

October, 2013

Women's Exclusion from the Constitutional Canon

Jill Elaine Hasday

WOMEN'S EXCLUSION FROM THE CONSTITUTIONAL CANON

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This Essay asks why sex equality is outside the constitutional canon. While race discrimination is a canonical concern of constitutional law, the story of America's struggles over and against sex discrimination is not widely taken to be a central, organizing part of our constitutional tradition—a defining narrative that exemplifies and expresses the nation's foundational values and commitments. I offer three potential explanations for the exclusion of sex equality from the constitutional canon. First, the Supreme Court's jurisprudence developed in ways that suggested that sex discrimination was not a core constitutional problem and concern, especially when compared to race discrimination. Second, the Court's sex discrimination case law has focused narrowly on state action that draws explicit distinctions between women and men. The Court has little interest in reviewing facially neutral laws, no matter their contribution to women's unequal status, so the Court hears few sex discrimination suits anymore. This paucity of case law contributes to the sense that conflicts over sex equality are no longer central to constitutional law, if they ever were. Third, the story of women's resistance to sex discrimination may be less prominent in American constitutional law because this story is less prominent in American popular culture, and vice versa. The Essay concludes by exploring why sex equality may ultimately become part of the constitutional canon. The Court's reading of the Equal Protection Clause to prohibit sex discrimination has become much less controversial since the 1970s. Moreover, new analogies have emerged in constitutional law, which over time have pushed sex discrimination closer to the core of the Equal Protection Clause. Courts, lawmakers, advocates, and scholars seeking constitutional protection from sexual orientation discrimination now routinely analogize sexual orientation to sex. The frequency and prominence of these analogies, which presuppose that struggles against sex discrimination are already central to our nation's understanding of equality and equal protection, may help move sex into the constitutional canon at last.

* Centennial Professor of Law, University of Minnesota Law School. © 2013, Jill Elaine Hasday. I would like to thank Akhil Amar, Susanna Blumenthal, Allan Erbsen, Kurt Lash, Larry Solum, and the participants in the *University of Illinois Law Review's* symposium on *America's Unwritten Constitution*.

INTRODUCTION

Akhil Amar's fascinating new book, *America's Unwritten Constitution*,¹ offers a rich and nuanced account of our nation's constitutional past and present. In this Essay, I will focus on one question that emerged as I read the book: Why is the story of women's struggles against sex-based discrimination not a canonical story in American constitutional law? Why is sex equality outside the constitutional canon despite its legal, political, and social significance?

I confess that I am very focused on the idea of legal canons now because I am writing a book about family law's canon.² In my view, legal canons are not necessarily limited to a set of foundational texts that exemplify, guide, and constitute a discipline. Canons can also include dominant stories, examples, and ideas that judges, lawmakers, lawyers, scholars, and citizens routinely invoke and utilize to describe and explain a body of law and its governing principles. A canonical story is widely understood to be central to a field, illustrating, defining, and embodying its core values and guiding concerns.

Although Amar does not make his case in precisely these terms, from my perspective his book argues that the story of America's struggles over and for racial equality is a canonical story in American constitutional law. It is an overarching narrative that legal decision-makers and commentators repeat, reinforce, and rely on with the help of canonical statutes, speeches, and judicial decisions, as well as anticanonical judicial decisions. *America's Unwritten Constitution* contends that at least six texts outside the Constitution itself are canonical in American constitutional law. Four of the six texts that Amar identifies are centrally about race: Abraham Lincoln's Gettysburg Address, Martin Luther King's "I Have a Dream" speech, the Supreme Court's opinion in *Brown v. Board of Education*, which held that racially segregated public education could never be constitutional, and the Northwest Ordinance, which banned slavery in the Northwest Territories as one of its signature provisions.³ Amar also argues that three Supreme Court decisions are anticanonical, consigned to "the lowest circle of constitutional Hell."⁴ Two of the three anticanonical decisions that Amar names revolve around race: *Dred Scott v. Sanford*,⁵ which held that African-Americans could not be United States citizens and that Congress could not prohibit

1. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

2. See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (forthcoming 2014).

3. See AMAR, *supra* note 1, at 247. The other two texts are the Declaration of Independence and *The Federalist*. See *id.*

4. *Id.* at 270.

5. 60 U.S. (19 How.) 393, 406, 452 (1857).

slavery in federal territories, and *Plessy v. Ferguson*,⁶ which upheld the constitutionality of 'separate but equal' racial segregation.⁷

I agree with Amar that race is central to the American constitutional canon. The story of how the United States labored to throw off first slavery and then legalized racial segregation in a bid for racial equality is a core narrative in the American constitutional tradition. The texts that Amar identifies as canonical are widely known and widely taken to espouse principles that are fundamental to America's national identity. It would be political suicide for a public official to speak against any of those texts or to speak favorably about either the *Dred Scott* or *Plessy* decisions. For example, judicial, legislative, scholarly, and popular disputes in American constitutional law do not center on the correctness of *Brown* or the moral appeal of King's "I Have a Dream" speech. *Brown*'s rightness and the beauty of King's Dream are polestars, such that debates instead revolve around ongoing controversies about how *Brown* and King's Dream are best understood and implemented.

