Liberals—those on the "left" side of the political spectrum—tend to be critical of the existing social order, with its unequal distribution of wealth, economic security, medical care, political power, education, and employment. Liberals are interested in changing our legal and governmental structure to constitute a more just society. There are, however, a variety of approaches to social change. I will discuss four strands of contemporary legal thought on the left: traditional liberalism, republicanism, critical legal studies, and feminism.

Each of these approaches to social change offers a slightly different perspective or focus. Traditional liberals focus on the individual and the role the legal system should play in limiting majoritarian abuse and fostering individual autonomy; republicans focus on democratic self-government and the role the legal system should play in fostering collective self-determination and community; critical legal scholars focus on class interests, ideology, and biases within the legal system and the larger society; feminists focus on gender interests, ideology, and biases within the legal system and the larger society.

Traditional Liberalism and Constitutional Interpretation

For traditional liberals, a central function of the legal system is to protect autonomous individuals from the "tyranny of the majority." There is, of course, a tension between judicial invalidation of majoritarian legislation and the democratic process. Both traditional liberals and conservatives emphasize this tension, though they resolve it differently.

Conservatives maintain that it is relatively easy to resolve this tension because they believe that every clause of the Constitution has "some fixed, reasonably ascertainable meaning, which constrains both legislatures and judges." Judges therefore need not, and in a democracy should not, apply the Constitution by reference to their subjective preferences and values. For conservatives, the primary functions of judicial review are thus to protect the Constitution's "well-defined personal liberties" and to ensure that no branch of the federal government oversteps its specified and limited powers.

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Traditional liberals see the task of constitutional interpretation as more complex. Many clauses of the Constitution are vague and open-ended. This is especially true of the personal liberties protected in the Bill of Rights and the fourteenth amendment. For example, the first amendment provides that “Congress shall make no law...abridging the freedom of speech”; the fifth amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law”; the fourteenth amendment provides that no state “shall abridge the privileges or immunities of citizens of the United States”; and the ninth amendment provides that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The meaning of such clauses is hardly self-evident. The framers must have intended someone—presumably judges—to give concrete meaning to these provisions of the Constitution.

According to traditional liberals, the framers considered judicial review of democratically enacted legislation an essential check to protect minorities against majoritarian bias, panic, indifference, and hostility. The framers, in other words, were acutely aware of both the advantages and dangers of majority rule. Without some check, the majority would have unlimited power over minorities. Liberals believe that the framers intended judges, through judicial enforcement of the rights and liberties guaranteed by the Constitution, to guard aggressively against the dangers of majority rule.

Moreover, as emphasized by Geoffrey Stone and other liberal scholars, aggressive protection of fundamental rights is essential to preserve the line between the government and the governors. In a self-governing society, rights against the government, such as the privilege against compelled self-incrimination, the right to due process, and the freedoms of speech, religion, and assembly, help to preserve the citizen’s sense of autonomy, dignity and integrity; they help to remind citizens that they—and not the “government”—are in charge. The private-public distinction is often used by liberals to explain this limit on governmental power: there is a private sphere beyond which government should not intrude on its citizens’ activities.

Consistent with these views, at the end of the Lochner (1905) era, Justice Harlan Fiske Stone, in his famous footnote 4, identified three types of legislation that should be carefully scrutinized by the courts: legislation restricting fundamental rights, such as those enumerated in the Bill of Rights and the fourteenth amendment; legislation limiting access to the political process; and legislation aimed at discrete and insular minorities.2

In the end, liberals argue, the process of constitutional interpretation is more complicated than conservatives admit. One cannot faithfully interpret the document in a manner consistent with its words and the intentions of its framers and also interpret it according to “some fixed, reasonably ascertainable meaning, which constrains both legislatures and judges.” Conservatives err on the side of majority rule: unless a judge is confident beyond reasonable doubt that the framers meant to proscribe challenged legislation, the will of the majority should prevail. Liberals, on the other hand, err on the side of aggressive protection of fundamental rights: a judge should invalidate legislation when there are reasonable grounds to believe that the majority has impermissibly burdened a right guaranteed by the Constitution. Despite their differences, however, both liberals and traditional conservatives try to give effect to the language and (what they believe to be) the intentions of the framers of the Constitution.

