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In Search of Equality for Women: From Suffrage to Civil Rights

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ABSTRACT

This article analyzes women's rights advocacy and its impact on evolutions in the meaning of gender equality during the period from the achievement of suffrage in 1920 until the 1964 Civil Rights Act. The primary lesson is that one cannot separate the conceptualization of equality or the jurisprudential philosophy underlying it from the dynamics and characteristics of the social movements that actively give it life. Social movements identify the institutions and practices that will be challenged, which in turn determines which doctrinal issues will provide the raw material for jurisgenerative change. Without understanding a movement's strategy and opportunities for action, one cannot know why law developed as it did.

This article also demonstrates that this phase of women's rights advocacy comprised not one movement—as it is usually described—but three: the suffragists who turned to a campaign for an Equal Rights Amendment (ERA) after winning the Nineteenth Amendment; the organizations inside and outside the labor movement that prioritized the wellbeing of women workers in the industrial economy; and the birth control movement. All three branches engaged with courts, legislatures, and other lawmakers, using a variety of methods and a mixture of complementary and contradictory arguments in an effort to secure full citizenship status for women in the political, economic, and family realms.

Different approaches to equality, however, created a significant movement disability. Prioritizing the ERA cemented that branch's allegiance to what would now be called formal equality, the principle that men and women should be held to the same rights and duties under law. This absolute equality stance precluded support for laws setting protective working standards only for women, the paramount goal of those most concerned with women working in

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factories. ERA advocates saw protective laws as Trojan horses that promised minimum wages and a cap on hours but also disqualified women from some of the highest-paying jobs. Labor activists saw the disabilities associated with women's political and family status as problematic, but secondary to economic issues. Birth control advocates developed arguments that sidestepped the frame of equality altogether.

The absence of a united position on the scope of gender equality under the law facilitated the silence of the Supreme Court, which perpetuated a discourse of domesticity with respect to the legal status of women that began before suffrage and continued long after. The gap in constitutional law as to gender not only stymied doctrinal development but also deprived women's rights advocates of the cultural power that attaches to an overarching equality narrative. Yet although the discourse of law drove the branches of women's rights advocacy apart, it also provided a venue in which equality had to be, and ultimately could be, defined, at least for regulatory purposes.

It was the labor-oriented portion of the movement that brought an anti-discrimination model into women's rights advocacy. Demands for equal pay combined the no-differential-treatment approach of the ERA wing with the workplace-only focus of the labor movement. This linkage ironically brought the women workers groups substantively closer to the anti-classification position associated with the equality/sameness understanding advocated by supporters of the ERA. The institutional mechanism that instantiated this melding was a presidential commission that produced a report which appeared destined for the shelves of the bureaucracy. Beneath the surface, however, the commission served the function of aggregating and integrating women's rights advocacy across all three movement branches.

The conventional understanding that feminism was dormant between adoption of the Nineteenth Amendment and the eruption of rights claims in the 1960s is wrong. Examining the campaigns for legal change across the branches of the movement during this time reveal an increase, not a diminution, in demands for full and equal citizenship in multiple arenas. What was dormant was the development of the concept of gender equality in constitutional law, but that was not for lack of activity by women on the ground.

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I. INTRODUCTION

In 1966, the National Organization for Women (NOW) declared in its Founding Principles that it sought to fill a yawning political gap: "[t]here is no civil rights movement to speak for women, as there has been for Negroes and other victims of discrimination."[1] The implicit message that there was no comprehensive social movement focused on equality under law for women was both right and wrong. It was wrong because, by 1966, decades of work by multiple organizations that were feminist in function, if not always in name, had produced not just the Nineteenth Amendment's promise of suffrage,[2] but also social insurance programs that partially

1. Betty Friedan, *The National Organization for Women's 1966 Statement of Purpose*, NAT'L ORG. WOMEN, https://now.org/about/history/statement-of-purpose/ (last visited Oct. 10, 2020).

2. I use the term "promise" to reflect the reality that only white women and Black women outside the South received the benefits of the Nineteenth Amendment. In the remainder of this article, I sometimes use "women" when the proper referent would be "white women." Rather than seek to specify differential consequences for each instance, I make note here that the organizations, strategies, and concepts of law discussed throughout were pervasively racialized. Foundationally, the Nineteenth Amendment itself had little impact on Black women in southern states who were disenfranchised by Jim Crow laws in 1920 and

compensated for gendered economic structures, nationwide access to birth control, and Congressional enactment of two anti-discrimination statutes. NOW was right, though, that there had not been a successful litigation campaign framed in terms of women's rights of the kind that the NAACP had brought to the campaign for racial justice.

The desire by NOW's founders to mimic the role of the NAACP, and especially its Legal Defense Fund, reinforced the belief during the 1960s that creating new law, especially in and through the process of Supreme Court rulings, constituted the most effective strategy to achieve equality. By that measure, women's rights advocacy was indeed several steps behind efforts to end discrimination based on race. And the path suggested by NOW proved to be essential. Politically and doctrinally, feminist arguments succeeded only after they built directly on the analogy to race. The civil rights movement—a phrase generally used as synonymous with seeking to secure racial equality—has provided the dominant narrative for all American social movements for equality.

As a result, most legal scholarship on law and social movements has taken race-oriented efforts as the starting point for the field.[3] The early conventional wisdom was that these campaigns were centered on litigation, a strategy later imitated by many movements.[4] More recently, the literature has stressed that reliance on litigation renders social movements susceptible to the multiple flaws that come from assuming that the courts can produce significant reallocation of power relations or reworking of structural practices.[5]

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remained so for many years thereafter. Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 19TH AMEND. ED. GEO. L.J. 73, 75 n.3 (2020). Their inability to benefit from the Amendment was well known at the time. *See* Elsie Hill & Florence Kelley, *Shall Women Be Equal Before the Law?*, NATION (Apr. 12, 1922), https://www.thenation.com/article/archive/shall-women-be-equal-law/ ("Today millions of American women . . . are kept from the polls in bold defiance of the Suffrage Amendment."). In the effort to win ratification by the necessary number of states, suffragists vacillated repeatedly over how much to accommodate the white political leadership in southern states. *See generally* AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890–1920, at 163–218 (1965).

3. Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1439–41 (1984); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN L. REV. 207, 208 (1976). As Houck notes, free legal aid for persons who could not afford lawyers also began in this period; however, I am examining only cause-oriented organizations.

4. Rabin, *supra* note 3, at 215. The history of the NAACP, which relied on litigation to a greater extent than the other rights groups, provides some justification for this approach. Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC'Y REV. 367, 375–76 (2020). The ACLU and other groups followed suit. *Id.* at 380–81, 390.

5. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2037, 2043–47 (2008).

This article analyzes the dynamics of law and social change movements from a different perspective: the role of legal advocacy in women's rights campaigns from the cusp of the Nineteenth Amendment to the enactment of the 1964 Civil Rights Act. We still tend to think of legal equality for women as beginning with the suffrage campaign, culminating in adoption of the Nineteenth Amendment in 1920, and followed by an effort to enact the Equal Rights Amendment that withered into obscurity until its rebirth in the 1970s.[6] The lens that I use in this article brings into focus three distinct movements or movement branches that dominated the fifty-year interim and utilized new concepts of women's equality and a wide range of methods—inside and outside courts—to achieve it.

In those first years after suffrage, three powerful movements formed that were organized explicitly or implicitly around gender and the role of law in gender formation: the Equal Rights Amendment (ERA) campaign, the campaign for women workers' rights, and the birth control campaign. All were efforts self-consciously directed at enhancing women's power in society, in varying contexts. In each, the associated legal change efforts highlighted the life conditions of women, even if the terminology of equality was not used.

Methodologically, except for the birth control movement, women's rights advocates during this period largely avoided litigation, having learned that lawsuits produced fights that they could not win. In court, they faced a discourse of domesticity that reigned in constitutional law until the 1970s. Viewed from today's perspective, in which society uses the extent of legal equality to measure a civil rights movement's success, the result is a blank space for women in the history of equal protection law until the 1970s.[7] The absence of successful litigation challenges under the Equal Protection Clause created a lacuna for women's rights not just in equal protection doctrine but also in the broader concept of equality. The greatest significance of the litigation gap was the absence of the legitimating effects of judicial text, not the absence of that particular method of change. The third branch of women's rights—the birth control movement—initially sought to end the double standard between men and women with regard to the prerogatives and responsibilities for sexual behavior, but soon based its legal arguments on free expression and deference to medical authority.

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6. JANE J. MANSBRIDGE, WHY WE LOST THE ERA 17–18 (1986).

7. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 454, 479 (2020); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002).

The division of women's rights advocacy into three branches reflected the failure to develop a shared understanding of their goal. The political and economic branches bitterly and publicly disagreed about what equality for women meant. Potentially, there could have been a positive side to the divisiveness: the inability to settle on a definition left space for the concept of equality to evolve, develop new meanings, and emerge from jurisgenerative venues other than the courts. In the venue of state legislatures, on an issue other than the struggle between labor and management, there was a glimmer of greater flexibility and intra-movement accommodation. For the most part, however, feminists surmounted these divisions only much later by adopting the paradigm of civil rights, a resolution that continues to beg the question of whether equality is synonymous with full political, economic, and sexual rights or only with a much more limited claim against discrimination.

The complexities of gender equality predate even the right to vote. Beginning with the Seneca Falls Declaration of Sentiments in 1848, the goal of ending coverture—which sounded in a frame of collective liberty more than equality—carried as much importance as securing the vote.[8] The two goals were inextricably linked, at the superficial level because married women were thought to be already represented through the votes of their husbands who were understood to hold dominion over households, and at a deeper level, because coverture was the enforcement arm of a legal system that accorded marriage the status of quasi-sovereignty in its jurisdictional authority over women. Subordination within the family was both the predicate for and product of political subordination. The legal and social insulation of family governance undercut efforts to apply the constitutional norms of equality or liberty.

