

Gender and Constitutional Citizenship

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Citizenship is a normatively over-burdened concept. In recent times, it has spawned a vast body of literature, in which unwieldy, often incommensurable claims are made, and new normative categories and adjectival taxonomies created. As the unifying theme of this literature, the term 'citizenship' captures claims for equality and/or political virtue in particular communities or the public sphere broadly. But citizenship is also a formal status, a legal classification of persons. It has major, real-world consequences, unrelated (or only indirectly related) to normative claims. It may determine whether an individual enjoys political, residential, and sometimes social entitlements under law. Political theorists and sociologists of citizenship commonly overlook this legal reality; in return, citizenship lawyers commonly neglect the normative or ethical dimension. *Constitutional citizenship* blends the two. It takes account of the legal framework in which citizenship is acquired, retained and transmitted, as well as the norms of constitutional allegiance, or (to use the Habermasian term) 'patriotism.'

In this paper, I am concerned with an under-recognised aspect of constitutional citizenship, its gendered character. That constitutional citizenship has been historically and normatively gendered, is evidenced in a number of (inter-related) domains. Historically, notwithstanding the facially gender-neutral character of the term 'citizen'

- Constitutional provisions for birthright citizenship have not guaranteed the retention of citizenship for women,¹ or the right to transmit maternal citizenship to children.
- The constitutional rights and entitlements expressly guaranteed to 'citizens' have been denied to women.²
- Legal concepts of constitutional 'allegiance' have grown from common law concepts of masculine citizenship.

Normatively,

- While modern critiques of constitutional identity seek to include, or make way for cultural pluralism, most overlook the pluralism of gender.
- Ideas of constitutional allegiance and 'patriotism' remain inflected with citizenship's masculine history.

¹ For example, notwithstanding the apparent guarantee of citizenship by birth in the Fourteenth Amendment, the U.S. *Expatriation Act* 1908, provided: 'Any American woman who marries a foreigner shall take the nationality of her husband.' Its repeal by the *Cable Act* 1922 did not extend to women of Asian origin. Their disqualification was repealed in 1931. See Leti Volpp, 'Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage' (2005) 53 *UCLA Law Review* 357.

² Upheld by the U.S. Supreme Court in cases such as *Bradwell v Illinois* 63 U.S. 130 (1872), and *Minor v Happersett* 88 U.S. 162 (1875).

Much has been written on pluralism and constitutional attachment, addressing the problem of securing the adherence or consent of minorities to majority (or universal) constitutionalism. Simone Chambers, for example, calls constitutions 'mirrors of the multi-faceted identities that populate a political order.'³ Narratives of popular sovereignty, she argues, can no longer rely on hypothetical consent, but must include what citizens actually say on the subject of their own constitution.

Very little attention, however, has been paid to the forms or means of constitutional attachment available to women. Why should this be an issue? We can recognize readily why minority cultural attachments may be problematic; they may clash with or erode the values required to maintain stable and coherent governance. But (or so it might be objected) gender differences do not line up with value-cleavages. They are neither sufficiently unified, nor aligned with the type of alternative normative systems that are of relevance to coherent governance. To put it bluntly, if the problem with minority cultural 'patriotism' is its potential for destabilizing modern constitutionalism (specifically the commitment to equality and liberal justice), women's culture, to the extent that it is identifiable in systems governed by modern constitutionalism, is harmless. That may be so. However, my concern lies elsewhere.

Modern constitutionalism rests on, and requires, legitimacy. Constitutional legitimacy entails a mixture of consent and attachment to the constitutional state on the part of individual citizens. Stable and just constitutional states require (as a minimum) the attachment and consent of the majority. While some aspects of the theoretical discussion about ways of securing minority attachment to majoritarian constitutional government are relevant to gender, women cannot be assimilated to minorities. They are, like men, an equal majority. Theories of modern constitutionalism cannot afford to overlook the forms of constitutional attachment, allegiance and meaning experienced by a majority of the citizens.

In explaining why attention to gender is a significant (albeit largely overlooked) aspect of constitutional citizenship, I want to avoid an explanation based on notions of 'inherent' or socially-intractable difference; that is to say, the sort of account that suggests that women have different 'ways' of attaching themselves than men, and that the universal or abstract attachments required of constitutional 'patriotism' or normative constitutional citizenship are inappropriately masculine and faux-universal. Such accounts are valid, but they miss the point: theories of constitutional attachment or constitutional citizenship are normative claims for transcending particularities, whether ethnic/racial/religious/national or, indeed, genetic. We need to engage with what the theory seeks to do; the 'ought' cannot be defeated by the 'is.' On the other hand, concepts cannot be abstracted from history. Not only are they historically embedded (being articulated in particular historical contexts and moments), they are also shaped by, and evolve through, historical practice.

³ Simone Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy", *Constellations*, vol II/2 (2004), p. 158.

Keeping this in mind, my argument goes like this: the legal-normative status of citizenship developed historically from reciprocal relations of allegiance and duty between the individual and the sovereign.⁴ A citizen (or subject) owed allegiance to, and in return was protected by, the sovereign. Allegiance was direct and masculine. It was measured, primarily, by readiness and capacity for military defence. To enter and enjoy this relationship, an individual had to be male and free born. The entitlements of citizenship (those associated with participation in public affairs) followed. In classical times, and in the early modern state, women were not included in the category of 'citizen'. When, later (from around the second half of the nineteenth century) they came to be included (conceptually, if not practically), their citizenship was derivative. They were classified (in the manner of children today) under the citizenship of their father and, if they married, their husband.

