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The Long History of Feminist Legal Theory

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THE LONG HISTORY OF FEMINIST LEGAL THEORY

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Scholars typically date the beginning of feminist legal theory to the 1970s.[1] The conventional story places the advent of feminist legal theory in the second wave feminist movement of the sixties and seventies, birthed by the political activism of the women's liberation movement and nurtured by the intellectual leadership of women newly entering legal academia. Yet legal feminism has a much longer history, conceptualized more than a century earlier.[2] The foundations of feminist legal theory were first established in 1848 and developed over the course of the next one hundred and fifty years. The theoretical precepts were grounded in the comprehensive philosophy of the nineteenth-century's first women's rights movement, advanced by the political activism of the women's suffrage movement, expanded by the global and intellectual work of progressive feminism in the early twentieth century, and consolidated in the formal equality legalism of the equal rights amendment and equal protection.

In the beginning, theorists of women's legal rights did not use the label "feminist." Instead, they used terms like "strong minded," "true woman," or the singular "woman's rights" to describe the new ideology and its adherents. Progressives first used the word "feminist" in the U.S. in the 1910s to identify a person committed to principles of social revolution for women's liberation and equality.[3] It derived from the French word "feminisme" coined in 1882 by French suffrage leader and newspaper editor, Hubertine Auclert. Initially employed by detractors to criticize the movement as radical, destructive, and anti-male, feminists soon claimed the word as their own, embracing the broad and radical nature of its meaning. Regardless of terminology, early women's rights advocates and thinkers talked about the key anti-discrimination principles of feminism, identifying subjugation and degradation based on sex as the core of injustice, and the need for liberty and freedom to rectify such oppression.

Conventional thinking about legal feminism describes its development as linear, moving from a simplistic origin of a "first wave," to a more modern "second wave," and then to a sophisticated contemporary school of thought. This evolutionary framework, however, does not accurately reflect the richness of the early first-wave feminism which set feminist theory on its path. The early legal feminism was a comprehensive, holistic feminism. It simultaneously embraced multiple strands of feminist legal thought, including women's "sameness" of ability and opportunity, women's "difference" with respect to

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[1] ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 1 (2006); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 31-32 (3d. ed. 2010).

[2] NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 3 (2d. ed. 2016). The terms "legal feminism" and "feminist legal theory" are used interchangeably in this chapter.

[3] NANCY COTT, THE GROUNDING OF MODERN FEMINISM 13-14 (1987); Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS 119, 125 (1988).

biology and maternal experience, the systemic role of institutions in reproducing gender inequality, and the integrated nature of the private and public spheres. Early legal feminism also developed and applied feminist legal methods, questioning the status quo, deconstructing laws to reveal male bias and misogyny, and reconstructing alternative visions of inclusive systems. Rather than following a linear trajectory, feminist legal theory evolved more like a universal theory of politics or sociology, starting with a broad ideology and then developing strands of that ideology that rose to prominence over different periods of time. Throughout each of these periods of feminist legal thought, however, there were two imperatives: the need to ask "the woman question" –an inquiry that places women at the center of analysis—and the recognition of law as both a fundamental agent in women's inequality and a powerful vehicle for change.

I. Comprehensive Legal Feminism from the Beginning (1848-1880)

Legal feminism emerged from what was called the first movement dedicated to "the Social, Civil, and Religious condition of woman."[4] At the first women's rights convention held in Seneca Falls, New York in July 1848, the movement initiated activism and devised a cohesive agenda for social and legal reform of the state, family, church, and market.[5] The "woman's rights movement" grew out of the abolition movement against slavery where social reformers like Lucretia Mott also addressed women's rights and abolitionists like Angelina and Sarah Grimké raised the "woman question" of allowing women to speak in public. It was at Seneca Falls that abolitionists like Mott, her Quaker colleagues, and noted former slave Frederick Douglass joined to endorse the nascent women's movement.[6] The Seneca Falls convention in turn spawned annual grassroots women's rights conventions where women like Lucy Stone, Susan B. Anthony, and former slave Sojourner Truth continued to advocate for women's rights.

Credit for being the guiding force behind a theory of legal feminism belongs to organizer Elizabeth Cady Stanton.[7] Stanton has been identified as the "original feminist thinker," and the women's movement "principal philosopher," who "single handedly invented standalone feminism."[8] Then a thirty-two year old mother of three children under the age of four and wife of a leading abolitionist, Stanton joined her mentor Mott at Seneca Falls to organize the convention. She was responsible for drafting the convention's founding document, the Declaration of Sentiments, and articulating its now-famous claims of women's wrongs and demands for women's rights. The Declaration of Sentiments provided

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[4] Report of the Woman's Rights Convention, Held at Seneca Falls, July 19-20, 1848, in THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, V. I, IN THE SCHOOL OF ANTI-SLAVERY, 1840-1866, 75, 76-79 (Ann D. Gordon ed., 1998).

[5] *Id.*; NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA xviii (1998).

[6] JUDITH WELLMAN, THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION 36 (2004).

[7] TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 19 (2016); SUE DAVIS, THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON 1 (2008); ELLEN CAROL DUBOIS, FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869, 60 (1978).

[8] THOMAS, *supra* note 7, at 19; DAVIS, *supra* note 7, at 1.

an agenda that became a roadmap for women's rights, calling for eighteen specific reforms, including the equal right to vote, changes in laws and customs governing divorce, marital property, child custody, guardianship, employment, education, pay, entry into the professions, church governance, and freedom from domestic violence.[9] It also denounced the entrenched social norms that fostered male privilege, female inferiority, religious subjugation, and double standards of morality and sexuality.

