

## “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective

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In her classic work *Ain't I a Woman*, African-American feminist critic bell hooks excoriated white feminists for their “constant comparison[s] of the plight of ‘women’ and ‘blacks,’”<sup>1</sup> charging that such analogies “support the exclusion of black women”<sup>2</sup> and represent the linguistic expression of a “sexist-racist attitude”<sup>3</sup> endemic to the women’s liberation movement. Hooks, writing in the early 1980s, perceived analogies between racial and sexual oppression—at least as articulated by white women who “used black people as metaphors”<sup>4</sup>—as a quintessentially opportunistic, parasitic, and marginalizing practice.

Two decades earlier, when civil rights attorney Pauli Murray, already a veteran of battles against racial and sexual exclusion, was searching for a means of persuading skeptics that the eradication of “Jane Crow” deserved moral commitment and legal mobilization equivalent to the fight against “Jim Crow,” she had emphasized the “strikingly similar positions in American society” of “women and Negroes.”<sup>5</sup> Invoking the “parallel and interrelated” histories of women’s rights and civil rights movements, Murray articulated an analogy that superficially resembled the very comparison hooks would later condemn.

Powerful political and legal imperatives shaped Murray’s decision to invoke an analogy between race and sex in the early 1960s. In so doing, she deliberately and self-consciously adopted a long tradition within feminist advocacy traceable to the genesis of the antebellum woman’s rights struggle

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1. BELL HOOKS, *AIN'T I A WOMAN* 141 (1981).

2. *Id.* at 140.

3. *Id.* at 8.

4. *Id.* at 141.

5. Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) To Prohibit Discrimination in Employment Because of Sex 4-5 (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

in the crucible of antislavery activism. She also acted on the strong legal impulse to justify the application of old principles to new circumstances through analogical reasoning. The analogical arguments advanced by Murray and others would have a profound impact on the development of antidiscrimination law in both its legislative and its constitutional incarnations, an impact that continues to be felt today.

As the juxtaposition of hooks's and Murray's words suggests, the political connotations of analogies between race and sex are highly context-dependent and historically variable. As this Note will show, changing historical conditions render the legal ramifications of analogical arguments equally protean, with momentous consequences for both feminism and antiracism. Following a conceptual introduction to analogical argumentation and civil rights advocacy in Part I, Part II investigates the particular historical context of the 1960s in which race-sex analogies emerged as a central component of modern feminist legal thought. The transformation of the social meaning and legal consequences of analogical arguments in 1970s constitutional jurisprudence is the subject of Part III. In order to suggest the continuing relevance of this history to today's civil rights and feminist agendas, Part IV discusses the trajectory of race-gender analogies in the recent debate over the Violence Against Women Act's civil rights remedy. Finally, Part V provides some concluding remarks about the historical dynamics of analogical arguments.

## I. ANALOGICAL ARGUMENTS AND CIVIL RIGHTS ADVOCACY

Analogical arguments, common in legal reasoning generally,<sup>6</sup> are a staple of civil rights advocacy, where established claims of inequality and injury serve as a template upon which individuals and groups assert new claims and demand new remedies.<sup>7</sup> Analogies have both political and legal currency: They can inspire empathy and understanding of harms previously unrecognized, and they may be desirable, if not necessary, in an adjudicative system based upon fidelity to precedent. Analogical arguments not only dominate equal protection jurisprudence, but also play a crucial role in the construction and legitimation of legislative remedies for discrimination and violence against subordinated groups. In American

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6. For discussions of analogical reasoning in the law generally, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); and Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

7. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 115 (David Kairys ed., 1998) ("[A]dvocates are opportunists looking for a simile."). Halley observes that "asking the advocates of gay, women's, or disabled peoples' rights to give up 'like race' similes would be like asking them to write their speeches and briefs without using the word *the*." *Id.* at 120.

antidiscrimination law, race—in particular, the legal response to the African-American experience of racial subordination—is both the source of Americans’ political imagination about the nature and scope of equal rights protection, and the legal baseline against which new rights claims are measured.<sup>8</sup> This Part first examines the structure of analogical arguments in the civil rights context and then surveys recent critiques of parallel reasoning about rights. The final Section suggests that a complete understanding of the dynamics of analogical argumentation requires a historical inquiry into the particular contexts and changing conditions that shape the social meanings and legal consequences of these parallels.

A. *Forms of Analogical Argument in the Civil Rights Context*

Analogical arguments in the civil rights context assume a variety of forms. Advocates often employ analogies simply to evoke the moral opprobrium reserved for classic civil rights harms, demanding a normative commitment to the eradication of a previously unrecognized, or underrecognized, category of injuries. This first type of claim may be simply that sexism, like racism, is a moral wrong worthy of condemnation and corrective action. This persuasive technique is distinguishable from a second type of analogy, which identifies parallel consequences wrought by various types of discrimination. For instance, an advocate might argue that discrimination based on sex, like discrimination based on race, detrimentally affects the economic well-being of individuals and groups by unjustly constraining their employment opportunities. A third type of analogy consists of specific claims about the particular dynamics of different types of oppression. At the level of specific employment practices, the manner in which discrimination is effectuated may vary considerably according to whether the victim is a clerical worker or a factory operative, black or Asian, white or Latino/a, male or female, gender-conventional or not, and so forth. Nevertheless, an analogical argument might posit that stereotypes and prejudices are the common root of both sex- and race-based workplace discrimination. Such a parallel often leads to a fourth type of analogy, whereby advocates use existing legal solutions as models for combating newly recognized forms of inequality. For instance, advocates have argued that violence based upon gender or sexual orientation should be covered by hate crimes legislation similar or identical to laws that protect individuals from racially motivated assaults.<sup>9</sup>

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8. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1289 (1991) (“The African American struggle for social equality . . . has provided the deep structure, social resonance, and primary referent for legal equality. . . .”).

9. E.g., Steven Bennett Weisburd & Brian Levin, “*On the Basis of Sex*”: *Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL’Y REV. 21 (1994).

Analogical reasoning may go beyond direct parallels between various forms of inequality to engage in more nuanced comparisons that recognize differences as well as similarities and attempt to determine their moral and legal significance.<sup>10</sup> For instance, an analogical backdrop might facilitate rather than hinder a determination that while sexual orientation may not be “immutable” like race, lesbians and gay men nevertheless suffer discrimination worthy of redress. This insight is possible, though, only if gay rights advocates compare the damaging nature of racial and sexual oppression rather than the characteristics of targeted groups.<sup>11</sup> In other words, they might argue that although sexual minorities and racial minorities have different group traits and histories, their subordination is similar in its grave material and dignitary consequences. Further, a comparative framework may highlight the need for different remedies in response to different dynamics of oppression or for synergistic solutions to overlapping inequalities. Often, however, analogical arguments emphasize similarities rather than differences and intersections, provoking many of the critiques described in the next Section.

#### B. *Critiques of Analogical Reasoning About Civil Rights*

Notwithstanding the considerable rhetorical and legal power of analogies as persuasive tools, analogical reasoning gives rise to several analytic and strategic pitfalls in the civil rights context. First, analogies may hamper the normative recognition and constrain the substantive definition of the new harm that advocates hope to establish as worthy of political attention and legal remedy. As Catharine MacKinnon and others have argued, rigid adherence to analogical reasoning may preclude the recognition of inequality and suffering that does not precisely resemble practices already defined as civil rights injuries.<sup>12</sup> Analogies make a particularly procrustean bed if existing law has incorporated a cramped or impoverished conception of the scope of the original right.<sup>13</sup>

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10. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 373 (“Considering actual or apparent differences between race and gender may lead to important insights, which in turn may assist in conceptualizing new approaches to challenging oppression based on either.”); see also Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1780-81 (1996) (arguing that courts have incorporated some sensitivity to similarities and differences between discrimination against various groups into equal protection jurisprudence).

11. Halley, *supra* note 7, at 125; see also Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing that discreteness and insularity are not necessarily hallmarks of political powerlessness, and therefore are inappropriate prerequisites for judicial protection of a group).

12. MacKinnon, *supra* note 8, at 1288 (“[S]exism must be like racism, or nothing can be done.”).

13. See *id.* at 1289-91 (arguing that the model of race discrimination on which sex discrimination is based is itself flawed); see also Reva B. Siegel, *Discrimination in the Eyes of the*

Second, a number of theorists have contended that analogical arguments detrimentally affect established civil rights claims. Trina Grillo and Stephanie Wildman argue that even well-intentioned comparisons between racism and sexism perpetuate white supremacy by decentering the experiences of people of color, unfairly appropriating their suffering in a manner that distorts its unique nature and magnitude and obscures the racial privilege enjoyed by white women.<sup>14</sup> To the extent that new claims garner weaker political support than older claims, advocates have often worried that association of the new with the old may undermine the legitimacy of the established claims.<sup>15</sup> In her essay on the use of “like race” arguments in the gay rights context, Janet Halley notes that analogies may also have detrimental doctrinal consequences for an existing body of law, hardening and reifying categories that were previously soft and amorphous.<sup>16</sup> Furthermore, analogical arguments may inadvertently lead judges to interpret equality mandates narrowly, in ways that constrict existing remedies.<sup>17</sup>

Critics have also emphasized how analogies, by stressing the parallel, rather than the intersectional, synthetic, and overlapping, aspects of various forms of inequality, can obscure the experiences of individuals and groups who suffer discrimination along multiple axes. Kimberlé Crenshaw,<sup>18</sup>

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*Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (explicating shortcomings of the legal conception of what constitutes race discrimination).

14. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397.

15. E.g., AILEEN S. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM 60 (1967) (describing male antislavery advocates’ concern that the inclusion of woman’s rights claims would undermine the abolitionist platform); Halley, *supra* note 7, at 128 (identifying “the argument that gay civil rights claims should be muted because the stigma attached to same-sex sexuality, indeed to sexuality, might contaminate civil rights law for other constituencies”).

16. According to Halley, [w]hen gay rights advocates began to invoke the “immutable characteristic” simile, they were working from a set of scattered, sketchy rationales occurring at happenstance in the race and sex discrimination cases. By translating these immutable characteristic references into an indicia of suspectness checklist and implying that its items were not merely sufficient but necessary conditions for heightened judicial protection, they invited judges to harden up the law in this area. Judges did just that . . . . Halley, *supra* note 7, at 138.

17. E.g., L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997) (arguing that narrow judicial conceptions of sexual harassment have constrained the scope of actionable hostile environment racial harassment claims); cf. Halley, *supra* note 7, at 130 (noting that the Supreme Court’s decision in the gay rights case *Bowers v. Hardwick*, 478 U.S. 194 (1986), “so deeply undermined the foundation” of *Roe v. Wade*, 410 U.S. 113 (1973), that women’s rights advocates “seriously faced the possibility that the Supreme Court could overturn it”).

18. 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 [hereinafter Crenshaw, *Demarginalizing the Intersection*]; Kimberlé Crenshaw,

Angela Harris,<sup>19</sup> Regina Austin,<sup>20</sup> and other intersectionality theorists have exposed the tendency of antiracist and feminist discourses to ignore and erase women of color by imagining men as the quintessential targets of race discrimination, and white women as the classic sex discrimination victims. Nonlegal scholars and critics, including bell hooks,<sup>21</sup> Deborah King,<sup>22</sup> and Elizabeth Spelman,<sup>23</sup> identify race-sex analogies as a central manifestation of this phenomenon within the modern feminist movement.<sup>24</sup> Others, like Paulette Caldwell, endorse the careful use of analogical reasoning, but caution that an emphasis on the similarities and differences between race and sex discrimination often obscures their inextricable links in the experiences of women of color.<sup>25</sup>

Civil rights analogies have garnered criticism for their strategic drawbacks as well as their descriptive or analytic disadvantages. In a conservative climate where existing civil rights protections are under siege, analogies may become decidedly less attractive to advocates. For instance, after the Supreme Court's decision in *Adarand Constructors v. Peña*<sup>26</sup> to apply strict scrutiny to all racial classifications, including affirmative action programs, parallels to race lost some of their currency.<sup>27</sup> Advocates have also identified analogical reasoning as a tool of retrenchment whereby opponents of civil rights expansion seize upon differences between new and established claims to argue that any discrepancy between new and old

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*Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

19. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

20. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539. On the shortcomings of antidiscrimination law's response to the oppression of women of color, see also MacKinnon, *supra* note 8, at 1291.

21. HOOKS, *supra* note 1.

22. Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 43-46 (1988).

23. ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 119-25 (1988).

24. For critiques of analogies between race and sexual orientation for their occlusion of gay men and lesbians of color, see Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1469-1505 (2000); and Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 583-84, 631-33 (1997). For more optimistic perspectives on the possibilities for fruitful analogies between race and sexual orientation, see Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”*: *Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997); and Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda,”* 1 AFR.-AM. L. & POL'Y REP. 33 (1994).

25. Caldwell, *supra* note 10, at 373-74; see also Hébert, *supra* note 17 (analyzing the advantages and drawbacks of analogies between racial and sexual harassment).

26. 515 U.S. 200 (1995).