However, reading Amar's discussion of the constitutional canon made me wonder why the story of America's struggles over and for sex equality is not also canonical in constitutional law. Why aren't some of the key texts in this struggle canonical texts? Why don't schoolchildren, or law students for that matter, routinely read the Declaration of Sentiments (1848), which marked the start of the first organized woman's rights movement in the United States and announced many of that movement's goals?⁸ Why don't they read the National Organization for Women's Statement of Purpose (1966)⁹ or Bill of Rights (1967),¹⁰ which announced an agenda for the second women's movement?

Similarly, why aren't some of the decisions in which the Supreme Court denied women's claims to equal rights now considered anticanonical decisions? The Court's constitutional jurisprudence on women contains many precedents that appear to be prime candidates for anticanonical status, such as *Bradwell v. Illinois* (1873),¹¹ which upheld women's exclusion from the practice of law, *Minor v. Happersett* (1875),¹² which upheld women's exclusion from voting, *Muller v. Oregon* (1908),¹³ which upheld legal limits on the hours that women could work outside the

6. 163 U.S. 537, 550–51 (1896).

7. See AMAR, *supra* note 1, at 270. The third anticanonical decision Amar identifies is *Lochner v. New York*. See *id.*

8. Declaration of Sentiments (1848), reprinted in 1 HISTORY OF WOMAN SUFFRAGE 70–71 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1881).

9. Nat'l Org. for Women, Statement of Purpose (1966), reprinted in FEMINIST CHRONICLES, 1953–1993, at 159–63 (Toni Carabillo et al. eds., 1993).

10. Nat'l Org. for Women, Bill of Rights in 1968 (1967), reprinted in FEMINIST CHRONICLES, 1953–1993, *supra* note 9, at 214.

11. 83 U.S. (16 Wall.) 130, 139 (1873).

12. 88 U.S. (21 Wall.) 162, 178 (1875).

13. 208 U.S. 412, 423 (1908).

home, *Goesaert v. Cleary* (1948),¹⁴ which upheld legal prohibitions on women working in some occupations, and *Hoyt v. Florida* (1961),¹⁵ which upheld laws automatically excluding women from juries.

Competent judges, legislators, lawyers, legal scholars, and law students are familiar with the basic outlines of the constitutional law of sex discrimination. But the story of America's struggles over and for sex equality is not widely taken to be a central, organizing part of the American constitutional tradition—a defining narrative that exemplifies and expresses the nation's core values and commitments. This is why it is plausible, if still striking, that Amar's list of canonical texts and anticanonical decisions in American constitutional law does not include anything linked to sex equality.

Other scholars writing about canonical or anticanonical constitutional cases also focus on the story of America's struggles over and for race equality and not the story of America's struggles over and for sex equality. For instance, Jamal Greene's recent article on the "Anticanon" focuses on four anticanonical decisions. Three of the four are centrally about racial inequality: *Dred Scott*, *Plessy*, and *Korematsu v. United States*,¹⁶ which upheld the internment of Japanese-Americans during World War II. None are about sex-based inequality.¹⁷ In discussing the contents of the constitutional canon, Greene observes that the first Supreme Court decision applying intermediate scrutiny under the Equal Protection Clause to sex-based state action is not a canonical decision. Greene explains that *Craig v. Boren* (1976)¹⁸ "was cited in an average of 2.4 decisions per Term between the 1976 and 2010 Terms of the Supreme Court, but to say it is therefore part of the canon would make the canon unworthy of any special interest or attention."¹⁹

I. THE STORY OF AMERICA'S STRUGGLES OVER WOMEN'S LEGAL STATUS

Although not (yet) part of constitutional law's canon, the story of America's struggles over women's legal status is fascinating and sometimes even heartening. We begin with a Constitution that (some privileged white) men wrote and then voted on in Philadelphia and at state ratification conventions. The Constitution produced in 1787 did not include the word male because the Founders presumed that they could use

14. 335 U.S. 464, 465 (1948).

15. 368 U.S. 57, 62 (1961).

16. 323 U.S. 214, 223–24 (1944).

17. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). *Lochner* is Greene's fourth anticanonical case. See *id.*

18. 429 U.S. 190, 197 (1976).

19. Greene, *supra* note 17, at 397.

sex-neutral language—“We the People,”²⁰ rather than “We the Men”—without suggesting that men and women had equal rights under the law or in the Constitution. That firmly embedded assumption was as much a part of the background against which the Constitution was written as William Blackstone’s *Commentaries on the Laws of England* (1765) or anything else.

