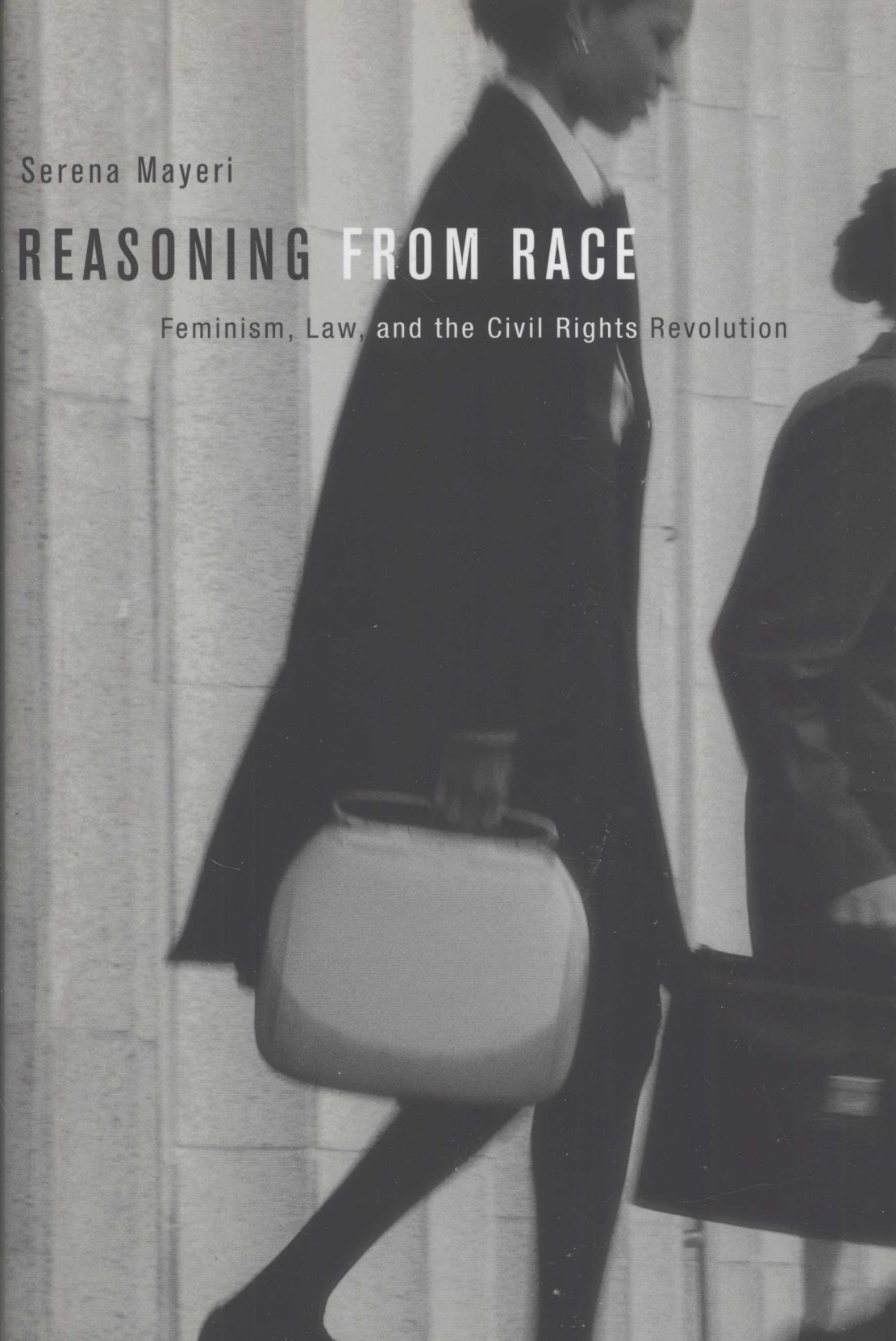

Serena Mayeri

REASONING FROM RACE

Feminism, Law, and the Civil Rights Revolution

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Mayeri, Serena.
Reasoning from race : feminism, law, and the civil rights revolution / Serena Mayeri.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-674-04759-4 (alk. paper)
1. Sex discrimination against women—Law and legislation—United States—History—20th century. 2. Women's rights—United States—Philosophy. 3. Feminist jurisprudence—United States. 4. Women's rights—United States—History—20th century. 5. Civil rights movements—United States. 6. Women—Legal status, laws, etc.—United States—History—20th century. 7. Constitutional law—United States—Methodology. 8. Feminist theory—United States. I. Title.
KF4758.M39 2011
342.7308'78—dc22 2010048448

