Federalism, Equality, and Autonomy: Toward an Embedded Feminist Constitutional Agenda: A Review of *The Gender of Constitutional Jurisprudence*, Beverley Baines & Ruth Rubio-Marin, eds. (Cambridge: Cambridge University Press, 2005)

I. Introduction

> There are no doubt thousands of pathways, direct and indirect, by which constitutions work to enforce and to unsettle the institutions, practices, and understandings that regulate social status of men and women.[1]

In October 2005 the Supreme Court of Canada rendered its decision in *Reference Re Employment Insurance Act (Can.), ss. 22 and 23*.[2] The Court had been called upon to determine the constitutionality of the maternity and parental leave benefits regime, in place in Canada since 1971, on division of powers grounds.[3] The manner in which the question had been posed to the Court had caused considerable concern, primarily amongst Canadian feminists, and activists within the labour movement.[4] Since the mid-1990s there have been numerous efforts to challenge the way in which the benefit was delivered using the *Canadian Charter of Rights and Freedoms*[5] on the basis that its eligibility requirements were discriminatory. Yet, the question that ultimately wound its way to the highest court in Canada did not ask the justices to contemplate whether the benefit, as structured, enhanced the equality of women and other caregivers. They were asked solely to determine which body in Canada's federal system, the provinces or the federal government, had jurisdiction over this benefit regime.

The outcome of this particular case reflects a traditional pathway in Canadian constitutional law: a conflict between a provincial government and the Government of Canada over the delivery of a program with intended national standards, settled by the Supreme Court of Canada with attention to federalism and the division of powers.[6] However, in this case, it seemed that the answer rendered by the Supreme Court of Canada was the right answer to the wrong question.[7] Its finding that the maternity and parental leave benefits

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1. Reva B. Siegel, "Gender and the United States Constitution" in Beverley Baines & Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005) 306 at 306.
2. 2005 SCC 56, [2005] 2 S.C.R. 669 [*Reference Re EI*].
3. For a recent case comment on this decision see Gillian Calder, "A Pregnant Pause: Federalism, Equality and the Maternity and Parental Leave Debate in Canada" (2006) 14:1 Fem. Legal Stud. 99.
4. See discussion of the tensions in Rachel Cox, *et al.*, *The Recent Quebec Appeal Court Decision on the Constitutionality of Maternity and Parental Benefits as Employment Insurance Benefits: Some Feminist Reflections* (Ottawa: National Association of Women and the Law, 2004), online: National Association of Women and the Law <www.nawl.ca/ns/en/documents/Pub_Brief_MPBenefits04_en. pdf>.
5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. For recent cases pursuing these equality questions see, *e.g.*, *Canada (A.G.) v. Lesiuk*, 2003 FCA 3, [2003] 2 F.C. 697, leave to appeal to S.C.C. refused, [2003] 2 S.C.R. viii; *Miller v. Canada (A.G.)*, 2002 FCA 370, 220 D.L.R. (4th) 149, leave to appeal to S.C.C. refused, [2003] 1 S.C.R. xiv.
6. See, *e.g.*, F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951) 29 Can. Bar Rev. 1095, with thanks to Jennifer Raso for bringing this article to my attention.
7. For analysis of this decision see Calder, *supra* note 3.

regime was properly a matter of federal jurisdiction[8] would do little to investigate *how* the benefit was being delivered. The divide that exists between division of powers jurisprudence and *Charter* jurisprudence seemed to leave the Court with only one possible solution. As such, the first time in the 21st century that the Supreme Court of Canada turned its attention to an analysis of the maternity and parental leave benefits regime, it is focused on the question of which level of government has jurisdiction over the matter, and not which level of government *should*.

This case, its core questions and their outcome, raises a series of further questions for scholars and activists working in this area — is it commonplace in constitutional law to keep these kinds of questions separate? Why does Canada bifurcate this kind of analysis and jurisprudence? Would constitutional analysis be improved by a more integrated approach? Are there principled ways in which substantive equality questions should inform divisions of powers analysis? How do other jurisdictions deal with these kinds of questions? How should division of powers cases be interpreted? Is litigating these questions the best approach? What is obscured by dichotomizing these sorts of struggles?

