catharine A. MacKinnon, *Women's Status, Men's States*, *in* ARE WOMEN HUMAN? 1 (2006).

[3] Useful forerunners include THE GENDER OF CONSTITUTIONAL JURISPRUDENCE (Baines and Rubio-Marín 2004), and CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW (Williams 2009), as well as Kathleen M. Sullivan's insightful article, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735 (2002).

[4] *See especially* Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights*, *in* FEMINIST CONSTITUTIONALISM, *supra* note 1, at 15; Tsvi Kahana & Rachel Stephenson, *The Promise of Democratic Constitutionalism: Women, Constitutional Dialogue, and the Internet*, *in id.* at 240 (arguing that legislative approaches are preferable for women to judicial ones). Further strong examples include the structural analysis of gender provided by Kerri A. Froc, *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*, *in id.* at 132; the examination of horizontal and vertical constitutions by Elizabeth Katz, *Women's Involvement in International Constitution-Making*, *in id.* at 204; and the inquiry into the use of the tutela by Carolina Vergel Tovar, *Between Constitutional Jurisdiction and Women's Rights Organizations: Women, War, and the Space of Justice in Colombia*, *in id.* at 223. Mary Ann Case innovatively combines an argument that gay marriage is supported by constitutional sex equality principles with a critique of marriage in *Feminist Fundamentalism and the Constitutionalization of Marriage*, *in id.* at 48.

sections,[5] these contributions go further to suggest that constitutionalism, although significant, as such may not be the most illuminating framework for interrogating the role of law in the lives of women, including their status and treatment under male-dominant institutions. Although the legal form "constitution" is inspired by liberalism and democracy, which are, for the most part, taken for granted in this volume, they are importantly interrogated by Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, who argue that constitutionalism's inherited model of democracy rests on an ideology of social-sexual contract that structurally restricts women's full citizenship.[6]

Throughout, by the scope of materials found necessary to engage, as well as the range of subjects taken up,[7] these papers – although no one says so – find constitutionalism too narrow and formalistic a container for addressing the problems feminism identifies. Directives, criminal law, religious law, and customary law are easily as portentous, they notice de facto, often more potent. International law, it might be added, has proven more nimble and visionary.[8] Social reality is authoritatively ordered, conflict acceptably resolved, the means of force legitimately monopolized by legal arrangements that – so far as women's status is concerned including relationships with men, are far from confined to constitutions or even usually accountable to them. Custom, habit, norms, roles, and other dominant regularities powerfully constitute the law for women, that is, the real rules to which they are held. The chapters of this book accordingly range productively over multiple nonconstitutional systems with the constitutional ones, interrogating gendered rules, contextualized by gendered social realities, sometimes at an explicit interface with constitutions and sometimes not.[9]

If constitutionalism is too restrictive a cabin for the legal issues raised by taking the substance of sex inequality seriously, the chapters in this collection further indicate that feminism has become something to be done more than a flag to be flown. Fortunate, as feminism as a flag can become a way to confine work by gender, saluted so that it can be ignored, a means to cede the rest of the world to everyone who is not labeled, so they can continue doing what they imagine is everything else, unchallenged and unchanged. The evasion of feminist content is reminiscent of Tolstoy's observation:

> I know that most men – not only those considered clever, but even those who are very clever, and capable of understanding most difficult scientific, mathematical,

[5] *See, e.g.*, Chuma Himonga, *Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and "Old Pathways," in id.* at 317; Jewel Amoah, *Watch GRACE Grow: South African Customary Law and Constitutional Law in the Equality Garden, in id.* at 357.

[6] Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *On Parity, Independence and Women's Democracy, in id.* at 188.

[7] Strangely, there is no sustained discussion of sexual abuse.

[8] See MacKinnon, *Women's Status, Men's States, supra* note 2.

[9] The refreshing analysis of abortion by Rachel Rebouché, *Challenges for Contemporary Reproductive Rights Advocacy: The South African Example, in* FEMINIST CONSTITUTIONALISM, *supra* note 1, at 298, strongly suggests that constitutionalism is the wrong question.

> or philosophic problems – can very seldom discern even the simplest and most obvious truth if it be such as to oblige them to admit the falsity of conclusions they have formed, perhaps with much difficulty – conclusions of which they are proud, which they have taught to others, and on which they have built their lives.[10]

That feminism as a philosophy as well as by its focal topics should have become a form of scholarly marginalization by gender is, of course, ironic. Its entire impetus has been to end the confinement of people and work to and by sex and gender, in the process transforming the legal project from one that promotes male dominance to one that promotes equality of the sexes, freeing women as well as legal scholarship. Yet in the legal academy, feminist analysis is not yet considered an expertise; it remains regarded as autobiographical and ideological: that stuff about women, a statement about the speaker rather than the spoken-about, a narrow solipsistic fixation rather than an approach to comprehending reality that increases accuracy by identifying a bias in prior approaches that makes them incapable of meeting even their own standards. Instead, it has become at best an academic niche to be occupied, if minimally; a little square of turf to be tilled by perhaps one person per faculty, likely a visitor; an eddy at the edge of the mainstream; a brand to be cultivated and competed over; a private faith like a religion, internally sustaining but unbecoming and unscholarly and stigmatic to expose or acknowledge, far less explicitly to pursue as the backbone or compass of an intellectual agenda.

