

DOES GENDER SPECIFICITY IN CONSTITUTIONS MATTER?

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INTRODUCTION

“You’re a woman; why don’t you write the women’s rights section?”¹

With that, 22-year-old interpreter Beate Sirota Gordon, whose only experience with constitutions occurred in her high school social studies class, was entrusted with drafting the new constitutional provisions that would protect Japanese women.² Her assignment represents a typical phenomenon in constitution drafting during that period that has persisted to the present—drafters assume that women should be specifically protected³ but do not see it as a particularly serious, or complicated, element of the constitution.⁴ Of the four provisions related to women that Gordon drafted, only one very general provision ended up in the final 1946 Japanese Constitution;⁵ the drafters assumed, too, that the interest in women’s

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* 2009 J.D./LL.M., Duke University School of Law. My sincere thanks to Professor Katharine T. Bartlett and Taryn Marks for their assistance with this project.

1. BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM* 106 (1997).

2. *Id.*

3. *See id.* at 104-06 (noting that gender equality was not included as a principle in the MacArthur Note, but gender equality was still included as part of the Constitution); *see also* Alexandra Dobrowolsky & Vivien Hart, *Introduction: Women, New Politics and Constitutional Change*, in ALEXANDRA DOBROWOLSKY & VIVIEN HART, *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* 3 (2003) (noting that women’s protection clauses must be included in the constitutional text).

4. *See, e.g.*, GORDON, *supra* note 1, at 106 (noting that while other constitutional provisions were drafted by “specialists” in the field, Gordon, who had no experience in the area, was given the responsibility of drafting the women’s rights section).

5. *Id.* at 113-18. The clause that was adopted in the Constitution is article 24, which states: “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.” *Id.* at 125. As adopted, the clause was shortened from Gordon’s original draft, which stated: “The family is the basis of human society and its traditions for good or evil permeate the nation. Hence marriage and the family are protected by law, and it is hereby ordained that they shall rest upon the undisputed legal and social equality of both sexes, upon mutual consent instead of parental coercion, and upon cooperation instead of male domination. Laws contrary to these principles shall be abolished, and replaced by others viewing choice of spouse, property rights,

equality warranted an abstract statement of sex equality but not specific guarantees or protections.⁶

Women's protection clauses—defined in this paper as constitutional provisions that specifically grant or protect the rights of women⁷—have been considered in nearly every constitution drafted since World War II,⁸ but little systemic research has been done to explain what difference the clauses make.⁹ Examining these clauses is important because they may play a role in expanding (or perhaps even limiting) women's equality. This paper begins to correct this deficiency by exploring the experiences of two countries, Canada and Colombia, to ascertain the importance of these clauses and what lessons they provide for future efforts at securing gender equality through constitutions.¹⁰

I chose Canada and Colombia as case studies because each country adopted a constitutional enforcement mechanism to implement its respective women's protection clauses.¹¹ By including an enforcement

inheritance, choice of domicile, divorce, and other matters pertaining to marriage and family from the standpoint of individual dignity and the essential equality of the sexes." *Id.* at 117. One of Gordon's clauses about education was also adopted in shortened form. *Id.* at 116.

6. *Id.* at 114-16 ("Your basic point . . . is good, but in general the draft should be more concise."). The committee went on to note that "[c]oncrete measures . . . may be valid, but they're too detailed to put into a constitution. Just write down the principles. The details should be written in the statutes. This type of thing is not constitutional material." *Id.* at 115.

7. *See infra* Part I.A.

8. *See* Laura Lucas & Taryn Marks, Women and Constitutions Project – Index (2009), <http://www.law.duke.edu/capstone/index> [hereinafter, Lucas & Marks, Index]. The trend has been to frame rights in a gender-specific way ("All men and women are equal") instead of a neutral way ("All are equal"). *See id.*

9. Note, however, that the efficacy of state constitutional gender equality clauses in the United States has been evaluated. *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2004). Wharton's evaluation found that the state clauses were effective. *Id.* at 1204. Other scholars have also considered the efficacy of constitutions in promoting change. *See, e.g.,* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (2d ed. 2008).

10. To examine the impact of laws, F.L. Morton and Avril Allen identified two "relevant and necessary" studies. F.L. Morton & Avril Allen, *Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada*, 34 CAN. J. POL. SCI. 55, 64 (2001). The first type, an intramural study, looks at "what occurs within the confines of litigation and the courthouse." *Id.* The second type of study, an extramural study, looks past the courtroom and after the judgment to determine the "impact" of the study, including "the intermediate-term issue of 'compliance' and the longer-term issue of 'real world change.'" *Id.* Although the importance of the extramural study is not questioned, I focus mainly on the intramural examination of women's protection clauses because of the limited information available about extramural legal change. The World Bank's gender statistics, among the most comprehensive and accurate statistics available, contain a limited number of gender statistics that span an adequate amount of time to test for change. *See* World Bank Genderstats, <http://go.worldbank.org/YMPEGXASH0> (last visited Apr. 30, 2009) [hereinafter World Bank Data].

11. Canada's constitutional documents include language that specifically authorizes individuals to bring cases. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being

mechanism, a country demonstrates a commitment to comply with the constitution beyond that which is demonstrated when a country adopts a constitution for purely symbolic reasons. In contrast, the practical legal application of laws is necessarily limited under purely symbolic, or aspirational, constitutions.¹² Because of their constitutions' enforcement mechanisms, Canada and Colombia are "nearly ideal" countries to test for the practical legal application of women's protection clauses.¹³

Limiting this study to two countries means that the paper's findings must be viewed cautiously. Still, the study suggests three recurring themes that provide some guidance for integrating protections for women into new or existing constitutions and help focus a future research agenda with respect to women's protection clauses in other countries.

First, while women's protection clauses cannot be shown dispositively to be the cause of improved legal protection of women, they seem associated with some gains and, in any event, are not connected to a decline in women's rights. Second, many different forms of women's protection clauses exist, each with different potential consequences. Differences exist, for example, in how much judicial interpretation is required to give meaningful effect to the clause, whether men as well as women have rights under the clause, and whether the clause requires litigants to make arguments that reinforce sex stereotypes or otherwise cause long-term disadvantage to women in order to benefit in the short run. Third, while women's protection clauses may help improve the legal protection of women, the case studies demonstrate that the clauses should not be relied upon as the exclusive mechanism for promoting the legal protection of women. A combination of factors in these two countries contributes to women's legal success, such as enforcement mechanisms, social support networks, enabling legislation, and efforts at giving non-privileged parties access to the courts.

Sched. B to the Canada Act 1982, ch. 11, § 24(1) (U.K.); see also Charles R. Epp, *Do Bill of Rights Matter? The Canadian Charter of Rights and Freedoms*, 90 AM. POL. SCI. REV. 765, 768-69 (1996). Colombia's *tutela* system empowers individuals "to seek immediate judicial protection of their fundamental constitutional rights." Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in BEVERLEY BAINES & RUTH RUBIO-MARIN, THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 75, 76 (2005) [hereinafter Morgan, *Emancipatory Equality*].

12. Mauricio García Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT'L L. 133 (2004).

13. See Epp, *supra* note 11, at 765, 768 (noting that Canada's Charter is a good test case for determining whether a constitutional document itself brought about change or whether the change stemmed from other factors); see Morgan, *Emancipatory Equality*, *supra* note 11, at 76 (discussing the *tutela*, a constitutional enforcement mechanism that makes Canada a good test for the practical legal application of women's protection clauses). Although Canada has no single constitution, for simplicity this paper refers to the collection of constitutional documents as a constitution. See *infra* Part II.A.

This paper proceeds as follows. First, in Part I, I provide a general background of women's protection clauses in constitutions throughout the world. In Part II, I focus more specifically on the historical and legal backgrounds in Canada and Colombia. Finally, in Parts III, IV, and V, I discuss in turn each of the three lessons suggested from the experiences of Canada and Colombia that might be useful to constitution-drafters and other individuals who seek to advance gender equality through constitutions or constitutional amendments. I also show how these lessons might define a future research agenda in the field of constitutional women's protection clauses.

I. BACKGROUND ON WOMEN'S PROTECTION CLAUSES

Women's protection clauses, while incorporated in recent decades into virtually all new constitutions, are a relatively recent phenomenon in constitutional design. This section explores the history of women's protection clauses. It also considers the question of how we might measure the beneficial effects of these clauses, including what counts as progress with respect to women's rights. Furthermore, this section explores whether constitutions ever have the power to promote social change.

A. History of Women's Protection Clauses

When the world's first constitutions were developed, constitutional framers gave little consideration to the idea of a women's protection clause.¹⁴ People generally assumed that women served different roles than men and were not their political equals.¹⁵ As the concept of women's equality gained strength, constitutional designers increasingly included constitutional provisions that recognized and attempted to ensure women's rights.¹⁶

Since 1945, almost every constitution or constitutional revision has included a women's protection clause.¹⁷ These clauses fall into five basic categories.¹⁸ The first category consists of general equality clauses that

14. See HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN* 16 (2008) (noting that drafters did not consider women's issues during the development of the U.S. Constitution).

15. See Elizabeth Reitz Mullenix, *Private Women/Public Acts: Petticoat Government and the Performance of Resistance*, 46 *DRAMA REV.* 104, 105 (2002).

16. See Georgia Waylen, *Constitutional Engineering: What Opportunities For The Enhancement Of Gender Rights?*, 27 *THIRD WORLD Q.* 1209, 1209 (2006).