To this end, Beverley Baines and Ruth Rubio-Marin's *The Gender of Constitutional Jurisprudence* is a researcher's dream. From the first pages of the "Introduction," it is clear that the text strives to offer some answers to these kinds of questions by looking at the ways in which constitutional litigation has been used to "resolve controversies involving gender issues" by women around the world.[9] Concerned that there is a "gender gap" in contemporary constitutional analysis, the authors gather a series of constitutional scholars, each embedded in a particular country's jurisprudence, with the aim of developing a feminist constitutional agenda. Their immediate question is how women might use both constitutive constitutional processes and existing judicial processes to achieve gender equality in an increasingly globalized context.[10] And, in what seems like a direct response to the question posed by the Canadian maternity and parental leave dilemma, they propose to design a feminist constitutional agenda that subverts the more rigid, doctrinal categorization that often defines constitutional law scholarship.[11] Each of the 17 authors writing on the 12 different countries are asked to describe and analyze that country's constitutional jurisprudence as it pertains to women.

The "Introduction" is a rich resource in and of itself. Divided into eight questions, the authors probe the ways in which issues of agency, rights, diversity, equality, sexual autonomy, family, socio-economic development, and democracy are engaged in the 12 different chapters that comprise the text. Probing each of these areas raises a series of questions that the authors leave enticingly to be answered in the chapters that follow, with each of the individual authors charged both with investigating their own country's constitutional jurisprudence as it pertains to women, and to analyzing if and how constitutional progress on issues of gender has manifested itself in practical and progressive ways.

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8 For the conclusions of the Court, see *Reference Re EI*, *supra* note 2 at paras. 67-68.

9 Beverley Baines & Ruth Rubio-Marin, "Introduction: Toward a Feminist Constitutional Agenda" in Baines & Rubio-Marin, *supra* note 1, 1 at 1 [Baines & Rubio-Marin, "Introduction"].

10 *Ibid.* at 3.

11 *Ibid.* at 5.

This review of the Baines and Rubio-Marin text will be structured with two aims. The first is agenda driven, and tied to the maternity and parental leave question — is there a way in which constitutional jurisprudence can escape the rigid doctrinal understandings of problems as belonging either to federalism, autonomy, or equality? I will return to this question in the conclusion. The second is with an aim of taking up the challenge of Kim Lane Scheppele and other scholars of comparative constitutionalism to look to the constitutional experiences of actors across countries in order to both broaden perspective on local constitutional outcomes and to "enable us to ask better questions and to better understand the answers that we find."[12] To this end I will discuss the chapters of this book by looking at four key themes that are present in each of these chapters, and through which some of the key ways in which thinking about constitutions are gendered, how women are involved and represented across national structures and forms, and how substantive equality as a principle of gendered justice, is manifested across place and time.

II. THE PUBLIC/PRIVATE DIVIDE

A common theme throughout this text is the ways in which issues of public and private are represented in the various constitutional structures, primarily as a means of analyzing jurisdictional and territorial choices, and their impacts on women.[13] This is predominant in the chapter on Australia written by Isabel Karpin and Karen O'Connell.[14] Their analysis highlights how the absence of an enumerated rights doctrine in the Australian Constitution is understood within a federal system, with attention to the ways that issues of equality are guaranteed through legislation and the incorporation of international law norms. They also examine how issues of gender are addressed within such a system, particularly one that allocates matters by head of power to either the local governments or the federal governments. Here they argue that the danger of such a system is that it "reinforces the traditional division of public and private life to the detriment of women."[15] They demonstrate that the Australian Constitution was originally designed to constrain the power of the federal government, and yet over time federal powers have expanded, particularly in line with international obligations.[16] They query whether having matters that relate to the so-called domestic sphere included in the federal framework would be better for women. They argue for an embedded approach to constitutionalism as one site of struggle, connecting the discursive power of a constitutional framework to broader feminist theorizing of the state.[17]

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[12] Kim Lane Scheppele, "The Agenda of Comparative Constitutionalism" *Law and Courts: Newsletter of the Law and Courts Section of the American Political Science Association* 13:2 (Spring 2003) 5 at 15, online: New York University School of Law <www.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf>, cited in Baines & Rubio-Marin, "Introduction," *ibid.* at 21.

