

# Abortion Law: "Unique Problem for Women"<sup>†</sup> Or Sex Discrimination?

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The campaign for the Equal Rights Amendment to the United States Constitution employed a political strategy that excluded women's access to abortion, along with other basic equality issues, from the orthodox analysis of why the Equal Rights Amendment was needed and what it was expected to do. As part of this costly strategy, women's pregnancy rights were located in a sex-neutral right of privacy. The privacy right has subsequently been used as a "gotcha" against women's right not only to privacy, but to equality as well.

## I. POLITICAL CONSTRAINTS ON THE ERA LEGISLATIVE HISTORY

Some twenty years ago, leading proponents of the Equal Rights Amendment faced an extraordinary opportunity to redefine constitutional equality from a man-to-man standard to a human standard. Their goal was ratification of the amendment. They could choose to pursue ratification as advocates for women or as politicians. That is, they could create a vision of how equality would look if it were done right. They could seek through public discourse to inspire women to claim that vision by using the only right women have that is recognized by the Constitution—the right to vote, guaranteed by the Nineteenth Amendment. Or they could, in consultation with lawyers and legislators, strategize to treat the principle of constitutional equality as any other piece of negotiable, special interest legislation by stripping out the toughest parts, agreeing on some trade-offs, and going for what they thought they could get.

History indicates that ERA proponents chose the second option, making a strategic decision by accretion<sup>1</sup> to argue that the ERA would have "nothing

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<sup>†</sup> In a 1974 letter, Yale Law Professor Thomas Emerson described abortion as a "unique problem for women" that does not raise equal protection issues. *See infra* text accompanying note 32.

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1. For a discussion of the term "decision by accretion," coined by Carol Weiss, *see* JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 68 & 264 n.2 (1986). Although I disagree with Mansbridge's view that ERA proponents should have done more to tailor their interpretation of the amendment to please "mainstream voters and legislators," *id.* at 68, I agree that "[k]ey decisions taken by a few actors structured

to do with" providing a constitutional basis for legal remedies against five major categories of sex discrimination: 1) barriers to abortion (a subclass of pregnancy discrimination though not identified as such); 2) discrimination on the basis of sexual orientation; 3) exemption of women from military combat (and the implied privileges of adulthood and citizenship that non-exemption confers on men); 4) sex discrimination in insurance (with its invidious view of women as sickly, excessively long-lived, and financially advantaged by sex discrimination); and 5) tax support or tax exemptions for single-sex schools.

Pretexts for these five exclusions had an air of expediency and all have come back to haunt us. Proponents of this strategy argued that pregnancy, involving a physical characteristic unique to one sex, did not in itself involve equal protection questions.<sup>2</sup> They further argued that abortion was already addressed by a sex-neutral right to privacy<sup>3</sup> (located elsewhere in a constitution that was not obliged to respond to women unless their right to vote was being abridged). Because the ERA was said to deal only with discrimination between the sexes, homosexuals would not be protected from discrimination except "when laws treat male homosexuals differently from female homosexuals."<sup>4</sup> Military combat was not absolutely precluded, but "[w]omen would serve, as men do now, where they are best fit to serve."<sup>5</sup> Insurance, a state-regulated industry, arguably involved no state action and might therefore be outside ERA jurisdiction. If not, threatened premium increases for women must be "the price of equality."<sup>6</sup> Single-sex schools might be granted various forms of public support without involving state action<sup>7</sup> if "evaluated as making a positive contribution to overcoming the effects of discrimination and promoting sex equality."<sup>8</sup>

the information available to the rank and file." *Id.*

2. Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893 (1971) [hereinafter Brown et al.].

3. *Roe v. Wade*, 410 U.S. 113 (1973). See *infra* text at note 34 for Thomas Emerson's explanation for not mentioning abortion in the Privacy Qualification section of Brown et al., *supra* note 2, at 900.

4. Sarah E. Burns, 1983 ERA Legislative History Project 36 (Aug. 26, 1983) (on file with National Organization for Women, Washington, D.C.) [hereinafter 1983 ERA Legislative History Project]; see also 118 CONG. REC. 9331 (1972) (statement of Sen. Birch Bayh).

5. 117 CONG. REC. 35,796 (1971) (statement of Rep. Thomas P. O'Neill); 1983 ERA Legislative History Project, *supra* note 4, at 43.

