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## **Feminist Legal History and Legal Pedagogy**

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## *SYMPOSIUM*

### FEMINIST LEGAL HISTORY AND LEGAL PEDAGOGY

*Paula A. Monopoli\**

*Women are mere trace elements in the traditional law school curriculum. They exist only on the margins of the canonical cases. Built on masculine norms, traditional modes of legal pedagogy involve appellate cases that overwhelmingly involve men as judges and advocates. The resulting silence signals that women are not makers of law—especially constitutional law. Teaching students critical modes of analysis like feminist legal theory and critical race feminism matters. But unmoored from feminist legal history, such critical theory is incomplete and far less persuasive. This Essay focuses on feminist legal history as foundational if students are to understand the implications of feminist legal theory. It offers several examples to illustrate how centering women and correcting their erasure from our constitutional memory is essential to educating future judges and advocates.*

#### INTRODUCTION

On August 25, 1980, almost sixty years to the day after the Nineteenth Amendment became part of the United States Constitution, I walked

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through the doors of the University of Virginia School of Law.<sup>1</sup> It was my twenty-second birthday and the beginning of a forty-year career in law, including thirty years in legal academia. But during the following three years of a traditional law school curriculum, I was not exposed to the idea that the Nineteenth Amendment was one of the most significant democratizing events in American legal history.<sup>2</sup> Nor did I learn about the seventy-two-year struggle by women to overturn the legal regime of coverture that denied them control over their bodies, their income, and their children. No professor mentioned that women's advocacy had yielded the vote in fifteen states prior to 1920, or that women had testified before Congress as part of the struggle to achieve a federal voting amendment. That silence taught me and other law students that women<sup>3</sup> were not constitution-makers, but merely marginal figures in Constitutional Law—the course that sits atop the curricular hierarchy.<sup>4</sup>

Forty years later, this erasure of women's legal history is still pervasive in the American law school curriculum. Most of my students still do not understand the link between the woman suffrage movement<sup>5</sup> and the

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<sup>1</sup> The Nineteenth Amendment was certified by U.S. Secretary of State Bainbridge Colby on August 26, 1920. Paula A. Monopoli, *Constitutional Orphan: Gender Equality and the Nineteenth Amendment 1* (2020) [hereinafter Monopoli, *Constitutional Orphan*].

<sup>2</sup> See Akhil Reed Amar, *America's Constitution: A Biography* 419 (2005); see also J. Kevin Corder & Christina Wolbrecht, *Counting Women's Ballots: Female Voters from Suffrage Through the New Deal* 3 (2016) (explaining how the Nineteenth Amendment created the largest expansion of voting rights in U.S. history). Although it should be noted that the Nineteenth Amendment did not confer the vote on any woman or protect all women from disenfranchisement. Native American women were not permitted to become citizens until federal legislation was enacted in 1924. See Monopoli, *Constitutional Orphan*, supra note 1, at 155 n.5. Asian American immigrant women were not allowed to become naturalized U.S. citizens until federal legislation was enacted in the 1940s and 1950s. *Id.* at 156 n.5. Black and Latina women were de facto disenfranchised using literacy tests, poll taxes, physical intimidation, and other devices for another forty-five years until the Voting Rights Act of 1965. *Id.* at 43–67, 156 n.6.

<sup>3</sup> I use “women” in this Essay in an inclusive way to include all those who identify as women.

<sup>4</sup> See, e.g., Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *Colum. L. Rev.* 199, 216–17 (1997) (noting that Constitutional Law is widely considered the most prestigious field to teach in and that teaching it also carries many practical benefits).

<sup>5</sup> See Ellen DuBois, *Woman Suffrage: The View from the Pacific*, 69 *Pac. Hist. Rev.* 539 n. 1 (2000) (“‘Woman suffrage,’ ‘women's suffrage,’ ‘woman's suffrage’—different national movements and traditions used slightly different terms. . . . ‘Woman suffrage’ was the term used in the United States, the singular ‘woman’ stressing the essential womanhood of which all women were understood to partake.”).

Fourteenth and Fifteenth Amendments.<sup>6</sup> Nor do many of them seem to know that, as recently as 1982, this country failed to ratify a federal equal rights amendment.<sup>7</sup> While a number of Constitutional Law casebooks now include some coverage of the Nineteenth Amendment, few delve deeply into women's long struggle for legal and political rights preceding its ratification.<sup>8</sup> And most do not characterize that struggle as having yielded one of the most significant shifts in power between the states and the federal government in American constitutional history. Many give only cursory coverage to the early debates among suffragists after the federal equal rights amendment was introduced into Congress in 1923.<sup>9</sup>

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<sup>6</sup> See *infra* Section II.0.

<sup>7</sup> See Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. Times, July 1, 1982, at A12.

<sup>8</sup> See, e.g., Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* 638, 652, 677–78 (8th ed. 2018) (covering, briefly, the Nineteenth Amendment and history of the Equal Rights Amendment); Daniel A. Farber, William N. Eskridge, Jr., Phillip P. Frickey & Jane S. Schacter, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* 34, 54, 200–01 (6th ed. 2019) (mentioning the Nineteenth Amendment twice and briefly covering the Equal Rights Amendment's history); Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 588 (17th ed. 2010) (noting that “[o]nly the Nineteenth Amendment addresses expressly any aspect of women’s equality” and briefly referencing the early history of the ERA and its failed ratification). Each of these books does include a comprehensive section on sex discrimination in the context of the Fourteenth Amendment’s equal protection doctrine. Of course, even if a casebook includes more extensive history, that history will have little impact on the intellectual development of law students if law professors do not assign or discuss those sections of the book. For a casebook that is organized historically and includes more historical context, see 2 Howard Gillman, Mark A. Graber & Keith E. Whittington, *American Constitutionalism: Rights and Liberties* (2d ed. 2016) (which also includes the Senate debates on women’s suffrage, *id.* at 265; a map of the United States demonstrating that women had full or partialized voting rights in some states prior to 1920, *id.* at 286; and coverage of the ERA as “The Blanket Amendment,” *id.* at 355). See also Michael Stokes Paulsen, Steven Gow Calabresi, Michael W. McConnell, Samuel L. Bray & William Baude, *The Constitution of the United States* (3d ed. 2017) (referencing the Nineteenth Amendment five times, giving a comprehensive account of the woman suffrage movement that pre-dated its ratification, the link between ratification of the Nineteenth and the early history of the ERA, and the ERA’s failed ratification in 1982).