[13] Baines & Rubio-Marin, "Introduction," *ibid.* at 12. For feminist theorizing on issues of the public/private divide in law see, *e.g.*, Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; and Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995).

[14] Isabel Karpin & Karen O'Connell, "Speaking into a Silence: Embedded Constitutionalism, the Australian Constitution, and the Rights of Women" in Baines & Rubio-Marin, *supra* note 1, 22 at 47.

[15] *Ibid.* at 22.

[16] *Ibid.* at 29.

[17] *Ibid.* at 38, 46.

In contrast, Ruth Rubio-Marin looks at issues of the public/private divide in Spain, a parliamentary democracy with a more recent constitutional order. In her chapter, she traces the evolution of the role of women from before and after the introduction of the Constitution in 1978, through the lens of women's private and public roles.[18] She argues that before 1978 Spanish women were relegated to the private sphere, but the new constitutional order with its focus on formal equality, civil, criminal, and labour code changes has moved the issues of women more into the public realm.[19] Changes to the constitutional order have also had the effect of shifting the notion of what is private, with significant progress on questions of sexual harassment in the workplace,[20] and with constitutional litigation playing a role in bringing about changes in family law in Spain.[21] Rubio-Marin argues that by re-evaluating the role of the private within the constitutional framework, Spanish women have achieved success even in pressing the boundaries of understanding gender as a social and not merely biological concept.[22]

Further, while countries like Spain have achieved success through the constitutionalization of issues that would otherwise be seen as domestic and private, success for women in Turkey has come through focusing on more traditionally public realm issues.[23] Hilal Elver writes of Turkey as a bridge between two vastly different parts of the world, being simultaneously east and west, with cultural, legal, and social distinctions that are both difficult and puzzling for women. Elver complicates how the goal of "modernity" for Turkey as a country meant "Europeanization," a movement that entailed an enhanced formal status for women.[24] Turkey, unlike Spain and Australia, however, is an example of an area in which constitutional emphasis on issues of the public/private divide may be playing out doctrinally, but not bearing fruit in effect. Elver argues that despite changes in the constitutional framework that promote equality, the *de facto* situation of women in Turkey is "a combination of domestic responsibilities and economic hardship, [that] has made it very difficult for most women to become informed citizens, let alone socially and politically active ones."[25] All three of these jurisdictions demonstrate the complex interplay of public and private in constitutional change.

III. PARLIAMENT VS. THE COURTS

The issue of whether change in any given country is *de jure* or *de facto* is also represented in one of the key tensions of the book — the way that change results for women through litigation or through legislation.[26] This tension is discussed by Beverley Baines in her chapter

[18] Ruth Rubio-Marin, "Engendering the Constitution: The Spanish Experience" in Baines & Rubio-Marin, *supra* note 1, 256 at 257.

[19] *Ibid.*

[20] *Ibid.* at 264-65.

[21] *Ibid.* at 268.

[22] *Ibid.* at 261.

[23] Hilal Elver, "Gender Equality from a Constitutional Perspective: The Case of Turkey" in Baines & Rubio-Marin, *supra* note 1, 278 at 279.

[24] *Ibid.*

[25] *Ibid.*

[26] Baines & Rubio-Marin, "Introduction," *supra* note 9 at 8. For feminist theorizing of the difficulties in using rights-based instruments to advance gender equality, see: Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Judy Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989) 3 C.J.W.L. 246; Katherine

on Canada, where she documents the transformation in constitutional jurisprudence for women with the entrenchment of the *Charter* in 1982.[27] Baines examines how the introduction of a codified rights instrument transformed Canada from parliamentary to constitutional supremacy, moving enforcement of rights to the courts.[28] Although *Charter* jurisprudence is focused solely on government action, the rights embedded in the *Charter* were the result of engaged feminist lobbying, and bear the imprimatur of substantive equality.[29] While the chapter does not look at the relationship between other aspects of Canadian constitutional structures, Baines argues that the *Charter* had achieved success for Canadian women in its aim of naming male privilege, while at the same time acknowledging that using rights instruments to effect positive government action has been rare.[30]