After the adoption of the Nineteenth Amendment, women still faced a matrix of oppressive institutions (somewhat relaxed but continuing) that was anchored in the state, the family, and the economy. Black women struggled in addition with exclusion from all public and private spaces marked as white, not least among them large parts of the women's rights movement itself.[9] Divided not only by race but also by economic status and ideological

8. Hunter, *supra* note 2, at 90–92, 95–96; Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STAN. J. C.R. & C.L. 349, 350–51 (2020).

9. *See generally* Evelyn Brooks Higginbotham, *Clubwomen and Electoral Politics in the 1920s*, *in* AFRICAN-AMERICAN WOMEN AND THE VOTE, 1837–1965 (Ann D. Gordon ed., 1997); *see also* SUZANNE M. MARILLEY, WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES, 1820–1920, at 178 (1996); PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 53–55 (2020).

priorities, women undertook multiple, sometimes contradictory, campaigns to change the law of marriage, of economic structures, and of state regulation of sexuality.

Notwithstanding the combined scope of these campaigns, women's rights advocates failed to develop an analysis that addressed the interlocking nature of the domestic and economic aspects of women's citizenship. The three components of women's rights advocacy developed on different tracks, producing different understandings of equality, leading to a failure for several decades to develop a coherent theory of equality or a strategy that addressed the inseparability of family and work life. The result was a gap—intellectually, legally, and theoretically—at heart of the effort.

This intra-movement impasse ended with the adoption by women's advocates, led by Pauli Murray in the early 1960s, of what I will call the civil rights paradigm, *i.e.*, the anti-discrimination model for laws prohibiting race discrimination.[10] The largely forgotten President's Commission on the Status of Women in 1961 to 1963 served as the institutional venue for the work by Murray and others that led to the inclusion of "sex" in the 1964 Civil Rights Act. The civil rights paradigm was an imperfect fit for gender subordination, but it provided a workable compromise position for both ERA advocates and labor union women, who had developed a deep enmity in the course of battles over protective labor laws.

This article takes as its starting point that it has become part of American political culture that persons who seek justice do so in significant part by pursuing rights. Law is a strategy; litigation is one tactic. Participants in movements identify goals and select target institutions subject to a variety of internal and external pressures—the available resources; the preferences of funders, members and staff; the need to enhance the organization's status vis-à-vis rival groups in the same struggle; the state of the substantive law; and the ideological complexion of courts and legislatures. At bottom, political strategy guides the selection of institutions to be challenged, which, in turn, determines which doctrinal issues will provide the raw material for jurisgenerative change.

The legal system is not merely a passive venue, however. Legal discourse, understood as this is an ongoing process, translates and frames ideas in ways that can change social meanings and structural relationships. New interpretations of collective experience align with popular understandings of law. Meanings evolve as they

10. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968, at 126–30 (1988). *See generally* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

are (re)produced in and through social relationships, practices, institutions, and knowledges. In the course of that evolution, new political explanations emerge, which then produce new meanings, in an iterative process.

This article contributes to the scholarship both on law and social change and on gender equality. It is the first to link the history of the three branches of the early twentieth century women's movement by analyzing how each used law as a key ideological and strategic resource. This approach yields several insights.

First, divisions in the struggle to define gender equality, both in popular discourse and in legal terms, led to multiple, competing understandings of what that concept meant. Groups focused on eliminating discriminatory laws, especially with respect to families, pursued the goal of equal treatment as subjects of the state. Groups concerned with the special harshness of women's working conditions sought ameliorative steps that could be justified legally on necessity rather than equality grounds. The birth control branch of the movement sidestepped equality arguments, and perhaps because of that, had the greatest success in litigation.

These arguments forestalled the capacity to build coalitions, even—and perhaps especially—among women's groups. The exception came in the context of state-level legislative work, where cross-organizational collaboration occurred more frequently, likely because of the lower visibility of geographically dispersed state campaigns and the more pragmatic, adaptive nature of legislative lobbying compared to litigation. Regardless, women's rights advocates were left without a master frame or even a coherent argument for gender equality.

Second, the turn of the century—roughly coincident with the Nineteenth Amendment—was the period when law-focused organizational efforts for social change began. During the Progressive era, in the wake of the Reconstruction Amendments and as legal formalism declined, the major institutional bases for civil rights lawyering were founded. Organized and strategic constitutional litigation became a social movement tool. Each of the three branches of the women's rights movement had its own distinct relationship to and experience with litigation, and their continuing reliance on legislation, direct action, and public education illustrates that today's focus on alternatives to litigation is not new.

Third, when one does narrow the focus to litigation, legal realism emerges as a dominant factor both for the substantive content and the tactical innovations in women's rights law. This effect continues throughout the period before World War II and provides an

important linkage between legal realism and the legal liberalism associated with postwar civil rights campaigns. Ironically, the model for anti-discrimination law as applied to women, often criticized for its grounding in notions of formal equality now considered conservative, grew out of the branch of the movement most closely associated with the political left and the rights of women in the workforce.

Throughout, the article demonstrates that one cannot separate the conceptualization of equality or the jurisprudential philosophy undergirding it from the dynamics and characteristics of the social movements that actively give it life.

II. DÉBUT DE SIÈCLE

"[This] is the first hour in history for the women of the world. This is the woman's age!"[11]

Millions of American women had become engaged in political advocacy by the time that the Nineteenth Amendment was adopted in 1920. Although it secured the vote for many women, the Amendment lagged the front edge of a surge of social change at the beginning of the century that was driven by Progressive era reform, an urbanizing economy and culture, and an unprecedented level of women's activism.[12] At the same time, by its formalization of full citizenship status for women independent of husbands and outside the structure of the family, the Amendment also outpaced norms that still held sway in many parts of the country. For millions of women, the realities of life had not caught up to the opportunities that they could imagine or read about. The racial justice and labor movements also expanded during this period, albeit often in the face of violent opposition. One product of the disjuncture between the traditional structures and practices perpetuated by the legal system and the pressures for progressive change was the birth of social movement lawyering.

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11. J. STANLEY LEMONS, THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S, at 20 (1973) (quoting the President of the National Women's Trade Union League in an address to the organization's biennial convention in 1917).

12. Women during this era were, if anything, "*over*organized." Nancy F. Cott, *Across the Great Divide: Women in Politics Before and After 1920*, *in* WOMEN, POLITICS AND CHANGE 153, 161 (Louise A. Tilly & Patricia Gurin eds., 1990) (quoting Inez Haynes Irwin, author and former National Woman's Party suffragist). The inter-war period was the time of women's greatest level of involvement in various reform efforts. NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 97 (1987); *see also* LEMONS, *supra* note 11, at 41–58; NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE 382–416 (1984).

A. The Iron Triangle of Gender

Socially and legally, women have long faced an exit/entry trap with respect to marriage and economic independence. Divorce was rarely attainable in the nineteenth century, and while opportunities for higher education and paid employment increased, the best paths for mobility remained closed to women.[13] From its inception, the suffrage movement sought three goals alongside the vote, each of which would open new economic and social possibilities for women as well as reform the law: to democratize marriage, to liberalize divorce, and to improve access for women to paid employment. Today, we think of these as equality goals, but to be historically accurate, they first arose in a discourse of emancipation.[14]

Prior to the Civil War, women's rights and abolition advocates were often closely linked.[15] After the war, in debates over the Reconstruction Amendments, Congress refused to consider women as a group for whom it was necessary or appropriate to guarantee equality in the incidents of citizenship.[16] At the heart of congressional debates were fundamental questions of personhood and equality. White women were gendered as property under the law of coverture but raced as fully human, although unequal. For Black Americans, both legal personhood and equality were at stake. Congress extended minimal constitutional personhood to formerly enslaved persons through the Thirteenth Amendment and its embedded repudiation of the Supreme Court's *Dred Scott* decision.[17] The issue of constitutional equality for Black Americans became focused most sharply on the right to vote, resulting in the last in the series of Reconstruction Amendments—the Fifteenth, adopted in 1870—which guaranteed suffrage regardless of race.

Achieving the vote thus became the dominant framework after the Civil War for understanding equality of citizenship more generally. The Fifteenth Amendment reflected and embodied the belief that voting and political equality mutually defined each other. In response, women who had previously been focused on ending the regime of coverture as much as on suffrage began to prioritize

13. WOLOCH, *supra* note 12, at 221, 276.
14. Hunter, *supra* note 2, at 86–89.
15. ELLEN CAROL DUBOIS, WOMAN SUFFRAGE & WOMEN'S RIGHTS 65 (1998).
16. *Id.* at 90–94; MARILLEY, *supra* note 9, at 66–76; Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994).
17. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

achieving the vote as the path to what was understood to represent equal political status and full (that is, voting) citizenship.[18]

The most promising constitutional basis for securing political rights for women initially appeared to be Section One of the Fourteenth Amendment, which nationalized the concepts of equal protection of the law and the benefits of citizenship without an explicit limiting reference to race as the basis for coverage. In 1875, however, the Supreme Court ruled that voting was not among the privileges and immunities of federal citizenship, thus leaving women's access to the vote based on sex up to states.[19] And in 1880, the Court made clear its view that the Fourteenth Amendment as a whole, including the Equal Protection Clause, addressed only race discrimination.[20] In boxing women out of Fourteenth Amendment protection, the Court invoked the de jure subordination of wives to husbands and the "natural" role of women.[21] These rulings thereby installed an industrial age version of the feudal concept of coverture.[22] They conflated law and nature, creating the jurisprudential category of woman, defined by marriage.

The Nineteenth Amendment relaxed the legal bonds of gender and signaled the increasing social independence of women, but a quasi-carceral matrix of subordinating institutions remained in place. One can envision these components of the matrix as forming an iron triangle generated by the three primary domains in which women were fighting for freedom and equality: the state, the family, and the economy. Each wall of the triangle connected and was secured by two discursive and institutional regimes. Each dimension of the triangle was fully and de jure determined by gender.

