

1-1-2010

Social Justice Feminism

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SOCIAL JUSTICE FEMINISM

Kristin Kalsem and Verna L. Williams*

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* Professors of Law, University of Cincinnati College of Law. Copyright © 2010 by Kristin Kalsem and Verna L. Williams. We would like to thank Professors Deborah Brake, Martha Chamallas, Emily Houh, John McGuire, Kathryn Kish Sklar, and participants in faculty workshops at Villanova School of Law and the University of Cincinnati. We also would like to thank our law librarian James Hart and our research assistants Lara Pierce, Jason Swartz, Rebecca Waesch, and Andrea Yang. The research for this Article was supported by grants from the Harold C. Schott Foundation.

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I. INTRODUCTION

*"I don't want to do feminism any more unless it's social justice feminism."*¹

For about three years, women leaders from national groups, grassroots organizations, academia, and beyond gathered to examine the state of the women's movement. Spurred by a concern about the continued vitality and relevance of the women's movement, philanthropic organizations such as the Ford Foundation, Ms. Foundation, and Astrea Lesbian Foundation for Justice, brought together women leaders for a number of meetings and

1. Statement made by a participant of the New Women's Movement Initiative (notes on file with authors). For more information about the NWMI see *infra* notes 2-14 and accompanying text.

retreats and asked them to confront and transcend their differences in order to carve out a new agenda for change. This effort, dubbed the New Women's Movement Initiative ("NWMI"), forced participants to examine critically the cause that many had made their life's work.² "The purpose of these meetings and retreats was to address long-standing divisions within the women's movement and to build the relationships, trust and analysis necessary to revitalize US feminism."³ Participants were diverse in terms of race, ethnicity, economic status, sexuality, geographic locale, and age, among other things.⁴ There was "an especially strong presence of women of color, as well as a cross-generational representation of women who became active in the women's movement at various points over the past several decades."⁵ Not surprisingly, these women came with myriad perspectives on feminism: indeed, deep divisions caused many to question whether they were part of the same movement and whether they could or should trust one another enough to collaborate in this endeavor.⁶

What kept them all at the table, however, was a shared concern that "the women's movement [was] not mobilizing broad new constituencies or maximizing its potential as a social change agent."⁷ Feminism — at least as it had been practiced — was not something many wanted "to do anymore," in the words of the participant quoted above.⁸ Linda Burnham, co-founder and executive director of the Women of Color Resource Center and an NWMI attendee, explained that members essentially agreed that the "feminist project, while not completely stalled, does not have

2. See LINDA BURNHAM, THE NEW WOMEN'S MOVEMENT INITIATIVE (Aug. 16, 2007), <http://ms.foundation.org/user-assets/PDF/Program/NWMSumationFinalDraft.pdf> (hereinafter the NWMI REPORT). One of these meetings included a conference at the University of Cincinnati College of Law ("College") in February 2005. Funded by the Ford Foundation and hosted by the College's Joint Degree Program in Law and Women's Studies, this conference, "Women Coming Together: Claiming the Law for Social Change," convened a variety of women's advocates to develop new strategies, expand and enhance coalitions, and share ideas about how to claim the law as a vehicle for social change. (Notes on file with authors).

3. See *id.*

4. *Id.*

5. *Id.*

6. Burnham observed that "[s]harp differences existed over issues of how agendas [were] set and whose interests [were] represented, where power resides and how it [was] wielded, and which organizations and initiatives were well resourced while others languish[ed]." *Id.* (alterations in original).

7. *Id.* (alterations in original).

8. See *supra* note 1 and accompanying text.

the kind of political traction it needs if it is to effectively influence public policy and improve the lives of women.”⁹ Regaining momentum in the political arena was of utmost importance, given the conservative legal and political climate that produced recent Supreme Court decisions such as *Gonzales v. Carhart*,¹⁰ *Ledbetter v. Goodyear Tire & Rubber Company*,¹¹ *Parents Involved in Community Schools v. Seattle School District No. 1*,¹² and *Long Island Care at Home v. Coke*.¹³ Against this backdrop, participants reached some consensus about what might revitalize the movement: basing the movement’s work on and actively “promot[ing] principles of social justice feminism.”¹⁴ This conclusion intrigued both of us. As feminist law professors, we puzzled over the significance and implications of putting “social justice” and “feminism” together.

This was not the first time that the results of these gatherings had sparked our intellectual curiosity. At one of the NWMI meetings, in order to put into context some of the issues confronting women’s organizing today, participants viewed *Sisters of ‘77*,¹⁵ a documentary about the 1977 National Women’s Conference in Houston. Neither of us had ever heard of the film, much less the conference, which troubled us as feminist scholars. How could we not know about a federally funded gathering of over 20,000 women that resulted in a political manifesto for the nation’s women?¹⁶

9. NWMI REPORT, *supra* note 2.

10. 550 U.S. 124 (2007) (upholding a federal ban on late-term abortion).

11. 550 U.S. 618 (2007) (limiting the statute of limitations for filing employment discrimination claims under Title VII of the Civil Rights Act of 1964).

12. 127 S. Ct. 2738, 2768 (2007) (striking down student assignment plans designed to integrate elementary schools as unconstitutional).

13. 127 S. Ct. 2339, 2344 (2007) (upholding a Department of Labor regulation denying wage protection to domestic workers).

14. NWMI REPORT, *supra* note 2.

15. SISTERS OF ‘77 (Cynthia Salzman Mondell & Allen Mondell 2005).

16. An Official Report of the Conference, entitled *The Spirit of Houston*, was issued in 1978. NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN’S YEAR, *THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN’S CONFERENCE* (1978) [hereinafter OFFICIAL REPORT]. Shortly thereafter, Simon and Schuster published a book entitled *What Women Want*, which put the data accumulated in the *Official Report* into a more mainstream, populist form that included the personal narratives of many of the Conference participants. CAROLINE BIRD ET AL., *WHAT WOMEN WANT* (1979). In her introduction to this volume, Gloria Steinem observed the “rar[ity]” of a “published record of the political agenda of women as a group.” Gloria Steinem, *An Introduction to WHAT WOMEN WANT* 10, 10.

Indeed, “there was never anything like it.”¹⁷ From November 18 through 21, 1977, Houston was the site of this historic event. The documentary film captures the excitement and energy — and the sheer magnitude — of the Conference which is difficult to translate onto the page. It was, in every sense of the word, a happening, like the Olympic games, that gathered momentum over a 51-day period with a 2600-mile torch relay from Seneca Falls, New York, to Houston, Texas. A gathering, like a Democratic or Republican National Convention, with a packed and noisy crowd waving political placards and organized around State and Territory banners. A moment grand enough to be worthy of the drafting of a re-envisioned Declaration of Sentiments by Maya Angelou.¹⁸ The spirit of Houston was fueled by this coming together, in a new way, of 2,006 elected delegates from every State and Territory and 20,000 others interested in having a say in and listening to the concerns of women across the nation.¹⁹ That this moment in history had fallen into such obscurity astonished us. Even more striking, however, were the similarities between the challenges facing the women who assembled thirty years earlier at the National Women’s Conference and those that confronted the women participating in the NWMI.

Thirty years ago, women leaders also considered how to mobilize all women for social change and how to gain traction in the political system. Over the four-day period of the National Women’s Conference, this remarkably diverse and representative group of delegates worked tirelessly, discussing, debating, and ultimately adopting a National Plan of Action designed to “move history forward”²⁰ for the nation’s women.²¹ The twenty-six issue planks comprising the plan demanded “as a human right a full voice and role for women in determining the destiny of our world, our nation, our families and our individual lives.”²² Additionally, just as the NWMI participants had done, the Houston conferees sought to heal past divisions by concretely including women from all walks of life. Thus, organizers used much of the federal funds²³ allotted to them to ensure that the gathering

17. OFFICIAL REPORT, *supra* note 16, at 9.

18. *Id.* at 128, 195.

19. *Id.* at 119.

20. *Id.* at 15.

21. *Id.* at 13.

22. *Id.* at 15-16.

23. Congress allocated \$5 million for the Conference as part of the nation’s observance of the International Year of the Woman. *Id.* at 10.

would be as diverse as possible, for example, by providing funds for transportation, lodging and child care to women who otherwise would have been unable to attend.²⁴

Additionally, just as today's feminist movement sought to regroup in the face of conservative forces, organizers of the National Women's Conference confronted resistance and derision from the political right. For example, some predicted that the Conference would confirm "some of the most harmful stereotypes of women in politics"²⁵ or that it would be "the liveliest brawl since John L. Sullivan licked Jake Kilrain in 75 bare-knuckled rounds."²⁶

Finally, while the legal landscape in 1977 included such victories as *Craig v. Boren*,²⁷ in which the Court elevated sex to quasi-suspect status under the Constitution,²⁸ there also were decisions that relied upon the very outdated stereotypes about women that organizers were striving to dispel. For example, in *Dothard v. Rawlinson*,²⁹ the Court upheld a state regulation prohibiting women from serving as prison guards in high security institutions incarcerating men.³⁰ According to the majority, "womanhood" itself was incompatible with maintaining order in a prison setting.³¹ Moreover, just as today, debate swirled around affirmative action: the Court was due to hear arguments in *Regents of University of California v. Bakke*, a case that would have implications for how far states could go in imposing remedial measures to compensate for past discrimination based on race or sex.³² Moreover, as historian Marjorie Spruill argues, the Conference itself helped conservative forces such as Phyllis Schlafley's Eagle Forum to gain support and momentum.³³ Thus, the Houston conferees organized a political agenda in a con-

24. *Id.* at 10-11.

25. *Id.* at 205 (quoting *The Washington Post*) (internal quotations omitted).

26. *Id.* (quoting columnist James J. Kilpatrick).

27. 429 U.S. 190 (1976).

28. *See id.* at 204.

29. 433 U.S. 321 (1977).

30. *See id.* at 336-37.

31. *Id.* at 336 ("The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.").

32. *See Regents of University of California v. Bakke*, 553 P.2d 1152 (Cal. 1976), *cert. granted*, 438 U.S. 265 (1978).

33. Marjorie Spruill, *Gender and America's Right Turn*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970s* 71, 71-79 (Bruce Schulman & Julian Zelizer eds., 2008).

servative climate that would likely, at best, resist the conferees' proposed changes.

Because of the similarities between the challenges confronting women leaders thirty years ago and those existing now – both within and outside the movement – and in the wake of a regathering of conference participants and other leaders in the feminist community to commemorate the thirtieth anniversary of the National Women's Conference,³⁴ this is a particularly apt time to analyze the Conference and what it represents. This historical moment is rich with present-day relevance. Additionally, as suggested above and as will be discussed more fully below, the women's movement itself is at a crossroads, much as it was in the late 1970s. According to recent research by the Center for the Advancement of Women, less than half the women who were surveyed believed there was a need for a strengthened women's movement.³⁵ Specifically, 43% of all surveyed women so believed; however, for women of color, the numbers were much higher, with 63% of Black women and 68% of Latina women voicing support for a stronger women's movement.³⁶ Similarly, Black and Latina women were more likely to characterize themselves as "feminists."³⁷ Yet many women are disaffected from the movement, finding that it has invested its energies in those who are privileged because of their race, class, able-bodied status, and/or sexual orientation.³⁸ These women seek a movement that will represent their interests, one that organizes from the "bottom up," and builds leadership from those among the least

34. On November 10-11, 2007, the Bella Abzug Leadership Institute and over 70 other organizations sponsored a conference celebrating the thirtieth anniversary of the 1977 National Women's Conference. Bella Abzug Leadership Institute, Recent Events: Freedom Conference Summary, <http://www.abzuginstitute.org/newshtm#ConfSummary> (last visited Nov. 16, 2008). This conference, entitled Freedom on Our Terms, featured many of the original conference participants, as well as panels, workshops, and issue caucuses. *Id.*

35. CENTER FOR ADVANCEMENT OF WOMEN, PROGRESS AND PERILS: NEW AGENDA FOR WOMEN 3 (2003), available at http://www.advancewomen.org/images/uploads/Progress%20&%20Perils%20%20A%20New%20Agenda%20for%20Women_1.pdf [hereinafter PROGRESS AND PERILS].

36. *Id.*

37. *Id.* at 5. Sixty-three percent of African American women and 68% of Latina women said that being a feminist was "an important part of who they are." *Id.* Only 41% of white women agreed. *Id.* These results mirror other research findings that demonstrate that women of color identify more strongly as feminists than their white counterparts. See, e.g., Catherine Harnois, *Re-presenting Feminism: Past, Present and Future*, 20 NAT'L WOMEN'S STUD. ASS'N 120, 125-26 (2008).

38. NWMI Report, *supra* note 2, at 2, 4.

empowered and most marginalized.³⁹ As we will discuss, the social justice feminism paradigm holds promise in addressing these issues. Indeed, in calling for social justice feminism, the NWMI participants appear to be taking steps very reminiscent of those that the Houston delegates attempted to pursue thirty years ago.

Participants in the Conference recognized and highlighted the need for coalition building across lines of race, class, ethnicity, sexuality, age and other categories of identity and experience. Organizers and participants were acutely aware of this important aspect of the event. Gloria Steinem wrote in the introduction of *What Women Want*, which tells the story of the Conference: "If this book survives to be read by our relatives of the distant future, it will . . . be one of the few accounts of history made and recorded from the bottom up."⁴⁰ The Conference involved the coming together of women in a way that led the *London Evening Standard* to conclude that "mainstream feminism has evolved into the most broadly based movement for egalitarianism that America possesses"⁴¹

That this movement has somehow transformed from the "broad based, egalitarian" high point of the Conference, at least in the eyes of one observer, to splintered factions of activists who no longer "want to do feminism" is remarkable.⁴² However, the work of the NWMI is heartening in that activists were able to bridge some gaps, at least temporarily, by articulating a collective desire for social justice feminism and thus identifying a new way to proceed.

In the pages that follow, we explore the potential meanings and significance of "social justice feminism," prompted by the concerns of the NWMI participants. We have sought to uncover the historical and conceptual roots of this newly articulated desire to do social justice feminism. As the following will demonstrate, social justice feminism is not a new idea; we found its footprints in diverse political times, various women's movements, and divergent aspects of feminist legal theorizing. By exploring the many sources and implications of social justice feminism at

39. NWMI Report, *supra* note 2, at 4.

40. Steinem, *supra* note 16, at 10.

41. OFFICIAL REPORT, *supra* note 16, 205-06 (quoting *The London Evening Standard*).

42. The views of the commentator quoted at the beginning of the piece as no longer wanting to "do feminism" reflects the views of many women who attended the Conference and who felt the need for change. *See id.* at 1-3.

this time, we hope that this article will, at the very least, facilitate a conversation about feminist practice and theory.

In Part I, we examine “feminism” and “social justice” as key concepts. Exploring the history of these terms and aspects of the movements that have been associated with them, we analyze the possibilities that might emerge from their joinder. Drawing also on historical and modern-day “social justice feminist” work, we offer some initial thoughts on defining aspects of the concept of “social justice feminism.” Theoretically, social justice feminism shares many commonalities with feminist legal theory, particularly critical race feminism. However, while a basic tenet of these approaches is moving from theory to practice, social justice feminism actually emerges from practice. This is what activists, seeking a “broadly based movement for egalitarianism,” want to do. Thus, Part II focuses on practice not theory with its look back at the National Women’s Conference, convened to produce a National Plan of Action. In this Part, we examine the seeds of social justice feminism that were sown there, as well as identifying what, going forward, can be done differently so as not to repeat a history that has led so many women to feel that the feminist movement does not support what they really want. The third Part of this Article draws on the philosophical underpinnings of social justice feminism to set forth certain methodological tools. Finally, Part IV applies these tools to the recent Supreme Court case of *Long Island Care at Home v. Coke*,⁴³ a case upholding the lack of wage protections for certain domestic workers. This social justice feminist lens reveals that rather than merely presenting a simple question of administrative law, this case raised powerful issues of race, gender, and class hierarchies. As such, it deserves a prominent place on the feminist legal agenda.