Stanton was uniquely positioned to argue the legal case for women's equality, having received de facto legal education and training from her father, New York judge and lawyer Daniel Cady.[10] This was at a time when women were not formally trained in law—the first women lawyers and students would not appear until thirty-five years later, hindered by the U.S. Supreme Court's decision in 1875 in *Bradwell v. Illinois* that denied married women the right to practice law.[11] Considering that most male lawyers of the time trained through one-year apprenticeships, Stanton's training was extensive. As a child, she developed an interest in the law, spending her days in her father's office attached to the family home as he met with clients, observing his arguments in court, and debating his apprentices at the nightly dinner table. As a young adult, she clerked for her father while he traveled the judicial circuit and she read law under the tutelage of her brother-in-law. She learned to think like a lawyer, locate and cite case law, and mastered the craft of constructing legal arguments and articulating alternatives and supporting rationale. The brilliant and well-read Stanton integrated this legal training into her knowledge of political theory, theology, and the emerging fields of anthropology and sociology. Her intellectual approach blended multiple theories with the three philosophical traditions animating the women's movement generally—political liberalism, Protestant theology, and utopianism.[12]

Stanton's legal training gave her pioneering insights and understandings of the role of law in society. Moving beyond the moral suasion of reformers, Stanton appreciated the need to develop an agenda and philosophy to deconstruct the law of subjugation and to use that law in securing women's rights. Her legal analysis bears the hallmarks of what we now identify as feminist methodology.[13] Drawing on the work of the few preexisting feminist thinkers, including transcendentalist Margaret Fuller whom Stanton knew in Boston, abolitionist Sarah Grimké and her work *Letters on the Equality of the Sexes* (1837), socialist

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[9] Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STANFORD J. CIV. RGTS & CIV. LIB. 349, 350, 355-58 (2020); *see* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2128 (1996); Reva B. Siegel, *"Home as Work": The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1107 n.188 (1994).

[10] LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE 19-21 (2009); ELISABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON 8-11 (1985).

[11] 83 U.S. 142 (1873); *see* VIRGINIA C. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 5-6, 15-20, 37 (1998).

[12] *See* COTT, *supra* note 3, at 16-17; DAVIS, *supra* note 7, at 2-4; ELIZABETH CADY STANTON: FEMINIST AS THINKER 9 (Ellen Carol DuBois & Richard Candida Smith, eds. 2007); Elizabeth B. Clark, *Religion, Rights and Difference in the Early Woman's Rights Movement*, 3 WISC. WOMEN'S L.J. 29, 30 (1987); Elizabeth B. Clark, *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905, 905-06 (1988).

[13] THOMAS, *supra* note 7, at 22-23.

utopian Frances Wright, and English political theorist Mary Wollstonecraft,[14] Stanton relentlessly asked "the woman question," focusing the public debate on women's issues and demanding the inclusion of those issues into the mainstream public discourse. She also grounded the movement in women's experience, through her own personal experiences and those of her neighbors, friends, family, and employees, and relayed these experiences through the conventions of narrative and what is now called consciousness raising. Stanton criticized the masculine jurisprudence, deconstructing the laws to refute their supposed objectivity and to uncover male bias. She decried what she termed "man marriage," an institution created by and for men to their own advantage, and denounced marriage and custody laws treating women as imbeciles and slaves.

More fundamentally, Stanton established the foundational principle of gender as a unified class.[15] Politically, this idea helped organize women by raising their awareness of gendered oppression and reach across class lines based on shared domestic experiences. This unification, however, generally ignored race, although some made arguments to include black women, explaining that even after the elimination of slavery, black women would continue to be bound by the chains of marriage and coverture. Universalism as a political strategy had the advantage of countering the common refrain of women who refused to join the movement, claiming "I have all the rights I want" – a belief that Karl Marx would later identify as the "false consciousness" of an oppressed class of people who failed to appreciate their membership in a subjugated class.[16] Legally, the unified class idea framed the problem of gender discrimination, exposing how women were grouped together because of sex, and then treated similarly based on bias and stereotypes of weakness, inferiority, and incompetence. Universalizing women at this juncture helped expose the systemic injustices of law and power, showing how protection and coverture of women was in fact oppression.

The comprehensiveness of the first legal feminism encompassed the key strands that would later be identified as separate genres of feminist theory: formal equality, relational difference, and systemic oppression. This holistic feminism, however, was "unfettered by the modern demarcations that have circumscribed feminist theory"; instead embracing multiple notions of feminism simultaneously, viewing them all as instructive to understanding and challenging women's subjugation, rather than seeing them as competing ideas.[17]

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[14] *See* ELIZABETH ANN BARTLETT, LIBERTY, EQUALITY, SORORITY: THE ORIGINS AND INTERPRETATIONS OF AMERICAN FEMINIST THOUGHT: FRANCES WRIGHT, SARAH GRIMKE, AND MARGARET FULLER (1994); Barbara Caine, *Elizabeth Cady Stanton, John Stuart Mill, and the Nature of Feminist Thought* in DuBois & Smith, *supra* note 12, at 51, 62; Charles J. Reid, Jr., *The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton, and the Legal Emancipation of Women*, 10 UNIV. ST. THOMAS L.J. 1123 (2013); Eileen Hunt Botting & Christina Carey, *Wollstonecraft's Philosophical Impact on Nineteenth-Century American Women's Rights Advocates,* 48 AMER. J. POL. SCI. 707 (2004); Phyllis Cole, *Stanton, Fuller, and the Grammar of Romanticism*, 73 NEW ENG. Q. 553, 553-54 (2000); Molly Abel Travis, *Francis Wright: The Other Woman of Early American Feminism*, 22 J. WOMEN'S STUDIES 389 (1993).

[15] Tracy A. Thomas*, Elizabeth Cady Stanton and the Notion of a Legal Class of Gender*, in FEMINIST LEGAL HISTORY, 139, 140-41 (Tracy A. Thomas & Tracey Jean Boisseau eds. 2011).

[16] DAVIS, *supra* note 7, at 111, 220.