27. See, e.g., Halley, *supra* note 7, at 140. But see Brief of Amici Curiae National Women's Law Center, et al., *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941) (seeking strict scrutiny for “invidious” gender classifications in a suit to overturn a public military academy's male-only admissions policy); Brief for the Petitioner, *Virginia*, 518 U.S. 515 (same).

claims presumptively disqualifies the new assertion of rights.<sup>28</sup> Opponents of new rights may also characterize the undesirability of those rights claims in ways that undermine established claims. For instance, by labeling gay rights advocates' quest for protection against discrimination and violence as a plea for "special rights," foes implicitly denigrate all civil rights laws as "special" favors or preferences.<sup>29</sup>

### C. Analogical Argument as a Historical Phenomenon

These formidable obstacles may lead some theorists and civil rights advocates to despair of ever utilizing analogies in an effective and inclusive manner that adequately captures the complexities of various forms of subordination. But even the severest critics of analogical reasoning usually acknowledge analogies to be an unavoidable mode of legal argument,<sup>30</sup> and many civil rights advocates still seek to exploit their considerable power.<sup>31</sup> Because analogical reasoning has played and continues to play such a crucial role in the development of civil rights law, the dynamics of analogical argument are worth exploring further.

To capture these dynamics fully, it is necessary to resist any view of analogical argumentation as a static, ahistorical phenomenon with a stable collection of meanings, a consistent set of consequences, or a single moral

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28. In the gay rights context, Jane Schacter has labeled this strategy a "discourse of equivalents," which seeks to undermine civil rights protections for gay men and lesbians by emphasizing the differences between sexual orientation and other protected categories. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994).

29. Halley, *supra* note 7, at 134-36; Schacter, *supra* note 28, at 293-94.

30. *E.g.*, Carbado, *supra* note 24, at 1503 ("[C]omparing race to sexual orientation is [not] always inappropriate."); Halley, *supra* note 7, at 120 ("[A]nalogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian."); Darryl Lenard Hutchinson, "Gay Rights for Gay Whites"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000) (arguing that although race-sexuality analogies "ultimately . . . impede[] the quest for gay and lesbian equality," *id.* at 1360, advocates should nevertheless "examine why racial subordination and other forms of oppression are undesirable and injurious," *id.* at 1386-87, and apply those insights to sexual orientation subordination).

31. *E.g.*, Rush, *supra* note 24, at 72 (arguing that "analogical reasoning is both valuable and necessary" to the gay rights struggle); Russell, *supra* note 24, at 72-73, 75 (positing the "need to reclaim the power of analogy even as we seek to critique and distance ourselves from its excesses" in order to "build on the connections among all kinds of group subordination"). Analogical reasoning remains a popular mode of argument in academic literature on civil rights as well as in courtroom advocacy. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 153-63 (1996) (likening bans on same-sex marriage to antimiscegenation statutes); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) (arguing that laws preventing gay men and lesbians from engaging in sexual relations are analogous to laws against interracial marriage); Sandra L. Rierison, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994) (contending that because of historical similarities between race and gender discrimination, both should receive strict scrutiny under the Equal Protection Clause).

essence. Rather, analogical reasoning is part of a historical process—a mode of advocacy whose normative valence, substantive content, and practical effects on rights discourse are variable and highly context-dependent. The meanings and consequences of analogical argumentation are closely tied to the historical context in which the analogies are invoked, the motivations, agendas, and intellectual influences of those who are invoking them, the reception they receive, and the responses they provoke. Furthermore, changing historical conditions transform the meanings and consequences of analogical arguments in ways their originators may not anticipate or desire. After underscoring the historical variability of race-sex analogies, the next Part attempts to explain the context that produced one of the first instances of analogical advocacy in the modern civil rights era.

## II. ORIGINS OF ANALOGICAL ARGUMENTS IN MODERN FEMINIST LEGAL THOUGHT

Critics of feminists' analogical arguments see parallel reasoning as a parasitic and opportunistic exercise that tends to undermine antiracist goals, limit feminism's scope, ignore the interplay of racial and sexual inequalities, and obscure the experiences of women of color.<sup>32</sup> The first appearances of analogical reasoning in the modern civil rights era reveal a set of historical circumstances that produced very different meanings for race-sex analogies. In addition to lending the moral force and strategic expertise of the civil rights movement to the feminist cause, the race-sex analogy that emerged in the early 1960s was intended to resolve a longstanding impasse among feminists over the Equal Rights Amendment (ERA), to mend divisions between the black civil rights movement and the women's movement, and to place African-American women at the center of an integrated civil rights and feminist strategy.

### A. *Race-Sex Analogies in Feminist Legal Discourse: Historical Variability*

By the early 1960s, race-sex comparisons already boasted a long history within American feminism. Since the genesis of the antebellum woman's movement in Garrisonian abolitionism, parallels between racial and sexual subordination appeared intermittently in the service of feminist legal causes from marriage reform to suffrage. As the following illustrations indicate, such comparisons had a wide range of meanings and consequences for both feminism and antiracism, depending on how feminists wielded them, and on their contemporary political reception.

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32. *E.g.*, HOOKS, *supra* note 1; SPELMAN, *supra* note 23; King, *supra* note 22.



During the antebellum period, woman's rights advocates invoked similarities in the legal status of married white women and slaves in order both to attract white Northern women to abolitionism and to alert them to their own subordination.<sup>33</sup> Feminist abolitionists faced considerable opposition from antislavery men who were reluctant to grant power to female activists and fearful that any association with the cause of woman's rights would doom their primary objective, the abolition of racial slavery.<sup>34</sup> African-American women and men, including former slaves like Sojourner Truth, often subtly subverted the (white) woman-slave comparison by telling their own unparalleled stories of suffering and strength.<sup>35</sup> Meanwhile, pro-slavery apologists exploited the analogy for their own purposes. Stripped of the underlying assumption that slavery was wrong, comparisons between marriage and slavery had long been used to legitimate both white dominion over blacks and male domination of women as natural, divinely sanctioned inequalities.<sup>36</sup> In the antebellum period, then, analogies between sexual and racial subordination tended to strengthen the white woman's movement, divide white abolitionists, obscure black women's plight, and bolster proslavery rhetoric.

After the Civil War, the principles embodied in the Reconstruction Amendments proved an enticing template to gain enfranchisement for women as well as black men.<sup>37</sup> For a short time in the 1860s, feminists and abolitionists united behind the American Equal Rights Association to promote universal suffrage for African-American men and all women, and made freedwomen a central symbol of their struggle.<sup>38</sup> The unwillingness of Republican politicians to accept any analogy between black male suffrage and women's enfranchisement provoked bitter and lasting divisions between those who felt compelled to ensure black male enfranchisement even if woman suffrage was not forthcoming, and those who believed abolitionists should oppose anything short of universal suffrage.<sup>39</sup> Moreover, beginning in the late 1860s, some white woman suffragists turned to racist and nativist arguments in support of their cause,

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33. On the relationship between feminism and abolitionism in the United States, see ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 33-45 (1981); BLANCHE GLASSMAN HERSH, *THE SLAVERY OF SEX: FEMINIST-ABOLITIONISTS IN AMERICA* (1978); and JEAN FAGAN YELLIN, *WOMEN & SISTERS: THE ANTISLAVERY FEMINISTS IN AMERICAN CULTURE* (1989).

34. See *supra* note 15 and accompanying text.

35. Nell Irvin Painter, *Difference, Slavery, and Memory: Sojourner Truth in Feminist Abolitionism*, in *THE ABOLITIONIST SISTERHOOD* 139, 153 (Jean Fagan Yellin & John C. Van Horne eds., 1994) (observing that Truth "made her persona as different from the educated white women who made her famous as they thought it possible to be").

36. On proslavery uses of marriage-slavery analogies, see STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS* 208-25 (1995).

37. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 54-55 (1978).

38. *Id.* at 53-78.

39. *Id.* at 99-104.

compromising the link between white women's rights and the struggle for racial equality.<sup>40</sup> In this context, white woman's rights advocates' turn away from analogy signaled the end of an interracial abolitionist-feminist alliance.

With white feminism complicit in the long post-Reconstruction period of racial retrenchment, in the 1910s African-American advocates of woman suffrage used analogies between race and sex to promote female enfranchisement and advance the cause of universal suffrage. In a typical formulation, W.E.B. Du Bois declared that depriving women of the suffrage was "as unjust as . . . the denial of the right to vote to American Negroes,"<sup>41</sup> while activists such as James Weldon Johnson and Mary Church Terrell drew parallels between proslavery and antifeminist ideologies.<sup>42</sup> These woman suffragists used analogical arguments both to resist the racism of the white woman's movement and to convince African Americans that white women's exclusionary tactics made woman suffrage a no less laudable goal.

Aside from their complex and variable relationship to interracial politics, the perceived utility of analogical arguments also depended upon the legal content associated with the racial analogy. In the years between the winning of woman suffrage and the emergence of the second-wave feminist movement in the 1960s, analogical arguments were rare. Most women's groups opposed the ERA promoted by the National Woman's Party (NWP), fearing that the wholesale removal of sex-based distinctions from the law would endanger protective labor legislation for women.<sup>43</sup> Some, noting courts' restrictive interpretations of the Reconstruction Amendments, doubted both the feasibility and the utility of applying those constitutional provisions to women.<sup>44</sup> In short, many feminists between

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40. DAVIS, *supra* note 33, at 70-86, 110-36; DUBOIS, *supra* note 37, at 94-96; PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 123-29 (1984).

41. *Votes for Women*, 17 CRISIS 8, 8 (Nov. 1917).

42. J.W. Johnson, *About Aunties*, 10 CRISIS 179, 180 (Aug. 1915) (noting that "[i]t takes only a glance to see the striking analogy" between assertions that "women are inferior beings" and proslavery arguments); Mary Church Terrell, *Woman Suffrage and the 15th Amendment*, 10 CRISIS 191, 191 (Aug. 1915) ("[P]recisely the same arguments used to prove that the ballot be withheld from women are advanced to prove that colored men should not be allowed to vote. The reasons for repealing the Fifteenth Amendment differ little from the arguments advanced by those who oppose the enfranchisement of women."). For more on African-American advocates of woman suffrage, see GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW 211-13 (1996); and ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 (1998).

43. For a typical argument to this effect, see Catherine J. Tilson, *The Equal Rights Amendment to the Federal Constitution—Opposed*, 20 CONN. B.J. 66 (1946). For more on feminists' post-suffrage ideologies and activities, see NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1987).

44. *See, e.g.*, Tilson, *supra* note 43, at 68 (stating that "as everyone knows, many of the fundamental injustices to the negro [*sic*] have been held to be unaffected" by the Fourteenth Amendment).

1920 and 1960 associated a racial analogy with the demise of protective laws and the ineffectual enforcement of equal rights.

Furthermore, the few legal race-sex parallels advanced during this period were often detached from concerns about racial justice. Though the NWP intermittently flirted with various legal analogies derived from the Reconstruction Amendments,<sup>45</sup> the group contemplated no partnerships with nascent race-based civil rights organizations. In fact, even when the civil rights movement began to make legal strides in the 1950s, the NWP steadfastly resisted any alliance, electing instead to court the support of Southern segregationists for their perennial efforts to pass an ERA.<sup>46</sup> For the NWP, analogical arguments seemed a political liability as late as 1963, when NWP officer Miriam Holden advised her colleagues that successful passage of the ERA would require them to “at all costs, avoid comparisons of our position with the position of the American Negro.”<sup>47</sup> Thus, in the early 1960s, it was far from clear that an analogy to race could gain acceptance within the feminist community, much less win the approval of the legal mainstream.

#### B. *The Reemergence of the Race Analogy as Feminist Legal Strategy*

The origins of the race-sex analogies presented to legislatures and courts in the 1960s and 1970s are traceable, in large part, to the activities of the Committee on Civil and Political Rights of the President's Commission on the Status of Women (PCSW), a body convened at the request of President Kennedy in 1961 to study the position of women in American

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45. *E.g.*, Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723 (1935) (arguing that the Fourteenth Amendment should be applied to discrimination based on sex as well as race); *see also* 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, 211-12 (1991) (describing Alice Paul's early attempts to model the ERA on the Thirteenth Amendment).

46. *E.g.*, Letter from Alice Paul, Acting Congressional Chairman, National Woman's Party, to Mabel Pollitzer, Acting Chairman, South Carolina Branch (Feb. 7, 1955) (National Woman's Party Papers, Film Misc 959, Reel 101, on file with the Sterling Memorial Library, Yale University) (“You could probably make Governor [Strom] Thurmond see that women are once again, as after the Civil War, being made to stand aside on the ground that ‘this is the negroes [*sic*] hour.’”); Letter from Helen Paul to Miss [Mary] Brandon, Former Vice Chair, National Woman's Party (July 20, 1956) (National Woman's Party Papers, Film Misc 959, Reel 102, on file with the Sterling Memorial Library, Yale University) (“The Southern group [in the Senate] has not ever been for us but seems now to be galvanized into action probably due to the fact that the Republicans have been basing their appeal for votes very largely on Civil Rights for negroes [*sic*].”). For more on the NWP's activities during this period, see LEILA J. RUPP & VERTA TAYLOR, *SURVIVAL IN THE DOLDRUMS: THE AMERICAN WOMEN'S RIGHTS MOVEMENT, 1945 TO THE 1960S* (1987).

47. Letter from Miriam Holden to Anita [Pollitzer], Honorary Chairman, National Woman's Party (Feb. 16, 1963) (National Woman's Party Papers, Film Misc 959, Reel 108, on file with the Sterling Memorial Library, Yale University).

society.<sup>48</sup> It was through her involvement in the PCSW that Pauli Murray, a veteran civil rights lawyer and activist, pioneered a new strategy for feminist legal advocacy that relied on the recently revived Fourteenth Amendment. This Section examines the particular intellectual climate and historical conditions that made analogical arguments appealing to Murray and her colleagues on the PCSW.