<sup>9</sup> The recent television series “Mrs. America” has helped raise awareness of the struggle for an equal rights amendment in the 1970s and 1980s. *Mrs. America* (FX Networks 2020), <https://www.fxnetworks.com/shows/mrs-america> [<https://perma.cc/CA4S-U7NW>]. But law schools should do better in this regard, and not rely on popular culture for this kind of knowledge of feminist legal history. For example, students could be assigned Julie C. Suk’s book, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (2020), as their summer reading prior to coming to law school and/or in their first-year constitutional law course. This would introduce them to the idea that women have also played an important part

This expansive social movement for women's rights continues to be largely absent from the core law school curriculum.<sup>10</sup> Feminist legal scholars remain marginalized, with little of their scholarship actually changing how mainstream scholars teach law. And women continue to be subordinated in American society, remaining less than full citizens.

Reva Siegel has observed that the Supreme Court's development of Fourteenth Amendment sex discrimination doctrine "seems to have proceeded from the understanding that there is no constitutional history that would support a constitutional commitment to equal citizenship for women—that such a commitment is to be derived, to the extent it can be derived at all, by analogizing race and sex discrimination."<sup>11</sup> In terms of correcting that erasure, this paper's primary argument is that law schools are an important locus of change. We generate legal scholarship. And we produce the future judges who will interpret constitutional provisions and the future lawyers who will advocate before them.

In this Essay, I suggest that the failure of feminist legal scholarship to gain much traction among non-feminist scholars and to have more of an impact on how law is taught is connected to the failure to teach feminist legal history in law schools. And this erasure of women from the canon results in law school graduates who, when they become judges and advocates, are blind to the ways that law reifies the socio-economic subordination of women in terms of the gender pay gap, the disproportionate burdens of caregiving, and the structural barriers they face in advancing in the workplace. Law is central to the process of ensuring equality in a democratic society. But if women only exist, if at all, at the margins of the canon used to educate young lawyers, inequality and subordination will persist. What we have seen in the two years of a global pandemic—more than two million women pushed out of a labor market that is grounded in their free caregiving labor, and attacks on women's constitutional reproductive rights<sup>12</sup>—will continue if we do not

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in American constitutional development. They have been constitution-makers too, albeit in less formal governance roles than the men with whom most law students are already familiar.

<sup>10</sup> It should be noted that history, in general, gets short shrift in the law school curriculum. This could be ameliorated if there were more courses built around casebooks like Richard Chused & Wendy Williams, *Gendered Law in American History* (2016).

<sup>11</sup> Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 1022 (2002) [hereinafter Siegel, *She the People*].

<sup>12</sup> See Katie Rogers, *2.5 Million Women Left the Work Force During the Pandemic*, Harris Sees a 'National Emergency', N.Y. Times (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/us/politics/women-pandemic-harris.html> [https://perma.cc/5XRU-AX7M];

rethink how the actors within our legal institutions are prepared to enter the profession. If they continue to leave law school with the understanding that women and law exist only in a siloed course of the same name, law will not respond to critical feminist theory because judges and advocates are unaware of feminist legal history.

Part I of this Essay describes the advent of feminist legal theory, its lack of traction in terms of affecting mainstream legal scholarship and pedagogy, and the absence of feminist legal history in the law school curriculum, in particular in Constitutional Law, the “pinnacle” course in terms of prestige. Part II offers several examples of how I teach my students in a way that changes their existing understanding about women as constitution-makers. Part III suggests that reading constitutional law in the context of feminist legal history is a pedagogical intervention that can have an impact on mainstream understandings of cases as well as the role of women in American constitutional development. It also suggests breaking down the hierarchy of courses within the curriculum and the hierarchy of faculty status as critical steps in this process. Finally, this Essay concludes that feminist legal theory alone, without feminist legal history, is not sufficient to produce judges and advocates who see a substantive equality for women in statutes and the U.S. Constitution.

#### I. FEMINIST LEGAL THEORY IN LEGAL PEDAGOGY

When I was a law student at UVA from 1980 to 1983, I had no female professors in my core curricular classes.<sup>13</sup> I did have a female adjunct professor for a seminar on women and law.<sup>14</sup> That seminar introduced us to the then fairly recent cases that law professor Ruth Bader Ginsburg had

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Adam Liptak, Supreme Court Seems Poised to Uphold Mississippi’s Abortion Law, N.Y. Times (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/supreme-court-mississippi-abortion-law.html> [<https://perma.cc/4BV7-6LX4>] (noting the expectation that the Supreme Court will curtail or eliminate the right to an abortion with their pending decision in *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), cert. granted in part, 141 S. Ct. 2619 (2021)).

<sup>13</sup> Professor Lillian R. BeVier was the only female tenured member of the faculty in 1980. See A Note on ‘Making Room for Women’, UVA Lawyer, Fall 2021, at 3 (noting that BeVier was the first female professor to earn tenure at UVA Law). See *infra* Section 0.B on the significance of this lack of descriptive representation among the faculty.

<sup>14</sup> I was also a member of the student organization, Virginia Law Women, which had been founded in 1971. See Eric Williamson, Making Room for Women, UVA Lawyer, Spring 2021, at 46–50, <https://www.law.virginia.edu/uvalawyer/article/making-room-women> [<https://perma.cc/LQR5-5U8H>] (noting that the first course in women and law was offered at UVA Law in Spring 1972, and was taught by men).

brought as test cases before the U.S. Supreme Court in the 1970s. Those cases expanded the scope of the Fourteenth Amendment's Equal Protection Clause to laws that treated men and women differently. I recall that the course also included statutory developments, like Title VII and Title IX of the Civil Rights Act of 1964, which addressed sex-based discrimination. We may have discussed the failed efforts to ratify the Equal Rights Amendment, which had been given a three-year extension by Congress and was expiring in 1982<sup>15</sup>—the very year I took the course. I do not remember it covering the history of women advocating to abolish the legal regime of coverture or their efforts to achieve “political freedom.”<sup>16</sup> So my impression of the statutory developments in the 1970s and the fight for a constitutional amendment in 1982 was that they were isolated historical developments.<sup>17</sup> I certainly did not have any sense that women were significant constitution-makers. Nonetheless, the course was very welcome, but so few students took it that its impact was limited.

On the other hand, everyone took Constitutional Law. The only reference in our casebook to the Nineteenth Amendment was in a footnote.<sup>18</sup> I have no memory of a discussion about the legal history of the women's rights movement that preceded ratification of the Nineteenth Amendment. Nor do I remember any discussion of the subsequent cases interpreting the amendment.<sup>19</sup>

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<sup>15</sup> See Clymer, *supra* note 7, at A12.

<sup>16</sup> See Monopoli, *Constitutional Orphan*, *supra* note 1, at 159–60 n.7 (quoting Telegram from Bertha W. Fowler to Alice Paul (Aug. 27, 1920) (on file with the Library of Congress, Manuscript Division, The Records of the National Woman's Party, Group II Box 6) (characterizing what the Nineteenth Amendment's ratification achieved as “political freedom”)).