[17] *Id.* at 29-33, 219-21.

A. Formal Equality

The first principle embedded in Stanton's philosophy was that of formal legal equality. Early feminism embraced an ideology of individualism and entitlement, holding that women were fully autonomous individuals deserving the same rights, freedoms, and opportunities as men.[18] This tenet derived in part from political theories of liberalism, including those of John Locke's natural and equal rights of the social contract, and John Stuart Mill's liberal feminist theory of equality. As Stanton explained, women's rights were demanded "simply on the ground that the rights of every human being are the same and identical."[19]

Women, however, had been historically excluded from this social contract and republican theories of political citizenship. Instead, they were relegated to community agents of "Republican Motherhood," defining women's citizenship role as confined to the private, domestic sphere, with the responsibility of raising and morally guiding the next generation of male citizens.[20] Under this ideology, women were portrayed as different from men—weaker, emotional, intellectually inferior, yet sentimentalized as selfless, benevolent and morally virtuous. The problem, Stanton explained, was that people could not "take in the idea that men and women are alike; and so long as the mass rest in this delusion, the public mind will not be so much startled by the revelations made of the injustice and degradation of woman's position."[21] Thus, she said, it was important to establish the "identity of the race in capabilities and responsibilities" in order to achieve "the equality of human rights."[22]

B. Women's Difference

Formal equality, however, was only the first part of Stanton's feminist theory. As she explained, "I have wrought heretofore mainly in behalf of the equality of the sexes because it has seemed to me that the recognition of that equality was, as I still think it is, the first requisite, the first step on the road to social emancipation and social happiness."[23] However, she continued, "I perceive more and more clearly every day that the recognition of the equality of woman with man in all the senses in which it is possible that they should be equal is not enough, that it is only a first step and nothing more."[24] The second step, she explained, was to integrate considerations of women's biological and social difference,

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[18] SUZANNE M. MARILLEY, WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES, 1820-1920 2-3, 43 (1996).
[19] Elizabeth Cady Stanton, Address to the Legislature of New-York, Feb. 14, 1854.
[20] LINDA KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 185-220 (1986); NANCY COTT, THE BONDS OF WOMANHOOD 1-2, 63-64 (1982); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AMER. Q. 151 (1966).
[21] Address to the Legislature of New-York, *supra* note 19, at 17-18.
[22] Report of Woman's Rights Convention, *supra* note 4, at 77.
[23] Elizabeth Cady Stanton, Free Love Speech (ms.) ¶ 2 [c. 1871], *microformed on* The Papers of Elizabeth Cady Stanton and Susan B. Anthony (Patricia G. Holland & Ann D. Gordon eds., 1991) (Scholarly Res. Inc.).
[24] *Id.*

pointing out that: "The advocates of woman's rights do not deny a difference in sex, but on the contrary, based their strongest arguments for equal rights on this very principle, because of its mutually protecting, elevating, invigorating power over the sexes."[25] Both were important to feminist advocacy because "[t]he resemblances of sex," Stanton said, "are as great as their differences," and so from the start, she included gender difference in her theory.[26]

This acceptance of what we now regard as relational feminism was in part expedient, embracing the growing conservative and religious supporters of women's suffrage like those from the Woman's Christian Temperance Union (WCTU), which emphasized women's moral and biological difference.[27] However, incorporation of difference was also normative. Feminist understanding of difference recognized and responded to women's lived experiences of maternity and caregiving, and translated into legal rights of maternal child custody, joint ownership of marital property, reproductive control, and jury service as a voice of mercy.

The difficulty with emphasizing women's difference, however, was that to law and society, gender difference meant inferiority. The new science of Darwinism and similar evolutionary theories claimed they proved that women were intellectually and physically inferior to men. As Supreme Court Justice Bradley explained concurring in *Bradwell v. Illinois*, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[28] Accordingly, he concluded, ""the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[29]

Feminists like Stanton subverted this difference of inferiority by proclaiming gender difference as an attribute of power. She asserted, "if a difference in sex involves superiority, then we claim it for woman; for as she is more complicated in her physical organization, fills more offices than man, she must be more exalted and varied in her mental capacities and endowments."[30] Emerging theories of sociology and positivism supported this theory of women's superiority, identifying a "feminine element" essential to the ordering of a cooperative and harmonious society free from war, colonialism, and class conflict. Stanton co-opted this idea, ignoring its conclusion of women's separate sphere, and argued that such a peaceful and caring feminine element was needed as a governing power to counteract the selfish and destructive male force.

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[25] Elizabeth Cady Stanton, *The Other Side of the Woman Question*, 129 NO. REAMER. REV. 432 (1879).
[26] Elizabeth Cady Stanton, *Miss Becker on the Difference in Sex*, REVOLUTION, Sept. 24, 1868.
[27] Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 239-40 (2012); *see* Richard H. Chused, *Courts and Temperance "Ladies,"* 21 YALE J.L. & FEMINISM 339, 368-69 (2010); *see generally* RUTH BORDIN, WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900 (1990).
[28] Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J. concurring).
[29] *Id.*
[30] Stanton, *Miss Becker, supra* note 26.

C. Systemic Oppression

The third key component of early feminist legal thought was its radical understanding of the operation of systems of law, religion, and society that created and perpetuated a patriarchy to subordinate women. The patriarchy was erected by the legal system of coverture, under which a married woman was "covered" or "protected" by her husband and simultaneously denied a separate legal existence and individual civil rights of property, contract, child custody, and the right to sue in courts of law.[31] The patriarchy was created and endorsed by the church, which taught women's moral inferiority in the story of Eve and her original sin and God's alleged punishment of women for this sin by the pain of childbirth. It was reinforced by sexualized cultural norms which viewed a woman as a "toy of man," an object solely for man's desire, endorsing male sexual prerogatives in and out of marriage. Under this more radical lens, women's inequality could be understood as the result of systemic effects, requiring the dismantling of laws, coverture, and religious subordination.