One of the most important of the Constitution’s open-ended provisions is the equal protection clause of the fourteenth amendment. Although this clause was enacted to end the subordination of ex-slaves, its language is not limited to racial discrimination: “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” Liberals interpret this clause in light of the need to protect minorities, especially discrete and

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2United States v. Carolene Products, 304 U.S. 144 (1938).
insular minorities, from majoritarian abuse. Although blacks are the paradigm, liberals are willing to grant special protection under the equal protection clause to other, arguably analogous groups, such as aliens, illegitimate children, and women. Because such groups are unlikely to enjoy effective participation in the political process and have historically been subjected to discrimination, liberals maintain that laws directed at such groups should be suspect (or quasi-suspect) even when rational (i.e., even when based on a difference between the targeted group and the rest of society). The Supreme Court’s equal protection standard is consistent with this analysis.

Although liberals believe in a more aggressive judicial review than traditional conservatives, they share with traditional conservatives a hostility to judicial interference with democratically-enacted legislation on the basis of judges’ subjective judicial values or preferences. Both traditional conservatives and liberals believe that the Constitution can and should be interpreted in a value-neutral way.

As this suggests, pluralism plays an important role in traditional liberal thought. Liberals believe that the purpose of the democratic process is to give each individual the opportunity to use his or her political power to best advantage. The essence of political activity is thus to negotiate deals among competing groups acting in their own self interest. The anti-majoritarian restraints liberals espouse are designed to ensure that no interest group is unfairly handicapped by other interest groups in the give and take of interest group politics.

### Republicanism

In recent years, a number of legal scholars have turned to the origins of the Constitution in order to understand modern constitutional controversies. Many such scholars emphasize the roots of the Constitution in “republican” principles. In this view, the framers had a vision of democracy in which political actors deliberate about the public good rather than seek their own selfish ends. The framers did not conceive of democracy as interest group politics; political equality is necessary to ensure that all groups have access to this deliberative process.

Republicans value political participation by all citizens. In the republican view, something is seriously wrong if political participation is skewed according to race, class, or sex. Republicans regard active citizenship as important because it acts as a control on governmental abuse and because participation cultivates empathy and feelings of community, thereby facilitating deliberation in the political process.

Republicans believe deliberation yields political results different from those of a pluralistic process. A pluralistic process, in which each interest group fights for its own interest, yields results that reflect the current distribution of power. In contrast, a deliberative process, in which participants seek the common good, brings alternative perspectives and information to bear; it produces results that do not necessarily reflect the interests of the powerful.

Republicanism is also a response to libertarianism. Libertarians believe in pre-political natural rights to liberty and property with which government cannot legitimately interfere. Republicans reject such rights. They maintain that there is no such thing as a pre-political (i.e., pre-social) human being. Republicans emphasize that the current distribution of property is itself the product of prior political deliberations and thus properly the subject of continuing political deliberation. Although republicans believe in rights, they believe that there are no natural, pre-political rights—rights beyond the scope of legitimate political deliberation.

On a number of important issues, republicans take varying approaches. With respect to the purpose of deliberation about the common good, there are two major strands of republican thought. The Madisonian strand, represented today by scholars such as Cass Sunstein and Frank Michelman, values deliberation as a mechanism for making government less responsive to powerful groups, whether at the local, state, or national level. Another strand, represented by scholars such as Paul Brest and Gerald Frug, stresses the value of democracy and participation on the local level. For these republicans, like many conservatives, local control is an important component of the republican vision.

Similarly, though equality is an important concept within the republican tradition, republicans do not all agree on its content. Republicans, like traditional liberals, emphasize the importance of political equality to the democratic process; the process can work only if all individuals have equal access to the political sphere. Republicans differ from traditional liberals, however, in stressing that political equality requires more than universal...
adult suffrage. In their view, unim­ 
peded universal adult suffrage is too thin and abstract a standard of political equality; it ignores problems faced unequally by different groups attempting to affect the political process. In addition, some republicans, such as Paul Brest, believe that equality must include economic as well political equality, for in this view economic equality is a necessary prerequisite to political equality. Less radical republicans do not include economic equality within their notion of equality.