REASONING FROM RACE

FOR MY PARENTS

Harriet and Ray Mayeri

ABBREVIATIONS USED IN TEXT

Organizations

ACLU	American Civil Liberties Union
CCR	Center for Constitutional Rights
CEDAPW	Campaign to End Discrimination Against Pregnant Workers
CESA	Committee to End Sterilization Abuse
FEW	Federally employed women
LCCR	Leadership Conference on Civil Rights
LDF	NAACP Legal Defense and Educational Fund, Inc.
NAACP	National Association for the Advancement of Colored People
NBFO	National Black Feminist Organization
NEA	National Education Association
NOW	National Organization for Women
NOW LDEF	NOW Legal Defense and Education Fund
NUL	National Urban League
NWP	National Woman's Party
PCSW	President's Commission on the Status of Women
SPLC	Southern Poverty Law Center
WEAL	Women's Equity Action League
WLF	Washington Legal Foundation
WRP	ACLU Women's Rights Project

Government Agencies

DOJ	Department of Justice
EEOC	Equal Employment Opportunity Commission
HEW	Department of Health, Education, and Welfare

CONTENTS

INTRODUCTION

In October 2008, LaDoris Cordell was hopeful. Polls showing that Americans would likely elect the first black president buoyed Cordell, a university administrator and former judge. Her optimism extended to the likely fate of Proposition 8, a ballot measure that would prohibit same-sex marriage in California. Although she was "well aware of the black community's discomfort with things gay," Cordell nevertheless believed that "the African American electorate will come through" and vote against the ban.[1]

Less than a week later, Cordell felt "angry" and "betrayed." Barack Obama had won, but so had Prop 8. Worse, many pundits attributed both victories to historically high African American turnout.[2] After a "long and tortured history of fighting against discrimination and exclusion," Cordell lamented, "black folks . . . vote[d] to oppress others in exactly the same way."[3] A mother of two who was once married to a man, Cordell described herself as an "African American lesbian who [has] been in a loving relationship for over two decades." She wrote, "I did not choose to be gay anymore than I chose to be black."[4] Cordell's rhetorical analogy between sexual orientation and race and between gay rights and civil rights echoed the legal arguments adopted by California's highest court less than six months earlier. In a stirring opinion legalizing

same-sex marriage, the court had declared that "an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights."[5]

Not everyone embraced the parallels that seemed so self-evident to Cordell. Opponents of same-sex marriage rejected the moral equivalence they implied. Some more sympathetic to gay rights worried about alienating African Americans whose religious beliefs or memories of Jim Crow made comparisons to antigay discrimination offensive or painful. Others feared that pithy slogans like "Gay Is the New Black" trivialized both racial oppression and homophobia while implying that gayness and blackness were mutually exclusive.[6]

Stanford law professor Richard Thompson Ford offered a different critique. Much opposition to same-sex marriage, he argued, stemmed not from "prejudice and bigotry" but from a desire to preserve "distinctive sex roles" within marriage. "Civil rights law," wrote Ford in an article published the week after the election, "reflects this ambivalence about sex difference." Judges scrutinized sex discrimination less carefully than race discrimination under the federal Constitution; employment laws allowed for sex-specific workplace grooming standards and other sex-based distinctions.[7] Ford's logic suggested that the same misgivings that had prevented courts and legislatures from embracing a full-blown analogy between race and sex might stand in the way of including gay Americans under the civil rights umbrella.

