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## **WHEN EXPERIENCE BECOMES HISTORY: SEXISM, RACISM, AND THE JUDICIAL MIND**

Judith A. Baer\*

SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011). Pp. 369. \$39.95.

One generation's news becomes the next generation's history. The scholar reads in the archives what the participant got from experience and the observer got from the media. Serena Mayeri's first book focuses on events familiar to second-wave feminists, especially those who, like this reviewer, were both students and activists at the time. Mayeri, a professor of law and history at the University of Pennsylvania, seeks to "uncover[] the myriad ways that Americans reconfigured the relationship between racial injustice, sex inequality, and the law in the 1960s and 1970s."<sup>1</sup> The task she has set for herself takes her through much of the late twentieth century feminist history. She has read voluminous papers and archives and has explored biographies, memoirs, legal briefs, contemporary accounts, office memoranda, court decisions, and just about every available primary and secondary source. *Reasoning from Race* began as Mayeri's Ph.D. dissertation. The highest praise I can give this book is to report that acquiring this information required a web search. The book's provenance cannot be guessed from the research, the writing, the argument, or the theme. Mayeri has produced a sophisticated, nuanced, lucidly written, and thoroughly professional study. She excels at both of her disciplines. Her future work promises to be worth reading.

The task of turning a dissertation into a book requires a transition from writing for people who know more than the author to writing for people who know less. The specialist in recent history does not leave the first type of audience behind. The faculty committee is replaced by readers who recall both the script and the cast and retain their own interpretations of them, filtered through time and distance and not necessarily recollected in tranquility. The historian may have much to teach the witness. Hindsight confers advantages: the ability to discern a new tune from familiar words, to sort information, to find order in jumble, to see patterns in retrospect, and to ask new questions of the material. *Reasoning from Race* meets these challenges. But the witness is tempted to look for what the author gets wrong. This type of reader is predisposed to

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1. SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 7 (2011).

the reviewer's critical stance. Research is a better tool than memory for ascertaining facts, but not necessarily for identifying all the relevant facts. Factual errors of omission are more common and more serious than errors of commission, which can be corrected in later printings. Mayeri's specific errors of omission consist of inattention to the details of constitutional and legal texts. This inattention leads to significant misunderstandings that weaken the force of this book. Mayeri approaches mastery of her subject, but she falls short of achieving it.

"The African American quest for civil rights has become so deeply ingrained in American consciousness that it is the yardstick against which all other reform movements are measured."<sup>2</sup> This yardstick has been and remains problematic for gender equality. Racial injustice arrived in North America soon after the first English settlers. African slavery antedated all the original thirteen colonies. It lasted from 1619, more or less, to 1863.<sup>3</sup> Not until 2107 will we have lived without slavery as long as we have lived with it. The oppression of women, including forced migration, has also been present since Europeans settled in North America.<sup>4</sup> But slavery was a peculiar institution from the beginning, while traditional gender arrangements were an accepted part of life. The racial analogy is particularly powerful with respect to the adjudicating of cases and the making of laws. An active feminist movement existed by the end of the Civil War, but Frederick Douglass's proclamation of "the Negro's hour" ended any hope of combining women's voting rights with those of black men.<sup>5</sup> The history of Jim Crow laws needs no retelling, but the Equal Protection Clause of the Fourteenth Amendment ceased to be "the usual last resort of constitutional arguments"<sup>6</sup> by the time the women's movement resurfaced in the late 1960s. Racial classifications were "constitutionally suspect," and could survive strict scrutiny only after meeting "a heavy burden of justification."<sup>7</sup> They were, in effect, presumed invalid. Sex, however, was still a valid basis for classification.<sup>8</sup> The title of Pauli Murray and Mary Eastwood's path breaking article said it all: *Jane Crow and the Law*.<sup>9</sup> It is exactly this "reasoning from race" that

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2. *Id.* at 2.

3. PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877*, at 3 (Hill & Wang 1993).

4. ANN JONES, *WOMEN WHO KILL*, 15-27 (Holt, Rinehart, & Winston 1980) (reporting that English women, arrested for theft, vagrancy, or prostitution, were often "released" from jail onto ships).

5. See Elizabeth Cady Stanton, Letter to the Editor, *This is the Negro's Hour*, NAT'L ANTI-SLAVERY STANDARD, Dec. 30, 1865.

6. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (rejecting an equal protection challenge to a state statute that authorized sterilization of the "feeble-minded").