What was missing, however, from early legal feminism was an appreciation of the significance of race. With ties to the abolition movement, women's rights activists initially worked alongside black reformers, aligned on a platform of anti-slavery and universal suffrage.[32] However, the Fourteenth and Fifteenth Amendments, which segregated black and women's suffrage, broke this allegiance, and women's rights activists splintered into different organizations in which race and sex were viewed in opposition.[33] Stanton's willingness to resort to racist statements to advance women's suffrage, such as expressing outrage that "lower orders" of uneducated men like "Patrick and Sambo and Hans and Yung Tung" would legislate for white women, further alienated her former abolitionist colleagues and served to privilege white women's rights, regardless of Stanton's personal support for the rights of black women.[34] For their part, black women independently worked for women's suffrage through church and club organizations, and a few notable women, such as Mary Church Terrell and Mary Ann Shadd Cary joined and contributed to the efforts of national suffrage organizations including Stanton's. Yet Black, Native, and Asian women were segregated in action and leadership, and concerns affecting women of color at the intersection of race and gender were dismissed, leaving early legal feminism with a legacy of essentialism and exclusion.[35]

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[31] NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17 (1982).

[32] *See generally* MARTHA S. JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900 (2007).

[33] *See* LAUREN E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 2-3, 5 (2015); Catherine Powell & Camille Gear Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 131-32 (2020).

[34] Elizabeth Cady Stanton, *Manhood Suffrage*, REVOLUTION, Dec. 24, 1868; Anniversary of American Equal Rights Association, Address of Elizabeth Cady Stanton, REVOLUTION, May 13, 1869; Elizabeth Cady Stanton, *Equal Rights to All!,* REVOLUTION, Feb. 12, 1868; Ann Gordon, *Stanton and the Right to Vote: On Account of Race or Sex*, in DuBois & Smith, *supra* note 12, at 124; Michele Mitchell, *"Lower Orders," Racial Hierarchies, and Rights Rhetoric*, in DuBois & Smith, *supra* note 12, at 128, 137.

[35] *See* LOUISE MICHELE NEWMAN, WHITE WOMEN'S RIGHTS: THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES 8 (1999); ROSLYN TERBORG PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE

II. Narrowing Legal Feminism in the Women's Suffrage Movement (1880-1920)

Despite the promise of first-wave legal feminism, political factors drove the movement to narrow its energies to the single issue of the vote. The unity women previously gained organizing around women's domestic and maternal experience intensified as significant numbers of women with diverse political and religious views came together for the cause of suffrage. However, the consensus on suffrage proved detrimental to legal feminism in the long run. The broad association of women's groups tended to work together only at the lowest common denominator of the vote, sacrificing the development of feminist theory and larger legal reforms.

Notably, Stanton and others in the early woman's rights movement viewed winning the vote as only one tool, as one piece of a comprehensive agenda for feminist reform. It was not meant to be all about the vote. Indeed, Stanton's inclusion of the vote, at the time, was controversial, as most of her Quaker and religious colleagues rejected political activism as morally corrupt, and instead advocated for moral persuasion of the public citizenry. Women's demand for the vote had been raised in a few petitions in New York several years prior, and women had voted for several decades in colonial New Jersey.[36] Before the Civil War, reformers from the abolitionist movement agreed on universal suffrage for all, regardless of race or sex. However, after the war, reformers split, segregating black (male) suffrage from women's suffrage and advocating only for ratification of the Fifteenth Amendment. The Fourteenth Amendment had previously set the constitutional parameters for the franchise voters by counting only "male voters" in determining sanctions for a state's denial of the right to vote. This established what Stanton called a constitutional "aristocracy of sex."[37] Feeling betrayed by her colleagues, Stanton and Susan B. Anthony established the National Woman Suffrage Association, which proposed a Sixteenth Amendment for the women's vote and continued the broad agenda of Seneca Falls. Other women, led by Lucy Stone and her husband Henry Blackwell, split off into the American Woman Suffrage Association, and dedicated themselves first to black suffrage and the Fifteenth Amendment.[38]

As the vote became the hallmark of citizenship under the Reconstruction Amendments, the women's movement evolved into a single-issue feminism aimed at suffrage. The National suffrage organization devised a strategy whereby they sought to claim women's citizenship under the new constitutionalism of suffrage. In a campaign

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VOTE, 1850-1920, 2 (1998); ANGELA Y. DAVIS, WOMEN, RACE & CLASS, ch. 4 (1981); Christine Stansell, *Missed Connections: Abolitionist Feminism in the Nineteenth Century,* in DuBois & Smith, *supra* note 12, at 32; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STANFORD L. REV. 581, 585-90 (1990).

[36] RICHARD CHUSED & WENDY WILLIAMS, GENDERED LAW IN AMERICAN HISTORY 37-43 (2016).

[37] FREE, *supra* note 33, at 2-3, 158; Introduction in, THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, 1866 TO 1873, V. II, AGAINST AN ARISTOCRACY OF SEX, xxiii-xxiv (Ann D. Gordon, ed. 2000).

[38] LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848-1898, 34 (2014); Andrea Moore Kerr, *White Women's Rights, Black Men's Wrong, Free Love, Blackmail, and the Formation of the American Woman Suffrage Association*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT 61-78 (Marjorie Spruill Wheeler, ed. 1995).

called the "New Departure," which departed from prior political strategies for state law reform or constitutional amendment, they claimed that the Fourteenth Amendment's Privileges or Immunities Clause guaranteed women's right to vote.[39] They asserted that a simple, textual analysis of the clause protecting against state abridgement of "the privileges or immunities of the citizens of the United States" applied to women, who were U.S. citizens, and to voting, which was assumed to be a defining privilege of citizenship. Under this claimed authority, many women went to the polls to attempt to vote.