The unfinished business of sex equality is often expressed in such comparative terms by legal scholars, political pundits, and casual observers alike. The African American quest for civil rights has become so deeply ingrained in American consciousness that it is the yardstick against which all other reform movements are measured.[8] In the American legal system, analogical reasoning often justifies applying accepted principles to new circumstances; analogies to race have therefore held particular salience to those who demand changes in the law. "The African American struggle for social equality . . . has provided the deep structure, social resonance, and primary referent for legal equality," the feminist legal theorist Catharine MacKinnon observed in 1991.[9] By the twentieth century's end, the use of race as a template for other rights claims had become routine. In the words of legal scholar Janet Halley, "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*."[10]

Although such analogies now carry an aura of inevitability, it was not always so. Nineteenth-century women's rights movements famously compared marriage to slavery and women to freedmen in the hope of enfranchising women through the Reconstruction Amendments.[11] Race-sex analogies then lay largely, though not entirely, dormant for almost a century, until their resurrection in the early 1960s.[12]

Beginning in the 1960s, "second-wave" feminists conscripted legal strategies developed to combat race discrimination into the service of women's rights.[13] They compared discrimination against women to the injustices suffered by racial minority groups, asserting that sex inequality, like racial subordination, betrayed the American promise of egalitarian democracy. Feminists also promoted parallels between race and sex as legal categories. Litigators argued that sex, like race, should be a "suspect classification" under the Fourteenth Amendment's equal protection clause. Supporters of the Equal Rights Amendment (ERA) insisted that women, like African Americans, needed constitutional protection of their rights. Feminists sought to codify race-sex analogies in employment discrimination statutes, educational equity laws, and affirmative action policies by listing sex alongside race as a prohibited category of discrimination and as a basis for remedies.

By the early 1980s, feminists had secured significant legal and constitutional advances. But their success had limits. So did race-sex analogies, according to many feminist theorists. Such comparisons, they charged, epitomized white women's exploitation of African Americans' hard-won victories and ignored the complicated interactions between race and sex. Moreover, race-sex analogies obscured the experiences of women of color. The title of an influential anthology published in 1982 said it all: *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave.*[14]

The modern origins of the legal race-sex analogy could not have been further removed from the parasitic and marginalizing tendencies decried by this new generation of feminists. Two decades earlier, Pauli Murray, an African American attorney, scholar, and activist, engineered the rebirth of reasoning from race as the centerpiece of feminist legal strategy. Murray was determined to fight "Jane Crow"—laws and practices that segregated or discriminated against women—by emulating the battle against Jim Crow. For Murray, the race-sex analogy depicted the struggles for racial justice and sex equality as intertwined and rooted in century-old alliances between movements against slavery and for women's rights. Murray's analogy placed African American women's ad-

vancement at the center of an integrated campaign for what she called "human rights." Murray linked the battles against Jim and Jane Crow because she hoped to close the divide between the reawakening feminist movement and the black civil rights cause. In civil rights advocacy she found both an effective strategic model and a compelling source of moral legitimacy for the feminist legal battles of her time.

"Reasoning from race" eventually included a variety of strategies. Feminists tried to emulate the civil rights movement's organizational structure and tactics: most famously, the NAACP Legal Defense Fund's triumphant litigation campaign against state-sponsored racial segregation inspired feminists to seek judicial redress. Feminists also used analogies rhetorically, to unsettle habits of thought and practices that seemed natural and just, as racial difference and subordination once did. If advertisements had formerly included "No Negroes Need Apply," then perhaps "Men Only" labels on some jobs were equally problematic.[15] Legal analogies took this rhetorical parallel a step further, justifying similar legislative, administrative, or judicial responses to various forms of injustice. In legislatures, feminists sought the inclusion of sex alongside race and other categories in antidiscrimination laws. In court, they urged judges to examine legal classifications based on sex with the same skepticism applied to racial distinctions. In administrative agencies, they lobbied for the enforcement of laws and regulations against sex as well as race discrimination.

From its inception, reasoning from race provoked controversy. Some civil rights advocates charged that it belittled the African American freedom struggle and risked squandering the movement's hard-won moral and political capital. Some feminists worried that women too wedded to the civil rights example would be unable to develop an independent agenda. Women of color feared that comparing "women" to "blacks" or other "minorities" erased white women's complicity in racial oppression and downplayed the class differences so highly correlated with racial identity. Others simply believed that analogies between race and sex were descriptively inaccurate. Nevertheless, social movement activists and politicians, lawyers and judges, journalists and laypeople continued to use race as an all-purpose comparator.