17. See Lucas & Marks, *Index*, *supra* note 8.

18. Laura Lucas & Taryn Marks, *Women and Constitutions Project – Data by Category* (2009), <http://www.law.duke.edu/capstone/category.html> [hereinafter, Lucas & Marks, *Category*].

make open-ended promises of equality for women.¹⁹ These clauses generally mandate equal treatment for men and women without specifying equality in a particular area.²⁰ For example, article 22 of the Constitution of Afghanistan mandates that “[t]he citizens of Afghanistan, man and woman, have equal rights and duties before the law.”²¹

A second type of women’s protection clause defines particular political guarantees for women, including suffrage, quotas in government offices, citizenship, and royal descent.²² As an example, article 19 of the Constitution of the Central African Republic guarantees to “[a]ll Central Africans of both sexes who are over 18 years of age and enjoy their civil and political rights . . . the right to vote in elections within the conditions determined by law.”²³

A third type of women’s protection clause makes various social guarantees with respect to matters such as education, motherhood, and domestic violence.²⁴ Article 44(1) of the Sudanese Constitution is an example of a social clause; it mandates that “[e]ducation is a right for every citizen and the State shall provide access to education without discrimination as to . . . gender”²⁵

A fourth type of women’s protection clause guarantees women various economic freedoms, such as equality in the workplace.²⁶ For example, article 35(8) of the Ethiopian Constitution guarantees that “[w]omen shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.”²⁷

Finally, the fifth type provides for affirmative action, supplying women with special protections, privileges, or job advantages.²⁸ As an example of an affirmative action clause, article 116(2) of the Greek Constitution states: “Adoption of positive measures for promoting equality between men and women does not constitute discrimination on the basis of

19. *Id.*

20. *Id.*

21. CONST. OF THE ISLAMIC REP. OF AFG. art. 22, available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

22. See Lucas & Marks, Category, *supra* note 18.

23. CONST. OF THE CENT. AFR. REP. art. 19, available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

24. Lucas & Marks, Category, *supra* note 18. Other miscellaneous types of social clauses are also adopted occasionally in constitutions. *Id.*

25. INTERIM NAT’L CONST. OF THE REP. OF THE SUDAN art. 44(1), available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

26. Lucas & Marks, Category, *supra* note 18.

27. FED. NEGARIT GAZETA OF THE FED. DEM. REP. OF ETH. art. 35(8), available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

28. Lucas & Marks, Category, *supra* note 18.

sex. The State shall attend to the elimination of inequalities actually existing, especially to the detriment of women.”²⁹

All five main categories of clauses can be found in the Canadian Charter of Rights and Freedoms (“Charter”) and the Colombian Constitution.³⁰ The Charter includes two general equality clauses³¹ and an affirmative action clause.³² The Colombian Constitution contains two general equality clauses,³³ one political clause,³⁴ two social clauses,³⁵ and an economic clause.³⁶

B. Constitutions and Social Change

Constitutions are limited in their ability to create meaningful social change. Change is facilitated when the citizens of the country internally desires to mobilize the law and the government has sufficient power and resources to enforce the new law.³⁷ Without this background support, women’s protection clauses in constitutions may become “empty promises.”³⁸ For example, scholars have noted that in Canada, “in the absence of adequate resources for legal mobilization, few noneconomic cases are likely to reach the judicial agenda”; without these resources, many rights-based cases involving women’s protection clauses would not be adjudicated.³⁹ In this way, women’s protection clauses may “matter, but only if civil societies have the capacity to support and develop them.”⁴⁰

Because of the interaction of new constitutional protections with institutional commitments and resources, it is difficult to tease out their impact—sometimes a change in the circumstances of women may follow

29. 1975 SYNTAGMA [SYN] [Constitution] art. 116(2) (Greece), *available at* <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

30. *See generally* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11 (U.K.); POLITICAL CONST. OF COLOM., *available at* <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

31. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, §§ 15(1), 28 (U.K.).

32. *Id.* § 15(2). The Constitution Act of 1982 also contains a women’s protection clause (separate from the Charter) in section 35(4), a social clause that guarantees aboriginal women equal rights. *Id.* Part II of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 35(4).

33. POLITICAL CONST. OF COLOM. arts. 13, 43, *available at* <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

34. *Id.* art. 96.

35. *Id.* arts. 42, 43.

36. *Id.* art. 53.

37. Epp, *supra* note 11, at 766.

38. *See id.* at 777.

39. *See id.*

40. *See id.*

constitutional reform but may in actuality stem from other, non-constitutional factors. For example, in a regime change, the new government may promulgate a new constitution, but any subsequent improvements in the condition of women actually could be a result of the new regime's perspective on women rather than of the text of the constitution.⁴¹ Thus, while this paper draws associations between constitutional reforms and the social, economic, and political circumstances of women's lives, it makes no causal claims. In this sense, it is meant to be suggestive, rather than authoritative, about best practices for women's protection clauses.

C. Underlying Assumptions

Use of the term "women's protection clause" itself represents a commitment to a particular vision of women's rights. The assumption of this paper is that what matters is not abstract, formal equality between men and women but rather concrete protections that speak to, and seek to improve, the actual circumstances of women's lives. In general, I use a substantive standard of equality that addresses the outcome and results of laws and policies.⁴² Thus, in evaluating how various constitutional provisions have "worked" or "succeeded," I count any movement that increased legal protection for women as a success. For example, while a court case would not be successful if the judiciary struck a law that guaranteed maternity leave for pregnant women, I would classify the case as successful if the court gave mothers increased protection in the workplace. There is the possibility, of course, that increased legal protection might become so paternalistic as to trade women's long-term welfare away in exchange for only a short-term gain.⁴³ Yet none of the court cases or clauses considered in this study seemed to make this trade-off.

41. *See id.* at 765.

42. *See* Savitri W. E. Goonesekere, *The Concept of Substantive Equality and Gender Justice in South Asia*, U.N. DEVELOPMENT FUND FOR WOMEN 9-10 (2007), <http://www.unifem.org.in/PDF/The%20Concept%20of%20Substantive%20Equality%20-final%20-%2031-12-07.pdf> (explaining the concept of substantive equality).

43. For example, instead of simply guaranteeing special protection for mothers in the same way that many constitutions do, article 47(2) of the Bulgarian Constitution states that "[m]others enjoy special protection of the state which provides them with . . . easier work . . ." CONST. OF THE REP. OF BULG. art. 47(2), *available at* <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database). By assuming that pregnant women can only perform "easier work," the Bulgarian Constitution can be interpreted as setting forth a paternalistic and limited view on the abilities of women.

II. HISTORICAL AND LEGAL INFORMATION ON CONSTITUTIONS OF CANADA & COLOMBIA

The women's protection clauses of Canada and Colombia emerged from different historical and legal backgrounds. For example, in Canada, the clauses resulted from an amendment to a preexisting constitution.⁴⁴ In contrast, Colombia adopted its women's protection clauses simultaneously with a new constitutional regime.⁴⁵ This section examines this difference and other important differences in the historical and legal backgrounds of the Canadian and Colombian constitutions.

A. Canada

Canada's initial 1867 Constitution contained no promises of women's equality.⁴⁶ After the Canadian Supreme Court decided several "landmark" civil liberty cases that restricted civil rights, the Diefenbaker government adopted a statutory Bill of Rights in 1960.⁴⁷ However, the document was largely ignored because of its statutory nature.⁴⁸

In the late 1960s and 1970s, justice minister Pierre Trudeau⁴⁹ proposed a constitutional bill of rights in an attempt to provide protection to Canadian English speakers (who could not read the French laws in Quebec) and to "encourag[e] the development of rights-based cleavages that would unite some Canadians across provincial boundaries."⁵⁰ Although women's rights were not the catalyst for this constitutional reform project, Canadian women participated in the negotiation of this amendment and managed to negotiate some provisions that extended their legal rights.⁵¹ After much "complicated political maneuvering," the act was passed in 1982 as part of a larger set of reforms contained in the Constitution Act of 1982.⁵² Upon its adoption, the Constitution Act and its protections for

44. LYNN SMITH & ELEANOR WACHTEL, A FEMINIST GUIDE TO THE CANADIAN CONSTITUTION: A BACKGROUND PAPER COMMISSION BY THE CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN 11-12 (1992).

45. Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 257 (1998) [hereinafter Morgan, *Machismo*].

46. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

47. Epp, *supra* note 11, at 768.

48. *Id.*

49. Trudeau later became the prime minister of Canada. *Id.*

50. *Id.*

51. See IRVING, *supra* note 14, at 16.

52. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11 (U.K.); Epp, *supra* note 11, at 768; SMITH & WACHTEL, *supra* note 44, at 28-41.

women became “entrenched” in the Canadian Constitution, meaning that the Act can be changed only through the use of a “special constitutional amendment.”⁵³

The Constitution Act of 1982 included several law reforms, a few of which are of special relevance to women. Most importantly, the reforms entrenched the Charter into a constitutional document.⁵⁴ The Charter contains several women’s protection clauses. First, section 28 guarantees that all the rights mentioned in the Charter apply “equally to male and female persons.”⁵⁵ Second, section 15(1) of the Charter explicitly mandates the equality of men and women.⁵⁶ The Charter also notes in section 15(2) that affirmative action programs designed to ameliorate past sex discrimination do not violate the Charter.⁵⁷ Section 15 came into effect on April 17, 1985, in order to give governments time to align with the new rights accorded by the section.⁵⁸

While the Charter grants broad rights, they are limited by section 1, which mandates that the rights in the Charter are “subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵⁹ The section 1 limitation is consistent with the international human rights model of setting out rights.⁶⁰

53. See SMITH & WACHTEL, *supra* note 44, at 11-12. The Canadian Constitution consists of several constitutional documents, including: (1) the Canada Act of 1982, which enacted the Constitution Act of 1982 (which includes the Canadian Charter of Rights and Freedoms); (2) the Constitution Act of 1867; (3) several laws that “admit[] provinces or territories to Confederation or altering boundaries”; and (4) the Statute of Westminster 1931. *Id.*

54. *Id.* at 29.

55. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 28 (U.K.) (“Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”).

56. *Id.* § 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

57. *Id.* § 15(2) (“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”).

58. HUMAN RIGHTS PROGRAM, AN OVERVIEW OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (2006), available at <http://www.pch.gc.ca/pgm/pdp-hrp/canada/guide/ov-apr-eng.cfm>.

59. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 1 (U.K.).

60. ROBERT J. SHARPE & KENT ROACH, THE CHARTER OF RIGHTS AND FREEDOMS 46 (3d ed. 2005) (noting that international human rights documents “expressly acknowledge that rights can be limited to protect other individual rights or broader community interests”). See, e.g., International Covenant on Civil and Political Rights, pmbl., opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (“Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant . . .”).

In addition to memorializing the Charter as a constitutional document, the Constitution Act of 1982 also specifically protects aboriginal women in section 35(4), which notes that “[n]otwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”⁶¹

Two final judicial policies also impact the potential success of the women’s protection clauses. First, the Charter includes language that specifically authorizes individuals to bring cases under the Charter.⁶² Second, courts in Canada have a policy of deciding cases on non-constitutional grounds if at all possible.⁶³

B. Colombia

The 1886 Colombian Constitution—the oldest operating constitution in Latin America⁶⁴—“lacked many of the fundamental rights common in contemporary constitutions.”⁶⁵ The Constitution of 1886 did not include any gender-based discrimination prohibitions⁶⁶ or express any equality provisions.⁶⁷

Colombian students initiated a campaign in 1991 to create a new constitution.⁶⁸ A team of young lawyers drafted a detailed and organized draft, and, after five months of debate, Colombia adopted a new Constitution in July of 1991.⁶⁹

The 1991 Constitution organizes Colombia into an *estado social de derecho*, a “concept . . . [that] unit[es] the rule of law with a social state and . . . represent[s] a middle ground between liberal and socialist notions of the state.”⁷⁰ The new constitution contains negative and positive rights

61. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 35(4) (U.K.).

62. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 24(1) (U.K.); see also Epp, *supra* note 11, at 768-69.

63. Robert J. Sharpe, *Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide*, in CHARTER LITIGATION 327, 343-45 (Robert J. Sharpe ed., 1986) [hereinafter Sharpe, *Mootness*].

64. Morgan, *Emancipatory Equality*, *supra* note 11, at 75.

65. Morgan, *Machismo*, *supra* note 45, at 258.

66. Martha I. Morgan, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353, 380 (1992) [hereinafter Morgan, *Constitution-Making*].

67. Morgan, *Emancipatory Equality*, *supra* note 11, at 75.

68. Morgan, *Constitution-Making*, *supra* note 66, at 365.

69. Morgan, *Machismo*, *supra* note 45, at 257 & n.11.

70. *Id.* at 258 & n.15 (citing Manuel José Cepeda, *Democracy, State, and Society in the 1991 Constitution: The Role of the Constitutional Court*, in COLOMBIA: THE POLITICS OF REFORMING THE

that extend to “civil, political, social, economic, cultural, and collective rights.”⁷¹

The Colombian Constitution grants a broad array of rights to women through the use of seven women’s protection clauses—articles 13 (equality), 40 (political participation), 42 (women’s status in the family), 43 (equal rights, non-discrimination, protection of pregnant women, and special support to female heads of households), 53 (workplace protection for women and mothers), 96 (citizenship based on mothers), and 323 (women as alderwomen).⁷²

The Colombian Constitution so extensively protects women that it includes multiple enumerations of the same right. The constitution guarantees equality for women three times. First, article 13 guarantees equal “rights, freedoms, and opportunities” to all individuals regardless of gender.⁷³ Then, article 43 grants “equal rights and opportunities” to women.⁷⁴ Finally, article 43 bans “any type of discrimination” against women.⁷⁵

The Constitution also specifically protects women in their political, family, and work lives. Article 40 requires state authorities to “guarantee the adequate and effective participation of women in the decision-making ranks of the public administration.”⁷⁶ Women also enjoy “special

STATE 71, 86 (Eduardo Posada-Carbó ed., 1998)) (describing *estado social de derecho* as defined by an advisor to the constitution-making process).

71. Morgan, *Machismo*, *supra* note 45, at 258.

72. POLITICAL CONST. OF COLOM. arts. 13, 40, 42, 43, 53, 96, 323, available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

73. *Id.* art. 13 (“All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy. The State will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups that are discriminated against or marginalized. The State will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction the abuses or ill-treatment perpetrated against them.”).

74. *Id.* art. 43 (“Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination. During their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the State and will receive from the latter food subsidies if they should thereafter find themselves unemployed or abandoned.”).

75. *Id.*

76. *Id.* art. 40 (“Any citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may: 1. Vote and be elected. 2. Participate in elections, plebiscites, referendums, popular consultations, and other forms of democratic participation. 3. Constitute parties, political movements, or groups without any limit whatsoever; freely participate in them and diffuse their ideas and programs. 4. Revoke the mandate of those elected in cases where it applies and in the form provided for by the Constitution and the law. 5. Take initiatives in public bodies. 6. Undertake public measures in defense of the Constitution and the law. 7. Agree to

protection” in the workplace as guaranteed by article 53.⁷⁷ Finally, the Constitution protects women’s family lives in article 43, which guarantees “special assistance and protection of the State” for pregnant women⁷⁸ and requires the state to “support the female head of household.”⁷⁹ Article 53 guarantees “special protection” for mothers in the workplace.⁸⁰

Although many of the previous Colombian constitutions were aspirational, the drafters created a new Constitutional Court with enforcement duties “[t]o ensure that these broad new protections did not remain merely ‘paper guarantees.’”⁸¹ The Constitution gave the Court broad judicial review powers, including review over legislation, international treaties, and public actions.⁸²

An important aspect of the new Constitution is the *tutela*, which empowers individuals “to seek immediate judicial protection of their fundamental constitutional rights.”⁸³ Individuals may file a *tutela* with any justice, and a ruling must be made within ten days.⁸⁴ Following the ruling, offenders must comply with any implementing decrees within forty-eight hours.⁸⁵ All *tutelas* are sent to the Constitutional Court for discretionary review by the Court.⁸⁶ *Tutela* rulings formally apply only to the parties,

undertake public functions and responsibilities, except for those Colombian citizens, native-born or naturalized, who hold dual citizenship. The law will spell out this exception and will determine the cases where they apply. The authorities will guarantee the adequate and effective participation of women in the decision-making ranks of the public administration.”).

77. *Id.* art. 53 (“The Congress will issue a labor statute. The appropriate law will take into account at least the following minimal fundamental principles: Equality of opportunity for workers; minimum essential and flexible remuneration proportional to the amount and quality of work; stability in employment; irrevocability of minimum benefits established in labor regulations; options to negotiate about and reconcile uncertain and arguable rights; a situation more favorable to the worker in case of doubt in the application and interpretation of the formal bases of the law; the primacy of facts over established formalities in issues of labor relations; guarantees to social security, training, instruction, and necessary rest; special protection of women, mothers, and minor-age workers. The State guarantees the right of suitable payment and the periodic adjustment of legal retirement benefits. International labor agreements duly ratified are part of domestic legislation. The law, contracts, agreements, and labor settlements may not infringe on the freedom, human dignity, or rights of workers.”).

78. *Id.* art. 43.

79. *Id.*

80. *Id.* art. 53.

81. Morgan, *Emancipatory Equality*, *supra* note 11, at 76 (noting that the constitutional court has the power to enforce the supremacy of the constitution).

82. *Id.*

83. *Id.*

84. Morgan, *Machismo*, *supra* note 45, at 276.

85. *Id.*

86. *Id.* at 277.

which is a feature consistent with the Colombian Constitution's civil nature.⁸⁷

The "modern" new Constitution created "bold expectations,"⁸⁸ but many scholars had lingering concerns about how successful the document would be in practice.⁸⁹ Like many of the previous Colombian Constitutions, there was a fear that the 1991 Constitution would not be enforced and a "wide gulf . . . between the law in books and the law in action" would continue to exist with respect to the new women's protection clauses.⁹⁰

III. LESSON NO. 1: CONSTITUTION-MAKERS SHOULD CONTINUE TO INCLUDE WOMEN'S PROTECTION CLAUSES

An extensive look at the women's protection clauses in Canada and Colombia reveals three important lessons. In this section I discuss the first lesson—that constitution-drafters should continue to include women's protection clauses. I demonstrate that courts frequently use women's protection clauses to legally protect women, but even in the absence of positive legal advancement, decreased legal protection does not result. As I show, the legal protection of women in both Canada and Colombia appears to have improved since the adoption of women's protection clauses.

A. Canada

Prior to the adoption of the women's protection clauses, feminist litigants lost every case they brought.⁹¹ Since the Charter's adoption, women in Canada have experienced increased protection.⁹²

87. *See id.* at 280.

88. Morgan, *Emancipatory Equality*, *supra* note 11, at 75.

89. *See, e.g.*, Morgan, *Constitution-Making*, *supra* note 66, at 405.

90. *See id.*

91. Morton & Allen, *supra* note 10, at 71-72 (citing reviews by Sylvia Bashevkin and William Bogart that both report five feminist litigation cases and five losses).

92. For a discussion of what constitutes a possible increase in protection, see Part I.C.

Increases in the extramural protection of women in Canada may also have occurred, although it is impossible to ascertain the direct cause of this improvement. The World Bank's gender statistics, among the most comprehensive and accurate statistics available, contain a limited number of gender statistics that span a long enough period to test for change. *See* World Bank Data, *supra* note 10. For that reason, my examination of Canada's gender consequences includes only a look at the labor force participation rate for women.