<sup>17</sup> We also did not have the context to understand that the passage of Title IX was a significant reason that one-third of our first-year class was female. See Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 *Clev. St. L. Rev.* 473, 486, 488 (2007) (noting that the passage of Title IX resulted in the abolition of quotas in professional schools, like medical and law schools, and an increase in the number of women admitted).

<sup>18</sup> Gerald Gunther, *Cases and Materials on Constitutional Law* 1691 n.3 (10th ed. 1980). Several of the then-recent Fourteenth Amendment sex-equality cases, including *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), were included in that 1980 edition of the casebook. See *id.* at 678, 791–92, 864–69, 880, 883. That was the most significant mention of sex equality in our core courses. Note that more recent editions of that casebook now mention the Nineteenth Amendment in the text itself. See Sullivan & Gunther, *supra* note 8, at 588.

<sup>19</sup> See, e.g., *Breedlove v. Suttles*, 302 U.S. 277 (1937) (invoking gender stereotypes and implicitly relying on the remnants of coverture to justify its decision upholding an exemption from the poll tax for women but not for men, reasoning that “[t]he laws of Georgia declare the

Feminist legal theory was just beginning to emerge as a distinct field. It was being taught at some law schools, although not perhaps by that name.<sup>20</sup> In her book, *Introduction to Feminist Legal Theory*, Martha Chamallas notes that “[p]articularly for lawyers who graduated from law school before the mid-1980s, the very idea of feminist legal theory may be both intriguing and perplexing.”<sup>21</sup> She defines feminist legal theory as “the exploration of women’s subordination through the law.”<sup>22</sup> Chamallas goes on to note that as an intellectual field, feminist legal theory examines “how gender has mattered in the development of the law and how men and women are differently affected by the power in law.”<sup>23</sup> And she quotes from Clare Dalton’s 1988 Berkeley Women’s Law Journal article, *Where We Stand: Observations on the Situation of Feminist Legal Thought*:

Feminism is . . . the range of committed inquiry and activity dedicated first, to *describing* women’s subordination—exploring its nature and extent; dedicated second, to asking both *how*—through what mechanisms, and *why*—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third, to change.<sup>24</sup>

At UVA Law in the early eighties, I do not remember any professor invoking feminist legal theory as an explanation for how and why the law had developed in any area. We did have extensive exposure to law and economics as a theory in a number of our first-year courses, but I have no memory of that methodology being used to explain women’s continuing

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husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden” (citation omitted)), overruled by *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663 (1966). While *Harper* later overruled the Fourteenth Amendment holding in *Breedlove, Breedlove’s* Nineteenth Amendment holding stands to this day.

<sup>20</sup> Martha Chamallas, *Introduction to Feminist Legal Theory* 17 (2d ed. 2003). Some feminist legal historians have challenged the conventional idea that feminist legal theory began “in the second wave feminist movement of the sixties and seventies. . . nurtured by the intellectual leadership of women newly entering legal academia. Yet legal feminism has a much longer history, conceptualized more than a century earlier.” Tracy A. Thomas, *The Long History of Feminist Legal Theory*, in *The Oxford Handbook of Feminism and Law in the United States* (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., forthcoming Oxford Univ. Press) (manuscript at 1).

<sup>21</sup> *Id.* at xxi.

<sup>22</sup> *Id.* at xx.

<sup>23</sup> *Id.* at xix.

<sup>24</sup> *Id.* at 2 (quoting Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 Berkeley Women’s L.J. 1, 2 (1987)).



subordination. Law was presented as gender-neutral, with little, if any, attention paid to the underlying social structures that were anything but neutral. But law operates on the ground. To divorce it from historical conditions and social realities renders it at best ineffective, and at worst harmful to its subjects. In my work as a legal academic, I have sought to bring that insight to my students. The next section describes three examples of how I integrate feminist legal history into my teaching in a way that seeks to change my students' mainstream understandings of canonical cases and alter their perception about where women stood as constitution-makers.

## II. INTEGRATING FEMINIST LEGAL HISTORY

### A. *Bradwell v. Illinois* and the Slaughter-House Cases

My first example is teaching students the historical context in which the U.S. Supreme Court decided *Bradwell v. Illinois*.<sup>25</sup> In *Bradwell*, the Court rejected Myra Bradwell's efforts to characterize her right to practice law as a privilege or immunity of national citizenship under Section 1 of the Fourteenth Amendment.<sup>26</sup> *Bradwell* is typically given short shrift in constitutional law casebooks, which usually cite Justice Bradley's concurrence about how women were not fit to be lawyers.<sup>27</sup> But Gretchen Ritter has suggested in *The Constitution as Social Design* that the "severity" of the Supreme Court's narrow interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*<sup>28</sup> was influenced by the Court's concern about "the New Departure."<sup>29</sup> The New Departure was the woman suffrage movement's more aggressive campaign for the vote, following the inclusion of the word "male" in the U.S. Constitution for the very first time in Section 2 of the Fourteenth Amendment and the failed campaign

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<sup>25</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

<sup>26</sup> *Id.* at 139.

<sup>27</sup> For example, the tenth edition of Gunther included a reference to *Bradwell* and Justice Bradley's concurrence in a footnote. Gunther, *supra* note 18, at 868 n.1. More recent editions mention *Bradwell* in the text itself. See Sullivan & Gunther, *supra* note 8, at 588; see also Gillman, Graber & Whittington, *supra* note 8, at 268 (commenting on the case, including noting Justice Bradley's dissent in *Slaughter-House* and his concurrence in *Bradwell*).

<sup>28</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>29</sup> Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* 25 (2006).

by women activists to include women in the Fifteenth Amendment.<sup>30</sup> Ritter makes clear her claim is a modest one, and she does not offer it as a complete explanation of why some Lincoln appointees to the Supreme Court, like Justice Miller, would embrace a narrow view of the Privileges or Immunities Clause.<sup>31</sup>

After reading Ritter several years ago, I began to have my seminar students read Justice Bradley's dissent in *Slaughter-House* together with his concurrence in *Bradwell*. And I ask them: How can the same justice have written both, in terms of their disparate views on the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment? My students grapple with various ways of understanding the seeming inconsistency of Bradley arguing that the right to one's profession was a privilege or immunity of national citizenship when it came to the butchers in *Slaughter-House*,<sup>32</sup> but declaring that the clause could not be read the same way when it came to Myra Bradwell's right to practice law.<sup>33</sup> Without having been taught the context of the nineteenth-century women's rights movement and the New Departure, it would never occur to my students that the majority in *Slaughter-House* might have been afraid of the implications of an expansive interpretation of the Privileges or Immunities Clause because of its possible extension to women's equality. Nor would it occur to them that these men were acutely aware that women's rights activists had made the argument that the right to a profession and the right to vote came within the ambit of that constitutional clause.<sup>34</sup> Without understanding that those activists had

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<sup>30</sup> Id. at 16–27 (explaining that “[t]he New Departure campaign lasted from 1869–75, ending with . . . *Minor v. Happersett*, 88 U.S. 162 (1874)”) During this time, suffragists used publicity, legislative action, direct action, and judicial action to secure the vote. The direct action included efforts to register to vote and to actually vote. Id. at 19. See also Siegel, *She the People*, supra note 11, at 973 (describing how Susan B. Anthony was prosecuted for voting unlawfully as a result of such direct action); Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton & Susan C. Ross, *Sex Discrimination and the Law: Causes and Remedies* 9 (1st ed. 1975) (“(a.) The Trial of Susan B. Anthony”).