Notwithstanding the popular ideology of domesticity that had dominated 1950s gender discourse, a small but significant body of postwar social science and polemical literature provided scholarly and theoretical support for the notion that sexism and racism were comparable phenomena. The moral force and legal successes of the civil rights movement made analogizing sex to race a promising strategy for the recognition of sexual inequality as an important moral, political, and legal problem. As a practical matter, the legal arm of the civil rights movement stood as a powerful strategic model for attacking sex discrimination through litigation. Further, the use of the Fourteenth Amendment to combat sex discrimination promised to circumvent the contentious debate over the ERA that had divided feminists since the 1920s. Finally, the analogy between race and sex provided a means of linking movements for racial justice and women's rights, movements that had already begun to diverge in damaging and divisive ways.

1. *Jane Crow, a New American Dilemma, and an NAACP for Women*

Pauli Murray, an African-American lawyer and civil rights pioneer, was ideally suited to the task of formulating a strategy that drew both intellectually and tactically from the racial justice movement. A North Carolina native, Murray had urged a direct challenge to educational segregation in the early 1940s and made important contributions to the NAACP's litigation strategy in *Brown v. Board of Education*.<sup>49</sup> When Murray earned top honors at Howard Law School in 1944, an accomplishment usually rewarded with a prestigious Harvard fellowship, officials there informed her that, as a woman, she was ineligible for admission. Murray penned a strongly worded, though unsuccessful, appeal to the Harvard Corporation and grew more determined to combat the

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48. For a thorough account of the PCSW's activities, see CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968, at 109-68 (1988). The PCSW included government officials, legislators, labor leaders, representatives of women's groups, and college presidents. *Id.* at 112-13.

49. PAULI MURRAY, THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET 254-55 (1987) (discussing Murray's connection to *Brown v. Board of Education*, 347 U.S. 483 (1954)).

phenomenon she termed “Jane Crow.”<sup>50</sup> After fifteen years of law practice, writing, and activism, Murray was working toward her doctorate at Yale Law School in 1962 when her expertise in civil rights law made her an obvious choice to explore alternative legal strategies on behalf of the PCSW. In a widely circulated memorandum, Murray articulated a race-sex analogy that would profoundly shape women’s rights advocacy under the Fourteenth Amendment and through civil rights legislation well into the 1970s and beyond.<sup>51</sup>

Murray’s memorandum argued that the gravity and nature of women’s subordination were comparable to racial oppression. Women, like racial minorities, were “an easily identifiable group, to a large degree unrepresented in the formal decision-making processes,” and their “legal history [was] one of slow progress against considerable resistance from the dominant (male) group.”<sup>52</sup> Women’s inferior position, like that of blacks, was predicated upon supposedly inherent differences, so that “legal distinctions based upon sex [were] particularly susceptible” to applications prolonging and reinforcing “women’s inferior status.”<sup>53</sup> Murray emphasized to PCSW members that “[t]he attributes of sex have obscured the attributes of humanity in much the same way the attributes of the slave as property also obscured his attributes as a thinking human being.”<sup>54</sup>

In addition to calling for an equivalent moral commitment to the eradication of sex and race discrimination, Murray’s analogy posited similar causal bases and mechanisms for racial and sexual inequality. To make the case for operational similarities between racism and sexism, Murray drew upon a burgeoning postwar social science literature that had begun to explore parallels between the subordinate status of women and racial inequality. Eventually, her sources came to include sociologist Gunnar Myrdal, social psychologist Helen Mayer Hacker, anthropologist

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50. *Id.* at 183, 238-44. Another African-American feminist who would later become an outspoken lawyer and activist, Florynce Kennedy, was also exploring the parallels between racism and sexism as a Columbia undergraduate in the mid-1940s. See Florynce Kennedy, *A Comparative Study: Accentuating the Similarities of the Societal Position of Women and Negroes*, reprinted in *WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT* 102 (Beverly Guy-Sheftall ed., 1995).

51. For other discussions of the Murray memorandum, see HARRISON, *supra* note 48, at 126-34; LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* 189-92 (1998); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 *WM. & MARY L. REV.* 209, 222-31 (1998); and Rosalind Rosenberg, *Pauli Murray and the Killing of Jane Crow*, in *FORGOTTEN HEROES* 279, 279-87 (Susan Ware ed., 1998).

52. Pauli Murray, *A Proposal To Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se* 10 (Dec. 1962) (PCSW Papers, Doc. II-20, Box 8, Folder 62, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

53. *Id.*

54. Pauli Murray, *Presentation to the PCSW* 351 (1962) (transcript available in the Pauli Murray Papers, MC 412, Box 49, Folder 885, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

Ashley Montagu, and philosopher Simone de Beauvoir, all of whom wrote against an older scientific tradition that had treated race and gender as analogous elements of a “natural” hierarchy.<sup>55</sup>

In her PCSW memo, Murray relied primarily on Myrdal and Hacker to support her analogical arguments. She utilized Myrdal’s influential 1944 study *An American Dilemma* for its brief discussion of similarities between racism and sexism in the six-page appendix entitled “A Parallel to the Negro Problem.”<sup>56</sup> Myrdal argued that women, like Negroes, were branded intellectual inferiors, deemed ineducable, confined to certain societal roles, excluded from many fields of employment, denied citizenship rights, and mythologized as “content” in their subordinate positions.<sup>57</sup> Hunter College Professor Helen Mayer Hacker provided a more detailed portrait of the social values and practices operating on Negroes and women in her 1951 article “Women as a Minority Group,” published in the journal *Social Forces*.<sup>58</sup> Hacker asserted that both women and Negroes occupied a “caste-like” status, exhibiting tendencies toward self-hatred, an internalization of the inferiority attributed to them by the dominant society.<sup>59</sup> Moreover, Hacker argued that the dynamics and consequences of racism and sexism were similar, and enumerated them in detail: the “high social visibility” of both skin color and sex; similar ascribed attributes including intellectual inferiority, emotional volatility, and lack of sexual self-control; confinement to low social status and mythologized “contentment”; strategies of accommodation such as a deferential manner, pretension of ignorance, and methods of “outwitting” the dominant group; and finally, educational, economic, professional, and social discriminations that resulted in lower occupational attainments.<sup>60</sup>

In later iterations of her analogical arguments, Murray also drew upon the work of the controversial and charismatic anthropologist Ashley Montagu, who published several works in the 1940s and 1950s designed to demolish myths of racial and sexual inferiority that had long plagued biology and the social sciences.<sup>61</sup> In the widely read *Man’s Most Dangerous*

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55. For more on race-gender analogies in earlier scientific discourse, see CYNTHIA EAGLE RUSSETT, *SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD* 27-28 (1989); and Nancy Leys Stepan, *Race and Gender: The Role of Analogy in Science*, in *ANATOMY OF RACISM* 38 (David Theo Goldberg ed., 1990).

56. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* app. 5 at 1073 (1944).

57. *Id.* at 1077.

58. Helen Mayer Hacker, *Women as a Minority Group*, 30 *SOC. FORCES* 60 (1951).

59. *Id.* at 61. Hacker was careful to delineate differences between “women and Negroes”: Women “lack[ed] a sense of group identification,” depended upon the dominant group (men) for many aspects of economic and social status, and suffered less overt discrimination. *Id.* at 62-66.

60. *Id.* at 65.

61. *See* sources cited *supra* note 55.

*Myth: The Fallacy of Race*,<sup>62</sup> first published in 1945, Montagu devoted a brief chapter to the parallels between antifeminism and race prejudice, urging his readers to “recall that almost every one of the arguments used by the racists to ‘prove’ the inferiority of one or another so-called ‘race’ was not so long ago used by the antifeminists to ‘prove’ the inferiority of the female.”<sup>63</sup> Murray inverted Montagu’s argument that the “slackening of prejudices” against women led to a concomitant “increase in the intensity of prejudices against ethnic and minority groups” due to the “displaced aggression” of dominant groups in search of a scapegoat.<sup>64</sup> Conversely, Murray warned, white women’s resentment of the attention paid to racial problems and the perceived neglect of sex discrimination might precipitate a racial backlash damaging to both the feminist and antiracist causes.<sup>65</sup>

French philosopher and social commentator Simone de Beauvoir was also among those who compared racial and sexual subjugation in the postwar period. In *The Second Sex*,<sup>66</sup> de Beauvoir used comparisons between women and blacks to highlight the degree to which Western societies subordinated women, and to lament women’s lack of collective consciousness. While Negroes and proletarians organized themselves against an “other”—be it whites or the bourgeoisie—women did not “authentically assume a subjective attitude,” de Beauvoir complained.<sup>67</sup> Nevertheless, she identified “deep similarities between the situation of the woman and that of the Negro.” Both were socialized to submit to the will of the dominant group rather than asserting their own self-ownership and efficacy,<sup>68</sup> and both deserved the chance to prove themselves, unfettered, before their worth was adjudged wanting.<sup>69</sup> Murray cited de Beauvoir for her substantive and normative comparison of women and blacks,<sup>70</sup> and implicitly urged her compatriots not to succumb to the inertia of subordination.

In her PCSW memorandum and other writings, Murray drew upon these social scientists to argue that the parallels between race and sex discrimination were numerous, but emphasized that while courts had come to recognize the evil of the former, they remained nearly blind to the latter’s scourge. In large part, Murray suggested, the judicial failure to perceive the

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62. ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (4th rev. ed. 1964) (1945) [hereinafter MONTAGU, *MAN’S MOST DANGEROUS MYTH*]; see also ASHLEY MONTAGU, *THE NATURAL SUPERIORITY OF WOMEN* (1953).

63. MONTAGU, *MAN’S MOST DANGEROUS MYTH*, *supra* note 62, at 181.

64. *Id.* at 183.

65. See *infra* notes 104, 122.

66. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1952) (1949).

67. *Id.* at xliii.

68. *Id.* at 348.

69. *Id.* at 750.

70. E.g., Murray, *supra* note 5, at 6.

grave harms of sex discrimination was attributable to the lack of a women's organization comparable to the NAACP that could spearhead a multipronged assault on sex discrimination through political advocacy, public education, legal scholarship, social scientific studies, and, most importantly, litigation.<sup>71</sup> These measures, Murray suggested, could produce a judicial breakthrough for women comparable to blacks' achievement in *Brown*. For Murray, then, the utility of the race-sex analogy extended beyond persuading courts of the substantive similarities between the two forms of discrimination to encompass an institutional and tactical strategy modeled on the legal arm of the civil rights movement.

## 2. *Beyond the ERA Impasse, Toward Interracial Cooperation*

There was another impetus behind Murray's proposal, one that was crucial to its acceptance by PCSW members—the desire to move beyond the contentious wrangling over the ERA that had divided feminists and reformers since the 1920s. An ERA, opponents feared, would demolish labor legislation that protected women, as women, from the worst working conditions. Many labor-oriented reformers were also skeptical, as a matter of principle, of measures that would eliminate all legal distinctions based on sex. By early 1963, Murray perceived that the “controversy over the Equal Rights Amendment seemed to force people who espoused the same goals into rigid positions and dissipated energies which might have gone toward a development of standards for the concept of equal status.”<sup>72</sup> Feminists could circumvent the counterproductive ERA dispute, Murray suggested, by uniting behind a litigation strategy based upon the Fourteenth Amendment's equal protection guarantee.

When Murray proposed the pursuit of women's rights through Fourteenth Amendment litigation, committee members sought to reassure themselves that her strategy would leave protective labor legislation unharmed.<sup>73</sup> For her part, Murray emphasized that the Fourteenth Amendment approach differed from the ERA in that the former would

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71. Murray, *supra* note 54, at 355; Murray, *supra* note 52, at 32-34, 36-37.

72. Letter from Pauli Murray to Representative Edith Green 2 (Jan. 24, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 878, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

73. *E.g.*, Letter from Katherine P. Ellickson, Executive Secretary, PCSW, to Pauli Murray (Oct. 4, 1962) (Pauli Murray Papers, MC 412, Box 49, Folder 876, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (“I believe it would be helpful to clarify your thinking on protective labor legislation. Some people interpreted your remarks as meaning that you would consider protective labor legislation discriminatory and subject to invalidation under the Fourteenth Amendment. This is not my understanding of your position . . .”); Letter from Pauli Murray to Katherine P. Ellickson (Oct. 13, 1962) (Pauli Murray Papers, MC 412, Box 49, Folder 876, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (“First, let me say that my position on labor legislation protective in nature is that it should not be disturbed.”).



allow the government to protect women to the extent that they performed certain functions in society, such as childbearing and child-rearing. Murray suggested that

[w]hat is needed to remove the present ambiguity of women's legal status is a shift of emphasis from their *class* attributes (*sex per se*) to their functional attributes and to redelineate the boundaries between social policies that are genuinely protective of the family and maternal functions and those which are unjustly discriminatory against women as individuals.<sup>74</sup>

She proposed a standard of "reasonableness," under which a policy that treated women differently would be constitutionally valid if and only if it was either "designed to protect the maternal and family functions through compensatory measures and [was] limited in operation to that class of women who perform these functions," was demonstrably necessary to protect women's unique health needs, was "designed to protect an equality of right which women, because of their traditionally disadvantaged position in society, themselves have been unable to assert," and did not "imply inferiority or enforce an inferior status by singling women out as a class for restrictive treatment."<sup>75</sup> By declaring that not all sex-based legal distinctions would be invalid under the Fourteenth Amendment, Murray clarified to skeptics that the race-sex analogy did not dictate identical treatment of men and women.