Similar to Canada, write Ran Hirschl and Ayelet Shachar, Israel has also seen a recent shift in the relationship between courts and legislatures. In 1992, the Government of Israel enacted two partly entrenched fundamental rights laws, both of which gave the Supreme Court of Israel the authority to hold unconstitutional primarily legislation enacted by the Knesset.[31] Formally recognized to have constitutional status, the laws have ushered in an interpretation of human dignity that has afforded protection to gender and sexual orientation in Israel.[32] Ultimately, through these laws and a liberalization of Court procedures, the Supreme Court has come to have extensive jurisdiction over, and an impact upon, women's rights in Israel.[33]

Eric Millard's chapter on France offers an interesting juxtaposition on this same issue, as that country's republican universalism is focused much more intensively on the role of legislators to protect the key French principles of equality and democracy.[34] The author sets his analysis of France's civil law system in its context, that of a 200-year-old constitutional history, born out of revolution, with the present system adopted in 1958. This new system contemplates judicial review, but only *a priori*, and does not contemplate actions brought by citizens.[35] This means that any provisions that may not accord with gender equality remain difficult to challenge through the courts.

O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985); and Toni Williams, "Re-Forming 'Women's' Truth: A Critique of the Report of the Royal Commission on the Status of Women in Canada" (1990) 22 Ottawa L. Rev. 725.

27 Beverley Baines, "Using the Canadian Charter of Rights and Freedoms to Constitute Women" in Baines & Rubio-Marin, *supra* note 1, 48 at 50 [Baines].

28 *Ibid.* at 49.

29 *Ibid.* at 53.

30 *Ibid.* at 74.

31 Ran Hirschl & Ayelet Shachar, "Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course" in Baines & Rubio-Marin, *supra* note 1, 205 at 206-207.

32 *Ibid.* at 207.

33 *Ibid.* at 208.

34 Eric Millard, "Constituting Women: The French Ways" in Baines & Rubio-Marin, *supra* note 1, 122 at 122.

35 *Ibid.* at 123.

IV. TENSIONS BETWEEN EQUALITY, RACE, RELIGION, AND CULTURE

The situation noted above in Israel, while illustrative of the significance of the locus of action for issues of gender, is also an example of the kinds of tensions that exist within varying constitutional frameworks.[36] A further way in which this text allows for a rich comparative analysis is by investigating how various tensions between competing rights play out for women working to use constitutions to advance their gendered claims. Baines and Rubio-Marin argue that gender conflict has never been the source of a national revolution, but highlight as key the fact that economic, cultural, and religious conflicts have often been instrumental in determining constitutional forms.[37]

The chapters on Colombia and Costa Rica are examples of the way in which the Catholic Church has had a strong influence on both the structure and implementation of their respective constitutions.[38] Martha Morgan looks at the 1991 Constitution in Colombia, a new social contract that protects the cultural and ethnic diversity of the nation, while simultaneously creating a constitutional court. The results for women have grown over time with real benefits with horizontal effects in traditionally private spheres and entrenched substantive equality.[39] And while the laws on abortion have not fared as well in a country with strong Catholic ties, Morgan argues that there have been great strides forward in almost all aspects of life for women in Colombia, a violence-torn country.[40]

Costa Rica, in contrast, has felt the influence of Catholicism as the constitutionally established state religion, argue Aldo Facio, Rodrigo Jiménez Sandova, and Martha Morgan.[41] The authors note how the constitutional protection of a state religion has meant more obstacles for Costa Rican women in the enjoyment of their sexual health and reproductive rights.[42] However, incorporation of international human rights laws into Costa Rican constitutional law have led to the courts being a site of struggle for women seeking to challenge the restrictions in place, particularly with attention to issues of *in vitro* fertilization and sterilization.[43]

Other issues of religion are also discussed by the various authors in the book, including the relationship between Hindu law and property in the context of India,[44] the intersection of gender and Judaism in Israel,[45] and Turkey as a modern, democratic, Muslim society.[46]