Data indicates that the women's protection clauses in Canada are correlated with positive improvement in the rate of female participation in the labor force. *See id.* Since the adoption of its women's protection clauses, Canada improved its female labor force participation rate. *See id.* Prior to the adoption of the women's protection clauses in 1982 (and 1985, since section 15 did not come into force until this date), 59 percent of women participated in the labor force. *Id.* Since adoption, women have slowly gained a higher rate of participation, with an average improvement of 0.6 percentage points per year. *Id.*

One example of the increased protection is pregnancy.⁹³ Prior to the adoption of the women's protection clauses, the Supreme Court of Canada decided, in *Bliss v. Attorney General of Canada*, that pregnancy discrimination did not constitute sex discrimination.⁹⁴ In *Bliss*, a woman brought a suit based on an insurance law that differentiated between pregnancy claims and other regular or disability-based claims.⁹⁵ The Court upheld the law, holding that "any inequality between the sexes in this area is not created by legislation but by nature."⁹⁶ However, since the adoption of Canada's women's protection clauses, cases have extended the protection of women, finding that pregnancy discrimination is a form of unlawful sex discrimination.⁹⁷ The Court has extended protection in other areas as well, such as abortion⁹⁸ and sexual assault.⁹⁹

The latest figures, from 2006, showed participation of 73.2 percent of females. *Id.* The rate of improvement may be connected to proximity to the date of the women's protection clauses' adoption. In the first ten years following the adoption of the clauses, the rate of labor force participation improved the most, with an average of 1.0 percent improvement each year. *See id.* The next ten years the rate improved by an average of 0.2 percent each year, with some years netting a loss on participation. *See id.* This data suggests that increased female participation in the labor force may be connected to the amount of time that has passed since the adoption of the clause.

This information indicates that women's protection clauses may have played a role in the increased participation of women in the workforce. Although more information is needed to ascertain whether the improvement is part of a bigger trend, women's protection clauses are correlated with positive change in this area. In addition, since the rates of improvement weakened as time passed from the adoption of the clauses, the data suggests that the improvements may be correlated to the adoption of the clauses.

93. I make no attempt to argue what the proper scope of maternity protection should be. Instead, I argue simply that prior to the adoption of the women's protection clauses, the Supreme Court of Canada changed its view on pregnancy in a way that arguably expands women's protection under the law.

94. *Bliss v. Attorney Gen. of Can.*, [1979] 1 S.C.R. 183 (Can.).

95. *Id.*; see also CHRISTOPHER P. MANFREDI, FEMINIST ACTIVISM IN THE SUPREME COURT: LEGAL MOBILIZATION AND THE WOMEN'S LEGAL EDUCATION AND ACTION FUND, at xiii (2005).

96. *Bliss*, 1 S.C.R. at 184; see also MANFREDI, *supra* note 95, at xiii.

97. *See, e.g.*, *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.) (departing from the Court's policy in *Bliss* of ignoring the impact of pregnancy on the equality of women and holding that pregnancy discrimination is unlawful sex discrimination). In *Brooks*, the Court did not explicitly note that sections 15 and 28 of the Charter led to the decision. *See id.* Instead, the Court considered the Manitoba Human Rights Act. *Id.* However, the Women's Legal Education and Action Fund ("LEAF") argued for the Manitoba Act to be interpreted consistently with sections 15 and 28, so it may be assumed that the Court considered these gender provisions. *See* WOMEN'S LEGAL EDUC. AND ACTION FUND, EQUALITY AND THE CHARTER: TEN YEARS OF FEMINIST ADVOCACY BEFORE THE SUPREME COURT OF CANADA 73 (1996).

98. *See, e.g.*, *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (striking a law that prohibited abortions outside of hospitals).

99. *See, e.g.*, *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (Can.) (holding that a male doctor sexually assaulted his female patient when he offered her a sex-for-drugs arrangement); *R. v. Daviault*, [1994] 3 S.C.R. 63 (Can.) (holding a man guilty for sexual assault against a woman despite his being intoxicated).

Few cases explicitly cite to constitutional violations of women's protection clauses because of the judiciary's policy of avoiding constitutional grounds in its decisions;¹⁰⁰ instead, the women's protection clauses usually influence judges as a background factor as part of the legal culture without being mentioned in the text of the decision. For example, even though section 28 (equal application of Charter rights "to male and female persons")¹⁰¹ is infrequently referred to in Charter cases, scholars argue that "its spirit has influenced the approach taken by the Court in some cases. . . ."¹⁰² These scholars contend that section 28 led the Court in *R. v. Morgentaler* to strike a rule that prohibited abortions outside of hospitals, yet the Court did not discuss section 28 in its opinion.¹⁰³ Similarly, there is evidence that the Court generally considers the clauses even when the Court does not explicitly mention the clauses in the text of the decisions. In particular, briefs filed before the Court by the Women's Legal Education and Action Fund (LEAF)—a strategic litigation group—regularly point out the relevant women's protection clauses to the Court.¹⁰⁴

As these cases demonstrate, women have enjoyed increased protection under the law since the adoption of women's protection clauses in Canada. Yet, it is impossible to say with certainty whether this increased protection is due to the women's protection clauses or some other factor. At a minimum, these cases demonstrate that women's legal protection has not decreased in Canada since the adoption of the women's protection clauses.

B. Colombia

Traditionally, Colombian women have not been protected strongly by constitutional law.¹⁰⁵ Instead, machismo and the prevalent conservative Catholic views of Colombian society marginalized women.¹⁰⁶ Now,

100. See Sharpe, *Mootness*, *supra* note 63, at 343-44.

101. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 28 (U.K.).

102. C. Lynn Smith, *Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees*, 55 LAW & CONTEMP. PROBS. 211, 229 (1992).

103. *Id.* (discussing *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.)).

104. See WOMEN'S LEGAL EDUC. & ACTION FUND, *supra* note 97, at 69-85 (discussing LEAF's argument that a women's protection clause applied in *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.); *Norberg v. Wynrib*, [1992] 2 S.C.F. 226 (Can.); *Weatherall v. Can. (Attorney Gen.)*, [1993] 2 S.C.R. 872 (Can.); *R. v. M.L.M.*, [1994] 2 S.C.R. 3 (Can.); *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (Can.)).

105. Morgan, *Machismo*, *supra* note 45, at 256.

106. *Id.*

however, Colombia's women's protection clauses protect women more expansively than in the past, especially in the private sphere.¹⁰⁷

Since the adoption of the women's protection clauses, women have received the protection they were seeking in the majority of worthy suits brought to the court.¹⁰⁸ For example, in *Sentencia No. C-470/97*, the Court used several women's protection clauses—including articles 13, 43, and 53¹⁰⁹—to justify its decision that pregnant women should be protected in

107. Women's protection clauses were applied to the private sphere through the use of the *tutela*. See *supra* Part II.B.

Women's protection clauses also appear to be correlated with improvements in the extramural protection of women. The women's protection clauses in Colombia also seem to be correlated with positive changes in gender equality data. My extramural study was necessarily limited because the World Bank's gender statistics, among the most comprehensive and accurate statistics, contain a limited number of gender statistics that span a long enough period to test for change. See World Bank Data, *supra* note 10. The female labor force participation rate and the primary completion rate of females have both steadily improved since the adoption of the women's protection clauses. See *id.* However, data suggests that some of these improvements might be part of a trend that began prior to the adoption of the clauses.

First, Colombia's female labor force participation rate has undergone steady improvement since the adoption of its women's protection clauses. See *id.* In 1990, a year prior to the adoption of the clauses, 47.6 percent of females participated in the labor force. *Id.* After the adoption of the women's protection clauses, the rate jumped nearly 4 percent, to 51.4 percent. *Id.* Since then, the steady improvement has continued, ending up at 68.6 percent in 2006. *Id.* All in all, the female labor force participation improved 21 percentage points since the adoption of the clause, an average of 1.3 percentage points per year. See *id.* While the improvement in the labor force participation rate is remarkable, it pales in comparison to the growth in female labor participation that the country had experienced prior to adopting the clause. In 1980, eleven years prior to the adoption of the clauses, 38.2 percent of females participated in the labor force. *Id.* The participation rate improved approximately 2.8 percentage points each year until the women's protection clause was adopted. See *id.* This demonstrates that improvements in the female participation rate are likely part of a trend that developed prior to the adoption of the women's protection clause. Because of the ongoing trend in Colombia, women's protection clauses should probably not be given sole credit for the improvements in the rate of labor force participation.

Second, since the adoption of women's protection clauses, the primary completion rate of females has grown 33.7 percentage points. See *id.* The year prior to the adoption of the clauses, 1991, had a primary completion rate of 73.3 percent. *Id.* Since the adoption, the rate has improved yearly by an average of 2.1 percentage points. See *id.* The World Bank's data on primary completion rate begins in 1990, so no information is available regarding rather a preexisting trend of improvement existed. However, this data suggests that women's protection clauses are correlated with positive changes in the primary completion rate of females. Since the female labor participation rate and the primary completion rate of females have both improved since 1991, the data suggests that Colombia's women's protection clauses are correlated with positive changes in equality. These improvements, however, may be part of an ongoing preexisting trend.

108. On occasion, the Colombian Constitutional Court has ignored relevant women's protection clauses. See, e.g., Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-152/94* (upholding a discriminatory law that mandated that men's surnames must be listed prior to women's surnames on birth registries despite article 13's prohibition against sex discrimination).

109. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-470/97*.

the workplace.¹¹⁰ The Court also used a women's protection clause to find for a woman in *Sentencia No. T-098/94*.¹¹¹ In that case, the Court used article 13 (equal "rights, freedoms, and opportunities" to individuals of both genders)¹¹² to strike a social security policy that provided benefits for the "wives or permanent companions" of male employees but did not provide the benefits for female employees.¹¹³ Similarly, the Court used a women's protection clause to justify its decision in *Sentencia No. T-414/93*.¹¹⁴ There, the Court used article 43 ("[t]he state shall support the woman head of family in a special manner"),¹¹⁵ along with articles that deal with due process and labor rights, to protect a widow whose family blacksmith shop had been closed down by municipal authorities.¹¹⁶ The Court also used women's protection clauses in *Sentencia No. T-222/93* to strike a prison regulation that required female prisoners to get an intra-uterine device or take contraceptives before they could go on conjugal visits.¹¹⁷ Because male prisoners were not subject to similar requirements, the Constitutional Court found the regulation unconstitutional, holding that the case violated article 13 (non-discrimination on ground of sex), article 43 (special protection and assistance to women during pregnancy), and three gender-neutral constitutional clauses.¹¹⁸

110. *Id.*; see also Morgan, *Machismo*, *supra* note 45, at 286 (noting that the Court held that "women workers cannot be dismissed from their jobs without cause during pregnancy or within the first three months after giving birth and that employers who unlawfully terminate an employee during these periods are not only obligated to pay the employee sixty days' salary as provided in . . . the labor code but also must reinstate all employment rights").

111. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-098/94*; see also Morgan, *Machismo*, *supra* note 45, at 309.

112. POLITICAL CONST. OF COLOM. art. 13, available at <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database).

113. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-098/94*; see also Morgan, *Machismo*, *supra* note 45, at 309 (noting that the judge looked to the traditional machismo society in Colombia and said that "[t]he historical vision of woman's role must not affect . . . the recognition of benefits that have the effect of increasing her income as a pensioner").

114. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-414/93*; see also Morgan, *Machismo*, *supra* note 45, at 303.

115. POLITICAL CONST. OF COLOM. art. 43, available at <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database).

116. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-414/93*; see also Morgan, *Machismo*, *supra* note 45, at 303.

117. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-222/93*; see also Morgan, *Machismo*, *supra* note 45, at 288.

118. POLITICAL CONST. OF COLOM. arts. 13, 43, available at <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database); Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-222/93*; see also Morgan, *Machismo*, *supra* note 45, at 288-89. The applicable neutral clauses were articles 16, 42, and 83 of the Colombian Constitution. Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-222/93*; see also Morgan, *Machismo*, *supra* note 45, at 288-89. Article 16 provides that "[a]ll individuals are entitled to the

As these cases demonstrate, women receive more legal protection now that Colombia has adopted women's protection clauses. Still, it is difficult to determine the extent to which the improved legal status of women is a result of the women's protection clauses because the impact of the clauses is intertwined with the impact of the *tutela*.¹¹⁹ The increased substantive provisions along with the enforcement system, however, have led to increased legal protection.

IV. LESSON NO. 2: CONSTITUTION-MAKERS SHOULD CAREFULLY CONSIDER THE FORMAT OF WOMEN'S PROTECTION CLAUSES

This section discusses the second lesson apparent from the case studies—that there are potential differences in the scope and format of women's protection clauses and that drafters must choose from the various options. Drafters should consider the extent to which the clause: (1) requires judicial interpretation, (2) may be applied to men, and (3) may require litigants to make arguments that are in their short-term, but not their long-term, interests in terms of sex equality. Valid reasons exist to format women's protection clauses in various ways; I merely suggest that these differences be considered deliberately, with a view toward the priorities of the drafters.

A. Consideration No. 1: Does the Clause Produce Easy-to-Administer Standards or is Judicial Interpretation Required?

When drafting a women's protection clause for a new constitution or amendment, one of the factors for drafters to consider is whether the clause produces easy-to-administer standards or whether substantial judicial interpretation will be required. Of these two formatting options, one is not necessarily preferable to the other. Constitution-makers should consider the current status of women's equality in the country, along with the country's

unrestricted development of their identity without limitations other than those imposed by the rights of others and the legal order," article 42 provides that "[t]he couple has the right to decide freely and responsibly the number of their children," and article 83 provides that "[t]he activities of individuals and of public authorities will have to be performed in good faith, which will be presumed in all the measures that the former promote *vis-à-vis* the latter." POLITICAL. CONST. OF COLOM. arts. 16, 42, 83, available at <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database).

119. See Morgan, *Emancipatory Equality*, *supra* note 11, at 76 (noting that scholars believe that "[*tutelas*] have been particularly critical to the success of the pioneering efforts at social change through litigation under the new Constitution."); Morgan, *Machismo*, *supra* note 45, at 311-23 (discussing the impact of the *tutela* on women's protection).

faith in its judiciary, when deciding which format of women's protection clause will best serve the nation.

On one hand, easy-to-administer standards provide legal certainty and bind legal professionals (in this case, law-makers who make legislation to comply with the laws and the judiciary that serves as a law-enforcer) to defined standards of equality. This may be preferable if the law is quite progressive and/or if constitution-makers do not trust the judiciary to interpret the clauses in ways that protect women. If the judiciary cannot be trusted, it may be inadvisable to rely on the judiciary to interpret the women's protection clauses, since the policy preferences of judges necessarily influence the scope of gender rights granted.¹²⁰

Clauses with explicitly stated standards are subject to two potential downsides. First, since the scope of the women's protection clause is strictly defined, little flexibility exists to adjust the standard once new needs for women arise. For example, article 76(2) of the Rwandan Constitution demands that women fill exactly twenty-four of eighty seats on the Chamber of Deputies.¹²¹ If women gained political power and rightfully won a larger number of seats, article 76(2) could still be used to limit them to only twenty-four seats. The explicit nature of clauses like this one may serve as a cap to women's progress. Second, specific standards could be dangerous to women if the drafters go too far and draft paternalistic clauses. For example, instead of simply guaranteeing special protection for mothers in the same way that many constitutions do, article 47(2) of the Bulgarian Constitution states that “[m]others enjoy special

120. See Epp, *supra* note 11, at 767 (“The application of a bill of rights is likely to be influenced . . . by the policy preferences of judges.”); see also Andrew D. Heard, *The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal*, 24 CAN. J. POL. SCI. 289, 291 (1991) (“The potential intrusion of individual judges’ values into their decisions has long been recognized by legal commentators.”); *id.* at 306 (“The lottery-like nature of judicial decisions on the Charter is certainly not restricted to the Supreme Court of Canada.”); *id.* at 307 (“From the Court’s treatment of Charter cases, it is clear that the composition of a deciding panel does indeed have a significant bearing on the outcome of a Charter case.”).

121. CONST. OF THE REP. OF RWANDA art. 76(2), available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database). Other constitutional clauses that set out quotas often guarantee a minimum number of seats, which permits women to hold more positions if they win the slots. See, e.g., POST-TRANSITION INTERIM CONST. OF THE REP. OF BURUNDI art. 164, available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database) (“The National Assembly is composed of at least hundred (100) deputies . . . including a minimum of thirty percent (30%) women”); PERMANENT CONST. OF THE REP. OF IRAQ art. 47(4), available at <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database) (“The elections law aims to achieve a percentage of female representatives not inferior to one-quarter (1/4) of the members of the Council of Representatives.”).

protection of the state which provides them with . . . easier work . . .”¹²² By assuming that pregnant women can only perform “easier work,” the Bulgarian Constitution sets forth a paternalistic and limited view on the abilities of women. Specific clauses, such as Bulgaria’s, may ultimately limit women’s equality if the drafters go too far and draft paternalistic clauses.

However, if constitution-makers have faith in the judiciary, it may be preferable to use a women’s protection clause that requires a fair amount of judicial interpretation. This format of a women’s protection clause benefits from its flexibility, as judges can adjust the legal standards required by the clause should new needs for women arise. However, this format is most appropriate when the judiciary can be trusted to perform its duties in a way that protects women. If constitution-makers fear that the judiciary will interpret the clause in a way that fails to protect women, this format is less advisable.

In both Canada and Colombia, drafters formatted the women’s protection clauses to require judicial interpretation. This approach seems to suit Canada’s needs. In Colombia, where traditions of sex equality are less developed, a more specific approach may have been less risky, but Colombia still managed to reach satisfactory results in most cases.

1. Canada

The drafters of Canada’s amendment selected broad women’s protection clauses that require a great deal of interpretation by the courts.¹²³ For example, section 15 of the Charter guarantees “equal protection and equal benefit of law without discrimination and, in particular, without discrimination based on . . . sex”¹²⁴ and does not provide standards for determining whether equal protection has been violated.¹²⁵ This broad flexibility is enhanced by section 1 of the Charter, which provides that limits on rights can be justified in some circumstances but does not set out standards for determining whether rights have been violated.¹²⁶ The vague and general language in the Charter makes it “impossible to ascertain from

122. CONST. OF THE REP. OF BULG. art. 47(2), *available at* <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

123. *See generally* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, §§ 15, 28 (U.K.); *see also* Heard, *supra* note 120, at 293 (“The broad and ringing phrasing of many rights contained in the Charter gives free rein to judicial discretion.”).

124. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 15 (U.K.).