Indeed, Blackstone’s *Commentaries*, which Amar discusses as an important reference work for the Founders,²¹ endorsed and may even have strengthened and made more extreme the bonds of common law coverture, which legally subordinated married women to their husbands and stripped wives of most aspects of a separate legal identity. Blackstone famously explained that “the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing.”²²

Almost a century after the Founding, the United States restructured significant aspects of its constitutional order in the aftermath of the Civil War. Yet congressmen on all sides of the debates over the Fourteenth Amendment hoped that the amendment’s Equal Protection Clause would not be read to disrupt common law coverture or prohibit sex discrimination, even as their discussion of the amendment made clear that such an interpretation of equal protection was possible. For example, Representative Robert Hale warned in 1866 that the proposed amendment would empower Congress “to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women,” at a time when “[t]here is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less extent still exist.”²³ Representative Thaddeus Stevens, one of the Fourteenth Amendment’s key supporters, insisted in response that married women’s coverture was consistent with a constitutional guarantee of equal protection, explaining that “[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.”²⁴ Hale, however, continued to worry about “the extremely vague, loose, and indefinite provisions of the proposed amendment.”²⁵ He drew attention to a logical gap in Stevens’s argument: “The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend

20. U.S. CONST. pmbl.

21. See AMAR, *supra* note 1, at 7–8.

22. 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

23. CONG. GLOBE, 39TH CONG., 1ST SESS. 1064 (1866) (statement of Rep. Robert Hale).

24. *Id.* (statement of Rep. Thaddeus Stevens).

25. *Id.* (statement of Rep. Robert Hale).

to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.”²⁶

The word “male” first appeared in the Constitution in the Fourteenth Amendment’s second section, which provided that states would suffer no penalty for continuing to exclude women from voting.²⁷ The entry of the word male into the Constitution in 1868 constituted both a key failure and an enormous mark of recognition for the nineteenth-century woman’s rights movement. That movement first coalesced in organized form at an 1848 convention held in Seneca Falls, New York. Woman’s rights advocates at the Seneca Falls Convention issued a “Declaration of Sentiments” setting out a sex equality agenda that still has not been completely achieved.²⁸ The Declaration of Sentiments explicitly modeled itself on a canonical text in American constitutional law, the Declaration of Independence. It declared: “We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.”²⁹ Where the Declaration of Independence listed grievances against King George, the Declaration of Sentiments detailed “a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.”³⁰ But the Declaration of Sentiments is not canonical in American constitutional law. Many Americans have never heard of it, much less read it.

The inclusion of the word male in the Fourteenth Amendment marked a bitter setback for the nineteenth-century woman’s rights movement, which had hoped that women’s work for the Union cause during the Civil War would be rewarded at war’s end with a grant of woman suffrage.³¹ At the same time, the fact that the word male was in-

26. *Id.*

27. See U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

28. See Declaration of Sentiments, *supra* note 8, at 70–71.

29. *Id.* at 70.

30. *Id.*; see also 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 8, at 68 (“After much delay, one of the [women gathered to write the Declaration of Sentiments] took up the Declaration of 1776, and read it aloud with much spirit and emphasis, and it was at once decided to adopt the historic document, with some slight changes such as substituting ‘all men’ for ‘King George.’”).

31. See 2 HISTORY OF WOMAN SUFFRAGE 90–151 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1882); CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 44–51 (1926).

cluded in the Fourteenth Amendment confirmed how much attention and concern the woman's rights movement had attracted in a very short period. Just two decades after the Seneca Falls Convention, the woman's rights movement and its claims could not be ignored, even in the Constitution. The drafters of the Fourteenth Amendment realized that if they did not use sex-specific language in the Fourteenth Amendment's second section, then women would immediately contend that they had been enfranchised and that women might even win such arguments.³²

After the ratification of the Fourteenth Amendment, the woman's rights movement continued to mobilize for woman suffrage and many other equality goals. Securing women's right to vote required the formation of a mass movement, which culminated in the ratification of the Nineteenth Amendment in 1920. This amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."³³ As two leading suffragists recalled in 1926, "[t]o get the word male in effect out of the constitution cost the women of the country fifty-two years of pauseless campaign thereafter. . . . Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest and such aid as they could. It was a continuous, seemingly endless, chain of activity."³⁴ With decades of work, woman suffrage went from being widely derided as simultaneously ridiculous and frightening to becoming enshrined in constitutional law.

The second organized women's movement in the United States emerged in the late 1960s and early 1970s. This movement was importantly staffed by women who were both energized by their role in the civil rights movement for racial equality and incensed by the treatment that women sometimes experienced within that movement.³⁵

The second women's movement did not accomplish all of its goals. Much of its agenda remains a work in progress, rather than a completed project. But the movement did succeed in significantly expanding the opportunities open to women and men in all areas of life, including work, politics, family, and civil society. Moreover, this movement succeeded in inspiring and pushing the Supreme Court to enforce constitutional pro-

32. See 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 31, at 90–91.

33. U.S. CONST. amend. XIX, § 1.

34. CATT & SHULER, *supra* note 31, at 107–08.

35. See, e.g., SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT 83–101, 119–25, 156–232 (1979); JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION 56–62 (1975); Casey Hayden & Mary King, *Sex and Caste: A Kind of Memo from Casey Hayden and Mary King to a Number of Other Women in the Peace and Freedom Movements* (Nov. 18, 1965), reprinted in LIBERATION, Apr. 1966, at 35, 35–36; Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233–35 (1965); Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 254, 257–59 (1971).

tections against sex discrimination after decades in which the Court tolerated, endorsed, and reinforced the legalized subordination of women to men.