6. ERA proponents generally avoided discussing the validity of sex-divided insurance classifications and their alleged advantages for women. During House debate, ERA opponents cited automobile insurance to support the argument that women would be hurt by equality, but ERA advocates did not respond. 117 CONG. REC. 35,790 (1971). Brown et al., *supra* note 2, at 891 n.45, cite without comment a discussion of "insurance rates based on statistical differences between men and women" in *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1172-76 (1971). In the context of state action, however, Brown et al. stress that the ERA could allow different treatment on account of sex in the private sector. Brown et al., *supra* note 2, at 906. See also *infra* note 15.

7. Brown et al., *supra* note 2, at 907.

8. 1983 ERA Legislative History Project, *supra* note 4, at 33. See also *Equal Rights Amendment: Hearings on H.R.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 124 (1983) (statement of Bernice R. Sandler, Association of American Colleges) [hereinafter *House 1983 ERA Hearings*].

By the second ERA run-through in 1983, the earlier excuses were buttressed by reassurances that state ERAs had been powerless to legitimize homosexual marriages,<sup>9</sup> mandate public funding of abortions,<sup>10</sup> or do anything the federal ERA was not expected to do.

From the start, however, these circumventions were intended to expedite ratification of the ERA by denying or avoiding its most essential and therefore most controversial implications. The strategy not only failed, but also doomed advocates to fight from a defensive stance throughout the ERA campaign and up to the present day, and to do so at great cost not only to the major issues involved, but at hazard to existing civil rights laws as well. Consider, for example, the 1977 Hyde Amendment<sup>11</sup> and the Pregnancy Discrimination Act of 1978.<sup>12</sup> The Hyde Amendment denied Medicaid funding of abortions for poor women. The Pregnancy Discrimination Act excluded abortion coverage when it amended Title VII to require employers to provide pregnancy benefits in employee health insurance plans. Or consider the undermining of Title IX enforcement by continued tax support for men-only military schools and women-only public high schools, not to mention tax exemptions for women's private prep schools and colleges. Note as well the divisive touting of the advantages of sex and race self-segregation that these arrangements promote in the name of affirmative action.<sup>13</sup>

With an honest agenda, the ERA campaign could have been a national experience in feminist consciousness raising. What should have been a strong affirmative statement of the power of the ERA to guarantee women's right to equal protection of the law became instead an ignominious game of cat and mouse when advocates showed reluctance to acknowledge that the ERA would require fundamental change. Legislators took turns trapping ERA experts in their own inconsistencies and evasions. Opponents taunted advocates by asserting that the ERA would actually do what it ought to do, thus forcing advocates into ever more tortuous denials.<sup>14</sup> The issues on which women most

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9. 1983 ERA Legislative History Project, *supra* note 4, at 36.

10. *See, e.g.*, the response of Mary Frances Berry, a commissioner testifying on behalf of the U. S. Commission on Civil Rights, to a question concerning the effect of ERA on the Hyde Amendment, Pub. L. No. 95-205, 91 Stat. 1460, § 101 (1977): "I see the issue of abortion as in the Colorado state cases as something that ERA does not have to be involved in and would not be involved in any decision." *House 1983 ERA Hearings*, *supra* note 8, at 53-54.

11. Pub. L. No. 95-205, 91 Stat. 1460, § 101 (1977). The Supreme Court upheld the constitutionality of the Hyde Amendment, ruling that it did not violate the Due Process Clause of the Fifth Amendment or the Establishment Clause of the First Amendment, in *Harris v. McRae*, 448 U.S. 297 (1980).

12. 42 U.S.C. § 2000e(k) (1978).

13. *See, e.g.*, Alice Digilio, *Classrooms of Their Own: Are Single-Sex Schools Better for Girls?*, WASH. POST EDUC. REV., Aug. 6, 1989, at 4; Lawrence Feinberg, *Student's Thesis Explores Her Black Identity: Howard Students Found Proud to Be 'at Home,'* WASH. POST, Sept. 9, 1989, at B1; Leslie Milk, *Separation in Schools Now Means Sexual Equality Later*, ALEXANDRIA J. (Va.), Mar. 14, 1990, at 5; Linda Wright Moore, *When Separate Can Be Beneficial: All-Black All-Male Schools Tried*, PHILA. DAILY NEWS, Apr. 12, 1990, at 42; Larry Gordon, *Decision To Go Co-ed Prompts Tears at California Women's College*, PHILA. INQUIRER, May 4, 1990, at A3; Letters to the Editor, *What's Good Enough for Mills Should Be Good Enough for VMI*, WASH. POST, May 26, 1990, at A27.