II. WORDS AND THE MEANINGS THEY CARRY: WHAT IS SOCIAL JUSTICE FEMINISM?

A. *Keywords*

“Social justice” and “feminism” are loaded terms, susceptible to various interpretations depending upon the context and the user. These terms that “have an edge of energy and uncertainty . . . in public usage”⁴⁴ are “keywords” in our culture. In his

43. 127 S. Ct. 2339 (2007).

44. Tony Bennett, Lawrence Grossberg & Meaghan Morris, *Introduction to NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE & SOCIETY* xvii, xxii

influential volume, *Keywords: A Vocabulary of Culture and Society*, scholar Raymond Williams explored such freighted words and their ranges of meanings across boundaries such as time, discipline, and audience.⁴⁵ Not a dictionary, this word study was “a record of an inquiry into a vocabulary: a shared body of words and meanings in our most general discussions, in English, of the practices and institutions which we group as culture and society.”⁴⁶

Williams's work is helpful in thinking about the concept of social justice feminism for two reasons. First, his ideas on the importance of looking at the ways in which the meanings of words change – why and how meanings shift – are particularly apt for examining “feminism,” a term that encompasses both theory and a social movement. Second, as Tony Bennett, Lawrence Grossberg, and Meaghan Morris explain in their introduction to *New Keywords*:

For Williams the point was not merely that the meanings of words change over time but that they change in relationship to changing political, social, and economic situations and needs. While rejecting the idea that you could describe that relationship in any simple or universal way, he was convinced that it did exist – and that people do struggle in their use of language to give expression to new experiences of reality.⁴⁷

Williams explored the relationships of words to each other; as a consequence, his work is helpful in thinking about the significance of expressing the work of the women's movement in terms of social justice feminism. Specifically, this Part will examine how “feminism” – the word and the movement – might be modified by the term “social justice.” Since both terms carry meanings of their own, this Article will briefly examine each separately before considering them together.

B. *Feminism*

The term “feminism” in the United States has been variably a term of empowerment and scorn, a source of pride and a scath-

(Tony Bennett, Lawrence Grossberg & Meaghan Morris eds., 2005) [hereinafter *NEW KEYWORDS*].

45. Neither term was included in the original 1976 volume of *Keywords*. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* (1976). However, “feminism” was a keyword in the updated 2005 *New Keywords* and “social justice” is discussed under the keyword “Justice”. See *NEW KEYWORDS*, *supra* note 44, at 128-30, 193.

46. WILLIAMS, *supra* note 45, at 15.

47. *NEW KEYWORDS*, *supra* note 44, at xvii.

ing insult, a call to action and a threat to mankind, a representation of unity and one of divisiveness – often all at the same time. Historian Sara Evans has observed that from its inception, the movement associated with “feminism” has had “a history rife with contradiction: growth and fragmentation, innovation and internal conflict.”⁴⁸ Evans traces the origin of the term to late nineteenth century France and explains that a segment of the women’s suffrage movement first adopted it in the United States in the 1910s.⁴⁹ While currently defined in dictionaries in positive terms such as “advocacy of the rights of women,”⁵⁰ an article in *Harper’s* magazine in 1927 illustrates that, early on, feminism was a controversial term associated with negative stereotypes:

“Feminism” has become a term of opprobrium to the modern young woman. For the word suggests either the old school of fighting feminists who wore flat heels and had very little feminine charm, or the current species who antagonize men with their constant clamor about maiden names, equal rights, woman’s place in the world, and many other causes . . . ad infinitum.⁵¹

Throughout the twentieth century, feminism was a keyword that carried continuously changing meanings and significance.

1. Feminist Movements in the Early Twentieth Century

In 1920, as a result of more than fifty years of women’s rights activism, the Nineteenth Amendment to the U.S. Constitution was passed, guaranteeing women, at long last, the right to vote.⁵² Having accomplished this goal, women activists disagreed vigorously about how next to proceed, divided by “tactical and ideological differences.”⁵³ Former suffragists, such as Alice Paul, believed that women needed a constitutional guarantee of formal equality in order to gain equal footing with men.⁵⁴ Paul headed the National Women’s Party (“NWP”) which, generally speaking, included “affluent, business-oriented, and politically conserva-

48. SARA M. EVANS, *TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY’S END* 4 (2003).

49. *Id.* at 2-3.

50. *COMPACT OXFORD ENGLISH DICTIONARY* 579 (2d ed. 1993).

51. EVANS, *supra* note 48, at 6 (quoting Dorothy Dunbar Bromley, *Feminist—New Style*, *HARPER’S MONTHLY MAG.*, Oct. 1927, at 552).

52. *See* U.S. CONST. amend. XIX.

53. Verta Taylor, *Social Movement Continuity: The Women’s Movement in Abeyance*, 54 *AM. SOC. REV.* 761, 763 (1989).

54. *See, e.g.*, DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 60 (2004).

tive” women.⁵⁵ As professionals in the workplace, many of these women had competed against men.⁵⁶ For them, equality meant securing equal treatment and, therefore, equal opportunity, with their male counterparts. To achieve this goal, the NWP embarked on a decades-long quest to pass an Equal Rights Amendment (“ERA”), starting in earnest in 1923, when Congress introduced the measure.⁵⁷ In direct opposition to the NWP stood feminists who believed that women’s equality would best be achieved by removing gender-based barriers to the workplace.⁵⁸ These feminists typically were “poor, union-oriented and politically liberal.”⁵⁹ Having worked in traditionally female occupations,⁶⁰ these women advocated for, among other things, laws to facilitate women’s capacity to earn a living.⁶¹ While both groups were committed to assuring that the newfound right to vote translated into full citizenship rights for women, these two factions had “clashing class interests, fundamentally opposing philosophies of economic and political reform, and deeply held but divergent views on gender and women.”⁶² For the NWP, formal equality was a natural next step to the political equality women had attained with suffrage. They believed that women needed an overarching guarantee that they would be allowed to exercise their rights just as their male counterparts could. The ERA opponents, on the other hand, believed that equal treatment would mean that important differences between men and women would be subsumed. These feminists were concerned that formal equality would require women to meet a “male standard, which would encourage inequality.”⁶³ Accordingly, they sought a legal regime that would reflect, for example, the reality that women frequently had to both work outside the home to support dependents and care for them;⁶⁴ thus, for these activists workplace accommodations for women were key to attaining full

55. *Id.* at 60-61 (quoting Carl M. Brauer, *Women Activists, Southern Conservatives and the Prohibition of Sex Discrimination in Title VII of the 1964 CRA*, 49 J. S. HIST. 37, 40 (1983).

56. *Id.* at 65.

57. *Id.* at 60.

58. *Id.* at 61.

59. *Id.*

60. *Id.* at 65.

61. *See infra* Section D.1.

62. COBBLE, *supra* note 54, at 61.

63. Sybil Lipschultz, *Social Feminism and Legal Discourse: 1908-1923*, 2 YALE J.L. & FEMINISM 131, 149 (1990) (quotation marks omitted).

64. *See, e.g., id.* at 145-46.

citizenship.⁶⁵ In this regard, the rift between feminist groups was not merely about strategy but also about the meaning of discrimination and equality.⁶⁶

The end of World War II helped push both groups to the political periphery. The return of soldiers from Europe and Japan meant a return to the feminine sphere for many of the women who had managed work and family life on their own.⁶⁷ Additionally, societal pressure to conform to traditional gender norms was great. According to public opinion polls of the time, women who failed to get married were deemed “sick, immoral and neurotic.”⁶⁸ Similarly, married women faced great pressure to have children.⁶⁹ Not surprisingly, cultural forces “denounced feminism, discredited women who continued to advocate equality, and thus thwarted the mobilization of discontented women.”⁷⁰

In the face of this backlash, few women claimed the label of feminist. Verta Taylor, a scholar of social movements, writes that “only the NWP members continued” to do so; and, in so doing, they reflected what later would become the stereotypical image of the “feminist.” Namely, most of the NWP members were “white, middle- or upper class, well educated, employed in professional or semiprofessional occupations . . . and older (in their fifties, sixties, or seventies).”⁷¹ Evans suggests that the societal pressure to conform to gender roles, coupled with the negative popular images of the term, conspired to keep young women in the dark about the movement. Indeed, “by the 1950s feminism was so thoroughly marginalized that most young women were en-

65. See *infra* notes 113 -141 and accompanying text.

66. These differences animated the discord that would characterize the women’s movement for the fifty years leading up to the 1977 National Women’s Conference in Houston. There is a rich body of literature detailing the struggle among feminists from the 1920s through the 1970s, towards the end of the Second Wave feminist movement. See, e.g., Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991); Lipschultz, *supra* note 63; Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004); John Thomas McGuire, “The Most Unjust Piece of Legislation”: Section 213 of the Economy Act of 1932 and Feminism During the New Deal, 20 J. POL’Y HIST. 516 (2008); Wendy Sarvasy, *Beyond the Difference Versus Equality Policy Debate: Postsuffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329 (1992).

67. Taylor, *supra* note 53 at 764.

68. *Id.* at 765.

69. *Id.*

70. *Id.*

71. *Id.* at 767.

tirely unaware of it.”⁷² Thus, just thirty years after the ratification of the Nineteenth Amendment, feminism and the attendant movement had shifted from being an “inclusive [movement] across the class and political spectrum” at the height of the battle for the vote, to being a term synonymous with marginalization, claimed only by a few predominately white and economically privileged members.⁷³

Taylor posits, however, that the very exclusivity and homogeneity of feminism allowed the women’s movement to survive, particularly in light of its status on the political periphery.⁷⁴ With women increasingly becoming active in other social and policy issues, the NWP maintained a small, white, and privileged membership that could devote the time and money necessary to pursue its ERA campaign,⁷⁵ purposefully eschewing efforts to build a larger base of support.⁷⁶ One member explained that “no mass appeal will ever bring into the Party the type of woman who can best carry forward our particular aims. We are an ‘elect body’ with a single point of agreement.”⁷⁷ That single point of agreement was a “feminist world view” that embraced a “feeling of

72. EVANS, *supra* note 48, at 6.

73. Taylor, *supra* note 53, at 767. As Taylor describes:

At the peak of the suffrage struggle, the NWP . . . attracted wage-earning women from a variety of occupations as well as elite women social activists. Its members had ties to political parties, government, and industry, as well as to the socialist, peace, labor, and anti-lynching movements. But when the NWP launched its ERA campaign, many bodies organized on occupational, religious, and racial grounds and devoted to other policy issues began to absorb women from mainstream suffrage groups and siphon off NWP members. This left the NWP with a small and relatively homogenous permanent core of feminists.

Id.

74. *Id.*

75. *Id.*

76. *Id.* For example, noted civil rights attorney Pauli Murray attempted to mediate the differences among feminists and build a coalition between feminists and civil rights advocates. She recommended a litigation strategy to achieving women’s equality that was modeled after the National Association for the Advancement of Colored People’s (NAACP) own strategy to dismantle the nation’s legal regime of racial segregation. NWP members resisted her strategy, even suggesting erroneously that she sought to weaken the women’s movement. See Mayeri, *supra* note 66, at 762-69.

77. Taylor, *supra* note 53, at 767 (quoting letter from Ernestine Bellamy to Ethel Ernest Murrell (May 24, 1953)).

loyalty to our own sex and an enthusiasm to have every degradation that was put upon our sex removed.”⁷⁸

2. Feminist Movements in the 1970s and Beyond

Taylor notes that the existence of the NWP, its membership, and methods contributed to the rise of the second wave feminist movement.⁷⁹ Thus, for example, among the founders of the National Organization for Women are NWP members, who shared the NWP’s political connections, their strategies for change, and their collective identity as feminists.⁸⁰ In the 1970s, passage of the ERA was central to the feminist agenda. Commentators have observed that feminists who focused on trying to get the ERA passed distanced themselves from other social issues, just as their predecessors had done.⁸¹ Winifred Wandersee notes:

And in fact, many women, feminist or otherwise, felt that the attention given the ERA in the latter years of the drive for ratification detracted from more pressing social and economic issues. Women who did not identify so readily with the white middle-class career-oriented women of the liberal feminist movement, especially ethnic and minority women, were apt to show little enthusiasm for the amendment. They complained that ERA organizations failed to develop policy around the whole issue of racism/sexism, and they were insensitive to minority participation within the reform structure. These women felt left out of the network that ERA proponents had developed between 1972 and 1979.⁸²

Once again, the central meaning of feminism was put to the test, with the hope that a general emphasis on bettering women’s lives would be a unifying principle.⁸³ Still, larger questions remained about the term and the movement:

78. *Id.* at 769 (quoting AMELIA R. FRY, CONVERSATIONS WITH ALICE PAUL: WOMAN SUFFRAGE AND THE EQUAL RIGHTS AMENDMENT 197 (1976)).

79. Taylor, *supra* note 53, at 770. It should be noted that scholars have critiqued the “wave” metaphor used to describe women’s movements. In their view, the “wave” terminology is historically inaccurate and incomplete because it ignores the efforts of low-income women and women of color. Harnois, *supra* note 37, at 122 (citing ROBIN MORGAN, SISTERHOOD IS FOREVER: THE WOMEN’S ANTHOLOGY FOR A NEW MILLENIUM (2003); Cathryn Bailey, *Making Waves and Drawing Lines: The Politics of Defining the Vicissitudes of Feminism*, 12 HYPATIA 17 (1997); Catherine M. Orr, *Charting the Currents of the Third Wave*, 12 HYPATIA 29 (1997); Kimberly Springer, *Third Wave Black Feminism?* 27 SIGNS 1059 (2002)).

80. See Taylor, *supra* note 53, at 770-71.

81. WINIFRED D. WANDERSEE, ON THE MOVE: AMERICAN WOMEN IN THE 1970s 199 (1988).

82. *Id.* (citation omitted).

83. See *supra* notes 54-57 and accompanying text.

Should women work inside existing institutions, such as the political party system, universities, and corporations, or should they create new ones? Should they prioritize economic rights, reproductive rights, or cultural change? Should they seek alliances with men? Can they work simultaneously on the problems of race, poverty, and militarism while maintaining a focus on sexual equality? The differences among feminists are so deep that some regularly challenge others' credentials as feminists.⁸⁴

The divide among women suggested not only differences in perceptions of the term "feminism" and feminist goals, but also feelings of marginalization and exclusion on the part of women who embraced the overarching principles of feminism but recognized the need to address other forms of oppression as well. Specifically, Benita Roth observes that feminist women of color had long sought broad social change and urged white feminists to do the same:

When feminists aim to change "gender relations" they are not precluded from also asking for the rights due them as members of racial/ethnic groups or classes. Feminists of color in the second wave made just such claims on the basis of their being women who were members of racially oppressed, economically disadvantaged communities; selecting the label "feminist" was not a simple or automatic act but a political choice among other political choices.⁸⁵

Roth traces the developments of Black and Chicana feminisms in the second wave, exploring "the roughly simultaneous emergence by 1968 of white and Black feminist groups," and the feminist organizing in the Chicana movement starting from 1969.⁸⁶ She observes that "[f]eminists of color saw themselves as belonging to a different movement than white feminists did," specifically looking at the ways in which women of color feminists "espoused a feminism that incorporated analyses of the consequences of mutually reinforcing oppressions of gender, race/ethnicity, and class (and, less frequently, sexual orientation)."⁸⁷ Women of color thus sought to broaden the meaning of "woman" and "feminism," building upon the efforts that took place

84. EVANS, *supra* note 48, at 2-3.

85. BENITA ROTH, *SEPARATE ROADS TO FEMINISM: BLACK, CHICANA, AND WHITE FEMINIST MOVEMENTS IN AMERICA'S SECOND WAVE* 9 (2004) (citing MYRA MARX FERREE & BETH B. HESS, *CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS FOUR DECADES OF CHANGE* 9 (3d ed. 2000) for the term "gender relations").

