Introduction

Now you have touched the women, you have struck a rock.
—Song by South African women protesting racial apartheid in the 1980s

I have something to prove, as long as I know there’s something that needs improvement,
And you know that every time I move, I make a woman’s movement.
—Ani DiFranco, “Hour Follows Hour”

Feminism and Law

What is feminism? The rote answer is that it’s the idea that women and men should have equal political, economic, and social rights. Surely that’s true; but there are many parts to the story. For some, feminism suggests the many dramatic examples of women organizing for justice or thwarting social convention: Elizabeth Cady Stanton firing up the suffragist crowds at the Seneca Falls Convention in 1848; the “Million Mom March” on Washington, calling for reproductive freedom and better child care; Katharine Hepburn starring in those fabulous 1940s films—in slacks.

Feminism has modern heroes too. Consider Catharine MacKinnon, who reshaped the law of sexual harassment to help workers avoid unwanted sexual advances and belittlement. Think of Oprah Winfrey, the first woman to launch her own television network, reaching out to confront issues, such as domestic violence, previously unaddressed on television; or Tina Fey, dubbed the “involuntary heroine” of feminism, for writing her character “Liz Lemon” for NBC’s 30 Rock to be a real woman who refuses to trade in her thick glasses for bombshell tresses or to portray a woman who meets an unattainable ideal. Or Nadezhda Tolokonnikova and Maria Alyokhina of Pussy Riot, Russia’s feminist
punk protest band, who were imprisoned in gulag-like conditions for two years on contrived charges of hooliganism.¹

For others, feminism is not an isolated movement but one that by necessity is intersectional and multifaceted. To quote bell hooks,

Feminism is not simply the struggle to end male chauvinism or a movement to ensure that women have equal rights with men; it is a commitment to eradicating the ideology of domination that permeates Western Culture on various levels—sex, race, class to name a few—and a commitment to reorganizing U.S. society so that the self-development of people can take precedence over imperialism, economic expansion and material desires.

Yet, feminism has a quiet side too. Think of Jane Austen, alone in the parlor, scribbling out *Pride and Prejudice* in between cross-stitches. Or the more than ten million single American moms who today rear their children in the shadows of drugs and poverty. Or the thousands of women who enter classrooms en masse to study law or medicine, for the first time, in some cases, outnumbering their male colleagues. Whether deserved or not (and we think not), feminism also suffers from a hard-to-shake “bad-girl” image of selfishness and militancy.

Pat Robertson, the founder of the Christian Coalition, once called feminism a “socialist, anti-family political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians.”² Say what you want, there is no escaping this conclusion: feminism is an extremely powerful political and social force.

Feminism is also an influential legal force. At its roots, feminism is about equal rights. One can talk philosophically about “equality” and “rights,” but for those concepts to be *actualized*, to be stamped onto the fabric of everyday life, feminist goals must be incorporated into *law* and made enforceable by the government. The struggles for enfranchisement, family-planning services, and parental support are all legal battles in the most fundamental sense. To be a student of feminism is to be a student of law too. So we begin this chapter with a brief history of feminist efforts to define and “equalize” the legal rights between the sexes.
A Brief History of Women’s Rights and Early Concepts of Equality

It is not easy to pinpoint when feminist legal theorizing began, since many of the initial arguments for women's equality involved legal and political issues. Some of the earliest arguments for equal legal treatment—such as the rights to vote, make contracts, and own property—first appeared in social and political tracts. The battle for suffrage saw women speaking in public for the first time in American history. Women reached out to supporters through written tracts, pamphlets, and books like Sarah Grimké’s *Letters on the Equality of Sexes and the Condition of Women* (1838), in which she pleaded, “I ask no favors for my sex. . . . All I ask of our brethren is that they will take their feet from off our necks.”

Early strategies for women’s suffrage were tied to the abolitionist movement and racial enfranchisement. When two female representatives of antislavery societies, Elizabeth Cady Stanton and Lucretia Mott, were denied admission as delegates to the World Anti-Slavery Convention in London in 1840 and forced to watch from a balcony, they decided to organize the first women’s rights convention. Eight years later, Stanton and Mott published a newspaper advertisement that called a meeting on the rights of women. Three hundred or so women and men gathered in Seneca Falls, New York. There they developed the Declaration of Sentiments, a manifesto modeled after the Declaration of Independence, that proclaimed, “We hold these truths to be self-evident: that all men and women are created equal.” The Declaration of Sentiments listed “injuries and usurpations . . . on the part of man toward woman” and claimed women’s natural rights to equality in political, religious, social, and public spheres, including the right to vote. The declaration’s most radical and controversial provision was its demand for women’s suffrage: “Resolved, therefore, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise.”

The Seneca Falls Convention marked the beginning of the first wave of the women’s rights movement. Word of Seneca Falls spread, and organizers began to hold local, state, and national women’s suffrage meetings. It was at the second National Women’s Suffrage Convention in Akron, Ohio, in 1851 that former slave and gifted orator Sojourner Truth
drew parallels between the enslavement of blacks and the servitude of women in her speech “Ain’t I a Woman?”:

That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain’t I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain’t I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain’t I a woman? I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother’s grief, none but Jesus heard me! And ain’t I a woman?

