

**“HORROR OF A WOMAN”: MYRA BRADWELL, THE 14TH  
AMENDMENT, AND THE GENDERED ORIGINS OF  
SOCIOLOGICAL JURISPRUDENCE<sup>+</sup>**

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I. INTRODUCTION

On June 14, 1873, Myra Bradwell reprinted a short article from the *St. Louis Republican* in the *Chicago Legal News* announcing the U.S.

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<sup>+</sup> This article draws on concepts the author presents in *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, NEV. L.J. (forthcoming), which details the development of a women’s law reform faction within the women’s rights movement beginning in the mid-nineteenth century and continuing to the turn of the twenty-first century.

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Supreme Court's decision in her case.<sup>1</sup> The article glossed over the import of the Supreme Court's interpretation of the new Fourteenth Amendment and focused instead on the Illinois court's underlying decision to deny women the right to practice law.<sup>2</sup> The piece had a pejorative tone because, three years earlier when Bradwell filed her appeal to the U.S. Supreme Court, Missouri had become the second state to grant a woman a license to practice law.<sup>3</sup> By the time the Supreme Court rendered its decision in April 1873, five states and the District of Columbia had admitted women to their bars.<sup>4</sup> The *St. Louis Republican*, a Democratic newspaper, readily chided its northern neighbor:

It seems very hard for some of the Republican States to learn a simple lesson in that liberality which they pretend to teach to others. Women, qualified for the vocation, are admitted to the bar in Missouri, without let or hindrance, and no shock to our social system has come of the practice. But the Republicans of Illinois appear to have the same horror of a woman that an old-fashioned Democrat once had of a negro.<sup>5</sup>

This short article reveals an important insight that challenges some contemporary interpretations of *Bradwell v. Illinois*. First, it points out what we know, but sometimes overlook, that the Supreme Court holding in *Bradwell* did not prevent women from becoming lawyers or practicing law.<sup>6</sup> More importantly, however, it suggests that Justice Bradley's oft-cited concurrence – where he reveals his horror of a woman, writing that “[t]he harmony, not to say identity, of interest 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”<sup>7</sup> – that this opinion was perhaps not the dominant ideology of the day. Looking beyond the Supreme Court opinions, this paper attempts to assess what *Bradwell v. Illinois* meant to Myra Bradwell and the women's rights movement.

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1. CHI. LEGAL NEWS, June 14, 1873, at 454 (discussing the Supreme Court's decision to uphold the Illinois Supreme Court's decision to deny Myra Bradwell's law license application).

2. *Id.*

3. *A Woman Admitted to the Bar in Missouri*, CHI. LEGAL NEWS, Apr. 3, 1870, at 212.

4. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 37-38 (1986) (Iowa, Missouri, Michigan, Maine, and Utah).

5. CHI. LEGAL NEWS, *supra* note 1, at 454.

6. Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1529 (1986); MORELLO, *supra* note 4, at 21-22.

7. *Bradwell v. State*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

Many scholars have well and thoroughly analyzed both Justice Miller's majority opinion and Justice Bradley's concurring opinion.<sup>8</sup> Richard Aynes even crafted a hypothetical opinion for Chief Justice Chase, the sole dissenter in the case, as Chase died before he was able to write his own opinion.<sup>9</sup> Additionally, almost every constitutional law casebook includes at least a note discussing the case.<sup>10</sup> The note typically follows or cites *Slaughter-House Cases* and describes *Bradwell* as the second nail in the coffin of the Fourteenth Amendment's Privileges and Immunities Clause.<sup>11</sup> They explain that in *Bradwell*, Justice Miller reiterated the majority's holding from its holding in *Slaughter-House Cases* that the Clause only protected the privileges and immunities of national citizenship and that the right to work in one's chosen profession was not one of those privileges.<sup>12</sup>

Most casebooks also include *Bradwell* as representative of the Court's support for the ideology of separate spheres.<sup>13</sup> This concept divided social roles based on gender, preserving the public domain for men and relegating women to the private, domestic sphere.<sup>14</sup> This

8. Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 260-61 (1989); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991); Nancy T. Gilliam, *A Professional Pioneer: Myra Bradwell's Fight to Practice Law*, 5 L. & HIST. REV. 105 (1987); Olsen, *supra* note 6, at 1527-29; DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 21-22 (1989); WILLIAM WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 150 (1998); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY VOLUME 1836-1918, at 550 (1935); 4 CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 1364-68 (1971).

9. Richard L. Aynes, *Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work"*, 59 LA. L. REV. 521, 537-38 (1999).

10. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 827 (6th ed. 2000); DOUGLAS W. KMIK ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 1179 (2d ed. 2004); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 648 (4th ed. 2001).

11. See, e.g., NOWAK & ROTUNDA, *supra* note 10, at 827; KMIK ET AL., *supra* note 10, at 1179; SULLIVAN & GUNTHER, *supra* note 10, at 648.

12. See *supra* note 11.

13. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 622 (5th ed. 2005); KMIK ET AL., *supra* note 10, at 1399; SULLIVAN & GUNTHER *supra* note 10, at 648; WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 744 (1986) (citing the decision in *Bradwell* as part of the Court's "judicial indifference to the rights of persons who were not white males"). See also Ellen Carol DuBois, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s*, in VISIBLE WOMEN: NEW ESSAYS ON AMERICAN ACTIVISM 30 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993); JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL 21 (1993).

14. For discussions of the concept of separate spheres, see Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966); NANCY F. COTT, THE BONDS OF WOMANHOOD:

interpretation of *Bradwell* cites Justice Bradley's infamous concurrence where he, perhaps too vociferously, espoused support for the "wide difference in the respective spheres and destinies of man and woman" and revealed his horror of a woman who acted outside of her sphere.<sup>15</sup> These casebooks suggest, I believe mistakenly, that Bradley's perspective represented the dominant gender ideology that endured into the twentieth century.<sup>16</sup>

The most progressive casebooks and a number of additional legal scholars place *Bradwell v. Illinois*, I believe correctly, within the women's rights movement.<sup>17</sup> Myra Bradwell was among the women's rights activists that immediately perceived the potential of the new Fourteenth Amendment to emancipate women.<sup>18</sup> She used her case to make a claim on the Amendment, hoping to secure an interpretation that its provisions granted women full citizenship rights, privileges, and obligations and ensured them due process and equal protection of the law.<sup>19</sup> These accounts agree with the traditional assessment that the majority opinion in *Bradwell* reaffirmed the Court's interpretation of the privileges and immunities clause, but by contextualizing the case within the women's rights movement, they suggest that Bradwell and other women's rights activists were involved in an assault on the separate spheres doctrine that was gaining some support.<sup>20</sup> This context also allows us to see the connection between Myra Bradwell, Elizabeth Cady Stanton, Susan B. Anthony, and Virginia Minor and the strategy they pursued to use the Fourteenth Amendment to bring women into the public sphere as full and equal citizens.<sup>21</sup>

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"WOMAN'S SPHERE" IN NEW ENGLAND, 1730-1835 (1977); Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations between Women in Nineteenth-Century America*, 1 SIGNS 1 (1975).

15. *Bradwell v. State*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

16. See NOWAK & ROTUNDA, *supra* note 10, at 827-28 ("The views quoted here [by Justice Bradley] were representative of the attitudes women met when they attempted to challenge sex-based classifications."); see also DuBois, *supra* note 13, at 30.

17. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1179-80 (5th ed. 2006); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 945-54 (3d ed. 1999); DuBois, *supra* note 13, at 30; Gilliam, *supra* note 8, at 115.

18. BREST ET AL., *supra* note 17, at 1180; DuBois, *supra* note 13, at 30; Gilliam, *supra* note 8, at 115.

19. *The XIV Amendment and Our Case*, 5 CHI. LEGAL NEWS, Apr. 19, 1873, at 354.

20. See *supra* notes 17-19 and accompanying text.

21. BREST et al., *supra* note 17, at 1179-80; FISHER, *supra* note 17, at 946-48. For a discussion of Virginia Minor and her case, *Minor v. Happersett*, see DuBois, *supra* note 13, at 22.

Bradwell was a leader in the Illinois women's rights movement.<sup>22</sup> She initiated her case at a time when the women's rights movement was beginning to divide over the issue of woman suffrage and the Fifteenth Amendment.<sup>23</sup> I contend that Bradwell was not part of that divide, but rather represented a third faction of the women's rights movement that pursued a comprehensive strategy of securing women's legal equality through affirmative rights claims.<sup>24</sup> Bradwell and her followers maintained this strategy as the splintering factions narrowed their focus to securing woman suffrage and later abandoned what Ellen Carol DuBois described as their original "democratic vision."<sup>25</sup> Bradwell never chose sides in the fight between the National Woman Suffrage Association, led by Susan B. Anthony and Elizabeth Cady Stanton, and the American Woman Suffrage Association, led by Lucy Stone and Julia Ward Howe.<sup>26</sup> Instead, she held fast to her democratic vision, maintained relationships with both groups, and developed her arguments in concert with those activists who were intent on establishing that the Fourteenth Amendment granted women full and equal citizenship rights, privileges, and obligations.<sup>27</sup>

I argue that through her case Myra Bradwell developed two legal innovations that would be invoked by other rights activists through the remainder of the nineteenth century and throughout much of the twentieth century, albeit sometimes in opposition to each other. The first was an argument that the Equal Protection Clause of the Fourteenth Amendment should be applied to women.<sup>28</sup> The second was the

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22. FRIEDMAN, *supra* note 13, at 11; *Death of Mrs. Myra Bradwell*, 28 AM. L. REV. 278 (1894); *Myra Bradwell* 26 CHI. LEGAL NEWS, Feb. 17, 1894, at 200-02.

23. See ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869, at 162-202 (1978) (describing the first split in the women's rights movement, which occurred in 1869, over whether to support the Fifteenth Amendment that granted suffrage to African-American men, but not to women).

24. I develop this argument more fully in *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, NEV. L.J. (forthcoming).

25. DuBois, *supra* note 13, at 21. Anthony and Stanton held onto their democratic vision longer than the leaders of the AWSA, but by 1890 when the NWSA merged with the AWSA to become the NAWSA the leaders had also narrowed their focus and dropped their attacks on separate spheres. MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 10-11 (1994).

26. ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 145-46 (Harvard Univ. Press 1996) (1959).

27. See *infra* Part I.

28. See Gilliam, *supra* note 8, at 115 (arguing that Bradwell's "fourteenth amendment argument was based on equality" and that her "perception of the issue was generations ahead of her time"). It was an adaptation of the New Departure arguments set forth by Francis Minor and adopted by many suffragists. See *infra* note 152.

introduction of a new form of legal interpretation that set forth the foundations of what would later be called sociological jurisprudence.<sup>29</sup> As elite lawyers and justices were advocating an ideology that William Wiecek has labeled “legal classicism,” which was based on the notion that the legal order was an “autonomous, determinate, natural, neutral, necessary, objective, and apolitical structure of principles and norms,”<sup>30</sup> Bradwell was adapting the ideology of instrumentalism to the cause of women’s rights, crafting what I will call pre-sociological jurisprudence arguments.<sup>31</sup>

To support these claims, Part II situates Bradwell firmly within the women’s rights movement and asserts that she intended her case to advance women’s rights beyond opening the legal profession to women. Part III sets forth the arguments Bradwell presented in support of her application for a law license to the Illinois Supreme Court. It demonstrates how Bradwell developed a line of legal reasoning that drew on the principles of instrumentalism but transformed its goal to one of social justice. It describes how Bradwell asked the court to view the law within a broad social context, to consider the changing social and economic circumstances when interpreting the law, and to apply the law in a manner that would secure social justice. It further asserts that Bradwell’s claim of sex discrimination was based, in part, on the Equal Protection Clause of the new Fourteenth Amendment. Part IV sets forth some of the responses by the public and those in the legal community that supported Bradwell and other women’s rights activists making similar claims. These popular responses were critical of the majority opinion and the endorsement of separate spheres articulated in Justice

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29. Sociological jurisprudence is philosophy that the law be viewed “within a broad social context rather than as an isolated phenomenon” and that “legislation and court adjudications [should] take into account the findings of other branches of learning, particularly the social sciences.” Justice William O. Douglas, *Jurisprudence*, Microsoft® Encarta® Online Encyclopedia (2008), available at [http://encarta.msn.com/encyclopedia\\_761558172/Jurisprudence.html](http://encarta.msn.com/encyclopedia_761558172/Jurisprudence.html).

30. WIECEK, *supra* note 8, at 3, 175, 177-80; see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983) (arguing that elite lawyers during this time fought against an instrumental approach to law and advocated instead a scientific, formalist approach); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 3, 109-42 (1992); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 223 (1989).

31. The term sociological jurisprudence was coined by Roscoe Pound in the first decade of the twentieth century. WIECEK, *supra* note 8, at 191-93. Bradwell and the others who developed these arguments in the nineteenth century did not give it a name. For purposes of this article, I will refer to these early arguments as “pre-sociological jurisprudence.” For a discussion of instrumentalism see HALL, *supra* note 30, at 106; WIECEK, *supra* note 8, at 44.

Bradley's concurrence. It argues that these criticisms cast doubt on the notion that the separate spheres doctrine was as widely and uncritically accepted as Justice Bradley implied.

The article concludes with an assessment that this is not a story of grand victory. Women did and continue to face discrimination within the legal profession and society.<sup>32</sup> The obstacles were and are even greater for women of color.<sup>33</sup> But there have been incremental advances. Bradwell was ultimately admitted to both the Illinois and the Supreme Court bars.<sup>34</sup> By 1950 every state in the Union admitted women lawyers.<sup>35</sup> In 1971 the Supreme Court began using the Equal Protection Clause to strike down sex discrimination.<sup>36</sup> In 1981 the first woman Justice was appointed to the United States Supreme Court.<sup>37</sup> This article suggests that the tools Myra Bradwell crafted in concert with other mid-nineteenth century women activists served as an important foundation for the incremental advances women secured over the subsequent one hundred and fifty years.

## II. MYRA BRADWELL AS A LEADER IN THE WOMEN'S RIGHTS MOVEMENT

Myra Colby Bradwell was a rights activist her entire life. Like many of the women activists of her generation, she was raised as an abolitionist.<sup>38</sup> She was also among the first cohort of women who were able to take advantage of the opportunity to study in the seminaries and colleges that were newly opened to women.<sup>39</sup> In 1852, at age twenty-

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32. See generally Smith, *supra* note 8; see also AMERICAN BAR ASSOCIATION COMM. ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR (1995); AMERICAN BAR ASSOCIATION COMM. ON WOMEN IN THE PROFESSION, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 4 (2006).