Tokenism is the practical organizing principle of this ghettoizing reduction. One is a feminist legal scholar, not a legal scholar with particular information and focus and perspectives to offer. Meantime Marxists and conservatives and most of all liberal legal scholars of all stripes are simply legal scholars – defined by their subject matter or expertise or angle of vision, however male-valenced, however little relevance to women it has, their insights contended with for their content rather than as a this-kind-of-point from a scholar who is a one-note one-of-those. Confining feminism to a separate sphere, even if more room than it had before, becomes another way of maintaining male dominance as a discourse of power, as if it is neutral and tolerant.

Which is not to say there should be no feminist books. This book calmly challenges these limits, unsettles this complacency by exceeding its own envelope, putting more solid ground under women's feet as it expands law's horizons.

Catharine A. MacKinnon
August 4, 2011

[10] Leo Tolstoy, What is Art? 124 (Aylmer Maude trans., 1899).

Contributors

Jewel Amoah is a PhD candidate at the University of Cape Town, South Africa. Her research focuses on equality rights in both constitutional and customary law contexts.

Mary Anne Case is Arnold I. Shure Professor of Law and the Director of the Feminist Theory Project of the Center for the Study of Gender and Sexuality at the University of Chicago. She researches constitutional law and regulation of family, sex, and gender.

Rosalind Dixon is an Assistant Professor at the University of Chicago Law School, and Senior Visiting Fellow at UNSW Faculty of Law. Her research focuses on constitutional law, comparative constitutional law and design, international human rights, and law and gender.

Hilal Elver is a research professor at the Global and International Studies Program at the University of California, Santa Barbara. Her research and teaching focus on international environmental law and human rights law.

Pascale Fournier is Vice-Dean of Research and Associate Professor of Law at the University of Ottawa. Her research focuses on comparative family law, constitutional law and freedom of religion, and the relationship between multiculturalism, laïcité, and gender equality.

Kerri A. Froc is a PhD candidate at Queen's University and an Adjunct Professor at Carleton University. Her research interests include constitutional hermeneutics and feminist legal theory.

Suzanne B. Goldberg is Herbert and Doris Wechsler Clinical Professor of Law and Director of the Center for Gender and Sexuality Law at Columbia Law School. Her research focuses on barriers to equality in theory and practice.

Jennifer S. Hendricks is an Associate Professor at the University of Tennessee College of Law. Her research areas include constitutional family law and federalism.

Chuma Himonga is a Professor of Law and holder of the National Research Foundation Chair in Customary Law at the University of Cape Town. Her research areas are customary law, family and succession law, and women's and children's rights in Southern Africa.

Nicole Huberfeld is the Gallion and Baker Professor of Law at the University of Kentucky. Her research focuses on the relationship between constitutional law and health-care law.

Puja Kapai is an Assistant Professor of Law and Deputy Director of the Centre for Comparative and Public Law in the Faculty of Law at the University of Hong Kong. Her areas of research are minority rights, equality and non-discrimination, constitutional theory, citizenship studies, and domestic violence.

Elizabeth Katz is an Associate with Covington & Burling LLP. She specializes in appellate litigation and Supreme Court practice as well as white collar defense and investigations.

Kelley Loper is an Assistant Professor, the Director of the Master of Laws in Human Rights program, and a Deputy Director of the Centre for Comparative and Public Law in the Faculty of Law at the University of Hong Kong. Her research interests include equality rights and the protection of refugees in Asia.

Eileen McDonagh is a Professor in the Department of Political Science at Northeastern University.

Paula A. Monopoli is a Professor of Law at the University of Maryland School of Law. Her research interests include inheritance law and gender and constitutional design.

Vrinda Narain is an Assistant Professor and Chair of Women's Studies in the Faculty of Law and the Institute for Gender, Sexuality, and Feminist Studies at McGill University. She is a Research Associate at the International Institute for Studies in Race, Reconciliation and Social Justice at the University of the Free State, South Africa. Her research focuses on constitutional law and feminist legal theory.

Jennifer Nedelsky is a Professor of Law and Political Science at the University of Toronto. Her primary research area is legal and political theory.

Martha C. Nussbaum is Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago, appointed in Law, Philosophy, and Divinity. Her work focuses on moral and political philosophy.

Rachel Rebouché is an Assistant Professor of Law at the University of Florida Levin College of Law. Her research areas are family law, health policy, and comparative law.

Heather Roberts is a Lecturer at the ANU College of Law at The Australian National University. Her research focuses on constitutional law, legal biography, and the swearing-in ceremonies of Australian judges.

Blanca Rodríguez-Ruiz is an Associate Professor of Constitutional Law at the University of Seville, Spain. Her work analyzes fundamental rights, the modern family, and democratic citizenship from a gender perspective.

Ruth Rubio-Marín is a Professor of Constitutional and Public Comparative Law at the European University Institute, Florence, Italy. Her research focuses on constitutional law, citizenship, migration, cultural rights, and transitional justice.

Rachel Stephenson is an associate at a litigation firm in Toronto, Ontario.

Carolina Vergel Tovar is a PhD candidate at Université de Paris X Nanterre / EHESS and a Fellow at Universidad Externado de Colombia. Her research examines activist and institutional uses of law with regard to women victims of armed conflict in Colombia.

Susan Williams is the Walter W. Foskett Professor and Director of the Center for Constitutional Democracy at Indiana University Maurer School of Law. Her research focuses on constitutional design and feminist theory. She advises constitutional reformers in several countries, including Burma, Cuba, and South Sudan.

Contents

Introduction

The Idea and Practice of Feminist Constitutionalism

Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana

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).