Whether Truth actually spoke these precise lines is a matter of some dispute. Yet historians agree, on the basis of contemporary reports, that Truth delivered a powerful speech at the Akron Convention, making the points that black women were doubly burdened and that their concerns were in part different from those of white women.

Throughout these early struggles, race continued to drive a wedge. Some feminists saw abolition and female suffrage as part of a larger, shared struggle; others did not. During the Civil War, organizations such as the Women’s National Loyal League collected signatures on petitions calling for the emancipation of slaves. When the Fifteenth Amendment conferred the right to vote only on black men, some later suffrage groups, such as the National Woman Suffrage Association, led by Stanton and Susan B. Anthony, campaigned for women’s suffrage on the theory that the white female vote was needed to counter the votes that would be exercised by black males.

Internal rifts aside, the feminist fight against slavery helped women master the political skills they would later deploy against patriarchy. When women were excluded from all-male antislavery organizations, they formed their own abolitionist societies and gradually emerged as a dominant force of political activity. Individuals and groups started to petition legislatures for basic rights to make contracts and hold property. Under the common law, the doctrine of coverture said that wives had no independent legal existence from their husbands—upon marriage,
the woman’s legal identity merged with that of her husband. Husbands had control of their wives’ property, wages, and children; and they could physically discipline their wives. Beginning in the mid-nineteenth century, states began to enact statutes, called Married Women’s Property Acts, to allow women to make contracts, execute wills, sue and be sued, own their wages, and control their real and personal property. Still, it’s worth noting that male lawmakers primarily justified these statutes out of concern for protecting the estates of their daughters and other female family members.

Women’s rights advocates took the demand for constitutional equality to the Supreme Court. Beginning in 1872, with Bradwell v. Illinois, the Supreme Court heard several claims that the recently enacted Fourteenth Amendment (1868) prohibited discrimination against women. The Fourteenth Amendment provides that no state shall deprive any person of the “equal protection of the laws” or of the “privileges and immunities” of federal citizenship. Myra Bradwell had applied for admission to the bar and was rejected by the Illinois Supreme Court on the basis of an Illinois state law that made no provision for admitting women to practice. Bradwell appealed to the U.S. Supreme Court, arguing that one of these guaranteed privileges was the right to practice a profession. A majority of the Court upheld the Illinois decision, ruling that the right to practice law was not a privilege of federal citizenship. In a concurring opinion, Justice Bradley added to this reasoning his own vision of men’s and women’s “separate spheres”—an unfortunate blend of theology and condescension for which he will always be remembered:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.
Without a federal guarantee to practice law, women were left to fight repeatedly for the right to be lawyers in individual states and territories. (Several of the first to succeed were Lavinia Goodell, who practiced in the trial courts of Wisconsin before being denied admission to the Wisconsin Supreme Court bar in 1875; Clara Shortridge Foltz, who was admitted to practice in California in 1878; and Belva Lockwood, who became the first female member of the bar of the U.S. Supreme Court in 1879.)

In 1875, the Supreme Court in *Minor v. Happersett* determined that the Fourteenth Amendment did not extend voting rights to women. Just as the right to practice a profession was not a privilege of federal citizenship, neither was universal suffrage. If women were going to secure the right to vote anywhere in the United States, they would need another constitutional amendment.

The movement for that separate amendment encompassed a sweep of several generations of effort. The investment of effort toward suffrage included countless meetings, newspaper articles, grassroots initiatives, suffrage associations, conventions, lectures, and speeches. Elizabeth Cady Stanton and Susan B. Anthony traveled across the country by stagecoach and train to give addresses on the public lecture circuit. Early media events, such as the trial of Anthony for unlawfully voting (for Ulysses S. Grant) in the 1872 election, drew attention to the cause of suffrage. (Upon being arrested, Anthony demanded that she be handcuffed as would any male arrestee. At trial, defense counsel argued that she could not have “knowingly” submitted an illegal ballot when she believed she had the right to vote. The judge refused to allow Anthony to testify because she was not competent to be a witness on her own behalf. He then refused to let the jury decide and found her guilty himself.) Later suffragists protested and organized pickets at the U.S. Capitol.

Passage and ratification of the suffrage amendment took an extraordinary amount of sustained energy on the part of individuals and organizations. Suffragist Carrie Chapman Catt described the more than half-century of political campaigns that culminated in the ratification of the Nineteenth Amendment in 1920:

Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest, and such aid as they could. It was a continuous, seem-
ingly endless, chain of activity. Young suffragists who helped forge the last links of that chain were not born when it began. Old suffragists who forged the first links were dead when it ended. . . . During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to urge Legislatures to submit suffrage amendments to voters; 47 campaigns to induce State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to persuade State party conventions to include woman suffrage planks; 30 campaigns to urge presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses.7

Voting rights for women were only the initial step in a still-continuing battle for equal rights.