33. JANET E. GANS EPNER, AMERICAN BAR ASSOCIATION COMM. ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS (2006).

34. FRIEDMAN, *supra* note 13, at 30 (stating that Bradwell refused to reapply for her license, but when she was dying of cancer, her husband convinced the Illinois Supreme Court to admit her based on her original motion; Bradwell was admitted to the bar in Illinois in 1890 and to the Supreme Court in 1892, two years before her death).

35. See MORELLO, *supra* note 4, at 37-38.

36. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); BECKER, *supra* note 25, at 25.

37. MORELLO, *supra* note 4, at 218.

38. FRIEDMAN, *supra* note 13, at 35; 1 THE BENCH AND BAR OF ILLINOIS 277 (John Palmer ed., 1899); *Death of Mrs. Myra Bradwell*, *supra* note 22, at 278.

39. FRIEDMAN, *supra* note 13, at 35-36 (stating that Bradwell first attended female seminary in Kenosha, Wisconsin and then, in 1851, studied at the newly established Elgin Seminary); *Myra Bradwell*, *supra* note 22, at 200. For a discussion of nineteenth century female seminaries in the Midwest, see STEPHEN M. BUECHLER, THE TRANSFORMATION OF THE WOMAN SUFFRAGE MOVEMENT: THE CASE OF ILLINOIS, 1850-1920, at 58 (1986); see also KAREN J. BLAIR, THE

one, she married fellow abolitionist and lawyer James Bradwell.<sup>40</sup> When her husband opened his first law office in Chicago in 1855, Myra Bradwell assisted him in his practice.<sup>41</sup> Within a few years, she determined to become a lawyer herself: “I came to find out that a woman could accomplish as much labor in the same lines as a man, and therefore,” Bradwell explained, “I concluded to read law.”<sup>42</sup>

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CLUBWOMAN AS FEMINIST: TRUE WOMANHOOD REDEFINED 1868-1914, at 8-9 (1980). For a broader discussion of the development of female seminaries see BARBARA MILLER SOLOMON, IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA 14-26 (1985).

40. *Myra Bradwell*, *supra* note 22, at 200. James Bradwell studied at the soundly abolitionist Knox College in Galesburg, Illinois. HERMAN KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION, 1874-1974, at 24 (1974). Reverend George Washington Gale, the founder of Knox College, organized an antislavery society in Knox County within five months of the college’s incorporation. HERMANN R. MUELDER, MISSIONARIES AND MUCKRAKERS: THE FIRST HUNDRED YEARS OF KNOX COLLEGE 6 (1984). Elijah Lovejoy published the call to establish this society in his antislavery paper the *Observer* – an act that led to his murder. *Id.* Though there was tremendous support for the Society among Gale and the new settlers who worked at Knox College, proslavery advocates attacked and killed Lovejoy ten days after the society was founded. *Id.* The founders and supporters of Knox College nonetheless remained steadfast in their antislavery position and their abolition activities, including having the president of the college attend the 1843 World Anti-Slavery Convention in London. *Id.* at 10.

41. Most accounts chronologize that James Bradwell and Myra Colby married in Illinois in 1852, subsequently moved to Memphis for two years where they operated a private school, and returned to Illinois in 1854 or 1855. FRIEDMAN, *supra* note 13, at 41; Caroline K. Goddard, *Bradwell, Myra Colby*, in WOMEN BUILDING CHICAGO 1790-1990: A BIOGRAPHICAL DICTIONARY 112 (Rima Lunin Schultz & Adele Hast eds., 2001); 1 Dorothy Thomas, *Bradwell, Myra Colby*, in NOTABLE AMERICAN WOMEN 1607-1950: A BIOGRAPHICAL DICTIONARY 223 (Edward T. James ed., 1971); Kogan, *supra* note 40, at 24; DICTIONARY OF THE AMERICAN BIOGRAPHY 580-81; George W. Gale, *Myra Bradwell: The First Woman Lawyer*, 39 A.B.A. J. 1080 (1953); Gilliam, *supra* note 8, at 106 (stating that the couple married in Tennessee). Most accounts also agree that James Bradwell was admitted to the Illinois bar in 1855 and opened a law office that year. FRIEDMAN, *supra* note 13, at 41 (stating that James Bradwell was also admitted to the Tennessee bar); Goddard, *supra*, at 112; Thomas, *supra*, at 223; DICTIONARY OF THE AMERICAN BIOGRAPHY, *supra*, at 580. Some accounts cite that James Bradwell opened his Chicago law office in partnership with Myra’s brother, Frank Colby. FRIEDMAN, *supra* note 13, at 41; Goddard, *supra*, at 112; Thomas, *supra*, at 223. *See also* *Obituary. Eben F. Colby*, CHI. LEGAL NEWS, Aug. 16, 1884, at 391 (describing that Colby was Myra’s brother and that he and James Bradwell maintained the law firm of Bradwell and Colby for several years). Most state that Myra Bradwell began to assist her husband in his law practice and then, sometime after that but before 1868 began to study the law herself. FRIEDMAN, *supra* note 13, at 41; Thomas, *supra*, at 224; Kogan, *supra* note 40, at 24-25; Gilliam, *supra* note 8, at 106; Gale, *supra*, at 1080. Goddard, *supra*, at 112. In response to a newspaper reporter’s interview questions, James Bradwell recollected that he was admitted to the Illinois bar and opened an office in Chicago in 1853. *All Dabble in the Law*, CHI. DAILY TRIB., May 12, 1889, at 26; *see also* 1 FREDERIC B. CROSSLEY, COURTS AND LAWYERS OF ILLINOIS 263 (1916) (asserting that James Bradwell returned to Chicago, was admitted to the Illinois bar and opened a law practice in 1853).

42. *All Dabble in the Law*, *supra* note 41. In this interview Myra Bradwell dates the beginning of her formal legal studies at 1857: “about five years after our marriage I determined to read [law] in good earnest.” *Id.*

Bradwell interrupted her studies during the Civil War to join other northern reform women in active support of the Union Army.<sup>43</sup> She was president of the Soldiers' Aid Society, one of the organizations that provided medical services and supplies to wounded soldiers and relief to their families.<sup>44</sup> She also was an officer in the Northwestern Sanitary Commission, established to assist in maintaining hygienic field hospitals and camps, and she worked diligently in the production of 1863 and 1867 Northwestern Sanitary Fairs that raised money for the Union Army.<sup>45</sup> Through these activities Bradwell and the other Commission activists learned how to establish and lead organizations to advance a cause.<sup>46</sup> After the war, she began her fight for women's rights in earnest.

Bradwell's first step was to establish a legal newspaper for lawyers and judges that prominently featured legal issues relating to women.<sup>47</sup> Because some of the laws of coverture still applied,<sup>48</sup> Bradwell petitioned the Illinois legislature for a special charter that allowed her to enter into contracts necessary for her to own and operate her own business.<sup>49</sup> In October 1868, Bradwell founded the *Chicago Legal News*, the city's only weekly legal newspaper.<sup>50</sup> Within five months the

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43. Thomas, *supra* note 41, at 223.

44. *Id.* at 224.

45. Myra Bradwell, *supra* note 22, at 201; see also Mrs. Mary A. Livermore, 16 CHI. LEGAL NEWS, Jan. 26, 1884, at 166 (where Bradwell describes the fairs and praises Mary Livermore for her leadership role). The Northwestern Sanitary Fairs were one of many local sanitary fairs that raised money for the Union Army. THE BENCH AND BAR OF ILLINOIS, *supra* note 38, at 278. For descriptions of the Sanitary Commissions see FLEXNER & FITZPATRICK, *supra* note 26, at 100-01; 2 BESSIE LOUISE PIERCE, A HISTORY OF CHICAGO: FROM TOWN TO CITY, 1848-1871, at 453, 455 (1940); KATHLEEN D. MCCARTHY, NOBLESSE OBLIGE: CHARITY AND CULTURAL PHILANTHROPY IN CHICAGO, 1849-1929, at 34-35 (1982); MARY A. LIVERMORE, MY STORY OF THE WAR: A WOMAN'S NARRATIVE OF FOUR YEARS PERSONAL EXPERIENCE AS NURSE IN THE UNION ARMY, AND IN RELIEF WORK AT HOME, IN HOSPITALS, CAMPS, AND AT THE FRONT, DURING THE WAR OF THE REBELLION 411-56 (1889).

46. BUECHLER, *supra* note 39, at 59.

47. Myra Bradwell, *supra* note 22, at 200; Goddard, *supra* note 41, at 113; FRIEDMAN, *supra* note 13, at 77-78.

48. The doctrine of coverture tied women's legal status to her marital or kin relationships. A married woman was thought to become one with her husband, a union that effectively rendered her civilly dead. See NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17-19, 20-24 (1982); Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reactions, or Revolution?*, in WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE VOLUME II: PROPERTY, FAMILY AND THE LEGAL PROFESSION 69-70 (D. Kelly Weisberg ed., 1982); Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9, 10 (1994); SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 108-10 (2001).

49. FRIEDMAN, *supra* note 13, at 77.

50. *Id.*; Myra Bradwell, *supra* note 22, at 200.

Illinois legislature granted the paper a special charter to immediately publish all new laws passed at the end of each legislative session.<sup>51</sup> It also deemed that the paper's publication of those laws was proper evidence of their content in court and that the paper was a sufficient method of publication of legal notices.<sup>52</sup> The paper quickly became an important resource for lawyers and earned praise from lawyers and judges in Chicago and across the country.<sup>53</sup>

Bradwell published the *Chicago Legal News* for a year before she applied for her law license. During that year she became one of the leaders of the women's rights movement in Illinois and utilized her paper, with its large male readership, as one of her primary tools to advance the cause. Bradwell filled the *Legal News* with articles on the professional and political activities of women, prominently chronicling women's participation in the legal profession.<sup>54</sup> She also advocated for a number of women's rights law reforms, including woman suffrage and property rights.<sup>55</sup> One of her first successful legislative campaigns, which she conducted largely within the pages of the *Chicago Legal News*, was to secure the enactment of Illinois' second Married Woman's Property Act.

In 1865 the Illinois Supreme Court had ruled that the state's first Married Women's Property Act, passed in 1861, failed to grant women the right to own and control their own wages.<sup>56</sup> By the 1870s there was a national movement to pass Married Women's Property Acts.<sup>57</sup> Like Illinois, many state legislatures and courts maintained that a married women's wages were not her separate property and therefore were not covered by the Acts.<sup>58</sup> They maintained that under the doctrine of coverture, these wages belonged to the husband.<sup>59</sup> Women's rights

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51. *The Laws of 1869*, 1 CHI. LEGAL NEWS 188 (Mar. 13, 1869); *Myra Bradwell*, *supra* note 22, at 200; FRIEDMAN, *supra* note 13, at 79.

52. FRIEDMAN, *supra* note 13, at 79.

53. 6 INDUSTRIAL CHICAGO: THE BENCH AND BAR 642 (1896); Goddard, *supra* note 41, at 113; *The Myra Bradwell Case*, CHI. DAILY TRIB., Apr. 20, 1873, at 8 (describing the *Chicago Legal News* as "the best law-newspaper in the country").

54. For example, in one of her first issues Bradwell reported that Mary E. Magoon was practicing law in the lower courts in North English, Iowa (where a law license was not required). *Female Lawyer*, CHI. LEGAL NEWS, Feb. 27, 1869, at 172.

55. INDUSTRIAL CHICAGO, *supra* note 53, at 642; FRIEDMAN, *supra* note 13, at 78.

56. *Bear v. Hays*, 36 Ill. 280, 281 (1865).

57. BASCH, *supra* note 48, at 136-37; HOFF, *supra* note 8, at 127-31. For a discussion of the movement for Married Women's Property Acts before 1870, see Speth, *supra* note 48.

58. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 197-200 (1998).

59. *Id.*

activists were engaged in a campaign to change these laws and Bradwell led the charge in Illinois.<sup>60</sup> During the paper's first year Bradwell flooded the *News* with articles imploring the Illinois legislature to pass a second act that would deem women's wages to be their sole and separate property and even travelled to Springfield to lobby for the bill in person.<sup>61</sup> She relentlessly pursued the matter until the legislature finally acquiesced with a second act in March 1869.<sup>62</sup>

During this time, Bradwell also participated in organizing the Illinois Woman's Suffrage Association (IWSA) and found herself in the middle of a fight among the leaders of the national suffrage movement.<sup>63</sup> The IWSA was one of two woman suffrage organizations established in Illinois in February 1869.<sup>64</sup> Bradwell was elected an officer in the IWSA and her position brought her into contact with Susan B. Anthony and Elizabeth Cady Stanton, two of the national leaders who both attended and addressed the IWSA's founding convention.<sup>65</sup> Bradwell and her husband were among those elected as representatives of the IWSA to attend the National Equal Rights Association Convention held three months later in May 1869.<sup>66</sup> Bradwell again interacted with Stanton and Anthony at the Equal Rights convention, but like many of the attendees, disagreed with their decision to oppose the Fifteenth Amendment if women were not included.<sup>67</sup> This disagreement led to a well-studied split among the woman suffrage activists. Susan B. Anthony and Elizabeth Cady Stanton led the dissenting faction and

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60. *Id.* at 176-77, 201-03.

61. See *Husband and Wife – Property of Latter Under Law of 1861*, CHI. LEGAL NEWS 22 (Oct. 17, 1868) (specifying the inequalities that persisted in the Illinois property laws). *Law Relating to Women*, CHI. LEGAL NEWS, Oct. 31, 1868, at 37; CHI. LEGAL NEWS, Jan. 9, 1869, at 117 (informing readers that New Hampshire passed a married earning act and asserting: "We hope, before the adjournment of the present legislature, they will have that right in Illinois."); *Talk with the Legislature*, CHI. LEGAL NEWS, Feb. 27, 1869, at 172; *Married Women's Separate Property Under Act of 1861*, CHI. LEGAL NEWS, Nov. 13, 1869, at 53.