One of these women was Susan B. Anthony, famously convicted for illegal voting, but denied the right to appeal when the trial court refused to enforce the penalty. Virginia Minor's challenge then became the test case. In *Minor v. Happersett*, the U.S. Supreme Court stated that women were indeed citizens, going to some lengths to explain that "there is no doubt that women may be citizens," that "they are persons," that "women have always been considered as citizens the same as men" and "that sex has never been made one of the elements of citizenship in the United States."[40] Although this finding of women's public citizenship overturned older notions of women's limited citizenship under a conception of Republican Motherhood in the private family, it did not serve to gain women the right to vote. Instead, the Court held that federal citizenship does not include the right to vote, because the vote is a right of *state* citizenship. Thus, the Court declared that voting is a privilege to be granted only by each state, and is not a privilege of federal citizenship protected by the Privileges or Immunities Clause.[41]

The vote also emerged as the key proxy for women's rights because the political consensus among women reached out into new groups of supporters, but only on this limited ground. Beginning in 1880, a conservative prohibition group, the Woman's Christian Temperance Union, joined the suffrage movement, bringing with it huge numbers of members, visibility, and grassroots support. Social reformers, club women, labor women, trade women, and professional groups such as teachers and journalists similarly endorsed and actively joined the suffrage movement. Black women, though nominally affiliated, were still segregated and kept on the outskirts of the movement. In 1890, the splintered women's suffrage organizations merged back into one National American Woman Suffrage Association (NAWSA) focused on the vote.

This new coalition of women reformers reached a feminist consensus only on difference feminism. Most of the new groups viewed women as different from men, different with respect to motherhood and different in morality. Women needed the vote, these maternalists argued, to contribute a unique perspective grounded in family and children and intended to improve the morality of the corrupt political process and resulting laws. Society was said to be a giant family, and women were ideally situated to care for that domestic home. Under these maternalist views, women had a moral duty to add their voice to the governance of the country. Such arguments amounted to a reassertion of Republican Motherhood, with women's duty as virtuous citizens to contribute to the common good, this time with the power of the vote. Prior feminist supporters of women's right to vote agreed on women's difference stemming from motherhood. However, they viewed motherhood as

[39] ELLEN CAROL DUBOIS, SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE 85 (2020).
[40] 88 U.S. 162, 165, 169-70 (1874).
[41] *Id.* at 170.

a source of individual entitlement and empowerment under political liberal theories of equality.

The woman's suffrage movement thus proceeded on the theoretical duality of both liberal and relational feminism. "The vote harmonized the two strands in . . . women's rights advocacy; it was an equal rights goal that enabled women to make special contributions; it sought to give women the same capacity as men so they could express their differences."[42] Women's sameness and difference from men were seen as two alternative arguments bolstering women's demand for the vote. As Stanton explained, the women's movement pragmatically started out on the equality ground "because we thought, from that standpoint, we could draw the strongest arguments for woman's enfranchisement. . . . until we saw that stronger arguments could be drawn from a difference in sex, in mind as well as body."[43] This seeming acceptance of women's difference quieted some of the most vocal women's rights opponents, who cast their most constant and loudest criticism of suffrage and feminist legal reform as a threat to the destruction of the family.[44]

The unified movement for suffrage spent the next three decades in the trenches advocating and petitioning for women's right to vote. NAWSA concentrated on state strategies, demoting Stanton's idea of a federal constitutional amendment, and focusing instead on a state level grassroots strategy of securing voting rights piecemeal. Women had some limited successes here, securing in some states municipal suffrage, school board suffrage, and presidential elector suffrage, and full suffrage in a handful of Western states. Then, in the early 1910s, Alice Paul led a splinter group within NAWSA, later breaking off into her own National Woman's Party (NWP) that utilized militant tactics to sway public and political support for a federal constitutional amendment.[45] Adopting tactics of the British women suffragists, learned from Irish nationalists, Paul organized the famous women's suffrage parades and pickets of the White House, leading to the jailing of the picketers under inhumane conditions that ultimately tipped public opinion. Black women were still dismissed, as Paul relegated Black and Asian suffrage women to the back of parades.

Race continued to be a barrier to women's suffrage as Southern legislators feared that ratification of the Nineteenth Amendment would strengthen the enforcement of the Fifteenth Amendment—at the time weakened by Jim Crow laws—and serve to increase black voting power. The fear harkened back to concerns that had shaped the Fourteenth and Fifteenth Amendments and led to the exclusion of black women who outnumbered freedmen in every state of the Confederacy. The Post-Reconstruction era saw the escalation of racism and Jim Crow laws, and "as the nation's racial politics descended, so did those of leading white suffragists" as they recognized that a constitutional amendment would never pass

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[42] COTT, *supra* note 3, at 30.
[43] Stanton, *Miss Becker*, *supra* note 26.
[44] Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 452 (2020); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 978-79, 1000 (2002).
[45] Lynda Dodd, *Sisterhood of Struggle: Leadership and Strategy in the Campaign for the Nineteenth Amendment*, in FEMINIST LEGAL HISTORY 189 (Tracy A. Thomas & Tracey Jean Boisseau eds. 2011); *see generally* BERNADETTE CAHILL, ALICE PAUL, THE NATIONAL WOMAN'S PARTY AND THE VOTE (2015).

without the support of white Southern politicians.[46] Suffragists responded to the opposition by asserting white privilege, going along with the assumption that black women's suffrage, like that of black men under the Fifteenth Amendment, could be restricted through state literacy laws and poll tax voting requirements.