86. *Id.* at 8.

87. *Id.* at 11.

in the previous century,⁸⁸ and foreshadowing the development of feminist legal theories that would place issues such as anti-essentialism⁸⁹ and intersectionality⁹⁰ at the forefront of the movement.

C. *Social Justice*

In the academy, the term “social justice” is closely associated with the political philosopher John Rawls. For Rawls, social justice requires examining the “basic structure of society,” and, significantly, articulating principles to construct a social framework that is fair and just.⁹¹ Specifically, social justice is concerned with how society’s practices and institutions create and distribute society’s benefits and burdens in terms of “rights and disabilities, privileges and disadvantages, equal or unequal opportunities, power and dependency, wealth (which is a right to control the disposition of certain resources) and poverty.”⁹² However, social justice’s concern with fairness has deep roots that precede Rawls and a reach that goes far beyond political philosophy.

“Social justice” is a term that various constituencies have used in the past; it continues to enjoy great purchase. As such we consider it to be a keyword that is not limited to “the specialized

88. For example, Black women simultaneously fought against the practice of lynching and worked towards Black women’s progress through their own movements that emerged at the end of the 19th century, in part out of “frustrat[ion about] the negative epithets hurled at them [in society], and by the failure of Black leaders to defend them or the race as a whole.” PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 83 (2001). In the 1970s, similar impulses fueled activism by Black women and Chicanas who struggled with sexism in their respective liberation movements. ROTH, *supra* note 85, at 138.

89. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (criticizing feminist legal scholars for failing to consider race in theorizing about women).

90. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (stating that the failure to analyze such issues using a multiple axis “defeats efforts to restructure the distribution of opportunity and limits remedial relief to minor adjustments within an established hierarchy”).

91. JOHN RAWLS, *A THEORY OF JUSTICE* 7-11 (1971). The concept of social justice, at least as it has been defined by Rawls, has been the subject of feminist critique for, among other things, neglecting gender altogether, privileging men over women, and, significantly failing to address patriarchy. See, e.g., Marion Smiley, *Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls*, 72 FORDHAM L. REV. 1599, 1601 (2004). Smiley counters, however, that in some respects, Rawls’s account actually may be helpful in challenging patriarchy. *Id.* at 1600.

92. BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* 355 (2005).

vocabulary of a specialized discipline, though it often overlaps with several of these," but rather an example of a word that while "beginning in particular specialized contexts, [has] become quite common in descriptions of wider areas of thought and experience."⁹³ Thus, it is informative to examine both the use of "social justice" in the contexts of political philosophy and labor history, as well as its ubiquitous presence in everyday culture.

Theories about social justice emerged in France and Britain in the wake of the industrialization of the 1840s. Fueled by the inequality of nineteenth century economic and social institutions, the notion of social justice was a tool to challenge the "unequal relations between employers and employees . . . the distribution of income and wealth arising from the operation of capitalist institutions and the part played in people's lives by money."⁹⁴ What was "revolutionary" about this way of thinking was that it considered challenging "the justice of a society's institutions . . . not merely at the margins but at the core."⁹⁵

The concept of social justice evolved over the course of the nineteenth century. Calls for social justice grew stronger as gaps among the economic classes widened.⁹⁶ In Germany and the United States, social justice was seen as a means of countering the revolutionary call of Karl Marx by providing Christian and moral arguments for addressing the "'social question,' and what the 'social classes' owed each other."⁹⁷ By the 1890s it had gained currency as a "plastic term that could embrace diverse social goals, and applied particularly well to public policies, such as protective labor legislation or widows' pensions."⁹⁸ Thus, by the early twentieth century, social justice became a popular means for justifying "public policies that intervened in the relationship between capital and labor, and signified a redistribution of resources based on fairness rather than pity or fear."⁹⁹

More recently, social justice has great currency in contexts as varied as human rights, hip hop, and education. For example, in the context of labor, the non-profit organization Educating For

93. WILLIAMS, *supra* note 45, at 14.

94. BARRY, *supra* note 92, at 5.

95. *Id.*

96. KATHRYN KISH SKLAR, ANJA SCHULER & SUSAN STRASSER, *SOCIAL JUSTICE FEMINISTS IN THE UNITED STATES AND GERMANY: A DIALOGUE IN DOCUMENTS, 1885-1933*, at 7 (Kathryn Kish Sklar et al., eds., 1998).

97. *Id.* at 5-6 (quoting RONALD WHITE ET AL., *THE SOCIAL GOSPEL* (1976)).

98. *Id.* at 6.

99. *Id.*

Justice has produced a multimedia presentation on international labor abuses entitled *Behind the Swoosh: Sweatshops and Social Justice*.¹⁰⁰ In the world of hip hop, J.A.M. awards are given to recognize social justice and responsibility.¹⁰¹ The Agricultural Justice Project, which has “pilot[ed] a food label that verifies fairness for farmers and farmworkers alike[,]” describes itself as “a non-profit initiative to create a fair and equitable food system through the development of social justice standards for organic and sustainable agriculture.”¹⁰² There are films about social justice,¹⁰³ poets who fight for social justice,¹⁰⁴ and social justice blogs.¹⁰⁵ The University of West Virginia has a strategic plan for achieving social justice.¹⁰⁶

In addition, the term social justice often is associated with calls for diversity and anti-discrimination initiatives. For example, a spokesperson for the Ford Foundation described the institution’s values in terms of “a bedrock commitment to social justice and innovation and to helping those whose voices are not heard for any number of reasons, whether economic or because of discrimination.”¹⁰⁷ Similarly, the Social Justice Education Program at the University of Massachusetts describes its theory and practice as “rooted in the civil rights social movements of the past forty years, within which concepts of social justice, oppression and liberation are central categories for analyzing, evaluat-

100. Educating for Justice, *Behind the Swoosh: Sweatshops and Social Justice*, <http://www.educatingforjustice.org/sweatshops.htm> (last visited Nov. 13, 2008).

101. Chris Richburg, *Snoop, Talib, Others Honor Jam Master Jay at J.A.M. Awards*, Oct. 5, 2007, <http://allhiphop.com/stories/news/archive/2007/10/05/18692373.aspx> (quoting foundation creator and J.A.M. co-host Terri Corley-Mizell) (“Every year, one honoree from the Hip-Hop community will be selected and honored in the field of social [j]justice, one in the Arts and another in music.”).

102. The Agricultural Justice Project, *New Pilot Food Label Certifies Social and Environmental Stewardship*, <http://www.cata-farmworkers.org/english%20pages/laborstandardsorg.htm> (last visited Oct. 20, 2008).

103. For a list of social-justice related films, see School of Communication American University, *Social Justice*, <http://www.centerforsocialmedia.org/keywords/film/> (last visited Jan. 24, 2009).

104. Ram Devineni, *Leading International Poets Fight For Social Justice and Arms Control at World Social Forum*, available at http://rattapallax.com/press/wsf_release.pdf (last visited Nov. 16, 2008).

105. See, e.g., Identity Theory, *Social Justice Blog*, <http://www.identitytheory.com/sjblog/> (last visited Oct. 27, 2008).

106. See The Strategic Plan for Achieving Social Justice at West Virginia University (2003), <http://www.wvu.edu/~socjust/usstrategic.htm>. In this plan, the “principle of social justice encompasses the legal and moral obligations to promote opportunity, equality, civility, and respect for all people.” *Id.*

107. Stephanie Strom, *Ford Foundation Selects Its New Leader From Outside the Philanthropic World*, N.Y. TIMES, Aug. 14, 2007, at A11.

ing and transforming interlocking systems of discriminatory institutional structures and cultural practices.”¹⁰⁸ Vanderbilt University Law School has a social justice program that “promotes a wide variety of educational and scholarly activities aimed at exploring the role of law in creating, perpetuating and eradicating hierarchies of power and privilege in our society. The program seeks to address inequalities based on race, ethnicity, gender, sexual orientation and social and economic status, as well as the responsibility of the legal profession to protect the interests of marginalized, subordinated, and underrepresented clients and causes.”¹⁰⁹ Columbia University’s Teachers College presents an annual social justice award “to honor the significant contributions of an individual who exemplifies the integration of multicultural initiatives with social action.”¹¹⁰ Thus, in these contexts, social justice seems to signal a commitment to addressing societal inequities.

Moreover, social justice as a concept of fairness and equality continues to expand globally, such that the principles of social justice may be understood as being part of the international struggle for human rights and dignity.¹¹¹ Thus, the notion of social justice has evolved and continues to change, as scholars and activists seek to build upon its emphasis on fairness for all in order to develop a framework for transforming society and how its institutions allocate resources, rights, and the capacity to exercise

108. University of Massachusetts Social Justice Education, Social Justice Education Bodies of Knowledge and Practice, www.umass.edu/sje/overview.html (last viewed Oct. 24, 2008).

109. Vanderbilt University Law School, Social Justice Program, <http://law.vanderbilt.edu/academics/academic-programs/social-justice-program/index.aspx> (last viewed Oct. 24, 2008).

110. Teachers College, Columbia University, Winter Roundtable Social Justice Action Award, <http://www.tc.columbia.edu/centers/roundtable/index.asp?Id=Award+Recipients&Info=Social+Justice+Action+Award> (last viewed Oct. 24, 2008).

111. See, e.g. Joseph Kahn, *Despite Buildup, China Insists Its Goals Are Domestic*, N.Y. TIMES, Mar. 17, 2007, at A3 (quoting Prime Minister Wen Jiabao of China, “[t]he two great tasks are, first, develop the productive forces of society and, second, advance social justice and fairness”); United Nations Division for Social Policy & Economic Affairs, World Day of Justice, <http://www.un.org/esa/socdev/social/intl days/IntlJustice> (last visited Jan. 24, 2009) (discussing the General Assembly of the United Nation’s declaration of February 20th as World Day of Social Justice and the recognition by governments participating in the World Summit for Social Development that “social justice, equality, and equity constitute the fundamental values of all societies”).

rights. In this regard, social justice is consistent with, and indeed an appropriate goal for, the feminist project.¹¹²

D. *Social Justice Feminism*

The NWMI is not the first instance in which the terms “social justice” and “feminism” have been paired together. In this section, we examine both historical and modern-day usages and examples of “social justice feminism.”

1. Social Justice Feminists in the Early Twentieth Century

Historian John McGuire uses the term social justice feminism to describe a movement of working- and middle-class activists in the late nineteenth and early twentieth centuries.¹¹³ McGuire identifies this movement as beginning with the appointment of Florence Kelley to the general secretaryship of the National Consumers’ League in 1899.¹¹⁴

These social justice feminists focused on labor reform, first in seeking reduced working hours and better working conditions and later a minimum wage. As discussed above, this agenda placed these feminists squarely at odds with the National Women’s Party’s advocacy for an Equal Rights Amendment in the 1920s. As McGuire explains, the social justice feminists had turned their efforts to protecting women workers, with an eye toward expanding workplace protections to all employees.¹¹⁵

112. Feminists often identify their work as social justice work. For example, political columnist Katha Pollitt describes herself as “part of a social-justice movement, which is how I think of feminism.” Deborah Solomon, *Questions for Katha Pollitt; Woman’s Studies*, N.Y. TIMES, Sept. 23, 2007, §6 (Magazine), at 17. Moreover, on its webpage, the magazine *Bitch*, which is about “pop culture, feminism, and media criticism,” states that it “encourage[s] people to consider feminism as a necessary part of the broader social justice movement.” *Bitch: Feminist Response to Pop Culture*, Frequently Asked Questions, <http://www.bitchmagazine.org/about/faq> (last visited Oct. 13, 2008) (alteration in original).

113. John McGuire, *From the Courts to the State Legislatures: Social Justice Feminism, Labor Legislation, and the 1920s*, 45 LABOR HIST. 225, 225-26 (2004).

114. McGuire discusses this movement in four stages. The first stage, from 1899 through 1911 focused on labor protection for women, primarily through litigation. The second stage, 1911 to 1918, was marked by extensive legislative reform. In 1918, the Women’s Joint Legislative Conference was formed, marking the beginning of a third stage. The fourth stage involved work with the Roosevelt New Deal in the 1930s for labor reforms. *Id.* For additional information on social justice feminists and the activist work of Florence Kelley, see generally KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION’S WORK, 1830-1900* (1995).

115. McGuire, *supra* note 113, at 238. Indeed, after *Muller*, the Court upheld a number of statutes designed to protect male workers, in effect, extending the rule of that case. See, e.g., *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 554 (1923)

Thus, these feminists counted among their early successes *Muller v. Oregon*.¹¹⁶ In that case, Florence Kelley and Josephine Goldmark teamed with then attorney Louis Brandeis to defend an Oregon statute that restricted the hours of working women in certain industries.¹¹⁷ The social justice feminists prevailed in that case. The Court upheld the statute, in part because unlike the male workers in *Lochner v. New York*,¹¹⁸ these women lacked full political and contract rights. Attorneys for the plaintiffs argued that women's health and safety, as well as their caregiving responsibilities at home militated in favor of limited work hours.¹¹⁹ In this regard, the social justice feminists hoped that the victory in *Muller* would not only improve working conditions for women, but also make work more compatible with their family responsibilities.¹²⁰ For male labor law advocates, *Muller* was to be a bridge facilitating state intervention on the part of workers, both male and female: "they used women workers as a legal category because they needed them as a wedge to enter a legal system otherwise hostile to economic intervention."¹²¹ However, the *Muller* victory did not open the door to greater workplace regulation as the social justice feminists hoped.

On the one hand, *Muller* did support shortened work hours for men in certain industries.¹²² Feminists thought this precedent could be marshaled to improve women's wages, which became even more important post-*Muller*. "When hours were reduced, hourly pay was not increased. Many women worked at piece-work, paid by the product rather than their time on the job;

(Holmes, J., dissenting) (describing cases that applied *Muller* to men); *Bunting v. Oregon*, 243 U.S. 426, 434, 438 (1917) (approving statute limiting the workday to ten hours for employees in mills, factories or other similar enterprises); *Wilson v. New*, 243 U.S. 332, 332-33 (1917) (sustaining a statute limiting the workday to eight hours for workers on interstate carriers). Indeed, by the time the Court decided *Adkins*, it noted that state legislatures may restrict workers' hours without violating due process "where work of long continued duration is detrimental to health." *Adkins*, 261 U.S. at 554.

116. 208 U.S. 412 (1908).

117. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905 - 1923*, 78 J. AM. HIST. 188, 199 (1991).

118. 198 U.S. 45 (1905).

119. Sybil Lipschultz, *Hours and Wages: The Gendering of Labor Standards in America*, 8 J. WOMEN'S HIST. 114, 121 (1996).

120. *Id.*

121. *Id.*

122. See *Bunting v. Oregon*, 243 U.S. 426 (1917).

fewer hours meant fewer pieces and lower pay.”¹²³ Moreover, by this time, more women were responsible not just for providing care to their families, but also for supporting them economically, a fact documented in a groundbreaking report by the Women’s Bureau.¹²⁴ Minimum wages for women thus became an important goal for social justice feminists.

Kelley and other social justice feminists lobbied successfully for minimum wage laws; twelve states had such legislation by 1917.¹²⁵ Activists were particularly hopeful when Congress enacted such legislation in the District of Columbia. For example, “Kelley and [then attorney Felix] Frankfurter hoped the district’s minimum wage law would become a model for all the states.”¹²⁶ However, in *Adkins v. Children’s Hospital of D.C.*,¹²⁷ an employer challenged the law, arguing that it interfered with the right to contract.¹²⁸ Well-versed in the importance of wage laws to women and their families, social justice feminists argued that underpayment was harmful to women’s health, suggesting that the police power would support such legislation; the statute was essential, they averred, to protect women’s “subsistence, health, and morals.”¹²⁹ Social justice required¹³⁰ that such wage protection legislation remain on the books.