Some remained unconvinced, believing that legitimate differences between the sexes barred an analogy to race. A representative of the National Council of Jewish Women (NCJW) pointed to Murray's "attempt[] to equate racial discriminations with discriminations on the basis of sex" as the "one general weakness" of her memorandum.<sup>76</sup> "As a philosophical and sociaological [*sic*] concept it may have some validity," the NCJW said of the race-sex parallel, but the group expressed concern that "the attempt to equate the two kinds of discrimination carried with it the implication that differential treatment for women is not acceptable."<sup>77</sup> Others simply did not find the analogy empirically accurate or morally compelling. Harvard Law School Dean Erwin Griswold wrote Murray a cordial, if condescending, note praising her "excellent memorandum" but refusing to endorse her conclusions. "I must confess . . . that I find myself rather lukewarm about your proposition," he admitted. "[I]t has always

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74. Murray, *supra* note 52, at 8-9.

75. *Id.* at 17.

76. Statement of Mrs. Samuel Brown, National Council of Jewish Women, Before the Civil and Political Rights Committee 4 (Mar. 8, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 883, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

77. *Id.*

seemed to me that there are differences in sex, and these differences may, in appropriate cases, be the basis of classification . . . [Y]our proposal does seem to me at times to carry a good thing, perhaps a little bit too far.”<sup>78</sup> In response, Murray continued to emphasize that her proposal was not the functional equivalent of an ERA, but rather retained the flexibility to remedy sex discrimination without barring legislation designed to benefit women as a class.

Attacks on the race-sex analogy from the pro-ERA camp highlighted another central object of Murray’s strategy: uniting the civil rights and feminist movements at a moment when they threatened to diverge in damaging and divisive ways. While in its public statements, the ERA-centered NWP derided the Murray strategy as “wishful thinking” and insisted that an ERA was the only genuine guarantor of women’s equality,<sup>79</sup> privately some in the organization suspected Murray of hijacking the women’s movement on behalf of black civil rights. In a letter circulated to NWP leaders, Miriam Holden advised against endorsing a race-sex analogy, and advanced a startling theory to explain the Murray strategy. Murray’s “preoccupation,” she posited, “is with the Negro problem, and her primary purpose seems largely to be an attempt to hitch that wagon to our Equal Rights Amendment star.”<sup>80</sup> Such a linkage, Holden worried, would jeopardize the political viability of an ERA and “spell disaster for our hopes,” for “[t]he Southern states are sure to look with disfavor on any Constitutional legislation that is linked with the Negro problem.”<sup>81</sup> Oddly, Holden suggested that the civil rights movement—which by 1963 had enjoyed success that the NWP could only dream of—was attempting to co-opt the ERA for its own purposes; she accused the NAACP of conspiring to “infiltrate” the women’s movement and “make use of it as a springboard for their own propaganda.”<sup>82</sup> It was here that Holden advised her compatriots to “at all costs, avoid comparisons of our position with the position of the American Negro.”<sup>83</sup> Holden and others urged the party to continue courting Southern segregationists in their quest for an ERA.

As Murray was well aware, the hostile stance of these NWP activists was nothing new. The historical record was replete with cautionary tales about white feminists’ exclusion of black women and men from their

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78. Letter from Erwin N. Griswold, Dean, Harvard Law School, to Pauli Murray 1 (Jan. 31, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 878, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

79. Miriam Y. Holden, *Argument in Favor of the Equal Rights Amendment, to the President’s Commission on the Status of Women* (Mar. 23, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 883, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

80. Letter from Miriam Holden to Anita [Pollitzer], *supra* note 47.

81. *Id.*

82. *Id.*

83. *Id.*

agenda. Invoking this history, Murray repeatedly suggested to supporters of black civil rights that a failure to assuage women's concerns would be racially divisive, reenacting the Reconstruction-era demise of the equal rights alliance.<sup>84</sup> In such a scenario, Murray emphasized, black women would be left without effective means of redress. To audiences of white women, Murray struck a more positive note, evoking past alliances as precedent for a renewed joint effort.<sup>85</sup> But her message was unmistakable: She was, as a black woman, unwilling to bear the costs of racial division within the feminist movement.

Conversely, Murray's personal experience revealed the potential for women's contributions and concerns to be marginalized within the black civil rights movement. "Nowhere is there a greater need for appreciation of the rights of women as citizens than in the Negro community itself," Murray wrote in 1962.<sup>86</sup> "Negro women, although they have battled valiantly for 'equal rights' have not always shared those rights when they were established."<sup>87</sup> Without special attention to sex discrimination, Murray argued, one-half of black Americans would be left without protection, fatally hampering racial progress.

### 3. "A Common Fate of Discrimination": Murray's Analogy in the Title VII Debate

The role of Murray's race-sex analogy in linking the advancement of blacks and white women came into even sharper relief during the brief but contentious debate over the inclusion of "sex" as a prohibited basis of discrimination under Title VII of the Civil Rights Act of 1964.<sup>88</sup> The introduction of the Title VII sex amendment by Representative Howard Smith of Virginia, an avowed opponent of the Civil Rights Act, led some to later call its passage a mere joke or fluke;<sup>89</sup> whatever his nefarious motivations, women's rights advocates seized the moment to argue on the

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84. See *infra* notes 104, 118, 122, and accompanying text.

85. E.g., Pauli Murray, Address at the All-Women Conference Sponsored by the National Council of Women of the United States 4-5 (Oct. 11, 1962) (National Woman's Party Papers, Film Misc 959, Reel 107, on file with the Sterling Memorial Library, Yale University).

86. Letter from Pauli Murray to Gertrude Wilson 2 (Aug. 29, 1962) (Pauli Murray Papers, MC 412, Box 49, Folder 875, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

87. *Id.* at 2. For more on links between feminism and women's participation in the civil rights movement, see SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1979); and WOMEN IN THE CIVIL RIGHTS MOVEMENT: TRAILBLAZERS AND TORCHBEARERS (Vicki L. Crawford et al. eds, 1990).

88. For other accounts of the Title VII sex amendment debate that discuss Murray's role, see HARRISON, *supra* note 48, at 180-81; MURRAY, *supra* note 49, at 354-58; and Becker, *supra* note 51, at 233-35.

89. Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164 (1991).

amendment's behalf.<sup>90</sup> More starkly and publicly than in the controversy over the PCSW's Fourteenth Amendment strategy, the racial politics of the debate over Title VII's sex provision placed the interests of white women and African Americans in tension.

When Smith introduced the sex amendment, Representative Emanuel Celler of New York, a primary sponsor of the Civil Rights Act and a prominent ERA opponent, immediately rose in opposition to including sex in the bill. He listed a parade of horrors—compulsory military service, the decline of traditional family relationships, the invalidation of rape laws and protective labor legislation—that would follow from the adoption of legal sex equality.<sup>91</sup> Moreover, Celler contended, even if women did experience some discrimination in employment, their progress toward equality was rapid compared to that of Negroes.<sup>92</sup>

Representative Martha Griffiths of Michigan, a longtime advocate of women's rights, issued a lengthy rebuttal in which she appealed to her colleagues not to leave white women unprotected from employment discrimination. "I rise in support of the amendment," announced Griffiths, "because I feel as a white woman when this bill has passed . . . that white women will be last at the hiring gate."<sup>93</sup> Despite her support for the civil rights bill, Griffiths did not hesitate to appeal directly to the prejudices of Southern congressmen, posing several hypotheticals in an attempt to force Celler to admit that Title VII, sans sex amendment, would cover black but not white women. "[Y]ou are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all," she complained.<sup>94</sup> Eager to undermine the race discrimination provisions of Title VII, Southern legislators jumped on Griffiths's bandwagon. For instance, Representative Rivers of South Carolina announced his support for the amendment "making it possible for the white Christian woman to receive the same consideration for employment as the colored woman."<sup>95</sup> Much of the legislators' rhetoric echoed a 1963 NWP resolution, which had warned: "[T]he Civil Rights Bill would not even give protection against discrimination because of 'race, color, religion or national origins,' to a

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90. *Id.* at 172-83.

91. 110 CONG. REC. 2577 (1964) (statement of Rep. Celler).

92. *Id.* at 2578.

93. *Id.* (statement of Rep. Griffiths).

94. *Id.* at 2579-80. Griffiths continued: "[W]hen the colored woman shows up and she is qualified, she is going to have an open entrée into any particular field . . . [W]hite men have done this before . . . your greatgrandfathers were willing as prisoners of their own prejudice to permit ex-slaves to vote but not their own white wives." *Id.*

95. *Id.* at 2583; *see also id.* (statement of Rep. Andrews) ("[T]he white women of this country would be drastically discriminated against in favor of a Negro woman.").

*White Woman, a Woman of the Christian Religion, or a Woman of United States Origin.”*<sup>96</sup>

Fearful that the alliance between feminists and Southerners would derail the entire bill, Representative Edith Green, author of the Equal Pay Act, PCSW member, and longtime supporter of women’s progress, professed her opposition to the amendment for fear it would defeat the bill. Sardonicly praising her Southern colleagues for their belated conversion to the women’s rights cause, she acknowledged that discrimination against women in employment was an important and serious problem. But at the risk of being labeled an “uncle Tom” or “aunt Jane,” as she put it, Green declared, “I do not believe this is the time or place for this amendment. For every discrimination that has been made against a woman in this country there has been 10 times as much discrimination against the Negro of this country.”<sup>97</sup> The House debate, then, framed the inclusion of sex in Title VII as a favor to white women that might well undermine the primary purpose of the bill—to protect African Americans from racial discrimination.

When the sex amendment was in danger of failing in the Senate, Murray used her race-sex analogy to dispel the impression that the prohibition of sex discrimination was necessary only as a protection for white women. In a memorandum circulated among Senators and eventually reviewed by the White House,<sup>98</sup> she insisted that including sex as a prohibited basis for discrimination was the only way to extend the benefits of Title VII to the group that most needed them: black women. She discredited the scenario suggested by Griffiths—that white women would be “last at the hiring gate”<sup>99</sup> without a sex amendment:

What is more likely to happen . . . [is that] in accordance with the prevailing patterns of employment *both* Negro and white women will share a common fate of discrimination, since it is exceedingly

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96. National Woman’s Party Resolution (adopted Dec. 16, 1963) (National Woman’s Party Papers, Film Misc 959, Reel 108, on file with the Sterling Memorial Library, Yale University), quoted in Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 43 (1983). Some NWP members went beyond pandering to Southern congressmen and endorsed their racist opposition to the Civil Rights Act. See Letter from Nina Horton Avery, member, NWP, to Representative J. Vaughan Gary (D-Va.) (Jan. 8, 1964) (National Woman’s Party Papers, Film Misc 959, Reel 108, on file with the Sterling Memorial Library, Yale University) (thanking God for the intervention of politicians “who will use their brains and energies to prevent a mongrel race in the United States and who will fight for the rights of white citizens in order that discrimination against them may be stopped”), quoted in Brauer, *supra*, at 43.

97. 110 CONG. REC. 2581 (1964) (statement of Rep. Green); see also *id.* (“As much as I hope the day will come when discrimination will end against women . . . [this amendment] may later . . . be used to help destroy this section of the bill by some of the very people who today support it.”)

98. MURRAY, *supra* note 49, at 357.

99. See *supra* note 93.

difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex.<sup>100</sup>

In fact, Murray urged, “A strong argument can be made for the proposition that Title VII without the ‘sex’ amendment would benefit Negro males primarily and thus offer genuine equality of opportunity to only *half* of the potential Negro work force.”<sup>101</sup> And if white women were excluded on the grounds that black rights were paramount, their resentment might further compromise already frayed American race relations. Invoking the post-Reconstruction suffrage movement split, Murray warned that the “bitter memories” of the previous century’s betrayal made women “understandably apprehensive and resentful” of any attempt to exclude them from the new equal employment law.<sup>102</sup>

Murray and Justice Department attorney Mary O. Eastwood also made the race-sex analogy the opening salvo of their influential 1965 article “Jane Crow and the Law,” which appeared in the *George Washington University Law Review*.<sup>103</sup> Published just as it was becoming clear to feminists that the EEOC had chosen to all but ignore the sex provision of Title VII, the “Jane Crow” article used a race-sex parallel to highlight the moral seriousness and economic magnitude of discrimination against women, and to insist that the eradication of race discrimination was impossible without the inclusion of black women in employment protections. Two years later, Murray helped to found the National Organization for Women (NOW), which was established to spur the enforcement of Title VII in cases of sex discrimination.<sup>104</sup>

Murray continued to reiterate her analogical arguments throughout the 1960s, in the face of considerable opposition from both black civil rights leaders and the predominantly white ACLU staff.<sup>105</sup> Murray had been an early critic of the black civil rights movement’s male-dominated public

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100. Murray, *supra* note 5, at 20.

101. *Id.* at 20-21.

102. *Id.* at 12.

103. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. U. L. REV. 232 (1965). For a contemporaneous rejection of the race-sex analogy, see Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 797 (1965).