II. WHY IS SEX EQUALITY OUTSIDE THE CONSTITUTIONAL CANON?

Why, then, is the story of America's struggles over and for sex equality outside the constitutional law canon? I think there are at least three sets of potential explanations.

A. *How Sex Discrimination Jurisprudence Came into Constitutional Law*

One set of possible explanations for why sex is outside the constitutional canon centers on how questions of sex discrimination came into constitutional law. The Supreme Court's case law developed in ways that suggested that sex discrimination was not a core constitutional problem and concern.

The Court's sex discrimination jurisprudence did not develop as an interpretation of the Nineteenth Amendment. Immediately after that amendment's ratification, some courts suggested that the Nineteenth Amendment was the source of a general constitutional commitment to sex equality, reaching beyond voting.³⁶ Most notably, the Supreme Court in *Adkins v. Children's Hospital* (1923)³⁷ struck down a minimum wage law that applied to women but not men,³⁸ declaring that "[i]n view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences [between the sexes] have now come almost, if not quite, to the vanishing point."³⁹

That some courts initially read the Nineteenth Amendment to have constitutional implications for women's legal status that extended beyond voting should perhaps be unsurprising, given how much the campaigns for and against woman suffrage focused on the impact that enfranchisement would have on women's roles in the family and the economy, as well as in political life.⁴⁰ However, courts settled relatively

36. For lower court opinions, see *Children's Hosp. v. Adkins*, 284 F. 613, 618 (D.C. Cir. 1922), *aff'd*, 261 U.S. 525 (1923); *United States v. Hinson*, 3 F.2d 200, 200 (S.D. Fla. 1925); *Hollander v. Abrams*, 132 A. 224, 229 (N.J. Ch. 1926).

37. 261 U.S. 525 (1923).

38. *See id.* at 539, 562.

39. *Id.* at 553. For more discussion of this aspect of *Adkins*, see Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 221–25 (1991).

40. *See, e.g.*, AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920*, at 14–28, 96–122 (W.W. Norton & Co. 1981) (1965).

quickly on the view that the Nineteenth Amendment was simply about women's suffrage.⁴¹ While the prospect of women voting was highly controversial before the Nineteenth Amendment's ratification, woman suffrage quickly became uncontroversial after ratification, perhaps because women did not vote in a bloc as opponents of the amendment had feared and supporters had hoped.⁴² As a consequence, courts did not develop a Nineteenth Amendment jurisprudence. Today, even some law professors have to be reminded what the Nineteenth Amendment provides.⁴³

Without a Nineteenth Amendment jurisprudence on which to draw, the Supreme Court decided some key constitutional cases in the 1960s and early 1970s before developing a robust body of case law that was alert to questions of sex equality or gender discrimination. Notably, both *Griswold v. Connecticut*, which struck down an anticontraception law in 1965,⁴⁴ and *Roe v. Wade*, which found a limited constitutional right to abortion in 1973,⁴⁵ did not focus on questions of sex equality and women's status in reasoning about birth control and abortion.

Griswold never suggested that women might have an especially pressing interest in accessing birth control because of the biological fact that only women can become pregnant and the social reality that women are expected to devote their time and energy to raising children in ways that men are not. Instead, the Court discussed the married couple as an undifferentiated unit, declaring: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."⁴⁶

Roe did not explicitly consider how abortion rights might support women's equality by giving women more control over whether they bear children and become mothers, but instead emphasized how (male) doctors, judges, and legislators had understood abortion over time.⁴⁷ Indeed, *Roe's* understanding of abortion regulation was so focused on protecting physicians' autonomy that the Court's account of the constitutionally protected right to choose abortion sometimes appeared to give doctors,

41. For an illuminating account of this history, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1012–22 (2002).

42. On female voting patterns after the Nineteenth Amendment's ratification, see SOPHONISBA P. BRECKINRIDGE, *WOMEN IN THE TWENTIETH CENTURY: A STUDY OF THEIR POLITICAL, SOCIAL AND ECONOMIC ACTIVITIES* 245–56 (1933); WILLIAM HENRY CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920–1970*, at 29–34 (1972); Sara Alpern & Dale Baum, *Female Ballots: The Impact of the Nineteenth Amendment*, 16 J. INTERDISC. HIST. 43, 48, 61–64 (1985).

43. See Siegel, *supra* note 41, at 1045.

44. See 381 U.S. 479, 485–86 (1965).

45. See 410 U.S. 113, 164–65 (1973).

46. *Griswold*, 381 U.S. at 486.

