

## Book Review

Tracy A. Thomas, *Elizabeth Cady Stanton and the Feminist Foundations of Family Law*, New York, NY: New York University Press, 2016, pp. 328, \$55, Cloth.

Reviewed by Paula A. Monopoli

### **Mother. Author. Orator. Woman Suffrage Leader: The Feminist Legacy of Elizabeth Cady Stanton**

Tracy Thomas's new book, *Elizabeth Cady Stanton and the Feminist Foundations of Family Law*, provides extensive support for the claim that Stanton was "the intellectual giant of the [women's rights] movement."<sup>2</sup> In this eminently readable yet deeply substantive work, Professor Thomas argues that Stanton was a foundational theorist for modern feminism. Until recently, Stanton's intellectual contributions have not been widely explored,<sup>3</sup> and Thomas aims to rectify that oversight. She situates Stanton in her rightful place by focusing on Stanton's writings and advocacy in the area of family law. Thomas does a persuasive job, using Stanton's views on marital property law, divorce, voluntary and involuntary maternity, and the custody of children as a lens through which to examine broader themes about women's status as equal citizens in our republic. She also documents Stanton's intellectual contributions in a way that informs current debates about gender equality.

While Stanton's writings ranged broadly on the subordination and emancipation of women, Thomas narrows in on Stanton's views on the subjugation of women within marriage. She also reveals Stanton's extensive, if *de facto*, training in law through her father's practice, law library and clerks. "As a young woman, Stanton had read widely in her father's law library and discussed cases with him . . . [H]er legal training allowed Stanton to bring to the early women's rights movement a keen sense of the role of law in creating

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1. These are the words inscribed on Elizabeth Cady Stanton's gravestone (16).
2. GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 17 (2006).
3. ELIZABETH CADY STANTON, *FEMINIST AS THINKER: A READER IN DOCUMENTS AND ESSAYS* 1 (Ellen Carol DuBois & Richard Cándida Smith eds., 2007).

inequality between the sexes.”<sup>4</sup> Thomas argues that this understanding of the common law itself and her understanding of how to construct legal arguments were central to Stanton’s efficacy as a theorist and an advocate.

Thomas begins by examining Stanton’s personal story. Stanton was a harried mother of three children under the age of ten when she convened the first women’s rights convention in Seneca Falls in 1848.<sup>5</sup> In the decade that followed, she went on to have four more children and to advocate tirelessly for women’s equality. Thomas points out how much the adage “the personal is the political” applied to Stanton, as she wrote to her partner in advocacy, Susan B. Anthony, for help:

Can you get any acute lawyer . . . sufficiently interested in our movement to look up just eight laws concerning us—the very worst in all the code? I can generalize and philosophize easily enough myself; but the details of the particular law I need, I have not time to look up. You see, while I am about the house, surrounded by my children, washing dishes, baking, sewing, etc., I can think up many points, but I cannot search books, for my hands as well as my brains would be necessary for that work . . . Men who can, when they wish to write a document, shut themselves up for days with their thoughts and their books, know little of what difficulties a woman must surmount (54).

These words would resonate with many female scholars today. After this first letter, Stanton again wrote to Anthony to tell her that the legislative testimony she was trying to finish was not nearly done and that her deadline was rapidly approaching. Anthony responded by coming to babysit while Stanton finished the address (54-55). Having a public voice requires time and energy. But bearing a disproportionate share of family caregiving makes such public participation difficult and remains a structural barrier to gender equality today.

Thomas integrates these and similar examples of the connection between the nineteenth-century Stanton and modern-day feminists. She begins her book with an introduction that gives the reader a thumbnail sketch of modern feminist theory. Thomas outlines the distinctions among liberal feminism, with its focus on formal equality; difference feminism, with its focus on resolving subordination by recognizing women’s biological, relational, and cultural differences; and radical or dominance feminism, which situates subordination in the victimization of women as sexual objects and emphasizes the need for structural reforms (20).<sup>6</sup> Thomas argues that Stanton’s views on

4. *Id.* at 7-8.