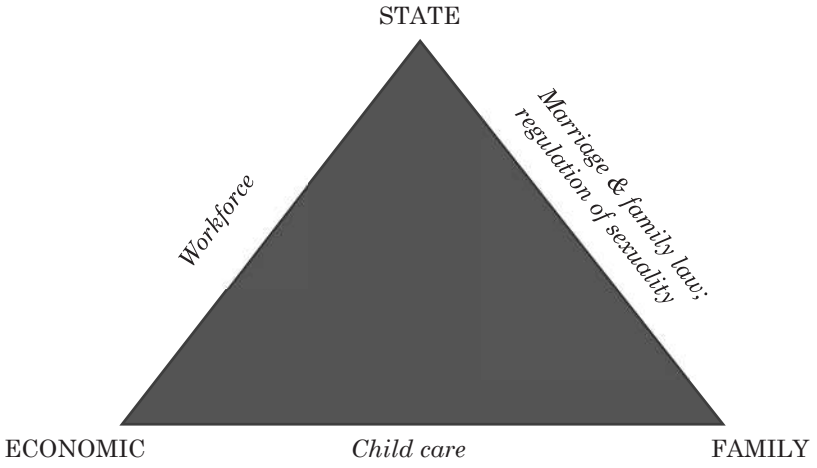
18. Thomas, *supra* note 8, at 369–70.

19. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

20. Strauder v. West Virginia, 100 U.S. 303, 310 (1880); *see* Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723, 724–25 (1935).

21. Most famously, *see* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

22. LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 38–40 (1969).



For women, political status, family life, and economic need were symmetric and parallel, and the intersecting axes of the triangle formed what amounted to a triple bind. Few women could leave a marriage given financial dependence on husbands and the dearth of viable job opportunities outside marriage. During marriage, the law granted husbands an enforceable right to economic dominance. Until the Nineteenth Amendment, women had no independent capacity as citizens to use the vote to alter these rules. Although these dimensions of women's lives were changing both inside and outside the realm of legal structures, the triangle continued in law in the late nineteenth and early twentieth century, and its vestiges persisted long afterward.

B. A New Relationship Between Social Movements and Law

At the same time that women's rights advocates were regrouping after their exclusion from protection under the Reconstruction Amendments, other social justice movements were beginning to generate planned, sustained litigation or legislation to secure or enforce constitutional protections. These efforts were made possible by two substantive pillars that had emerged as the basis for rights-based arguments: the Reconstruction Amendments with regard to race and the invocation of the First Amendment by political dissenters, especially leftists engaged in labor organizing. Debates over the Reconstruction Amendments set the stage for an explosive growth in "[t]he idiom of rights,"[23] including those framed in terms

23. LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 125–26 (2015).

of "equality."[24] As leftists pressed for structural change in economic relations, they found a powerful resource in the First Amendment's promise (if often not a reality) of protection for speech.[25]

With these new or newly invigorated constitutional bases, social movement litigation as a distinctive, organized enterprise began in the period surrounding the turn of the twentieth century, roughly from 1890 to 1920. Political organizations dedicated to systematic law reform as a strategy for social change began to appear, creating what was the first wave of coordinated social movement lawyering in the courts. Not until the 1960s and 1970s, with the birth of multiple legal defense organizations, was there a period of similar expansion.[26]

The NAACP began in 1909, preceded by two smaller organizations that had sponsored litigation efforts to reinforce and expand the protections of the Reconstruction Amendments.[27] Early efforts were led by white lawyers, some of whom were veterans of abolitionist efforts.[28] With the increasing education of Black lawyers, a path broken by Charles Houston's conversion of Howard University School of Law into virtually a training ground for rights advocacy, Black lawyers and other professionals took over the leadership of the NAACP.[29] The organization rapidly came to dominate the field then known as race law.

Lawyers affiliated with the labor movement had begun fighting anti-labor injunctions in the late 1800s.[30] As protests over labor-related issues increased, lawyers supportive of labor drove the development of First Amendment expression law.[31] The right to organize and to picket generated the core of the field.[32] Some small firms specialized in labor-side representation, and unions created their own legal departments.

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24. Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1930*, 103 AM. HIST. REV. 1440, 1473 (1998).

25. CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 28–53 (2007); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 75–86, 122–26 (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 (1997).

26. Rhode, *supra* note 5, at 2033.

27. SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915, at 58–62, 122–41, 252–66 (2013).

28. *Id.* at 277.

29. Steven D. Jamar, *Charles Hamilton Houston (1895–1950)*, HOW. UNIV. SCH. OF L., http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html (2004); *NAACP Legal History*, NAACP, https://naacp.org/naacp-legal-team/naacp-legal-history/ (last visited Nov. 11, 2020).

30. *See, e.g.*, United States v. Debs, 64 F. 724 (N.D. Ill. 1894) (upholding injunction).

31. *See generally* RABBAN, *supra* note 25.

32. Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 302, 309–10 (2014).

The National Consumers League (NCL), which began in 1891,[33] was predominantly a women's organization in fact[34] and was led, beginning in 1899, by social justice powerhouse Florence Kelley.[35] The NCL focused during this period primarily on labor issues (despite its name),[36] especially the concerns of women and children who worked in factories or at home as piece workers. The NCL enlisted Louis Brandeis to defend the constitutionality of state laws that guaranteed women minimum wages and maximum hours.[37] The result was what became known as the Brandeis brief,[38] famously successful in *Muller v. Oregon*.[39] After *Muller*, the political stature of the NCL soared.[40] In 1919, on the eve of suffrage, the organization adopted an ambitious ten-year strategy for legal reform based on enactment of protective labor laws for women.[41] Over time, Brandeis was joined or succeeded by other elite attorneys who represented the NCL in the effort to preserve such laws.[42]

Emerging from prior groups that provided support first for pacifists and then for workers, the American Civil Liberties Union (ACLU) began in 1920.[43] Among its earliest endeavors was advocacy for the speech rights of Margaret Sanger, who launched the American birth control movement.[44] Facing legal threats in 1916, Sanger reached out to Roger Baldwin, who later co-founded and became the first director of the ACLU, whom she knew from their shared social circle of leftists and progressives.[45] This connection forged a link between women seeking reproductive control and leaders in the mobilization of legal representation for progressive

33. LANDON R. Y. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 14 (2000).

34. *Id.* at 13–14, 259–61, 264–69.

35. NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S, at 61–62 (2015).

36. The name derived from the principle of "[e]thical consumption," a tradition associated with women who boycotted British goods during the Revolutionary period and slave-made goods prior to the Civil War. STORRS, *supra* note 33, at 19.

37. NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 26–28 (1996).

38. I use the term Brandeis-Goldmark brief in the remainder of this article because the massive body of empirical research for the brief was done by a team led by Josephine Goldmark. *See id.* at 28–31; *see also* Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

39. 208 U.S. 412 (1908).

40. WOLOCH, *supra* note 37, at 87.

41. *Id.* at 125.

42. Brandeis's successors as legal advisors to the NCL included Felix Frankfurter, Roscoe Pound, Benjamin Cohen, and Dean Acheson. STORRS, *supra* note 33, at 37.

43. *See generally* RABBAN, *supra* note 25.

44. LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 11 (2013).

45. *Id.* at 22–25.

causes that began before the formal establishment of either the ACLU or what became Planned Parenthood.

C. Confluence

The period encompassing the last quarter of the nineteenth century and the first quarter of the twentieth century solidified the structural apparatus for civil rights movements. A profoundly ambivalent constitutional discourse of equality and free expression emerged in the Supreme Court's interpretations of constitutional law during that period, inspiring a burst of new legal rights claims but validating only some. The structural apparatus of law-focused organizations made possible the cross-fertilization of doctrine and strategy in at least two respects.

First, it fostered the first politically-driven formations of lawyers in support of social justice causes. Organized legal advocacy for constitutional rights was born during this period. The political and cultural ascendance of equality and expression claims combined with the new lawyer-led advocacy groups intensified the power of law and specifically of constitutional rights claims as the primary frame for the contestation of gendered and raced power relations and the suppression of dissent. Lobbying of state legislators continued, as well as direct action, protests, and public education. Litigation documents, such as briefs, began to be published and circulated after the end of lawsuits, sometimes achieving substantial distribution.

Second, the lawyers affiliated with these organizations developed strong professional and interpersonal ties that facilitated the migration of strategies, tactics, and doctrinal evolution across progressive causes. Allying themselves with the jurisprudence of legal realism, then at the height of its challenge to formalist reasoning, these lawyers helped to channel judicial attention to "sociological facts" generated by empirical or expert studies.[46] One example of this technique—the Brandeis-Goldmark brief—migrated from the NCL to the ACLU to the birth control movement.

III. THREE ROADS DIVERGED

By 1920, when suffrage was achieved, the movement for women's rights had already fractured. During the post-Civil War period, advocacy organizations diverged into three distinct branches that

46. *See generally* Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 LAW & SOC. INQUIRY 493 (2020).

roughly corresponded to the iron triangle. Organizations focused on women workers and the lines or spokes emanating from the economy node in the triangle—the Women's Trade Union League (WTUL)[47] and the NCL—were in place by the turn of the century. The almost 400,000 women who had joined unions by 1920 could vote as union members before they had a right to vote as citizens.[48] The birth control movement, focused on the lines emanating from the family node in the triangle, also began before 1920. The oldest of the cluster—the suffrage movement—had long been focused on the meaning of citizenship for women, at the state node of the triangle. Because so many vestiges of coverture remained in place, suffragists could declare only partial victory after winning the vote in 1920. They redirected energy and resources toward the crusade for a second constitutional amendment.

Each of these movements faced the challenge of defining equality.[49] The conventional wisdom among historians is that the promotion of so-called protective laws by organizations focused on women workers represented the "difference" approach to women's equality, an assertion that women could secure equal opportunity only if the law accommodated the family and reproductive roles that seemed inevitable. By contrast, the former suffragists adopted what we now call an equal treatment approach, stressing arguments that women were the same as men in their political roles and social capacities, leading to the demand for equal laws that was embodied in the proposed ERA. These women, often educated and economically secure, saw protective laws as enforcing a ceiling as much as a floor, while working class women needed the floor more than they feared the ceiling. Only the birth control movement avoided the equality versus difference trap by choosing neither, and reframing its rights claims on libertarian rather than egalitarian arguments.