47. See *Roe*, 410 U.S. at 129–52.

rather than pregnant women themselves, the central role in abortion decisions. For instance, *Roe* explained that “for the period of pregnancy prior to [approximately the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”⁴⁸ The Court stated that “[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”⁴⁹

Griswold and *Roe*’s inattention to issues of sex equality and women’s legal status is striking in retrospect. But this aspect of the opinions may reflect the fact that the Court decided both cases before or just as the second women’s movement was getting underway and before the Court had done much wrestling with the movement’s claims.

Moreover, the Equal Rights Amendment, which would have textually marked the Constitution’s commitment to sex equality and served as a rallying point for further legal, political, and social reform, was never ratified. The second women’s movement focused enormous energy in the 1970s and early 1980s on campaigning for the ERA, which would have amended the Constitution to provide that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”⁵⁰ The amendment had the support of a popular majority, but won ratification in only thirty-five of the necessary thirty-eight states.⁵¹

Instead, the Supreme Court developed its sex discrimination jurisprudence under the Equal Protection Clause of the Fourteenth Amendment, which provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵² The Court importantly built this jurisprudence on an analogy to race.⁵³

The Court first struck down a statute for denying women equal protection of the laws in *Reed v. Reed*,⁵⁴ decided in 1971. *Reed* was a significant milestone. It took 103 years from the Fourteenth Amendment’s ratification—a century in which the legalized privileging of men over women was pervasive—for the Supreme Court to identify any law that failed to provide women with equal protection. But *Reed* did not of-

48. *Id.* at 163.

49. *Id.* at 164.

50. H.R.J. Res. 208, 92d Cong., 86 Stat. 1523, 1523 (1972).

51. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 1, 14–19 (1986).

52. U.S. CONST. amend. XIV, § 1.

53. For an insightful discussion of how feminist strategists in the 1960s and 1970s employed analogies between sex discrimination and race discrimination in ways that were often more nuanced, creative, and sophisticated than the Supreme Court’s use of such analogies, see SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 4–7 (2011).

54. 404 U.S. 71 (1971).

fer much explanation for the Court's decision. It held that a provision in the Idaho probate code unconstitutionally preferred men over women for appointment as estate administrators,⁵⁵ observing that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."⁵⁶

The Court's most extended argument for why sex discrimination should be prohibited under the Equal Protection Clause appeared in the four-Justice plurality opinion in *Frontiero v. Richardson*,⁵⁷ which the Court decided in 1973. This plurality focused on explaining why sex discrimination was like race discrimination. For instance, the *Frontiero* plurality reported that "throughout 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."⁵⁸ The plurality observed that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁵⁹ The plurality noted that Congress had prohibited employment discrimination based on sex as well as race in Title VII of the 1964 Civil Rights Act.⁶⁰

The *Frontiero* plurality emphasized commonalities between sex discrimination and race discrimination because the plurality wanted to subject sex-based state action to strict scrutiny under the Equal Protection Clause, the same level of scrutiny that the Court applies to race-based state action.⁶¹ But the plurality's reasoning by analogy left the impression that sex discrimination should be the concern of the Equal Protection Clause only to the extent that it resembles race discrimination and that any differences between sex and race discrimination undercut the case for focusing constitutional attention on sex discrimination.

Another consequence of how the *Frontiero* plurality analogized sex to race is that the plurality left little room for women of color. The plurality opinion was written as if all women were white and all African-Americans were male. It reported that "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names,"⁶² recounting this history as if the category of "slaves" and the category of "women" did not overlap. More generally, the plurality's account of sex discrimination implicitly focused on the experiences of white women, explaining that "[t]raditionally, [sex] discrimination was rationalized by an

55. See *id.* at 73–74.

56. *Id.* at 76.

57. 411 U.S. 677 (1973) (plurality opinion).

58. *Id.* at 685.

59. *Id.* at 686.

60. See *id.* at 687.

61. See *id.* at 682, 688.

62. *Id.* at 685.

attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”⁶³ Sex discrimination directed at white women may have purported to place them on a pedestal, but no one pretended that women of color were up there as well.

A majority of the Court ultimately held in *Craig v. Boren* (1976)⁶⁴ that sex-based state action would trigger intermediate rather than strict scrutiny under the Equal Protection Clause. *Craig* never explained why it would be inappropriate to require strict scrutiny, which would demand compelling state interests and narrow tailoring to further those interests. The *Craig* Court simply stated that sex-based state action “must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁶⁵ However, the implication in *Craig* was that the Court did not fully accept the analogy between sex discrimination and race discrimination and that race discrimination was the core case, the focus of America’s constitutional project to counter inequality. Indeed, Justices explicitly stressed distinctions between sex and race in subsequent sex discrimination opinions that presented explanations for why sex-based state action is subject to intermediate scrutiny.⁶⁶

The Court further reinforced the sense that sex discrimination is not a central problem in constitutional law through the vehicle it selected to announce the intermediate scrutiny standard. On its facts alone, *Craig* was poorly suited to become a canonical decision or to help establish the story of America’s struggles over and for sex equality as a canonical story in constitutional law. Notably, women’s movement lawyers did not originate the litigation.⁶⁷ In this case, a young man and a beer vendor challenged the constitutionality of an Oklahoma law permitting women to buy “‘nonintoxicating’ 3.2% beer” at age eighteen, while men had to wait until they reached age twenty-one.⁶⁸ The right to purchase near beer was

63. *Id.* at 684.