125. *See generally id.*

126. *Id.* § 1; *see also* SHARPE & ROACH, *supra* note 60, at 65.

the language of the Charter the precise scope and content of its [women's protection clause] guarantees."¹²⁷

Because the Canadian Charter does not provide standards for determining whether the constitution has been violated, the Canadian Supreme Court established the scope of women's rights that are protected under the Charter. Through litigation, the Court established a two-step process for interpreting the women's protection clauses in the Charter.¹²⁸ First, courts look to the "meaning of the right or freedom at issue to determine whether the matter complained of constitutes an infringement."¹²⁹ The Court set out a three-step test in *Law v. Canada*¹³⁰ for claims brought under section 15,¹³¹ which requires proof "on a balance of probabilities" of "(1) differential treatment under the law (2) on the basis of a ground of discrimination enumerated in section 15(1) or a ground of discrimination analogous to those that are enumerated, (3) which constitutes discrimination."¹³²

Second, courts consider whether the infringement at issue meets the section 1 justification of a "reasonable limit[] prescribed by law as can be demonstrably justified in a free and democratic society."¹³³ The Court established its analysis for this step in *R. v. Oakes*.¹³⁴ There, the Court considered four aspects:

- 1) the objective of the measure must be important enough to warrant overriding a *Charter* right;
- 2) there must be a rational connection between the limit on the *Charter* right and the legislative objective;
- 3) the limit should impair the *Charter* right as little as possible; and
- 4) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.¹³⁵

127. See Andrew Petter, *Canada's Charter Flight: Soaring Backwards into the Future*, 16 J.L. & SOC'Y 151, 156 (1989) [hereinafter Petter, *Charter Flight*].

128. SHARPE & ROACH, *supra* note 60, at 49-50.

129. *Id.* at 49.

130. [1999] 1 S.C.R. 497 (Can.).

131. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 15 (U.K.).

132. SHARPE & ROACH, *supra* note 60, at 276.

133. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 1 (U.K.); SHARPE & ROACH, *supra* note 60, at 50.

134. [1986] 1 S.C.R. 103 (Can.); SHARPE & ROACH, *supra* note 60, at 65-66.

135. SHARPE & ROACH, *supra* note 60, at 65-66. Courts have used this analysis in many cases. See, e.g., *Ford v. Quebec (Attorney Gen.)*, [1988] 2 S.C.R. 712 (Can.) (holding that a law that required all signs to be in French failed the "minimal impairment" aspect of the *Oakes* analysis since smaller English words could have been included on the signs); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (using the *Oakes* analysis to determine that a law that prohibited abortion was not rationally connected to the government's objective of protecting women's health and the fetus and was not proportional

After the analysis, the Court will hold that the Charter prohibits the behavior in question if the Court finds that an infringement has occurred that is not justified by section 1.¹³⁶

Although the Canadian Supreme Court laid out a framework for applying the women's protection clauses, subjectivity still plays a role in the judicial analysis.¹³⁷ Because the current framework requires judges to balance rights (particularly with respect to section 1), judges are forced to weigh and interpret the rights involved. Therefore, the actual scope of rights protected under the women's protection clauses is affected by the subjective interpretation of judges.¹³⁸

Ultimately, women have enjoyed strong legal protection under Canada's broad women's protection clauses,¹³⁹ but this increased protection is almost certainly connected to the Canadian Supreme Court's generous interpretation of women's rights. The broad and non-specific format of women's protection clauses works well for Canada because the judiciary has a history of thoughtfully protecting social values¹⁴⁰ and because women in Canada are not as oppressed as women in some other countries.¹⁴¹ By

under the *Oakes* analysis); *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.) (applying the *Oakes* analysis to hold that section 163 of the Criminal Code was justified because limiting pornography furthers the important objective of minimizing dangers in society and because the law was proportional); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (using the *Oakes* analysis, along with section 2(b) of the Charter, to hold that a teacher that made anti-Semitic comments to his students was in violation of the Charter).

136. SHARPE & ROACH, *supra* note 60, at 65-74.

137. Heard, *supra* note 120, at 294 (“[C]onsiderable discretion remains to individual judges in applying this analysis.”).

138. *See id.* (“Perhaps we need to reflect on the implications of the fact that Canada’s top jurists can hear the same arguments and read much the same material relating to a particular Charter claim and yet come to opposite conclusions about that claim. One might pause to wonder what this means for the supposed ‘inalienability’ of the rights enshrined in the Charter.”); *see also id.* at 297, 305 (noting that “serious discrepancies” exist in judges’ reactions to Charter claims – so much so that “the outcome of a Charter claim argued in the Supreme Court of Canada depends to a very large extent upon which judges sit on the panel that hears the appeal.”); Andrew Petter, *Twenty Years of Charter Justification: From Liberal Legalism to Dubious Dialogue*, 52 U. N.B. L.J. 187, 191 (2003) (describing a 1990 speech by Madam Justice McLachlin where the former Supreme Court justice “spoke of ‘the impossibility of avoiding value judgments in Charter decision-making,’ and referred to such value judgments as ‘essentially arbitrary’”).

139. *See supra* Part III.A.

140. *See* M. David Lepofsky, *The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?*, 55 LAW & CONTEMP. PROBS. 167, 168 (1992) (“The common law in Canada, as in England, has often shown itself capable of evolving over time to create new doctrines which meaningfully respond to changes in society and social values.”).

141. Women have certainly been oppressed in Canada. *See* Martha Jackman & Bruce Porter, *Women’s Substantive Equality and the Protection of Social and Economic Rights Under the Canadian Human Rights Act*, in *WOMEN AND THE CANADIAN HUMAN RIGHTS ACT: A COLLECTION OF POLICY RESEARCH REPORTS* (1999), available at http://www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=1028. However, the inequality pales in comparison to the physical and mental violence against women in other countries like Colombia. *See* Morgan,

selecting a broad format, the drafters of Canada's amendment gave the judiciary the constitutional foothold it needed to embrace a strong program of women's rights while also giving the judiciary the flexibility to react to the evolving needs of women. However, clauses like Canada's permit courts to interpret the language in ways that fail to protect women. Thus, this format may not sufficiently protect women in countries where the judiciary is not as trustworthy.

2. Colombia

Like in Canada, the drafters of Colombia's women's protection clauses chose a broad format that requires judicial interpretation. The Colombian women's protection clauses make broad promises of equal treatment without providing for a specific standard for enforcement.¹⁴² For example, article 13 proclaims that women have a right to be free from discrimination in general but does not define standards for what constitutes discrimination.¹⁴³ By drafting broad women's protection clauses, the drafters entrusted the Constitutional Court with the task of setting out specific standards for interpretation.

The Constitutional Court increased the protection of women by interpreting the *tutela* to extend to private rights. Drafters intended the Constitution to apply directly to state action and horizontally to private actors in some circumstances, but the text of the Constitution does not explicitly mandate such a broad application.¹⁴⁴ Although lower courts initially rejected many women's claims brought under a *tutela*, the Constitutional Court ultimately held that women are entitled to bring these claims, even in the private sphere.¹⁴⁵ For example, the Constitutional Court

Machismo, *supra* note 45, at 259 (discussing the violence in Colombia that served to keep women in a position of inequality).

142. See Morgan, *Machismo*, *supra* note 42, at 256 (noting that the 1991 Constitution is a "broad positive rights regime"). While the 1991 Constitution provides guidance with respect to the implementation and enforcement of the clauses, it does not specifically define the standard of equality applied to women. See, e.g., POLITICAL CONST. OF COLOM. art. 13, *available at* <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database).

143. See POLITICAL CONST. OF COLOM. art. 13, *available at* <http://www.oceanalaw.com> (search using "Constitutions of the Countries of the World Online" database) ("All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy. The State will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups that are discriminated against or marginalized. The State will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction the abuses or ill-treatment perpetrated against them.").

144. Morgan, *Emancipatory Equality*, *supra* note 11, at 80.

145. See *id.* at 81.

allowed women to pursue *tutela* claims against their spouses¹⁴⁶ and has also allowed *tutela* actions to extend into the private sphere of education and employment.¹⁴⁷

Although the Constitutional Court has used women's protection clauses in many instances to protect women,¹⁴⁸ at least one Colombian case suggests that the Court sometimes ignores applicable women's protection clauses and issues rulings that detract from gender equality. In *Sentencia No. C-152/94*, the Court looked past article 13's prohibition against sex discrimination and instead upheld a law that required men's surnames be listed prior to women's surnames on birth registries.¹⁴⁹ The Court found that the case did not involve equal rights and obligations for women but was a "matter . . . of logistics: there had to be an order and the law provided one."¹⁵⁰ However, as the dissent argued, "the law was not innocuous but reflected a longstanding patriarchal tradition that relegates women to a secondary plane."¹⁵¹ Perhaps if Colombia had adopted a more specific clause, the Court would not be justified in bypassing the equality issues.¹⁵² Although this case does not represent a systemic problem in Colombia, this case suggests that a more specific format of women's protection clauses may be necessary in some countries.

Even though the Colombian Constitutional Court has generally interpreted Colombia's women's protection clauses in a way that facilitates

146. *Id.*; see Corte Constitucional de Colombia [Constitutional Court] *Sentencia No. T-529/92*; Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-382/94*; Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-487/94*; Corte Constitucional de Colombia [Constitutional Court] *Sentencia T-552/94*. In deciding to apply the Constitution to these traditionally private spheres, the Court "explained the horizontal effects of the fundamental rights involved by pointing out that not solely private interests are jeopardized, but fundamental personal rights, likely including those of children whose rights are given constitutional priority over those of others." Morgan, *Emancipatory Equality*, *supra* note 11, at 81. In reaching its decision to apply horizontal rights, the Court also pointed out that the family unit enjoys constitutional protection since it is "recognized as the basis of social organization." *Id.*

147. See Morgan, *Emancipatory Equality*, *supra* note 11, at 82.

148. See *supra* Part III.B.

149. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-152/94*; see also Morgan, *Machismo*, *supra* note 45, at 304.

150. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-152/94*; see also Morgan, *Machismo*, *supra* note 45, at 304-05.

151. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-152/94*; see also Morgan, *Machismo*, *supra* note 45, at 304-05.