62. *An Act in Relation to the Earnings of Married Women*, LAWS OF THE STATE OF ILLINOIS ENACTED BY THE GENERAL ASSEMBLY 255 (1869). The law was approved March 24, 1869. It established that married women's wages were their sole and separate property, but specified that the act did not give a wife "any right to compensation from any labor performed for her minor children or husband."

63. BUECHLER, *supra* note 39, at 68-75.

64. *Id.*

65. *Id.* at 70-71.

66. Kate Doggett, Rev. E.J. Goodspeed, and Rebecca Mott were also elected to attend the ERA convention. *Chicago Woman Suffrage Convention*, CHI. LEGAL NEWS, Feb. 20, 1869, at 164; BUECHLER, *supra* note 39, at 71.

67. BUECHLER, *supra* note 39, at 70-71. See DUBOIS, *supra* note 23, at 162-202 (describing the first split in the women's rights movement, which occurred in 1869, over whether to support the Fifteenth Amendment that granted black suffrage to African-American men, but not to women).

established the National Woman Suffrage Association (NWSA) as an independent woman suffrage organization.<sup>68</sup> Lucy Stone, her husband Henry Blackwell, and Julia Ward Howe responded by establishing the American Woman Suffrage Association (AWSA).<sup>69</sup>

Bradwell refused to take sides in the split. She was part of the coalition in the IWSA that kept the Illinois association neutral in the national fight during its first two years.<sup>70</sup> Bradwell served on the executive committee of the IWSA and hosted its meetings in the *Chicago Legal News* offices.<sup>71</sup> She was elected, along with her husband, and a number of others, to attend the AWSA's first convention in Cleveland in November 1869.<sup>72</sup> But the delegates' relationship with the AWSA was qualified. They were bound by a resolution, adopted unanimously by the IWSA executive committee, which required them to maintain a neutral position in the fight between the national suffrage factions:

*Resolved*, That the delegates elected to the National Convention be requested not to identify themselves with any division that may exist among prominent workers in the cause in other parts of the country, or to participate in any action intended as antagonistic to any existing Woman's Suffrage organization.<sup>73</sup>

The delegates abided by their resolution. When Susan B. Anthony appeared at the hall in Cleveland, James Bradwell urged the leaders of the AWSA to allow her to sit on the platform and address the convention.<sup>74</sup> Myra Bradwell was elected one of two Secretaries for the AWSA,<sup>75</sup> but the IWSA did not affiliate with the association and Bradwell did not agree to exclusive membership. At the first meeting of the IWSA executive committee after the convention, the delegates acknowledged the animosity that existed between the leaders of the two national organizations and expressed their desire to "promote harmony in the furtherance of the great object sought to be attached by both

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68. See DUBOIS, *supra* note 23, at 195.

69. *Id.*

70. DUBOIS, *supra* note 23, at 198-99.

71. *Woman's Suffrage. Election of Delegates to the National Convention at Cleveland*, CHI. TRIB., Nov. 14, 1869, at 1.

72. *Id.*

73. *Id.*

74. 2 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: AGAINST AN ARISTOCRACY OF SEX: 1866 TO 1873, at 284 (Ann D. Gordon ed., 2000) (hereinafter PAPERS).

75. *Conventions*, N.Y. TIMES, Nov. 25, 1869, at 1; BUECHLER, *supra* note 39, at 86.

sections."<sup>76</sup> They discussed the possibility of forming a Northwestern Suffrage Association as a means of bringing the other two factions together<sup>77</sup> and then passed a second resolution that reiterated the IWSA's neutrality:

*Resolved*, That while we sympathize with the objects had in view in the formation of the National Woman Suffrage Associations formed in Cleveland and New York, we will *not* become auxiliary to either, until the difficulties between the two are settled.<sup>78</sup>

The IWSA preserved its middle position for another fifteen months. During that time, the IWSA steadfastly urged the two national associations to merge.<sup>79</sup> It even persuaded both Susan B. Anthony and Lucy Stone to come to a meeting in Chicago in November 1870 to "review the contest."<sup>80</sup> But the IWSA suffered its own division six months later that caused the Bradwells and five other officers to withdraw from the association and allowed Stanton and Anthony sympathizers to take over the IWSA in April 1871.<sup>81</sup> The Bradwells, nonetheless, maintained their neutral position.

The fracture in the IWSA occurred over issues of religion and divorce. Bradwell and those who withdrew opposed the practice of "free divorce"<sup>82</sup> and were offended by a pamphlet written by Alonzo J.

76. *Woman's Suffrage*, CHI. TRIB., Jan. 5, 1870, at 4.

77. *Id.* Some members of the committee who were also members of the Cook County Woman Suffrage Association (CCWSA) did act on the idea of a Northwestern Suffrage Association. Five months after the meeting the CCWSA published an initial call for a meeting in Chicago for anyone interested in the possibility of forming a Northwestern association. *Female Suffrage*, CHI. TRIB., May 19, 1870, at 1. A Northwestern Association was established on May 25, 1870, but it appears that it was sympathetic to Susan B. Anthony and the NWSA and not neutral. See *Woman Suffrage*, N.Y. TIMES, Dec. 1, 1870, at 5; *Woman's Suffrage Convention of the Northwestern Franchise Association*, CHI. TRIB., May 26, 1870, at 3.

78. *Woman's Suffrage*, *supra* note 76.

79. *The Woman Suffrage Associations – Illinois Advocates Urge Union*, N.Y. TIMES, Nov. 21, 1870, at 2; *Woman Suffrage*, CHI. TRIB., Nov. 27, 1870, at 3.

80. *Woman Suffrage*, *supra* note 79.

81. *Female Suffrage: Meeting of the Executive Committee of the Illinois Association*, CHI. TRIB., Apr. 19, 1871, at 3; BUECHLER, *supra* note 39, at 104.

82. *Female Suffrage: Meeting of the Executive Committee of the Illinois Association*, CHI. TRIB., Apr. 19, 1871, at 3. The term "free divorce" was used interchangeably with "easy divorce" and often in connection with the concept of "free love." *Free-Love and Free-Divorce*, EVERY SATURDAY: A JOURNAL OF CHOICE READING, July 22, 1871, at 75; *War in the Woman Suffrage Camp. Mrs. Henry H. Stanton. Free Divorce and Free Love*, CHI. TRIB., Nov. 13, 1870, at 2; *Taking the Back-Track*, CHI. TRIB., Apr. 14, 1872, at 5; *Judge Farwell on Divorce*, CHI. TRIB., Sept. 22, 1872, at 4; *Woman and Easy Divorce*, THE INDEPENDENT, Dec. 28, 1871, at 4. It was also called "freedom of divorce." *Editorial Article*, CHI. TRIB., Jan. 27, 1871, at 2; see also STANLEY, *supra* note 58 at 178. Free love embraced the concept of women's sexuality and advocated that women had the right to decline sexual intercourse. BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF

Grover, which was published by the Executive Committee of the Cook County Woman's Suffrage Association (CCWSA), that challenged the authority of the Bible.<sup>83</sup> The CCWSA was established in April 1870 as an independent suffrage association, but many of its members, including Grover and Catharine and Charles Waite, were members of both the CCWSA and the IWSA.<sup>84</sup> Catharine Waite and Jane Graham Jones, the primary leaders of the CCWSA during its first years, both sympathized with Susan B. Anthony.<sup>85</sup> In 1871, just before the division occurred, and

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SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL, 208 (1998). Opponents to free love described it as "free lust." *Editorial Article 2*, CHI. TRIB., Nov. 14, 1870, at 2. Free divorce referred to state laws that broadened the grounds under which either or both the husband and wife could sue for divorce. (See for example *Free Trade in Divorce*, N.Y. TIMES, Apr. 17, 1872, at 4, that describes a proposed bill in New York that would have allowed divorce on the grounds that one of the parties was "unhappy or uncomfortable.") Those who opposed divorce except on the grounds of adultery or extreme cruelty criticized these laws, arguing that they destroyed the institution of marriage that they insisted was the "foundations of the social order." *Divorces in Illinois*, CHI. TRIB., Feb. 23, 1873, at 6; *The World of Amusement*, CHIC. TRIB., Jan. 29, 1871, at 2 (arguing that "divorce[] made easy...makes a farce of marriage . . . kills the home . . . dissevers the family . . . [and] is an outrage upon the child"). See also NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 106-111 (2000). Proponents of liberal divorce laws, which included Elizabeth Cady Stanton, argued that denying divorce to women denied their liberty and caused harm to the family. "*Woman's Right to Divorce*" NEW YORK TIMES May 18, 1870 at 2; NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 68-69 (1999).

83. *Female Suffrage: Meeting of the Executive Committee of the Illinois Association*, CHI. TRIB., Apr. 19, 1871, at 3; A.J. GROVER, THE BIBLE ARGUMENT AGAINST WOMAN STATED AND ANSWERED FROM A BIBLE STANDPOINT (1870). Charles Waite similarly challenged Christianity. Waite, a self described free thinker, wrote a book which he described as a comprehensive view of the gospels of the first two centuries. CHARLES B. WAITE, HISTORY OF THE CHRISTIAN RELIGION TO THE YEAR TWO HUNDRED, at iii-iv (3d ed. 1881). It necessarily challenged the Bible as it included what he described as the lost gospels of that time. *Id.* at 1-15 (Chapter 1, "The Lost Gospels of the First Century"). The book was published by his wife, Catharine Van Valkenburg Waite's, publishing company. *Id.* at title page. Elizabeth Cady Stanton shared the position of Grover and Waite that Christianity and the Bible had a deleterious effect on the position of women. ELLEN CAROL DUBOIS, *The Limitations of Sisterhood: Elizabeth Cady Stanton and Division in the American Suffrage Movement, 1875-1902*, in WOMAN SUFFRAGE AND WOMEN'S RIGHTS 160, 163-64. In 1895, after almost a decade of work, she published the Woman's Bible. *Id.* at 164-65 and 170.

84. *Woman's Suffrage: Organization of the Cook County Women's Franchise Association*, CHI. TRIB., Apr. 6, 1870, at 3; *Cook County Organization for Woman Suffrage Formed*, THE REVOLUTION 253 (Apr. 21, 1870). Fernando Jones served as the temporary first chair and Catharine Waite served as secretary. Charles Waite was also a member of the association. Jane Graham Jones, wife of Fernando Jones, was subsequently elected as chair and served as president from 1870 to 1876. From its beginning the association supported Susan B. Anthony. 3 HISTORY OF WOMAN SUFFRAGE 589 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joselyn Gage eds., 1886); *Woman's Suffrage: Meeting of the County Franchise Association*, CHI. TRIB., May 15, 1870, at 3.

85. *Woman Suffrage: First Annual Convention of the Cook County Woman Suffrage Association: Resolutions Offered that Woman is Already Entitled to the Franchise*, CHI. TRIB., Mar.

perhaps one of the acts that precipitated it, Catharine Waite was elected the new president of the IWSA.<sup>86</sup>

The defection was well orchestrated and dramatic. James Bradwell, as chair of the IWSA executive committee, called a meeting of the committee for April 18, 1871.<sup>87</sup> Neither he nor his wife attended the meeting, but Elizabeth Babbit did.<sup>88</sup> Babbit read a paper signed by the dissenters, declaring their withdrawal from the organization and explaining that their decision was based on principle.<sup>89</sup> They cited Grover's pamphlet and accused Waite and other members on the committee who were also members of the CCWSA of attempting to "force us into a union with said association, which published and officially endorsed a pamphlet which treats the Bible as a collection of fables . . . [and] its principal speakers are those known to the public as advocates of free divorce."<sup>90</sup> Bradwell, who at this point was already being accused of trying to destroy the family because of her attempts to become a lawyer, could not be associated with this publication or position.<sup>91</sup> She and the others left and the IWSA fell firmly in the hands of NWSA supporters.<sup>92</sup>

Myra Bradwell remained committed to securing women's legal equality, including woman suffrage, and therefore maintained a relationship with Catharine Waite and both factions of the fighting national leaders. It appears that she and her husband had true affection

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11, 1871, at 3; *Woman Suffrage: Reception to Mrs. Stanton and Miss Anthony: The Former Addresses a Few Words to Her Friend*, CHI. TRIB., June 9, 1871, at 4; see also 3 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 152, 153 n.5 (Ann D. Gordon ed., 2003) (reprinting a letter from Anthony to Elizabeth Boynton Harbert urging Harbert to become President of the IWSA to replace Jones, who had moved to Europe and could no longer lead the NWSA; with Jones gone, Anthony feared the AWSA sympathizers within the IWSA might take control of the state association).

86. BUECHLER, *supra* note 39, at 104.

87. *Female Suffrage: Meeting of the Executive Committee of the Illinois Association*, CHI. TRIB., Apr. 19, 1871, at 3.

88. *See id.*

89. *Id.*

90. *Id.*

91. *See infra* notes 105-108 and accompanying text.

92. Jane Graham Jones succeeded Waite as President of the IWSA. BUECHLER, *supra* note 39, at 104. Jones was also committed to Anthony. See 3 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, *supra* note 85, at 152. There is some evidence that some of those who left the IWSA started their own suffrage association called the Christian Suffrage Society, but it does not appear that this society endured for long. See *Current Topics*, EVERY SATURDAY: A JOURNAL OF CHOICE READING, May 27, 1871, at 483; *Christian Suffrage Society*, CHI. TRIB., Apr. 26, 1871, at 2. It is not known whether either of the Bradwells was associated with this society.

for Lucy Stone.<sup>93</sup> Although their personal relationships may have been more strained, Bradwell also maintained a working relationship and displayed significant respect for Catharine Waite, Susan B. Anthony, and Elizabeth Cady Stanton.<sup>94</sup> Like Anthony and Stanton, Bradwell was fighting for more than suffrage. In a poem she read to the Illinois Press Association shortly after she left the IWSA, Bradwell outlined her law reform agenda. It included securing and advancing women's right to: education, work, contract, guardianship, property, inheritance, and physical protection from a drunken or violent husband.<sup>95</sup> Bradwell was in the middle of her fight to secure her law license and open the professions to women when she delivered this poem - a fight she waged with the assistance of Waite, Stanton, Anthony, and a number of other women's rights activists.