The Court disagreed, sharply rejecting these rationales,¹³¹ instead finding that the minimum wage statute for women unconstitutionally interfered with the freedom of contract.¹³² Significantly, the Court reasoned that *Muller* did not govern its decision, in part due to the intervening passage of the Nineteenth Amendment:

In view of the great — not to say revolutionary — changes which have taken place since that [decision], in the contractual, political and civil status of women. . . it is not unreasonable to say that these differences [between men and women] have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases . . . we cannot accept the

123. Lipschultz, *supra* note 119, at 121.

124. *Id.* at 126.

125. Zimmerman, *supra* note 117, at 201.

126. *Id.*

127. *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923).

128. Zimmerman, *supra* note 117, at 209.

129. *Adkins*, 261 U.S. at 558.

130. *Id.* at 561.

131. *See id.* at 559-60.

132. *Id.* at 554, 559.

doctrine that women of mature age, sui generis, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.¹³³

Thus, the Court struck down the statute as an interference with women's contractual rights — newly acquired rights pursuant to the Nineteenth Amendment. With this enactment, the Court reasoned that protecting women was not only unnecessary, it was inimical to the “individual freedom of action contemplated by the Constitution”¹³⁴ and threatened the common good.¹³⁵

Given their defeat in *Adkins*, social justice feminists were concerned that an Equal Rights Amendment would be used to undo hard-won protective labor legislation.¹³⁶ In retrospect, such protectionist laws seem to echo archaic stereotypes about women. However, as Joan Zimmerman observes, and as the foregoing suggests, the social justice feminist agenda was about improving the welfare of women *and* society, not reifying traditional ideas about women's roles and weaknesses that were reflected too often in the common law.¹³⁷ Moreover, as Zimmerman explains, Florence Kelley objected to the courts' interpretation of the Due Process Clause of the Fourteenth Amendment as emphasizing freedom of contract and individual rights.¹³⁸ Such a reading only helped the propertied and those in power; moreover, it was “a formidable barrier to [her] plan to use the police power—the inherent power of the state to pass laws that protect the health, safety, and welfare of its citizens – to enact laws that served the interests of working people, and women and children in particular.”¹³⁹ To Kelley, the blanket approach to equality represented by the ERA affirmed a formalist legal approach that she feared would be detrimental in the hands of conservative judges: “The definitions of ‘equal rights’ in the [F]ourteenth and [F]ifteenth [Amendments] have been continuously injurious first to Negroes, and afterward to white women and children. I see no reason for expecting the Court to interpret fresh attempts to put

133. *Id.* at 553 (alterations in original).

134. *Id.*

135. *Id.*

136. *See supra* note 115-117 and accompanying text.

137. Zimmerman, *supra* note 117, at 191-92.

138. *Id.* at 194-96.

139. *Id.* at 196.

political and social equality into the Constitution more favorably to women than they have done in the past.”¹⁴⁰

While the arguments of Kelley and others had some impact, ultimately, the formal equality strategy prevailed. In its earlier drafts, the ERA included savings clauses that exempted protective legislation from its formal equality mandate as a way to include social justice feminists and retain the gains they had achieved for bettering the lives of women.¹⁴¹ In the end, this language was removed as the *Adkins* decision aligned the Court with the formalist view espoused by the National Women’s Party.¹⁴² As Zimmerman concludes:

Legal requirements had forced both Kelley and [Alice] Paul to frame their arguments about women’s equality to conform to judicial expectations. As both compromised themselves, they drew further apart. The narrow judicial definition of women’s rights that emerged from their struggle exacted heavy costs. By establishing a male standard that was itself based on a legal fiction [liberty of contract], the *Adkins* opinion polarized the women’s movement and limited the debate over equality. Kelley’s imaginative vision of social reform and civic responsibility for women and for all groups in the Republic was lost not only to women of the 1920s but also to the historians who have studied their debate.¹⁴³

This chapter in the women’s movement is consistent with Brian Barry’s description of social justice and demonstrates how, early on, activists recognized its potential for effecting social change for all.¹⁴⁴ Specifically, as Barry stated, the “demand for social justice can best be seen as a response to the inadequacies of liberal justice.”¹⁴⁵ Concern about this very issue led the “social justice feminists” in the United States to pursue change in ways other than seeking formal equality through a constitutional amendment, a strategy that continues to be in use today.

140. *Id.* at 224 (quoting Letter from Florence Kelley to Lavinia L. Dock (Nov. 24, 1923), in EQUAL RIGHTS AMENDMENT CORRESPONDENCE, 1923-1931 (National Consumers’ League Papers)).

141. *Id.* at 206-08.

142. *See id.* at 223.

143. *Id.* at 225 (alteration in original).

144. BARRY, *supra* note 92, at 3-13.

145. *Id.* at 23.

2. Social Justice Feminism and Feminist Legal Theory

The dissatisfaction of social justice feminists with the “inadequacies of liberal justice”¹⁴⁶ marks one of the connections between social justice feminism and legal theory. Notwithstanding the success of liberal feminism’s emphasis on formal equality, scholars have sought alternative accounts for women’s subordination, accounts that neither rely on comparisons that treated white males as the norm, nor assume that addressing the concerns of a universal “woman” — typically, white, middle-class, and heterosexual — will result in equality. The literature that has emerged in response to these shortcomings helps clarify the meaning of social justice feminism.

In this regard, we build upon one of the few works to use the terms “social justice” and “feminism” together in feminist legal theory. Specifically examining inequalities affecting women’s reproductive choices, Dorothy Roberts and Joan Callahan modify “social justice” with “feminism” to articulate an “approach to questions of law and policy that address concerns about systemic inequities.”¹⁴⁷ They argue that feminist social justice is superior to liberalism and liberal feminism because both of these approaches focus inordinately on individual liberty without recognizing other important considerations.¹⁴⁸ Roberts and Callahan explain that:

privileged men have been the generators of liberalism and its individualistic ontology of persons. It cannot seriously be considered coincidental that men, who are so often most free to function autonomously (that is, relatively unimpaird by the requirements of households, children, and community) are also the primary creators and administrators of contemporary institutions that encourage an emphasis on extreme individualism, productivity, and competition between persons rather than an emphasis on community, nurturing, and connectedness between persons — an emphasis that is common — indeed, generally necessary — in characteristically female lives.¹⁴⁹

In contrast, feminist social justice, according to Roberts and Callahan, construes individual liberty more broadly to encompass the “moral equality of all persons, regardless of their social loca-

146. *Id.*

147. Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 *KY. L.J.* 1197, 1200 (1996).

148. *See id.* at 1206.

149. *Id.*

tion.”¹⁵⁰ Specifically, feminist social justice is based on the notions that “respecting another person is not just limited to leaving her alone; respecting another person involves attending to the conditions that are necessary for her thriving [I]t also means seeing that she has equally available to her the basic conditions of meaningful self-direction.”¹⁵¹ Thus, under feminist social justice, liberty is not merely a negative concept, in the sense of being free from governmental interference.¹⁵² Indeed, elsewhere, Roberts has written that liberty should be construed as a positive right in certain contexts.¹⁵³

What, then, are we to make of social justice feminism? Extrapolating from Roberts and Callahan, we posit that social justice feminism reflects dissatisfaction centered more directly on liberal feminism, particularly in light of the critiques mentioned above. Thus, liberal feminism, in practice and in legal theory, has focused primarily on a white, middle class, heterosexual female subject, examining her status when compared with her male counterpart. In its emphasis on formal equality, liberal feminism has failed adequately to address other social and political structures that support patriarchy. Social justice feminism strives to uncover and dismantle those structures, such as white privilege, heterosexism, able-ism, and classism. These concerns are evident in current strains of feminist legal theory, notably, critical race feminism (“CRF”).

CRF contains strands of critical legal studies, critical race scholarship, and feminism.¹⁵⁴ While many of its adherents draw upon mainstream feminist scholarship, they provide a “race intervention in feminist discourse, [because CRF] necessarily embraces feminism’s emphasis on gender oppression within a system of patriarchy.”¹⁵⁵ However, one of CRF’s contributions

150. *Id.* at 1207.

151. *Id.*

152. *See id.*

153. *See* Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 590 (1993) (asserting the existence of a positive right to self-determination, which would require the government to provide services necessary for participation in society, such as “abortion counseling [for] Title X patients”). Other feminist scholars have made similar arguments. *See, e.g.*, Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 748-750 (1999) (suggesting that the right to privacy extends beyond freedom from government intervention to include certain positive rights).

154. *See* Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM* 1, 4-7 (Adrien Katherine Wing, ed., 2d ed. 2003).

155. *Id.* at 7.

to the feminist canon is its theoretical analysis of multiple oppressions,¹⁵⁶ particularly with respect to women of color. Indeed, as Adrien Wing describes this movement, the theoretical impetus underlying CRF echoes sentiments of many of the NWMI participants. She writes that:

most CRF proponents have not joined the mainstream feminist movement [i]n some cases the refusal to become associated is due to that movement's essentialization of all women, which subsumes the variable experiences of women of color under the experience of white middle-class women. Mainstream feminism has paid insufficient attention to the central role of white supremacy's subordination of women of color, effectuated by both white men and women.¹⁵⁷

In other words, just like the advocates attending the NWMI meetings, these scholars did not want to "do feminism" as it had been done in the past.¹⁵⁸ In this regard, examining CRF and similar strands of feminist legal theory is significant for better understanding social justice feminism.

As suggested above, social justice feminism shares with CRF a concern about recognizing and addressing multiple oppressions.¹⁵⁹ This work is necessary not just for purposes of identity politics, but to gain a fuller understanding of the multiple and intersecting forms subordination can take. For example, the concepts of intersectionality and anti-essentialism, discussed first by Kimberlé Crenshaw¹⁶⁰ and Angela Harris,¹⁶¹ respectively, are intended to highlight not only differences among women, but also to identify strategies for addressing the myriad forms of inequality affecting them. In this vein, Mari Matsuda has written about the importance of building coalitions across the intersections of race, class, sexuality, ethnicity, among other forms of identity.¹⁶² Doing so, she argues, is necessary to develop more robust theories to combat subordination.¹⁶³

156. *See id.*

157. *Id.*

158. *See supra* note 1 and accompanying text. *See also* OFFICIAL REPORT, *supra* note 16, at 1-3.

159. *See, e.g.,* Callahan & Roberts, *supra* note 147, at 1203.

160. *See* Kimberlé Crenshaw, *supra* note 90, at 145.

161. *See* Harris, *supra* note 89 at 585.

162. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1188 (1991).

163. *See, e.g., id.* (observing that through "sometimes painful work in coalition we are beginning to form a theory of subordination; a theory that describes it, explains it, and gives us the tools to end it").

Indeed, as Matsuda suggests, critical race feminist scholars viewing subordination through a cross-cutting lens have produced important works that make visible forms of subordination that liberal feminism's emphasis on formal equality miss. For example, Regina Austin explores the "impact of fast food on obesity in a context of racial/ethnic and gender discrimination and poverty,"¹⁶⁴ a context overlooked by the popular film, *Super Size Me*.¹⁶⁵ Austin commends the film for demonstrating the credibility¹⁶⁶ of the highly publicized and ridiculed tort claims brought by African American women against McDonald's alleging violations of consumer protection laws and negligence for contributing to childhood obesity.¹⁶⁷ However, Austin criticizes the film's neutral approach to the issue. She argues that filmmaker Morgan Spurlock ignored the social, racial, and economic issues implicated in his account of the fast food industry and, in so doing, missed an opportunity to promote substantive change.¹⁶⁸ In this regard, Austin likens the filmmaker's approach to tort law's failure to contextualize such claims and its attendant inability to address meaningfully the material conditions that contribute to poor people's detrimental reliance on fast food.¹⁶⁹

Austin's work reflects social justice feminism in a variety of respects. First, it focuses on an issue that likely would have been ignored under liberal feminism. Austin highlights the fact that the proliferation of fast food and the obesity resulting from it have a disparate impact on poor women of color,¹⁷⁰ such as the plaintiffs in Spurlock's documentary who sued McDonald's in *Pelman v. McDonald's Corporation*.¹⁷¹ Additionally, she uncovers the class inequalities that facilitate obesity among urban people of color by highlighting the prevalence of "hunger or food

164. Regina Austin, *Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 *LOY. L.A. L. REV.* 687, 693, 697 (2007).

165. *See id.* at 697-98. *See generally* SUPER SIZE ME (The Con 2004).

166. *See* Austin, *supra* note 164, at 690.

167. *See id.* (discussing *Pelman v. McDonald's Corp.*, 237 F.Supp. 2d 512, 512 (S.D.N.Y. 2003)).

168. Austin, *supra* note 164, at 697-98.

169. *Id.* at 717-18. *See infra* notes 174-76 and accompanying text.

170. *See* Austin, *supra* note 164, at 699 (explaining that 53.9% of black women are classified as obese compared to 34% of black men, 30.6% of non-Hispanic white adults, and 36.8% of Mexican Americans).

171. *See id.* at 696, 698.

insecurity,”¹⁷² the lack of healthy alternatives to fast food,¹⁷³ and the limited access to recreational outlets that would promote physical activity.¹⁷⁴ In Austin’s work, we see how gender, race, and class conspire to affect even the most basic decisions and have serious health implications. In so doing, she has identified the multiple oppressions at play in this context. Moreover, by focusing on low-income women of color, she engages in social justice feminism’s call to seek change “from the bottom up.”¹⁷⁵ Significantly, this article highlights how poverty contributes mightily to inequalities in housing, education, as well as in living conditions, affecting even the most mundane decision – what to eat.¹⁷⁶ In this regard, Austin’s article also draws into question the notion of autonomy and the extent to which women of color may exercise agency in their communities. The article further highlights the link between popular culture and the law as tools for making systemic change.

Austin’s work illustrates the social justice feminism that permeates much of current feminist legal theory.¹⁷⁷ As the forego-

172. Austin, *supra* note 164, at 701. “A person who is poor and obese may be a person who goes hungry or cuts back on her or his caloric intake for a given period and then compensates by overeating during other periods.” *Id.*

173. *See id.* at 702, 704 (observing the lack of grocery stores and dining alternatives in urban areas and noting that some “communities seem saturated with fast-food restaurants; at least one study undertaken in pre-Katrina New Orleans found that the number of fast-food restaurants in black neighborhoods exceeded the number in white neighborhoods”).

174. *Id.* at 710. Austin notes that “urban schools . . . lack adequate recreational facilities; playgrounds may be taken up with trailers to relieve overcrowding . . . or they may be poorly maintained and dangerous. Security concerns may keep children indoors and out of harm’s way; girls are more likely to be handicapped in this regard than boys.” *Id.* at 710-11.

175. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. REV. 323, 387-88 (1987) (urging critical theorists to focus on the concerns of oppressed persons of color, including working with them to develop appropriate law reform strategies).

176. Austin, *supra* note 164, at 701-04.

177. For other examples of engagement in social justice feminism throughout current feminist legal theory, see Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory’s Role in New Legal Realism*, 2005 WIS. L. REV. 405, 419 (2005) (advocating for a reconceptualization of family and dependency in family law that moves beyond gender roles); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006) (arguing that Title VII sexual harassment law reporting requirements disparately impact women of color); Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181 (2006) (arguing for an intersectional approach to modifying bankruptcy and consumer protection laws); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy,*

ing suggests, social justice feminism is structural in its orientation, identifying issues that contribute to systemic subordination and developing theories and strategies for change.

As the above demonstrates, the NWMI's call for social justice feminism has deep roots and much in common with the work of other feminists seeking new paradigms effecting meaningful change in lives of the most oppressed women. While feminism emphasizes putting theory into practice, our project begins with practice. Activists want to do social justice feminism. Thus, in moving to theorize what that might mean in the context of a twenty-first-century women's movement, we start, as the NWMI did, with a look back at what we characterize as the modern-day seeds of social justice feminism that were sown at the nation's largest and most diverse gathering *ever* of women who wanted to work to improve the lives of women — the 1977 National Women's Conference.