7. See, for example, *Loving v. Virginia*, 388 U.S. 1, 11 (1967), where the Supreme Court took a circuitous route and *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). The *Korematsu* Court, of course, did the opposite of what it said. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding the congressional order excluding people of Japanese ancestry after stating racial classifications are subject to "the most rigid scrutiny"); see Walter F. Murphy, *Civil Liberties and the Japanese American Cases: A Study in the Uses of Stare Decisis*, 11 WESTERN POL. Q. 3, 4-5, 13 (1958).

8. JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 5, 70-77, 107-08 (1978) (describing the significance of the Court's sex classifications in both *Muller v. Oregon*, 208 U.S. 412 (1908) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)); see also *Hoyt v. Florida*, 368 U.S. 57 (1961) (rejecting a constitutional claim that the state statute excluded women from jury service); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state law that prohibited women from bartending).

9. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO.

was so costly and yet so inevitable.

The task confronting a lawyer who took on an equal protection case involving sex discrimination was to convince courts to move from the “sex is a valid basis for classification” doctrine, closer to the “suspect classification” doctrine on race discrimination. This burden fell to Ruth Bader Ginsburg of the ACLU’s Women’s Rights Project.<sup>10</sup> As a Supreme Court Justice, she is still working on this task forty years later.<sup>11</sup> The compromise standard has been entrenched since 1976: “[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>12</sup> The Court’s rejection of strict scrutiny in favor of intermediate scrutiny has remained constant.<sup>13</sup>

By 1980, two distinct judicial positions had emerged on the analogy between sexism and racism. Justice Brennan’s opinion in *Frontiero v. Richardson* recommended making sex a suspect classification.<sup>14</sup> He recounted how “our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, 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.”<sup>15</sup> Justice Powell, however, insisted five years later that “the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.”<sup>16</sup> Neither statement articulates binding constitutional doctrine; Justice Brennan was one vote short of a majority,<sup>17</sup> and Justice Powell’s remark was dicta.<sup>18</sup> But they are important expressions of a tension that persists to the present.

Justice Brennan’s statement was qualified. He did not “lump together” sexism and racism, as second-wave feminists were often accused of doing. He made a familiar comparison that Justice Powell rejected. Typical critics of the analogy argued that racial inequality and gender inequality were different in degree: racism was worse than sexism. This criticism ignored the fact that minority women confronted both types of inequality at once. Justice Powell declared that sexism and racism are different,<sup>19</sup> but was he positing a difference in degree or a difference in kind? If the former, we may roll our eyes and think “here we go again.” If the latter, Justice Powell’s statement is difficult to dispute. Racial and sexual inequality may share a similar history, but they do not have the same history. Both histories are lengthy and may be equally tragic, but they are not tragic in the same way.

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WASH. L. REV. 232 (1965-1966).

10. Amy Leigh Campbella, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157, 162–63 (2002).

11. *See id.* at 163.

12. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

13. *See, e.g., Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Craig*, 429 U.S. 190.

14. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion).

15. *Id.* at 685.

16. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978).

17. *See Frontiero*, 411 U.S. 677.

18. *See Bakke*, 438 U.S. at 303.

19. *See id.*

The dangers and limits of reasoning from race go far beyond gender equality. Mayeri begins and ends the book, not with comparisons between race and gender, but with the relationship between minority rights and same-sex marriage. It is impossible to think about this issue without recalling *Loving v. Virginia*, the Supreme Court's ruling that invalidated prohibitions against interracial marriage.<sup>20</sup> But Mayeri twice quotes a law professor who insists that opposition to same-sex marriage arises not from "prejudice and bigotry," but from the desire for "the kind of meaningful gender identities that traditional marriage seems to offer."<sup>21</sup> The support among African American voters for California's Proposition 8 in 2008<sup>22</sup> and North Carolina's constitutional amendment in 2012<sup>23</sup> suggests that this desire exists in diverse segments of American society. To the feminist reader, of whatever race, this sort of rhetoric has a familiar ring. It evokes the *Moynihan Report* of 1965, which found a "[t]angle of [p]athology" in the black family caused by "a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well."<sup>24</sup> In the mid-1960s, one did not criticize the *Moynihan Report*; one faced up to its implications. By 1970, the feminist and black power movements had challenged this white male orthodoxy. But criticism did not make the orthodoxy go away; it continues to affect public policy.