The test remained one of allegiance. Women were assumed to owe allegiance not to the sovereign, but to their closest male relative. (The man, like the sovereign, owed a reciprocal duty to support and protect his family.) Political entitlements did not attach to women's citizenship because their relationship was not with the political sovereign, but with a personal family member.⁵ This normative foundation was translated into law. The clearest example lies in 'marital naturalization' and its counterpart, loss of citizenship on alien marriage. During the nineteenth century, modern constitutional states began to put into legislative effect the assumption that a woman's personal status was derived from her husband. In many cases, automatic citizenship was conferred on alien women by the country of their husband's citizenship. Women who married alien men lost their birth-citizenship (this applied even where citizenship by birth appeared to be constitutionally guaranteed⁶). Behind such laws lay the assumption that allegiance and citizenship were co-mingled; that a woman owed allegiance to her husband, not to a country; and that her country of citizenship was therefore the country of her husband's allegiance. Such laws lasted into - in some cases, well into - the twentieth century.

The co-mingling of citizenship and personal allegiance endures. It has increasingly become constitutionalized, both normatively and legally.⁷ While simple tests of capacity for military defence no longer apply, the concept of citizenship allegiance still rests on principles of loyalty and individual propensity to public harmlessness. Legal consequences follow.⁸

⁴ This applies whether we take the English common law or the (much overworked, and largely irrelevant) classical (Athenian/Roman) citizenship as our model.

⁵ One of the principal arguments against female suffrage indeed was its likely 'alienating' effect; drawing women away from their primary sphere of loyalty and service, the family.

⁶ As noted in fn 1, above.

⁷ In the theory of constitutional 'patriotism'; in the growth of 'tests' for citizenship by naturalization; and in cases involving challenges to the constitutional identity of individuals, for example, with respect to deportation orders (see Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 133)

⁸ Among others, deportation of dangerous resident aliens; loss of voting rights for prisoners; denial or stripping of citizenship by naturalization; loss of citizenship on military service to a foreign sovereign.

Jan-Werner Muller observes that in Habermas's concept of constitutional patriotism, the object of attachment is not the specific constitution itself but, 'ultimately the very idea of citizens mutually justifying political rule to each other.' More specifically, he states, 'citizens attach themselves to the norms and values at the heart of the constitution, that is, the constitutional essentials, and, in particular, the fair and democratic procedures that can be presumed to produce legitimate law.'⁹ Muller argues for a concept of constitutional culture which mediates between universal norms and particular contexts. These contexts enter the norms, '[b]ut the norms included in the constitution in turn will transform the way in which citizens view their traditions and the ... cultures ... with which they find themselves confronted.' This is a circular process, 'in which constitution, constitutional culture, and a diverse and evolving set of cultural ... self-understandings in a more general sense come to influence and, ideally, reinforce one another.'¹⁰

In such ways, we take notice of, and factor cultural pluralism into accounts of constitutional universalism. Similar considerations can and should apply with respect to gender. What, then, are the traditions, norms, legal realities, and self-understandings which assist with understanding and transforming a constitutional citizenship that rests on, and is emerging from, an exclusionary (masculine) history?

I do not offer a check-list but, rather, make a number of observations (all of which eschew 'identity politics'). First, the validity of claims for minority interests and cultural pluralism does not rest on specific values or particularities, but on the centrality of citizen 'consent' in establishing constitutional legitimacy, and the recognition that a requirement of consent is unrealistic and/or unreasonable where its object denies contested values or depends on narratives of exclusion. Similar considerations apply to gender. At the same time, the very claim for recognizing pluralism and the effort to articulate alternative frameworks for achieving normative coherence has an iterative (or circular) effect on our theories of constitutional attachment, consent and legitimacy. Thus also with gender.

Secondly (and related), we need to recognize the gender-normative impact of heroic stories of constitutional 'fathers' (and other metaphors); accounts of allegiance as military service; the residue and memory of past rights deprivations; the normative privileging of the traditional public sphere as the site of (virtuous) citizenship; the trivializing of histories of gender oppression and, similarly, of women's political and legal victories; as well as the history of constitutional cases (including those affecting women) in shaping constitutional identity;¹¹ and the recognition (that we offer to cultural minorities) of both the value and the price paid in the

⁹ Jan-Werner Muller, *Constitutional Patriotism* (Princeton University Press, 2007), p. 58

¹⁰ Muller, *ibid*, p. 59

¹¹ Michel Rosenfeld, 'The Identity of the Constitutional Subject' (1994-1995) 16 *Cardozo Law Review* 1049. As Rosenfeld states, the result in *Roe v Wade* (1973) 'had an unmistakable and significant impact on the constitutional identity of the United States' (p. 1066). Presumably, this impact included the recognition by women that the Constitution 'spoke to' or about a core female experience; as, also presumably, *Reed v Reed* (1971) did, in (finally) extending the 14th Amendment 'equal protection of the laws' to women.

abandonment of traditional identity-formation and the adoption of 'postconventional' identities.

As Frank Michelman writes, constitutional patriotism enters 'not in entire forgetfulness but trailing clouds of culture from our particular national home.'¹² There is no reason to confine these 'trails' to *national* culture; no reason to assume that the national has a uniform and privileged place in identity formation and that it, alone, leaves a residue in the forging of constitutional patriotism. In place of 'national', we may readily insert 'gendered.' The core equality norm of constitutional citizenship, I conclude, cannot be met without both a theory and a legal reality in which the place, voice and allegiance of women is accorded equal status and salience.

¹² Quoted by Muller, note 11, p. 70.