This book is a history of reasoning from race as a legal strategy pursued by feminists during the 1960s and 1970s. To understand the history of

feminist legal advocacy is to recognize reasoning from race as a fluid, historically variable practice rather than as a fixed or foregone conclusion. The social meaning and legal content of reasoning from race varied widely over time. Political and economic context mattered tremendously, as did the audience to whom feminists presented their demands.

And reasoning from race did not only involve simple parallels or assertions of equivalence. When advocates reasoned from race, they often engaged in more sophisticated uses of comparative analysis. Analogies illuminated differences as well as similarities between race and sex. As the legal scholar Paulette Caldwell has written, analogies can lead "to important insights, which in turn may assist in conceptualizing new approaches to challenging oppression based on either [race or sex]."[16] Reasoning from race allowed feminists to reimagine as well as to emulate ideas, strategies, legal precedents, and policies conceived as responses to racial injustice. As a legal strategy, reasoning from race could be unifying as well as divisive, binding together groups that might otherwise compete for recognition and resources in a shared quest to win or preserve legal rights and remedies.

Why study feminism and the law through the prism of reasoning from race? In the latter years of the civil rights era, reasoning from race transcended legal doctrines, categories, and forums. It cast a long shadow over debates about education and employment, citizenship and reproduction, sexuality and class, political economy and cultural mores. Race and sex had always been deeply intertwined in American culture; feminists' investment in the civil rights revolution married race and sex equality as a matter of law and policy. By the 1970s, it had become impossible to understand one without reference to the other.

The history of reasoning from race illuminates the rich but often troubled relationship between civil rights and feminism.[17] The connections between race and sex as categories of legislation and jurisprudence reflected and shaped interactions among social groups and social movements. The stories of women like Murray who attempted to bridge these movements expose moments of effective cooperation as well as conflict and competition. These stories also highlight the integral role played by African American women—as strategists, plaintiffs, theorists, and government officials—in shaping both equality law and the infrastructure of the civil rights–feminist coalition.

Finally, the civil rights paradigm continues to influence movements

for legal change in ways both obvious and subtle. Advocates grapple with how to frame their claims in relation to the civil rights struggle, how to win the support of established civil rights constituencies, and how to build upon race equality law precedents.[18] Conservative movements, too, have sought to assume the civil rights mantle even as they resist and revise its core premises.[19]

Historians and sociologists, political scientists and legal scholars have acknowledged the centrality of race-sex analogies to feminist advocacy in the United States.[20] But we know remarkably little about how reasoning from race has evolved over time, especially after race-sex parallels were incorporated—often partially and problematically—into the law.[21] This book fills that gap by examining both the origins of modern race-sex analogies in the period before 1970 and their subsequent career as a building block of equality law in the 1970s.

Reasoning from race has often borne blame, explicitly or implicitly, for the shortcomings of 1970s sex equality law. Commentators routinely characterized feminists' legal agenda during this period as limited to "formal equality," an "equal treatment" or "sameness" model that required women's assimilation to a male norm. The resulting jurisprudence removed overt, sex-based classifications from the law but failed to grapple with enduring physical and cultural sex differences or with racial and economic stratification among women. Feminists, these critiques suggested, took from civil rights the principle of colorblindness and applied it to sex. In doing so, they embraced an impoverished version of equal rights that allowed for the continued subordination of women, especially those who were poor or of color.