14. *See, e.g.*, *House 1983 ERA Hearings*, *supra* note 8, at 802-03. When an anti-ERA congressman

needed to see women standing firm and speaking clearly instead became those issues most dreaded, most divisive, and most easily exploited to confirm stereotypes of feminine deviousness.<sup>15</sup> As time passed, the forbidden issues increasingly came to resemble a necklace of albatrosses.<sup>16</sup>

The basic principles articulated by the United States Constitution should be clear enough for citizens to understand directly, but the tricky approach chosen by ERA advocates discouraged grass roots discussion of what equality would mean if human needs—women's and men's—rather than men's needs alone were to set the standard for defining equal protection of the law. Aside from traditional political organizing, the role of ERA supporters was reduced by this negative strategy to that of true, if nervous, believers. They were typecast as cheerleaders at legislative tournaments where expert "pro's" jostled with expert "anti's" over mysterious *last vestiges of sex discrimination*<sup>17</sup> or led scavenger hunts for sex discriminatory language in state and federal statutes.<sup>18</sup>

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asked if the Hyde Amendment denying Medicaid funding for abortion would constitute sex discrimination under ERA, pro-ERA law professor Ann Freedman replied:

My analysis is that [a court] would not decide the case on the basis of the Equal Rights Amendment because it is quite clear that the basis of the analysis by the Supreme Court in regards to Hyde and all matters regarding abortion [is] a privacy standard, and . . . that although sex discrimination arguments would be made, have been made under the Fourteenth Amendment and have been made in any context, the Court would not decide on that basis . . . [T]hat the Equal Rights Amendment would simply not be a factor . . . [I]f the Court chooses to strike [the Hyde Amendment] down, which it has not done so far, it would do it on the basis of privacy. If it chooses to uphold it, it would be based on privacy.

*Id.*

In this context, Catharine MacKinnon observed, concerning the approach of the June 30, 1982 end of the ERA ratification period, "By spring 1982, there seemed little to lose, even from the truth." Catharine A. MacKinnon, Introduction to *Excerpts from MacKinnon/Schlafly Debate*, 1 LAW & INEQ. J. 341 (1983).

15. See, e.g., exchange between Dr. Donna Shalala and Senators Hatch and Metzenbaum on tax status of single sex schools during hearings before the Senate Judiciary Committee on Sept. 13, 1983. *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess., pt. 1, at 133, 137 (1985) [hereinafter *Senate 1983 ERA Hearings*].

16. Dubbing these issues "the horribles," Phyllis Schlafly observed after the 1983 Senate hearing on ERA, "In fairness to [Senator] Tsongas, it isn't his fault that he couldn't answer [Senator] Hatch's questions. No one can guarantee that ERA won't result in abortion-funding, gay rights, drafting women, unisex insurance, and more power to the Federal Courts—*unless amendments are added which prevent ERA from doing those horribles.*" EAGLE FORUM (Wash., D.C.), June 1983 (emphasis in original). Reacting defensively, ERA supporters used the same term to subvert the dignity of their own goals. Offering a list of "Things To Do Over Again The Right Way," columnist Ellen Goodman urged, "Be prepared to play hardball. Anyone who heard Orrin Hatch's opening salvo knows the outline of the renewed parade of horribles that would follow from the passage of ERA: homosexual marriages, insurance classification, the end of veterans preference, and tax exemptions for some churches." Ellen Goodman, *ERA's Coming Back Older and Wiser*, PHILA. INQUIRER, June 10, 1983, at 25A.

17. See, e.g., Lynda Crawford, *NOW President Alleges Sex Bias in Insurance*, HARTFORD COURANT, June 5, 1983, at A28. Referring to discriminatory practices as the "last vestiges" or "final bastion" of sex discrimination was common usage that trivialized the need for the ERA by falsely implying that most of the problems it would address no longer existed.

18. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, 95TH CONG., 1ST SESS., SEX BIAS IN THE U.S. CODE (1977); MANSBRIDGE, *supra* note 1, at 138-43. In her discussion of legislative research projects, Mansbridge argues that experts were inhibited from producing lists of substantive changes because they "knew how little the ERA would do for women in the short run," and that "[w]ithout such a list, most activists remained convinced that the ERA would produce major substantive results." *Id.* at 142.

In the tactful style of women's politics, discrimination against women was described, but men were not identified as the source and beneficiaries of it. By default, the fact that women had less money, status, and physical security than men seemed to prove that women were indeed their own worst enemies. Women who dared to hold men responsible for sex discrimination were journalistically dismissed as "strident" or "man-haters" and found that there is no way to speak softly enough to please those who don't want to hear what you have to say, even when they profess to be on your side. In electoral politics, activists applied ERA litmus tests to candidates, counted votes, scanned the polls, and hunted for non-threatening slogans like "Sex discrimination hurts everybody." Since no one wanted to be "unreasonable," as advocates for change must be in order to be effective, many sex-referenced distinctions officially accepted as "reasonable" went unchallenged.<sup>19</sup>

Arguing the Equal Rights Amendment as if it were a bad case seems ultimately to have had a chilling effect on serious retrospective analysis. Substantive strategy gets scant critical attention in published accounts of the campaign for ratification.<sup>20</sup> Situating the ERA campaign in a virtually sex-neutral world without misogyny or sex-discriminatory pay-offs for men, historians are disinclined to question accepted wisdom about who opposed the ERA and why. Focusing closely instead on political tactics, ERA historians seem either to regard proponents as hapless women who "lost" the ERA by not doing the wrong things hard enough (the blame the victim theory), or to assume that the amendment, more symbol than substance, simply "failed" (the sour grapes theory). No one acknowledges that it was men who defeated the

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19. In a 1982 newspaper advertisement, the National Organization for Women detailed facts rebutting the accepted notion that insurance sex discrimination was a "fair" trade-off that balanced price advantages for women in life and auto insurance with lower charges for men in health insurance and annuities. ERA historians nevertheless generally discuss the insurance discrimination issue and NOW's stance on it in routine political terms without apparent reference to the analysis presented in the advertisement and subsequent testimony on federal and state legislation, as well as in litigation under the Pennsylvania Casualty and Surety Rate Regulatory Act. This failure to research the record empowers myths inimical to equality and conceals the existence of genuinely sex-neutral remedies. See *Will the ERA be Sacrificed for the Insurance Numbers Game?*, in the following three newspapers: WALL ST. J., June 2, 1982, at 19; L.A. TIMES, June 2, 1982, at V4; N.Y. TIMES, June 3, 1982, at 31 (three-quarter page advertisement by the National Organization for Women). See also Patrick Butler, Twiss Butler, & Laurie L. Williams, *Sex Divided Mileage, Accident, And Insurance Cost Data Show That Auto Insurers Overcharge Most Women* (pts. 1 & 2), 6 J. INS. REG. 243, 373 (1988); Patrick Butler, Twiss Butler, & Laurie L. Williams, *Insurance Department 'Catch-22' Shields Auto Insurers From Consumer Challenges*, 7 J. INS. REG. 285 (1989); Patrick Butler & Twiss Butler, *Driver Record: A Political Red Herring That Reveals the Basic Flaw in Automobile Insurance Pricing*, 8 J. INS. REG. 200 (1989).

20. Accounts widely cited and generally favorably reviewed are: MARY FRANCES BERRY, *WHY ERA FAILED* (1986); RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA (Joan Hoff-Wilson ed., 1986); MANSBRIDGE, *supra* note 1; DONALD G. MATHEWS & JANE S. DEHART, *SEX, GENDER, AND THE POLITICS OF THE ERA* (1990); GILBERT Y. STEINER, *CONSTITUTIONAL EQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985). An exception among the reviews is a criticism of the Mansbridge book by Catharine MacKinnon, who faults Mansbridge for presenting the failure of the ERA "not as yet another male victory but as a female defeat. Indeed, both this book and the ERA effort—because they do not face up to male dominance and therefore cannot face it down—condescend to and blame the victim while purporting only concern for her welfare." Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 763 (1987).