In reality, the discursive battle between the ERA-focused groups and the worker-focused groups was even more complex than this dichotomy suggests because both invoked both understandings of equality for women. Their efforts illustrate concretely how the indeterminacy of the idea of equality, and specifically of the idea of

47. The Women's Trade Union League formed in 1903 and was "the first national body dedicated to organizing women workers." PHILIP S. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM COLONIAL TIMES TO THE EVE OF WORLD WAR I 120 (1979).

48. MAURINE WEINER GREENWALD, WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES 39 (1980).

49. *See generally* Nancy F. Cott, *Historical Perspectives: The Equal Rights Amendment Conflict in the 1920s*, *in* CONFLICTS IN FEMINISM 44–59 (Marianne Hirsch & Evelyn Fox Keller eds., 2016).

gender equality, shaped U.S. politics and law in the early twentieth century. The problem was less the movement than what were understood to be the parameters of "equality."

A. The Women's Movement for Citizenship

What was known then as "the woman's movement" pivoted after suffrage was achieved. Organizations seeking suffrage disbanded, and one—the Congressional Union—essentially reconstituted itself the next year as the National Women's Party (NWP), with the goal of eliminating laws that perpetuated the residual effects of coverture and restricted women in a variety of arenas. The NWP initially hoped to convert women's votes into support for legislative repeal of discriminatory laws. When that voting bloc failed to materialize, the NWP dove into an ultimately futile effort to achieve the same result with an Equal Rights Amendment.

The ERA was designed to use the scope and power of the Supremacy Clause to remove all remaining legal disabilities that applied to women. It was of a piece with the Nineteenth Amendment, which rectified the omission of women from the scope of the Fifteenth Amendment by guaranteeing the right to vote regardless of sex. The ERA's function would have been to correct for the exclusion of women from the scope of the Fourteenth Amendment by effectively expanding the Equal Protection Clause to reach inequality based on sex.

The ERA campaign continued the movement's focus on state actors, political citizenship, and—because so many of the laws to be attacked were grounded in family law—especially on the linkage between government and family. Uniquely for women as a class, unlike groups demarked by racial or ethnic bias or economic status, the family was a major institutional factor in the vectors of subordination.[50] The post-Nineteenth Amendment effort to enact an ERA would have, and was intended to, build on the understanding that, to be meaningful, political citizenship had to encompass the democratization of family and marriage.[51]

In their public advocacy of the ERA, NWP leaders referred almost exclusively to family law issues, as evident in the debate-style features on the disputes among feminists over strategy published by

50. Hunter, *supra* note 2, at 82, 85–86, 90–92, 95–96; Thomas, *supra* note 8, at 369–70; CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 165–67, 175 (1980).

51. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 7, at 473.

popular magazines in the decade after the Nineteenth Amendment.[52] The pieces written by NWP spokeswomen emphasized the imperative to eliminate state laws that privileged the authority of husbands over the bodies, domicile, and property of wives, as well as the father's entitlement to legal control of children. The ERA held the promise of achieving this goal with one effort rather than the multiple and repeated campaigns required to change laws in each state, thereby replacing the long state-by-state campaign to enact Married Women's Property Acts, an effort that had begun before the Civil War and continued after the Nineteenth Amendment.[53]

In the first years after suffrage was won, Congress responded positively to ameliorative legislation for women framed in different ways. "Equal treatment" arguments prevailed in the successful campaign by a coalition of women's groups to enact the Cable Act in 1922, which eliminated the disparity in the use of marital status to determine citizenship. On a parallel track but using maternalistic arguments, the same coalition secured enactment and continuation for several years of the Shepherd-Towner Act that provided services to pregnant women and infants.[54]

Other than the legal incidents of marriage, jury service was the issue that continued longest and most clearly bridged family law and citizenship status after suffrage was secured. In general, states relied on voter rolls to generate jury lists, and logic and precedent supported the argument that once women had won equal voting rights under the Nineteenth Amendment, they should be equally subject to and eligible for jury service.[55] Nonetheless, the mean length of time after suffrage before states adopted equal treatment provisions for women on juries was 21.7 years.[56]

The jury service effort produced both litigation and legislative battles, which were fought by women's rights advocates on grounds of both equal treatment principles and the value of different perspectives associated with women jurors. Most campaigns were directed at state legislatures. Litigation challenges arose, but most

52. *See, e.g.*, Hill & Kelley, *supra* note 2; Inez Haynes Irwin, *The Equal Rights Amendment: Why the Woman's Party Is for It*, GOOD HOUSEKEEPING, Mar. 1924, at 18.

53. DEGLER, *supra* note 50, at 332–33.

54. COTT, THE GROUNDING OF MODERN FEMINISM, *supra* note 12, at 98–99.

55. Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2183–85 (1993).

56. HOLLY J. MCCAMMON, THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT 192 (2012). McCammon references one movement participant as saying that the effort to change jury service laws required something very like a second suffrage campaign. *Id.* at 3.

of those were brought by (typically male) defendants appealing a criminal conviction, with no apparent participation by women's groups.

What is most noticeable about the legislative campaigns was the willingness of advocates to blend the positions on both goals and framing. Although they disagreed about whether to seek a jury service only bill or a blanket ERA-style bill, the two sides did not undercut each other in negotiations with state legislatures, as did their counterparts who worked on proposals for the ERA in Congress.[57] They also displayed a willingness to shift back and forth between equality and difference frames, unlike the much more tenacious adherence to one argument or another that characterized disputes over protective labor laws.

Organizationally, the equal jury law advocates appear to have operated with very little national direction.[58] State chapters of the League of Women Voters (LWV) led the effort in most places, a group that resembled the NWP in its middle-class, essentially all-white membership and that tended to favor an equal treatments frame for its arguments.[59] Unlike the NWP, however, it did not prioritize the goal of ERA-style blanket bills over specific legislation such as jury service bills. But as they operated in legislative venues at the state level, the cluster of women's groups involved were usually flexible on both points.

Exceptions to this pattern occurred in a handful of states when significant tensions over goals arose within the coalition of women's groups. But the effect appears not to have been seriously negative; the fine-tuning of arguments to counter the argument frames of local opponents may have amounted to "productive conflict" that was a net benefit to the coalition.[60] And even in those states, there was a significant period of time in which groups that prioritized different goals collaborated.[61]

In the end, only one state—Wisconsin—enacted a blanket ERA-style bill,[62] but the equal treatment frame was nonetheless validated. An analysis of framing strategies used in fifteen state-level

57. The process of drafting the ERA produced months of intensive wrangling among organizations and the lawyers advising them. Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital*, 1905–1923*, 78 J. AM. HIST. 188, 203–22 (1991).

58. MCCAMMON, *supra* note 56, at 230.

59. SUSAN D. BECKER, THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS at 204–11 (1981).

60. MCCAMMON, *supra* note 56, at 227–28.

61. *Id.* at 79, 101–07.

62. *Id.* at 131–35.

campaigns for equal jury service laws between 1911 and 1967 found that arguments based on women's differences from men constituted approximately twenty-five percent of the recorded examples of framing.[63] Arguments based on the concept that women and men should have equal rights and duties with respect to jury service were not only more frequent but also more likely to succeed, to a statistically significant degree, than arguments based on the theme that women brought unique perspectives to jury service.[64]

The "equal treatment" frame also dominated arguments in state courts as well as legislatures but it was rarely successful.[65] In states where advocates sought to use litigation to achieve equality of jury service, courts unanimously ruled against them. The courts rejected any version of an equality analysis, usually justifying their holding with a finding of no legislative intent to include women within the parameters of jury statutes, a narrow reading of the Nineteenth Amendment as concerning only the vote, and the reiteration of the inapplicability of the Reconstruction Amendments to questions of discrimination based on sex.[66] Litigation successes occurred when the issue presented was the validity of a prior legislative enactment that had extended jury responsibilities to women.[67]

Litigation was also pursued for secondary goals. In the handful of jury service cases in which the NWP participated, organizational records show that the NWP's motivation for litigation was often more to build publicity around the arguments that they were advancing in state legislatures than to win the case at hand.[68] Their perspicacity may have derived from personal or institutional memory of the Reconstruction era efforts to win a right to vote under a Fourteenth Amendment theory, an effort that one political scientist described as a strategy in which litigation was used primarily as a method to gain greater public visibility for suffragist arguments.[69]

The point is not the absence of consistency or of philosophical purity, which in politics is probably impossible and almost certainly at times counterproductive, but the alignment of which approach

63. Holly J. McCammon et al., *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements*, 72 AM. SOCIO. REV. 725, 728 tbl. 2 (2007).

64. *Id.* at 740.

65. Brown, *supra* note 55; Richard F. Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Right*, 9 AM. U. J. GENDER SOC. POL'Y & L. 97, 117 (2001).

66. *See, e.g.*, Commonwealth v. Welosky, 177 N.E. 656 (Mass. 1931).

67. MCCAMMON, *supra* note 56, at 61 n.5.

68. Hamm, *supra* note 65, at 116–17.

69. KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 56–57 (1980).

was more successful in which (legislative versus litigation) venue. One reason that may help explain why the sameness/equality argument made much less progress in courts than in legislatures is the background law on women's family responsibilities. Courts adjudicating family law disputes invoked gender as ordained by nature and the need for "family harmony" to reject wives' claims for independent rights to material goods or the indicia of separate legal status. A discourse of domesticity crowded out rights arguments, allowing courts to effectively delegate authority to the family as an intermediary lawmaking institution.

The imprimatur for domesticity flowed directly from the Supreme Court, where it had begun in *Bradwell v. Illinois*[70] and *Minor v. Happersett*,[71] and persisted for half a century.[72] As late as 1961, the U.S. Supreme Court perpetuated the domesticity rationale in holding that there was no federal constitutional barrier to exclusionary or differential laws regarding women on juries,[73] a ruling that was not reversed until 1975.[74]

Initially, the difference in results between legislative and judicial venues seems counterintuitive. One might expect that judges—especially if not elected—would be more receptive than legislators to politically or socially disruptive arguments. But, in a moment of changing norms, a wall of negative judicial precedent—even if not binding—may shift the balance in the relative appeal to movement advocates of legislative and litigation avenues. Especially when one is seeking an under-the-radar approach, legislation offers its own set of advantages. A key difference between the venues is intrinsic to each institution: courts must give reasons as well as reach outcomes. Members of legislatures can more easily hide controversial results by alluding to collateral reasons for their actions and avoid explicitly endorsing as radical a principle sex equality was then. In addition, state-level legislative contests may be more manageable because there are relatively low stakes involved. There is no doctrine of preclusion to prevent re-argument of issues that did not prevail in previous years, and more personalized and informal contact with both decisionmakers and opponents is the accepted norm.