Many second-wave feminists regard traditional marriage roles as examples of prejudice and bigotry, and as remnants of a tragic history. While the Supreme Court has never endorsed this view, it went so far as to reject "old notions" and "stereotyped characterizations" as bases for gender discrimination on its way to a formal invalidation of traditional marriage law.<sup>25</sup> Without treating sex exactly like race, the Justices perceived the gross, stereotyped distinctions underlying family law. The *Craig v. Boren* standard of intermediate scrutiny<sup>26</sup> has produced significant gains in women's rights, and this is no small achievement. What the Court has been unable or unwilling to do is to reject discrimination based, however dubiously, on factors that are not stereotyped characterizations — notably women's childbearing capacity. From *Michael M.* in 1981 through *Tuan Anh Nguyen* in 2001, the Court has upheld laws like these.<sup>27</sup> When the

20. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

21. MAYERI, *supra* note 1, at 2, 225 (quoting Professor Richard Thompson of Stanford Law).

22. Shelby Grad, *70% of African Americans Backed Prop. 8, Exit Poll Finds*, L.A. TIMES (Nov. 5, 2008, 12:10 PM), <http://latimesblogs.latimes.com/lanow/2008/11/70-of-african-a.html>.

23. Michael Gordon, *Amendment One: N.C. Voters Approve Measure to Block Same-Sex Marriage*, CHARLOTTE OBSERVER (May 9, 2012), <http://www.charlotteobserver.com/2012/05/08/3227863/amendment-one-nc-voters-approve.html>.

24. Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39, 75 (Lee Rainwater & William L. Yancey eds., 1967). The report repeatedly refers to a family with a "female-head," not a "single-parent" family. *See id.* at 63.

25. *See Kirchberg v. Feenstra*, 450 U.S. 455, 458–61 (1981); *Stanton v. Stanton*, 421 U.S. 7, 14–17 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 685–88 (1973).

26. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

27. *See Nguyen v. INS.*, 533 U.S. 53 (2001); *Michael M v. Superior Court of Sonoma Cnty.*, 450 U.S. 464 (1981). *See also Miller v. Albright*, 523 U.S. 420 (1998) (requiring additional proof of parentage from an illegitimate child born abroad when the parent with citizenship was the father and not the mother). *Cf. Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding, under the *Craig* standard, the male-only draft registration

racial analogy is useless, the judiciary is compliant.

Mayeri ably shows that the failure to treat sexism as seriously as racism is not the only problem with constitutional doctrine. In two important respects, race and sex have been treated alike since the 1970s to the detriment of the equal protection doctrine. First, the Court neutralized inequality into classification and discrimination.<sup>28</sup> Judges and lawyers did not speak of white supremacy, male supremacy, oppression, or inferior treatment, but of classification by race or gender.<sup>29</sup> The Court has refused to distinguish between invidious and benign discrimination. Justice Rehnquist's dissent in *Craig* marked the last occasion any Justice made a distinction between discrimination against women and discrimination against men.<sup>30</sup> Justice Powell declared in *Bakke*, "[r]acial and ethnic classifications of any sort are inherently suspect, and thus call for the most exacting judicial examination."<sup>31</sup> This neutrality made it easy to presume that discrimination in favor of the disadvantaged was just as bad as discrimination against them, a conclusion that is not required by text, history, or logic. Secondly, the Court has required that discrimination be deliberate; disparate impact does not count unless there is evidence of intent.<sup>32</sup> *Washington v. Davis* upheld a testing requirement for aspiring police officers,<sup>33</sup> and *Personnel Administrator v. Feeney* upheld a veterans' preference,<sup>34</sup> despite the fact that the rule in *Washington* disproportionately excluded African Americans and the rule in *Feeney*, women.<sup>35</sup>

It is at this point in the argument that Mayeri appears to have conflated constitutional interpretation and statutory construction. Under "Disparate impact theory," the index lists *Dothard v. Rawlinson*, *Geduldig v. Aiello*, *General Electric v. Gilbert*, *Griggs v. Duke Power Company* and *Personnel Administrator v. Feeney*.<sup>36</sup> The last case does not belong here. It was brought under the Equal Protection Clause,<sup>37</sup> whereas all the other rulings were based on Title VII of the Civil Rights Act of 1964.<sup>38</sup> Title VII refers directly to discrimination on the basis of race and sex,<sup>39</sup> not to denial of equality. Furthermore, disparate impact has been accepted as evidence of employment discrimination since the *Griggs* decision in 1971.<sup>40</sup> No showing of intent is necessary. Mayeri describes *Washington v. Davis* as a "severe blow" to disparate impact theory,<sup>41</sup>

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requirement, and demonstrating traditional judicial deference to Congress with respect to the military).

28. See *Fontiero*, 411 U.S. at 688.

29. *Id.* at 687–88.

30. *Craig*, 429 U.S. at 219–20 (Rehnquist, J., dissenting).

31. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

32. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979).

33. *Washington v. Davis*, 426 U.S. 229, 250–52 (1976).

34. *Feeney*, 442 U.S. at 280–81.