152. Even if the drafters of Colombia's constitution had chosen a women's protection clause that provided clear standards, it is possible that the Colombian judiciary would still ignore the clauses. Although a more specific clause may make a court more likely to comply with the women's protection clauses, a chance always exists that the court will still ignore the clause because the problem may be an institutional one rather than one related to the clauses themselves.

women's equality,¹⁵³ it may have been risky to choose a clause that requires judicial interpretation.¹⁵⁴ Because of the existing culture of inequality of women at the time of the clauses' adoption¹⁵⁵ and the history of a weak judiciary,¹⁵⁶ a safer choice for Colombia would have been a more specific clause that did not require much judicial interpretation.

B. Consideration No. 2: Should the Clause Be Structured in a Way that Excludes Men?

A second characteristic that constitution-makers should consider is whether the scope of the women's protection clause ought to be open to claims by men. In the abstract, neither closing the clauses off to men nor opening them to men is preferable as a general rule. Instead, the country's specific situation needs to be considered. If women will be better served by allowing men to use the clauses as well (e.g., if the best litigation strategy involves the use of men), then the clauses should be open to men. If, however, the drafters fear that leaving the clauses open to men will result in better treatment for men at the expense of women, the clauses should be written in a way that prohibits their use by men.

Constitution-drafters in both Canada and Colombia structured their women's protection clauses in a way that allows claims to be brought by men. In Canada, allowing men to use women's protection clauses ultimately benefited the legal protections of women in Canada, due to a readily available social support network and a trustworthy judiciary. Despite a culture of gender inequality and distrust in the judiciary, Colombia's women's protection clauses enjoyed success. However, it may have been less risky in Colombia to use a clause that excluded women.

1. Canada

Canada's women's protection clauses provide legal recourse to men as well as women. Instead of limiting claims to women, the clauses guarantee rights to "male and female persons."¹⁵⁷ As it turns out, male claimants brought seventy percent of the first thirty-five sex discrimination claims

153. *See supra* Part III.B.

154. *See* Morgan, *Machismo*, *supra* note 45, at 256 (noting that the Colombian judiciary has "[l]ong [been] seen as the 'Cinderella' among the Colombian governmental branches").

155. *See id.* at 259-60 (discussing the violence in Colombia that served to keep women in a position of inequality).

156. *See id.* at 256.

157. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 28 (U.K.).

brought under the Charter.¹⁵⁸ Although in the abstract it may appear detrimental to women's legal protection to allow men to take advantage of the clauses, LEAF, the Canadian feminist legal strategy group, used male cases as part of a litigation strategy designed to protect women.¹⁵⁹

In *Shewchuk v. Ricard*, a man claimed a violation of section 15 ("every individual [should be treated as] equal before and under the law . . . without discrimination based on . . . sex")¹⁶⁰ based on a law that treated fathers of illegitimate children differently than mothers of the children.¹⁶¹ LEAF intervened, but instead of attacking the formal equality argument as an inadequate interpretation of the women's protection clause, the feminist group embraced the more limited formal view of equality.¹⁶² The attorneys representing LEAF felt that "it would weaken their credibility to argue that sexual equality rights should not be available to males."¹⁶³

LEAF also used cases with male plaintiffs as a strategy to develop constitutional interpretations that could be used in later cases to further women's equality. For example, LEAF intervened in *Andrews v. Law Society of British Columbia*¹⁶⁴ in attempt to expand the Court's interpretation of section 15 for future claims.¹⁶⁵ This case centered on a male plaintiff who claimed that his Charter rights were violated by a Canadian citizenship requirement.¹⁶⁶ LEAF used this case to successfully "urge[] the Court to narrow eligibility for section 15 protection to 'historically disadvantaged groups'; to broaden its scope to include discriminatory effect as well as discriminatory purpose; and to shift the burden of proof to the government by deferring the issue of

158. Andrew Petter, *Legitimizing Sexual Inequality: Three Early Charter Cases*, 34 MCGILL L.J. 358, 360-61 (1988) [hereinafter Petter, *Legitimizing Sexual Inequality*]. In some of these cases, men attempted to use the women's protection clauses to chip away at women's freedoms, such as by attempting to limit women's abortion rights. See, e.g., *Minister of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575 (Can.) (holding that men do not have standing in abortion suits); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (striking a law that prohibited abortions outside of hospitals).

159. Morton & Allen, *supra* note 10, at 64-67 (discussing LEAF's litigation strategy of using "test cases" and listing several LEAF cases with male plaintiffs).

160. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 15 (U.K.).

161. [1986] 28 D.L.R. (4th) 429 (Can.); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 15(1) (U.K.); see also Petter, *Legitimizing Sexual Inequality*, *supra* note 158, at 362.

162. Petter, *Legitimizing Sexual Inequality*, *supra* note 158, at 362 ("[T]he LEAF factum voiced unqualified support for the view that all sexual distinctions in legislation should be treated alike . . .").

163. *Id.* at 362-63.

164. [1989] 1 S.C.R. 143 (Can.).

165. Morton & Allen, *supra* note 10, at 64.

166. [1989] 1 S.C.R. 143 (Can.).

‘reasonableness’ to the second stage (proportionality) of the section 1 test.”¹⁶⁷

LEAF also successfully used this strategy in *R. v. Keegstra*,¹⁶⁸ a case that ultimately played a crucial role in a later pornography censorship victory by LEAF.¹⁶⁹ In this case, an anti-Semite complained that his Charter rights were violated by a hate speech provision of Canadian law.¹⁷⁰ In its intervention, LEAF “defend[ed] the law as a ‘reasonable limitation’ of freedom of speech (section 1) on the grounds that it served the ‘pressing and substantial purpose’ of protecting the same ‘historically disadvantaged minorities’ protected by section 15 (in the matter of *Andrews*).”¹⁷¹ The Supreme Court accepted LEAF’s argument, and LEAF later used this decision as “the foundation” for its successful arguments in the later pornography censorship case.¹⁷² As LEAF’s strategy in these cases demonstrates, women’s groups in Canada took advantage of male cases to gain credibility in their own quest for women’s legal equality.¹⁷³

2. Colombia

As in Canada, the designers of the Colombian constitution formatted many of the women’s protection clauses in language that applies to both men and women.¹⁷⁴ For example, article 13 states that “all *individuals* are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender”¹⁷⁵

167. Morton & Allen, *supra* note 10, at 65 & n.24.

168. [1990] 3 S.C.R. 697 (Can.).

169. Morton & Allen, *supra* note 10, at 66.

170. [1990] 3 S.C.R. 697 (Can.); *see also* Morton & Allen, *supra* note 10, at 66.

171. Morton & Allen, *supra* note 10, at 66.

172. [1989] 1 S.C.R. 143 (Can.); Morton & Allen, *supra* note 10, at 66. The pornography case is *Butler*. [1992] 1 S.C.R. 452 (Can.). In *Butler*, LEAF argued successfully “that pornography is a form of ‘hate speech’ targeted at a different section 15 ‘minority’: women.” Morton & Allen, *supra* note 10, at 66.

173. Women’s legal rights in the United States have also been furthered by a litigation regime that includes equal protection cases brought by men. Although the United States’ Constitution does not include a women’s protection clause, *see* U.S. CONST., the Supreme Court has interpreted the Equal Rights Clause of the Fourteenth Amendment as protective of women’s rights. *Craig v. Boren*, 429 U.S. 190, 208-09 (1976). Led by Supreme Court Justice Ruth Bader Ginsburg, the U.S. Supreme Court followed a litigation strategy that allowed both men and women to take advantage of promises of equal protection. *See* Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg’s Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 47 (2004). Ginsburg conceived of a strategy based on the notion that women should be treated equally with men and that, if women were treated favorably without proper justification, then the quest for true equality could not be achieved. *Id.* at 43.

174. *See, e.g.*, POLITICAL CONST. OF COLOM. art. 13, *available at* <http://www.oceanalaw.com> (search using “Constitutions of the Countries of the World Online” database).

175. *Id.* (emphasis added).

Colombia illustrates a set of circumstances in which it may have been appropriate to exclude men from taking advantage of the women's protection clauses. These circumstances included a distrust for the judiciary and a cultural norm of gender inequality.¹⁷⁶ Because of the presence of these two factors, there was a strong risk in Colombia that men would attempt to take advantage of the clauses to the detriment of women.

In fact, in at least one case, *Sentencia C-410/94*, men have used Colombia's women's protection clauses in an attempt to limit the protection women experience under the clause.¹⁷⁷ In that case, a man challenged a retirement law that favored women under article 13.¹⁷⁸ Despite the risks mentioned above, the Court upheld the law as reasonably designed to compensate women for past discrimination.¹⁷⁹

This case demonstrates that, notwithstanding these attacks and the historical weakness of the judiciary, the Colombian judiciary managed to enforce the clauses, for the most part, to protect women.¹⁸⁰ Thus, even when a country may be better suited for a narrow format, the country may still succeed with a broad clause. I suggest that constitution-drafters should carefully consider whether they ought to take on this risk.

C. Consideration No. 3: Does the Structure of the Clause Force Litigants to Make Arguments that Restrict Women's Rights?

Finally, constitution-drafters should consider the arguments promoted by the structure of the clause in conjunction with the rest of the constitution. The structure may encourage arguments that favor formal equality, which views men and women as similarly situated individuals that should have equal access to the same legal mechanisms.¹⁸¹ The structure may alternatively encourage arguments that favor substantive equality, which emphasizes gender equality in the actual outcomes and results of judicial decisions.¹⁸² I do not seek to identify which theory of rights best protects women.¹⁸³ Instead, I simply note the importance of drafting the

176. See Morgan, *Machismo*, *supra* note 45, at 256, 259.

177. See Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-410/94*; Morgan, *Machismo*, *supra* note 45, at 256.

178. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-410/94*, *see also* Morgan, *Machismo*, *supra* note 45, at 306.