The judicial discourse of domesticity proved to be strikingly resilient. Equality advocates had little success in court well past the middle of the twentieth century. In *United States v. Yazell*, for

70. 83 U.S. (16 Wall.) 130 (1872).
71. 88 U.S. (21 Wall.) 162 (1875).
72. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948).
73. Hoyt v. Florida, 368 U.S. 57 (1961).
74. Taylor v. Louisiana, 419 U.S. 522 (1975).

example, the Supreme Court in 1966 ruled that there was no substantial national interest in the federal government adopting contract enforcement principles contrary to the coverture-based state law which was then still applicable in twelve states.[75] Referring to the "peculiarly local jurisdiction of these States"[76] and the "peculiarly domestic" nature of the laws,[77] the Court found no reason to countermand "the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements . . . ."[78] Like what critical race scholars have called "the Confederate narrative" that persisted in law long after the Civil War,[79] the discourse of domesticity expressed and helped maintain legal structures of subordination.

B. The Women's Movement for Economic Rights

The steady growth, beginning in World War I, of women working outside the home gave visibility and recognition to what became the most significant branch of the women's rights movement early in the century. Economic citizenship issues arose in two kinds of organizations: labor unions and progressive women's reform organizations, most prominently the WTUL and the NCL.[80] The focus on workplace issues brought pressure to bear on the state-economy nexus of the iron triangle, specifically on the options for entry into the paid labor market and the conditions under which women worked outside the home.

This branch of the movement prioritized the enactment of protective labor laws designed for women factory workers that set a maximum number of hours in the work week, a minimum hourly wage, restrictions on night work, and regulated a variety of other conditions of employment. The NCL agreed with the NWP on the need to eliminate abuses of women tolerated by traditional family law but argued that the NWP approach was too rigid in its insistence on a sameness approach across the board: "Sex is a biological fact. The political rights of citizens are not properly dependent upon sex, but social and domestic relations and industrial activities are. . . . Women will always need many laws different from those needed by

75. 382 U.S. 341, 351–53 (1966).
76. *Id.* at 353.
77. *Id.* at 358.
78. *Id.* at 353.
79. *See generally* Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301 (2017).
80. WOLOCH, *supra* note 12, at 209.

men."[81] At a 1921 conference called to determine the direction of women's rights advocacy after suffrage, the split over this issue became irreparable.[82] The disagreement between the ERA advocates and the worker-centered organizations about protective labor laws dominated women's rights political debates until the 1960s.[83]

Where the NWP saw protective laws as providing incentives for employers to hire male workers to avoid the restrictions,[84] the NCL and its allies viewed the NWP as taking the wrong side in the class war.[85] Both sides were at least partially correct. Support for the protective legislation did often come from employers who were willing to accept a floor for women's wages so long as it was sufficiently low, and reliably preserved a cheap source of labor for undesirable jobs, and from male workers who understood that the protections effectively eliminated competition by women for work that may have been more physically demanding, but also was more highly paid. Union support for protective laws derived from mixed motives, some supportive of women's rights, others seeking to preserve higher pay for men and the exclusivity of "men's jobs."[86]

Although the NCL and labor union women stressed that protective legislation was a necessary means to shield the most vulnerable workers, they also lacked a coherent conceptual model of gender equality. Unions held out the hope of providing "the greatest good [for] the greatest number,"[87] but most were led and controlled by men with little regard for women workers, whose numbers fell far short of half of the membership. The excesses of capitalism, or capitalism itself, loomed for the unions as an ideology to be fought. By contrast, gender was seen not as an ideology but as an attribute of nature. When confronted by ERA advocates with examples of protective laws that harmed women, women worker-oriented groups

81. Hill & Kelley, *supra* note 2.

82. The NWP established itself as an organization focused solely on equality between the sexes in significant part through its rejection in 1921 of the concerns as to race, international peace, and socialist politics presented by delegates, such as Florence Kelley. COTT, THE GROUNDING OF MODERN FEMINISM, *supra* note 12, at 68–71.

83. *See infra* text accompanying note 152.

84. The NWP endorsed laws that extended the same wages, hours, and other limitations to all workers, but unions at the time believed such comprehensive protections to be politically infeasible.

85. One particularly acute moment of such tension was when women in the NWP collaborated with business interests to produce a Supreme Court brief advancing a liberty of contract theory grounded in the absence of a need by modern women for protective laws, an argument successfully deployed in support of the invalidation of a minimum wage law in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

86. FONER, *supra* note 47, at 339–96.

87. COTT, THE GROUNDING OF MODERN FEMINISM, *supra* note 12, at 136.

often responded with proposals to fix each situation one-by-one with "specific bills for specific ills."[88]

Social conventions of male dominance depended on a family structure that exemplified and perpetuated those norms, and that family structure, in turn, depended on higher wages for men.[89] Union women were divided among themselves in their allegiance to the wife-mother model as primary life aspiration and public policy goal.[90] It was generally, and probably correctly, believed that most women union members wanted a heteronormative home life as well as better working conditions in paid jobs. Women in union leadership positions navigated these conflicting interests by trying to avoid the politics of family, the zone in which ERA advocates sought the greatest change. The inseparability of family and economic systems rendered this avoidance ultimately impossible for groups affiliated both with workers and the ERA.

The unions' belief that a fair exchange for one's labor was the most important issue for all workers produced a gender-neutral rhetoric that masked a gender-stratified reality. It contained no understanding of the vestiges of coverture or the gendered nature of industrial capitalism but was more sensitive to the economic power relations to which the NWP women paid less attention. The union approach was more successful than the ERA campaign in generating a universalist vocabulary, even if at that time there were many fewer women in the workforce—and certainly in unions—than there were women in marriage.

But even if unions' rhetorical frame was universalist, their actual demands perpetuated material effects skewed by gender. A protected status for women structured wages in a way that buttressed men's status as the primary wage earner. Women's minimum wage laws amounted to a kind of social pay—wages were set at a level thought to provide sustenance income for an individual woman. The family wage—also socially determined—was thought to provide men with remuneration that could support a wife and children. Both so-called women's wages and the family wage represented a negotiated midpoint between the ideal social policy and a market-based approach. Neither corresponded (or was meant to) with any understanding of equality.

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88. This phrase persisted in the arguments by ERA opponents for decades. *See Equal Rights Amendment: Hearing on H.J. Res. 75 Before the H. Comm. on the Judiciary*, 68th Cong., 2d Sess. 43, 46 (1925); HARRISON, *supra* note 10, at 39.

89. ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES 9, 122 (1990).

90. *See* BECKER, *supra* note 59, 122–23.

The ERA campaign continued to shrink, with support for it drained by the economic crisis of the Depression, the urgency of World War II, and a postwar surge of suburbanization, until a new generation of feminists revived it in the early 1970s. By contrast, the focus on workers and economic citizenship during the New Deal contributed to a growth of unions, and the war brought a massive need for more women in the paid workforce. The worker-centered branch of the women's rights movement grew in vitality as the ERA campaign faded.

Throughout this period, the NCL and union women dug into a "difference," as opposed to an "equality" politics. Although the justifications for most selective protections for women essentially died with the enactment of nationwide minimum wage and maximum hour laws for men as well as women,[91] the NCL and unions continued to support the categorization of women as workers needing special legal protections. Path dependence and lingering internecine battle wounds among the women's rights advocates made the positions difficult to change, as well as the extent to which protective laws had become popular, for different reasons, among both men and women workers.

Beyond the specifics of protective laws, the labor union movement provided women with a parallel model of governance—"the workplace constitution"—and an alternative concept of equality, grounded in claims for economic citizenship.[92] The unions' concept of "industrial equality" referred to the achievement of at least a somewhat level playing field between men and women, secured by special treatment laws protecting women wage-earners.[93] Correlatively, unions framed the concept of "industrial liberty" as a negative liberty shield against government power.[94]

On this key question of relationship with the state, worker-oriented women's rights groups, such as the NCL, split with unions. Unions sought and needed a shield from the state for their institutional existence, to allow them to organize workplaces and bargain collectively without repression by employers. They also sought semi-autonomy from government in order to secure social welfare

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91. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219; *see* DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA 96 (2004); STORRS, *supra* note 33, at 177–79.

92. *See generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014).

93. WOLOCH, *supra* note 35, at 131, 134; Sybil Lipshultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 YALE J.L. & FEMINISM 131, 158 (1989).

94. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 7 (1991).

type benefits through collective bargaining, so that workers would depend on their unions, rather than on government, for important benefits. Unions sought to provide both economic power and self-governance for workers, reflecting a rough calculation that union-management negotiations would determine male wages, while government could set minimums for women's jobs that men did not want.[95] The NCL, by contrast, adopted a much more cooperative attitude toward the state and called on government to furnish social insurance-type benefit programs regardless of the nature of the individual's relationship to the workplace.

Concretely, this philosophical difference facilitated the development of an institutional capacity for rights advocacy that distinguished women workers' rights groups from the other two branches of feminism. The collaboration among worker-centered women's rights advocates inside and outside unions led to the establishment of an ongoing institution within government that was essentially the voice of women in labor. It also facilitated the development of a pipeline of progressive feminists who led it and other social insurance-oriented agencies for decades. That new institution was the Women's Bureau of the Department of Labor, which opened in 1920 as an outgrowth of the influx of women into the non-domestic workforce during World War I. The Women's Bureau became the preeminent center for research on the status of American women workers. It was able to draw on resources for advancing the interests of women workers that the non-governmental groups did not have. It specialized in investigations of working conditions, data collection, and publication and dissemination of those findings.[96] Its Labor Advisory Committee functioned as a law and policy think tank for women's economic citizenship issues.[97]

The new pipeline that the Women's Bureau enabled was the steady migration of women leaders from workplace-related positions into the New Deal. Many women who worked in some capacity with the Women's Bureau during the 1920s later flowed into New Deal policymaking positions and helped to cement the role of social insurance in American policy and politics.[98] In terms of building movement capacity and sustainability, the instantiation of

95. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 83 (2001).

96. Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J.L. & GENDER 170, 194–96 (2008).

97. COBBLE, *supra* note 91, at 52.

98. WOLOCH, *supra* note 35, at 154.

feminist perspectives through the Women's Bureau in the Department of Labor paid countless dividends.

C. The Women's Movement for Sexual Autonomy

The third component of women's rights advocacy—the birth control movement—provides another distinctive example of how advocates used the mechanisms of the legal system in conjunction with a rights-oriented social movement. It was by far the most successful branch in the arena of litigation, an achievement likely attributable at least in part to its frequent positioning as defendants in criminal prosecutions rather than as plaintiffs in constitutional challenges, and to the benefits of using free speech arguments rather than pressing rights explicitly grounded in gender specifically or equality more generally. The political message that emerged from birth control advocacy was at once anti-statist, liberal, and feminist, with each of these themes dominating at particular points in time.

The demand for birth control can be traced to what the authors of the Seneca Falls Declaration and other early feminists described as a right to self-sovereignty. Emma Goldman reframed self-sovereignty as grounded in a left anarchist ideology of personal freedom.[99] Margaret Sanger began with a leftist political analysis, oriented to workers' rights groups, and went on to build a social movement centered on the needs of women that added dimensions of health and sexual autonomy to citizenship and economic justice issues.[100] Sanger developed a political framework that appealed to bohemians, medical professionals, wealthy liberals, and eugenicists as well as to women concerned with gender equality. Over time, her arguments grew more conservative, initially having been grounded in sexual freedom and public health frameworks, and later including anti-immigrant and racist themes as well.[101]

The legal architecture for suppression of birth control information and devices lay in federal and state statutes that defined such materials as categorically obscene.[102] Birth control advocates

99. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA 215–17 (1990); DAVID M. KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER 10–12, 74 (1970).

100. GORDON, *supra* note 99, at 203–04, 217–18, 227; KENNEDY, *supra* note 99, at 15–17.

101. GORDON, *supra* note 99, at 222–26, 239–40, 245–47; KENNEDY, *supra* note 99, at 107.

102. In 1873, Congress enacted a law, known colloquially as the Comstock Act, that criminalized "obscene literature and articles of immoral use." It prohibited use of the mails to transmit contraceptives and information about contraception. Comstock Act of 1873, ch. 238, 17 Stat. 598. A number of states enacted copycat laws. Alvah W. Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 LAW & CONTEMP. PROBS. 593, 600 (1960).

pursued two strategies: statutory repeal and challenges in court. The group using the first approach, led by Mary Ware Dennett, made no headway against legislators who would not publicly criticize the suppression of behavior commonly considered to be sexually immoral.[103] The second, pursued by Sanger, successfully used litigation in increasingly sophisticated ways.[104]

The first phase of birth control litigation grew out of Sanger's prosecution for violation of the New York state obscenity statute after she opened the first American birth control clinic in 1916. Her lawyer, Jonah Goldstein, offered the constitutional argument that the prohibition of birth control access denied women the right to enjoy sexual relations without fear, in violation of liberty rights. In addition, in a variation on the Brandeis-Goldmark brief's use of social facts, he sought to introduce the testimony of physicians and women who had used Sanger's clinic to demonstrate the physical and emotional effects of unwanted pregnancy.[105]

Neither the trial judge nor the appellate court took the constitutional argument seriously, but the latter reinterpreted the statute in a way that transformed the legal dynamics of the birth control movement. The New York Court of Appeals ruled that birth control information and services for women could fall within the disease prevention exception to prosecution on the theory that pregnancy by itself (*i.e.*, without sexually transmitted infection) could constitute a disease.[106] Even though limited to doctors, the new interpretation of the obscenity statute opened the space for women's access to birth control to become a reality.

Thus, the keystone to the first phase of birth control rights was replacement of sexual radicalism by deference to medical authority. The judiciary granted physicians the power to provide birth control without fear of prosecution, while also not necessarily upsetting the culture of shame associated with women seeking to have sex without risk of pregnancy. The medical deference model aligned as well with other early twentieth-century trends: toward greater professionalization of medicine and the concentration of power under the control of formally trained doctors.[107]

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103. KENNEDY, *supra* note 99, at 76–77, 94, 221–24.

104. GORDON, *supra* note 99, at 292; KENNEDY, *supra* note 99, at 226–40.

105. ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 152–53, 157 (1992). Goldstein's brief on appeal cited *Muller v. Oregon*. *Id.* at 529 n.6.

106. People v. Sanger, 118 N.E. 637 (N.Y. 1918).

107. *See generally* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY 79–144 (1984).

The New York decision also brought into focus a third method for eliminating repressive statutes: not by repeal or by invalidation on constitutional grounds but by reinterpretation of statutory text. By construing statutory language, a court leaves open the possibility that the outcome of its ruling may be effectively overruled by the legislature to mandate a different interpretation of statutory text, thus making the judicial decision less binding and less normatively weighty. At the same time, such a decision establishes a new status quo: legislators who were willing to accept the new meaning, but not willing to go on record by voting to change the old meaning, had the perfect solution; they could do nothing.

And on the surface, nothing was precisely what happened after the *Sanger* decision, not only in the New York legislature but in state legislatures around the country. By the late 1930s, birth control advocates claimed that physicians in forty states were "free to act in the field of contraception."[108] In virtually every state, however, the rule of law was actually more a gentlemen's agreement of silence.[109] As a result, by 1930, fifty-five clinics had opened in twelve states.[110] By 1944, approximately 800 contraceptive service providers existed, located in Planned Parenthood and other nonprofit clinics, public health agencies, and hospitals.[111]

With doctors shielded from criminal liability, advocates undertook the second phase of birth control litigation as an attempt to create a uniform national rule and to bring more pressure on physicians to provide their patients with access to contraceptives.[112] On the surface, it addressed a supply-side problem: even if prescribed by doctors, some devices were not available for legal purchase because of restrictions on use of the mail. In the early 1930s, federal courts had ruled that the government could bar condoms from the mail only if prosecutors demonstrated that their intended use was only for contraception and not disease prevention, an impossible burden of proof, which effectively barred restrictions on shipments of condoms.[113] But devices that women could use on their own remained at risk of confiscation.

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108. Frederick A. Ballard et al., *Contraceptive Advice, Devices and Preparations*, 108 [J]AMA 1819, 1820 (1937).

109. Harriet F. Pilpel & Abraham Stone, *The Social and Legal Status of Contraception*, 22 N.C. L. REV. 212, 220 (1944) ("only one of these laws has ever been changed").

110. GORDON, *supra* note 99, at 266.

111. Pilpel & Stone, *supra* note 109, at 215–16.

112. *See* KENNEDY, *supra* note 99, at 240–50.

113. Davis v. United States, 62 F.2d 473 (6th Cir. 1933); Youngs Rubber Corp., Inc. v. C.I. Lee & Co., Inc., 45 F.2d 103 (2d Cir. 1930).

By this point, Goldstein had become a judge, and Sanger sought the assistance of Morris Ernst, the ACLU general counsel who had begun to build a reputation for winning acquittals in obscenity prosecutions.[114] He had successfully defended two birth control advocates, one indicted for violation of the Comstock Act for sending information through the mail[115] and the other prosecuted under the Tariff Act for materials imported into the U.S.[116] In each, Ernst relied on extensive expert testimony as to the characteristics and social value of the information, and in each, the court rejected a First Amendment challenge to the suppression of speech but interpreted the statute to rule that the material in question did not fall within its definition of obscenity. The strategy culminated in what became Ernst's most famous case: the 1934 ruling that James Joyce's *Ulysses* could not be barred from the country on the ground that it was obscene.[117]

Sanger and Ernst developed a test case for birth control law that combined the doctor's only defense with a statutory argument that contraceptive devices, as well as information, fell outside the scope of federal obscenity law.[118] They facilitated prosecution in the case—*United States v. One Package*—by ensuring that federal authorities would seize a shipment of Japanese diaphragms that were in transit to Dr. Hannah Stone, head of the Sanger-affiliated Birth Control Research Bureau in New York. Again relying on physician testimony, Ernst won a ruling from the Second Circuit that the prohibition of obscenity in the Tariff Act did not apply to "things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the wellbeing of their patients."[119]

The Solicitor General declined to seek Supreme Court review, leaving the Second Circuit decision governing imports through New York, the nation's largest port of entry. Taking their cue from the Department of Justice decision not to appeal the Tariff Act case, federal prosecutors stopped prosecutions under the Comstock Act as well since both statutes used the term "obscene."[120] *One Package*

114. Alden Whitman, *Morris Ernst, 'Ulysses' Case Lawyer, Dies*, N.Y. TIMES, May 23, 1976 at 40.

115. United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

116. United States v. One Obscene Book Entitled "Married Love," 48 F.2d 821 (S.D.N.Y. 1931); United States v. One Book Entitled "Contraception," by Marie C. Stopes, 51 F.2d 525 (S.D.N.Y. 1931).

117. United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

118. CHESLER, *supra* note 105, at 331–73; KENNEDY, *supra* note 99, at 248–50.

119. United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936).

120. Ballard et al., *supra* note 108, at 1819–20.

thus effectively eliminated enforcement of federal obscenity laws against birth control providers.

One Package also strengthened the gentlemen's agreement that grew of the *Sanger* decision in New York.[121] There were, however, two exceptions. Pushback came in Massachusetts and Connecticut, where state courts rejected the statutory interpretation strategy—both the "doctors only" exception and construction of the meaning of "obscene."[122] By World War II, these were the only two states where prosecutions for birth control materials or information continued.[123]

Of the three branches of the women's rights movement, birth control advocates—both the (mostly women) leaders and the (mostly male) lawyers—were the least constrained in their framing of the issues, which one might characterize as highly adaptive or, less benignly, relentlessly opportunistic. The movement's incrementalistic litigation efforts were far more successful than its legislative campaigns. In particular, the "doctors only" strategy served several functions simultaneously, illustrating how the structure of legal argument can shape broadly cultural as well as narrowly legal ideas. In addition to its doctrinal impact, the "doctors only" argument created a new narrative in which professional, male authorities asserted scientific bases for their defense of innocent women facing physical harm; and it provided a rhetoric of reassurance that a dependable male institution would protect society against unconstrained female immorality.