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36 Hirschl & Shachar, *supra* note 31 at 228.
37 Baines & Rubio-Marin, "Introduction," *supra* note 9 at 11.
38 Martha I. Morgan, "Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution" in Baines & Rubio-Marin, *supra* note 1, 75 and Aldo Facio, Rodrigo Jiménez Sandova & Martha I. Morgan, "Gender Equality and International Human Rights in Costa Rican Constitutional Jurisprudence" in Baines & Rubio-Marin, *ibid.* at 99.
39 Morgan, *ibid.* at 80, 86.
40 *Ibid.* at 96-97.
41 Facio, Sandova & Morgan, *supra* note 38 at 116.
42 *Ibid.*
43 *Ibid.* at 117-18, 120.
44 Martha C. Nussbaum, "India, Sex Equality, and Constitutional Law" in Baines & Rubio-Marin, *supra* note 1, 174 at 182.
45 Hirschl & Shachar, *supra* note 31.
46 Elver, *supra* note 23.

Another important tension explored by various authors is the significance of race. Here we see in the chapters on South Africa[47] and the United States,[48] how constitutional notions of equality that consider race first have had a profound impact on issues of gender.

One of the most powerful chapters in the book is the one that details the new South African constitution and the way in which a post-apartheid South Africa chose to address issues of gender equality. Jagwanth and Murray introduce the constitutional framework by highlighting the key tension that existed in 20th century South African politics: divisions along two axes, white and black.[49] Against this formidable context they go on to show how issues of gender and substantive equality have both been effected and realized.[50] The equality provisions in the new constitution are elaborate and the concerns for women move beyond equality to include issues such as bodily autonomy, reproductive health, freedom from violence, and prohibitions on gender hatred.[51] The authors demonstrate that a constitution born in a context of incredible racial conflict can lead to a more inclusive approach to rights generally, including due attention to issues of cultural and religious practices that undermine women, as well as realizations that bringing these kinds of changes to life need institutional support.[52] While they conclude with caution about the ways in which practice is still far from satisfactory, the story of the South African constitution is one of optimism for positive, substantive rights for women.

This stands in interesting contrast with the constitution of the United States, where Reva Siegel looks at "the prominent ways that the United States Constitution has served to legitimate and to dismantle social arrangements that sustain inequalities between the sexes"[53] set against the way in which struggles over race equality have shaped American constitutional law governing sex equality.[54] The author effectively shows how the movements for women's emancipation have grown out of social movements for racial emancipation.[55] However, unlike more recent constitutional processes in Canada and South Africa, the U.S. Constitution does not contain explicit denial of sex discrimination.[56] Instead, the author shows how sex discrimination has evolved through a formal equality doctrine within the 14th Amendment, and through other constitutional rights like the right to privacy. Equal protection in the United States has led to a form of gender equality that has divergent and, at times, contradictory results for women.[57]

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47 Saras Jagwanth & Christina Murray, "'No Nation Can Be Free When One Half of It Is Enslaved': Constitutional Equality for Women in South Africa" in Baines & Rubio-Marin, *supra* note 1, 230.
48 Siegel, *supra* note 1.
49 Jagwanth & Murray, *supra* note 47 at 230.
50 *Ibid.* at 254.
51 *Ibid.* at 234.
52 *Ibid.* at 239, 236.
53 Siegel, *supra* note 1 at 306.
54 *Ibid.* at 307.
55 *Ibid.*
56 *Ibid.* at 309.
57 *Ibid.* at 329.

V. FORMAL VS. SUBSTANTIVE EQUALITY

Finally, the book and its individual chapters are a valuable resource for scholars looking to understand the difference between formal and substantive equality, and the role of constitutions in protecting the substantive equality rights of women.[58] Baines and Rubio-Marin define substantive equality at the outset as a means by which one

> tries to identify patterns of oppression and subordination of women as a group by men as a group on the understanding that most sex discrimination originates with the long history of women's inequality in almost every area of life rather than inhering in sex as a conceptual category.[59]

The authors thus identify that the goal of substantive equality is to transform social patterns of discrimination, something they argue can work across the three doctrines of federalism, autonomy, and equality; doctrines that are ordinarily kept distinct in constitutional jurisprudence.