The Equal Rights Amendment

In 1923, three years after ratification of the Nineteenth Amendment, Alice Paul, of the National Woman’s Party, first proposed an Equal Rights Amendment to Congress: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.” The ERA was proposed in Congress every year for the next fifty years until the last version of it—“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex”—finally passed both chambers in 1972. The ERA failed to achieve the constitutionally required ratification by three-fourths of the states. Only thirty-five of the necessary thirty-eight states ratified the ERA during its seven-year (later congressionally extended by three more years) deadline, and the amendment lapsed in 1982. In 2011 bills were introduced in both the House and Senate to ratify the ERA and to remove the ratification deadline. As of August 2012, the bills were languishing in the Judiciary Committee.

Commentators speculate on why the ERA failed. In addition to the fact that both men and women were deeply attached to the status quo, a constitutional amendment seemed unnecessary to many people who saw no urgent social problems, but instead believed that equality was being achieved. America had just witnessed the expansion of women’s educational and employment rights with the passage of Title VII in 1964. Con-
servatives viewed recent decisions of the Warren Court—particularly *Roe v. Wade* in 1973—as much too liberal, and this crystallized additional opposition to the ERA. This relatively rapid progress for women was coupled with uncertainties about what the ERA would mean. Some women feared that husbands’ obligations to support their wives would lapse, and they shied away from unisex bathrooms and the prospects of military service. (The argument of ERA supporters that women were small and would fit well in tanks was not an appealing sort of publicity.) The role played by entrenched opposition to equality should not be underestimated: fundamentalist religious groups such as Jerry Falwell’s Moral Majority, political action groups such as Concerned Women for America and Phyllis Schlafly’s Eagle Forum, and other conservative leaders portrayed the amendment as an attack on homemakers.

Even today, legal scholars debate the significance of the failed ratification: what its consequences might have been; whether the landscape of gender rights would look different if the ERA had passed; whether the symbolic loss of the ERA may have actually galvanized support for more extensive individual rights on a state level. Eighteen states (Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, Wyoming) have state equal rights amendments, many of which were adopted during the 1970s. Their particular provisions vary widely, though. Pennsylvania’s mirrors the federal ERA: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Connecticut’s provides more elaborate protection: “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.” California’s (which was the earliest adopted, in 1879) states, “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”

As with the suffrage movement, the ERA campaign carries a significance beyond its substantive goal. The ratification campaign built political opportunities, networks, and organizations whose work continues today. The converse may also be true: the absence of a unifying political
project such as the ERA, which had drawn together diverse groups of feminists, may be in part an explanation for the current fracturing of the feminist movement.

Varieties of Contemporary Feminist Legal Theory

Feminism has been described as a house with many rooms; and theorists have offered a variety of ways to classify these chambers, or schools, of feminist theory. This book will focus on types of feminist legal theory. We will not address schools of feminism you may have encountered in political or social theory, such as Marxist feminism, humanist feminism, third wave feminism, psychoanalytic feminism, or French feminism. Feminist legal theories emphasize the role of law in describing society and in prescribing change, while other types of feminist theory might de-emphasize or even question the role of law in these areas. Despite the differences, there has been some amount of free exchange between legal and “nonlegal” feminist scholars. In the next chapter, we’ll introduce eight categories of feminist legal theory that we find particularly important: equal treatment theory, cultural feminism, dominance theory, lesbian feminism, critical race feminism, postmodern feminism, pragmatic feminism, and ecofeminism. Of course, these divisions are not discrete, and many feminists defy categorization. Some of these theories are overlapping. At times people will disagree as to what kind of feminist a particular writer is. It is important to keep in mind that these are loose categories that help feminists manage discussion, not memberships into particular clubs. Moreover, individual theorists might generally believe in one set of principles—say, precisely equal treatment of similarly situated people—but be willing to vote in favor of, say, maternity leave even if a proposal does not include matching paternity leave because this would be the best option under the circumstances, a pragmatic outcome.

Organization and Approach of This Book

This book is intended particularly for readers who are just becoming acquainted with feminist legal theory. The second and third chapters introduce you in more depth to the varieties of feminist legal theory and feminist legal methods. The remaining chapters are arranged topically,
according to the major substantive areas (such as the employment arena, education, and global issues) in which feminist theory has informed and helped shape the law. The book is theory driven, but we will continually use litigation, court decisions, and statutes to illustrate and to prompt further discussion.

You will find in this primer facts and figures regarding the separate cultures for males and females—in clothing, possessions, sports, occupations, civic associations, and domestic roles; statistics regarding divorce and custody, the feminization of poverty, divisions of labor at home and in the workplace; and data on gender gaps in educational differences, representation in business and politics, criminal sentences, and political and social views. The last chapter, devoted to globalization, examines the promise of feminist legal theories for industrialized and developing countries. We will return time and again to the ways in which feminist legal concepts shape the everyday lives of women and men.