104. MURRAY, *supra* note 49, at 365-68; *see also* Letter from Pauli Murray to Richard Graham, Commissioner, EEOC 2 (Mar. 28, 1966) (Pauli Murray Papers, MC 412, Box 55, Folder 959, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (asserting that Graham’s statement that the EEOC would give a lower priority to sex discrimination claims “imply[d] that Negro males are to be favored over white females and only intensifies an ever potential ‘backlash’ of racial discrimination,” repeating the nineteenth-century error). For more on the founding and early development of NOW, see JO FREEMAN, *THE POLITICS OF WOMEN’S LIBERATION* 71-102 (1975); and HARRISON, *supra* note 48, at 192-209.

105. For more on Murray’s role in the ACLU during the 1960s, see SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 52-81 (1998).

face,<sup>106</sup> and grew increasingly concerned about the repression of female voices as the Black Power movement gained momentum in the mid-1960s. When the Congress on Racial Equality (CORE) director Floyd McKissick declared his organization's commitment to "black male power," and CORE's intention to defer until "tomorrow" the "equality of women,"<sup>107</sup> Murray continued to press her race-sex analogy.<sup>108</sup> Murray's ACLU colleagues were similarly inclined to discount the problem of sex discrimination, calling it "'relatively unimportant' when compared with the goal of eliminating race discrimination."<sup>109</sup> When Murray pushed for an ACLU policy statement condemning sex discrimination in 1968, Equality Committee members insisted that race discrimination must remain the top priority.<sup>110</sup> It was in response to this intransigence that Murray employed analogical arguments to universalize demands for rights that threatened to polarize the civil rights and feminist communities and to force a false choice between the interests of blacks and women—a choice that erased those at the intersection of categories.<sup>111</sup>

#### 4. "An Integral Relation": Women, Race, and Jury Service

Aside from the controversies over the wording and enforcement of Title VII's employment discrimination prohibition, the most prominent 1960s appearance of analogical arguments came in the debate over the equal protection implications of women's exclusion from juries.<sup>112</sup> In the context

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106. *Id.* at 184 (describing Murray's complaints about the exclusion of female speakers from the 1963 March on Washington); MURRAY, *supra* note 49, at 353 (same).

107. Minutes, ACLU Equality Committee 4 (Dec. 28, 1967) (Pauli Murray Papers, MC 412, Box 54, Folder 942, on file with the Schlesinger Library, Radcliffe Institute, Harvard University); *see also* KERBER, *supra* note 51, at 195 (describing McKissick's comments).

108. *See, e.g.*, Minutes, ACLU Equality Committee 4 (Dec. 28, 1967) (Pauli Murray Papers, MC 412, Box 54, Folder 943, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

109. Minutes, ACLU Equality Committee 2 (Apr. 26, 1966) (Pauli Murray Papers, MC 412, Box 54, Folder 943, on file with the Schlesinger Library, Radcliffe Institute, Harvard University). One of Murray's colleagues argued that "a simple equation regarding race and sex . . . is not realistic," *id.*, while another remained unconvinced that sex discrimination damaged group prosperity in the same way that race discrimination harmed African Americans, *id.*

110. *E.g.*, Minutes, ACLU Equality Committee 6 (June 6, 1968) (Pauli Murray Papers, MC 412, Box 54, Folder 943, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) ("Priority should be given, [Mr. Perkel] felt, to ending discrimination on the basis of color. Anyone who wishes to add sex discrimination as a top priority criterion . . . will have to show the necessity for having that issue come before race."). Murray and her supporters eventually succeeded in 1970 in convincing the ACLU Board to reverse its longstanding policy opposing the ERA. HARTMANN, *supra* note 105, at 71-81.

111. As historian Susan Hartmann writes, Murray and other African-American feminists during this period "used the authority of their identities and experiences as black women to fill two critical gaps—the gap in racial justice efforts that left out women, and the gap in feminist projects that neglected women of color." HARTMANN, *supra* note 105, at 205.

112. For an excellent discussion of the struggle to end discrimination against women in jury service, *see* KERBER, *supra* note 51, at 124-222.

of jury service, as in the workplace, race and sex discrimination were, in practice, deeply intertwined. In many Southern jurisdictions, African Americans and white women were excluded from juries—black men de facto, and women de jure. A federal court found for the first time that the exclusion of women from jury venires violated the Equal Protection Clause of the Fourteenth Amendment in the 1966 Alabama case *White v. Crook*,<sup>113</sup> which arose from the trial of the men accused of killing civil rights activists Viola Liuzzo and Jonathan Daniels. The accused murderers were tried and acquitted in Lowndes County, where white men of eligible age were just 6% of the county's population, but composed 100% of every jury.<sup>114</sup> With Murray's assistance, Dorothy Kenyon, a former judge and longtime advocate of equal jury service for women, briefed the sex discrimination issue for the *Crook* plaintiffs.<sup>115</sup>

Significantly, Gardenia White and the other female plaintiffs in *Crook* were African Americans, whose exclusion from juries was the product of both racist custom and sexist law.<sup>116</sup> Analogical arguments that compared sex discrimination to race discrimination in the jury service context were therefore connective as well as comparative. In addition to asserting the rights of black female potential jurors, Murray contended that the exclusion of white women from juries was injurious to civil rights for African Americans, for two reasons. First, she argued, white women would be more sympathetic jurors in civil-rights-related cases than were white men; and second, she worried that an expansion of black citizens' rights without a concomitant widening of women's opportunities would engender ill will among white women. A few weeks before the *Crook* ruling, Murray persuaded the ACLU Board to approve a resolution proclaiming "an integral relation between the exclusion of women and exclusion of Negroes in Southern courts."<sup>117</sup> The resolution explicitly tied women's jury service in the South to the accomplishment of civil rights goals and warned of the "evidence of rising resentment on the part of women" that their demands for equality were ignored.<sup>118</sup> Again, in advancing an analogical argument for the application of equal protection principles to women, Murray emphasized the interconnections as well as the parallels between race and sex discrimination in jury composition.

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113. 251 F. Supp. 401 (M.D. Ala. 1966) (per curiam).

114. KERBER, *supra* note 51, at 198. The murderers were later found guilty by a federal jury. *Id.* at 197.

115. *Id.* at 197-99.

116. The *New York Times* noted "the use of an all-purpose plaintiff—Negro women." Fred P. Graham, *Rights Case Yields Dividend for Women*, N.Y. TIMES, Feb. 13, 1966, at 8E.

117. Letter from Pauli Murray to Marguerite Rawalt 2 (Feb. 2, 1966) (Pauli Murray Papers, MC 412, Box 59, Folder 999, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (quoting the ACLU resolution).

118. *Id.*



5. *Analogical Arguments on Behalf of “Compensatory Treatment”*

For Murray, the race-sex analogy was not merely instrumental to the removal of sex-based distinctions from the law; it was also a means of expanding the possible remedies for all forms of discrimination. In debates over “compensatory treatment” among ACLU Equality Committee members in the mid-1960s, Murray maintained that some form of remedial action was imperative to correct the injustices that created present racial inequalities. She argued in 1964 that “[c]learly remedial treatment is necessary” given the history of slavery and discrimination, and that “[p]referential treatment’ must be seen as a part of remedial treatment.”<sup>119</sup>

But Murray broke ranks with her predominantly male ACLU colleagues to suggest that compensatory policies should be directed at all disadvantaged people, not just African Americans.<sup>120</sup> Asserting that women and other groups had histories of discrimination that were worthy of redress, Murray expressed concern that embracing compensatory programs for blacks only would imply an undesirable narrowing of the Fourteenth Amendment’s scope to include African Americans but not women generally.<sup>121</sup> Furthermore, she argued, confining remedial programs to blacks would permit the root causes of disadvantage to go unremedied, provoke racial backlash,<sup>122</sup> and allow the government to avoid truly transformative economic investments in the inner cities and elsewhere.<sup>123</sup> Though it might operate somewhat differently, Murray asserted that sex discrimination was like race discrimination in that its lingering effects warranted concerted remedial action. Murray’s position on compensatory treatment reflected her belief that a race-sex analogy would expand the universe of remedies for sex inequality beyond the horizon of formal equality.

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119. Letter from Pauli Murray to Aaron Levenstein, Chairman, New York Chapter, Jewish Labor Committee (Feb. 19, 1964) (Pauli Murray Papers, MC 412, Box 104, Folder 1872, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (emphasis omitted).

120. *Id.*

121. Minutes, ACLU Equality Committee 5 (Nov. 30, 1967) (Pauli Murray Papers, MC 412, Box 54, Folder 943, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (“[Murray] questioned what [compensatory treatment for African Americans only] would mean to our general acceptance of the Fourteenth Amendment as broad enough to reach all people. Either the breadth of the 14th Amendment would be narrowed, or we would imply that the Federal government will take action to raise questions of compensatory treatment to all people.”).

122. *Id.* (“For every victory the Negro achieves, there are other groups who see that the Negro gets special treatment while they are not even considered.”).

123. *Id.* at 6.

C. *Murray's Analogy in Historical Context: Interracial Coalition and Remedial Flexibility*

This historical context illuminates the content and meaning of Murray's analogical arguments about race and sex. In large part, Murray's analogy was a persuasive tool—an attempt to impress upon skeptics the normative seriousness of sex-based inequality, and the importance of devoting resources to its eradication. At a time when judges, legislators, the public at large, and even dedicated reformers either justified women's subordinate position or downplayed its significance, comparing sexual subordination to the recognized national problem of racial inequality was an attempt to lend legitimacy and moral weight to the cause's shaky foundations. The analogies advanced by Murray and other lawyers were bolstered by a small but suggestive postwar social science literature that explored the operational and consequential parallels between racism and sexism and inverted older models that posited similarities between racial and sexual inferiority.

For Murray, the race-sex analogy was also a potentially powerful means of linking two movements that threatened to diverge in divisive and exclusionary ways. Murray invoked the analogy before multiple audiences: white legislators who depicted the interests of African Americans and white women as antagonistic; black and white civil rights activists who subordinated women's rights to the goal of male empowerment; and white feminists who, for a variety of reasons, resisted links between race and sex. The analogy, Murray believed, could place African-American women at the center of the women's movement and simultaneously minimize racial backlash on the part of white women. At a time when women's liberation was represented publicly by works like Betty Friedan's *The Feminine Mystique*,<sup>124</sup> which suggested women's need for emancipation from middle-class housewifery, Murray's invocation of black women's roles as workers and heads of households altered the terrain of feminism.

Significantly, the concrete legal contexts in which Murray and others successfully promoted race-sex analogies in the 1960s were employment and jury service, both areas in which race and sex inequality were deeply connected and in which African-American women were arguably the most severely disadvantaged by discrimination. In both the workplace and the jury box, race and sex discrimination were clearly intertwined as a matter of everyday practice for women of all economic classes, so that the elimination of sex discrimination could credibly be viewed as a necessary part of racial emancipation. In these contexts, analogical arguments were not merely abstract and comparative, but concrete and connective.

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124. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

Furthermore, the legal consequences of the more abstract race-sex analogies advanced with respect to sex-based classifications generally remained ambiguous and fluid during this period. As Mary Becker has noted, the Fourteenth Amendment strategy did not necessarily dictate a commitment to formal equality, to the removal of all sex distinctions from the law.<sup>125</sup> To the contrary, Murray was careful to distinguish her Fourteenth Amendment proposal from the pure formal equality principle for which the ERA had come to stand. Her standard left the door open to both protective labor regulations—the primary concern of ERA opponents—and to measures “designed to protect an equality of right which women, because of their traditionally disadvantaged position in society, themselves have been unable to assert adequately,”<sup>126</sup> arguably a reference to the kind of compensatory or remedial programs now called affirmative action. Though labor-oriented reformers feared a racial analogy might have similar consequences to an ERA, the greatest proponents of formal equality had allied themselves with Southern segregationists and rejected the race parallel.

By the end of the 1960s, Title VII had rendered the protective legislation issue less salient, so that many women’s organizations reversed their positions and supported a renewed effort on behalf of an ERA.<sup>127</sup> Many, including Murray, had come to see the Fourteenth Amendment and an ERA as alternative paths to similar ends.<sup>128</sup> As Murray assured one longtime ERA supporter, “[W]e differ not so much in our objectives as in our strategy.”<sup>129</sup> In struggles over the Fourteenth Amendment, the ERA, and Title VII alike, the race-sex analogy remained a means of legitimating efforts to portray sex discrimination as an injury worthy of legal redress. To be sure, the inclusion of sex alongside race, color, religion, and national origin in Title VII provided no guarantee that the EEOC would equalize enforcement, or that courts would treat various forms of discrimination similarly—much less that Title VII would be an effective weapon against

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125. Becker suggests that the feminist shift toward formal equality resulted in part from modeling feminist legal strategy on the battle against Jim Crow before affirmative action became a major legal issue. Becker, *supra* note 51, at 248-49. I complicate this account above at notes 119-123 and accompanying text.

126. Murray, *supra* note 52, at 17.

127. Becker, *supra* note 51, at 232, 238-39. Although some protective legislation proponents continued to press their agenda, many lost their official positions when President Richard Nixon took office in 1968. HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY 190-91* (1992).

128. *E.g.*, Letter from Pauli Murray to Alma Lutz 1 (Dec. 9, 1965) (Pauli Murray Papers, MC 412, Box 97, Folder 1730, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) (“I...believe that the quickest way to obtain the results the Equal Rights Amendment is intended to produce is to urge the courts to make clear that discrimination against women by the state or federal governments violates the Fifth and Fourteenth Amendments.”).