In 1918, the Nineteenth Amendment "hung by a thread in Congress."[47] The Spanish flu pandemic shut down gatherings and ordered people to stay home, activists and legislators fell ill, and World War I continued to ravage. Persuaded by NAWSA's persistent lobbying and women's patriotic support of his war effort, President Wilson finally helped push the amendment through in his speech to Congress in September 1918, publicly shifting from his prior opposition to suffrage.[48] Mid-term elections in November put the Republicans in power, and Congress quickly passed the Nineteenth Amendment in June 1919, now supported by both political parties. The amendment was ratified by the final state, Tennessee, in August 1920, after seventy-two years of feminist advocacy.[49] However, many laws continued to restrict minority women's voting rights. Native American women were denied the vote until the Indian Citizenship Act of 1924, Asian American women were denied until the 1943 Chinese Exclusion Repeal Act and the 1952 Immigration and Nationality Act, and Black women until the Voting Rights Act of 1965 and its prohibition of Jim Crow poll taxes and literacy tests.

Once the Nineteenth Amendment was ratified, the feminist consensus quickly evaporated. Women splintered into an alphabet soup of various organizations, segregated by issues and race, and often working in opposition to one another. NAWSA became the League of Women Voters and adopted a goal of enrolling, educating, and protecting women voters. Social feminists like Florence Kelley and her National Consumers League concentrated on labor issues of maximum hours, minimum wages, and protective worker legislation. The NWP turned to formal equality and an equal rights amendment. When black women leaders like Ida Wells-Barnett and Mary Church Terrell sought to forge a coalition with Paul's national organization to fight continued voting restrictions on minority women, Paul insisted that the disfranchisement of black women was "a race, not a sex matter and of no interest to the NWP."[50] Black women formed their own organizations, oftentimes working within existing clubs and church groups, but were excluded from the history of women's suffrage and intersectional issues of race ignored.[51]

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[46] DUBOIS, SUFFRAGE, *supra* note 39, at 151.

[47] Alisha Haridasani Gupta, *How the Spanish Flu Almost Upended Women's Suffrage*, N.Y. TIMES, Apr. 28, 2020.

[48] TINA CASSIDY, MR. PRESIDENT, HOW LONG MUST WE WAIT?: ALICE PAUL, WOODROW WILSON, AND THE FIGHT FOR THE RIGHT TO VOTE 215 (2019); KIMBERLY A. HAMLIN, FREE THINKER: THE EXTRAORDINARY LIFE OF HELEN HAMILTON GARDENER 237, 254 (2020).

[49] ELAINE WEISS, THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE 1-4 (2019).

[50] DUBOIS, SUFFRAGE, *supra* note 39, at 289; *see* MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL 8-9, 175-76, 179 (2020); PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 2-3, 5 n.5 (2020); Liette Gidlow, *More Than Double: African American Women and the Rise of a "Woman's Vote,"* 32 J. WOMEN'S HISTORY 52, 58 (2020).

[51] JONES, VANGUARD, *supra* note 50, at 164-65; Barbara Young Welke, *"When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 LAW & HISTORY REV. 261, 265-66 (1995).

For a brief time following passage of suffrage, a coalition formed in the Women's Joint Congressional Committee was able to force national attention to women's issues. Built around the suffrage consensus on women's maternal difference, the Joint Committee expanded the issues debated in the U.S. Congress to include matters of marriage, motherhood, and children. It succeeded in efforts to secure passage of the Cable Act, reinstating national citizenship to American women expatriated when they married non-American men.[52] The committee also achieved success in passing the Sheppard-Towner Act, designating federal money for maternal and child health care and remedying high infant and maternal mortality rates.[53] Additionally, they were able to move forward the constitutional amendment against child labor, although it was never ratified.[54] This early Congressional bipartisan support of women's legislation was, however, short-lived. It quickly dissipated as lawmakers realized that women voters would not vote as a collective block and thus the support of women and women's issues was not politically required.

III. Progressive Feminism (1890-1930)

While women's suffrage dominated mainstream politics with its narrow focus on the vote, a more radical vein of feminism emerged. During the late Progressive Era, feminism emerged as an expressly recognized term and ideology. The appearance of the word in the 1910s signaled a new phase in women's rights, distinguishing the new more radical movement from moderate suffragism. As one proponent explained, "All feminists are suffragists, but not all suffragists are feminists."[55] The new feminism was "both broader and narrower: broader in intent, proclaiming revolution in all the relations of the sexes, and narrower in the range of its willing adherents. As an *ism* (an ideology) it presupposed a set of principles not necessarily belonging to every woman—nor limited to women."[56] Like early legal feminism, progressive feminists embraced a broad agenda beyond the vote: "The real goal was a 'complete social revolution': freedom for all forms of women's active expression, elimination of all structural and psychological handicaps to women's economic independence . . . release from constraining sexual stereotypes, and opportunity to shine in every civic and professional capacity."[57]

Progressive feminists severed the ties of conservatism and its affiliation with Christianity and conventional respectability and became associated with politically-left ideologies and socialism. They "embedded their critique of gender hierarchy in a critique

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[52] *See* LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 3 (1998); Felice Batlan, *"She Was Surprised and Furious": Expatriation, Suffrage, Immigration, and the Fragility of Women's Citizenship, 1907-1940*, 15 STAN. J. C.R. & C.L. 315 (2020); Leti Volpp, *Expatriation by Marriage: The Case of Asian American Women*, in FEMINIST LEGAL HISTORY 68 (Tracy A. Thomas & Tracey Jean Boisseau eds. 2011).
[53] *See* JAN DOOLITTLE WILSON, THE WOMEN'S JOINT CONGRESSIONAL COMMITTEE AND THE POLITICS OF MATERNALISM, 1920-30, 27 (2007); Susan L. Waysdorf, *Fighting For Their Lives: Women, Poverty, and The Historical Role of United States Law in Shaping Access to Women's Health Care*, 84 KENTUCKY L.J. 745, 771-791 (1996); J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776, 778 (1968).
[54] WILSON, *supra* note 53, at 66.
[55] COTT, *supra* note 3, at 3.
[56] *Id.*
[57] *Id.* at 35-36.