64. 429 U.S. 190 (1976).

65. *Id.* at 197.

66. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . .” (citation omitted)); *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (“[D]etrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.” (citations omitted)).

67. See Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 *TEX. J. WOMEN & L.* 157, 235–38 (2002); Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 11 *WOMEN’S RTS. L. REP.* 73, 93–95 (1989).

68. *Craig*, 429 U.S. at 191–92.

a matter of relatively little practical or cultural significance.⁶⁹ Moreover, *Craig* featured a male plaintiff, as did many of the Court's later sex discrimination decisions.⁷⁰ Yet men have historically been much more likely to benefit from sex discrimination than to be harmed by it. The Court's selection of a male plaintiff's suit deemphasized women's long historical experience of legalized subordination as a central narrative in American law and American life. In contrast, *Brown*, a canonical case if there ever was one, featured African-American plaintiffs contesting the constitutionality of racially segregated public education,⁷¹ an issue that was central to the regime of Jim Crow segregation and crucial to the prospects and opportunities for people of color.

B. *How the Court Has Defined Sex Discrimination*

A second set of potential reasons for why sex is outside the constitutional canon centers on how the Court has defined sex discrimination. The Court has structured its sex discrimination jurisprudence to focus all but exclusively on explicit distinctions between men and women. Laws or other forms of government action that openly treat men and women differently are subject to intermediate scrutiny under the Equal Protection Clause. But less than three years after *Craig*, the Court held in *Personnel Administrator v. Feeney* (1979)⁷² that facially neutral state action with a disparate impact on one sex is subject to rational basis review, the least demanding form of review under the Equal Protection Clause, unless the plaintiff can demonstrate the equivalent of legislative malice—"that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women or men.⁷³

Plaintiffs are extremely unlikely to satisfy this standard. Malicious lawmakers have every incentive to hide their animus to avoid both intermediate scrutiny in the courts and opposition in political arenas. In addition, the literature on cognitive bias suggests that lawmakers may be unlikely to think, even to themselves, that they are acting out of sex-based animus.⁷⁴

69. For contemporaneous commentary on *Craig* stressing the triviality of the case's facts, see Nathan Lewin, *Trivializing Discrimination*, NEW REPUBLIC, Apr. 2, 1977, at 19, 20–21 ("The constitutional question [in *Craig*] was treated with a sobriety appropriate to the non-intoxicating quality of its subject, but altogether unsuited to the gossamer importance of the case.")

70. For some examples, see *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720, 723 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 143, 147 (1980); *Caban v. Mohammed*, 441 U.S. 380, 381–82 (1979); *Orr v. Orr*, 440 U.S. 268, 271 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 202–03 (1977) (plurality opinion).

71. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954).

72. 442 U.S. 256 (1979).

73. *Id.* at 279.

74. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213–17 (1995).

For instance, the Court held in *Feeney* that it would apply just rational basis review to a Massachusetts statute providing that “all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans.”⁷⁵ The law meant that the best jobs in the Massachusetts civil service went to veterans, at a time when 98.2% of the state’s veterans were male.⁷⁶ Almost all women were confined to lower-ranking civil service positions too unappealing to attract veterans as applicants. The Court did not subject the Massachusetts statute to intermediate scrutiny because Helen Feeney, who had sued after the veterans’ preference law repeatedly prevented her from getting a better civil service job,⁷⁷ could not prove that the Massachusetts legislature *wanted* to “keep[] women in a stereotypic and predefined place in the Massachusetts Civil Service.”⁷⁸ On the Court’s account, the fact that the scheme *did* function, overwhelmingly and foreseeably, to keep women in dead end, lower paid, female-dominated civil service jobs was insufficient to trigger intermediate scrutiny.

To be sure, the Court’s inattention to facially neutral state action is not confined to the law of sex discrimination. *Washington v. Davis* (1976) similarly holds that the Court will apply rational basis review to facially neutral state action with a racially disparate impact unless the plaintiff can prove discriminatory intent.⁷⁹ But by the time the Court decided *Davis*, race discrimination was already established as one of constitutional law’s canonical concerns and *Brown* was one of the Court’s most celebrated decisions. In contrast, the Court decided *Feeney* when sex discrimination jurisprudence was much less entrenched and had produced no canonical judicial opinions. The *Feeney* decision helped keep the issue of sex discrimination closer to the margins of constitutional law.