5. RITTER, *supra* note 2, at 17.

6. In addition, Thomas defines first-, second-, and third-wave feminism: The first, she says, was focused on the vote in the nineteenth century; the second was focused on formal equality in employment and abortion in the 1970s; and the third was a “movement against reductionism to a few ‘women’s’ issues” (36). Thomas argues that Stanton moved beyond formal equality and was a “holistic” feminist thinker who understood that formal equality in law was necessary but not sufficient to achieve full equality. Indeed, reform of the very structure of the family and of political, social, and religious institutions was necessary for women to

family law reform informed modern feminist theory. And in developing those views, Stanton drew on such feminist thinkers of her own time as Margaret Fuller, author of *Woman in the Nineteenth Century*, and abolitionist Sarah Grimke, author of *Letters on the Equality of the Sexes*. She had also read the work of earlier political theorists, including Mary Wollstonecraft's *A Vindication of the Rights of Woman* (19-20).

This intellectual debt that second- and third-wave feminists owed to Stanton has its roots in Stanton's belief that women's subjugation was most entrenched in marriage. Thus, reform of marital relations was essential to dismantling broader gender inequality in society as a whole. Stanton's early advocacy in the 1840s included direct challenges to marital property laws grounded in the coverture doctrine of the English common law. In an era of general legal reform, including consolidation of the equity and law courts, the decade was an opportune time to also push for legal reforms relating to women's status. Property ownership, in particular, was an important legal principle to use as a fulcrum, since it represented legal agency and was deeply connected to political theories about who had full citizenship in society.

Thomas argues that Stanton's personal story is important in that her father, Daniel Cady, was a property lawyer and judge. Stanton had seen widows coming into her father's office seeking assistance after having been deprived of hearth and home by common-law property doctrines, with very little protection afforded them by the ancient and limited concept of dower (42). In addition, the common-law doctrine of coverture severely limited a married woman's ability to retain property she brought into a marriage or to own property she was given or had inherited. Daniel Cady tried very hard to give his daughter property outside the control of her husband, Henry Stanton, using careful drafting around such legal limitations (43-44). Stanton's long but unhappy marriage to Henry, who was often absent and not financially successful, had a significant influence on her views about marital property as well (7).

Both coverture and dower were reflections of biblical and legal theories that embraced the idea that, in terms of authority and harmony, there could only be one head of the family and that was the husband. Through her writing, Stanton focused on the moral arguments against this premise and against its expression in the marital property laws of the time (46). Stanton took a radical position in advocating specifically for joint property—the first of her radical positions on marital rights, but certainly not the last. In the wake of New York's refusal to embrace feminist demands for a community property regime, Stanton worked her political networks in Albany from 1844 through 1849 to achieve reforms that allowed women to convey and devise their separate inherited property (49-51).<sup>7</sup>

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achieve full equality (21).

7. Much as some state courts later cabined the impact of the Nineteenth Amendment by narrow construction, they also cabined the impact of the Married Women's Property Acts via the same judicial technique (193). This perceived threat to the social order from gender equality is a continuing theme across thousands of years and a variety of cultures. We see

Thomas argues that Stanton's intellectual leadership informed second-wave feminism and laid the foundation for third-wave feminism. As she notes, Stanton transcended the two waves in that she clearly understood that formal equality was necessary but not sufficient for full equality. We are still working to achieve Stanton's vision of equality in a number of areas, including the marital property rights she fought so hard to establish. We still have facially neutral laws like ERISA that distort the accumulation of property within intact marriages, resulting in a disproportionate share of couples' property in the sole name and control of the husband.<sup>8</sup> Fewer than ten states have community property regimes. The vast majority still adhere to a separate property framework in which the spouse who has financial power within the marriage can defeat equal ownership by titling the property in his name alone.<sup>9</sup> Even at death, a number of states still have the remnants of dower in the form of the traditional elective share. In those states, a widow whose husband disinherited her may be left a mere one-third of his estate, and that one-third does not include nonprobate property or property held in trust.<sup>10</sup> Stanton's theory of marriage as a joint economic partnership has still not been fully implemented in modern American property or inheritance law.<sup>11</sup>

Stanton is better-known as a suffragist than for her efforts at property and inheritance law reform. But it is not surprising that her early theories on marital property laid the foundation for her later work on universal suffrage. The concept of being able to own property is closely tied to the franchise. Stanton theorized that securing women's legal agency through property ownership was an important link to securing the right to vote. After working on marital property rights reform for more than a decade, Stanton constructed