Although republicanism is not in itself a theory of constitutional inter­ 
pretation, a belief that the framers intended to fashion a democratic republic influences one’s approach to several constitutional questions. For example, republicans consider campaign finance regulation constitutional since it furthers political equality. Sim­

ilarly, republicans favor regulations banning private discrimination on the basis of race, sex, sexual preference, religion, etc., because such discrimination interferes with political equality. And republicans tend to applaud the fairness doctrine (requiring broadcasters to give airtime to opposing viewpoints) because it encourages consider­
ation of many viewpoints and, thus, better deliberation. And, as sug­

gested earlier, some republicans place a premium on local self government and are therefore more likely to invalidate expansive exercises of federal power.

Despite their many differences, republicans and traditional liberals both believe in rights. Indeed, both believe that rights, including constitutional rights, can and should be used to achieve a more just political and social order. This belief in rights is not, however, shared by all strands of liberal thought.

Critical Legal Studies

Critical legal scholars challenge the possibility of achieving meaningful change through legal rights. They argue that principled adjudication is impossible. There is, in their view, no such thing as distinctly legal reasoning; every case is in some sense ultimately indeterminate. Judges inevi­
itably and necessarily decide cases on the basis of personal values and preferences. Legal discourse and doctrine thus cannot be separated from ideology.

Further, critical legal scholars such as Robert Unger and Mark Tushnet argue that legal doctrines (including legal rights) tend, perhaps invariably, to serve and legitimate the interests of the powerful. Even the most cursory glance at history, they argue, reveals that the powerful have always con­
trolled the content of law to protect their interests by preserving existing social, political, and economic relationships. Equally important, laws that preserve existing inequities seem neu­
tral both to the powerful and to those oppressed by existing inequities. Thus, law legitimates inequitable relationships. It covers them with a patina of legitimacy by creating the false impression that it is itself neutral and independent of existing power inequities. This patina of legitimacy encourages the powerless to accept the existing social, political, and economic order because of their false belief that it is founded on individual choice within a neutral legal structure.

Critical legal scholars criticize the traditional legal bifurcation of social reality into private and public spheres. Traditional liberals and conservatives tend to see democracy as appropriate only in the public sphere. But, critical legal scholars argue, governments are not the only important institutions in our society. The powerless lack, and need, the ability to participate in other important social and economic organizations. Yet traditional liberals and conservatives have created and persis­

tently legitimize a system in which democracy refers only to limited par­
ticipation in what the critical legal scholars see as an arbitrarily-defined “public” sphere.

Critical legal scholars reject the use of legal rights to alter the existing dis­
tribution of social, political, and eco­

nomic power. As indicated above, they believe that all cases are indeterminate and that rights serve mainly to legit­
mate existing inequities. Most critical legal scholars thus advocate the develop­
ment of more informal, communi­
tarian forms of decision making: groups of equal individuals with com­
mon concerns should meet and reach consensus on matters of interest to their community. All hierarchies should be abolished. Factory workers should establish rules for their factory. Students should establish rules for their school. All rules should be entirely renegotiable, subject to con­
stant reformation.

Many of the points made by critical legal scholars are squarely in the realist tradition. Both the realists and critical legal scholars maintain that there is no such thing as value-free legal reasoning; that legal rules are historically contingent; that the development of doctrine is not the true goal of legal decisionmaking. Critical legal scholars are, however, far more radical than the realists, for they are committed to the view that legal doctrines, legal “rights,” and legal reasoning are always manipulated to serve the interests of the powerful. And, unlike the realists, many critical legal scholars believe that rights should be repu­
diated as a viable instrument for achieving a more equitable distribu­
tion between social classes and groups.
Feminism

Feminist legal scholars are concerned about the status and well-being of women. Despite women's increased access to some areas of human activity in recent years, women continue to be disadvantaged in comparison to men in terms of income, financial security, leisure time, status, and power. Levels of violence against women remain disproportionately high.

Feminist legal scholars have been strongly influenced by feminist scholars in other fields. In discipline after discipline, feminists have identified sexist bias in a variety of subtle and not so-subtle forms. For example, in biology and sociology, researchers have tended to view the male as the norm or normal and the female as the exception or aberration. Linguistic analysis reveals semantic derogation of women. Consider the quite different connotations of bachelor and spinster, old man and old woman, master and mistress, sir and madam. Feminists argue that language, which has been largely man-made, has played an important role in structuring individuals to serve male interests.