179. Corte Constitucional de Colombia [Constitutional Court] *Sentencia C-410/94*, *see also* Morgan, *Machismo*, *supra* note 45, at 306.

180. See *supra* Part III.B.

181. See Goonesekere, *supra* note 42, at 9-10.

182. See *id.*

183. I have already acknowledged my bias toward a substantive view of equality. See *supra* Part I.C.

women's protection clause carefully so that the theory of rights chosen is properly supported by the structure of the clause and the rest of the constitution.

There are two relevant inquiries in determining whether the structure of the clause forces litigants to make particular types of arguments: the format of the clause itself and the format of the clause in conjunction with the constitution as a whole. First, drafters should consider what types of arguments are promoted by the structure of the women's protection clause itself. For example, one way to promote a substantive theory of equality is through the use of a women's protection clause that specifically allows for affirmative action, or even mandates it.¹⁸⁴ Article 15(2) of the Canadian Charter illustrates such an allowance approach. It provides that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."¹⁸⁵ By explicitly allowing affirmative action, the Canadian Charter embraces a substantive view of equality.

Second, drafters need to consider how the women's protection clauses interact with the constitution as a whole. This inquiry is important because the arguments promoted by women's protection clauses may be overcome by other structural tendencies within the constitution. For instance, even though Canada adopted an affirmative-action women's protection clause, some scholars argue that the structure of the Charter forces more restrictive arguments.¹⁸⁶ Richard Petter, for example, argues that the "powerful and pervasive" nature of the Charter favors formal, rather than substantive, equality arguments and that feminist litigants are sometimes forced "to play the *Charter* game on its own terms—even if doing so legitimizes a view of equality that disregards women's real social disadvantage and supports the ability of men to claim an even greater share of scarce social resources."¹⁸⁷

184. See Goonesekere, *supra* note 42, at 10 (noting that affirmative action fits within a substantive view of equality).

185. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 15(2) (U.K.).

186. See, e.g., Petter, *Legitimizing Sexual Inequality*, *supra* note 158, at 361, 363.

187. *Id.* (noting that formal equality arguments have enjoyed the most success in the Court). This tendency to accept formal equality arguments over substantive equality arguments may in part be due to the section 1 limitation, which notes that all Charter rights are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11, § 1 (U.K.).

As an example, Petter offers *Shewchuk v. Ricard*.¹⁸⁸ There, a man sued based on a law that treated fathers of illegitimate children differently than mothers,¹⁸⁹ and LEAF intervened and argued in favor of formal equality as an adequate interpretation of section 15.¹⁹⁰ The Court struck down the law, thus accepting the formal equality interpretation.¹⁹¹ As Petter argues, this case suggests that, despite the affirmative action women's protection clause, the structure of the Charter may sometimes be so pervasive that it can force litigants to argue for moderate or conservative views of women's equality.¹⁹²

As demonstrated by Canada, drafters can use the structure of women's protection clauses as a good first step in indicating which notion of equality constitution-drafters wish to be embraced under a new constitution or constitutional amendment, but constitution-makers also need to consider how the women's protection clauses interact with the rest of the constitution's structure to ensure that their chosen theory of equality can be promoted using the constitution.

V. LESSON NO. 3: WOMEN'S PROTECTION CLAUSES ALONE ARE INSUFFICIENT TO SECURE WOMEN'S RIGHTS

The third lesson evident from the case studies is that women's protection clauses alone may be insufficient to bring about complete legal equality for women. As Dr. Ninon Colneric discovered after an analysis of the new gender rights guarantees in Germany in the mid-1990s, "if we are going to bring about true equality between men and women, it is not enough to simply create equal rights for men and women. A more active approach is needed."¹⁹³ An examination of Canada and Colombia reveals that an active approach was taken to achieve gender equality success; as discussed in Part III.B.2, multiple factors may have played a role in the success of the women's protection clauses.¹⁹⁴ The case studies indicate that

188. *Shewchuk v. Ricard*, [1986] 28 D.L.R. (4th) 429 (Can.); Petter, *Legitimizing Sexual Inequality*, *supra* note 158, at 363.

189. 28 D.L.R. (4th) at 433.

190. See Petter, *Legitimizing Sexual Inequality*, *supra* note 158, at 362 ("[T]he LEAF factum voiced unqualified support for the view that all sexual distinctions in legislation should be treated alike . . .").

191. *Shewchuk v. Ricard*, 28 D.L.R. (4th) at 450.

192. This is not to say that conservative or moderate views on feminism cannot protect women adequately. Instead, I suggest that the structure of the Charter forces litigants to argue for this view even if they believe a different equality theory should apply.

193. Ninon Colneric, *Making Equality Law More Effective: Lessons from the German Experience*, 3 CARDOZO WOMEN'S L.J. 229, 249 (1996).

194. See *supra* Part II.B. (discussing the possible role of the *tutela* in the success of the women's protection clauses in Colombia).

women's protection clauses may be affected by enforcement mechanisms, active feminist litigation groups, enabling legislation, and efforts to improve access to courts.

First, enforcement mechanisms almost undoubtedly played a role in the success of the women's protection clauses in Colombia. In contrast to previous constitutions, the 1991 Colombian Constitution created a Constitutional Court and the *tutela*, which empowered individuals to bring suits when their constitutional rights have been abridged.¹⁹⁵ Litigants have used the new women's protection clauses with success in many cases,¹⁹⁶ but their success is due also to the enforcement mechanisms that allow litigants to even *bring* suits. Without the *tutela* and the new Constitutional Court, the women's protection clauses may have been meaningless.

Second, an active feminist organization, LEAF, was crucial to the success of the clauses in Canada.¹⁹⁷ LEAF organized a litigation campaign that strategically developed the jurisprudence with respect to the women's protection clauses to take full advantage of the protections within the women's protection clauses.¹⁹⁸ Without the involvement of LEAF and other similar litigation support organizations, the women's protection clauses in Canada may not have been utilized as effectively in securing women's rights.

Third, enabling legislation may play a crucial role in securing legal equality. The culture of violence against women in Colombia acted as an impediment to achieving the equality guaranteed in the Colombian Constitution.¹⁹⁹ In an effort to comply with the constitutional mandate to eliminate family violence, Colombia enacted *La Ley de Violencia Intrafamiliar* in 1996, which penalized family abusers with a one- to two-year prison sentence.²⁰⁰ Since a crucial element in achieving gender equality in Colombia was to eliminate violence against women,²⁰¹ the efforts for achieving women's equality likely benefited from this

195. See *supra* Part II.B.

196. See *supra* Part II.B.

197. Epp, *supra* note 11, at 776.

198. See Morton & Allen, *supra* note 10, at 56.

199. See Morgan, *Machismo*, *supra* note 45, at 259-60 (discussing the violence in Colombia that served to keep women in a position of inequality).

200. C. PROC. CIV. art. 294/96 (1996) (Colom.); Morgan, *Machismo*, *supra* note 45, at 283. The constitutional mandate to eliminate family violence is contained in article 42, which states in part that "[a]ny form of violence in the family is considered destructive of its harmony and unity, and will be sanctioned according to law." POLITICAL CONST. OF COLOM. art. 42.

201. Morgan, *Machismo*, *supra* note 45, at 259-60 (discussing the violence in Colombia that served to keep women in a position of inequality).

legislation. Other similar legislation may be a factor in the success of women's protection clauses.²⁰²

Finally, endeavors to achieve gender equality need to be supported by efforts to improve true access to courts for non-privileged parties. For example, scholars argue that Canadian gender equality may be limited to privileged women.²⁰³ Because remedies are tied to the "availab[ility] of education, wealth, information, time and a sense of political efficacy,"²⁰⁴ not all Canadian women have access to the benefits secured by Canada's women's protection clauses.²⁰⁵ The costs of litigation in Canada are often so high that low- and middle-income Canadians cannot afford to pursue their Charter rights.²⁰⁶ As Canada's example demonstrates, successful endeavors at achieving gender equality may need to include efforts at ensuring that non-privileged parties have access to courts.

CONCLUSION

An examination of the practical legal effects of the women's protection clauses in Canada and Colombia reveals three important lessons for constitution-drafters. Although no absolute answers exist as to the appropriate structure of women's protection clauses, drafters should carefully select a format that best serves the needs of the country. In particular, drafters ought to consider whether the clause depends upon judicial interpretation, whether the clause allows men to make use of the clause, and whether the structure of the clause forces litigants to make arguments that restrict women's rights. Relevant considerations in making these decisions include the country's background and the drafters' own goals in including the clauses. By carefully considering the format of the women's protection clauses, drafters can ensure that women's protection clauses continue to make a positive impact on women's equality (or at a minimum, ensure that the clauses do not make a negative impact). However, even after drafters carefully tailor women's protection clauses for their country, the clauses probably will not be enough to protect gender

202. For example, Poland's inability to achieve gender equality through its 1997 Polish Constitution may have been due to the absence of enabling legislation. Waylen, *supra* note 16, at 216. Poland, which transitioned from state socialism to democracy during the third-wave of democracy, incorporated a women's protection clause that guaranteed the equality of men and women. *Id.* Despite the women's protection clause, Poland struggled to achieve equality because no legislation or civil codes existed to support the clause. *Id.*

203. See Joyce Green, *Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada*, in DOBROWOLSKY & HART, *supra* note 3, at 37, 43.

204. *Id.* at 43.

205. See *id.* at 39.

206. See Petter, *Charter Flight*, *supra* note 127, at 156.

equality on their own. Women's protection clauses are one, but only one, important component of what needs to be a multi-faceted approach toward achieving gender equality.