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as far back as ancient Greece playwrights detailing the fear that a woman challenging the state arouses in those in power: "Therefore it is we must assist the cause of order; this forbids concession to a feminine will; better be outcast, if we must, of men than have it said a woman worsted us; foul-spotted heart—a woman's follower." Sophocles, *Antigone* (Sir George Young, trans., 1993). Similarly, one New York legislator wrote of Stanton and other feminists: "It is well known that the object of these unsexed women is to overthrow the most sacred of our institutions, to set at defiance the Divine law which declares man and wife to be one . . . ." (57).

8. See Paula A. Monopoli, *Marriage, Property and [In]Equality: Remediating ERISA's Disparate Impact on Spousal Wealth*, 119 YALE L.J. ONLINE 61 (2009), <http://yalelawjournal.org/forum/marriage-property-and-inequality-remediating-erisas-disparate-impact-on-spousal-wealth>.
9. Angela M. Vallario, *The Elective Share Has No Friends: Creditors Trump Spouse in the Battle over the Revocable Trust*, 45 CAPITAL U. L. REV. (forthcoming 2017) (manuscript at 4 n.26), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2856659](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2856659).
10. *Id.* at 2.
11. Some of the most powerful parts of Thomas's book are the passages that link the laws governing marital property and relations at the time to custody and sexual intimacy. Mothers could not legally oppose the indenturing out of their minor children to third parties. It reminds us how that legal framework, which rendered women unable to stop the indentured servitude of minor children and unable to refuse sexual relations at any time within marriage, was tantamount to legal servitude for women in Stanton's era.

a constitutional framework for women's full citizenship.<sup>12</sup> Her efforts, however, to have women explicitly included in the Reconstruction Amendments or, failing that, to have the United States Supreme Court interpret the Privileges and Immunities Clause of the Fourteenth Amendment to include voting for women, all failed.<sup>13</sup> So a new amendment was needed. Stanton was the first woman to testify before Congress on what would have been the Sixteenth Amendment, guaranteeing women's suffrage. In her 1878 testimony before the Senate Committee on Privileges and Elections, she connected voting to the other reforms for which she had fought:

Few people comprehend the length and breadth of the principle we are advocating to-day, and how closely it is allied to everything vital in our system of government. Our personal grievances, such as being robbed of property and children by unjust husbands; denied admission into the colleges, the trades, and profession; compelled to work at starving prices, by no means round out this whole question. In asking for a sixteenth amendment to the United States Constitution, and the protection of Congress against the injustice of State law, we are fighting the same battle as Jefferson and Hamilton fought in 1776, as Calhoun and Clay in 1828, as Abraham Lincoln and Jefferson Davis in 1860, namely, the limit of State rights and federal power. The enfranchisement of woman involves the same vital principle of our government that is dividing and distracting the two great political parties at this hour.<sup>14</sup>

The suffrage amendment came to fruition only after Stanton's death in 1902, in the form of the Nineteenth Amendment to the United States Constitution, ratified in 1920. That amendment would likely not have passed had Stanton not laid its intellectual and legal foundation. She provided the basis for her successors to argue that the franchise was essential to full citizenship and was the central instrument in forming a government that reflected the full experience and concerns of its female citizens.

After laying out Stanton's theories and advocacy around marital property rights, Thomas proceeds to detail Stanton's ideas around such other family law

12. See Ritter, *supra* note 2, at 16-20. The Fourteenth Amendment, adopted in 1868, provided that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It further prohibited the states from "abridg[ing] the privileges and immunities of citizens of the United States." After losing the legislative battle for women to be explicitly included in the new Fourteenth Amendment, Stanton and other feminist activists of the time took a new tack. This "New Departure" was an effort to have the courts find that the terms of the new amendment included women. But that effort failed with the United States Supreme Court's decision in *Minor v. Happersett*, 88 U.S. 162 (1875). The Court found that suffrage in particular was a matter of state citizenship and not national citizenship. If suffrage had not been extended to women by a state at the founding of the nation, this new amendment did not extend it to women. It simply protected state privileges they already had in this regard. *Id.*
13. See *Happersett*, 88 U.S. at 162. Thomas argues that Stanton was an early proponent of a dynamic approach to constitutional interpretation as opposed to what we would now call originalism (69-70).
14. ELIZABETH CADY STANTON, *FEMINIST AS THINKER*, *supra* note 3, at 226-27.