In the behavioral sciences, feminists have developed firm empirical evidence of unconscious bias against women, a bias suggested by the differential connotations of language depending on the sex of the referent. Both women and men tend, unconsciously and inadvertently, to view women as inferior. For example, both women and men rate as less important an article presented with a female author than the same article presented with a male author. Feminist psychoanalytic theory suggests that the origins of misogyny may be deeply ingrained, far beyond the reach of reason, and associated with ambivalence towards those who cared for us as infants.

It is against the background of feminist work in other disciplines detailing pervasive, yet invisible (to many) sexism, that feminist legal scholars approach law. Not surprisingly, their attitude is one of suspicion of legal rules and legal method, both of which, they argue, have been developed almost exclusively by and for men. Feminists are especially wary of the neutrality norm (a norm espoused not only by traditional liberals but also by many republicans and conservatives). Feminists suspect that rules made by and for men are likely to appear as "neutral" and that rules taking into account women's reality are likely to appear as "special pleading." Despite these reservations, feminists hope to use law to improve women's lives.

Feminist legal scholars are interested in a number of central questions. How do legal rules, doctrines, language, and analyses contribute to women's subordinate status or reflect sexist biases and assumptions? How are various actors in the legal system (police, prosecutors, judges, and lawyers) affected by the sex of victims, witnesses, parties, lawyers, and experts? Do legal processes or theories (including legal reasoning and the adversarial system) reflect men's perspectives, values, and thought processes more than women's? What changes in legal rules or in the practices of actors within the legal system would contribute to a more equal society?

In addressing these concerns, feminists offer a critical perspective on each of the bodies of liberal legal thought discussed thus far: traditional liberalism, republicanism, and critical legal studies. Feminists maintain that traditional liberals are largely blind or indifferent to the realities of sexual subordination and discrimination. Liberals, like John Hart Ely, think of the relationship between the sexes as essentially friendly given its closeness and intimacy. Feminists point out that the sexes' closeness is not inconsistent with deep misogyny on the part of both women and men. Indeed, feminist psychoanalytic theory suggests that the closeness of the sexes may actually reinforce misogyny.

Most feminist legal scholars believe that liberals have missed the boat on equality. First, liberals tend to see "the problem" as the inappropriate use of stereotypes of male-female differences. Feminists maintain, however, that the problem is not just that differences between the sexes have been used inappropriately. Women and men could be different in many ways and yet enjoy equal financial security, leisure, status, and power. The core problem is the differential distribution of these "goods" between the sexes. The liberal focus on whether some difference between the sexes justifies differential treatment ignores the reality of sexual subordination; differences between the sexes are systematically used to justify male privilege and female impoverishment, though the sexes could be different and equally well off. Despite the differences between domestic work and wage labor, for example, homemakers could be given financial security in old age equivalent to that enjoyed by wage workers.

Second, the equality standard used by liberals—formal equality or open access—gives women only the right to be treated like men, according to rules, standards, and practices developed by men and for men with no significant domestic responsibilities. Consider, for example, the workplace. Liberal "equality" entitles women only to be treated like men. But, feminists argue, women will never achieve economic equality in the workplace while saddled with the lion's share of domestic responsibilities (including child care) and faced with rules designed for men with wives.

Third, feminists contend that in the political arena, open access—e.g., the right to vote—means little in a world in which women and men are differentially socialized and educated, so that men are likely to control political life. Consider, for example, the fact that (despite the widely-accepted stereotype—
to silence women and other groups whose interests are not shared by the politically powerful and whose requests for consideration can, with republican rhetoric, be denigrated and dismissed as narrow self-interest.

Further, feminists are concerned that women are likely to assert their interests too little in the political arena, rather than too much. Women (more than men) are socialized to put the needs of others, especially their children and spouses, ahead of their own. Women are still socialized (with obviously mixed results) to regard the domestic sphere as theirs and the political sphere as men’s. As mentioned earlier, women tend to talk less than the family. But feminists see these “private” spheres as areas in which men control women. Women are more likely than men to need government intervention in these areas. Privacy, feminists argue, is freedom for men, defining areas in which women (and children) can be subordinated without redress through government “interference.”