<sup>31</sup> Ritter, supra note 29, at 25.

<sup>32</sup> 83 U.S. (16 Wall.) at 113–14 (Bradley, J., dissenting).

<sup>33</sup> *Bradwell*, 83 U.S. (16 Wall.) at 139–42 (Bradley, J., concurring).

<sup>34</sup> See Siegel, *She the People*, supra note 11, at 973–74 (citing Babcock, Freedman, Norton & Ross, supra note 30, at 8) (“Given the contemporary visibility of the woman suffrage cause, it is plain that the Supreme Court was already anticipating the claim that the Fourteenth Amendment enfranchised women when the Court narrowly interpreted the Privileges or Immunities Clause in its 1873 decisions in the *Slaughter-House Cases* and *Bradwell v. Illinois*.”). That argument *vis-à-vis* voting was subsequently rejected in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

waged a very public battle, especially in Washington, D.C., to be included in the Fourteenth and the Fifteenth Amendments, students are unlikely to see the link between the two cases.

This failure to understand the important role women activists played in constitutional development leaves these future judges and advocates ill-equipped to recognize a substantive equality in law that would advance women's social, legal, economic, and political status as citizens. It also highlights an issue for law school faculty, many of whom are also unaware of this history, in teaching Constitutional Law without it. If they do not understand women activists' centrality to discussions around the Fourteenth and Fifteenth Amendments as a historical matter, such faculty are far less likely to entertain a theory like Ritter's about why the Justices in *Slaughter-House* may have taken the narrow view of the Privileges or Immunities Clause that they did. It also helps explain why feminist legal theory continues to be unlikely to change mainstream legal pedagogy. If one of the goals of feminist legal scholarship is to have an impact on how non-feminist legal scholars think about canonical cases, it is unlikely to do so if those non-feminist scholars themselves have little or no grounding in feminist legal history. And their students are less likely to be exposed to these alternative explanations of how law developed as it did.

### B. The Nineteenth Amendment

My second example is teaching students about the historical context surrounding the passage of the Nineteenth Amendment, including the centrality of race in its ratification.<sup>35</sup> My law school classmates and I never learned the unique history around the Nineteenth Amendment's ratification and constitutional development, and the consequent thin understanding of the Nineteenth Amendment by the courts.<sup>36</sup> If we had

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<sup>35</sup> See supra note 2, regarding who was not able to vote even after ratification of the Nineteenth Amendment.

<sup>36</sup> See generally Siegel, *She the People*, supra note 11 (arguing that the historical context of the woman suffrage movement should inform how we interpret the Nineteenth and Fourteenth Amendments and that the Nineteenth Amendment repudiated women's "subordination in or through the family"); Monopoli, *Constitutional Orphan*, supra note 1 (covering the Nineteenth Amendment's interpretation by courts in the decade after its ratification, and arguing that while the amendment initially carried the "promise of significant change," the prevailing interpretation that emerged was instead a "thin" conception of its meaning and scope); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 *Geo. L.J.* 27 (2020) (contrasting "thin" and potential "thick" interpretations of the Nineteenth Amendment, and arguing that a "thick"

any impression about the amendment, it was that it “only” concerned voting. But we were never taught that “voting was *the* central question” for nineteenth-century Americans and that they “knew what woman suffrage signified, even if its full significance to *them* is no longer legible to *us* today.”<sup>37</sup>

So today, feminist legal scholars are reconstructing that history so that courts can evaluate the context within which the text was developed, enacted, ratified, and subsequently construed.<sup>38</sup> We teach our students much more about those women who advocated around ratification of the Nineteenth Amendment. The goal is to lead our students, as future advocates and judges, to pay close attention to those who were instrumental in developing the amendment but who were generally excluded from formal participation in the political process.<sup>39</sup> In 1920, women were not entitled to full voting rights in most states, and there was only one female member of Congress at the time an initial vote was taken on the Nineteenth Amendment.<sup>40</sup> I suggest to my students that the voices

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interpretation allowing constitutional claims against restrictive voting laws that burden women’s voting ability would be consistent with the Nineteenth Amendment’s text and history).

<sup>37</sup> Siegel, *She the People*, supra note 11, at 1045.

<sup>38</sup> Feminist legal scholars have contributed much to feminist legal history around the centennial of the Nineteenth Amendment. See, e.g., Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 *Yale L.J.F.* 450 (2020) [hereinafter Siegel, *Democratization of the Family*]; Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 *Stan. J. C.R. & C.L.* 349 (2020); Tracy Thomas, *Reclaiming the Long History of the “Irrelevant” Nineteenth Amendment for Gender Equality*, 105 *Minn. L. Rev.* 2623 (2021) [hereinafter Thomas, *Reclaiming the Long History*]; Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 *Geo. L.J.* 73 (2020); Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 *Duq. L. Rev.* 125 (2021) [hereinafter Nan D. Hunter, *In Search of Equality for Women*]; Taunya Lovell Banks, *Commemorating the Forgotten Intersection of the Fifteenth and Nineteenth Amendments*, 94 *St. John’s L. Rev.* 899 (2020); Danielle M. Conway, *Black Women’s Suffrage, the 19th Amendment, and the Duality of a Movement*, 13 *Ala. C.R. & C.L. L. Rev.* (forthcoming 2022); Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 *Yale L.J.F.* 512 (2020); Julie C. Suk, *A Dangerous Imbalance: Pauli Murray’s Equal Rights Amendment and the Path to Equal Power*, 107 *Va. L. Rev. Online* 3 (2021); Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women’s Legal Right to Hold Public Office*, 34 *Yale J. L. & Feminism* (forthcoming 2022).

<sup>39</sup> I say “generally excluded” because it is little understood that by 1920 there were fifteen states in which women had full suffrage and twelve where they had partial suffrage. Monopoli, *Constitutional Orphan*, supra note 1, at 160 n.13.