The fight began just after Bradwell had secured the second Illinois Married Women's Property Act and in the midst of her suffrage activism with the IWSA (before the dissension). She closely followed the events in the neighboring state of Iowa where, in June 1869, Arabella Mansfield had become the first woman to secure a state license to practice law.<sup>96</sup> Mansfield had studied law for two years in her brother's law office.<sup>97</sup> Judge Francis Springer, known for his support of the woman's rights movement, had encouraged Mansfield to apply for her license.<sup>98</sup> Although the Iowa law regulating the licensing of attorneys to the bar restricted admission to "white male persons,"<sup>99</sup> Springer admitted

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93. Bradwell also used the *Chicago Legal News* presses to serve as the *Woman's Journal's* western agent, publishing the paper every Saturday. *The Woman's Journal*, CHI. LEGAL NEWS, Jan. 15, 1870, at 124. Lucy Stone, Mary Livermore, and Julia Ward Howe, all leaders of the AWSA, were the editors of the Journal. *Id.*

94. Before the split, Bradwell met with Elizabeth Cady Stanton in Springfield, Illinois in late February 1869 and described her as one of the "great apostles" of the woman suffrage movement. *Suffrage and Springfield*, CHI. LEGAL NEWS, Feb. 27, 1869, at 172. She met with Susan B. Anthony in Chicago in March, 1870. *Susan B. Anthony*, CHI. LEGAL NEWS, Mar. 12, 1870, at 188. She described the encounter as "a very pleasant visit" and published her full support for Anthony's proposed sixteenth Amendment to the Constitution. *Id.* After Bradwell left the IWSA she attended at least two national meetings of the NWSA. See *Washington*, CHI. DAILY TRIB., Dec. 1872, at 2; *The Women*, CHI. DAILY TRIB., May 7, 1879, at 3. Bradwell and Anthony also exchanged a handful of letters from 1873 to 1888 that reflected their continued, albeit strained, relationship. FRIEDMAN, *supra* note 13, at 184-89.

95. *Mrs. Bradwell's Poem*, CHI. TRIB., July 2, 1871, at 2.

96. MORELLO, *supra* note 4, at 11.

97. Louis A. Haselmayer, *Belle A. Mansfield*, 55 WOMEN LAWYERS J. 46 (1969); Dorothy Thomas, *Arabella Mansfield*, in NOTABLE AMERICAN WOMEN 1607-1950: A BIOGRAPHICAL DICTIONARY 492, 493 (Edward T. James ed., 1971).

98. See Thomas, *supra* note 97, at 493.

99. Haselmayer, *supra* note 97, at 47.

Mansfield to the bar, making her the first licensed woman lawyer in the country.<sup>100</sup> Bradwell prominently celebrated Mansfield's admission in the *Chicago Legal News*.<sup>101</sup> Myra Bradwell applied for her Illinois law license three months later, in September 1869.<sup>102</sup> She applied in part because she wanted to practice law, but Bradwell also applied to advance the broader cause of women's rights.<sup>103</sup>

### III. BRADWELL'S CASE AS A STRATEGY IN THE WOMEN'S RIGHTS MOVEMENT

Bradwell's application and subsequent lawsuit were part of her lifelong fight to secure women's legal equality. Bradwell was not a radical. She believed in liberal individualism, Christianity, and marriage.<sup>104</sup> What she denounced was the concept of separate spheres and the laws, doctrines, and social practices that limited women's citizenship rights. That is why twenty years after she first filed her application, she was still angry at those who had openly questioned her ability to be a lawyer because she was a woman and chastised her for attempting to leave her rightful place as wife and mother.<sup>105</sup> "All the wiseacres of the land," she explained, "made doleful prophecies concerning the end of my career . . . [and] predicted that I'd wreck my family and break my hearthstone to smithereens."<sup>106</sup> Two decades later it was still important to her to prove them wrong: "I often wish all those excellent folk who used to picture me as a fanatic destroyer of domesticity and the sweetness of true womanhood could see my two

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100. Mansfield used her legal expertise to advance the women's rights movement in Iowa. Haselmayer, *supra* note 97, at 49 (quoting a letter from John Mansfield published in the IOWA CLASSIC, Dec. 1872, at 17). In August of 1870 she drafted a "Constitution for the Henry County Woman Suffrage Association." *Id.* She continued to teach as well as give various lectures on legal issues such as "The Principles of Government" and "The Origin of Law" and furthered her legal education at Iowa Wesleyan University receiving her Bachelor of Laws degree in June 1872. *Id.* In 1872-73 she studied English, Hindu, and Muslim law in London and Paris. *Id.* At the first national meeting of women lawyers that occurred at the Isabella Clubhouse in Chicago during the World's Fair of 1893, Mansfield gave an address on her admission to the bar and was given an honorary membership to the National League of Women Lawyers founded during the Fair. *Id.*

101. *A Married Woman Admitted to the Bar in Iowa*, CHI. LEGAL NEWS, Oct. 16, 1869, at 20.

102. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, CHI. LEGAL NEWS, Feb. 5, 1870, at 145. Bradwell received her certification of examination from Judge E.S. Williams on August 2, 1869. *Id.*

103. *All Dabble in the Law*, *supra* note 41.

104. Friedman, *supra* note 13, at 37.

105. *See id.* at 40.

106. *All Dabble in the Law*, *supra* note 41; Friedman, *supra* note 13, at 40.

daughters and our homelife.”<sup>107</sup> Bradwell had never fought against marriage or motherhood, but she had always argued that being a wife and mother should not limit a woman’s citizenship status or be a barrier to a woman working in her chosen profession.<sup>108</sup> Bradwell wanted equal rights, not revolution.

*A. Bradwell’s Equal Protection Argument and Her Contribution  
Toward the Development of Sociological Jurisprudence*

Bradwell ultimately lost her case, but by her own assessment, her efforts helped to dismantle the doctrine of separate spheres and her legal arguments were an important contribution to the women’s rights movement.<sup>109</sup> These arguments and her innovation in jurisprudence were all set forth in her case at the state level.<sup>110</sup> She developed them in concert with other women’s rights activists as the case progressed. Bradwell filed three briefs to the Illinois Supreme Court in support of her application for a license to practice law. Each one offered increasingly sophisticated arguments that incorporated and developed the contemporaneous events and arguments set forth by other women’s rights activists.

The first brief accompanied her initial application.<sup>111</sup> The brief was not required by statute but Bradwell submitted it along with the required documents, a certificate of legal study and proof of successful completion of the state bar examination. Because she was the first woman to apply for a license in the state, Bradwell wanted to reassure the justices that her application was legally proper. She stated simply that she met the statutory requirements and therefore her sex should not prohibit her from entering her chosen profession. She acknowledged that the governing statute used the male pronoun in its recitation of requirements to enter the bar, but argued that it was not an explicit requirement that the applicant be male.<sup>112</sup> She cited as evidence the

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107. *All Dabble in the Law*, *supra* note 41. Bradwell was referring to her daughter Bessie Bradwell Helmer, an attorney, and her daughter-in law, Hattie Burton Bradwell. Bessie and Hattie were close friends in school. *Id.* Both women lived with their husbands, Frank Helmer and Thomas Bradwell, both attorneys, in James and Myra Bradwell’s home in Chicago. *Id.*

108. FRIEDMAN, *supra* note 13, at 37; *see Aynes*, *supra* note 9, at 536.

109. *All Dabble in the Law*, *supra* note 41 (“The world, too, has begun to learn the lesson that it is not necessary for a woman to break up all family ties and sacrifice womanly attributes and graces in order to succeed in other trades than the honored one of housewife.”) (quoting Myra Bradwell).

110. *See In re Bradwell*, 55 Ill. 535 (1869).

111. *See A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 145.

112. Bradwell quotes the Illinois law as:

Illinois statute that specified "[w]hen any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included."<sup>113</sup> Bradwell also cited other examples in the statutes where the court would have to interpret the male pronoun "he" to include women to avoid an absurd result.<sup>114</sup>

It was in Bradwell's second brief that she began to invoke arguments that included what would become tenets of sociological jurisprudence.<sup>115</sup> She wrote this brief in response to the Illinois court's initial denial of her application.<sup>116</sup> The decision came in a short letter sent by the court reporter, stating that the court denied her application based on the laws of coverture.<sup>117</sup> She used new statutes, other court decisions, examples of women's social progress, and her own special situation to argue that the laws of coverture no longer applied.<sup>118</sup> She asserted that in light of these changes the court must reconsider and grant her application.<sup>119</sup>

Bradwell first asked the judges to consider the new laws and court decisions that granted women property rights as a changed circumstance that should affect their interpretation of the law governing law licenses.<sup>120</sup> Bradwell insisted that the two Illinois Married Women's Property Acts, passed in 1861 and 1869 that allowed women to enter into contracts and own their own wages, invalidated the rule of

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No person shall be permitted to practice as an attorney or counselor-at-law, or to commence, conduct or defend any action, suit or plaint, in which he is not a party concerned, in any court of record within his State, either by using or subscribing his own name or the name of any other person without having previously obtained a license for that purpose from some two of the Justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counselor-at-law, and shall authorize him to appear in all courts of record within this state, and there to practice as an attorney and counselor-at law, according to the laws and customs thereof . . .

*A Woman Cannot Practice Law*, *supra* note 102, at 145.

113. *Id.*

114. *Id.*

115. Adam Winkler describes these arguments as "living constitutionalism." Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1463 (2001) (explaining that Living Constitutionalism requires that the Constitution must be interpreted "in light of society's changing needs and conditions rather than solely the Framers' intent"); BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 82-83 (1921).

116. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 145.

117. The letter from the Supreme Court Reporter was dated October 6, 1869. *Id.* Bradwell filed her second brief on November 18, 1869. *Id.*

118. *Id.* at 145-46.

119. *Id.* at 146.

120. *Id.* at 145-46.

coverture.<sup>121</sup> She also cited a number of court decisions in Illinois, other states, and in England, which she contended were precedents that supported the changed legal and social position of married women, specifically the condition that women could contract and engage in business dealing.<sup>122</sup> Bradwell also reminded the court that the Illinois legislature had granted her a special charter to own and operate the *Chicago Legal News*.<sup>123</sup> These arguments, using new statutes and court decisions as persuasive precedents to illustrate changed social and legal circumstances, became a common strategy of sociological jurisprudence in the twentieth century.<sup>124</sup>

Bradwell next asked the justices to consider the current social conditions when interpreting the Illinois licensing statute. She set forth these changes by describing the many advances women had made in public life:

The doors of many of our universities and law schools are now open to women upon an equality with men. The Government of the United States has employed women in many of its departments, and appointed many, both single and married, to office. Almost every large city in the Union has its regularly admitted female physicians. . . . The bar itself is not without its women lawyers, both single and married.<sup>125</sup>

Bradwell then described the details of Arabella Mansfield's law license application and Judge Springer's interpretation that the use of the word "male" in the Iowa statute was "not an implied denial of the right to females."<sup>126</sup> Bradwell offered both Mansfield's admission and Springer's interpretation of the Iowa statute as precedent-setting changes in the social and legal position of women and asked the court to interpret and apply the Illinois law to her case in line with these changes.<sup>127</sup>

Bradwell developed her argument by drawing on the strategies of instrumentalism that had developed during the antebellum period and were being challenged by legal classicists. Legal classicism was the

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121. *Id.* at 146; Olsen, *supra* note 6, at 1524. Bradwell also argued that for her in particular, coverture was not a barrier to her ability to engage in business transactions since the Illinois legislature had granted her a special charter to operate the *Chicago Legal News*.

122. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 145-46.

123. *Id.*

124. Winkler, *supra* note 115, at 1481, 1482 n.141.

125. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 146. However, at this time Iowan Mansfield, a married woman, was the only woman admitted to any state bar in the United States.

126. *Id.* at 146.

127. *Id.*

form of judicial interpretation that believed the Constitution was based on "concepts and principles [that] were static and unchanging" and required judges to interpret the Constitution based on the original intent of those who drafted and enacted it.<sup>128</sup> Legal classicism opposed the early nineteenth century practice of some state court judges who had used the law to advance economic policies that supported entrepreneurial growth and expansion, interpreting the laws in light of the current social and economic circumstances.<sup>129</sup> In opposition to legal classicism, Bradwell invoked the strategy of the instrumentalists, but transformed their ends from supporting a Hurstian release of energy<sup>130</sup> to advance a nascent notion of social justice.<sup>131</sup> She urged the court not to enforce some outdated common law doctrine or to interpret a statute from the perspective of those who enacted it, but rather to interpret the law in light of the changed social conditions of women and grant her a license to practice law "as a matter of right and justice."<sup>132</sup>

The connection between Bradwell's arguments and instrumentalism is explicit in her brief. She specifically invoked the words of the instrumentalist, English jurist, Lord Mansfield, citing a case where Mansfield had ruled that regardless of the prescriptions of common law there were exceptions when a married woman could contract and be sued.<sup>133</sup> Lord Mansfield intended his decision to advance the free market, not woman's rights, but Bradwell contended that his decision also supported the contention that the law must adapt to the changing social circumstances of women's position.<sup>134</sup> As evidence she quoted Mansfield's assessment that when "the reason of the law [ceased], the law itself must cease; and that, as the usages of society alter, the law

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128. Morton J. Horowitz, *Transformation of Constitutional Law*, in 6 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2712 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); Paul W. Kahn, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 32-64 (1992); Winkler, *supra* note 115, at 1463; WIECEK *supra* note 8, at 19.

129. WIECEK, *supra* note 8, at 44; *see also* MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 178-80 (1977); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513, 521-24 (1974).

130. J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956). Hurst argued that in the United States in the nineteenth century, men used the law affirmatively "to promote the greater release of individual or group energies" to advance material and economic growth. *Id.* at 7.

131. I am indebted to James Schmidt for helping to develop this insight into social justice.

132. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 146.

133. *Id.*

134. *Id.*

must adapt itself to the various situations of mankind.”<sup>135</sup> Bradwell merely changed the goal of the instrumentalist approach from economic expansion to her gendered justice.

These pre-sociological jurisprudence arguments are echoed in the arguments of Justices and legal scholars credited with developing concepts of sociological jurisprudence, legal realism, and living constitutionalism.<sup>136</sup> In the last two decades of the nineteenth century, Oliver Wendell Holmes, (who some call the father of legal realism) published treatises challenging the notion of legal interpretation as objective and detached from social realities.<sup>137</sup> In the first decade of the twentieth century, Roscoe Pound conceived the term “sociological jurisprudence,” issued a call for “pragmatism as a philosophy of law,”<sup>138</sup> and advocated the concept that the law should be used to achieve social justice.<sup>139</sup> In the 1920s, Benjamin Cardozo advocated living constitutionalism, explaining that the “content of constitutional immunities is not constant, but varies from age to age.”<sup>140</sup> Although none of these men referenced Bradwell, their writings developed the arguments she set forth in her second brief to the Illinois Supreme Court in November 1869.