ERA, redeeming the promise of John Adams: "Depend upon it, We know better than to repeal our Masculine systems."<sup>21</sup> That this pressured women proponents at all levels to sell out also goes unacknowledged, as does the apparent pressure on women scholars not to mention it.

To pass an ERA worth passing requires changing the way women think about equality and their entitlement to it. This is a process that can occur only through public dialogue freely pursued. The power of a hostile press to frame issues so as to conceal men's self-interest in maintaining inequality cannot be overstated. Nevertheless, the only way to advance great issues is to move them through the fire of controversy.

## II. ABORTION LAW AND SEX DISCRIMINATION

It is interesting to consider where the abortion issue might have been today if ERA advocates had refused to separate abortion from pregnancy and the conditions under which women become pregnant. Suppose that they had responded to the accusation that the ERA would mean abortion on demand by agreeing enthusiastically, adding that the ERA would not only prohibit legal barriers to abortion and public funding of abortion, but would also protect women from such other forms of pregnancy discrimination as forced sterilization of minority women, denial or surcharging of pregnancy coverage on private medical expense and disability income insurance, punitive treatment of maternity leave, and suppression of contraceptive information in public school curricula.

### A. *Pregnancy as the Ultimate "Gotcha"*<sup>22</sup>

Institutional discrimination has always relied for justification on "gotchas"—reasons why ending the discrimination would do its victims "more harm than good." For women, the ultimate gotcha is pregnancy—a condition impossible to achieve without, as it were, men's input, but one which assigns virtually the entire physical burden to women.<sup>23</sup> Thus, pregnancy discrimination cuts clean, controlling women without penalty to men. Forced pregnancy and maternity is the central gotcha used by both conservative and liberal patriachs to defeat legislation for women's equality by staging mock

21. Letter from John Adams to Abigail Adams (Apr. 14, 1776), in *THE FEMINIST PAPERS* 11 (Alice S. Rossi ed., 1974).

22. Parts of this section appeared in Twiss Butler, *Abortion and Pornography: The Sexual Liberals' "Gotcha" Against Women's Equality*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

23. As expressed by Professor Garrett Hardin in an editorial explaining a scheme for sterilizing women, but not men, as a population control measure, "Biology makes women responsible." Garrett Hardin, *Parenthood: Right or Privilege?*, 169 *SCIENCE* 427 (1970). *But see* letter in response which identified the sex discrimination and showed how men could be made equally responsible and subject to sterilization. Letter to the Editors from Patrick Butler, Jr., in 170 *SCIENCE* 257 (1970).

battles over abortion.

It is hard for a pregnant woman to look and feel like a person in full command of her own body and destiny.<sup>24</sup> Pregnancy is a physical fact which precludes privacy. It "shows." What does it show? That a woman is manifestly not a virgin. Moreover, that she has been invaded by a man and visibly subjugated and colonized.<sup>25</sup> In traditional terms, she is "in a fix," a description which underscores her lack of autonomy. There is, they chuckle, "no such thing as a little bit pregnant."

But abortion provides a way to be only a little bit pregnant and then not pregnant at all. In *Roe v. Wade*,<sup>26</sup> a way was found to legalize abortion without acknowledging women's right to autonomy at any stage of pregnancy decision-making, including the initiation of the pregnancy itself.

### B. Privacy, Not Equality

Granting women a right to privacy in pregnancy matters was like granting women expensive, limited, and easily revokable guest privileges at the exclusive men's club called the Constitution. In contrast, men's membership in this club is a birthright, possibly retroactive to conception.

Between the "creation,"<sup>27</sup> as he termed it, of the constitutional right to privacy in *Griswold v. Connecticut*<sup>28</sup> in 1965 and its application to team decisions about abortion in *Roe v. Wade* in 1973, Yale Law Professor Thomas Emerson and his student co-authors pondered privacy's relationship to the proposed Equal Rights Amendment in a celebrated Yale Law Journal article in 1971.<sup>29</sup> The article criticizes earlier efforts to gain congressional approval of an ERA for yielding to political pressure and failing to uphold an absolute standard of equality between the sexes.<sup>30</sup> Yet it proceeds to replicate those earlier failures by allowing the only exceptions to an absolute standard that would be needed to render the ERA ineffective. These are exceptions for "compelling social interests, such as the protection of the individual's right of privacy, and the need to take into account objective physical differences between the sexes."<sup>31</sup>

Yet abortion is not mentioned in this article which was intended to guide the legislative history of the ERA. In a 1974 letter, Emerson explained why:

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24. Letter from Twiss Butler to *Houston Post* columnist Leon Hale, *A Few Things Frances Didn't Tell* (Apr. 22, 1976).