If one believes, as the Court’s jurisprudence presumes, that the problem of sex discrimination is essentially limited to explicitly sex-based state action, then that problem has been all but solved. There are only a few statutes remaining that draw explicit lines between men and women and only a few sex-segregated public institutions still in place. In practice, as *Feeney* itself suggests, facially neutral state action can sustain many disparities between women and men. But the Court has little interest in reviewing facially neutral laws, so it hears few sex discrimination suits anymore. This paucity of case law contributes to the sense that sex discrimination is not a core constitutional concern, that struggles over sex equality are no longer central to American constitutional law, if they ever were.

75. *Feeney*, 442 U.S. at 259.

76. *See id.* at 270.

77. *See id.* at 259, 264–65.

78. *Id.* at 279.

79. *See* 426 U.S. 229, 239, 248 (1976).

C. Sex Equality Outside the Courts

A third set of potential reasons for why sex is outside the constitutional canon centers on American life outside the courts. The story of women's struggles for sex equality may be less prominent in American constitutional law because this story is less prominent in American popular culture, and vice versa. Many young women do not identify themselves with the history of feminist activism in the United States, even as they enjoy rights and opportunities that women's movements helped secure.⁸⁰ Popular media appears to focus on civil rights movements for racial equality more intently than it focuses on civil rights movements for sex equality. For instance, there have been several "major motion pictures" about the twentieth-century civil rights movement for racial equality.⁸¹ But it is difficult to name a single "major motion picture" about either the first or second organized women's movements in the United States.⁸²

In addition, constitutional law is generally taken to be the quintessential example of public law, concerned with relationships between individuals and the state and relationships among government actors. Our culture has conventionally associated women with private spaces and that association remains strong to this day. Americans often attribute persistent inequalities between women and men to private choices and actions within the family and the home, rather than to public policy and institutional design.⁸³ This gendered public/private divide may help further a sense that women are central to private life, but not to public stories about America's constitutional principles.

80. See Shawn Meghan Burn et al., *The Relationship Between Gender Social Identity and Support for Feminism*, 42 *SEX ROLES* 1081, 1086 (2000); Miriam Liss et al., *What Makes a Feminist?: Predictors and Correlates of Feminist Social Identity in College Women*, 25 *PSYCHOL. WOMEN Q.* 124, 127, 133 (2001); Alyssa N. Zucker, *Disavowing Social Identities: What It Means When Women Say, "I'm Not a Feminist, but . . ."*, 28 *PSYCHOL. WOMEN Q.* 423, 423–24, 429 (2004).

81. See, e.g., *GHOSTS OF MISSISSIPPI* (Columbia Pictures 1996); *MALCOLM X* (Warner Bros. Pictures 1992); *MISSISSIPPI BURNING* (Orion Pictures Corp. 1988); *PANTHER* (Gramercy Pictures 1995).

82. For a television movie about the suffrage movement, see *IRON JAWED ANGELS* (HBO 2004).

83. For examples of arguments along these lines, see DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, *WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA* 17 (1999) ("What appears to be happening (and what those who cite discrimination ignore) is that women in many professions are making decisions to balance work and family priorities and that those decisions can result in fewer women's reaching the top of their fields."); Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 *ARIZ. L. REV.* 971, 1104 (1995) ("The fact that some people prefer to focus their energies on their families while others prefer to concentrate on their careers does not seem to be the perceived problem. The demand for social intervention arises from the fact that the former group is disproportionately female, while the latter group is disproportionately male. Similarly, the fact that the business world rewards competitive risk-takers is not by itself a problem; the problem is that risk-takers tend to be men. At bottom, the feminist case is based upon a normative vision of what women *should* want, rather than on what they *do* want. . . . In a very real sense, the patterns we now see are in fact a product of female choice . . ."); Michael Lynch & Katherine Post, *What Glass Ceiling?*, *PUB. INT.*, Summer 1996, at 27, 28 ("In general, we found that women's current economic position relative to men is more a product of individual choices than of third-party discrimination.")

III. HOW SEX EQUALITY MAY BECOME PART OF THE CONSTITUTIONAL CANON

While there are multiple possible explanations for why our constitutional canon excludes the story of women's struggles for sex equality, I do not mean to suggest that this exclusion is fixed and permanent. To the contrary, I see some signs that sex equality may become part of the canon, and I will end this Essay on that note.

First, the Court's reading of the Equal Protection Clause to prohibit sex discrimination has become much less controversial over time. One indication that *Brown v. Board of Education*⁸⁴ is a canonical case in constitutional law is that no federal judicial nominee can hope to be confirmed without agreeing that *Brown* was correctly decided.⁸⁵ Similarly, scholars believe that they must establish that their theories of constitutional interpretation are consistent with the Court's holding in *Brown*.⁸⁶

I think that we will soon reach the day, if we are not there already, when no federal judicial nominee can hope to be confirmed if he insists that the Court was wrong to read the Equal Protection Clause to cover sex discrimination.⁸⁷ Indeed, one reason that Robert Bork's nomination to the Supreme Court attracted so much criticism in 1987 is that Bork had argued before his nomination that the Court should not interpret the Equal Protection Clause to prohibit sex discrimination. For example, Bork declared in a speech delivered in the spring of 1971, before the Court decided *Reed*, that "[t]he equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause."⁸⁸ In June 1987, when the Court had been applying interme-

84. 347 U.S. 483 (1954).