<sup>40</sup> See James J. Lopach & Jean A. Luckowski, *Jeannette Rankin: A Political Woman 144–46* (2005); *Rankin, Jeannette*, U.S. House of Reps. Hist., Art & Archives,

of the disenfranchised should be read back into the interpretive process and given significant weight by courts.<sup>41</sup> As the institutional actors in civil society most instrumental in the Nineteenth Amendment's enactment, many suffragists spoke in terms of its securing their political freedom.<sup>42</sup> Others thought it meant even broader emancipation.<sup>43</sup> Anti-suffragists opposed the fundamental shift that the Nineteenth Amendment would create, allowing women to move from the private into the public sphere. This shift threatened to disrupt the social order and weaken patriarchal institutions, including the family.<sup>44</sup>

It is very important to teach my students that white suffragists excluded Black suffragists over the course of the suffrage movement and that the rhetoric around the enactment and ratification process of the Nineteenth Amendment was racist and nativist. Nonetheless, Black suffragists advocated for its passage.<sup>45</sup> Mary Church Terrell argued that:

Even if I believed that women should be denied the right of suffrage,  
wild horses could not drag such an admission from my pen or my lips,  
for this reason: precisely the same arguments used to prove that the

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[https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-\(R000055\)/](https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-(R000055)/)  
[<https://perma.cc/T4D9-YDFK>] (last visited Feb. 8, 2022).

<sup>41</sup> See Siegel, *She the People*, supra note 11 at 1040–41 n. 47 (asking “[i]f groups are formally excluded from voting on an Article V amendment, or are otherwise politically inaudible in the process, whose voices should we attend to in interpreting the ratified amendment?”); Reva B. Siegel, *The Nineteenth Amendment and the Politics of Constitutional Memory*, 20 *Geo. J.L. & Pub. Pol’y* (forthcoming 2022) (manuscript at 40–41), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4007656](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007656) [<https://perma.cc/82RK-CAX8>] [hereinafter Siegel, *The Nineteenth Amendment and the Politics of Constitutional Memory*]; Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 *Geo. J.L. & Pub. Pol’y* (forthcoming 2022) (manuscript at 24).

<sup>42</sup> See supra note 16.

<sup>43</sup> Suffragists like socialist Crystal Eastman, for example, asked, “What . . . do we mean by a *feminist organization*? It does not mean mere women juries, congressmen, etc., but it means to raise the status of women, making them self-respecting persons.” Vivien Hart, *Bound by Our Constitution: Women, Workers, and the Minimum Wage* 116 (1994). See also Melissa Murray, *The Equal Rights Amendment: A Century in the Making* Symposium Forward, 43 *N.Y.U. Rev. L. & Soc. Change*, *The Harbinger* 91, 91 (2019) (“The question of women’s freedom, Eastman conceded, yielded no easy answers. ‘Freedom,’ she wryly observed, ‘is a large word.’ Freedom, as Eastman imagined it, included a broad range of topics and concerns related to women’s citizenship—women’s economic position, their exclusion from the workplace, the liminal position of childcare and housework, voluntary motherhood, and stereotypes that delineated the home and its work as the province of women, and not men.”).

<sup>44</sup> See Siegel, *Democratization of the Family*, supra note 38, at 458.

<sup>45</sup> See generally Rosalyn Terborg-Penn, *African American Women in the Struggle for the Vote, 1850–1920* (1998) (explaining why Black women “supported the ‘votes for women’ campaign, and . . . the obstacles they met along the way to enfranchisement”).

ballot be withheld from women are advanced to prove that colored men should not be allowed to vote.<sup>46</sup>

Native American and Asian American immigrant suffragists, who could not become citizens,<sup>47</sup> also argued that women should be enfranchised. Mabel Ping-Hua Lee was a suffragist who contrasted the status of women in the United States with that of women in the new Chinese nation, which had enfranchised women in 1912.<sup>48</sup> Lee “spoke eloquently on the topic [of woman suffrage], concluding with a plea for equality and a condemnation of the racism that limited Chinese women in the United States.”<sup>49</sup> Native American suffragist Gertrude Simmons Bonnin (Zitkala-Ša) also advocated for woman suffrage, while identifying the intersection of race, sex and citizenship.<sup>50</sup> Future judges and advocates should hear their voices too, as we as law professors shape what Reva Siegel has called “constitutional memory.”<sup>51</sup>

### *C. Pauli Murray and Equal Protection*

My third example is teaching students about the Black legal theorist and activist, Pauli Murray. I had been a feminist legal scholar for more than twenty years before I learned about Murray.<sup>52</sup> Today, Murray is more widely known, with institutions like Yale recognizing her historic significance by naming one of its new residential colleges after her.<sup>53</sup> And

<sup>46</sup> Mary Church Terrell, *Woman Suffrage and the 15th Amendment*, *The Crisis*, Aug. 1915, at 191.

<sup>47</sup> See Monopoli, *Constitutional Orphan*, *supra* note 1, at 155–56 n.5.

<sup>48</sup> Cathleen D. Cahill, *Recasting the Vote: How Women of Color Transformed the Suffrage Movement 25–26* (2020).

<sup>49</sup> *Id.* at 32 (citing *Suffrage Notes*, *Dobbs Ferry (N.Y.) Register*, Apr. 17, 1912; *Chinese Women to Parade for Woman Suffrage*, *N.Y. Times*, Apr. 14, 1912; and other contemporaneous sources).

<sup>50</sup> *Id.* at 20; Nat’l Park Serv., *Zitkala-Ša (Red Bird / Gertrude Simmons Bonnin)*, <https://www.nps.gov/people/zitkala-sa.htm> [<https://perma.cc/CU6P-FN7Q>] (last visited Feb. 8, 2022).

<sup>51</sup> Siegel, *The Nineteenth Amendment and the Politics of Constitutional Memory*, *supra* note 41.

<sup>52</sup> See Univ. of Md. Francis King Carey School of Law, “Toward the Goal of Human Wholeness: Pauli Murray’s Journey” - Professor Serena Mayeri, YouTube (May 3, 2013), [https://www.youtube.com/watch?v=xRvAsQ3oPfo&list=PLYBWgedwTFEbtwPt0CKw\\_X\\_0ihLUU3-2i](https://www.youtube.com/watch?v=xRvAsQ3oPfo&list=PLYBWgedwTFEbtwPt0CKw_X_0ihLUU3-2i) [<https://perma.cc/5RVZ-X5JW>] (recording of keynote at *Switch Point Stories: Tales of Sex, Race and Sexuality, Women Leadership & Equality Program*).