This challenge is taken up in all of the chapters, some implicitly, in examining the kinds of equality guarantees that exist in constitutional protections for the women of their countries, and how those guarantees are effecting change in women's day to day lives. Some of the chapters, like Millard's on France and Siegel's on the United States, show the sheer resistance and perseverance of a formal approach to equality law. In Millard's view, the French principle of universalism is perhaps more properly seen as universalization of the male gender. He demonstrates that because "it rests on formal equality (which does not purport to correct real inequalities), the principle of universalism has been often criticized as a principle that reproduces social inequalities as a whole, and especially social relations of gender."[60] Change for women in France will come, as it is beginning to do, through a new interpretation of universalism, one that moves from a formal to a substantive conception of equality.[61] Similarly, Reva Siegel shows the strength of the formal equality model in the United States, showing how the U.S. Supreme Court has remained suspicious, with a few notable exceptions, of taking the sex of citizens into account in fashioning social policy.[62]

Against this backdrop, the chapter on the German Constitution by Blanca Rodríguez Ruiz and Ute Sacksofsky poses an interesting contrast.[63] The German Constitution was amended in 1994 to introduce positive rights obligations on the state (particularly with respect to equality) and, in keeping with shifts in understandings of the role of women in German society through the 1980s, a move to affirmative action.[64] The structure of the Basic Law confirms that it is the duty of parliamentarians not to merely confirm, but in fact to correct,

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[58] Baines & Rubio-Marin, "Introduction," *supra* note 9 at 13-14. For a good discussion of the significance of the difference between formal and substantive equality, see Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16 C.J.W.L. 165.

[59] Baines & Rubio-Marin, "Introduction," *ibid.* at 14.

[60] Millard, *supra* note 34 at 133.

[61] *Ibid.* at 147.

[62] Siegel, *supra* note 1 at 313.

[63] Blanca Rodriguez Ruiz & Ute Sacksofsky, "Gender in the German Constitution" in Baines & Rubio-Marin, *supra* note 1, 149.

[64] *Ibid.* at 150, 156.

past disadvantages faced by women.[65] The authors conclude that with only the exception of abortion, the German Constitutional Courts have approached equality issues through a constitutional lens that has moved from a formal to a substantive equality model.[66]

In this way, many of the chapters, including those on Canada, Spain, and Turkey, look at how the constitutions of those countries have worked to use substantive equality language in enacting provisions, and how that has led to powerful gains for women in some contexts, such as public participation, motherhood, and the workplace,[67] while in other contexts, it has not meant much more than equality before the law.[68] The question of what substantive equality can mean for women across jurisdictions, becomes a key concept for comparative analysis and conjecture on progress.

VI. CONCLUSION

> For feminists, then, to engage with the discursive power of Constitutions, it is strategically imperative to identify both the external local and global forces that make up the whole of the discursive frame.... We argue for an embedded approach to constitutional rights, one that acknowledges all of the diverse ways in which rights are filtered, translated, upheld, or undermined.[69]

Writing a review of a book of this depth, scope, and diversity is a unique challenge. There are many other ways that I could describe the chapters in relation to each other, most notably with respect to how each chapter addresses the key feminist concern of abortion and reproductive health.[70] In a review of this length, I have not done justice to the richness of each one of these chapters standing on their own. It is clear, however, that for scholars thinking about comparative constitutionalism, the questions this text asks and answers are forward-looking, and within each of the chapters lies a treasure-trove of analysis.

In terms of criticism, I have only a few, and will elaborate on three below. The first is unfair in that this book does not aim to be comprehensive, and yet I am left wanting to know more, to have access to other jurisdictions, and particularly to jurisdictions that are less well-known and theorized. Recent work on Afghanistan and Rwanda, for example, would have made excellent additions to this text.[71]

The second is in terms of voice. The individuality of voice in each chapter is a refreshing challenge to the reader, as all the authors have uniquely approached how to engage with the queries posed to them by the introduction. The chapter on India, however, reads discordantly.