III. THE NATIONAL WOMEN'S CONFERENCE: THE SPIRIT OF SOCIAL JUSTICE FEMINISM

*What Will You Reap? What Will You Sow?*¹⁷⁸

Barbara Jordan, Keynote Speech
National Women's Conference, 1977¹⁷⁹

In our exploration of the concept of social justice feminism, The National Women's Conference is a pivotal historical moment because central tenets of the concept's philosophical framework burgeoned there. Specifically, as will be discussed more fully be-

Race, and Feminist Legal Theory, 10 YALE J.L. & FEMINISM 101 (1998) (urging feminist legal theorists to challenge the underlying economic conditions that make adoption an attractive option for low-income women in developing nations); Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175 (1998) (arguing for the creation of legal theories that would yield change for the most oppressed women); Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399 (2004) (arguing that proposals to improve child care must simultaneously seek to improve the labor conditions in the child care industry); Verna L. Williams, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 WM. & MARY J. WOMEN & L. 563, 567-68 (2006) (asserting that feminist theories regarding private choice should be used to analyze public education reform).

178. OFFICIAL REPORT, *supra* note 16, at 223.

179. Jordan's keynote speech, as well as forty-two hours of speeches and debates recorded at the National Women's Conference, is available at <http://CHSWG.binghamton.edu>. Also, a document project on the National Women's Conference entitled "How Did the National Women's Conference in Houston in 1977 Shape a Feminist Agenda for the Future" is available at <http://womhist.alexanderstreet.com>.

low, the Conference was *productive, constructive, and healing* in ways that we characterize as social justice feminist in perspective.¹⁸⁰ Before examining each of these concepts in detail, however, this Part will briefly describe the origins of the Conference and what happened over those four days in Houston.

A. *The Event Itself*

1. How It Came About

The United Nations proclaimed 1975 International Women's Year ("IWY") and the ten years that followed as The International Decade for Women.¹⁸¹ Part of the program of the United Nations was a mandate that participating nations set up commissions to address the status of women and the road to gender equality within their own countries. To comply with this directive, President Ford established the National Commission on the Observance of International Women's Year ("the IWY Commission"). Pursuant to Public Law 94-167, Congress directed the IWY Commission to organize and convene a national women's conference, allotting \$5 million for this purpose.¹⁸²

In preparation for the Conference, the IWY Commission conducted research, held hearings, and issued a report detailing its findings in a 1976 publication entitled "To Form a More Perfect Union."¹⁸³ Based on that document, the Commission framed fourteen resolutions as a suggested "core agenda" for meetings held in every State and Territory of the United States.¹⁸⁴ At these meetings, participants elected delegates who ultimately would attend the convention. The IWY Commission also appointed delegates-at-large in an effort to comply with the statutory requirement that the Conference "reflect the demographic composition of women in the country and to include representatives of organizations that 'work to advance the rights of women.'"¹⁸⁵ In addition to discussing and proposing issues related

180. See *infra* Part II.B.

181. SUSANNA DOWNIE ET AL., *DECADE OF ACHIEVEMENT: 1977-1987 A REPORT ON A SURVEY BASED ON THE NATIONAL PLAN OF ACTION FOR WOMEN 5* (1988).

182. OFFICIAL REPORT, *supra* note 16 at 251-54.

183. NATIONAL IWY COMMISSION, "... TO FORM A MORE PERFECT UNION . . ." (1976). This report was a 382-page compilation of information gathered from interviews and surveys relating to "the status of women 200 years after the birth of our Nation." OFFICIAL REPORT, *supra* note 16, at 9.

184. OFFICIAL REPORT, *supra* note 16, at 11.

185. *Id.* at 119.

to the Commission-established core agenda, meeting participants also examined issues of particular local concern, which the Commission encouraged.¹⁸⁶ At the fifty-six meetings, participants adopted an additional 4,500 resolutions.¹⁸⁷ After further debate and discussion, the outcome was a twenty-six-plank National Plan of Action presented to the Houston delegates at the Conference.¹⁸⁸

2. The National Plan of Action: Issues and Process

The National Plan of Action included planks on issues as diverse as the women in attendance — from the arts and domestic violence to child care, the ERA, and the treatment of women in the media.¹⁸⁹ In this regard, the Plan sought nothing less than wholesale change in the lives of women in the nation. Over the three day period from Friday, November 18, until Sunday, November 21, the over 2000 delegates¹⁹⁰ presented, debated, and voted on each plank.¹⁹¹

The Conference officially opened at noon on Friday, when runners who had carried the symbolic torch 2610 miles from Seneca Falls, New York, arrived at the Houston Convention Center.¹⁹² Poet Maya Angelou read the Declaration of Sentiments, which she had written to accompany the torch from Seneca Falls.¹⁹³ With that auspicious beginning, participants immediately set about the hard work of putting together a national plan. That evening and throughout the next three days, caucuses met to discuss, debate, and finalize proposals created during the five official sessions.¹⁹⁴

186. *Id.* at 11.

187. BIRD ET AL., *supra* note 16, at 52.

188. OFFICIAL REPORT, *supra* note 16, at 11.

189. The Plan enumerated twenty-six planks as follows: Arts and Humanities, Battered Women, Business, Child Abuse, Child Care, Credit, Disabled Women, Education, Elective and Appointive Office, Employment, Equal Rights Amendment, Health, Homemakers, Insurance, International Affairs, Media, Minority Women, Offenders, Older Women, Rape, Reproductive Freedom, Rural Women, Sexual Preference, Statistics, Women, Welfare and Poverty, and Continuing Committee of the Conference. *Id.* at 13-97.

190. There were 2,006 delegates: 1,403 elected from State and Territorial meetings, 186 alternates, 47 IWY commissioners, and 370 delegates-at-large. *Id.* at 11.

191. *Id.*

192. *Id.* at 128.

193. *Id.* at 128-29.

194. These sessions were characterized by intense debate and discussion of the details of each of the twenty-six planks, some of which were accepted as originally proposed, others amended or substituted to reflect the concerns of those in attend-

B. *Sowing the Seeds of Social Justice Feminism*

In her opening keynote address, Congresswoman Barbara Jordan set the tone for the Conference:

This Conference is inclusive; everybody is here and everyone must be free to define the meaning of total woman, for herself.

The differences among us at this Conference cannot and should not be ignored. They are rational; the difference is ec-

ance. An examination of the sessions demonstrates that delegates were committed to ensuring that the planks they ultimately adopted would be properly vetted and would appropriately reflect the needs and concerns of the nation's women.

The first session began on Saturday morning, with opening remarks and speeches. Each of the three first ladies in attendance — Lady Bird Johnson, Betty Ford and Rosalynn Carter — spoke at this time. *Id.* at 138. Congresswoman Barbara Jordan gave the keynote address. *Id.* at 140. With the second session came the first discussions of the substantive provisions of the National Plan of Action. Eight microphones were set up and color-coded cards were used to let the Chair know what types of motions were being requested. For example, the cards indicated whether a participant wished to speak for or against a motion or wanted to make an amendment or substitution. *Id.* at 142. Participants voted on resolutions either vocally, by standing, or where the vote was close, by the count of tellers. *Id.* at 141. At the second session, delegates passed, in their originally proposed forms, the planks on Arts and Humanities, Battered Women, Business, Child Abuse, Child Care, and Credit. *Id.* at 143-45. The plank on Disabled Women was replaced with a substitute amendment that the disabled women's caucus worked to draft all night long. *Id.* at 145.

At the third plenary session, participants passed the plank on Education with two amendments. One stated that school systems should move against stereotyping on the basis of race as well as sex. *Id.* at 146. The other amendment recommended expanding the school curriculum to restore to women their history and achievements. *Id.* The planks on Elective and Appointive Office and Employment passed in their original forms. *Id.* at 146-48. Then came a key moment in the Conference when delegates presented the ERA Plank, which simply stated: "The Equal Rights Amendment should be ratified." *Id.* at 148. After passionate debate, delegates approved the plank in a standing vote by an apparent margin of five to one. *Id.* at 148-49.

The fourth plenary session was a marathon, in which delegates passed fourteen planks, including two of the most controversial provisions in the National Plan: Reproductive Rights, *id.* at 162-63, and Sexual Preference, *id.* at 165-66. During this session, delegates also debated and approved an amended plank on Minority Women, *id.* at 155-60. For more discussion on this plank, see *infra* notes 228-29 and accompanying text. Delegates adopted in their original forms the planks on Health, Homemakers, Insurance, International Affairs, the Media, Offenders, and Statistics. *Id.* at 153-67. Delegates adopted substitution planks on Older Women, Rape, *id.* at 161-62, and Women, Welfare, and Poverty, *id.* at 167. They also adopted the plank on Rural Women, *id.* at 163-64, with amendments.

At the final plenary on Monday, a weary and disbursing crowd voted down the twenty-sixth plank that would have established a Cabinet-level Women's Department to coordinate social policy affecting women. Instead, delegates decided there should be a Continuing Committee of the Conference. *Id.* at 169.

onomic, cultural, social, political, ideological—the differences are there.

The delegates to this Conference are certainly not of a single mind. No one person and no one sub-group at this Conference has the right answers.¹⁹⁵

But she emphasized that there was important work to be done:

Congress approved \$5 million with its congratulations, but, if we do nothing here *productive, constructive or healing*, we will have wasted much more than money.

We will have wasted, lost, negated an opportunity to do something for ourselves and for generations which are not here.

Not making a difference is a cost we cannot afford.

The cause of equal and human rights will reap what is sown November 18th through November 21st, 1977.¹⁹⁶

Looking back at the Conference, there was much that was *productive, constructive, and healing*. In the intersections of these, one can find the possibilities of social justice feminism. The next sections explore the meanings of these words individually and collectively.

1. Productive: Thinking Creatively; Thinking Big

To be productive means to have “the quality or power of producing, esp[ecially] in abundance”; to be originaive.¹⁹⁷ It means to yield or furnish “results, benefits, or profits.”¹⁹⁸ Those who attended the Conference were keenly aware that what they were doing was new and different. They were committed to coming up with specific proposals, big and small, that would yield substantive changes in the real world. Social justice feminist in its praxis orientation, the end result of the Conference was a National Plan of *Action*. As the Introduction to the Official Report made clear, the conferees were thinking in terms of what can be done *now*, as well as what steps could be taken toward more long-term goals:

Some of the women’s demands can be met by the present session of Congress, by Executive Order, by action in the States and in the private sector, or by a determination of those in

195. *Id.* at 223.

196. *Id.* (emphasis added).

197. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 991 (11th ed. 2003).

198. *Id.*

power to ensure more effective enforcement of programs that have been allowed to languish or be circumvented.

More long-range demands, such as those for a full employment economy, a national health system, and an end to the arms race, imply a fundamental reshaping of our present society that would require mass movements of men and women working together to seek to accomplish them.¹⁹⁹

Not to be side-tracked by the question of limited resources, the Official Report addressed this issue head-on: "No attempt was made to apply a price tag to the National Plan of Action, nor is it possible to estimate what it would cost if each recommendation were to become a reality."²⁰⁰ However, the Report made clear that many of the changes would cost no money at all:

There is no additional expenditure involved in giving women an equal chance with men to receive an arts grant, or in voting more women into office, or in making a woman a department head, or in appointing women to the U.S. Supreme Court, or in portraying women more realistically in the media and in textbooks.²⁰¹

In this way the National Plan of Action recognized and proposed strategies for dismantling what Iris Marion Young has identified as the role of formal and informal patterns of society in reifying oppression and domination of social groups.²⁰²

Indeed, the National Plan of Action anticipated that a new social contract would be necessary, with a reordering of priorities:

Equal pay for equal work and for work of "equal value" would cost employers more, as would ending double discrimination against minority women. . . . Child care facilities, education and job training programs, health insurance, and other social programs would require Federal spending. Whether or not in the long run these would involve spending *more* money or only a reordering of present priorities for spending depends on decisions about the kind of society we wish to live in.²⁰³

Importantly, the National Plan of Action recognized the value of yielding "results, benefits, or profits" that were not measured in only monetary terms: "A full employment society, for example, that would make jobs available to all who seek work will un-

199. OFFICIAL REPORT, *supra* note 16, at 11-12.

200. *Id.* at 12.

201. *Id.*

202. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 9 (1990).

203. OFFICIAL REPORT, *supra* note 16, at 12.

doubtedly require outlays of money initially, but the return in human productivity and dignity is incalculable.”²⁰⁴ At the Conference, participants considered ideas within the primary context of eliminating subordination and oppression from American society.

2. Constructive: Moving Forward Differently

To be “constructive” is to promote “improvement or development.”²⁰⁵ In many respects the Conference sought to promote improvement and development, not only in the national status of women, but also in the relationships among women themselves. This necessary constructive criticism was in the spirit of moving things along *differently*.

a. *Re-envisioning the Invitation List*

In order to facilitate truly constructive work, Conference organizers made significant efforts to ensure that vast and diverse voices had a say in the way progress should develop. Indeed, the very infrastructure of the planning and implementation of the National Conference was meant to make this political process accessible to those who previously had not been included. The following details how organizers succeeded in achieving this goal.

The IWY Commission appointed local coordinating committees, selecting persons they believed would promote the greater ideals of the Conference:

The committees were chosen to be representative of the population of women they served and the special groups the law said the Conference had to attract: representatives of organizations working to advance the rights of women; members of diverse racial, ethnic, and religious groups; unions; publications; women of all incomes and women of all ages.²⁰⁶

Local coordinating committees facilitated the State and Territory meetings, using guidelines designed to yield as much diversity among participants as possible. For example, to encourage young people’s participation, State and Territory meetings were open to the public and “[a]ny duly registered female or male resident over 16 years old had the right to a vote.”²⁰⁷ This structure

204. *Id.*

205. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 197, at 268.

206. BIRD ET AL., *supra* note 16, at 47. *What Women Want* includes descriptions of several of the state meetings, emphasizing their individual characteristics. *See id.* at 48-53 (describing the Vermont, Alaska, and California meetings, among others).

207. *Id.* at 48.

empowered young people to feel as if their voice mattered and that they could play a part in implementing positive change.

The local committees also recruited persons who might not ordinarily attend statewide meetings and made travel a possibility by providing financial assistance.²⁰⁸ Committee members translated notices of meetings into many languages. For, example, “[i]n California bilingual teams went into the fields in every county to tell workers about the program.”²⁰⁹ There were also many other creative outreach programs.

In South Dakota, the outreach chair was an American Indian who visited her sisters living on reservations. In Connecticut, coordinating committee teams visited homes for the elderly, mothers on Aid to Families with Dependent Children (AFDC), PTA meetings, handicapped women, and women offenders. In rural Nebraska, planners made the rounds of farm and ranch meetings. In West Virginia, they visited the wives and widows of coal miners and talked with hairdressers and neighborhood business women who could spread news of the meeting by word of mouth. North Dakota mailed IWY posters to 600 beauty shops.²¹⁰

Organizers recognized that having a truly representative group was essential to drafting a meaningful National Plan of Action. Emphasizing the ways in which this political conference sought to be representative in a way that American politics was *not*, Steinem described how Conference participants:

accepted a commitment to democratic inclusiveness that the original ideas of the country did not address. True, the American definition of democracy has broadened since our founders created a constitution for a limited constituency of white, property-owning males, but the state meetings that led up to Houston were generally more representative by race, age, economic status, ethnicity and religion than the official legislatures making decisions in those same states.²¹¹

Thus, in order to realize a new social contract, organizers set out to assure that all affected parties would be represented. Accordingly, starting with the very planning of the event, Conference leaders committed not merely to acknowledging those “at the bottom,” but also to giving voice to their needs and concerns, because doing so was necessary to the Conference’s overarching goal of addressing the numerous interlocking subordinating

208. *Id.* at 47.