<sup>53</sup> *Yale Retains Calhoun College’s Name, Selects Names for Two New Residential Colleges, and Changes Title of ‘Master’ in the Residential Colleges*, *Yale News* (Apr. 27, 2016), <https://news.yale.edu/2016/04/27/yale-retains-calhoun-college-s-name-selects-names->

there is a new documentary, built on Murray's extensive papers in Radcliffe College's Schlesinger Library collection, which is bringing Murray's work to the fore.<sup>54</sup> More feminist legal scholars are now teaching about Murray's foundational role in extending the Equal Protection Clause of the Fourteenth Amendment to encompass laws that treated men and women differently. I point out to my students that Ruth Bader Ginsburg acknowledged that intellectual debt when she added Murray's name on the brief in *Reed v. Reed*,<sup>55</sup> the first case to recognize that the Fourteenth Amendment's equal protection clause applied to women as a class.<sup>56</sup> I discuss the significance of Murray's scholarship analogizing race and sex, a connection she termed "Jane Crow."<sup>57</sup> And I connect her central insight to the work of subsequent scholars, like Kimberlé Crenshaw's theory of intersectionality.<sup>58</sup>

I also teach my students about the important role Murray played in the story of how "sex" was added to Title VII of the Civil Rights Act of 1964. Serena Mayeri notes that "when the bill reached the Senate, African American lawyer Pauli Murray . . . wrote an influential memorandum designed to persuade civil rights supporters that the sex amendment was integral, rather than antithetical, to Title VII's goals."<sup>59</sup> Murray argued that if there were:

[N]o 'sex' amendment . . . *both* Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a

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two-new-residential-colleges-and-change [https://perma.cc/KAQ8-XQ2S]. See also Pauli Murray College, Yale College, https://paulimurray.yalecollege.yale.edu/ [https://perma.cc/Y63C-5C8N] (last visited Feb. 8, 2022). Scholars have noted Pauli Murray's intersectional identity. Florence Wagman Roisman, Lessons for Advocacy from the Life and Legacy of the Reverend Doctor Pauli Murray, 20 U. Md. L.J. Race, Religion, Gender & Class 1, 2 (2020) ("Some of these women were lesbians; some, probably including Pauli Murray, were transgender.").

<sup>54</sup> Jason Dick, 'My Name is Pauli Murray'—Portrait of an Activist as a Major Influence, Roll Call (Sept. 23, 2021), https://rollcall.com/2021/09/23/my-name-is-pauli-murray-documentary [https://perma.cc/2332-JJK6].

<sup>55</sup> 404 U.S. 71, 71 (1971).

<sup>56</sup> Neil S. Siegel, Why the Nineteenth Amendment Matters Today: A Guide for the Centennial, 27 Duke J. Gender L. & Pol'y 235, 263 (2020).

<sup>57</sup> Pauli Murray & Mary O. Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 233 (1965).

<sup>58</sup> See 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, 139–40 (1989).

<sup>59</sup> Serena Mayeri, Intersectionality and Title VII: A Brief (Pre-)History, 95 B.U. L. Rev. 713, 718 (2015).

Negro woman to determine whether or not she is being discriminated against because of race or sex. These two types of discrimination are so closely intertwined [sic] and so similar that Negro women are uniquely qualified to affirm their interrelatedness.<sup>60</sup>

Pauli Murray died in 1985. One of the architects of a foundational legal theory was still alive when I was in law school, yet we knew nothing about her work. Clearly, other law students also were not taught about the role that Murray played in the passage of Title VII. In his opinion in *Bostock v. Clayton County*, Justice Gorsuch repeated the partial origin story about Title VII—suggesting that its passage had simply been the result of a “poison pill” attempt by a white southern congressman to sabotage the Civil Rights Act.<sup>61</sup> I ask my students to consider Pauli Murray’s erasure from constitutional history: If a current justice of the Supreme Court misunderstands the history of an important statutory provision in such a fundamental way, what does that do to his ability to render a correct interpretation of that provision?

### III. CHANGING LAW SCHOOLS

#### *A. Reading Constitutional Law in Feminist Context*

The U.S. Constitution is gendered in its very design. The Founders drew on masculine conceptions of authority—drawn from philosophical ideas about male heads of households—when deciding on a consolidated executive model that combined the head of state, head of government, and

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<sup>60</sup> Id. at 719 (quoting 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, at 20 (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).

<sup>61</sup> 140 S. Ct. 1731, 1752 (2020) (“[The congressman] may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill.”). See also Rebecca Onion, The Real Story Behind “Because of Sex”, *Slate* (June 16, 2020), <https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html> [<https://perma.cc/6PTE-JFET>] (recounting the story of how a white southern congressman included “because of sex” in the text of Title VII, but adding more context to show that women rights activists intentionally laid the foundation for that inclusion). Note that while I agree with the outcome in *Bostock*, I have concerns about the implications of Justice Gorsuch’s textualist methodology. See generally Guha Krishnamurthi, Essay, Not the Standard You’re Looking For: But-For Causation in Anti-Discrimination Law, 108 Va. L. Rev. Online 1 (2022) (expressing support for the result in *Bostock* but concern that “the simple but-for text can be used as a sword to cut down policies that have made our workplaces safer and less discriminatory”).



commander-in-chief functions in one person. They shied away from design choices, like a multi-member council, that would have evoked collaboration and consensus, traits more closely associated with the feminine.<sup>62</sup> We should expose students to that idea, and the idea that a feminist constitutionalism would prioritize the consideration of social and economic realities, as well as the goal of remedying subordination as a polestar of decision making.<sup>63</sup> They should understand that a feminist constitutionalism, as applied to the realm of constitutional interpretation, requires one to “ask[] the woman question.”<sup>64</sup> An understanding of feminist legal history would ground future judges in how law shaped those social and economic realities, and how those realities should shape law. For example, all law students should understand that the definition of equality that emerged in 1920 following ratification of the Nineteenth Amendment was highly contested. They should know that the Equal Rights Amendment was introduced as early as 1923, with former suffragists split between those who supported formal equality in the form of legal neutrality between the sexes, and those who advocated for a more substantive equality in the form of special, protective legislation for women.<sup>65</sup> They should understand that subordinating legal regimes around political rights like jury service and public office-holding; economic rights like access to equal pay and credit; and civil rights like freedom from domestic violence, persisted throughout the twentieth and into the twenty-first century.<sup>66</sup> They should understand that it took

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<sup>62</sup> See generally Paula A. Monopoli, *Gender and Constitutional Design*, 115 *Yale L.J.* 2643 (2006) (arguing that these gendered design choices have normative “implications for how successful women will be in ascending to executive positions”).

<sup>63</sup> Catharine A. MacKinnon, Foreword, *in* *Feminist Constitutionalism: Global Perspectives*, at x (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012) (“A feminist constitutionalism would . . . require a substantive equality of women both as an overarching theme in the document and as an underlying reality in the social order . . .”).

<sup>64</sup> Daphne Barak-Erez, *Her-meneutics: Feminism and Interpretation*, *in* *Feminist Constitutionalism*, *supra* note 63, at 85, 95 (internal quotation marks omitted). Such a method “avoid[s] interpretive choices that disproportionately burden women and . . . prefer[s], where possible, interpretive alternatives that promote the just allocation of social burdens.” *Id.*

<sup>65</sup> Monopoli, *Constitutional Orphan*, *supra* note 1, at 127–44.