D. Summary

Women's rights advocacy in the years immediately prior to and after the Nineteenth Amendment reflected a moment of great flux in constitutional history and social movement development. The Reconstruction Amendments had redefined citizenship and equality but had ducked the question of gender with regard to both, deferring instead to a concept of family as quasi-sovereign and semi-autonomous with regard to the state. The use of First Amendment arguments by left-liberal lawyers in other contexts opened up

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121. Less than a year after the decision, the American Medical Association voted for the first time to officially recognize birth control as a legitimate part of medical practice. William L. Laurence, *Birth Control Is Accepted by American Medical Body*, N.Y. TIMES, June 9, 1937 at 1, 26.

122. Pilpel & Stone, *supra* note 109. Voters in Massachusetts also twice rejected referendum proposals that would have liberalized state law. *Id*.

123. In 1965, the Supreme Court eventually forced these two states into what had become the new national consensus. Griswold v. Connecticut, 381 U.S. 479 (1965).

avenues for the birth control movement. Overall, women's rights advocates developed distinctive positions on the relationship between gender and law.

The broader context held multiple cross-currents. Suffrage had so powerfully reshaped the discourse of gender that white women's claims to economic citizenship as independent workers and to sexual pleasure as autonomous actors became thinkable. At the same time, racism so powerfully poisoned political discourse, including concepts of women's rights, that broad-based opposition to equality was strengthened and the naturalization of hierarchy reinforced. The capacity of Progressives to leverage the power of the state for social goals waned in the period between the Nineteenth Amendment and the New Deal. As the nation grew more conservative in the latter part of the 1920s, right wing reaction manifested itself in the resurgence of the Ku Klux Klan[124] and enactment of harsh quotas in the 1924 Immigration Act.[125]

The following chart summarizes the internal dynamics in women's rights advocacy after adoption of the Nineteenth Amendment:

124. *See generally* THOMAS R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S (2011).

125. *See generally* JIA LYNN YANG, ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924–1965 (2020).

Social Movement Theory and Women's Rights Advocacy from Suffrage to the Second Wave

	ERA / "sameness" theory of equality	**Worker-focused / "differences" theory of equality** **(1) Unions** **(2) NCL**	**Birth control/ sexual autonomy**
Theory of change	Democratize marriage; transform family and divorce law	(1) Transfer economic power to workers (2) Transfer economic power to women workers	Liberate individuals from state interference with sexual decisions and conduct
Relationship to state	Reform family law	(1) Transfer state powers of governance to unions (2) Reform the state to enhance protections for vulnerable women workers	Decriminalize and deregulate
Relationship to market	Reform employment law	Share control of the economy between workers and the state as well as the private sector	Deregulate as to reproductive and sexual medicine
Relationship to family	Confront	Accommodate	Allow private decisions to produce change in norms
Primary venues of legal advocacy	State legislatures, Congress	(1) Legislatures (2) Executive Branch during New Deal	Federal and state courts, state legislatures
Discourse of oppression	Domesticity	Free contract	Morality
Method of grassroots mobilization	Direct action	(1) Strikes and strike support (2) Lobbying	Clinic services

IV. STATE, FAMILY, MARKET

Equality for women proved much easier to invoke than to define. If equality remained within the frame of voting and formal political citizenship, it was possible to imagine, effectuate, and defend. Equality in the context of family or sexuality, by contrast, fell short on all three measures. Advocates needed a framework for the theory and praxis of gender equality that applied across the board, but legal institutions are seldom sufficiently capacious to encompass such range in a single concept. Nor were women's rights advocates able to offer one.

The multiple meanings of women's equality demonstrate how contingent the concept of equality is on context and time. The history of the women's legal advocacy illustrates that equality is not one idea that can be applied to different social groups, with minor variations, as it is interpreted and taught in constitutional law. The women's rights movement experience in the early twentieth century shows that a melding, even a scrambling, of contradictory ideologies contributes to the popular discourse of equality. Understanding it as the linear development of a standardized concept of equal rights is both erroneous and misleading.

Today, law and a culture of civil rights have condensed equality into one conceptual mass, which typically manifests in law in two modalities: legislatively by the enumeration of protected categories and judicially by official suspicion of certain legislative classifications. Together, these two devices comprise what I am calling the civil rights paradigm. Going as far back as Reconstruction, and especially since civil rights statutes began to appear in significant numbers after World War II, the chief goal of equality advocates has been to add new categories and classifications to the list. This is the version of equality that dominates the legal system, major institutions, market actors, and popular understanding.

Women's rights organizations, however, lacked the essential ingredients to draw on that conceptual universe. There was neither a working and workable shared definition of gender equality nor was there widespread legibility of women as a "minority," *i.e.*, a political and social group that was defined by its legal status.[126]

126. I am using the term "minority" to include both an internal and external dimension. The internal, subjective dimension refers to a group of persons experiencing a sense of "weness" typical of civil rights constituencies. The external dimension refers to the understood similarity among members of the group, including a socially constructed or accepted pattern of unequal treatment. *See generally* Helen Mayer Hacker, *Women as a Minority Group*, 30 SOC. FORCES 60 (1951) (one of the first applications in sociological literature of the term "minority" to women).

The Supreme Court accepted the legitimacy of using judicial power to invalidate majoritarian legislation in 1938 in the famous Footnote Four of *United States v. Carolene Products Co.*,[127] by acknowledging the democracy deficit that attaches to minorities. Women, however, did not comfortably fit the *Carolene Products* analysis because they are not a numerical minority, and despite the ongoing campaign for equal rights under law for women that followed the adoption of the Nineteenth Amendment in 1920, they were not considered analogous to the categories of race or religion for purposes of the first antidiscrimination statutes. Today, women are often subsumed in a social and cultural category of "minority" in popular discussion.

If one re-imagines women's equality as a claim for justice on behalf of a numerically large group united more by its subordinate relationship to power structures than by any shared characteristics, economic class might have been the better analogy. That speculation has to remain counterfactual, however, because the bulk of the labor movement at that time did not welcome women as equal comrades. One can imagine that this shift in analogy might have opened up the concept of legal equality for women to deeper understandings of the role of economic status in equality under law. But neither constitutional discourse, with its heritage of the Reconstruction Amendments excluding women as a class and its *Carolene Products* emphasis on minorities unable to engage in pluralist bargaining, nor the labor movement, with its concept of equality as exogenous to the state, made such a possibility even thinkable.

Strategically and conceptually, the divergence between the three branches of feminism rendered the articulation of equality as a master frame for women's rights impossible during this period. The ERA and worker-focused branches demonstrated the shortfalls of addressing one side of the iron triangle—the state-family or the state-economy side—without tackling the others. Operating on a parallel doctrinal track, but without addressing equality head-on, the birth control movement more successfully engaged the family-market axis but only by relying on medical authority.

In movement organizational terms, each major component of women's rights advocacy had a comparative advantage. The NWP proposed to eliminate discriminatory state laws with a constitutional amendment, building on its track record of winning the Nineteenth Amendment; unions brought their knowledge and skills in confronting the power of capital; worker-focused women's groups,

127. 304 U.S. 144, 152 n.4 (1938).

such as NCL, expertly navigated positions of power within the state; and the birth control movement, largely through the ACLU and its affiliated lawyers, brought its growing ability to make successful constitutional arguments in the courts. But the multiple comparative advantages together created a huge minus: the inability to make a coherent legal equality argument for a unified concept of women's rights across issues and zones of political, economic, and social life.

V. BRIDGE DISCOURSES

In 1920, when victorious suffragists celebrated the Nineteenth Amendment, and confidently turned to their next project, the relative power of the three components of women's rights advocacy movements had already begun to shift away from them. Campaigners for the ERA continued during the 1930s and 1940s to battle NCL and other feminists, but support and enthusiasm for the ERA at the grassroots level ebbed. The ascent of women workers' concerns followed the increasing power of the New Deal and the labor movement. The birth control movement, just beginning in 1920, grew in power and influence as liberal First Amendment arguments were used to defeat restrictive contraception and obscenity laws but did not directly challenge the other two branches as to conceptualizations of equality.

Beneath the surface, even as the returning male veterans of World War II took or took back the well-paid industrial jobs that women had performed during the war, an even more important and longer lasting shift was occurring. After the loss of jobs in the immediate postwar period, the number and percentage of women working outside the home increased during the 1950s.[128] By 1960, key demographic indicators had reversed: marriage rates fell, the average age at marriage increased, the fertility rate began to decline, and the divorce rate was growing.[129]

A. Seeds of the Civil Rights Paradigm

The unprecedented numbers of women who came into the civilian workforce during World War II, many doing what had been considered to be men's jobs, brought the demand for equal pay into new

128. EUGENIA KALEDIN, MOTHERS AND MORE: IN THE 1950S, at 64 (1984).

129. ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 221 (1988); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 203 (1988).

prominence for the worker-focused women's rights advocates.[130] At the same time, racial justice advocates were developing the model for statutory civil rights law. The anti-discrimination paradigm in federal law initially emerged in pre-war Department of Interior regulations developed by Robert Weaver and Harold Ickes.[131] Its first prominent use came in an Executive Order against discrimination based on race (but not sex) in war-related industries, which established a Fair Employment Practices Commission charged with enforcing the Executive Order.[132] New York enacted the first statewide statute providing comprehensive anti-discrimination protection in the workplace based on enumerated protected characteristics in 1945, also covering race but not sex.[133]

Women in unions began to incorporate and adapt the civil rights approach. Ironically, this brought them substantively closer to the anti-classification position associated with the equality/sameness understanding advocated by the ERA supporters who opposed protective workplace laws for women. But although ERA advocates and women worker groups fought each other for decades over protective employment laws, the two camps had always agreed on the principle of equal pay for equal work. In normal times, the sex segregation of the workforce rendered this issue largely irrelevant: men and women rarely did the same jobs. Only with the emergency conditions of women performing "men's jobs" during wartime did the principle of equal pay acquire practical and political importance.[134]

The opposing camps within the women's rights movement had argued not only over what "equality" meant, but also, correlatively,

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130. Earlier, during the relatively short life of the National Recovery Administration, NCL (and NWP) had fought against the sex-based wage differentials that were built into the NRA codes at the beginning of Roosevelt's first term. STORRS, *supra* note 30, at 108. Once the codes, although discriminatory, were adopted, NCL organized workers to demand their enforcement and supported enactment by state legislatures of what were effectively minimum wage laws intended as a response to the economic emergency. COBBLE, *supra* note 91, at 112–13, 115–19, 121–22. This effort cemented both equality and difference women's rights advocates as sharing the same position as to unequal pay and also placed them in alliance with the efforts by the NAACP to stop race differentials in the same codes.