of the social system," drawing on theories of socialism and the new field of sociology.[58] Their expanded political and social theories integrated issues of class and economics, and broadened the feminist agenda to global issues like pacifism and international peace. For example, the Feminist Alliance, organized in 1914, held "Feminist Mass Meetings" on topics such as "What is Feminism?" and "What Feminism Means to Me," which included issues of labor, professions, housekeeping, married women's names, and pacifism.[59] Other organizations like the Alliance, such as Heterodoxy, sprung up in New York City's Greenwich Village to gather together feminists and discuss feminist goals. To these progressives, "[f]eminism needed to bring more than equality to women: it also needed to extend their power and agency to secure the much-needed 'human world.'"[60]

Advancing this broad agenda, two key ideas dominated and distinguished the progressive feminist movement: women's economic interests and sex rights.[61] The first issue, home economics, re-envisioned women's confinement in the isolated domestic sphere and advocated for women's right to market work. Charlotte Perkins Gilman was a strong influence, labeled by global newspapers as the "preeminent feminist intellectual theorist" of the time, although she disavowed the label, preferring the term "humanist."[62] Gilman located the source of women's oppression in biological differences, drawing on social Darwinist theory. "Androcentric culture," she maintained, promoted male culture and its hallmarks of prostitution, intemperance, and war, while relegating women to the home. Her classic work, *Women and Economics: A Study of the Economic Relation Between Men and Women as a Factor in Social Evolution* (1898) argued for the outsourcing of women's private domestic work to professionals who would perform the childcare, cooking, and cleaning, and organizing of the home in more efficient ways, complete with apartments, and co-op kitchens and nurseries.[63] Such organization would then allow all women, domestic and professional, to obtain paid market work and be economically self-sustaining. In Gilman's feminism, women were extracted from their "sex work" of domestic housekeeping and repositioned in "race work," i.e., important political and market work for the good of the human race. By grounding feminist claims in economics and sociology, Gilman transformed feminism from a privileged individualism into a theory of social evolution.

The second dominant issue marking progressive feminism was its conception of "sex rights." Former nineteenth-century notions of "voluntary motherhood" and women's control of reproduction through choosing abstinence during marriage gave way to the birth control movement.[64] During the 1920s and 1930s, the movement to legalize birth control saw feminists articulating different supporting theories, from protecting working class women, to embracing women's sexual freedom, to eugenic notions of population control. Margaret Sanger based her original defense of birth control on radical feminist ideals of women's

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[58] *Id.*
[59] *Id.* at 12.
[60] JUDITH A. ALLEN, THE FEMINISM OF CHARLOTTE PERKINS GILMAN: SEXUALITIES, HISTORIES, PROGRESSIVISM 176 (2009).
[61] COTT, *supra* note 3, at 44, 49.
[62] ALLEN, *supra* note 60, at xiii, 2, 5, 163, 165.
[63] *Id.* at 116-17.
[64] LINDA GORDON, THE MORAL PROPERTY OF WOMEN OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 57-59 (2002).

emancipation, moved by the desperate conditions of women she met as a public health nurse. But shifting alliances, brought on by obscenity laws, physician allegiances, and the eugenics movement, allowed Sanger's work to be used as a tool for the social control and regulation of poor and black women.[65]

The idealism and promise of progressive feminism was quickly lost. It was doomed in part by its association with socialism that became a prime target in the post-World War I era. Following the Russian communist revolution, anti-communist sentiment was high. Feminists moved to distance themselves from the negative implications of communism, and from its more radical ideologies. Progressive feminism was also done in partly by its success: the home economics arguments had resulted in significant gains in women's access to employment and education, which seemed to lessen the need to challenge a sex-segregated patriarchy.

IV. Liberal Formalism as the Dominant Theory (1920-1970)

By the early twentieth century, both narrow and progressive forms of legal feminism became dormant. Only Alice Paul's National Woman's Party continued to embrace the label of feminism.[66] Paul still believed that law was the fundamental cause of women's oppression, and the key avenue for its reform. This time, she focused on an equal rights amendment.

As one of the new priorities for her organization after the suffrage success, Paul chose Burnita Shelton Matthews to lead a committee of thirteen women attorneys charged with studying the discriminatory laws of each state.[67] They examined laws relating to women's property rights, child custody, divorce and marital rights, jury duty, education, employment, and national citizenship rights—most of which paralleled those issues identified in the Declaration of Sentiments. The committee's purpose "was to expose legal inequalities between men and women that were embedded in all facets of law" and to propose new legislation to counteract these inequalities.[68]

The results of the study convinced Paul that Stanton's first step of formal equality had not yet been achieved. Women's inequality and inferiority were still embedded in the formal law. Rather than take on each issue individually, Paul decided on a national, blanket law to redress all issues at once. In 1921, one year after Nineteenth Amendment, Paul and socialist lawyer Crystal Eastman drafted and proposed the first Equal Rights Amendment. "The work of the National Woman's Party," Paul said, "is to take sex out of law—to give

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[65] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 57-58 (1997); ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 88, 231 (1992).

[66] COTT, *supra* note 3, at 135.

[67] Matthews would become the first woman judge on a federal district court, appointed in 1949 to the United States District Court for the District of Columbia. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on US Trial Courts*, N.Y. TIMES, Apr. 28, 1988, at D27.

[68] COTT, *supra* note 3, at 227, 232.

women the equality in law they have won at the polls."[69] Paul had also learned the political lesson of the suffrage campaign--that a single, concrete feminist issue was more expedient than an amorphous ideology.