issues as divorce, custody, the right to refuse sexual relations within marriage, the role of women in organized religion, and the benefits of coeducation. In each chapter, Thomas builds on her argument that Stanton's theories of law reform in areas concerning the private sphere of the family informed her views and advocacy as they related to the relationship between women and the state in the public sphere. She persuades the reader that without Stanton's ideas, which seem surprisingly modern, second-wave feminism and third-wave feminism would have lacked a firm theoretical grounding.

Stanton's radical views on marriage, including divorce at will and women's status in the Bible, alienated her supporters as the nineteenth century came to a close. And her vehement rhetoric, deployed in opposition to the enfranchisement of black men and male immigrants before white women, reminds us that she was not a leader without flaws. Like Alice Paul and the final battle for a federal suffrage amendment,<sup>15</sup> Stanton's story is messy. But so is the story of most male political leaders, like Thomas Jefferson and George Washington when it comes to slavery and their personal behavior. Unlike those men, Stanton never had the chance to hold formal leadership in our republic. Yet hers was a rare and influential female voice in the public sphere of her time.

Law can only do so much. As Stanton and feminist scholars who followed her have recognized, the final battle for equality lies in the private sphere—in those intimate negotiations between spouses and partners about spheres of influence and responsibility within the home.<sup>16</sup> And, in conjunction with our jurisprudence moving from status to contract, such negotiated “deals” have the power to transform gender roles in ways that are essential to full equality.

The only arguable weakness in this book is that after the trenchant introduction, Thomas does not do much to connect back to the different strands of feminist theory *per se*. But in my view, the main strength of the book lies in Thomas as legal historian pulling together the arguments out of Stanton's own writings, making them available to us and linking them to Stanton's surprisingly modern legal theories. This book should be included on reading lists for upper-level seminars in jurisprudence, family law, and legal history, in addition to gender and the law. Reading it will introduce students

15. See, e.g., MARY WALTON, *A WOMAN'S CRUSADE* (2010). In 1913, Alice Paul was faced with resistance from other suffragists when African-American women, including Ida Wells-Barnett, a founder of the NAACP, petitioned to march in a major suffrage parade in Washington, D.C. Paul equivocated and “[t]he controversy continued up to the day of the parade. Afterward, Alice's failure to unreservedly welcome black marchers left a permanent stain on her reputation.” *Id.* at 64.

16. See, e.g., MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015). Ertman calls these negotiations or non-legally binding agreements “deals.” “Deals can be big things, like agreeing to inseminate, or casual, implicit, daily household exchanges like ‘I pay the bills and you do the grocery shopping.’ They shape intimate relationships because they create expectations of reciprocity and grounds for changing the relationship when one person isn't holding up his or her end of the deal.” *Id.* at xiii.

to a significant legal mind, albeit an informally trained one, not traditionally included in the canon of prominent American legal thinkers.

Stanton often stated the most important element in achieving equality was a woman's "sovereign right" to control her own body (163).<sup>17</sup> From that right followed the ability to earn a living that fostered independence from men. As Thomas notes, many of the reforms that Stanton wrote about and advocated for in terms of property, marriage, divorce, and custody have become the legal status quo. But in these turbulent times, Thomas's book reminds us how fragile those gains are and how radical they still seem to many in our society. As Stanton lamented, after "years of untiring effort" to obtain guarantees of property and custody, those statutes were "repealed in States where we supposed all was safe" (194). Her cautionary note to be vigilant rings as loudly in 2017 as it did in 1876, and we would do well to heed it. Professor Thomas's excellent new book has given us additional intellectual tools to do just that.

17. In Thomas's discussion of Stanton's views on abortion, she notes that Stanton wrote, "the sacred right of a woman to her own person, to all her God-given powers of body and soul" was a great social and human right "before which all others sink into utter insignificance." (232-36).