Feminists also worry about the republican stress on deliberation to attain the common good rather than pursuit of self-interest. Iris Marion Young has noted that there is no such thing as a transcendent, disembodied perspective from which to regard the common good. Feminists fear that such a (false) conception of the political process may tend to entrench the status quo. Women are less likely than more powerful groups to have their interests included in the calculus of the common good. For this reason, women are more likely (than men) to have to push for policies that are explicitly in their self-interest. In the real political world, rejection of self-interest is likely to be succeeded more by men than by women. Men tend to dominate women in just about every social and political setting. Feminists argue that republicans—like traditional liberals—tend to ignore these problems. The pursuit of the common good, if it is to be successful, must take affirmative steps to overcome the many non-obvious barriers women face to equal consideration of their interests in the process of deliberation.

Feminists agree with, and would expand upon, many of the key insights of the critical legal scholars. Law, they would argue, is an instrument men have designed and used to maintain power over women. Moreover, like critical legal scholars, feminists are suspicious of rights. Rights tend to be defined by the powerful to serve their own interests. Consider the traditional rights of a husband during marriage. Even today, rights and the rhetoric of rights are used (though more subtly than in the past) to oppress women. Consider first amendment rights, which feminists such as Catharine MacKinnon argue are misused to protect a multi-billion dollar business in pornography which damages women in untold ways.

Many feminist legal scholars are also suspicious of critical legal studies, however. Critical legal scholars would replace formal deliberation about rights with more informal decision making processes. But in informal settings—such as the private sphere of the family—those with power are likely to prevail. In informal groups, the powerful control the discussion, define the issues, establish the range of acceptable discourse, and dictate the result. Women and minority groups have often done better with rights, despite their imperfections and shortcomings, than with informal decision making.

In addition, critical legal scholars rarely offer practical ideas for improving women’s lives short of radically transforming society by eliminating all hierarchy. Since radical transformation seems unlikely in the foreseeable future, critical legal scholars offer women a better understanding of their subordination, but no help in lessening it during their lives. On a practical level, the critical legal studies movement is profoundly conservative, tending to entrench the status quo by teaching the impossibility of social change other than through a vague (and possibly ineffective) radical transformation that will not take place in our lifetimes, if ever.
What is the feminist agenda for the future? During the seventies and early eighties, almost all feminists interested in legal change agreed on one important goal: a formal equality standard with strict scrutiny for sex-based classifications analogous to strict scrutiny for racial classifications under the equal protection clause. This goal was pursued both through litigation and through the drive for the ERA. During the eighties, the consensus for a formal equality-strict scrutiny standard has evaporated. Today, some feminist legal scholars continue to support the strict-scrutiny standard or to search for a new and better equality standard to replace it. Some feminists interested in legal change believe that equality cannot be achieved without changing sexuality, so that domination is no longer erotic. These feminists concentrate on the regulation of pornography. Most, probably all, feminist legal scholars call for legal change in a variety of forms and fora if we are to make significant changes in the relative distribution of power, physical and financial security, status, and leisure time between the sexes. Most feminists believe that the current diversity among legal feminist scholars is an advantage, for they recognize that there is no single solution to the myriad forms of sexual inequality in our society.

**Conclusion**

The last few decades have been an especially productive period for legal thought on the left. The current versions of traditional liberalism, republicanism, critical legal studies, and feminism are, today, almost unrecognizable as developments of the liberal thought of even twenty years ago. Within and among these various strands of liberal thought there is a wide variety of approaches to what should surely be the central question for legal scholars of the future: how can our legal system create a more just social order?

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Suggested further reading for this article and for Michael McConnell’s article on conservative legal thought in the Spring 1988 issue of the Law School Record.

**Traditional Conservatism**

**Libertarianism**

**Law and Economics**

**Social Conservatism**

**Traditional Liberalism and Constitutional Interpretation**
Bruce A. Ackerman, Social Justice in the Liberal State (1980).

**Republicanism**

**Critical Legal Studies**

**Feminism**