35. *Id.* at 269; *Washington*, 426 U.S. at 242.

36. MAYERI, *supra* note 1, at 355.

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

38. *Dothard v. Rawlinson*, 433 U.S. 321, 323 (1977); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127–28 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 425–26 (1971).

39. 42 U.S.C. § 2000e-2 (2012).

40. See, e.g., *Dothard*, 433 U.S. at 329; *Gilbert*, 429 U.S. at 133; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

41. MAYERI, *supra* note 1, at 110.

but in fact it was merely a refusal to incorporate Title VII into the equal protection guarantee. The Fourteenth Amendment and the Civil Rights Act use different words, have different purposes, and have emerged from different contexts. I agree with Mayeri that intent should not be required for a Fourteenth Amendment violation — after all, Section 1 guarantees “equal protection of the laws,”<sup>42</sup> not “immunity from intentional unequal treatment”— but Title VII is not an authoritative source of the equal protection doctrine. Even if one accepts the attitudinal model of judicial decision making, the belief that judges decide cases on the basis of their personal preferences does not entail the conclusion that they vote only on this basis.<sup>43</sup>

The Civil Rights Act of 1964 started with race and color, progressed to religion, and, in a bizarre attempt at “[sinking] the bill under gales of laughter,”<sup>44</sup> added sex to the list of prohibited classifications in its section on employment discrimination.<sup>45</sup> Described as a “joke” by commentators<sup>46</sup> and a “fluke” by the first director of the Equal Employment Opportunity Commission,<sup>47</sup> the sex provision of Title VII has been treated by the Commission and the courts as anything but a joke or fluke. Mayeri’s treatment of statutory cases dispels, once and for all, the familiar canard that early second-wave feminists cared only about the interests of white, middle-class, educated women.<sup>48</sup> This feminist cohort included minority women like Pauli Murray,<sup>49</sup> Aileen Hernandez, and Dorothy Height.<sup>50</sup> The same lawyers who were active in the much-maligned National Organization for Women argued cases on behalf of blue-collar women workers like Lorena Weeks, Leah Rosenfeld, and Ida Phillips.<sup>51</sup> While civil rights activists and their feminist counterparts exchanged criticisms, both groups sought cooperation; for example, “[f]eminists used the Phillips case to make common cause with the civil rights movement.”<sup>52</sup> Victories like these helped working women regardless of their race or class. Outside Mayeri’s time period, landmark cases on maternity leave and sexual harassment were won by African American women Lillian Garland and Mechelle

42. U.S. CONST. amend. XIV, § 1.

43. See, *inter alia*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 15–22 (1999) (describing the “preferential model” as the belief that judicial decision-making is largely based on personal preference). There is no evidence that Mayeri accepts this model; she neither discusses it nor cites it.

44. CAROLINE BIRD & SARA WELLES BRILLER, BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN 5 (David McKay Co. 1968).

45. 42 U.S.C. § 2000-2(a)(1) (2012).

46. JO FREEMAN, THE POLITICS OF WOMEN’S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 53 (1975).

47. *Id.* at 54.

48. See MAYERI, *supra* note 1, at 194–98.

49. See *id.* at 223, 226 (describing Murray’s efforts to unite the movements for both gender and racial equality).

50. See Duchess Harris, *From the Kennedy Commission to the Combahee Collective: Black Feminist Organizing, 1960-80*, in SISTERS IN THE STRUGGLE: AFRICAN AMERICAN WOMEN IN THE CIVIL RIGHTS-BLACK POWER MOVEMENT 280, 285–87 (Bettye Collier-Thomas & V.P. Franklin eds., 2001) (discussing the roles of both Aileen Hernandez and Dorothy Height in the civil rights movement).

51. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Rosenfeld v. S. Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968); Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967); MAYERI, *supra* note 1, at 30–33.

52. MAYERI, *supra* note 1, at 54.

Vinson.<sup>53</sup> “Parallels to race helped judges to see sexual abuse of women in the workplace as discrimination based on sex.”<sup>54</sup>

“Explain what unfair thing was done to you and how others were treated differently.”<sup>55</sup> This sentence, which headed the blank space on the EEOC charge form during Mayeri’s time frame, states the essence of a claim of unequal treatment.<sup>56</sup> If the charging party was a woman and the “others” were men, a sex discrimination charge was straightforward. If, as in Ida Phillips’s case, the “others” were not men but differently situated women, the case was more complex but still manageable. But what happens if discriminatory treatment is based on both sex and race? “In a way, African American women were too successful in universalizing their experience: once women of all races could claim violation, the particular underpinnings of black women’s claims were obscured.”<sup>57</sup> Judges, once persuaded to treat sex like race, forgot both the ways in which race and sex differed and the ways in which they combined. This linear, either-or model has limited the force of both constitutional and statutory law.