Bradwell did not cultivate this reasoning on her own. She worked in consultation with other women’s rights activists who were also employing this approach in attempts to influence the interpretation of various state laws and the new U.S. Constitutional amendments.<sup>141</sup>

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135. *Id.*

136. *See infra* notes 137-140 and accompanying text.

137. *See* HORWITZ, *supra* note 30, at 3, 109-10, 142; HALL, *supra* note 30, at 223. *See* Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897).

138. WIECEK, *supra* note 8, at 191-93. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908).

139. *See* Pound, *supra* note 138; *see generally* Roscoe Pound, *The Need of a Sociological Jurisprudence*, in 19 GREEN BAG 607 (1907); *see also* WIECEK, *supra* note 8, at 191-93.

140. CARDOZO, *supra* note 115, at 82-83.

141. Although there are no known correspondences between Bradwell and Stanton specifically discussing this argument of judicial interpretation, there is evidence that the two women interacted during this period and there is a letter Anthony wrote to Bradwell in 1873 after her prosecution for voting in which she asks Bradwell “What are we going to do or say next?” and writes “How I would love to talk of our Constitutional position and work for the future.” FRIEDMAN, *supra* note 13, at 184 (letter from Anthony to Bradwell dated July 30, 1873). This letter was written after Bradwell withdrew from the IWSA. It offers the possibility that Bradwell and Anthony had previously talked about their constitutional arguments. This possibility is supported by the similarities in the arguments of Bradwell, Stanton, and Minor three years earlier, before the splintering of the IWSA. Further, Anthony published an article on October 7, 1869 announcing that Bradwell was about to apply for her law license. *What Women are Doing*, THE REVOLUTION 218 (Oct. 7 1869). Bradwell had just submitted the application in October and just received the letter from the Court Reporter denying her application. Bradwell had not yet published this information in the *Chicago Legal*

Adam Winkler has identified that the New Departure strategy of women suffragists included arguments that the Constitution was a living document and that it be interpreted in light of the changed social and political circumstances.<sup>142</sup> According to Winkler, Elizabeth Cady Stanton publicly articulated this position in January 1870 while testifying before the Senate Committee on the District of Columbia. She was arguing in favor of a petition to grant women suffrage.<sup>143</sup>

Stanton's arguments, like Bradwell's, described democracy and law as evolutionary.<sup>144</sup> She first claimed that the underlying principles of the Constitution required that its provisions apply to all its citizens.<sup>145</sup> She then offered examples of the changed social and legal circumstances of women and argued that these changes required that the legislature grant women the right to vote.<sup>146</sup> Specifically, she cited the recent Supreme Court decision that held that when a foreign born woman married a man born in the United States, she became a citizen.<sup>147</sup> Stanton reasoned that this means a woman born in the United State is already a citizen and therefore entitled to all the privileges and immunities of citizenship.<sup>148</sup> Although, like Bradwell, her arguments did not persuade her audience to grant the demand she sought, her arguments were important to the movement.

Both Bradwell and Stanton also supplemented their pre-sociological arguments with a textual interpretation argument that Stanton described as the New Departure.<sup>149</sup> Ellen Carol DuBois credits Frances and Virginia Minor with the origins of the New Departure argument, which asserted that women were already enfranchised because the right to vote was one of the privileges and immunities of U.S. citizens protected by the Fourteenth Amendment.<sup>150</sup> The Minors first publicly articulated this argument in the form of six resolutions at a

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*News*. Bradwell submitted her second brief to the Illinois Supreme Court on November 16, 1869, but she did not publish copy of it until February 5, 1870. See *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 146. Stanton made her argument to the Senate Committee on the District of Columbia in January 1870. Winkler, *supra* note 115, at 1479.

142. Winkler, *supra* note 115, at 1457-58, 1479.

143. *Id.* at 1479.

144. *Id.* at 1480, 1483; 2 HISTORY OF WOMAN SUFFRAGE 407-520 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joselyn Gage eds., 1881).

145. Winkler, *supra* note 115, at 1480.

146. *Id.* at 1480-81.

147. See *Kelly v. Owen*, 74 U.S. 496 (1868).

148. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 412; see *Kelly*, 74 U.S. at 496.

149. DuBois, *supra* note 13, at 21; Winkler, *supra* note 115, at 1476.

150. DuBois, *supra* note 13, at 21-22.

state suffrage convention held on October 6 and 7, 1869 in Missouri.<sup>151</sup> Three weeks later, on October 28, 1869, Anthony published their resolutions in *The Revolution* and delivered ten thousand copies to activists and politicians throughout the country.<sup>152</sup>

Myra Bradwell drew on their argument and adapted it for use in her own case.<sup>153</sup> On December 31, 1869 she submitted her third and final brief to the Illinois Supreme Court, this time resting a woman's right to practice law on the Privileges and Immunities Clause of Article Four and the Civil Rights Act of 1866.<sup>154</sup> Unlike the Minors, and the argument her attorney would make on her appeal, Bradwell did not make a claim based on the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>155</sup> Rather, she asserted that the denial of her application on the basis of her status as a married woman violated her United States citizenship rights established by the Equal Protection Clause of the Fourteenth Amendment and the 1866 Civil Rights Act.<sup>156</sup> Like Minor, she argued that the court should employ a broad interpretation of the new laws.<sup>157</sup>

In her brief, Bradwell drew heavily on both the Equal Protection Clause and the Civil Rights Act.<sup>158</sup> She argued that the Act guaranteed all United States citizens the "full and equal benefit of all laws and proceedings for the security of persons and property."<sup>159</sup> Bradwell asserted both the Act and the Equal Protection Clause granted her "the right to exercise and follow the profession of an attorney-at-law upon the same terms, conditions and restrictions as are applied to and imposed upon every other citizen of the State of Illinois and none other."<sup>160</sup>

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151. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 407-10.

152. PAPERS, *supra* note 74, at 273-75; Winkler, *supra* note 115, at 1476-77; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 411. Although Minor's argument did not include the new method of constitutional interpretation that included consideration of changed social circumstance, it did call for a broad interpretation of the Constitution and it included a plea for justice. *Dear Revolution (Letter by Francis Minor)*, THE REVOLUTION (Oct. 21, 1869); PAPERS, *supra* note 74, at 275 ("That justice and equity can only be attained by having the same laws for men and women alike." (Francis Minor to the *Revolution*, Resolution 5, Oct. 14, 1869)). Suffragists quickly seized on the New Departure argument and put it into practice by demanding the vote. DUBOIS, *supra* note 23, at 117-18.

153. DuBois, *supra* note 13, at 30.

154. See Gilliam, *supra* note 8, at 114.

155. Bradwell filed the second brief on January 2, 1870. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 146. Gilliam, *supra* note 8, at 114.

156. Gilliam, *supra* note 8, at 114.

157. See *id.*

158. See notes 154 and 156 and accompanying text.

159. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 146.

160. *Id.*

Bradwell reasoned that because she complied with all of the state requirements for admission to the bar, "it is contrary to the true intent and meaning of said amendment and said 'Civil Rights Bill,' for your petitioner to be refused a license to practice law, upon the sole ground of her 'married condition.'"<sup>161</sup> Although she rested her case on alternate constitutional and legal provisions, her argument followed the New Departure reasoning.<sup>162</sup>

She also made a claim based on the Privileges and Immunities Clause of the Fourth Article of the Constitution, again asking the court to employ a broad interpretation of that clause.<sup>163</sup> She submitted an affidavit attesting that she was born in Vermont and argued she was therefore a citizen of that state and the United States.<sup>164</sup> She asserted that under this Article as a citizen of another state, Illinois was required to grant her all the privileges and immunities of a United States citizen.<sup>165</sup> She then listed her assessment of what rights were included in the privileges and immunities of citizenship, a list dramatically different than the one the U.S. Supreme Court would construct in its interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment on her appeal.<sup>166</sup> Bradwell's list included general rights, like "the protection of the Government, the right to the enjoyment of life and liberty, [and] to reside in the State."<sup>167</sup> It also included rights that she had spent much of her adult life fighting to ensure were extended to women, including the right "to acquire and possess property," and "to carry on trade," and her immediate fight "to follow any professional pursuit under the laws of the State."<sup>168</sup> She demanded that these rights "must work equally upon all citizens of the State," concluding that "under this section of the Constitution she has a right to receive a license to practice law upon the same terms and conditions as the most favored citizen of the State of Illinois."<sup>169</sup> Three weeks later, Elizabeth Cady Stanton made similar arguments in her appeal for woman suffrage.<sup>170</sup>

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161. *Id.*

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Stanton spoke at the Joint Hearing before the District of D.C. Committees on January 22, 1870. PAPERS, *supra* note 74, at 296.

In her address to the Senate Committee on the District of Columbia on January 22, 1870, discussed above, Stanton incorporated New Departure textual interpretation arguments together with her use of pre-sociological jurisprudence.<sup>171</sup> She employed Francis Minor's resolutions and argued that the right to vote was one of the privileges and immunities protected by the Fourteenth Amendment.<sup>172</sup> Like Bradwell, she used the changed social and legal circumstance of women and the evolution of the Constitution to support her call for this broad interpretation. Although both women lost their immediate appeals, their efforts introduced these new legal arguments into the public discourse.<sup>173</sup> Other women's rights activists drew on their innovations in their continued fight for women's civil and political rights.

An example that garnered significant public attention occurred one year later, when Victoria Woodhull employed these two innovations in her argument to the United States Congress in support of woman suffrage.<sup>174</sup> Although Woodhull had not previously worked with either Stanton or Bradwell, she echoed their arguments that the law must be interpreted in line with the evolving social and legal circumstances and specifically cited the advance in women's property rights as evidence of such evolution.<sup>175</sup> Woodhull also introduced the concept of justice as both evidence of social change and as a legitimate legislative goal, claiming that "the principle of justice and moral right ha[d] gained sway"<sup>176</sup> and demanding the Congress interpret the existing Constitutional provisions in light of these advances and pass a declaratory act acknowledging women's enfranchisement.<sup>177</sup> Shortly after her appearance, Woodhull was plagued by scandal, and she was not able to continue to publicly advance her arguments.<sup>178</sup> But her testimony had drawn considerable attention to the cause and others

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171. *Id.*

172. Winkler, *supra* note 115, at 1480.

173. *Id.* at 1483.

174. GOLDSMITH, *supra* note 82 at 248-55.

175. *Id.* at 247; Winkler, *supra* note 115, at 1484; ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 338 (1997). Woodhull was an outspoken supporter of free love and divorce, aligning her with Stanton and in opposition to Bradwell. GOLDSMITH, *supra* note 82, at 248-49. It is not known whether Woodhull had either read or heard of Bradwell or Stanton's arguments.

176. Winkler, *supra* note 115, at 1485 (quoting Victoria C. Woodhull's testimony before the Judiciary Committees of the Senate and House of Representatives of the Congress of the United States).

177. GOLDSMITH, *supra* note 82, at 248; Winkler, *supra* note 115, at 1484, 1489.

178. GOLDSMITH, *supra* note 82, at 255; *see* Winkler, *supra* note 115, at 1520 n.383.

continued to employ these arguments, most prominently Susan B. Anthony.<sup>179</sup>

Anthony used these arguments in her defense in the case of the *United States v. Susan B. Anthony*.<sup>180</sup> Anthony had been charged with voting illegally.<sup>181</sup> The judge presiding over Anthony's case deemed her incompetent to testify because she was a woman. Anthony, therefore, had her attorney, Henry Selden, speak for her.<sup>182</sup> He set forth both the New Departure argument that called for a broad textual interpretation, and the pre-sociological jurisprudence argument that demanded that the court consider the changed social and legal circumstances in interpreting the law.<sup>183</sup> Selden argued that evolution of society, and women's position within it, supported women's enfranchisement.<sup>184</sup> Like Bradwell, Stanton, and Woodhull before him, Selden used the Married Women's Property Acts to support women's changed condition.<sup>185</sup> He challenged the ideals of legal classicism and the use of originalism that required judges to discern the intent of the Framers and apply the law as if it were static.<sup>186</sup> Like the others before him, Selden lost his case, but his arguments advanced the new methods of interpretation, which had for the first time been set forth by a man.<sup>187</sup>

Bradwell's direct influence is most visible in the arguments offered by other women lawyers who invoked her words in support of their own law license applications. In the neighboring state of Wisconsin, Lavinia Goodell applied for a license to practice law before the Wisconsin Supreme Court in 1875.<sup>188</sup> She offered a plethora of arguments invoking

179. See *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873).

180. *Id.*

181. Winkler, *supra* note 115, at 1506; FLEXNER & FITZPATRICK, *supra* note 26, at 159; SMITH, *supra* note 175, at 341.

182. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 653.

183. *Id.* at 657-58.

184. *Id.*; Winkler, *supra* note 115, at 1509.

185. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 657-58.

186. Winkler, *supra* note 115, at 1511-12; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 667-68.

187. Winkler, *supra* note 115, at 1512, 1514; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 691; FLEXNER & FITZPATRICK, *supra* note 26, at 159-60; SMITH, *supra* note 175, at 341. Bradwell published the decision in Anthony's case and then wrote two editorial notes criticizing the decision, CHI. LEGAL NEWS, June 21, 1873, at 466 and CHI. LEGAL NEWS, July 19, 1873, at 498.