<sup>66</sup> See generally Nan D. Hunter, *In Search of Equality for Women*, *supra* note 38 (recognizing the “matrix of oppressive institutions” that women continued to face after the Nineteenth Amendment and analyzing three distinct movements organized around gender between the Nineteenth Amendment and the 1964 Civil Rights Act (“the Equal Rights Amendment campaign, the campaign for women workers’ rights, and the birth control campaign”). See also Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 *UCLA Women's L.J.* 35, 38–40 (1992) (jury service); Katz, *supra* note 38 (public

generations for the Supreme Court to finally extend the Fourteenth Amendment to sex-based differential treatment, with heightened scrutiny.<sup>67</sup> And they should be aware that we still have no sex-based equal rights amendment in the U.S. Constitution. Feminist legal history gives students insight into how formal legal equality is necessary but not sufficient to achieve sex-equality in democratic governance today.<sup>68</sup>

Women are half the population. Their relationship to the state and its Constitution are central to our representative democracy. If we were to teach more about the women's rights movement in the nineteenth and twentieth centuries in the required Constitutional Law course, students could better understand the significance of the Nineteenth Amendment today. Integrating feminist legal history into the curriculum can create a pervasive understanding among law students that there is a constitutional amendment—engineered by women—that expresses a clear commitment to sex equality in citizenship. I offer a seminar which incorporates that feminist legal history, in addition to empirical research that documents women's continuing subordination in the legal profession and the structural barriers they face in advancing in law.<sup>69</sup> Symposia and panels are also important in this regard. For example, I co-moderated a panel at the *Virginia Law Review Online's* Symposium, *From the Equal Rights Amendment to Black Lives Matter: Reflecting on Intersectional Struggles for Equality*, in January 2021.<sup>70</sup> These are all ways to bring feminist legal history to the attention of law students. But these efforts must also include integration into the core curriculum, especially into Constitutional Law, given its vaunted status.

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officeholding); Margaret J. Gates, Credit Discrimination Against Women: Causes and Solutions, 27 Vand. L. Rev. 409 (1974) (access to credit); Siegel, *She the People*, supra note 11, at 1024–30 and accompanying notes (violence against women).

<sup>67</sup> Thomas, Reclaiming the Long History, supra note 38, at 2654.

<sup>68</sup> See generally Paula A. Monopoli, Women, Democracy, and the Nineteenth Amendment, 100 B.U. L. Rev. 1727 (2020) (demonstrating that even with formal legal equality, women's participation in democratic governance lags behind that of men).

<sup>69</sup> The seminar is titled "Gender in the Legal Profession." It covers the feminist legal history around *Bradwell v. Illinois*, as well as the role of women lawyers in Congressional enactment of the Nineteenth Amendment, Title VII, Title IX, and the Equal Rights Amendment, in addition to empirical research documenting the structural barriers to women advancing in the profession today.

<sup>70</sup> Symposium, *From the Equal Rights Amendment to Black Lives Matter: Reflecting on Intersectional Struggles for Equality*, Virginia Law Review Online (Jan. 15, 2021), <https://www.law.virginia.edu/node/916986> [<https://perma.cc/JP2X-NAFJ>] (honoring and featuring a keynote by Elaine Jones '70, the first Black woman to graduate from UVA Law, and first director-counsel and president of the NAACP Legal Defense and Educational Fund).

*B. Eliminating Gender Hierarchies in Law Schools*

In addition to integrating feminist legal history into the curriculum, law schools must address the hierarchy of prestige not only in curriculum but in the faculty.<sup>71</sup> There is a signaling function to the way the faculty is constructed and an expressive dimension to who is allowed on the tenure-track. And women are less likely to be asked to teach the more prestigious courses, like Constitutional Law.<sup>72</sup> Law students are sensitive to the messages sent by these hierarchies.<sup>73</sup> Legal writing and clinical faculty—disproportionately women and people of color in the legal academy—are afforded less prestige than tenure-track, doctrinal faculty.<sup>74</sup> And a feminist history of the exclusion of women from law school faculties generally, and from the tenure-track specifically, illuminates this inequality and helps us chart a course for change. Furthermore, gender

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<sup>71</sup> There has been significant scholarship on the issue of women faculty in law schools, e.g., Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 *Temp. L. Rev.* 799 (1988); Kathryn M. Stanchi, *Who Next, the Janitors?: A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 *UMKC L. Rev.* 467 (2004); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 *BYU L. Rev.* 99 (2009); and most recently Dara E. Purvis, *Legal Education as Hegemonic Masculinity*, 65 *Vill. L. Rev.* 1145 (2020).

<sup>72</sup> See Merritt & Reskin, *supra* note 4 at 258–59 (“Men (both white and minority) were significantly more likely than women to teach constitutional law, while women (both white and minority) were significantly more likely to teach trusts and estates or skills courses.”); see also Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 *Mich. St. L. Rev.* 1745, 1768 (2012) (citing McGinley, *supra* note 71, at 102–03) (“There is also a clearly gendered pattern of course assignments in law schools with women being assigned to less prestigious areas of the curriculum.”).

<sup>73</sup> Fifty years after the passage of Title IX, we have a rich literature on the experience of women law students. See, e.g., Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 *J. Legal Educ.* 137 (1988); Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* (1997); Felice Batlan, Kelly Hradsky, Kristen Jeschke, LaVonne Meyer & Jill Roberts, *Not Our Mother's Law School?: A Third-Wave Feminist Study of Women's Experiences in Law School*, 39 *U. Balt. L.F.* 124 (2009); Nat'l Ass'n for L. Placement Found. & Ctr. for Women in Law, *Women of Color: A Study of Law School Experiences* (2020), <https://utexas.app.box.com/s/kvn7dezec99khii6ely9cve368q4gj9o> [https://perma.cc/BLJ2-P4KD].

<sup>74</sup> See Meera E. Deo, *Unequal Profession: Race and Gender in Legal Academia* 14–15, 19–20 (2019). And the impact of implicit bias on women of color in academia is extensively documented in *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) and *Presumed Incompetent II: Race, Class, Power, and Resistance of Women in Academia* (Yolanda Flores Niemann, Gabriella Gutiérrez y Muhs & Carmen G. González eds., 2020).

scholarship itself is marginalized.<sup>75</sup> Understanding feminist history, especially in the academy, helps understand why it has been slow to change mainstream understandings of constitutional development in light of continuing gender subordination. It would help us move feminist legal scholarship out of its silo and into the mainstream canon.