209. *Id.* at 50.

210. *Id.*

211. Steinem, *supra* note 16, at 11.

structures constraining the lives of too many women. In this way, the Conference sought to redress historical exclusions in both the women's movement and American society.²¹²

b. *Growing Recognition of Interlocking Subordinating Structures*

The constructive criticism of society that took place at the Conference acknowledged the intertwined nature of multiple oppressions to some extent. For example, the 1977 Declaration of American Women drafted in connection with the Conference included statements such as the following: "We are poorer than men. And those of us who are minority women—blacks, Hispanic Americans, Native Americans, and Asian Americans—must overcome the double burden of discrimination based on race and sex."²¹³ Moreover, the substantive planks also included constructive criticism that often took a multiply conscious perspective.

For example, the plank on Older Women addressed concerns across lines of race, ethnicity, as well as age. Specifically, it identified "poverty, isolation, and inadequate medical care" as issues that "deprive many older women of a productive and secure old age."²¹⁴ This plank observed that "[i]n 1976 women over 65 had the lowest median income of any age or sex group: \$2800, about half the income of men their age. Black women are poorer than the average—nearly half the black women over 65 were living below the poverty level."²¹⁵ It called for such actions as increased home health and social services, bilingual and bicultural programs, preventive as well as remedial health services, and public transportation in both urban and rural areas.²¹⁶ In speaking about the Conference, Betty K. Hamburger, delegate from Baltimore and member of the Maryland Advocates for the Aging, commented:

Houston gave all older women a little more stature, which we need most desperately. Because of mandatory retirement, many older people feel that they've been kicked out of the mainstream and are looked down upon as second-class, maybe

212. *See id.* ("It was as if women had recreated for themselves a temporary version of the national political structure that had substantially excluded them for 200 years . . .").

213. OFFICIAL REPORT, *supra* note 16, at 15.

214. *Id.* at 79.

215. *Id.*

216. *Id.*

third-class, citizens. It's worse to be black and old; it's worse to be a woman and old.²¹⁷

Issues of class also played an integral role in many proposals in the National Plan of Action. Conference delegate Marge Jindrich, a factory worker and member of the United Auto Workers Union, explained: "A lot of people—and I blame the media—picture women as working just for pin money or to get out of the house. It's not true. Very few women work in factories unless they have to."²¹⁸ She described the lack of advancement for factory women, as well as the lack of union support for women's issues:

The union says they are for women, but I see no concrete evidence of it. As women, we make up almost half of the membership, but when we want something, we get a pat on the head, just like they do to a pet dog: "Good dog, now go lie down in a corner and don't bother me."²¹⁹

Jindrich described the discriminatory treatment within the union, which was all the more frustrating because of the absolute necessity of the union for workers.²²⁰ She also elaborated on how certain minority women were especially silenced because of their immigrant status: "Most of the workers in our plant are women, Mexican women. They may not be here illegally, but they have friends or relatives who might be, and they are afraid to speak up, they might cause waves. The union is their only voice."²²¹ With respect to the specific planks, Jindrich highlighted the priority for factory women of such issues as battering and federally funded child care.²²²

The Conference also implicitly critiqued institutional power structures and, offered by its own example, a different form of representation. Not only was a more truly representative constituency present, as discussed above, there also was a different way of engaging in the business of politics. California Assemblywoman Maxine Waters²²³ described this Conference as "unique in politics" and very different from other political conventions with which she was familiar:

217. BIRD ET AL., *supra* note 16, at 23.

218. *Id.* at 30. Jindrich was one of the participants whose views were included in *What Women Want*. See generally *id.*

219. *Id.* at 31.

220. See *id.*

221. *Id.*

222. *Id.*

223. Ms. Waters is presently a member of the U. S. House of Representatives.

At a national political convention, there are different centers of power, and people come ready to manipulate the rules to keep somebody else from doing something. At Houston, the challenge was to learn the rules so you could get something done that was being overlooked. You didn't have to fight somebody who was really against you.²²⁴

The emphasis was not only on productive change, but on remedying that which had *not* been changed before.

c. Asking Important Questions

The Conference also was the site of constructive criticism of the mainstream women's movement itself. Specifically, participants examined questions about who was represented, who wasn't, and how those priorities played out.

In some parts of the National Plan of Action, there were apparent moves to be more mindful of language. With respect to the use of the word "woman," for example, the plank on Disabled Women specifically provided that the word "woman" be defined to include all women with disabilities. In order to translate that linguistic inclusion into substantive practical improvements, the plank clarified that "[t]he term 'bilingual' should be defined as including sign language and interpreters for the deaf" and that the "term 'barriers' against women and 'access' should be defined as including architectural barriers and communications barriers."²²⁵ Similarly, the plank on Rural Women specified the breadth of the term "rural women," in providing that "[a]ll programs developed on behalf of rural women should be certain to include migrant, black, Native American, Alaskan, Asian, and Hispanic women and all isolated minorities, and affirmative action programs should be extended to include all disenfranchised groups."²²⁶

The Conference also supported an atmosphere of sharing that enabled women to explain why some felt differently about certain issues than other women. Billie Nave Masters, for instance, explained that "[t]he feminist movement was a white woman's movement for so long because when you are living at the survival level you don't have time for anything else."²²⁷ However, she identified specific feminist concerns of Native American and Alaskan Native women, such as the destructive force of

224. BIRD ET AL., *supra* note 16, at 24.

225. OFFICIAL REPORT, *supra* note 16, at 32.

226. *Id.* at 87.

227. BIRD ET AL., *supra* note 16, at 37, 38.

paternalism on Native people.²²⁸ She also highlighted the great injustice of forced sterilization that had been practiced on Native American women.²²⁹

Waters explained that “there is a black perspective in all the feminist issues in the National Plan.”²³⁰ In discussing the plank on battered women, for example, she highlighted the “frustration of [black] men in seeking employment added to other sexist socialization [as a phenomenon that] often leads to wife-beating.”²³¹ She also provided historical information as to why black women might not support certain issues that had been identified as important for feminists. With respect to midwifery, for example, Waters talked about midwives historically being very common in the Black community because women could not afford to go to the hospital. Waters writes:

The new mothers suffered torn tissues, and the wounds were mended with alum and water—the scar tissue is still there. With this background, black women just don't understand white women who say they don't want to go to sterile hospitals to deliver their babies with uncaring doctors in an unwarm atmosphere.²³²

Specifically, Waters argued that the proposed “improvement” might limit the choice of some mothers because of subordinating structures: “Black women are afraid that midwifery will be encouraged under Medicaid to save money.”²³³

As discussed in Part I.B. above, women of color had certainly been raising such issues for years. However, one of the different and defining features of the Houston Conference — part of its social justice spirit — is that women actually seemed to be listening to each other—across their divides. Thus, there were conversations about issues that facilitated what Barbara Jordan also hoped would be accomplished in Houston — some healing.

3. Healing: Sharing and Concern

For many at the Conference, passage of the substituted plank on Minority Women represented the most significant and

228. *Id.*

229. *Id.*

230. *Id.* at 24.

231. *Id.* at 25.

232. *Id.*

233. *Id.*

moving aspect of the Conference.²³⁴ The first paragraph of the plank on Minority Women is itself very telling. It provided that “minority women share with all women the experience of sexism as a barrier to their full rights of citizenship. Every recommendation of this National Plan of Action shall be understood as applying equally and fully to minority women.”²³⁵

The fact that this statement needed to be made indicates the essentialism that marked the women’s movement at the time. “Women” tended to mean white women. However, the fact that the statement *was* made can be read as a step toward addressing this very problem. The next paragraph went on to acknowledge “institutionalized bias” that “has led to the additional oppression and exclusion of minority women and to the conditions of poverty from which they disproportionately suffer[,]” calling for recognition and remedy of this double discrimination.²³⁶

As originally proposed, the Minority Women’s Plank included three short paragraphs.²³⁷ A unified Minority Caucus, after working tirelessly for three days, ultimately came together and presented a substituted plank that listed specific concerns of “American Indian and Alaskan Native women,” “Asian/Pacific American women,” “Black women,” and “Hispanic women.”²³⁸ A woman representing each of these minority groups read their specific provisions at the plenary session.²³⁹

The discussion accompanying this plank in the Official Report took an intersectional approach to the subordination of minority women. It explained, with many specific examples, the ways in which “the combined effect of race, sex, and economic class can produce extreme hardship in the lives of these American women.”²⁴⁰ Before describing particular issues of different minority groups, this discussion raised certain issues and illuminated how minority women were discriminated against *vis a vis* men, as well as white women. For example, in the area of health, the plank provided statistics showing that “[m]aternal mortality was 29.0 per 100,000 minority women, as opposed to 9.1 per

234. Gloria Steinem described the “unity represented by the minority women’s resolution” as “perhaps the single greatest accomplishment of the Houston Conference.” Steinem, *supra* note 16, at 15.

235. OFFICIAL REPORT, *supra* note 16, at 70.

236. *Id.*

237. *See id.* at 155.

238. *Id.* at 156-57.

239. *Id.* at 158-59.

240. *Id.* at 71.

100,000 white women. The infant mortality rate among minorities was 24.2 per 1,000 live non-white births as compared with 16.1 per 1,000 in the population at large."²⁴¹ Cited reasons for these disparities included poor nutrition, less access to hospitals or clinics, and a smaller likelihood of insurance coverage, leading to the conclusion that "[t]his lack of access to good or adequate health care [was] a function of economic status. It represents a clear example of the interaction of income with race and sex."²⁴² The plank made similar points about the disparate access that minority women had to reproductive freedom, employment and education.²⁴³

While much work remained to heal painful divisions among women, Gloria Steinem characterized Houston as "the first public landmark in a long suspicion-filled journey across racial barriers."²⁴⁴ Women were engaging with each other—talking and listening to each other—in a way that made the possibility of working together to improve women's lives something many women wanted. Billie Nave Masters summarized the Conference as follows:

Sharing and concern seemed to be the keynote of the Houston Convention Some of the women [who came to Houston] have changed jobs, some have moved into better positions and some have gone back to school as a result of their Houston experience. All have continued as advocates of the concerns expressed in the Minority Women resolution. The confidence of being heard and accepted, and formulating the resolutions, has strengthened each and every one us.²⁴⁵

As the foregoing suggests, and as the 1977 Conference demonstrated, progressive women's movements must act intentionally to move forward. Specifically, they must recognize the context of built-in subordinating structures within American law and society, as well as the history of privilege and exclusion within the women's movement in order to rid themselves of those structures. Those intentions, to be social justice feminist in perspective, should be all three of these things: productive, constructive and healing.

241. *Id.*

242. *Id.*

243. *See id.*

244. Steinem, *supra* note 16, at 16.

245. BIRD ET AL., *supra* note 16, at 38.

IV. METHODOLOGICAL TOOLS OF SOCIAL JUSTICE FEMINISM

In her 1990 article *Feminist Legal Methods*, Katharine Bartlett described certain methods that feminists use when they “do law”; “these methods, though not all unique to feminists, attempt to reveal features of a legal issue that more traditional methods tend to overlook or suppress.”²⁴⁶ As Bartlett explains, methods matter “because methods shape one’s view of the possibilities for legal practice and reform.”²⁴⁷ It also is helpful to try to articulate methods because that very process can illuminate the nature of what is being done and make it possible to do it better.²⁴⁸ Following Bartlett’s example, in this Part, we articulate three methods of doing law from a social justice feminist perspective.

One method, looking to history to understand subordinating structures, seeks to acquire more knowledge with which to understand and then dismantle the bases of societal institutions that perpetuate hierarchies and inequities. Another method, examining the inter-relationships between interlocking oppressions, asks how issues of gender, race, class, and other categories of identity and experiences work together to create social injustice. A third method, ensuring that principles of dismantling interlocking oppressions inform solutions, keeps the focus on bottom-up strategies in fashioning remedies. We elaborate on each of these methodological tools below.

A. *Looking to History to Understand Subordinating Structures*

Much has been written in the fields of feminist and critical race theory about the potency of the power to label experience. Important work has been done, both in uncovering “lost” histories²⁴⁹ as well as re-examining how history has been told and un-

246. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990). Bartlett describes three methods in detail: (i) asking the woman question; (ii) feminist practical reasoning; and (iii) consciousness-raising. *Id.* at 829.

247. *Id.* at 830.

248. *Id.* at 831 (“As feminists articulate their methods, they can become more aware of the nature of what they do, and thus do it better. Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted.”).

249. See, e.g., Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 697 (1996) (contrasting two early and mid-nineteenth century cases to “demonstrate[] [both] that the black/white paradigm exercises influence on legal reasoning across time and geographic space, and also that the paradigm itself *appears* to be a natural ordering, obscuring the assumption of a white subject position”); Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning from America’s First Female Bankrupts*, 40 AM. J. LE-

derstood.²⁵⁰ History itself is constructed and has a point of view,

GAL HIST. 1, 6-7 (1996) (using a “ground up” approach to re-tell the early history of American bankruptcy law from the woman debtors’ perspective, which is vital because “[t]heir stories have so seldom been told that they are valuable in expanding our understanding of the past and the present”); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 38-39 (1987) (telling “the lost histories of the women who pioneered entrance to and practice at the bar[,]” and arguing that “these women, by their very existence, challenged the dominant knowledge structures”); Debora L. Thredy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1250 (1999) (“The gendered nature of contract law’s domain can be discovered by examining how women and women’s concerns historically were excluded from that domain.”); Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN’S L. J. 201, 226 (1985) (examining the historic participation of women in men’s sports and arguing that the memory of their presence suffered “as the sports became more commercialized” because “[the sports] became more sex-stratified and exclusionary”); Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race and the Road to Plessy, 1855-1914*, 13 LAW & HIST. REV. 261, 265 (1995) (“A more complex answer to the questions of what were the nature of race relations in the post-emancipation South and why Southern states resorted to statutorily mandated racial separation lies in the stories of women.”).

250. See, e.g., JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* 67 (2d ed. 1999) (taking a critical view that historians who ignore the deeper meaning of the term ‘gender’ “uncritically accept masculine conceptions of class and rule out feminist demands for attention to women and gender . . . unconsciously continuing the politics of an earlier age . . .”); Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29, 31 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (recounting the history of antidiscrimination law after *Brown v. Board of Education* from the “victim perspective” of racial discrimination, which “may be approached from the perspective of either its victim or its perpetrator. . . . In its core concept of the “violation,” antidiscrimination law is hopelessly embedded in the perpetrator perspective”); Linda K. Kerber & Jane Sherron De Hart, *Introduction to WOMEN’S AMERICA: REFOCUSING THE PAST* 1, 3 (Linda K. Kerber & Jane Sherron De Hart eds., 6th ed. 2004) (arguing that because “dates that mark major turning points in traditional historical accounts do not automatically coincide with those dates that mark significant changes in the lives of American women, women’s history challenges us to re-examine conventional periodization”); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 336 (1988) (exploring the nature of “equality of opportunity,” and seeking “to recover lost possibilities and to comprehend the many and subtle pressures that shape movements for social justice in a society whose hierarchies rest upon class as well as upon race”); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (dissecting the concept of “race” in American history to argue that “the U.S. Supreme Court’s use of color-blind constitutionalism — a collection of legal themes functioning as racial ideology — fosters white racial domination”); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing that most members of American society are unconsciously racist due to “our common historical and cultural heritage in which racism has played and still plays a dominant role”); Ian F. Haney López, *The Social Construction of Race: Some*

usually one possessed by those in power. Social justice feminism continues the work of uncovering stories and experiences that have not been told or included in accounts of history and examining how they alter ways of seeing. From a social justice feminist perspective, emphasis is placed on history relating to the intersections and the margins. The purpose of these inquiries is to better understand how subordinating structures were created and have been maintained. The goal is to use this knowledge in working to dismantle these structures.