188. See, e.g., *Mrs. Lockwood's Case*, 11 CHI. LEGAL NEWS, Nov. 16, 1878, at 70 (Bradwell's publishing of Lockwood's letter to Bradwell, the details of Lockwood's case, and Bradwell's commitment to support her; Lockwood's letter pledging to finish the fight Bradwell started to allow women to practice law and asking for her help in her application to practice law in Maryland). See *infra* notes 194-195 for Bradwell's support of Goodell's application to practice law in Wisconsin and Lockwood's application to practice law before the United States Supreme Court.

notions of equality as well as gender difference (that she asserted would enhance women's ability to practice law)<sup>189</sup> and interwove arguments that employed classical legal reasoning, the New Departure, and pre-sociological jurisprudence arguments.<sup>190</sup> She asserted that the Wisconsin legislature had not intended to exclude women when it enacted the state's licensing regulations just five years earlier. She explained that the laws were passed "when progressive ideas concerning the enlargement of the sphere of woman's industries were more widely known and adopted"<sup>191</sup> and reasoned that therefore it "may reasonably be presumed to have been within the minds of the legislators" that women would be admitted.<sup>192</sup> She also cited recently enacted laws that advanced the legal position of women, including the state's Married Women's Property Acts and the changes that had occurred since the Illinois Supreme Court rendered its decision in Bradwell's case.<sup>193</sup> Goodell lost her initial suit, but the case received considerable attention, primarily because Chief Justice Ryan's opinion articulated his horror of a woman in the same terms Justice Bradley had used two years earlier.<sup>194</sup>

The following year, Belva Lockwood took women's fight to practice law, and Bradwell's arguments, back to the United States Supreme Court and to Congress. She worked closely with Bradwell, who documented the events in the *Chicago Legal News*.<sup>195</sup> Lockwood, who was already licensed to practice law in the District of Columbia, sought to be admitted to practice law before the United States Supreme Court.<sup>196</sup> She engaged the assistance of attorney Albert Riddle, a strong supporter of women's rights who had used these new interpretation

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189. See Catherine B. Cleary, *Lavinia Goodell: First Woman Lawyer in Wisconsin*, 74 WISC. MAG. OF HIST. 243 (1991). See VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 22-23 (1998).

190. *Can a Woman Practice Law in Wisconsin?*, CHI. LEGAL NEWS, Jan. 1, 1876, at 116.

191. *Id.*

192. *Id.*

193. *See id.*

194. *See infra* notes 252-255 and accompanying text. In re Goodell 39 Wis. 232 (1875). For contemporary discussions of the case see *Should Women Practice Law in Wisconsin*, 8 CHI. LEGAL NEWS 215 (March 25, 1876) (where Bradwell dissects Ryan's opinion); *Women as Lawyers--Mrs. Goodell's Case*, THE CENTRAL LAW JOURNAL, Mar. 24, 1876, at 186 (arguing that women should have the chance to practice law); *Editorial Notes*, INDEP., Mar. 23, 1876, at 16 (describing Ryan's decision as "stupid, illiberal, and mean").

195. *See Shall Women Be Admitted to Practice Law in the Federal Courts?*, CHI. LEGAL NEWS, Mar. 23, 1878, at 215; *Shall Women Be Admitted to the Bar?*, CHI. LEGAL NEWS, Mar. 30, 1878, at 224-25; *The Admission of Women to the Bar*, CHI. LEGAL NEWS, Feb. 15, 1879; *Women as Lawyers*, CHI. LEGAL NEWS, May 11, 1878, at 271-72; *Women's Right to Practice in the U.S. Courts*, CHI. LEGAL NEWS, Feb. 10, 1877, at 169.

196. *See MORELLO, supra* note 4, at 31, 33.

arguments five years earlier while representing two women who unsuccessfully sued the District of Columbia Board of Electors for refusing to allow them to vote.<sup>197</sup>

Lockwood invoked the new method of interpretation immediately in her response to her initial rejection by Chief Justice Morrison R. Waite. Waite noted that only men had ever been admitted to the Supreme Court bar and therefore precedent barred her application.<sup>198</sup> Lockwood rejected his reasoning, asserting that "it was the glory of each generation to make its own precedents."<sup>199</sup> She then took her appeal to Congress.

Lockwood drafted a bill that granted women the right to be admitted to practice law on the same grounds as men and argued that the changed social conditions and the current position of woman required its passage.<sup>200</sup> In 1878, the House of Representatives passed the bill but it stalled in the Senate.<sup>201</sup> She submitted a brief to the Senate encouraging it to act in accordance with the demands of the age: "This country is one that has not hesitated when the necessity has arisen to make precedents" she wrote, "the more extended practice and the more extended public opinion [supporting women lawyers] . . . has already been accomplished. Ah! That very opinion . . . [is] asking you for that special act now so nearly consummated, which shall open this door of labor to women."<sup>202</sup> California Senator Aaron Sargent, a longtime supporter of woman's rights and a close friend of Susan B. Anthony's, took up Lockwood's fight.<sup>203</sup>

Sargent followed Bradwell's lead in his arguments to his fellow senators. He claimed that women were citizens and then listed the social

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197. Winkler, *supra* note 115, at 1497; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 144, at 587-94.

198. See MORELLO, *supra* note 4, at 33; DRACHMAN, *supra* note 189, at 27; FAIRMAN, *supra* note 8, at 1366. See also Jill Norgren, *Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics*, 23 J. SUP. CT. HIST. 16, 29 (1999); Lee Ann Potter, *A Bill to Relieve Certain Legal Disabilities of Women*, 66 SOC. EDUC. 117, 119 (2002).

199. Frances A. Cook, *Belva Ann Lockwood: For Peace, Justice, and President*, May 13, 1997, available at <http://stanford.edu/group/WLHP/papers/lockwood>.

200. See *Shall Women Be Admitted to the Bar?*, *supra* note 195, at 225.

201. See MORELLO, *supra* note 4, at 34; see also *Mrs. Lockwood's Victory*, CHI. LEGAL NEWS, Mar. 2, 1878, at 191; *Women's Right to Practice in the U.S. Courts*, *supra* note 195, at 169.

202. Bella Lockwood, *In Support of House Bill 1077, Entitled "A Bill to Relieve Certain Disabilities of Women,"* in JAMES KIRBY, 1 THE LEGAL NEWS 185 (1878).

203. See MORELLO, *supra* note 4, at 34; *Mrs. Lockwood's Victory*, *supra* note 197, at 91; *Women's Right to Practice in the U.S. Courts*, *supra* note 195, at 169.

and legal evolutions that had advanced their condition.<sup>204</sup> He invoked the names of accomplished women from a diversity of occupations and professions, including women lawyers.<sup>205</sup> He cited the state laws that had advanced women's legal rights, including the many states that already admitted women to their bars.<sup>206</sup> He also submitted petitions signed by lawyers in both New York and the District of Columbia that supported women's admission to the Supreme Court bar, which supported Lockwood's claim that there was popular support for the bill.<sup>207</sup> The Senate acquiesced and enacted the law in February 1879.<sup>208</sup> In a moment of great triumph, Lockwood was admitted to the Supreme Court bar on March 3, 1879.<sup>209</sup>

*B. The Illinois and United States Supreme Court Decisions in Bradwell's Case*

Bradwell lost her case at both the state and federal level. The Illinois Supreme Court rejected the arguments she set forth in her three briefs. The U.S. Supreme Court never even heard her arguments. Although Bradwell keenly suffered the defeat, these decisions did not dissuade the continued use and development of either the pre-sociological arguments or the New Departure. They were not even definitive on the issue of women securing their law licenses. Rather, they represent both courts' attempts to stay the evolution of democracy that was moving toward the demise of the ideology and practice of separate spheres.

The Illinois Supreme Court discussed its fear of women's progress in its opinion. It first stated definitively that married or not, no woman could be admitted to the Illinois bar and summarily dismissed Bradwell's constitutional claims.<sup>210</sup> Then, it rested the decision on its horror of a woman.<sup>211</sup> The court was acutely aware and openly afraid of

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204. *Women as Lawyers*, *supra* note 195, at 272. Throughout Sargent's political and legal career, he was a champion of women's rights. A close friend of Susan B. Anthony's, in 1878 he introduced the "Anthony Amendment" to Congress, the woman suffrage amendment that was ultimately enacted as the Nineteenth Amendment in 1920. FLEXNER & FITZPATRICK, *supra* note 26, at 165.

205. *See Women as Lawyers*, *supra* note 195, at 272.

206. *The Admission of Women to the Bar*, *supra* note 195, at 181.

207. *See id.*

208. *See id.*; 20 Stat. 292 (1879).

209. VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA* 243 (1993).

210. *See A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 147.

211. *See id.*

the woman's rights movement's quest for legal equality and the social upheaval that it believed would follow if the movement succeeded. Chief Justice Charles B. Lawrence explained that "this step [admitting Bradwell to the bar], if taken by us, would mean that, in the opinion of this tribunal, every civil office in this State may be filled by women; that it is in harmony with the spirit of our constitution and laws that women should be made governors, judges and sheriffs. This we are not yet prepared to hold."<sup>212</sup> The court tried to put the matter to rest by adding, insincerely, "[i]f the legislature shall choose to remove the existing barriers and authorize us to issue licenses equally to men and women we shall cheerfully obey . . . ."<sup>213</sup>

But there was growing support for women holding political office and working in the profession. Within two years, the Illinois legislature removed its barriers. The tide was turning and the justices felt it. Their pronouncements were defensive attempts to hold off the tide, rather than reflections of the general consensus. But the Illinois court dealt a significant blow to the movement and Bradwell understood this. She described the court's decision as a denial of women's citizenship. She charged, "what the decision of the Supreme Court of the United States in the Dred Scott case was to the rights of negroes as citizens of the United States, this decision is to the political rights of women in Illinois – annihilation."<sup>214</sup> Bradwell then took her case to the U.S. Supreme Court.<sup>215</sup>

Bradwell did not represent herself in her appeal. Instead, she hired Matthew Carpenter, a well-known attorney, U.S. Senator, and woman suffrage supporter to argue her case to the United States Supreme Court.<sup>216</sup> Bradwell wanted her case cast as a woman's rights case and framed in the broadest terms. She wanted the Supreme Court to rule that

212. *In re Bradwell*, 55 Ill. 535 (1869). See also Olsen, *supra* note 6, at 1518-41.

213. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 147. In addition to the *Bradwell* case, Justice Lawrence received strong criticism in his opinion in *The People vs. Charles L. Wilson and Andrew Shuman* in 1875. See 3 A[LFRED] T[HEODORE] ANDREAS, *HISTORY OF CHICAGO, 1839-1900*, at 252 (1975). The proprietor and the editor of the *Chicago Evening Journal* had published a column criticizing the lax treatment murderers received in the criminal courts. *Id.* The Supreme Court issued contempt citations against them and had them arrested. *Id.* Chief Justice Lawrence found them in contempt and fined them \$100 and \$200 respectively. *Id.* Newspapers throughout America and Europe commented negatively on the court's actions and Andreas wrote, "The action of Judge Lawrence in the case undoubtedly contributed to his defeat as a candidate for re-election to the Supreme Bench the following year." *Id.*

214. *A Woman Cannot Practice Law or Hold Any Office in Illinois*, *supra* note 102, at 147; see also BUECHLER, *supra* note 39, at 64.

215. *Bradwell v. State*, 83 U.S. 130 (1873).

216. Gilliam, *supra* note 8, at 117.

that the Fourteenth Amendment and the Civil Rights Act established women as full citizens entitled to all rights, privileges, and obligations of citizenship and to the equal protection of the law. But Carpenter did not comply with Bradwell's intentions. He did not consult with Bradwell prior to submitting his brief or presenting his oral argument before the Court.<sup>217</sup>

Carpenter was also the attorney for the Crescent City Slaughter-House company in *Slaughter House Cases*.<sup>218</sup> He argued in the *Slaughter-House* case that the law granting the monopoly was proper under the state police power.<sup>219</sup> In Bradwell's case, he followed the argument of his opponent in the *Slaughter-House* case, former Supreme Court Justice John Campbell, and argued that the right to work, which he labeled the liberty of pursuit, was one of the fundamental rights included in the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>220</sup> He did not present Bradwell's argument that the Illinois court's denial of her law license violated the Equal Protection Clause of the Fourteenth Amendment or the 1866 Civil Rights Act. Carpenter determined not to make any arguments based on gender equality and went so far as to differentiate the right to work from the right to vote.<sup>221</sup> He blatantly argued against the New Departure and claimed that the right to vote was a political right, not a privilege and immunity protected by the Fourteenth Amendment.<sup>222</sup>

Bradwell never commented publicly on Carpenter's concession that the right to vote was not included in the privileges and immunities of citizenship. She instead published Carpenter's argument in full in the *Chicago Legal News* and described it generally as an "able, concise, and unanswerable argument."<sup>223</sup> Leaders of the suffrage movement, were not so cavalier. Matilda Joslyn Gage wrote an editorial to the *Chicago Tribune* and described as "inconsistent" and "befogging" Carpenter's argument that the Fourteenth Amendment granted women civil equality but not political equality.<sup>224</sup> Anthony wrote a personal letter to Bradwell

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217. Gilliam, *supra* note 8, at 119. Bradwell did, nonetheless, praise Carpenter's argument on her behalf. *Senator Carpenter's Argument – Liberty of Pursuit*, CHI. LEGAL NEWS, Jan. 20, 1872, at 108.

218. E. BRUCE THOMPSON, MATTHEW HALE CARPENTER: WEBSTER OF THE WEST 101 (1954).

219. *See Slaughter House Cases*, 83 U.S. 36 (1872); THOMPSON, *supra* note 218, at 101.

220. Smith, *supra* note 8, at 260.

221. HOFF, *supra* note 8, at 168-69; Gilliam, *supra* note 8. *See also* DuBois, *supra* note 13, at 19-40.

222. *Supreme Court of the United States*, CHI. LEGAL NEWS, Jan. 20, 1872, at 108-09.

223. *Senator Carpenter's Argument – Liberty of Pursuit*, *supra* note 217.

224. *The Political Aspect of the Question*, CHI. TRIB., Feb. 8, 1872, at 5.

describing Carpenter's arguments as "such a school boy pettifogging speech . . . wholly without basic principle" but she conceded "still the courts are so entirely controlled by prejudice and precedent we have nothing to hope from them but endorsement of dead men's actions."<sup>225</sup> Perhaps Bradwell remained silent on the point because she understood the difficulties of crafting an argument that would persuade the Justices.

The U.S. Supreme Court took three years to render its ruling in Bradwell's case. When it did, it ruled against Bradwell, basing its opinion on the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>226</sup> The Court made its decision in *Slaughter-House Cases* first, and then applied its reasoning to *Bradwell*.<sup>227</sup> When the majority opinion by Justice Miller was read in open court – a decision which discussed its Constitutional grounds but abstained from any comment of the issue of women's rights – there was no notable reaction by the audience in the courtroom. In contrast, when Justice Bradley's concurring opinion was read, with its emphasis on separate spheres and women's place, one reporter described that "it seemed to cause no little amusement upon the bench and the bar."<sup>228</sup> The audience apparently considered Justice Bradley's horror of a woman comical.