131. *See generally* JILL WATTS, THE BLACK CABINET: THE UNTOLD STORY OF AFRICAN AMERICANS AND POLITICS DURING THE AGE OF ROOSEVELT (2020); Walter B. Hill, Jr., *Finding a Place for the Negro: Robert C. Weaver and the Groundwork for the Civil Rights Movement*, PROLOGUE, Spring 2005, https://www.archives.gov/publications/prologue/2005/spring/weaver.html.

132. Exec. Order 8802, 6 Fed. Reg. 3109 (June 27, 1941).

133. Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 420 (1945).

134. Equal pay legislation was first introduced in Congress in 1945. COBBLE, *supra* note 91, at 51–52.

what constituted "discrimination."[135] Among union women, references to "discrimination" increased beginning in the 1940s in the context of women's war work, and gradually expanded in scope as some women began to see the old protectionist laws in that light.[136] In the late 1930s, the National Labor Relations Board began to deny requests by unions or employers to certify collective bargaining units that excluded women workers.[137] In 1942, two unions successfully brought General Motors (GM) before the National War Labor Board over its policy of paying women less than men for doing what had been men's jobs.[138] The GM suit led to the Board's promulgation of General Order 16 that endorsed equalization of male and female wage rates but made compliance voluntary.[139] Other Board decisions involving sex discrimination addressed issues of pay and seniority.[140]

State laws banning job discrimination based on race were enacted beginning in 1920 in Massachusetts and New Jersey, initially covering only specific categories of public sector jobs.[141] By 1945, fourteen states had at least one such law, amounting to thirty-eight enactments in all, nearly half of which were adopted during World War II.[142] Of the thirty-eight provisions, three included sex discrimination.[143] In addition, Michigan enacted a separate equal pay law for women.[144] By the end of 1945, three other states had followed New York in enacting comprehensive anti-discrimination laws;[145] one, New Jersey, included sex as a prohibited classification.[146] Between 1945 and 1964, only one other state adopted a law that included protection from sex discrimination.[147] Male union leaders often supported these laws on the ground that they would prevent employers from lowering the pay assigned to the jobs that men were expected to have when the war ended, and the War Labor Board

135. *Id.* at 62–65.
136. *Id.* at 88–92, 98–99.
137. Murray, *supra* note 133, at 398.
138. FONER, *supra* note 47, at 357.
139. *Id.* at 357–58. Framing the order to merely permit rather than require equal pay standards was justified as necessary under a Presidential directive to prevent wage inflation. On the same rationale, the Board postponed ruling in thirty other equal pay cases until its authority to order pay upgrades was restored. WILLIAM HENRY CHAFE, THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920–1970, at 156 (1972).
140. Murray, *supra* note 133, at 416–17.
141. *Id.* at 418.
142. *Id.*
143. *Id.* at 419 n.111.
144. FONER, *supra* note 47, at 359.
145. Murray, *supra* note 133, at 420.
146. COBBLE, *supra* note 91, at 257 n.95.
147. *Id.* at 89.

justified its endorsement of the equal pay principle as necessary for the maximum utilization of "manpower."[148] Problems in enforcement, however, exacerbated the spotty coverage and limited the laws' effects.[149]

After the war, sex segregation returned in force and stymied the campaign for equal pay. Employers refused to give up the cheap labor pool of women workers by setting pay based on the skill levels associated with the job. The expanded campaign to increase the pay for women and for women's jobs offered the opportunity for rapprochement between the two sides that had fought so many intramovement battles. Pursuing common ground gradually became easier as a new generation of leaders took over the feuding organizations. Forty years after a failed attempt to coalesce the branches of the women's rights movement immediately after suffrage,[150] women from the various wings of the movement tried again and succeeded.

B. Truce

The institutional mechanism for integrating women into the civil rights paradigm was the President's Commission on the Status of Women (PCSW), "the first effort on the part of the Federal government to address the question of women in American society" in a comprehensive way.[151] Created by President Kennedy in 1961, the PCSW was led by Esther Peterson, whom President Kennedy appointed as Director of the Women's Bureau after she had worked as a lobbyist at the AFL-CIO. Peterson's selection to lead the PCSW made her the highest-ranking federal official until that time to have an explicit women's rights portfolio in national politics.

Tensions that had never fully healed from the split between the ERA equal treatment wing and the protective labor laws difference wing initially dogged the members of the Commission. They were unable to agree on whether to endorse the ERA, and instead adopted a compromise position that the ERA "need not now be sought" because properly interpreted, the Fourteenth Amendment would bar discrimination.[152] Very little of the Commission report

148. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 92–93 (2002).

149. CHAFE, *supra* note 139, at 154–58; FONER, *supra* note 47, at 357–59; LICHTENSTEIN, *supra* note 148, at 93–94.

150. COTT, THE GROUNDING OF MODERN FEMINISM, *supra* note 12, at 66–72.

151. DEGLER, *supra* note 50, at 441.

152. AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 45 (1963).

addressed issues of race. In the end, it was organized modestly into goals and steps. Its only immediate concrete product was President Kennedy's issuance of a directive ending sex discrimination in federal jobs.[153]

But the Commission was nonetheless a turning point for women's rights. Although punting on the ERA, the Commission endorsed Pauli Murray's pathbreaking analysis under which sex was formulated as a minority-like classification entitled to coverage under the Equal Protection Clause. Inclusion as a protected characteristic in civil rights statutes proceeded on the same logic.[154] Murray's work on the Commission led to both the foundational law review article making this argument[155] and a memorandum to Congress that proved decisive in coverage of sex under Title VII of the 1964 Civil Rights Act.[156]

The analogy of sex to race has become the dominant analytic mode throughout civil rights law with regard to gender equality. Its adoption by women's rights advocates during the deliberations of the Commission and its acceptance by Congress during debates over the 1964 Civil Rights Act presaged the extension of that understanding of equality rights to other socially disfavored groups as well.

C. Childcare: The Missing Link

At Women's Bureau conferences in 1945 and 1946, delegates expressed the desire that ending discrimination against women workers be done in such a way as not to penalize women for motherhood.[157] Overcoming the last link in the iron triangle, that connecting family and the economy, has proven to be an insuperable political barrier for every wave of the women's movement. The difficulty in securing reasonably priced child care is its most acute contemporary manifestation.

There is a long history of efforts to reallocate the burdens of childcare from individual families to collective entities.[158] Like many of the organizations discussed in this article, the leading actors have been women leading groups with a membership largely composed

153. HARRISON, *supra* note 10, at 145.

154. AMERICAN WOMEN, *supra* note 152, at 44–45.

155. *See generally* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

156. MAYERI, *supra* note 10, at 22.

157. COBBLE, *supra* note 91, at 57.

158. *See generally* Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577 (2010).

of women. But childcare is an economic issue that does not fit into the wages and hours paradigm. As a result, the social insurance principle—in this context, treating the family as the economic entity that it is—is rarely characterized as an essential part of the civil rights paradigm. After President Nixon's veto of a childcare bill in 1971, its proponents were unable to revive it enough to secure enactment.[159]

VI. CONCLUSION

Contestation over the meaning of equality, within the framework of law, had a profound impact on women's rights. It helps explain why a movement led by white women, and thus doubly majoritarian, could not plausibly invoke majoritarian rhetoric in support of its demands and instead adopted the social position of minority. Analysis of social movement-based arguments also helps us understand the structural implications of the law's creation and fostering of the quasi-sovereignty of family law; its regulation of the labor pool; and the resistance to incorporation of social insurance principles in the understanding of equality. These issues have produced unique challenges for women's rights movements seeking to take advantage of a master frame of equality that could align with legal discourse.

Then Professor Felix Frankfurter wrote in 1938 that:

> [t]he legal position of woman cannot be stated in a single, simple formula, because her life cannot be expressed in a single, simple relation. . . . The law must have regard for woman in her manifold relations as an individual, as a wage-earner, as a wife, as a mother, as a citizen.[160]

It is ironic, but more than coincidental, that Frankfurter's essay appeared in the same year that *Carolene Products* was decided; it resonates with the Supreme Court's assumption that women did not belong in a list of groups marked most indelibly by lack of political power. To Frankfurter and the Court, what we recognize today as the many forces that produce the social construction of woman rendered her illegible as a coherent legal subject apart from her social, especially family, roles.

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159. Emily Badger, *That One Time America Almost Got Universal Child Care*, WASH. POST (June 23, 2014, 5:52 PM), https://www.washingtonpost.com/news/wonk/wp/2014/06/23/that-one-time-america-almost-got-universal-child-care/; Jack Rosenthal, *President Vetoes Child Care Plan as Irresponsible*, N.Y. TIMES, Dec. 10, 1971, at 1.

160. *"Equal Rights" for Women?*, NEW REPUBLIC, Feb. 1938, at 34.

Between the adoption of the Nineteenth Amendment and the inclusion of women in anti-discrimination laws—between suffrage and civil rights—women's advocates sought to bend both the meaning and the law of equality into a principle that was expansive enough to encompass the reality of all dimensions of women's lives. That effort continues.