Since I graduated in 1983, my alma mater has done much better. From a single tenured faculty member in 1980 to noted legal historian Risa Goluboff as Dean of UVA Law and a substantial number of tenured women faculty forty years later is a significant leap. Descriptive representation has an important signaling function.<sup>76</sup> And women now make up more than half of the first-year class.<sup>77</sup> But we need to continue to pursue change in legal academia, like adopting a unified tenure-track that elevates the disproportionate number of women and people of color

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<sup>75</sup> Martha T. McCluskey, How Money for Legal Scholarship Disadvantages Feminism, 9 *Issues Legal Scholarship*, art. 9, at 1 (2011) (“In the last several decades, feminist legal theory has flourished as one of a number of schools of thought reexamining law’s basic principles, methods, and social functions. Courses, scholarship, journals, and advocacy focused on feminism have become an established part of the legal landscape. Despite these accomplishments, however, feminism’s place within theory, practice, and teaching remains largely marginal and subordinate.”). Note the remarkable departure of five women faculty from the Florida State University School of Law more than twenty years ago, in part, protesting the devaluation of their scholarship. See Robin Wilson, Women Quit Florida State U. Law Faculty, Fault Male Colleagues’ Elitism, *Chron. Higher Educ.* (May 11, 1999), <https://www.chronicle.com/article/women-quit-florida-state-u-law-faculty-fault-male-colleagues-elitism/> [<https://perma.cc/EG3X-E5UM>].

<sup>76</sup> See generally Amanda L. Griffith, Faculty Gender in the College Classroom: Does It Matter for Achievement and Major Choice?, 81 *S. Econ. J.* 211 (2014) (studying the impact of the gender of faculty members on male and female students); Tina R. Opie, Beth Livingston, Danna N. Greenberg & Wendy M. Murphy, Building Gender Inclusivity: Disentangling the Influence of Classroom Demography on Classroom Participation, 77 *Higher Educ.* 37 (2019) (finding that increased female representation in business schools may create inclusive learning environments in addition to other exogenous factors); Kenneth Gehrt, Therese A. Louie & Asbjorn Osland, Student and Professor Similarity: Exploring the Effects of Gender and Relative Age, 90 *J. Educ. Bus.* 1 (2015) (studying female and male students’ evaluations of professors’ gender and age and finding female students rated female faculty more highly than male faculty, perhaps in part because there were fewer female than male faculty at the university and thus female faculty “might have been especially salient to the students sharing the same gendered trait”).

<sup>77</sup> Mike Fox, Class of 2024 Sets Records in Academic Strength, Diversity, UVA Lawyer, Fall 2021, at 10 (noting that, of the 300 students in the Class of 2024, 51% are women, 49% are men, and 36% identify themselves as people of color). At the University of Maryland Carey School of Law, 67% of the Class of 2024 is women. See ABA Law School Data: JD Total First Year Class Enrollment Data, Fall 2021, ABA (Dec. 15, 2021), [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) [<https://perma.cc/EG3X-E5UM>].

in legal writing and some clinical positions to equal status.<sup>78</sup> We also need to elevate the prestige of feminist legal scholarship, and prevent its marginalization.<sup>79</sup> This is an opportune moment to focus on these reforms and the integration of critical legal theory, given the American Bar Association's recent amendments to the standards for law school accreditation, approved on February 14, 2022.<sup>80</sup> Those standards require law schools to integrate coverage of bias and racism.<sup>81</sup> A broad integration of critical legal theories, including critical race theory, feminist legal theory, critical race feminism, and masculinities theory could follow from these new standards.<sup>82</sup>

#### CONCLUSION

Reflecting on my forty years in law—including thirty as a legal academic—yields the conclusion that the law has yet to recognize the significance of women in its development. I began my career in law just as feminist legal theory was taking root in law schools. It has yet to have the influence it should have in interpreting law, especially constitutional law. That is disappointing, but not surprising given the sticky nature of women's social, legal, and economic subordination across societies and across millennia. I begin my seminar with Sophocles' play, *Antigone*.<sup>83</sup>

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<sup>78</sup> See, e.g., Kathryn M. Stanchi & Jan M. Levine, Gender and Legal Writing: Law Schools' Dirty Little Secrets, 16 Berkeley Women's L.J. 3, 4–6 (2001); Ruth Anne Robbins, Kristen K. Tiscione & Melissa H. Weresh, Persistent Structural Barriers to Gender Equity in the Legal Academy and the Efforts of Two Legal Writing Organizations to Break Them Down, 65 Vill. L. Rev. 1155, 1178–84 (2020).

<sup>79</sup> See McCluskey, *supra* note 75, at 1.

<sup>80</sup> Memorandum from The Standards Committee to the ABA Council of the Section of Legal Education and Admissions to the Bar, Final Recommendations: Standards 205, 303, 507 & 508 (Aug. 16, 2021), <https://taxprof.typepad.com/files/aba-council.pdf> [<https://perma.cc/7Z89-CXLJ>]; Karen Sloan, U.S. Law Students to Receive Anti-Bias Training After ABA Passes New Rule, Reuters (Feb. 14, 2022), <https://www.reuters.com/legal/legalindustry/us-law-students-receive-anti-bias-training-after-aba-passes-new-rule-2022-02-14/> [<https://perma.cc/DFD2-M46E>].

<sup>81</sup> Amended Standard 303(c) requires that a “law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.” *Id.* at 3.

<sup>82</sup> See Purvis, *supra* note 71, at 1145–46 (offering masculinities theory as a frame to better understand how legal pedagogy fails women and why reform would help all students).

<sup>83</sup> Sophocles, *Antigone* 3 (Dover Thrift ed. 1993) (Ismene declares: “We too shall perish, if despite of law we traverse the behest or power of kings. We must remember we are women born, unapt to cope with men. And, being ruled by mightier than ourselves, we have to hear these things—and worse.”).

Antigone defies her uncle's order not to bury her brother, Polynices. Sophocles makes clear the unique anger that Creon, ruler of Thebes, displays when defied by a woman. The point for my students is that in bringing a feminist perspective to bear on law and women's relationship to the state and to power, we are fighting thousands of years of deeply entrenched views about gender and its proper spheres.

Each of us can only do so much.<sup>84</sup> My contribution has been to join other legal scholars in bringing to light the history and significance of women in our constitutional development. If someone had told me on that first day of law school forty years ago that would be my legacy, I would have been surprised and pleased to know I would become a law professor who helped produce judges and advocates well-equipped to recognize a substantive equality of citizenship in law.

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<sup>84</sup> Jessie Kratz, *The Movement as a Mosaic: Alice Paul and Woman Suffrage*, Nat'l Archives Pieces of Hist. Blog (May 10, 2019), <https://prologue.blogs.archives.gov/2019/05/10/the-movement-as-a-mosaic-alice-paul-and-woman-suffrage/> [<https://perma.cc/QKZ4-5L2V>] (quoting Alice Paul) ("I always feel the movement is a sort of mosaic. Each of us puts in one little stone, and then you get a great mosaic at the end.").