85. See, e.g., Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 414 (2000) ("During the end of the 1960s and the beginning of the 1970s, the Supreme Court confirmation process revealed that it was unacceptable for anyone—particularly a Supreme Court nominee—to disagree with *Brown*.").

86. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("The supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it was decided incorrectly.").

87. Of course, Supreme Court Justices remain free to express such views once safely on the Court. Justice Antonin Scalia stated in a September 2010 interview that: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws." *Legally Speaking: The Originalist*, CAL. LAW., Jan. 2011, at 33, 33.

88. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971).

diate scrutiny to sex-based state action for the decade since *Craig*, Bork explained that: “I do think that the equal protection clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided that having different drinking ages for young men and young women violated the equal protection clause, I thought . . . that was to trivialize the Constitution and to spread it to areas it did not address.”⁸⁹ After his nomination, Bork testified in September 1987 before the Senate Judiciary Committee that he now thought the Equal Protection Clause applied to sex-based state action.⁹⁰ But the Judiciary Committee was skeptical about whether Bork had genuinely changed his mind,⁹¹ and the Senate refused to confirm Bork for the Supreme Court.⁹²

Moreover, scholarly theories about how best to interpret the Constitution are now frequently, if not universally, criticized if those theories suggest that the Court was wrong to recognize a constitutional prohibition on sex discrimination.⁹³ Even some originalists have argued that their brand of originalism is consistent with interpreting the Equal Protection Clause to prohibit sex discrimination.⁹⁴

Second, new analogies have emerged in constitutional law, which over time have pushed sex discrimination closer to the center of the Equal Protection Clause. As I have discussed, sex entered the Court's equal protection jurisprudence via an analogy to race. The United States is now having a wide-ranging debate about the status of sexual orientation under the Constitution. One striking aspect of this debate is how often courts,⁹⁵ judges,⁹⁶ advocates,⁹⁷ and scholars⁹⁸ draw analogies between

89. *Judge Bork vs. Himself: Evolution of His Views*, N.Y. TIMES, Sept. 21, 1987, at B14 (quoting Bork's “June 10, 1987 ‘Worldnet’ broadcast”).

90. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 133, 160–62, 176, 255–58, 392–96, 436, 705 (1989) (testimony of Robert H. Bork).

91. See S. EXEC. REP. NO. 100–7, at 50 (1987).

92. See 133 CONG. REC. 29,121–22 (1987).

93. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 297–98 (2007) (“The basic problem with looking to original expected application for guidance is that it is inconsistent with so much of our existing constitutional traditions. . . . The original expected application is . . . inconsistent with constitutional guarantees of sex equality for married women”); *id.* at 299 (“No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people.”); Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1214 (2009) (“Suffice to say that no theory of constitutional interpretation that sanctions school segregation or denies equality to women can be considered remotely viable today.”).

94. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 149–52 (1994); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2–15 (2011).

95. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Baehr v. Lewin*, 852 P.2d 44, 59–67 (Haw. 1993).

96. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971–73 (Mass. 2003) (Greaney, J., concurring); *Hernandez v. Robles*, 855 N.E.2d 1, 29–30 (N.Y. 2006) (Kaye, C.J., dissenting); *Baker v. State*, 744 A.2d 864, 904–12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

sex discrimination and sexual orientation discrimination. Indeed, even President Barack Obama's second inaugural address highlighted this analogy. Obama identified the woman's rights movement, the civil rights movement for racial equality, and the gay rights movement as fundamental parts of America's collective journey toward equality. He linked each social movement to the Constitution, to the Declaration of Independence, and to each other. Obama stated: "We, the people, declare today that the most evident of truths—that all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls and Selma and Stonewall."⁹⁹ Such analogies are widely taken to have political, cultural, and emotional appeal. They also have doctrinal implications. The Supreme Court subjects sex-based discrimination to intermediate scrutiny under the Equal Protection Clause, so one way to argue that the Court should apply intermediate scrutiny to sexual orientation discrimination is to analogize sexual orientation to sex. The frequency and prominence of these analogies, which presuppose that struggles against sex discrimination are already central to our nation's understanding of equality and equal protection, may help move sex into the constitutional canon at last.

CONCLUSION

America's Unwritten Constitution focuses our attention on constitutional law outside the text of the Constitution itself. This remarkable book prompts us to think about the stories that judges, lawmakers, lawyers, scholars, and citizens include and exclude in describing constitutional law's core purposes and guiding principles. The story of America's struggles over and against sex discrimination is not currently a canonical story in constitutional law. But it may become one yet.

97. See Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 397 (2001) ("The argument that laws that discriminate on the basis of sexual orientation in fact discriminate on the basis of sex is not new. Advocates have been pressing this claim for almost thirty years.").

98. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208–19 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230–32.

99. BARACK OBAMA, INAUGURAL ADDRESS 3 (2013).