Paul's formal equality approach, however, immediately garnered opposition from feminist leaders in the labor movement focused on women's difference. Progressive and left-leaning feminists opposed an equal rights amendment for its perceived threat to protective labor legislation regulating wages, hours, and working conditions of working-class women.[70] Their advocacy was based on women's differences—women's biological weaknesses of size, stamina, and maternity, and the social differences of family and housekeeping demands. Such difference arguments were persuasive in the famous Brandeis brief of sociological data submitted in the *Muller v. Oregon* case, filed by then-lawyer Louis Brandeis, but written and researched by his sister-in-law, Josephine Goldmark and consumer advocate, Florence Kelley.[71] Their strategy was to emphasize women's difference and weakness as a starting point for protective workplace legislation, which would have been prohibited under an equal rights law that treated all workers the same.

The battle among the feminist reformers was evident in the U.S. Supreme Court, where the Court vacillated between equality and difference feminism. In 1908, in *Muller*, the Court first embraced the legal feminism of difference guided by social feminists, and upheld a maximum hours law for women only, even though it had overturned such a law for men in the infamous case of *Lochner v. New York*.[72] However, fifteen years later, the Court in *Adkins v. D.C. Children's Hospital*, embraced liberal equality feminism based on the intervening Nineteenth Amendment, which the Court interpreted as a command for broad sex equality and structural change overturning coverture and sex protection laws.[73] It struck down a minimum wage law for women only. However, that same year, the Court returned to women-protective ideals in *Radice v. New York*, upholding prohibitions on women's night work.[74] A little over a decade later, the Court reaffirmed *Adkins* in *Morehead v. New York ex rel. Tipaldo*, invalidating a New York minimum wage law for women and minors, but one year later definitively overruled *Adkins* and in *West Coast Hotel Co. v. Parrish* upheld a women-only minimum wage law.[75] The struggle over feminisms in the context of the workplace laws was ultimately resolved by Congress in 1938 when it passed the Fair Labor Standards Act endorsing minimum wage and maximum hours laws for all workers.

Yet old animosities and alliances persisted. Equality feminists like Paul and many professional women who had recently entered careers aligned with business interests. Social

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[69] Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the Next Logical Step*, in 100 YEARS OF THE NINETEENTH AMENDMENT 227, 227 (Holly J. McCammon & Lee Ann Banaszak eds., 2018).

[70] NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s–1990s, 62, 64-68 (2015).

[71] 208 U.S. 412, 421-22 (1908); NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS 2-3 (1996).

[72] 208 U.S. 412 (1908); Lochner v. New York, 198 U.S. 45 (1905); *but see* Bunting v. Oregon, 243 U.S. 426 (1917) (upholding maximum hours law for all workers).

[73] 261 U.S. 525 (1923); MONOPOLI, *supra* note 50, at 187.

[74] 264 U.S. 292 (1923).

[75] 298 U.S. 587 (1936); 300 U.S. 379 (1937).

feminists, including Franklin Delano Roosevelt's first female cabinet member, Frances Perkins, and Florence Allen, the first federal appellate judge, sided with the American Civil Liberties Union and labor against an equal rights amendment. Feminism thus became imbued with connotations of classism and conservatism, associated with the business class and opposed by the working class.

Legal feminists continued to advocate for formal equality based on their core belief that law was fundamental to women's oppression as well as their freedom. Formal equality was easy to grasp, objective and concrete, and blanketed all areas of civic life. It was theoretically grounded in Aristolean ideals and the intuitive fairness of treating persons similarly situated the same. Moreover, it could be achieved practically at the individual level by women joining the professional ranks in law, medicine, and politics.

This return to formalism came despite the contrary vision of the Legal Realism School that emerged in the 1930s and 1940s. Legal realism was a theory of jurisprudence that rejected a conception of law as formal, absolute truth and instead saw law as influenced by political, social, and moral factors.[76] It deconstructed so-called objective legal norms and emphasized that legal interpretation had practical consequences such that law can be used to as a means to achieve just ends. However, legal realism failed to live up to its social promise and, ironically became stuck in academia rather than translating into transformative change in people's lived experience real experience. It did, however, influence the Law and Society movement of the 1950s and the Critical Legal Studies movement of the 1970s, which both lead to the development of contemporary feminist legal theory.

V. Conclusion

Feminist legal theory has thus expanded and contracted over time. Starting with the broad comprehensive agenda and methodology of the first woman's rights movement, it narrowed in on a consensus of maternalism. Progressive feminism stretched the theory and agenda back again, with its focus on radical systemic change to laws, systems, and global conflict. In the twentieth century, however, a narrower formal legal equality dominated, buoyed by pervasive formal gender inequality leading to a challenge to the use of women's difference as subordination. Formal legal equality proved to be a successful strategy for feminists. From securing the vote, to the U.S. Supreme Court's equal protection jurisprudence beginning in the 1970s, equality provided a useful analytical vehicle for protecting women's rights. This success was facilitated by the efforts of black lawyer Pauli Murray, who analogized sex to race discrimination to bridge the legal and political gap between racial and gender civil rights.[77] The success of equality theory was also fostered by Justice Ruth Bader Ginsburg, as an advocate and a judge, using formalism to dismantle historical gender stereotypes of women's domesticity and inferiority.[78] However, the persistence of pregnancy discrimination, workplace conflicts, and sexual harassment, among

[76] Mae C. Quinn, *Feminist Legal Realism*, 35 HARV. J. LAW & GENDER 1, 6 (2012).
[77] *See generally* ROSALIND ROSENBERG, JANE CROW: THE LIFE OF PAULI MURRAY (2017); SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).
[78] Ruth Bader Ginsburg & Barbara Flagg, *Some Thoughts on the Feminist Legal Theory of the 1970s*, 1989 U. CHIC. LEGAL F. 16.

other injustices, show that women's lived difference cannot be ignored, and that larger systems of public and private institutions and sexualized norms demand attention and radical change. In particular, intersectional understandings of women's subordination are now integral to rectifying gender injustice as feminists move forward with a more holistic and integrated theory of legal feminism.