129. *Id.* at 2.

discrimination of any kind.<sup>130</sup> But as the federal government seemed inclined to take at least some steps to rectify racial discrimination through Title VII enforcement, and civil rights organizations were pressing for affirmative action efforts on behalf of racial minorities, race-sex analogies had apparently expansive remedial consequences that feminist advocates sought to harness.

To the extent that race-sex analogies had entered the legal discourse by the mid- to late-1960s, then, they served to legitimate women's rights, link antiracist and feminist movements when their interests threatened to diverge, emphasize the interconnections as well as the parallels between race and sex discrimination, and expand the universe of available legal remedies for sex-based inequality. As the next Part demonstrates, however, the social meanings and legal consequences of race-sex analogies would be subject to transformation and reinterpretation as they were partially and selectively incorporated into constitutional jurisprudence and theory.

### III. ANALOGIES UNLEASHED: NEW MEANINGS AND UNINTENDED CONSEQUENCES OF RACE-SEX PARALLELS IN THE 1970S

To catalogue every instance of race-sex parallelism in feminist legal thought, legislative activity, and adjudication during the 1970s is beyond the scope of this Note. Rather, this Part examines a few instances of analogical argumentation in constitutional litigation in order to illustrate how changing historical conditions transformed analogies' political and legal implications. When feminist lawyers echoed Pauli Murray's earlier writings in their briefs to the Supreme Court in the early 1970s, the abstract character of analogical constitutional arguments—so appealingly malleable in the PCSW context a decade earlier—became a substantive and strategic liability. As courts and legal commentators interpreted and reshaped race-sex analogies, they often lost the complex and intersectional nuances Murray and others had earlier exploited. Furthermore, as advocates' analogical analysis was translated into legal doctrine against a backdrop of increasing conservatism, analogies began to serve as limiting, rather than expansive, instruments. The examples that follow illustrate how historically contingent are the dynamics of analogical arguments, and help to explain how a strategy once configured as racially inclusive and remedially flexible

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130. For more on the EEOC's enforcement failures, see FREEMAN, *supra* note 104, at 177-90; and GRAHAM, *supra* note 127, at 102-16. On the more recent failure of courts to treat race and sex discrimination allegations similarly, see Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992). On Title VII cases that failed to recognize African-American women as victims of particular discrimination, see Caldwell, *supra* note 10, at 374-81; and Crenshaw, *Demarginalizing the Intersection*, *supra* note 18, at 141-52.

became a symbol of racial exclusion and an instrument of legal circumscription.

A. *The Quest for Sex as a Suspect Classification*

Though Murray had proposed the Fourteenth Amendment strategy in 1962, it was not until the early 1970s that feminist lawyers successfully presented a sex discrimination case to the Supreme Court. When they finally did so in *Reed v. Reed*,<sup>131</sup> a suit challenging an Idaho statute preferring male estate administrators, it was under the aegis of the ACLU Women's Rights Project (WRP), headed by Ruth Bader Ginsburg. The *Reed* "grandmother brief"<sup>132</sup> consolidated the race-sex analogy Murray had developed over the preceding decade to argue for the treatment of sex as a "suspect classification," and provided a template for future WRP sex discrimination briefs.

In the *Reed* brief, the WRP argued that sex and race were both "congenital, unalterable trait[s] of birth,"<sup>133</sup> characterized courts' unwillingness to recognize the injustice of sex discrimination as a mistake comparable to the *Plessy* decision,<sup>134</sup> and drew the familiar parallel between slavery and women's status at common law.<sup>135</sup> At several points, the brief echoed Murray's emphasis on the centrality of African-American women to the struggles against slavery and women's subordination, and attempted to undermine the notion that women's lives had historically been filled with privilege. "[N]o pedestal marks the place occupied by most women," the brief asserted, going on to quote Sojourner Truth at length.<sup>136</sup> Several amici curiae joined the WRP in drawing heavily upon the race-sex analogy, flooding the Court with entreaties to treat sex and race discrimination as similar and equivalent harms prohibited by the Fourteenth Amendment.<sup>137</sup>

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131. 404 U.S. 71 (1971).

132. Brief for Appellant, *Reed*, 404 U.S. 71 (No. 70-4).

133. *Id.* at 5. The WRP was also able to cite a recent California case that affirmed the race-sex analogy in declaring sex a suspect classification under the state constitution. *Id.* at 20-21 (citing *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 540-41 (Cal. 1971)).

134. *Id.* at 12-13 ("Very recent history has taught us that, where racial discrimination is concerned, this Court's refusal in *Plessy v. Ferguson* to declare the practice unconstitutional, reinforced the institutional and political foundations of racism, made it more difficult eventually to extirpate, and postponed for fifty-eight years the inevitable inauguration of a national commitment to abolish racial discrimination." (citation omitted)).

135. *Id.* at 28-29.

136. *Id.* at 31.

137. Joint Brief of Amici Curiae American Veterans Committee and NOW Legal Defense and Education Fund at 10-12, *Reed*, 404 U.S. 71 (devoting a section to the proposition that "[s]ex and race discrimination are greatly similar and deserve similar constitutional treatment"); Brief of Amicus Curiae the City of New York at 16, *Reed*, 404 U.S. 71 ("[T]he net effect of sexual, like racial classifications is the same."); Brief of Amicus Curiae the National Federation of Business and Professional Women's Clubs at 8, *Reed*, 404 U.S. 71 (asserting that "sex discrimination takes an even greater economic toll than racial discrimination").

The Court's decision in *Reed* was a victory for the WRP and its allies,<sup>138</sup> though the opinion contained only a cryptic declaration that administrative convenience would not suffice as a rationale for discriminating on the basis of sex.<sup>139</sup> The WRP continued to urge the Court to declare sex a suspect classification, and less than two years later, in *Frontiero v. Richardson*,<sup>140</sup> these efforts came tantalizingly close to fruition. A four-Justice plurality, led by Brennan, accepted strict scrutiny as the appropriate standard for evaluating laws that drew distinctions on the basis of sex, in the course of invalidating a military benefit scheme that automatically awarded men a housing allowance and medical care for their wives, but required that women prove their husbands' dependency in order to receive the same benefits. Brennan wrote of the nation's "long and unfortunate history of sex discrimination,"<sup>141</sup> which, he suggested, was significant because of its similarity to racial subjugation:

[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.<sup>142</sup>

He continued: "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."<sup>143</sup> In Brennan's formulation, "women" and "blacks" seemed to be mutually exclusive categories, and the history of women's status in the American legal system appeared relevant only insofar as it resembled antebellum racial subjugation.

The fate of race-sex analogies in *Reed* and *Frontiero* reveals the profound context-dependency of their social meaning and legal consequences. The WRP's "grandmother brief" essentially replicated the substance of many of the analogical arguments Murray had advanced in the preceding decade,<sup>144</sup> but the contexts in which they were presented differed

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138. Ginsburg had not expected that the Court would accept her suspect classification argument right away. Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work To Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 341-42 & n.86 (1992).

139. *Reed*, 404 U.S. at 76-77.

140. 411 U.S. 677 (1973).

141. *Id.* at 684.

142. *Id.* at 685.

143. *Id.* at 686-87. The language of Brennan's opinion was remarkably similar to the wording of the California Supreme Court's decision in *Sail'er Inn*. See *supra* note 133.

144. Indeed, although her direct participation in the *Reed* case was limited, Murray was credited as one of the brief's authors and was quoted at length in the brief. Brief for Appellant at 17-18, *Reed*, 404 U.S. 71 (No. 70-4).

markedly from those of their 1960s incarnations. For one thing, the analogies' audience no longer consisted of feminists and civil rights activists who failed to see their movements' interdependencies, or of legislators construing a sex discrimination prohibition as an instrument of racial division rather than a completion of the civil rights movement's emancipatory project. Furthermore, the race-sex analogy in *Reed* and *Frontiero* was purely a legal-categorical comparison: Unlike the employment and jury service contexts, where race and sex discrimination overlapped in concrete, practical ways, discriminatory estate administration policies and spousal military benefits had no immediately evident racial counterparts. Indeed, the facts of *Frontiero* prompted the Court plurality to remark on the detrimental effects of placing women "on a pedestal,"<sup>145</sup> a position in which poor women and women of color had never found themselves, as the WRP brief in *Reed* had itself acknowledged.<sup>146</sup>

The analogies' new audience and increasingly abstract quality had significant consequences for the manner in which the WRP's analogical arguments were incorporated into equal protection jurisprudence. Although the WRP briefs recounted the interconnections between struggles for racial justice and women's rights campaigns, the analogy articulated by Justice Brennan in the *Frontiero* plurality opinion was merely comparative rather than connective. Thus, in addition to granting the history of women's status and struggles "no independent legal significance," and "generat[ing] a narrative that efface[d] the history of women's treatment in the American legal system," as Reva Siegel has observed of the *Frontiero* opinion,<sup>147</sup> the Court passed up an opportunity to provide a meaningful account of the socio-historical interrelationship between race and sex inequality.

*Frontiero's* invocation of the race-sex analogy had other important ramifications for the future of equal protection jurisprudence. For one, in listing the ways in which sex discrimination resembled race discrimination as a justification for heightened judicial scrutiny, the plurality ratified a list of qualifying attributes that could as easily constrain as expand the Equal Protection Clause's scope and applicability to other subordinated groups. Moreover, because Justice Brennan justified the application of strict scrutiny to sex-based classifications more or less solely on the basis of a parallel between race and sex as categories, his opinion could be read to imply that sex discrimination violated the equal protection guarantee *if and only if* it resembled discrimination based on race. In court, the analogy had become both more abstract, divorced from material connections between

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145. *Frontiero*, 411 U.S. at 684.

146. See *supra* text accompanying note 136.

147. Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131, 171 (Austin Sarat & Thomas R. Kearns eds., 1999).

race and sex discrimination—and more concrete, reifying specific legal consequences that feminists had thus far managed to avoid.

B. “*Getting the Court To Understand They Couldn’t Lump Sex and Race Together*”: *Refinement of and Retreat from Analogical Arguments*

The ambiguous legal ramifications of the analogical arguments that had rendered Murray’s Fourteenth Amendment strategy so attractive to various factions in the early 1960s became less of a virtue in the context of early 1970s litigation, as the WRP discovered in *Kahn v. Shevin*.<sup>148</sup> When *Kahn* reached the Supreme Court with neither the knowledge nor the approval of the WRP,<sup>149</sup> feminist lawyers feared that the race-sex analogy embraced by the Court’s liberal wing in *Frontiero* would lead these Justices to misconstrue a property tax exemption for widows as a permissible affirmative action measure. In *Kahn*, the WRP assiduously avoided invoking a race-sex analogy to a Court simultaneously considering *DeFunis v. Odegaard*,<sup>150</sup> an attack on the University of Washington Law School’s affirmative action policy by a white male plaintiff. Viewing the widows’ exemption as a paternalistic law catering to outdated conceptions of women’s roles, the WRP was anxious to make sure the Court distinguished between “[g]eneralized provisions based on gender stereotypes” and “affirmative action measures tailored narrowly and specifically to rectify the effects of past discrimination against women.”<sup>151</sup> Ginsburg later described the WRP’s challenge in *Kahn* as “get[ting] the Court to understand they couldn’t lump sex and race together; that there were differences.”<sup>152</sup>

The dilemma in which Ginsburg and her colleagues found themselves in *Kahn* illustrates how their zealous promotion of racial analogies became hazardous to feminists when the racial baseline legal remedy did not comport with their conception of appropriate remedies for sex discrimination in a particular case. Conversely, a WRP repudiation of the race-sex analogy could be, willfully or ingenuously, mistaken for a rejection of remedial policies altogether, despite the WRP’s support for such measures.<sup>153</sup> In fact, in the mid-1970s, Ginsburg’s writings began to

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148. 416 U.S. 351 (1974).

149. Ruth B. Cowan, *Women’s Rights Through Litigation: An Examination of the American Civil Liberties Union Women’s Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373, 390-91 (1976); see also Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 21 (calling *Kahn* “the wrong case brought to the Court at the wrong time”).

150. 416 U.S. 312 (1974).

151. Brief for Appellants at 24 n.19, *Kahn*, 416 U.S. 351 (No. 73-78).

152. Cowan, *supra* note 149, at 393.

153. The WRP’s support for affirmative action throughout the 1970s complicates Hugh Davis Graham’s assertion that by 1972, feminists had embraced an individual rights paradigm that



urge a more nuanced analogical relationship between race and sex discrimination, one that honored the differences as well as the similarities between the two forms of inequality.<sup>154</sup> Her retreat from the rhetoric of race-sex parallelism was not an effort to eliminate all possibility of gender-based affirmative action. Indeed, Ginsburg specifically endorsed aggressive recruitment efforts, the elimination of employment and educational tests and standards unrelated to performance, special training programs to help women overcome the effects of previous discrimination, and goals and timetables in appropriate circumstances.<sup>155</sup> What she sought to avoid in retreating from the race-sex analogy was the use of remedial justifications for laws rooted in women's subordination and dependency. In short, Ginsburg had recognized the double-edged quality of race-sex analogies, and was attempting to invoke them in more selective and subtle ways.