Bradwell offered her own assessment of the Court's decision in the *Chicago Legal News*. She respectfully disagreed with the majority's interpretation of the Fourteenth Amendment – both in determining its construction and in its definition of the privileges and immunities of citizens – but she was livid at Bradley's concurrence. She pointed out the inconsistency between his dissent in *Slaughter-House Cases* and his concurrence in her case. "If, as Justice Bradley says, the liberty of pursuit is one of the fundamental privileges of an American citizen," she asked, "how can he then, and be consistent, deprive an American citizen of the right to follow any calling or profession under laws, rules and regulations that shall operate equally upon all, simply because such citizen is a woman?"<sup>229</sup> She posited that he "lower[ed] the dignity" of his office "by traveling out of the record to give his individual views upon what we commonly term 'Woman's Rights.'"<sup>230</sup> The public

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225. FRIEDMAN, *supra* note 13, at 185 (emphasis deleted) (letter from Anthony to Bradwell dated June 30, 1873).

226. Gilliam, *supra* note 8, at 116; SMITH, *supra* note 175, at 339-41.

227. See *Slaughter-House Cases*, 83 U.S. 36 (1872).

228. *More Supreme Court Decisions*, BOSTON DAILY ADVERTISER, Apr. 16, 1873, at 1; Gilliam, *supra* note 8, at 126; WARREN, *supra* note 8, at 550.

229. *The XIV Amendment and Our Case*, CHI. LEGAL NEWS, May 10, 1873, at 390.

230. *Id.*

response to Bradwell's case and to other women lawyers suggests that Bradwell was not alone in her assessment.

#### IV. POPULAR SUPPORT FOR CHALLENGES TO THE DOCTRINE OF SEPARATE SPHERES

The Supreme Court and a number of state courts resisted various women's claims for legal equality and, specifically, their attempts to become licensed attorneys.<sup>231</sup> But Supreme Court decisions do not always or necessarily represent public sentiment on the specific issue in dispute or those underlying it. In the case of women's fight for legal equality, and specifically women's right to practice law, the Supreme Court lagged behind a more progressive public sentiment. There were some state courts and legislatures that granted women rights, including the right to practice law, even as Justice Bradley pronounced that it was a violation of divine and natural law.<sup>232</sup> And there was evidence of significant public support for the women who sought to enter the profession.<sup>233</sup>

The first evidence of public support for women's foray into the legal profession accompanied Arabella Mansfield's admission, the first woman who secured a state law license.<sup>234</sup> Mansfield had the support of a number of members of the Iowa bar, including the male lawyers who administered her bar examination.<sup>235</sup> They passed her with high honors and lauded her skill, noting that "in her examination, she has given the very best rebuke possible to the imputation that ladies can not qualify for the practice of law."<sup>236</sup> They further remarked on the changed social circumstances that, they asserted, required her admission. They explained that they construed the Iowa statute controlling the admission of attorneys to include women despite its use of the word "male" as a response to "the demands and necessities of the present time and occasion."<sup>237</sup>

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231. Nineteen state courts refused to admit grant women a license to practice law without an act from their legislatures. DRACHMAN, *supra* note 189, at app. 1 (listing the date of admission of the first woman lawyer in each state and the District of Columbia and whether the admission was approved by the state court or if an act of the state legislature was required to overcome the court's refusal to admit women to its bar).

232. *See id.*

233. *See infra* notes 234-249 and accompanying text.

234. *See* Thomas, *supra* note 97, at 492.

235. *Id.* at 493.

236. Ellen Martin, *Admission of Women to the Bar*, 1 CHL. L. TIMES 76, 76-77 (1887) (quoting the Examining Committee Report).

237. *Id.* at 76.

Support for Mansfield also appeared to extend beyond the activists that enabled her admission. The lawyers who examined her claimed that the committee's support for Mansfield was representative of all the lawyers in the state. "[W]e feel confident . . .," they explained, "that we speak not only the sentiments of the court and of your committee, but the entire members of the bar, when we say that we heartily welcome Mrs. Mansfield as one of our members, and most cordially recommend her admission."<sup>238</sup> Further evidence of public support was set forth in the local newspaper, which asserted that Mansfield is a "lady of strong mind. That she has the brain and the necessary ability to make a good record for herself no one will dispute."<sup>239</sup> As the number of women lawyers grew, so it appears did the public's approval of their endeavors.

Those who supported women lawyers attempted to answer the two greatest concerns expressed by those, like Justice Bradley, who championed the doctrine of separate spheres. They argued that women were intellectually capable of professional pursuits. Simultaneously, they insisted that working outside of the domestic sphere would neither make the women unfeminine nor destroy the family. Therefore, a number of papers that reported on Mansfield's admission described her as "the grace and beauty of the Iowa bar."<sup>240</sup>

Alta Hulett had similar public support in Illinois in the early 1870s. Even before she applied for her license, a local reporter had noticed her monitoring proceedings at the courthouse.<sup>241</sup> The paper described her in a way that was supportive of her ambitions and reassuring to those who feared women's rights would upset the social order. It observed she was "a charming young lady . . . of more than ordinary personal attractions bright and prepossessing in appearance, and evidently in earnest in her purpose to acquire a profession."<sup>242</sup> It suggested that she would make a competent lawyer by assessing that as she sat in the courtroom she "was

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238. *A Woman Lawyer at Last*, NEWARK ADVOCATE (Newark, OH), July 9 1869, at 1, col. H; *The Athens of Iowa Ahead*, MORNING REPUBLICAN (Little Rock, AR), July 14, 1869, at col. A.

239. *A Married Woman*, *supra* note 101, at 20 (quoting from the *Mount Pleasant Journal*); DAILY NATIONAL INTELLIGENCER & WASHINGTON EXPRESS (Washington, D.C.), Oct. 26, 1869, at col. H.

240. *Personal and General*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER (New York, NY), Nov. 27, 1869, at 171, col. C; *All Sorts and Sizes*, BANGOR DAILY WHIG & COURIER (Bangor, ME), Nov. 13, 1869, at col. F; *see also* THE NEWS AND OBSERVER (Raleigh, NC), Aug. 16, 1892, at col. A (discussing Mansfield being admitted to the bar); *Notes*, THE DAILY INTER OCEAN (Chicago, IL), Aug. 27, 1892, at 11, col. B; *Current Comment*, ST. PAUL DAILY NEWS, Aug. 30, 1892, at 4, col. C; *America's Female Lawyers*, THE ATCHISON DAILY GLOBE (Atchison, KS), Sept. 20, 1892, col. E.

241. *See* GA WEEKLY TELEGRAPH & GA JOURNAL & MESSENGER, Nov. 15, 1870, at col. D (reprinting an article from the ROCKFORD REGISTER).

242. *Id.*

watching the progress of a case with as much interest as any of the legal gentlemen present.”<sup>243</sup>

After Hulett passed the bar but was denied a license, newspapers around the country covered her story. They cited her ability without any criticism or objections and with an undertone of support.<sup>244</sup> A New Hampshire paper described the Illinois court as out of step with the modern times, noting “[t]he ‘old foggy’ Judges of the Illinois Supreme Court have [now] refused two applications of females [Bradwell and Hulett] to be admitted to the bar of that State.”<sup>245</sup> Local newspapers increased their support for Hulett when she, with the support of Myra Bradwell and others, drafted a state law that would open all professions to women.<sup>246</sup>

Alta Hulett increased her popular support by lecturing throughout the state in support of the bill. She crafted an address entitled “Justice versus the Supreme Court” outlining the issues in her case that included a general demand for equality between the sexes and a specific demand that women be granted the right to practice law.<sup>247</sup> She debuted her lecture in her hometown in northern Illinois where the crowds were overflowing and cheered often throughout her speech.<sup>248</sup> One local paper was so impressed with Hulett it exclaimed “[s]he is an honor to Rockford.”<sup>249</sup>

These displays of support for the early women lawyers by members of their local communities and some members of the bar are not evidence that the ideology of separate spheres had been overthrown, but they do suggest that there was growing opposition to its constraints. As one newspaper described, women’s efforts to practice law were “a new

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243. *Id.*

244. *See Personal*, THE MILWAUKEE SENTINEL, Nov. 10, 1871, at col. C.

245. THE DAILY PATRIOT (Concord, NH), Nov. 23, 1871, at col. B.

246. The law they drafted in the fall of 1871, was “[a]n act to secure to all persons freedom in the selection of occupation, profession or employment.” S. 275, 27th Sess., at 1024-1026 (Ill. 1872).

247. Alta Hulett first delivered her address on November 25, 1871 in Rockford’s Brown Hall to a capacity crowd. *Miss Alta M. Hulett’s Lecture*, ROCKFORD JOURNAL, Dec. 2, 1871, at 1; *Miss Alta M. Hulett’s Lecture*, ROCKFORD REGISTER, Dec. 2, 1871, at 1; *Miss Hulett’s Lecture*, ROCKFORD GAZETTE, Nov. 30, 1871.

248. *Miss Alta M. Hulett’s Lecture*, ROCKFORD REGISTER, *supra* note 247, at 1 (reporting that the night of Hulett’s debut the Hall was “filled to its utmost capacity . . . [with] not a foot of standing room unoccupied” and that “over four hundred persons went away unable to get inside”); *Miss Alta M. Hulett’s Lecture*, ROCKFORD JOURNAL, *supra* note 247, at 2 (reporting that Hulett “spoke for an hour and a half and during the whole time she held [the audience’s] strict attention and drew from them repeated rounds of applause.”).

249. *Miss Alta M. Hulett’s Lecture*, ROCKFORD REGISTER, *supra* note 247, at 1.

and most interesting phase of the great battle now raging along the entire of society between Progress and Prescription."<sup>250</sup> There were those that would never change their minds. Even after women were admitted to the bar, many members of the bench continued to oppose the idea of women practicing law. According to Myra Bradwell, after Alta Hulett was admitted to the bar in 1873, one of the Illinois Supreme Court judges acknowledged "that she had passed a good examination" but remarked "if she were his daughter, he would disinherit her."<sup>251</sup> Bradwell described his position as representative of the sentiment among some of the older members of the profession and resigned that "[n]othing save a blast from Gabriel's trumpet can dispel these lifelong prejudices."<sup>252</sup> But that judge, rather than representing the dominant sentiment in Illinois, was speaking out against the changes that were taking place.

Reactions to Myra Bradwell's case by the press and members of the bar offered additional support for the changing public sentiment on the condition of women. First, as Nancy Gilliam has noted, the State of Illinois did not present any case in opposition to Bradwell's appeal. It did not submit a brief to the Supreme Court supporting the Illinois Supreme Court's decision nor did it send a representative to the oral arguments. Although Gilliam claims there is some precedent for this, "it was not customary for a state to treat a suit so cavalierly."<sup>253</sup> Additionally, there was the single sentence written by a reporter for the *Boston Daily Advertiser* that noted that Justice Bradley's opinion, describing woman as unfit to practice law and championing separate spheres, "seemed to cause no little amusement upon the bench and in the bar."<sup>254</sup> The implication is that Bradley's position was so out of step with the current sentiment the audience laughed at his concurring opinion.

Editorial comments in a number of newspapers offer further evidence that there was a growing sector that disagreed with Bradley. The *Chicago Tribune* claimed that Bradwell had the skills and intellect to be an attorney<sup>255</sup> and described Bradley as "cling[ing] to the old idea

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250. *A Feminine Dred Scott Case*, THE INDEPENDENT, Mar. 10, 1870, at 4.

251. *Deep-Rooted Prejudice*, 5 CHI. LEGAL NEWS, June 14, 1873, at 453.

252. *Id.*

253. Gilliam, *supra* note 8, at 123.

254. *More Supreme Court Decisions*, *supra* note 228, at 1.

255. *The Myra Bradwell Case*, CHI. TRIB., Apr. 20, 1873, at 8.

of woman's sphere in life . . . ."<sup>256</sup> Another report, written while the case was on appeal before Bradley rendered his concurrence, praised Bradwell for her efforts and expressed its opinion that public sentiment was on her side: "Mrs. Bradwell has done well to push her claims . . . [and w]e have not the least doubt that the next legislature of Illinois will remove the grievance under which this accomplished woman, and all her sisters in that state, now suffer."<sup>257</sup>

Lavinia Goodell, like the other women lawyers, also received significant support for her professional efforts in local and national newspapers. When she was first admitted to practice law in Janesville, Wisconsin, a Milwaukee paper noted the occasion and offered its support. It attempted to calm any horror of a woman fears its readers might have by editorializing that Goodell "possesses a pleasing and modest address." It also affirmed that she had sufficient "intellectual vigor to rank among the foremost of her profession."<sup>258</sup> Other newspapers across the country noted the event without editorial, but without any negative undercurrent.<sup>259</sup>

Goodell also received broad public support after Chief Justice Ryan denied her application in an opinion that closely followed Justice Bradley's position.<sup>260</sup> Wisconsin attorney Ole Mosness published an editorial in the *Wisconsin State Journal* criticizing the court's decision.<sup>261</sup> The Wisconsin press called the decision unjust and predicted that, "[t]here will be very decided dissenting opinions

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256. *Woman's Right to Practice Law*, CHI. DAILY TRIB., May 11, 1873, at 8. Note that there were some who did not support separate spheres but were critical of Bradwell and the woman's movement for bringing this case when it was apparent that they would lose. WARREN, *supra* note 8, at 550 n.1 (quoting THE NATION, Apr. 24, 1873). See also *Women Practice in the Courts – A Test Case*, N.Y. TIMES, Mar. 16, 1873, at 1 (reprinting an article from the Chicago Journal which was published before the Supreme Court rendered its decision, offering support for Bradwell's argument that women are citizens and can practice law).

257. *A Feminine Dred Scott Case*, *supra* note 250, at 4.

258. *Admitted to Practice*, MILWAUKEE DAILY SENTINEL, June 19, 1874, at 5, col. C; see also THE GALVESTON DAILY NEWS, July 23, 1874, at col. D (noting that Goodell "is said to be a lady of good education, fine appearance, and modest bearing").