In a chapter entitled “Lost Intersections,” Mayeri recounts several instances in which black women suffered sexual harassment based partly on their race and courts dismissed their race discrimination complaint.<sup>58</sup> She devotes much of this chapter to the case of Katie Mae Andrews, an African American woman who was denied a job as a teacher’s aide in Drew, Mississippi in 1972 because she was a single mother.<sup>59</sup> The record contained abundant evidence that the superintendent’s refusal to hire unwed mothers was “part of a larger backlash against civil rights.”<sup>60</sup> The rule obviously had a disparate impact on African American women, but the plaintiffs “struggled to explain how the rule was racially discriminatory without suggesting that African American culture somehow encouraged or condoned ‘schoolgirl pregnancies.’”<sup>61</sup> By the time the case got to court, it had morphed into an equal protection claim, rendering the disparate impact theory irrelevant.<sup>62</sup>

But this whole discussion — and the sources on which it is based — ignores a crucial part of Title VII. It is illegal for employers to discriminate on the basis of “race, color, religion, sex, or national origin” except “where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>63</sup> This phrase is an implicit invitation to weaken anti-

53. Respectively, *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); see also Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 315–18 (2000).

54. MAYERI, *supra* note 1, at 145 (citation omitted).

55. See *Hicks v. ABT Assoc., Inc.*, 572 F.2d 960, 962 (3d Cir. 1978).

56. It now reads, “The particulars are:” EEOC, CHARGE OF DISCRIMINATION, FORM 5, available at [http://www.wylielaw.com/eeoc\\_form.pdf](http://www.wylielaw.com/eeoc_form.pdf).

57. MAYERI, *supra* note 1, at 145.

58. *Id.* at 144–67.

59. *Id.* at 145–53.

60. *Id.* at 146.

61. *Id.* at 158–59.

62. See *id.* at 151.

63. 42 U.S.C. § 2000e-2(a)(1), (e) (2012).



discrimination law; the authoritative source for information about a particular business is the employer, not the employee. But the word “race” is missing from the qualification. Race is never a bona fide occupational qualification (“BFOQ”). There is no such thing as “race plus” anything: pregnancy, motherhood, fertility, racially inappropriate behavior, or, for that matter, sex.<sup>64</sup> For some reason, no one mentioned in this book seems to have noticed this difference in textual language.<sup>65</sup> Nor does Mayeri mention it. Her account reveals how the failure to notice textual language has effectively nullified Title VII as a remedy where both sex and race discrimination are present. Analysis of this failure would have vastly enhanced the import and value of this study.

These criticisms are not trivial. But the book’s weaknesses do not render it insignificant. We can expect much more from an author who produces a study of this caliber early in her career. Mayeri’s work is essential to an understanding of law, history, feminist theory, and social science. What is depressing is the fact that the limited judicial reasoning she illuminates remains in place thirty years later, long after feminist jurisprudence left it behind. Angela Harris’s critique of gender essentialism, Kimberle Crenshaw’s exploration of intersectionality, and Mari Matsuda’s call for multiple consciousness are absent from court decisions.<sup>66</sup> Given the entrenched conservatism of federal appellate courts, this absence is unsurprising. But these authors are read by law students who become clerks and eventually judges. Mayeri’s explanation of what went wrong and the availability of alternative theories provide grounds for cautious optimism.

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64. Sex-plus discrimination against pregnant workers is not *per se* a violation of antidiscrimination law, but neither does pregnancy confer a blank check on employers. The EEOC upheld regulations prohibiting women from working as flight attendants in late pregnancy, but a federal appeals court invalidated a regulation barring any pregnant woman from working as a flight attendant. *Levin v. Delta Air Lines*, 730 F.2d 994, 996 (5th Cir. 1984.) The other Title VII cases are, respectively *Int’l Union v. Johnson Controls*, 499 U.S. 187 (1991) (discrimination based on fetal protection policy); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discrimination in partnership decision); *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) (discrimination based on having pre-school aged children). The first two cases lie outside Mayeri’s time frame, and *Hopkins* was not even a BFOQ case. I include them because they are apt illustrations of the differences between sex and race discrimination under Title VII.

65. The political scientist may be forgiven for mentioning that Andrews was awarded the back pay she sued for; she did not ask to be hired by the district. Katie Mae Andrews Peacock went on to teach in several Mississippi schools until her death in 2009. MAYERI, *supra*, note 1, at 235.

66. See Kimberle 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 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1989-1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989).