For these and other reasons,<sup>156</sup> *Kahn* marked the beginning of the end of the race-sex analogy as a consistent centerpiece of WRP strategy in the courts. WRP briefs in *Weinberger v. Wiesenfeld*<sup>157</sup> and *Craig v. Boren*<sup>158</sup> relied upon arguments independent of the race parallel, stressing the Supreme Court's new sex discrimination jurisprudence without making an explicit bid for the recognition of sex as a suspect classification. If *Frontiero* represented the apex of the race-sex analogy in constitutional jurisprudence, *Craig* was something of a nadir, as the Court defined a new intermediate scrutiny standard for sex-based classifications in the course of invalidating a law discriminating against underage men who wished to purchase watered-down beer. *Craig*, even more than *Kahn*, was a case brought to the Supreme Court against the wishes of feminists, and its trivial subject matter could not have provided a starker contrast to the serious and weighty crusades for justice that had defined race discrimination jurisprudence under the Equal Protection Clause.<sup>159</sup> Once attractive as a means of highlighting the comparable moral seriousness of sex

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sharply contrasted with the black civil rights movement's quest for group-based rights. GRAHAM, *supra* note 127, at 234.

154. See, e.g., Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 29 (1975) ("[C]hanging those patterns [of discrimination] entails recognition that generators of race and sex discrimination are often different. . . . Doctrine directed to the continuing impact of race segregation is not necessarily applicable to gender discrimination. . . . In short, most nonminority females do not encounter a formidable risk of 'death at an early age.'").

155. *Id.* at 30-34.

156. The WRP's strategy also reflected a practical calculation that the Court was unlikely to embrace sex as a suspect classification after only four Justices had approved such an approach in *Frontiero*. Cowan, *supra* note 149, at 398; Markowitz, *supra* note 138, at 350.

157. 420 U.S. 636 (1975).

158. 429 U.S. 190 (1976).

159. Markowitz, *supra* note 138, at 356-57; Siegel, *supra* note 147, at 171-72; see also MacKinnon, *supra* note 8, at 1299-301 (arguing that the trivial nature of cases like *Craig* exposes the fact that the most serious forms of sex inequality are not the result of facially discriminatory legal classifications).

discrimination, the race-sex analogy had, ironically, become an unwelcome reminder of the gulf between laws like the one challenged in *Craig* and the racial apartheid of Jim Crow.

Even as feminist litigators backed away from analogical arguments in many of the cases on their mid-1970s docket, their reliance upon the Fourteenth Amendment made comparisons to race on the part of judges evaluating their claims virtually inevitable. Those comparisons could constrain judicial recognition of equal protection harms as easily as they could expand the scope of protection. For instance, though it is difficult to determine whether the lack of a ready analogy to race contributed to the Court's failure to regard pregnancy-related discrimination as sex discrimination for the purposes of equal protection analysis,<sup>160</sup> a connection seems possible, if not likely. Similarly, the Court's disinclination to overturn the Third Circuit's decision in *Vorchheimer v. School District*,<sup>161</sup> an unsuccessful challenge to sex segregation in Philadelphia's elite public high schools, may have stemmed from judicially perceived differences between race and sex segregation.<sup>162</sup>

Furthermore, the race-sex analogy's utility for feminists was undermined by the changing political climate. As the 1970s wore on, an increasingly conservative Court scaled back the available remedies for racial discrimination. When the Court placed limits upon the ability of the Equal Protection Clause to remedy racial inequality, those limits bled almost inevitably into the sex discrimination context. Although sex discriminatory motives were arguably even more difficult to prove than racially invidious intentions, the 1979 case *Personnel Administrator v. Feeney*<sup>163</sup> confirmed that the Court's restrictive conception of what constituted state-sponsored racial discrimination would similarly constrain recognition of sex discrimination. Echoing the racial disparate impact case *Washington v. Davis*,<sup>164</sup> the Court required a showing that the

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160. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding a California law denying disability benefits for pregnancy-related disabilities). The parties in *Geduldig* did not use analogical arguments, though at least two amicus briefs pointed out that a policy denying disability benefits to sickle cell anemia sufferers would clearly constitute invidious racial discrimination. Brief of the Physicians Forum as Amicus Curiae at 13, *Geduldig*, 417 U.S. 484 (No. 73-640); Brief of the United States Equal Opportunity Employment Commission as Amicus Curiae at 7-8, *Geduldig*, 417 U.S. 484. Briefs supporting California argued that, unlike race and sex, pregnancy was not an "immutable characteristic" determined solely by an "accident of birth." Brief Amicus Curiae of the Chamber of Commerce of the United States of America at 36, *Geduldig*, 417 U.S. 484.

161. 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977). The Third Circuit's ruling provoked a stinging dissent that accepted the plaintiff's race-sex analogy. *Vorchheimer*, 532 F.2d at 889 (Gibbons, J., dissenting) (accusing the majority of "establishing a twentieth-century sexual equivalent to the *Plessy* decision").

162. Unlike most post-*Frontiero* cases, the WRP utilized race-sex analogies in *Vorchheimer*. Brief for the Petitioners at 21-25, *Vorchheimer*, 430 U.S. 703 (No. 76-37).

163. 442 U.S. 256 (1979).

164. 426 U.S. 229 (1976).

Massachusetts legislature specifically intended to disadvantage women when it instituted employment preferences for veterans.

Feminists' early reliance on race-sex analogies to plead their cause under the Fourteenth Amendment may well have contributed to the establishment of a tight link in judges' minds between the resemblance of sex to race discrimination, on the one hand, and the legitimacy of sex-based equal protection claims, on the other. Conversely, though perceived differences in the dynamics of race and sex discrimination had led the Court to forswear strict scrutiny of sex-based classifications, when those differences might have led to an expansion of Fourteenth Amendment protection the Court declined to invoke them. Meanwhile, as the political winds shifted toward a more conservative racial policy, race was becoming a less effective template for the accomplishment of feminist objectives.

### C. *Questions That Are "Sui Generis": The Elusive ERA*

The doctrinal consequences of tying the Fourteenth Amendment litigation strategy to a race-sex analogy were aggravated by the failure of the other constitutional route feminists pursued in the 1970s—the ERA. The ERA literature reveals that many proponents believed an independent constitutional amendment would allow them to reap the benefits of a race-sex analogy without suffering any detrimental doctrinal effects. By the early 1970s, many prominent ERA advocates embraced race-sex parallels to the extent that they illuminated the seriousness of sex inequality's moral challenge, its practical consequences, and, to some extent, its operational dynamics. For ERA supporters, the analogy to race remained a useful persuasive tool. For instance, in her congressional testimony and published writings, Pauli Murray emphasized the importance of the ERA to African-American women as a means of completing the civil rights revolution.<sup>165</sup>

But many of the most influential legal writings on the ERA also touted the amendment as necessary to redress the shortcomings of the race-sex analogy by providing an independent analytic framework and legal remedies that lacked a ready racial analogue. A much cited *Harvard Law Review* note declared that "[t]he similarities between race and sex discrimination are indeed striking . . . . Yet the analogy has its limits, and sex discrimination, if it is to be constitutionally attacked, must be treated as a problem in its own right."<sup>166</sup> Yale Law Professor Thomas Emerson, a

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165. See, e.g., Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253 (1971); see also Pauli Murray, *The Liberation of Black Women*, in VOICES OF THE NEW FEMINISM 87, 101 (Mary Lou Thompson ed., 1970) ("[B]lack women can neither postpone nor subordinate the fight against sex discrimination to the Black Revolution.").

166. Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507-08 (1971).

coauthor of the famous “Yale ERA” article,<sup>167</sup> argued that “taken as a whole, the problems of race discrimination are somewhat different from those of sex discrimination . . . . In short, the establishment of equal rights for women poses questions that are in important ways sui generis. An effective solution demands a separate constitutional doctrine.”<sup>168</sup>

In contrast to the early 1960s, when the Fourteenth Amendment appeared as a flexible alternative to the more rigid formal equality mandate of an ERA, by the early 1970s, it was the ERA that promised flexibility and the positive features of a race-sex analogy while the Fourteenth Amendment was associated with the racial parallel’s limiting aspects. So long as the ERA remained viable, legal feminists had an alternative strategy with the potential to recognize differences as well as similarities between racial and gender inequality. While the ERA lingered on the horizon,<sup>169</sup> feminists had less reason to fear that all of their hopes for legal equality were tethered to a somewhat flawed race parallel that courts seemed only partially prepared to accept.

The examples related in this Part illustrate how historically contingent and context-dependent are the social meanings and legal consequences of analogical arguments. Abstracted from their original contexts, race-sex analogies presented to the Supreme Court by the WRP became embedded in constitutional doctrine in a skeletal form that limited the scope of cognizable discrimination in significant ways. Even when feminist advocates revised, qualified, and selectively withdrew their analogical arguments as the 1970s wore on, the drawbacks of analogy continued to haunt constitutional sex discrimination jurisprudence. The ERA, once viewed as a rigid counterpoint to the more flexible Fourteenth Amendment, came to represent an opportunity to reap the substantial rhetorical advantages of a racial comparison, while preserving the opportunity to shape an independent sex discrimination paradigm.

Meanwhile, as some of the most creative constitutional theorizing incorporated versions of the race-sex analogy that obscured the experiences and concerns of women of color,<sup>170</sup> some feminists outside the legal arena

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167. Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

168. Thomas I. Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 225, 229-30 (1971).

169. No states ratified the ERA after 1977, but several came close before the ratification period expired in June 1982. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 184 (1986). For analyses of the ERA’s defeat, see MARY FRANCES BERRY, *WHY ERA FAILED* (1986); and MANSBRIDGE, *supra*.

170. E.g., Jo Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U. L. REV. 203, 222 (1971) (comparing racial and sexual “caste systems” and arguing that the failure to extend suffrage to women in the late nineteenth century “had the same effect that *Plessey [sic] v. Ferguson* had for Negroes”); W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 50 (1970) (proposing a revival of the Nineteenth Amendment as “the ultimate parallel between the law of

became increasingly vocal in their opposition to analogical arguments. To them, race-sex analogies had become symbols of racial privilege and a distorted, exclusionary feminist ideology.<sup>171</sup> Changing political and legal conditions had transformed the analogy's symbolic and practical meaning.

For better or worse, race-sex analogies continue to play a crucial role in the construction and interpretation of America's antidiscrimination laws. The next Part briefly examines one contemporary instance that encapsulates many of the ways in which the reception of analogical arguments, however carefully advanced, may limit rather than expand the scope of available remedies for gender inequality in a changing political climate.

#### IV. RACE-GENDER ANALOGIES IN THE 1990S: THE VIOLENCE AGAINST WOMEN ACT'S CIVIL RIGHTS REMEDY

Race-sex analogies remain integral to the ways in which feminists envision and attempt to implement legal remedies for gender inequality today. The construction and defense of the civil rights remedy of the Violence Against Women Act (VAWA), which created a civil cause of action against private individual perpetrators of "gender-motivated violence,"<sup>172</sup> reveals how nuanced analogies between race- and gender-based harms can be transformed into restrictive limitations on the scope of possible legal remedies.

Faced with resistance to the inclusion of the category "gender" in hate crimes legislation,<sup>173</sup> in the early 1990s feminist groups sought a separate

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the woman and the law of the black man"); Diana E. Richmond, *Down Home: A New Focus on Thirteenth Amendment Slavery*, WOMEN'S RTS. L. REP., Fall/Winter 1972-73, at 29, 29-30 (arguing that because "women in this country are forced by statute and prejudice to endure vestiges of slavery similar to those suffered by American blacks," courts should "apply the Thirteenth Amendment to women").

171. E.g., Frances Beale, *Double Jeopardy: To Be Black and Female*, in THE BLACK WOMAN 90, 98 (Toni Cade ed., 1970) (identifying "quite basic" differences between black and white women as undermining any parallel); Linda La Rue, *The Black Movement and Women's Liberation*, BLACK SCHOLAR, May 1970, at 36, 36 ("[A]ny attempt to analogize black oppression with the plight of the American white woman has the validity of comparing the neck of a hanging man with the hands of an amateur mountain climber with rope burns."); Catharine Stimpson, *"Thy Neighbor's Wife, Thy Neighbor's Servants": Women's Liberation and Black Civil Rights*, in WOMAN IN SEXIST SOCIETY 452, 473-74 (Vivian Gornick & Barbara K. Moran eds., 1971) (criticizing race-sex analogies for "exploit[ing] the passion, ambition, and vigor of the black movement," for being "[i]ntellectually sloppy," for "evad[ing], in the rhetorical haze, the harsh fact of white women's racism," and for precluding an independent feminist identity). *But see* SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSSED 163-67 (1970) (using a race-sex analogy to underscore the importance of feminist activism); Pauli Murray, *The Rights of Women*, in THE RIGHTS OF AMERICANS 521 (Norman Dorsen ed., 1970) (utilizing race-sex analogies); sources cited *supra* note 165 (same).

172. 42 U.S.C. § 13981 (1994).