The members of the NWMI looked back at the historical moment of the 1977 Women's Conference for ideas and inspiration. For many attendees of the 1977 Conference, especially for many women on the margins, it was one of the most significant events in their lives. The Chair of the American Indian/Alaskan Native Women's Caucus, Billie Nave Masters, wrote the following:

The IWY Conference in Houston was the most intense and meaningful experience I will have in my lifetime. . . . It was the first time that a group of Alaskan Native and American Indian women had come together nationally on their own initiative, the first time that a group of native women had sought and won positions on a national level. It was a warming experience. . . . We came together to exchange and share strength, knowledge, and awareness.²⁵¹

Others, like Lupe Anguiano, President of the National Women's Program Development and Chair of the Welfare Reform Task Force, imagined a future of a different kind after Houston, a time when "[m]inority women's voices were heard and supported by all[.]"²⁵² She believed that "the spirit of Houston will continue to grow."²⁵³

As activists, looking to re-vitalize the women's movement, the NWMI participants were interested in seeing what had created this sense of coming together. In thinking about how to

Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 38 (1994) ("Historical forces create races, groups defined by the social significance of their morphology and ancestry."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1146 (1997) (examining "the disestablishment of gender and racial status law during the nineteenth century in order to demonstrate that repudiating past practices has both preservative and transformative effects; it facilitates continuity as well as rupture").

251. BIRD ET AL., *supra* note 16, at 37.

252. *Id.* at 31.

253. *Id.* at 32.

move forward, the 1977 Conference also presents an opportunity to explore what might be done differently to sustain a sense of inclusion and belonging.

The Conference itself was grounded in history and, crucially, this included looking at how subordinating structures and race and class privilege were part of the history of the feminist movement itself. Gloria Steinem devoted substantial attention in her Introduction to *What Women Want* to the historical basis for the divide between Black and white women in the feminist movement.²⁵⁴ After recounting the decision by those in power to give the vote to Black men, but not women, Steinem described how “Black women were forced to painfully and artificially slice up their identities by choosing to support their brothers at their own expense, or, like Sojourner Truth, to advocate ‘keeping the thing going . . . because if we wait till it is still, it will take a great while to get things going again.’”²⁵⁵ Steinem went on to describe the schism that ensued:

Once it was clear that black men were going to get the vote first, black women were further isolated by some white suffragists who, embittered by the desertion of white and black male allies, used the racist argument that the white female ‘educated’ vote was necessary to outweigh the black male, “uneducated” vote. Divisions deepened.²⁵⁶

As discussed in the section above on healing, efforts were made at the Conference to bridge these divisions and many positive steps were taken. However, one can employ the methodological tool of using history to understand subordinating structures to the Conference itself and see where further reform and development is needed.

For example, while there are specific examples of places where the National Plan of Action addressed harms resulting from the intersections of race and class with gender, these concerns were marginalized or completely missing from certain planks. In less overt ways, the National Plan of Action also reaffirmed essentialist thinking, with “women” unmodified tending to be white women. For example, the plank on the media included information from several studies, including a study by the U.S. Civil Rights Commission entitled “‘Window Dressing on the

254. *Id.* at 15-16.

255. Steinem, *supra* note 16, at 15.

256. *Id.* at 15-16.

Set: Women and Minorities in Television.’”²⁵⁷ This study concluded that “[t]elevision drama does not reflect the sexual and racial/ethnic make-up of the United States. White males are overrepresented; female characters are underrepresented; and minority women are nearly invisible.”²⁵⁸ In many areas, minority women were specifically mentioned, but suggesting that they were not included in plain references to “women” or “females.”²⁵⁹

Heteronormativity also pervaded the National Plan of Action. There was a plank on Sexual Preference which provided that “Congress, State, and local legislatures should enact legislation to eliminate discrimination on the basis of sexual and affectional preference in areas including, but not limited to, employment, housing, public accommodations, credit, public facilities, government funding, and the military.”²⁶⁰ This plank also specifically identified laws regulating private sexual behavior and those inquiring into parents’ sexual orientation in determining child custody and visitation rights as problems to be addressed.²⁶¹

The background to this plank detailed the discrimination suffered by lesbians at the intersections of subordinating structures based on sex and sexual preference. In the area of credit, for example, this background section explained:

A lesbian woman trying to obtain credit has two strikes against her: as a woman, her income is considered less secure than that of a man; as a lesbian, she may be considered less stable. A heterosexual couple may co-sign loans, but a lesbian couple often may not, even if both partners are employed and have good individual credit ratings.²⁶²

However, the issues identified within this plank truly were contained here, with little mention of sexual orientation outside this plank at all. For example, there was no mention of the above-described double discrimination against lesbians with respect to credit in the Credit Plank.²⁶³ While the background section of that plank included anecdotal stories from newspapers about discriminatory credit practices against women in a wide variety of circumstances, there was no example illustrating the particular

257. OFFICIAL REPORT, *supra* note 16, at 67.

258. *Id.*

259. *Id.*

260. *Id.* at 89.

261. *Id.*

262. *Id.* at 90.

263. *See id.* at 30.

credit problems identified for lesbian women in the Sexual Preference Plank.²⁶⁴

Nor was there any mention of discrimination based on sexual preference in other particularly relevant parts of the National Plan of Action, such as in connection with discussions of representations in the media or in educational textbooks or in images of the family.²⁶⁵ In fact, one of the few places that issues relating to sexual preference were mentioned outside the specific Sexual Preference Plank was in the discussion section accompanying the plank on the ERA which specifically provided that the "ERA will NOT require the States to permit homosexual marriage. The amendment is concerned with discrimination based on gender and has nothing to do with sexual behavior or with relationships between people of the same sex."²⁶⁶

The history included in the Official Report did not recount the split within the women's movement in the 1920s between those singularly focused on the ERA and those concerned with addressing specific social issues.²⁶⁷ Whether purposeful or not, this exclusion is telling. Indeed, many of the primary organizers of the Conference were very focused on the ERA; rallies in support of the Amendment were held in Houston. However, the very structure of the National Plan of Action and the emphasis and planning beforehand make clear that the Conference was not solely about the ERA. Rather, the ERA was just one of twenty-six planks. Indeed, the National Plan of Action resembled the social justice feminist agenda of the 1920s in its broad array of specific proposals to address systemic injustices. The fact that the ERA was part and parcel of a much larger plan for change may have caused some of the reconciliation and healing that took place at the Houston Conference. However, as discussed above, there was a real push after the Conference to prioritize passage of the ERA.²⁶⁸ As was true in the earlier part of the century, this singular focus may have undermined much of the progress that had been made in Houston.

Thus, a historical analysis of the Conference illuminates both solid foundations on which a re-envisioned movement can build, as well as fissures based on exclusions, privilege, and in-

264. *Id.*

265. *See id.* at 34, 67.

266. *Id.* at 51.

267. *See supra* notes 62-66 and accompanying text.

268. WANDERSEE, *supra* note 81, at 52-54.

consistencies from which such a movement can learn. Both social justice and feminism are concerned about the structure of societal norms and practices and how they affect the distribution of “rights and disabilities, privileges and disadvantage, equal or unequal opportunities, power and dependency, wealth. . .and poverty.”²⁶⁹ Fully apprehending the nature of constraining norms and practices requires understanding and addressing their history in order to identify and eradicate them.²⁷⁰ As Reva Siegel has pointed out, subordination persists in part because of its ability to transform in the face of policies aimed at its elimination.²⁷¹ A firm grounding in history provides one with the necessary context for achieving the primary goals of social justice feminism.

B. *Examining the Interrelationships between Interlocking Oppressions*

While Bartlett identifies “asking the woman” question as an important feminist legal method,²⁷² the related social justice feminist method is more akin to what Mari Matsuda has identified as “asking the other question.”²⁷³ Because social justice feminism does not privilege different forms of subordination, it not only seeks to identify “the gender implications of rules and practices which might otherwise appear to be neutral or objective,”²⁷⁴ but also the implications of race, class, and other subordinating structures.²⁷⁵

269. BARRY, *supra* note 92, at 355.

270. Siegel, *supra* note 250, at 1116, 1119, 1148.

271. *Id.* at 1119.

272. Bartlett, *supra* note 246, at 837.

273. Matsuda, *supra* note 162, at 1189.

274. Bartlett, *supra* note 246, at 837.

275. *See id.* at 847 (discussing “converting the woman question into the question of the excluded”) (citing ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988)). Bartlett also suggests that [u]sing the “woman” question as a model for deeper inquiry into the consequences of overlapping forms of oppression . . . would require a general and far-reaching set of questions that go beyond issues of gender bias to seek out other bases of exclusion: what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account? Extended beyond efforts to identify oppression based only upon gender, the woman question can reach forms of oppression made invisible not only by the dominant structures of power but also by the efforts to discover bias on behalf of women alone.

Id. at 848.

As Matsuda has made clear “while all forms of oppression are not the same,” there are “certain predictable patterns.”²⁷⁶ Specifically, Matsuda identifies “tentative, starting truths:”

All forms of oppression involve taking a trait, X, which often carries with it a cultural meaning, and using X to make some group the ‘other’ and to reduce their entitlement and power. . . . All forms of oppression benefit someone, and sometimes both sides of a relationship of domination will have some stake in its maintenance. . . . All forms of oppression have both material and ideological dimensions. . . . All forms of oppression implicate a psychology of subordination that involves elements of sexual fear, need to control, hatred of self and hatred of others.²⁷⁷

From these patterns, she argues that one can discern the “interconnections of all forms of subordination.”²⁷⁸

Matsuda employs the method of “asking the other question” as a way to try to recognize and understand relationships among subordinating structures. As she explains, “When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’”²⁷⁹ Moreover, social justice feminism does not privilege different forms of subordination. As Patricia Hill Collins explains, in keeping with the tenets of social justice, social justice feminism does not “elevate one group’s suffering over that of another.”²⁸⁰ She warns that doing so threatens to limit the progress of social justice and urges instead that recognition of the interlocking nature of oppressions is essential to the elimination of social injustice.²⁸¹

Certain aspects of the National Plan of Action illustrate the effects of bringing diverse women together. Rather than focusing exclusively on sexism, interrelated issues were brought to the forefront. The Health Plank, for example, called for the productive goal of a “national health security program,” and addressed a wide range of concerns including the need for more preventive health services, better nursing homes and mental health facilities, improved drug testing and reporting, more women in the health

276. Matsuda, *supra* note 162, at 1188.

277. *Id.* at 1188-89.

278. *Id.* at 1189.

279. *Id.*

280. PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 3 (2004).

281. *Id.* at 7.

professions, funds for alcohol and drug abuse research and treatment, and health insurance and other coverage issues.²⁸²

However, as discussed above, there are many instances in the National Plan of Action where more and different questions were needed. In thinking about moving forward today, from the perspective of social justice feminism, these questions would be central to the development of plans of action.

C. *Developing Solutions Informed by a Bottom Up Approach*

In keeping with its feminist roots, social justice feminism is committed to making material changes to people's lives, not merely to theorizing. Theory is a means to making the substantive reforms necessary for refashioning society. Accordingly, social justice feminist theory yields more than aspirational principles; it consciously fashions strategies for social change.

Thus, for example, solutions proposed to address what was identified in the 2003 Progress and Perils study as the number one concern of women—violence against women—must be created using an intersectional lens.²⁸³ The distrust of law enforcement in communities of color, for instance, is well-documented.²⁸⁴ Proposals for addressing domestic violence from a social justice perspective would make this systemic issue central and explore strategies for change that would not only work within the reality created by this societal problem, but also work to dismantle this reality too.

Drawing on the work of the social justice feminists in the 1920s, this social justice feminist methodology also involves organizing around issues — problems to be solved. In putting to-

282. OFFICIAL REPORT, *supra* note 16, at 53-56. Health issues were of great concern, with more than 400 resolutions relating to changes in health care policies and procedures passed in the State and Territory meetings. *Id.*

283. PROGRESS AND PERILS, *supra* note 35, at 11. Ninety-two percent of the women surveyed identified “reducing domestic violence and sexual assault” as the highest priority issue. *Id.* Domestic violence was one of the substantive areas that Kimberlé Crenshaw has examined to demonstrate the necessity of taking an intersectional approach to legal issues. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993).

284. See generally BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994); Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 172-73 (1996).

gether a plan of action at the National Women's Conference — a list of issues to *actively* pursue — Steinem describes how there was much “blending of tactics and styles.”²⁸⁵ What she described as “[p]refeminist, either/or, polarized thinking seemed to give way to an understanding that victory was more likely if we surrounded a goal from all sides.”²⁸⁶ Fifteen years later, Matsuda echoed the importance of bridging differences to work together, while at the same time acknowledging that work in coalition is difficult, frustrating and painful.²⁸⁷ She queried, “if it is so hard to work together, if the gulfs in experience are so wide, if the false universals of the modern age are truly bankrupt, what need binds us?”²⁸⁸ Her answer came from an acknowledgment of the realities of the world we live in and the challenges we face: “[W]e cannot, at this point in history, engage fruitfully in jurisprudence without engaging in coalition, without coming out of separate places to meet one another across all the positions of privilege and subordination that we hold in relation to one another.”²⁸⁹ The delegates at the 1977 Conference, as well as the participants in the 2007 NWMI, also recognized that binding need.²⁹⁰

V. AN OPPORTUNITY FOR SOCIAL JUSTICE FEMINISM: *LONG ISLAND CARE AT HOME V. COKE*

What does it mean to “do” social justice feminism in light of the foregoing? The Supreme Court's recent decision in *Long Island Care at Home v. Coke*²⁹¹ provides some insight, as well as an opportunity for a social justice feminist intervention.

285. Steinem, *supra* note 16, at 17.

286. *Id.*

287. Matsuda, *supra* note 162, at 1187.

288. *Id.* at 1188.

289. *Id.*

290. For example, the opening session of the “Women Coming Together” Conference at the University of Cincinnati College of Law, cited *supra* note 2, was devoted to discussing these practical issues. This session explored: “the role law has and should play in the women's movement, developing and implementing a human rights framework to effect change, and possibilities for forming alliances across movements to broaden and strengthen the fight for all women's rights.” The last session challenged participants to organize a more diverse movement. Attendees were invited to brainstorm about how to diversify the women's movement: not only in terms of race, age, sexuality, and other characteristics, but also how we organize, prioritize our issues, and support one another.” Doing so was part of the event's overarching focus on how to build a new women's movement, “learning the lessons of the past—both the successes and missteps.” (conference materials on file with authors).

291. 127 S. Ct. 2339 (2007).

A. Case Background

Evelyn Coke, a 73-year-old immigrant from Jamaica,²⁹² began working as a home health care attendant for Long Island Care at Home (“LICH”) in 1997.²⁹³ As an employee of this agency, Ms. Coke worked in the homes of clients, helping them with meals, laundry, personal hygiene, and taking medicine.²⁹⁴ The job required long hours; sometimes Ms. Coke worked 24-hour shifts, staying at clients’ homes overnight.²⁹⁵ Frequently, she worked 70 hours a week.²⁹⁶ Ms. Coke requested but never received overtime for those efforts, and, as a result, she sued LICH, needing the money now more than ever since kidney problems and dialysis had sidelined her from the job market.²⁹⁷ Emblematic of the home health care work force that is overwhelmingly female, poor, of color, and lacking employment options,²⁹⁸ Ms. Coke’s case is rich with opportunity for addressing broad, cross-cutting social inequalities.