Or did they? Recent historical work has persuasively debunked popular characterizations of second-wave feminism as a white, middle-class, myopic endeavor populated by disaffected housewives, disillusioned young refugees from the civil rights and antiwar movements, radicals seeking sexual freedom but oblivious to bread-and-butter economic concerns, and naïve liberals who placed too much faith in principles like neutrality and equal opportunity. Historians have uncovered instead tremendous diversity of background, thought, and activism, a multiplicity of movements within a movement obscured by an exclusive focus on mainstream, predominantly white organizations and advocacy.[22] A few of these studies have examined legal advocacy in particular areas, such as affirmative action and sexual harassment, often at the less visible but no

less important grassroots level.[23] Historians have also begun to explore the pivotal contributions of Murray and other African American women to the revitalization of feminist advocacy in the 1960s and early 1970s.[24]

Tracing the career of reasoning from race across time helps to bridge the gap between these two disparate pictures. How did the rich, intersectional vision promoted by African American feminist advocates and their allies become the more limited version of legal equality, largely divorced from race and reproduction, that prevailed by the early 1980s? Answering this question will take us to schools and workplaces from the rural South to the urban North, to the pages of local newspapers and law reviews, and to intricate doctrinal debates in law offices, judges' chambers, and the halls of Congress. Looking beneath the surface of Supreme Court opinions reveals the arguments and strategies that did not prevail, the disappointments and missed opportunities—the "lost promise" of feminist advocacy.[25] It also helps to explain why these efforts have largely vanished from our historical memory.

The story of feminist legal advocacy is in part one of constraint and compromise. Feminists enjoyed their first substantial legal success just as a conservative resurgence and an economic downturn narrowed the possibilities for progressive reform. Movements against abortion, affirmative action, and other rights claims put feminists and civil rights advocates on the defensive. Reasoning from race became a less attractive strategy to the extent that Americans harbored second thoughts about the civil rights revolution and began to see economic opportunity as a zero-sum game.

But the 1970s also offered opportunities for creativity and coalition. Throughout the decade, feminists continued to promote much more expansive conceptions of equality than those that survived in published Supreme Court opinions. When the strategy of reasoning from race foundered, feminists reshaped the relationship between race and sex equality law. When formal equality principles fell short, they turned to more capacious theories, many of which implicated race as well as sex equality. When conservatives organized, feminists and civil rights advocates united against a common adversary. And when Ronald Reagan's election and the ERA's demise ended the civil rights era, feminist defeats proved not merely demoralizing but liberating.

This book uncovers the myriad ways that Americans reconfigured the relationship between racial injustice, sex inequality, and the law in the 1960s and 1970s.[26] During this period, reasoning from race usually—

though not always—concerned a particular racial group's historical struggle: even rhetoric that compared "women" to "minorities" frequently treated "minorities" as synonymous with "Negroes" or "blacks," and "civil rights" as the concern of African Americans.[27] The "feminism" of this book's title refers to the strands of activism that sought to remedy the injustice and inequality that advocates for women identified within American society and law. Feminist advocates lobbied, litigated, organized, demonstrated, and educated. They supported legislation, the repeal or judicial invalidation of discriminatory laws and policies, and the amendment of state and federal constitutions. The courts were a particularly crucial arena for feminists' reasoning from race, an homage to the civil rights movement's successful constitutional litigation strategy.

Feminist legal advocacy was only one component of the post–World War II women's movement: other feminist objectives were not primarily, or even nominally, legal in nature. Not only legal decision makers but also members of nongovernmental organizations, employees, professors, litigants, and homemakers all played important roles. Other historical actors included the politicians, journalists, attorneys, fellow activists, and members of the public to whom feminists presented their demands. Still, legal and constitutional reform played a starring role in the feminist constellation. The civil rights revolution shaped feminists' imagination—especially the imagination of those for whom racial justice and sex equality were inseparable.

Like Pauli Murray a half-century earlier, LaDoris Cordell placed her faith in the law as an instrument of social change. Despite her keen disappointment in the passage of Prop 8, Cordell remained optimistic about the future of same-sex marriage in California. "The courts," she predicted, "will reopen the doors of marriage to the gay community"—just as they had to mixed-race couples decades earlier.[28] Whether advocates embrace or reject civil rights as a model, they cannot escape the power of its legacy.