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65 *Ibid.* at 154.

66 *Ibid.* at 172-73.

67 Rubio-Marin, *supra* note 18 at 275.

68 Elver, *supra* note 23 at 284.

69 Karpin & O'Connell, *supra* note 14 at 46.

70 See, *e.g.*, key discussions in Ruiz & Sacksofsky, *supra* note 63 at 171-173; Rubio-Marin, *supra* note 18 at 271; Facio, Sandova & Morgan, *supra* note 38 at 116-19; Nussbaum, *supra* note 44 at 197; and Siegel, *supra* note 1 at 323-29.

71 See, *e.g.*, recent work done by a coalition of Canadian law students on women and constitutionalism, looking at the countries of Afghanistan, Rwanda, South Africa, and Canada for a conference held in Ottawa, Canada between 13-15 February 2006. See online: Women's Activisim in Constitutional and Democratic Reform <www.adhoc25.org/index.html>.

In a book that has taken great strides to embed the chapters in each jurisdictional context, the chapter on India reads as if written from a western perspective. Steps were clearly taken to ensure that the authors of most chapters were scholars from within the countries on which they were writing. The chapter on India would have been more persuasive in its arguments had it done so as well.[72]

Finally, the challenge that the authors take up at the outset is to find a means by which to begin a dialogue on comparative constitutionalism. And while they take steps toward such a conversation in the introduction, the chapters in the book are organized alphabetically, not thematically, and do not speak directly to each other. As I have noted in depth above, they are each powerful in their own right, and offer the scholar who is working to answer constitutional questions an unparalleled resource. However, the opportunity to have a more comparative conversation between these authors, each other and the text, is missed. As we move to take up the challenge of this book in other similar projects, having the authors engage with each other could lead to a more integrated analysis overall.

The question that the editors pose at the outset — is there a middle course for a feminist constitutional agenda[73] — ultimately takes me back to the place that I started. What have I learned about the dilemma facing Canadian constitutional scholars of rigid boundaries between constitutional doctrine from the various perspectives on women and constitutions embedded in this text? The clear message from this text is that this question is both a valid and an important question to be asking, and perhaps a question that is more informed by the specifics of Canadian constitutional structure than I had originally anticipated.

Thinking about what I can do to move through my question, I am struck by how across jurisdictions, and particularly across jurisdictions with varying parliamentary forms, the question of how substantive equality should inform division of powers questions arises. In Australia, for example, the authors tell us that without an entrenched Bill of Rights, Australia has pursued other measures to ensure equality protections for women. These kinds of protections, including attention to international human rights norms, and anti-discrimination legislation at both the state and federal level, offers a means by which, where there is the political will and legal imagination to do so, a more integrated approach to equality is possible.[74] This text has enabled my thinking on a key question in Canadian constitutional law both by clarifying jurisdictional difference, but also by inspiring strategies from choices made by women in constitutional struggles across time and place.

Issues relating to pregnancy and caregiving are also a touchstone, like abortion, for evaluating and comparing one jurisdiction to the next. As Canada struggles to define jurisdictional issues with attention to substantive equality, looking to the experience of countries with divergent constitutional frameworks and histories offers strategies for change. I think the answer partially lies in the analysis presented by the Australian authors with attention to a dissent in their High Court.[75] Looking to understand substantive equality as an

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72 See, *e.g.*, Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford: Oxford University Press, 1999).

73 Baines & Rubio-Marin, "Introduction," *supra* note 9 at 5.

74 Karpin & O'Connell, *supra* note 14 at 36, 46.

75 *Ibid.* at 22.

unwritten constitutional principle that does and should inform all aspects of constitutionalism in Canada, may be the way forward.[76] Cautions in each of these chapters also require me to reflect on whether or not this path, the constitutional path, is necessarily the right one for a question of this nature. In any event, each of the authors within *The Gender of Constitutional Jurisprudence* offer complicated reflections on these kinds of questions, and the possibilities for an "embedded constitutionalism" magnify as a result.

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[76] See Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dal. L.J. 5, with thanks to Jennifer Raso for bringing this article to my attention.

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