Ms. Coke challenged regulations enforcing the Fair Labor Standard Act (“FLSA”).²⁹⁹ According to LICH, these regulations precluded Ms. Coke from receiving overtime pay or minimum wage protections.³⁰⁰ Ms. Coke argued that the regulations were inconsistent with Congress’s intent to protect low-wage workers.³⁰¹ Pursuant to the terms of the FLSA, requirements for minimum wage and overtime do not apply to workers employed on a “casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for

292. Barbara Rose, *Overtime Case May Change Pay Rules for Home Care Workers*, CHI. TRIB., Apr. 16, 2007, § Business, at 1.

293. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332, 334 (E.D.N.Y. 2003).

294. Rose, *supra* note 291, at 1.

295. *Id.*

296. *Id.*

297. Steven Greenhouse, *Day in Court for Queens Home-Care Aide*, N.Y. TIMES, Apr. 17, 2007, at B2.

298. See, e.g., Peggie Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 537, 542 (2007) (citing STEVE DAWSON & RICK SURPIN, THE ASPEN INSTITUTE, *DIRECT CARE HEALTH WORKERS 6* (2001), www.directcareclearinghouse.org/download/Aspen.pdf).

299. *Coke*, 267 F. Supp. 2d at 333. She also alleged several state law violations that will not be discussed in this piece. See *id.*

300. *Id.* at 334.

301. *Id.* at 336.

themselves”³⁰² Regulations issued by the Department of Labor (“DOL”) define “domestic service employment” as “services of a household nature performed by an employee *in or about a private home* . . . of the person by whom he or she is employed.”³⁰³ However, in defining “companionship services,”³⁰⁴ the regulations state that the exemption applies more broadly to those workers “who are engaged in providing companionship services . . . and who *are employed by an employer or agency other than the family* or household using their services.”³⁰⁵ Because of this incongruence and the asserted conflict with congressional intent, Coke argued that the regulations were unenforceable.³⁰⁶

A district court dismissed Coke’s cause of action, upheld the regulations, and concluded that Coke was exempt from FLSA coverage.³⁰⁷ The Second Circuit Court of Appeals reversed, holding that the regulation exempting domestic service companionship employees, 29 C.F.R. § 552.109(a), was inconsistent with congressional intent because it denied FLSA coverage to workers who had been covered even before lawmakers intentionally expanded the reach of the FLSA.³⁰⁸ LICH petitioned for and was granted certiorari.³⁰⁹ The Supreme Court vacated the judgment of the appeals court and remanded the case for reconsideration “in light of the Department of Labor’s Wage and Hour Advisory Memorandum No. 2005-1[.]”³¹⁰ which the agency prepared during the litigation to explain the regulations at issue. On remand, the Second Circuit found that the memorandum merely

302. 29 U.S.C. § 213(a)(15) (1998).

303. 29 C.F.R. § 552.3 (emphasis added).

304. The regulations define such services as

those . . . which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.

Id. § 552.6.

305. *Id.* § 552.109(a) (emphasis added).

306. *Coke*, 267 F. Supp. 2d at 336.

307. *Id.* at 338.

308. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 134 (2d Cir. 2004) (“It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered.”).

309. *Long Island Care at Home, Ltd. v. Coke*, 549 U.S. 1105 (2007).

310. *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006).

reiterated arguments the agency had made earlier and once again concluded that the regulation was not enforceable.³¹¹

When LICH petitioned for review a second time, the Supreme Court granted certiorari to focus solely on the questions of administrative law the case ostensibly presented: Was the companionship regulation a legitimate exercise of DOL authority?³¹² And, if so, what level of deference should be afforded this regulation, if any?³¹³ A unanimous Court decided that, notwithstanding the conflict within the implementing regulations, the DOL's interpretation was "reasonable"³¹⁴ and entitled to the highest level of deference.³¹⁵ Accordingly, the Court reversed the Second Circuit's judgment.³¹⁶

B. *Applying Social Justice Feminist Methodologies*

The Supreme Court's opinion examined *Coke* as if it presented only questions of administrative law. However, this approach obfuscated the subordinating structures that the regulations helped to support, which is evident when we apply the social justice feminism methodologies discussed above.

1. Looking to History to Understand Subordinating Structures

The history of the FLSA sheds important light on how the Court should have interpreted the implementing regulations. Specifically, the FLSA, as originally enacted, played a significant role in entrenching an economic system that relegated Blacks and women to the bottom. Several decades after enacting the law, Congress remedied this wrong, in part, by expanding the scope of the Act.³¹⁷

When Congress enacted the FLSA in 1938,³¹⁸ it purposefully excluded domestic and agricultural workers from its protections in order to secure the support of Southern lawmakers.³¹⁹ At that

311. *Coke v. Long Island Home Care at Home, Ltd.*, 462 F.3d 48, 52 (2d Cir. 2006) (per curiam).

312. *Long Island Care at Home v. Coke*, 127 S. Ct. 2339, 2344 (2007).

313. *Id.* at 2350-51.

314. *Id.* at 2351.

315. *Id.*

316. *Id.* at 2352.

317. See *infra* notes 324-25 and accompanying text.

318. See Brief for Urban Justice Center et al. as Amici Curiae Supporting Respondents at 2, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (hereinafter "UJC Brief").

319. *Id.* See also IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA*

time, Blacks were 65 percent of the agricultural or domestic service work force.³²⁰ Southern members argued that exempting these positions was necessary to maintain a well-established subordinating social order. For example, Florida Representative James Mark Wilcox explained:

There has always been a difference in the wage scale of white and colored labor You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge This is just another instance of the well-intentioned but misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South.³²¹

Thus, notwithstanding its ambitious and laudatory aims, the FLSA nonetheless entrenched the economic and social subordination of Blacks by denying them the wage protection that the FLSA provided. Additionally, as the *amici* noted, this exclusion reflected equally oppressive notions that domestic service was a private relationship that did not need to be regulated because this work, which typically was performed by women, was not “real work . . . and . . . women did not work to support their families.”³²²

Starting in the 1960s, Congress took steps specifically to undo the injustices embedded in the FLSA. In 1961, Congress “extend[ed] minimum wage and overtime protections to all individuals ‘employed in an enterprise’ of a certain size,”³²³ which assured coverage of workers “employed by substantial firms and agencies, rather than individuals,”³²⁴ including domestic service workers. In 1966, lawmakers amended the Act again to provide minimum wages to agricultural workers, recognizing that “immi-

55 (2005) (observing that Southern lawmakers “traded their votes for the exclusion of farmworkers and maids, the most widespread black categories of employment, from the protection offered by [the FLSA and other New Deal] statutes”).

320. UJC Brief, *supra* note 317, at 2.

321. *Id.* at 3 n.2 (citing 82 CONG. REC. 1404 (1937)). Texas Representative Martin Dies echoed this concern, stating, “[W]hat is prescribed for one race must be prescribed for the others, and you cannot prescribe the same wages for the black man as for the white man.” KATZNELSON, *supra* note 318, at 60 (citing 82 CONG. REC. 1837-38 (1937)).

322. UJC Brief, *supra* note 317, at 3 (citing, *inter alia*, Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 880-918 (1999)).

323. *Id.* at 4 (citing 29 U.S.C. § 203(r)).

324. *Id.* at 5.

grant laborers were the largest and most vulnerable segment of this workforce.”³²⁵ Lawmakers were mindful that, by modifying the FLSA, they were addressing and remedying the past intentional exclusion of already oppressed groups. For example, Rep. Griffiths observed the following: “Women, especially black women, simply [had] not had a fair shake in the job market. It [was] time they were given their due.”³²⁶ Thus, the amendments to the FLSA were intended to extend much needed protections to workers who, on account of their race and/or gender, had been omitted from the landmark legislation. They were, indeed, remedial. However, the Court’s interpretation of the amendments in *Coke* ignores this fact and, worse, imposes a harm that lawmakers sought to redress.

2. Examining the Relationships Between Interlocking Oppressions

As the foregoing suggests, until its amendments, the FLSA was a tool for maintaining a race- and gender-based hierarchy in the workplace and, as a consequence, in the social order. The Court’s decision in *Coke* only reinforces this subordinating structure in the guise of deferring to the administrative expertise of the DOL.

Ms. *Coke* was paradigmatic of the workers affected by the third-party domestic employee exemption. Most of the almost one million workers in this area are female heads of household, members of a racial minority, and poor.³²⁷ Additionally, many of these workers have achieved a low level of education.³²⁸ The work is very difficult: workers perform tasks related to the clients’ medical care such as “taking vital signs . . . routine skin and back care . . . giving massages and alcohol rubs . . . [and] assist[ing] with medial equipment such as ventilators, which help patients breathe.”³²⁹ Home health aides perform these duties

325. *Id.* at 4 n.4.

326. *Id.* at 5-6 (quoting 119 CONG. REC. 18, 341 (1973)).

327. *See, e.g.*, Brief of Law Professors and Historians as Amici Curiae Supporting Respondent at 12, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593).

328. Brief for AARP and the Older Women’s League (OWL) as Amici Curiae Supporting Respondent at 8, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (hereinafter AARP/OWL Brief).

329. Brief of the Alliance for Retired Americans, et al., as Amici Curiae Supporting Respondent at 10–11, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593).

under physically and emotionally stressful circumstances. In its amicus brief, the Alliance for Retired Persons cited data showing that these workers

have 280.5 occupational injuries and illnesses involving days away from work per 10,000 full-time workers as compared to 188.3 for all private industries Home care workers often suffer emotional abuse from mentally impaired clients who may have severe behavioral problems. Homes may be “untidy and depressing,” and clients may be “angry, abusive, depressed, or otherwise difficult.”³³⁰

Notwithstanding the significant demands inherent in this work, home health aides are among the lowest paid workers in the nation's service sector.³³¹ Far from representing an opportunity to gain secure economic footing, these jobs mean continued poverty for too many workers.³³²

Unfortunately, the low pay, long hours, and demanding conditions are not unfamiliar to women like Ms. Coke. They engage in this work to support their families and likely will continue to do so because there are few alternatives available to them. Removing the exemption to wage protections was critical to assisting in their efforts towards economic self-sufficiency. However, the Court's decision helps reinforce a pay structure that assures that this job category will remain the preserve of poor women of color, and thus, be perpetually underpaid.

3. Developing Solutions Informed by a “Bottom Up” Approach

The Court's decision in *Coke* presents an opportunity to apply social justice feminism's emphasis on organizing “from the bottom up”³³³ to achieve change. In this context, social justice feminism might require feminist legal advocates to re-examine their agendas regarding employment opportunity to assure that they fully address existing subordinating social hierarchies. In other words, such groups should include the perspectives of the most oppressed working women in an effort to identify strategies that combat the multiple oppressions limiting the opportunities that these women have to earn a living wage.

330. *Id.* at 12 (citations omitted).

331. AARP/OWL Brief, *supra* note 327, at 8.

332. *Id.* (observing that the median income for home health workers was \$12,300 in 2001).

333. Matsuda, *supra* note 175, at 387.

Many feminist legal advocacy groups focused on the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire and Rubber Company*, in which the Court held that Title VII claims of pay discrimination must be brought within 180 days of the first instance of discrimination.³³⁴ Without question, this case represented a pinched view of Title VII that would constrain the ability of this statute to meaningfully accomplish its goals.³³⁵ Fortunately, feminist groups successfully organized for a legislative remedy for *Ledbetter*,³³⁶ one that better enables women and other litigants to bring suits challenging pay discrimination.³³⁷

The *Coke case*, however, which, in some respects, may hold promise for much wider systemic change, is much less prominent on the feminist legal advocacy agenda. For example, three prominent women's organizations signed on to the brief filed in the *Coke case* highlighting the intentional discrimination underlying passage of the FLSA.³³⁸ Each of those groups identified a legislative fix to *Ledbetter* as part of its agenda³³⁹ But none articulated

334. *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162, 2163 (2007).

335. See, e.g., Martha Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 78-82 (2007) (arguing that the Supreme Court's formalistic approach to *Ledbetter* renders the right to equal opportunity in employment under Title VII illusory).

336. On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. Pub. L. No. 111-2, 123 Stat. 5 (2009) ("Ledbetter Act"). The President's remarks are available at http://www.whitehouse.gov/the_press_office/RemarksbythePresidentUponSigningtheLillyLedbetterBill/. (February 9, 2009).

337. Under the new law, discrimination in compensation occurs each time a worker receives a paycheck adopted pursuant to an unlawful compensation decision. It amends Title VII of the Civil Rights Act, as well as the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. See *Ledbetter Act* cited *supra* note 336.

338. See UJC Brief, *supra* note 317 (listing Legal Momentum, the National Partnership for Women and Families, and the National Women's Law Center as *amici curiae*).

339. For example, the National Women's Center has a website dedicated to this effort that provides information about legislative developments in this area, see National Women's Law Center, The Fair Pay Campaign, <http://www.nwlc.org/fairpay>, and urged visitors to get involved in the advocacy effort. See, e.g., National Women's Law Center, *Ledbetter v. Goodyear Tire & Rubber Co.: The Supreme Court Limitation on Pay Discrimination Claims and The Legislative Fix (2007)*, available at <http://www.nwlc.org/pdf/Broad%20Ledbetter%20Fact%20Sheet-Letterhead.pdf>.

Even groups that focus on the issues confronting female low-wage workers have turned their attention to *Ledbetter*, rather than *Coke*. For example, Chicago-based Women Employed, an organization dedicated to improving the lives of working women, pledged to "organize support for a federal legislative fix" for *Ledbetter*. See WOMEN EMPLOYED, WOMEN EMPLOYED'S 2008 LEGISLATIVE AGENDA (March 11, 2008), http://www.womenemployed.org/fileadmin/templates/docs/WELegAgenda08_RGB.pdf.

such a strategy for *Coke*.³⁴⁰ Given the wage disparity issues inherent in *Coke*, a remedy for this case also should be part of the agenda for advocacy groups, particularly since the women affected are among the most marginalized and with the least agency. Doing so is of particular significance given the limitations of litigation in addressing such problems.³⁴¹ Similarly, looking at the issues implicated by *Coke* from the “bottom up” may suggest alternatives beyond litigation. In this regard, a social justice feminist approach would view organizing women like Evelyn Coke as essential to identifying appropriate goals and strategies.

VI. CONCLUSION

Activists concerned about what women want in the twenty-first century want to do social justice feminism. It makes sense to pair “social justice” with “feminism” at this critical time, a time when divisiveness threatens the larger anti-subordination project which embraces both concepts. Social justice brings to feminism a particular emphasis on fairness and transformation; it is a modification that signals change. Given the change former candidate Obama promised to bring to the nation, social justice feminists may be in a position to “initiate new ways of seeing,”³⁴² and realize new productive, constructive, and healing plans of action. In this climate, social justice feminism may ignite the “broadly based movement for egalitarianism,”³⁴³ envisioned at the Houston conference.

With this Article, we hope to move forward the conversation that already has begun, both in the world of practice, as evidenced by the work of the NWMI, as well as in the world of feminist legal theory. Drawing on history, we have taken initial steps at broadly defining social justice feminism as that which is productive, constructive, and healing. We hope that others will

340. At this writing, a visit to each group's website showed that the groups supported passage of the Fair Pay Restoration Act. S. 1843, 110th Cong. (1st Sess. 2007). However, the websites do not mention the legislation members have introduced in the wake of *Coke*, the Fair Home Health Care Act of 2007. H.R. 3582, 110th Cong. (1st Sess. 2007); S. 2061, 110th Cong. (1st Sess. 2007). *See also* Legal Momentum, <http://www.legalmomentum.org>; The National Partnership for Women and Families, <http://www.nationalpartnership.org>; The National Women's Law Center; <http://www.nwlc.org>.

341. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (discussing the challenges imposed by Title VII's prompt complaint and retaliation doctrines).

342. NEW KEYWORDS, *supra* note 44, at xix.

343. *See supra* note 41 and accompanying text.

engage in this “inquiry into a vocabulary”³⁴⁴ to add detail and substance to these concepts, as well as to continue to develop new ways of articulating social justice feminist work.

344. WILLIAMS, *supra* note 45, at 15.