1

THE REBIRTH OF RACE-SEX ANALOGIES

"The similarities of the societal positions of women and Negroes are fundamental rather than superficial," wrote college student Florynce "Flo" Kennedy in 1946. "[A] dispassionate consideration of the economic, sociological, historical, psychological, political, and even physiological aspects reveals some rather startling parallels." Both groups were "generally dependent economically upon the dominant group"; they were "barred from many specialized fields," penalized more severely for "sex 'transgressions,'" considered "naturally inferior," and their "[i]ndividual distinctions [were] minimized." Kennedy condemned "segregation, discrimination, and limitation" and hoped that comparing "women" and "Negroes" would "hasten the formation of alliances" and "counteract the divide-and-rule technique" endemic to social domination.[1]

Kennedy's analysis, written for a Columbia sociology course, reflected and anticipated a flowering of social science scholarship in the 1940s and 1950s that analogized "women" to "Negroes." Gunnar Myrdal's landmark *An American Dilemma* (1944) contained a six-page appendix titled "A Parallel to the Negro Problem," in which he described how women, like African Americans, 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.[2]

Myrdal's insight had many adherents, setting the stage for the analogical reasoning that became a powerful tool for feminist lawyers in subsequent decades. In 1945, anthropologist Ashley Montagu compared "antifeminism" with "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."[3] Social psychologist Helen Mayer Hacker's 1951 article "Women as a Minority Group" argued that "women and Negroes" occupied a "caste-like status," and described the similar operation of race- and sex-based subordination.[4] In one of the pivotal texts of second-wave feminism, *The Second Sex*, the French social theorist Simone de Beauvoir identified "deep similarities between the situation of the woman and that of the Negro."[5]

These writers laid the groundwork for the rhetorical and constitutional arguments that revolutionized American law in the 1960s and 1970s. Prior to 1960, however, race-sex parallels were of limited use to feminists. In 1951, for example, Flo Kennedy became the second African American woman to receive a law degree from Columbia. But several years later, when Columbia Law Professor Herbert Wechsler questioned whether racially segregated schools should always be held to violate the Constitution's equal protection guarantee, he invoked sex segregation as an uncontroversial example of legitimate discrimination. "Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?"[6] he asked rhetorically. To Wechsler—and likely to many Americans—the answer was almost surely no.

In the century before 1960, a few advocates for women argued that similarities between sex and race warranted comparable treatment.[7] But it was not until the early 1960s that reasoning from race became a centerpiece of feminist legal advocacy. As African Americans enjoyed greater success in the courts in the years after World War II, black civil rights became a more promising template for other reforms, including women's rights. Even then, many advocates for women remained skeptical of the race-sex analogy. Its acceptance required a concerted effort to overcome long-standing racial and ideological divisions, and achieving unity was not without costs.

* * *

Although the social science literature comparing race and sex was new in the mid-twentieth century, such comparisons had a long history in American political and legal discourse. Analogies between servitude and marriage had long legitimated both white dominion over blacks and male domination of women as natural, even divinely sanctioned.[8] Apologists for racial slavery in the seventeenth and eighteenth centuries drew upon common understandings of women's supposed inherent inferiority to justify a similar subordination for persons of African descent. In the nineteenth century, slaveholders defended the South's "peculiar institution" as an indispensable element of other social hierarchies, most prominently marriage.[9] In a sense, then, women's rights advocates of the nineteenth century answered proslavery theorists on their own terms when they invoked similarities between the legal status of married free women and slaves. These rhetorical parallels were useful in that they both attracted white Northern women to abolitionism and alerted them to their own subordination.[10] Sojourner Truth and others subtly challenged such comparisons and highlighted the particular plight of African American women by telling their own stories of suffering and strength.[11]

Analogical arguments resurfaced among advocates of racial and sexual equality after the Civil War. For a 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 they made freedwomen a central symbol of their struggle. The Reconstruction Amendments proved an enticing template for the enfranchisement of women as well as black men. Republican politicians' reluctance to accept any analogy between black male suffrage and women's enfranchisement provoked bitter and lasting divisions between those who believed it was better to achieve black male enfranchisement, even if woman suffrage was not forthcoming, and those who thought abolitionists should oppose anything short of universal suffrage.[12] Beginning in the late 1860s, some white woman suffragists turned to racist and nativist arguments, compromising the link between white women's rights and the struggle for racial equality.[13] This betrayal signaled the end of an interracial abolitionist-feminist alliance.

Race-sex analogies survived in pockets, especially among African American advocates of woman suffrage. In a typical formulation, W. E. B.