259. *About Women*, LOWELL DAILY CITIZEN AND NEWS (Lowell, MA), June 29, 1874, at col. C; *General Intelligence*, BOSTON INVESTIGATOR, July 8, 1874, at 6, col. D; *Personalities*, CLEVELAND DAILY HERALD, July 3, 1874, at 4, col. F (noting Goodell was admitted "after passing a very creditable examination").

260. See *In re Goodell*, 39 Wis. 232, 244-45 (1875); see also *Supreme Court of Wisconsin*, CHI. LEGAL NEWS, Mar. 11, 1876, at 196, 199.

261. See *Miss Goodell's Application Denied*, CHI. LEGAL NEWS, Mar. 4, 1876, at 191 (reprinting the Wisconsin State Journal article); see also *Mr. Mosness on Judge Ryan's Opinion*, CHI. LEGAL NEWS, May 13, 1876, at 271 (letter by Mosness to Bradwell arguing that the Chief Justice of the Wisconsin court's "prejudice against women in the practice of law" influenced him to "disregard the plain provision of the statute").

expressed by members of the bar and by the people . . . .”<sup>262</sup> A Milwaukee paper explained that Ryan denied Goodell’s application based on a “law that is about a thousand years old.” And finally, the *Journal* contended that if practicing law would place women’s purity in danger, “it would be better to reconstruct the court and the bar, than to exclude the women.”<sup>263</sup>

When Goodell subsequently reapplied for admission to the Wisconsin State Supreme Court bar, after she secured a new law that allowed women to be admitted,<sup>264</sup> newspapers again offered their support for Goodell and for women’s rights in general. One editorial despaired at the lingering prejudices that existed within the judiciary. “The prejudice of sex is the most imbecile, the least excusable, of all prejudices – and yet it is one of the strongest.”<sup>265</sup> This author perceived the prejudice against women as persistent and pervasive: “the intolerance of woman workers in the fields assumed to be out of their sphere is as bitter and almost widespread as ever.”<sup>266</sup> And yet, the author’s own position and the Wisconsin Supreme Court’s subsequent admission of Goodell (Ryan was the sole dissenter), suggest that the prejudice had lessened.

Public support for women lawyers increased throughout the decade. By 1877 *The New York World* published an article encouraging women to practice law, especially in the Federal Courts.<sup>267</sup> It cited Alta Hulett and Phoebe Couzins, a lawyer practicing in St. Louis, as examples of women “who have succeeded fairly, as well as men of equal mental caliber would have done, and this without ceasing to be womanly.”<sup>268</sup> The “womanly” qualifier reflects the opposition Myra Bradwell faced

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262. *Miss Goodell’s Application Denied*, *supra* note 261, at 191; see also *Female Lawyers*, MILWAUKEE DAILY SENTINEL, Feb. 24, 1876, at 7, col. A (reprinting Ryan’s opinion without textual editorial, but revealing its support for Goodell in its extended headline which reads “Female Lawyers. Opinion of Chief Justice Ryan in the Case of Miss Lavinia Goodell. The Reasons for Refusing Her Application to the Bar. Law That Is About a Thousand Years Old”).

263. *Miss Goodell’s Application Denied*, *supra* note 261, at 191. In 1877, with the support of every lawyer in her county, Goodell secured a law that prohibited sex as grounds for denying a law license. See Cleary, *supra* note 189, at 265.

264. Cleary, *supra* note 189, at 265 (describing Goodell’s bill prohibiting the denial of a state law license on the basis of sex and its enactment on March 22, 1877). Goodell reapplied for her law license in the spring of 1879. *Id.* at 267.

265. MILWAUKEE DAILY SENTINEL, Apr. 25, 1879, at 4, col. B (discussing Lavinia Goodell’s application to the bar).

266. *Id.*

267. INTER OCEAN (Chicago, IL), Jan. 31, 1877, at 4, col. F (summarizing article from NEW YORK WORLD).

268. *Id.*

when some, like Justice Bradley, claimed that a woman attorney would violate the natural order. The *World* strongly supported women leaving the domestic sphere and entering the public one. “There can be no earthly reason,” it continued “why women should not be admitted to compete with men in any occupation for which they are fitted . . . .”<sup>269</sup>

By the 1890s, papers throughout the country commented on the increase in the number of women lawyers. They particularly noted that there were several women practicing who were members of the Supreme Court Bar. A newspaper in Bismark, North Dakota described these accomplishments and then editorialized, “[i]n a single decade the number of women lawyers increased from one to seventy-five.”<sup>270</sup> None of the papers expressed any opposition or even discussed the issue of separate spheres; rather, there was a suggestion of pride in the way society had progressed.

#### IV. CONCLUSION

Myra Bradwell lost her appeal, but the Supreme Court decision in *Bradwell v. Illinois* should not historically negate the innovations she forged through her case. Each act Bradwell took in the process – from her initial application, her briefs to the Illinois Supreme Court, her appeal to the U.S. Supreme Court, and her prolific editorials on every aspect of her case and the cases of others – brought attention to the legal issues, garnered significant popular support for the cause, and advanced the women’s rights movement. Through her legal arguments, she also initiated two legal innovations that became important tools in the fight for rights: crafting the foundations of sociological jurisprudence and forging the argument that the Equal Protection Clause should be applied to women. She drew on the ideas and assistance of other women’s rights activists, men and women, to develop these innovations, and encouraged others to continue the fight. Over the subsequent century, the women’s rights movement developed and implemented the arguments Bradwell initiated in her case. Their legacy, however, (and perhaps, of course) was mixed.

The evolution of Bradwell’s early sociological jurisprudence arguments is complicated. Many scholars have identified Florence Kelley’s work at Hull House in Chicago and as the executive director of the National Consumers League in New York to advance protective

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269. *Id.*

270. *Woman Lawyers*, BISMARCK DAILY TRIB., June 20, 1891, at 2, col. D.

labor legislation as a significant contribution to the development of sociological jurisprudence.<sup>271</sup> Kelley first initiated these reforms for women and children with the intention of then expanding their protections to male laborers. As Rogers Smith explains, efforts to secure "protection for all and [maintain] a consistent, egalitarian liberal feminism, [had] proved to be inadequate, but there [was] no doubt that conditions of working women did urgently demand improvement."<sup>272</sup> Kelley and her colleague Josephine Goldmark developed the idea of using current economic and sociological evidence to enact laws that would limit the hours women laborers could be required to work, establish a minimum wage, and establish health and safety requirements for conditions in the workplace. Together they gathered the evidence and drafted the document that became known as the Brandeis brief. They convinced Louis Brandeis to argue their case before the U.S. Supreme Court and won a victory when the Court upheld Oregon's ten-hour work day law in *Muller v. Oregon*.<sup>273</sup> Roscoe Pound later labeled this strategy as sociological jurisprudence.<sup>274</sup>

Part of this strategy initially required arguing that laboring women needed special protections, drawing on the old notions of women's delicacy. This appeared to be inconsistent with women's rights activists' demands for legal equality. Scholars continue to debate the cost and effectiveness of these reforms and the damage they did to the women's rights campaign.<sup>275</sup> These laws were at the heart of the second major split in the women's movement in the 1920s when protective

271. HELENE SILVERBERG, *GENDER AND AMERICAN SOCIAL SCIENCE: THE FORMATIVE YEARS 13-14* (1998); Felice Batlan, *Law and the Fabric of the Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 S. CAL. INTERDISC. L. J. 235 (2006); Ira Harkavy & John L. Puckett, *Lessons from Hull House for the Contemporary Urban University*, 68 SOC. SERVICE REV. 299 (Sep., 1994); Andrew R. Timming, *Florence Kelley: A Recognition of Her Contributions to Sociology*, 4 J. CLASSICAL SOC. 289 (Nov. 2004).

272. Smith, *supra* note 8, at 270.

273. 208 U.S. 412 (1908); Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 245 (1999); Ronald K.L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 294 (1983). After the Nineteenth Amendment was enacted in 1920 granting women suffrage, the Supreme Court insincerely found that women no longer needed protective laws and maximum hours laws for women. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *see* I DISSENT 127 (Mark Tushnet ed., 2008); Smith, *supra* note 8, at 276. *But see* *Radice v. New York*, 264 U.S. 292 (1924) (upholding a law that prohibited women in New York from working after 10 pm until 6 am); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage for women, recognizing for the first time that laborers were not on an equal standing with employers in negotiating a contract for labor).

274. *See supra* notes 138-139 and accompanying text.

275. JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 66 (1978).

legislation proponents bitterly fought with Alice Paul and the proponents of her proposed Equal Rights Amendment.<sup>276</sup> They were also in conflict with women who brought claims of sex discrimination based on the Equal Protection clause.<sup>277</sup>

But there were others who followed Bradwell's example and used evidence of women's social advances to support arguments for sex equality. In the 1880s and 1890s other women lawyers used Bradwell's argument about the changing social circumstances and position of women to secure entrance to other state bars and, as discussed, Belva Lockwood and her supporters used the argument to secure the 1879 federal law that allowed women lawyers to practice in the federal courts.<sup>278</sup> Additionally, some women activists employed the strategy to fight for criminal laws and procedures that would protect women's bodies from physical and sexual abuse.<sup>279</sup> In the twentieth century, women lawyers including Catharine Waugh McCulloch and Dorothy Kenyon used these arguments in their campaigns for women jury service.<sup>280</sup>

The Supreme Court considered only a very few cases in which women made a claim of sex discrimination based on the Equal Protection Clause in the century after *Bradwell*.<sup>281</sup> The Supreme Court's decision in *Slaughter-House Cases* that the Equal Protection Clause was limited to ensuring the rights of African Americans stunted women's initial invocation of the clause. But the Court abandoned that distinction in its decisions on sex discrimination claims in the twentieth century. During the first half of the century, the Court rejected claims of sex discrimination based on the Equal Protection Clause by claiming that discrimination based on sex was not arbitrary, but rational, because men and women weren't equal. As Justice Holmes explained in *Quong Wing*

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276. Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 212, 214-16 (1998).

277. *Id.* at 222-29.

278. MORELLO, *supra* note 4, at 34-35.

279. Elizabeth Pleck, *Feminist Responses to "Crimes Against Women, 1868-1896,"* 8 SIGNS 451 (1983).

280. For a description of Dorothy Kenyon and her work and arguments for woman jury service, see SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 58-61 (1998); LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 169-70 (1998). For a description of Catherine Waugh McCulloch's work and arguments for woman jury service, see Catherine Waugh McCulloch, "Trial by Jury," *The Woman Citizen* (Oct. 2, 1920), at 488; Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW HIST. REV. 479 (2002).

281. *I DISSENT*, *supra* note 273, at 127.

*v. Kirkendall*, "the 14th Amendment does not interfere [with a law that makes a distinction in sex by placing a lighter burden on women than men] by creating a fictitious equality where there is a real difference."<sup>282</sup>

But there were those who disagreed, including women lawyers and an occasional dissenting Supreme Court Justice. In his dissent in *Quong Wing*, Justice Joseph Lamar argued that the Montana law that imposed a tax on men that did hand laundry work but exempted women, was an arbitrary distinction.<sup>283</sup> He wrote, "[t]he individual characteristics of the owner do not furnish a basis on which to make a classification for purposes of taxation."<sup>284</sup> Justice Rutledge made a similar argument in his dissent in *Goesaert v. Cleary* in 1948, asserting that since the Michigan law "arbitrarily discriminate[d] between male and female owners of liquor establishments," it was a denial of equal protection.<sup>285</sup>

The sex equality decisions by Congress and the Supreme Court during the second half of the twentieth century are well-studied.<sup>286</sup> In 1963, Congress passed the Equal Pay Act that prohibited sex discrimination in federal salaries.<sup>287</sup> In 1964, Congress enacted Title VII of the Civil Rights Act that made it illegal for an employer to discriminate on the basis of sex. In 1972, Congress passed Title IX of the Education Amendments that prohibited sex discrimination in education programs that received federal funds and the Equal Rights Amendment, although it failed ratification. In 1971, the Supreme Court began to apply the Equal Protection Clause to overturn legislation that arbitrarily discriminated on the basis of sex,<sup>288</sup> although it continues to

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282. 223 U.S. 59, 63 (1912); see Smith, *supra* note 8, at 272 ("[T]he Fourteenth Amendment did not require imposing 'a fictitious equality where there is a real difference.'" (quoting *Quong Wing*, 223 U.S. at 63)). See also *Fay v. New York*, 332 U.S. 261 (1947); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961).

283. 223 U.S. 59, 64 (1911) (Lamar, J., dissenting).

284. *Id.* at 64-65 (Lamar, J., dissenting).

285. 335 U.S. 464, 468 (1948) (Rutledge, J., dissenting).

286. See Leslie W. Gladstone, *Women's Issues in Congress: Selected Legislation 1832-1998*, in *WOMEN AND WOMEN'S ISSUES IN CONGRESS 11* (Janet V. Lewis ed., 2000) (listing and describing federal laws that granted women rights though the nineteenth and twentieth centuries).

287. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. 206 90d (2000)). See also CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 899 (1988).

288. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (finding a statute that required a preference for a male administrator for a decedent's estate was an equal protection violation); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (finding denial of housing and medical benefits to the families of female military officers was an equal protection violation). See also Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 *HOFSTRA L. REV.* 263, 267-68 (1997).

debate what level of scrutiny to use in evaluating such laws.<sup>289</sup> Many scholars argue that despite these decisions, sex inequality persists.<sup>290</sup> Myra Bradwell's case and legacy is not a story of great victory, but neither is it one of great defeat.

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289. See *Craig v. Boren*, 429 U.S. 190 (1976) (introducing intermediate scrutiny as a midpoint between strict scrutiny and a rational basis standard); *United States v. Virginia*, 518 U.S. 515 (1996) (applying a stronger "skeptical scrutiny" standard); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 761, 827-34 (2004) (arguing the feminist strategy to use the Equal Protection Clause to secure equality and the Court's interpretation of that clause limited the content of the equality). See also Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (arguing that although the ERA was never ratified, the amendment, nonetheless, influenced the judges to interpret the Fourteenth Amendment in a frame of formal equality rather than a substantive one).

290. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Lynn Hecht Schafran, *Is the Law Male?*, TRIAL, Aug. 1995, at 18; Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397 (1993); MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); Leslie Bender, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993); Sylvia A. Law and Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 354 (1993); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993); Sarah E. Burns, *Is the Law Male?: The Role of Experts*, 69 CHI.-KENT L. REV. 389 (1993).