173. *See, e.g.*, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CIVIL RIGHTS DIVISION POLICY BACKGROUND REPORT, HATE CRIMES STATUTES: INCLUDING WOMEN AS VICTIMS 12 (1990), quoted in *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 273-74 (1991) [hereinafter 1991 VAWA Hearing] ("While a

legislative remedy that would reframe violence against women as a civil rights issue.<sup>174</sup> Proponents of the civil rights remedy advanced a race-gender analogy designed to harness the moral opprobrium surrounding racially motivated violence by reconceptualizing sexual and intrafamily assaults as civil rights violations. “We seek to show,” Dr. Leslie Wolfe of the Center for Women Policy Studies told the Senate Judiciary Committee in a 1991 hearing, “that acts of violence based on gender—like acts of violence based on race, ethnicity, national origin, religion, and sexual identity—are not random, isolated acts but rather are crimes against individuals that are meant to intimidate and terrorize the larger group or class of people—women.”<sup>175</sup> However, the provision’s supporters were careful to distinguish the legal remedy they were seeking from existing civil rights laws, which, they asserted, did not offer adequate protection to women. For instance, Sally Goldfarb of the NOW Legal Defense and Education Fund (NOW LDEF) noted that “the basic concept” of the civil rights remedy “resembles that of the Reconstruction-era civil rights laws,” but that certain distinctions were “necessary because gender-based violence typically differs from the types of racial violence directed against men.”<sup>176</sup>

Nevertheless, when the remedy came under attack as too expansive, supporters had to convince skeptics that the provision would not flood the federal courts with assault cases or interfere with state prerogatives.<sup>177</sup> They were constrained to do so by defining gender-motivated crimes of violence to include only crimes that resembled a narrowly conceived racial violence paradigm, an analogy that significantly limited the remedy’s reach. VAWA sponsor Senator Joseph Biden frequently invoked post-Civil War civil rights laws, urging his colleagues to “[t]hink about the difference between a

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hate crime against a black sends a message to all blacks, the same logic does not follow in many sexual assaults. Victims are not necessarily ‘interchangeable’ in the same way; in cases of marital rape or date rape for example, the relationship between individual perpetrator and victim is the salient fact—whether the defendant is a woman-hater in general is irrelevant.”).

174. For a historical account of marital prerogative and privacy discourses justifying violence against women, see Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

175. 1991 VAWA Hearing, *supra* note 173, at 257-58 (statement of Leslie R. Wolfe, Director, Center for Women Policy Studies).

176. *Violence Against Women Act of 1993: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 10 (1993) [hereinafter 1993 VAWA Hearing] (statement of Sally Goldfarb, Senior Staff Attorney, NOW LDEF).

177. *E.g., id.* at 80 (statement of the Conference of Chief Justices) (expressing concern that the civil rights remedy would “plunge the federal government into this complex area which has been traditionally reserved to the states”); *id.* at 75 (report of the Proceedings of the Judicial Conference of the United States) (stating that enactment of the remedy would further overload federal court dockets); see also Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000) (discussing the federal judiciary’s role in the civil rights remedy controversy). On federal courts’ reluctance to exercise jurisdiction over topics perceived as gender-related, see Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

mugging of a person who happens to be an African-American and a lynching of an African-American by an all-white mob . . . . [VAWA] specifically provides that ‘random’ crimes NOT motivated by gender bias are not covered.”<sup>178</sup> Similarly, the acting Assistant Attorney General for civil rights testified before Congress that “the animus element should substantially reduce the number of meritorious actions and allow only those litigants who are proven victims of discrimination in a *traditional* sense to succeed.”<sup>179</sup>

Feminist advocates of the provision did not endorse such explicit limitations on the remedy’s scope. However, they too emphasized that the concept of gender motivation was no mystery—it would be proven in exactly the same manner as racial motivation under other statutes. NOW LDEF attorney Goldfarb listed the relevant factors in racial bias inquiries as including

racially derogatory epithets used by the assailant, membership of the victim in a different racial group . . . a history of similar attacks by the assailant . . . a pattern of attacks against victims of a certain race . . . lack of provocation, [and] use of force that is excessive. . . . By substituting ‘gender’ for ‘race’ in the foregoing list, it becomes apparent that many—but not all—crimes against women will qualify.<sup>180</sup>

Feminists were, understandably, invoking a preexisting consensus about the nature of bias crimes as anonymous, hate-filled, violent outbursts directed against victims discriminatorily selected based on their group membership.

Notwithstanding their undeniable rhetorical and precedential appeal, reliance on the existing paradigms of racial motivation had the potential to limit significantly the civil rights remedy’s ability to redress gender-subordinating violence. As several commentators have noted, the aspects of violence that handicap women’s quest for equality are not necessarily correlated with overt expressions of hatred or hostility of the kind contemplated in racial bias crime laws.<sup>181</sup> Furthermore, reliance on prevailing conceptions of racially motivated hate crimes to define the

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178. 140 CONG. REC. S6102 (daily ed. May 19, 1994) (statement of Sen. Biden).

179. 1993 VAWA Hearing, *supra* note 176, at 102 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, Department of Justice) (emphasis added).

180. *Id.* at 7 (statement of Sally Goldfarb, Senior Staff Attorney, NOW LDEF); *see also* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN’S L.J. 123 (1999) (explicating how gender-motivated violence could be proven with the same types of evidence used to prove intent under other civil rights laws).

181. *E.g.*, Birgit Schmidt am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN’S L.J. 1 (1995); David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 (1993).

parameters of gender motivation was consequential not only because gender-subordinating violence differed from racial violence, but also because the baseline conception of racially motivated violence as anonymous and impersonal, with interchangeable victims, obscured the historical complexities of racial subordination.<sup>182</sup>

Indeed, the relationship between the civil rights remedy and existing civil rights law proved problematic on a number of levels. Some in the civil rights community expressed concern that a vague or narrow interpretation of the civil rights remedy's intent requirement would seep insidiously into the interpretation of other antidiscrimination statutes, with "troubling repercussions for other types of civil rights cases."<sup>183</sup> Furthermore, though the remedy's architects sought to create an independent remedy to address gender-based violence, without the inclusion of other categories of discrimination the fate of victims at the intersection of categories remained uncertain.<sup>184</sup> And although witnesses testified to racial and class disparities in rape investigations and prosecutions,<sup>185</sup> and emphasized the interconnections as well as the similarities between race- and gender-based violence,<sup>186</sup> these observations did not appear in the congressional documents that would compose the civil rights remedy's official legislative history.

The legislative remedy that emerged from the VAWA debate suffered from many of the analytic and strategic drawbacks identified by the critiques of analogical argumentation described in Part I. But it was the changing political and legal climate that would distort the race-sex analogy's meaning and consequences in the most severely damaging ways. Once the VAWA civil rights remedy became law, the most pressing challenges to its viability came not from statutory construction but from constitutional objections. The constitutional parallel to race had been advantageous to civil rights remedy proponents while the bill was under consideration in Congress, since at the time of VAWA's passage in 1994,

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182. Lynching, for instance, was often a reaction to economic or political success of African Americans. *E.g.*, W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH* 111-13 (1993).

183. *1993 VAWA Hearing*, *supra* note 176, at 20 (statement of Elizabeth Symonds, Legislative Counsel, American Civil Liberties Union).

184. Frazee, *supra* note 181, at 214-19.

185. *E.g.*, *1991 VAWA Hearing*, *supra* note 173, at 138 (statement of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission) (testifying to racial disparities in police responsiveness to rapes and to the designation of assaults against poor and minority women as "dirty feet rapes").

186. *E.g.*, *1993 VAWA Hearing*, *supra* note 176, at 11 (statement of Sally Goldfarb, Senior Staff Attorney, NOW LDEF) (noting that "rape by individual white men acting in a private capacity, which has historically been a widespread form of oppression of African-American women, has never been actionable under the civil rights laws ostensibly designed to protect all African-Americans from racial terrorism").



the Supreme Court had yet to decide *United States v. Lopez*<sup>187</sup> and *City of Boerne v. Flores*.<sup>188</sup> But after *Lopez* and *Boerne* rendered the Commerce Clause and Section 5 of the Fourteenth Amendment problematic sources of congressional authority, the civil rights remedy's defenders were called upon to defend its similarity to race-based civil rights laws.

In this constricting constitutional context, the race parallel became simultaneously more important and more dangerous for supporters of the civil rights remedy. The conservative judicial response to assertions that gender-motivated violence was both substantively comparable to racially motivated violence and legally regulable under the same constitutional auspices was threefold: to refute the accuracy of the parallel; to make an exact analogy a necessary condition of the remedy's legitimacy; and to eviscerate virtually all of the analogy's utility by interpreting congressional power to remedy racial discrimination extremely narrowly.

In his opinion for the Fourth Circuit en banc in *Brzonkala v. Virginia Polytechnic Institute*,<sup>189</sup> Judge Michael Luttig rejected the race-gender analogy to the extent that characterizing gender-based violence as a civil rights violation would permit any federal role in domestic relations, which he considered a quintessential state responsibility. Though states were not permitted to exercise discretionary control over the enforcement of laws against racial violence, Luttig charged that "[b]y entering into this most traditional area of state concern, Congress has . . . substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence."<sup>190</sup> Later in the opinion, the Fourth Circuit majority was more straightforward in its unwillingness to accept the race-gender analogy, meanwhile suggesting that gender-based denials of equal protection must replicate a circumscribed set of race-based discriminations in order to warrant Fourteenth Amendment action:

[T]he conduct targeted by section 13981 bears little resemblance to the discriminatory state denial of equal protection or other conduct that is the concern of the Reconstruction Amendments . . . . [T]he particular shortcomings ascribed by Congress to the States are not so much intentional—and thus unconstitutional—discrimination . . . but rather the failure, despite “fervent” and “sincere” efforts, to eradicate the “subtle prejudices” and “stereotypes” that prevent

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187. 514 U.S. 549 (1995) (ruling the Gun-Free School Zones Act an unconstitutional exercise of the commerce power).

188. 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as exceeding congressional power under Section 5 of the Fourteenth Amendment).

189. 169 F.3d 820 (4th Cir. 1999) (en banc).

190. *Id.* at 843.

the victims of gender-motivated crimes from obtaining legal vindication in the state courts.<sup>191</sup>

This characterization not only obscured the ways in which state-sanctioned gender discrimination was in fact the result of intentional acts, but also reinforced the requirement that, in order to be actionable, sex discrimination must resemble the particular rights violations perpetuated by the Southern states against African-American citizens in the post-Civil War era.<sup>192</sup>

The Supreme Court's decision in *United States v. Morrison*<sup>193</sup> for the most part avoided explicitly engaging the petitioners' claims of analogical relationship between the civil rights remedy, on the one hand, and the 1964 Civil Rights Act and Reconstruction-era remedies for racial violence, on the other. In contrast, the dissenters emphasized the resemblance between gender-based violence and the racial discrimination Congress was permitted to prohibit under the Civil Rights Act of 1964, arguing that the provision fell squarely within a tradition of remedying inequality.<sup>194</sup> But in a very brief discussion denying the provision's constitutional basis in Congress's power under Section 5 of the Fourteenth Amendment, the majority first narrowly circumscribed the remedial possibilities for even racially discriminatory state action, and then dismissively characterized the evidence of states' discriminatory behavior in the gender context as minimal.<sup>195</sup> Not only did the Court implicitly reject a race-gender analogy, but the tightening strictures of federalism constrained the very civil rights paradigm that had given the analogy its power.

## V. CONCLUSION

Proponents of VAWA's civil rights remedy marshaled analogical arguments in a careful and nuanced manner that avoided many of the analytic pitfalls associated with race-gender analogies. They chose a context in which race and gender intersected at the level of concrete social

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191. *Id.* at 852 (citations omitted).

192. Amicus briefs in *United States v. Morrison*, 120 S. Ct. 1740 (2000), also attempted to undermine the race-gender analogies advanced by the petitioners. *See, e.g.*, Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund at 9 n.6, *Morrison*, 120 S. Ct. 1740 (Nos. 99-5 & 99-29) (arguing that domestic violence and rape should not be compared to civil rights violations because they involve "conflict in intimate relationships" rather than "discrimination"); Brief Amicus Curiae of Women's Freedom Network on Behalf of Respondents at 3, *Morrison*, 120 S. Ct. 1740 (calling the civil rights remedy "ill-conceived" and arguing that "[t]o equate Jim Crow regimes with whatever subtle bias or societal trends may affect women today is to trivialize the serious hardships suffered by blacks in the past").

193. 120 S. Ct. 1740.

194. *Id.* at 1763 (Souter, J., dissenting) ("[G]ender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's.").

195. *Id.* at 1759 ("Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.").

practices, rather than comparing race and gender as abstract legal categories. In arguing for an analogical relationship between racial assaults and gender-motivated violence, feminists emphasized the comparable moral gravity of these attacks but simultaneously articulated important differences in their social dynamics. Their congressional testimony highlighted the interrelationship between racial and sexual violence, remaining attentive to their inseparability in the lives of women of color. Exposing the limitations of Reconstruction-era remedies for violence, they framed VAWA as a completion of the nineteenth- and twentieth-century civil rights revolutions. The race-gender analogy helped to reconfigure rape and domestic violence as civil rights violations, evoking moral outrage and channeling normative commitment into a symbolically powerful legal remedy.

Notwithstanding analogical arguments' considerable utility when articulated in a nuanced, connective, and context-sensitive manner, the civil rights remedy's fate confirms the tendency of legislative and judicial processes to distort the social meaning and legal consequences of even the most well-constructed analogies. In the 1970s, the abstraction of Pauli Murray's race-sex analogy from its original context compounded the distortions resulting from the parallel's incorporation into constitutional doctrine, where it became a limiting principle under increasingly conservative political conditions. In the VAWA controversy, the analogy's substantive content remained tied to the singular harm of violence throughout, but legislative and judicial opposition converted the analogy into a limitation on both the remedial scope and the constitutional legitimacy of the civil rights remedy. In both instances, the vicissitudes of legislative and judicial politics transformed what had been a potent rhetorical weapon against a "common fate of discrimination" into a double-edged sword.