25. *Id.*

26. 410 U.S. 113 (1973).

27. Diane Osborne, *Lawyers in Birth Control Case Honored by NOW*, *NEW HAVEN REG.*, Feb. 11, 1985, at 13.

28. 381 U.S. 479 (1965).

29. Brown et al., *supra* note 2, at 900-02.

30. *Id.* at 886.

31. *Id.* at 887. In 1983, an additional "affirmative action" exemption was proposed to protect women-only schools. See *supra* text accompanying note 8.

The main reason we did not discuss the abortion problem in the article was that abortion is a unique problem for women and hence does not really raise any question of equal protection. Rather the question is one that is concerned with privacy.<sup>32</sup>

If abortion is "a unique problem for women," so is pregnancy. Emerson's standard of equal protection is defined by men's needs. Under that standard, women would have no protection from discrimination on the basis of pregnancy, the quintessential form of sex discrimination. Still, Emerson made clear that more than just police searches were to be protected by an independent, sex-neutral right of privacy in the Constitution, even though he admitted that "[t]he position of the right of privacy in the overall constitutional scheme was not explicitly developed by the Court" in the 1965 *Griswold* decision.<sup>33</sup>

Perhaps it was the reassuring vagueness and elasticity of the new abortion/privacy constitutional right, "derived from a combination of various more specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments,"<sup>34</sup> that tempted liberal women to hope that they could get by stealth what they dared not demand as a fundamental right to be secured by the ERA. Certainly, liberal men must have been satisfied with the prospect of having abortion legally available, but isolated from any woman's claim to bodily integrity or equal protection, and thus thoroughly under men's control. Then, as now, political supporters of the Equal Rights Amendment could be counted on to welcome a solution that simply shunted an awkward issue onto another track. Their instincts could hardly have differed from those of their predecessors of whom Emerson and his co-authors wrote, "the proponents may have wisely refused to be too explicit about the laws and institutions the Amendment would reach."<sup>35</sup>

Evidently pleased with the versatility of the privacy right he argued in *Griswold*,<sup>36</sup> Emerson speculated together with his co-authors on the many ways in which the right of privacy might be applied. The article even implies the legal basis for privacy's later use in defending pornography: "This constitutional right of privacy operates to protect the individual against intrusion by the government upon certain areas of thought or conduct, in the same way that the First Amendment prohibits official action that abridges freedom of expression."<sup>37</sup> Moreover, the right of privacy could be developed to meet new challenges. Although its exact scope conveniently was "not spelled

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32. Letter from Thomas I. Emerson to Cres Apprill (Jan. 15, 1974), in *Senate 1983 ERA Hearings*, *supra* note 15, at 635.

33. Brown et al., *supra* note 2, at 900.

34. *Id.* at 900.

35. *Id.* at 886.

36. See Osborne, *supra* note 27.

37. *Id.* at 900.



out by the Court in the *Griswold* case," nevertheless "it is clear that one important part of the right of privacy is to be free from official coercion in sexual relations."<sup>38</sup>

Lastly, concerning "the impact of the young, but fully recognized, constitutional right of privacy," Emerson and his co-authors said that its scope "is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event the impact of the right of privacy would change too."<sup>39</sup>

And so it has. In 1983 Catharine MacKinnon observed that, in *Roe v. Wade*, women got a constitutional right to abortion "as a private privilege, not as a public right."<sup>40</sup> In 1985, twelve years after *Roe v. Wade*, Emerson admitted that it had been difficult to argue for a constitutional right unmentioned in the Constitution and thought that it was "likely that the right to have an abortion might become so hedged in by bureaucratic regulations that it would be difficult to exercise the right."<sup>41</sup>

In 1985, Harvard Law Professor Laurence Tribe mused on what he called "the always difficult problem of abortion." He wondered if the "somewhat obscure 'privacy' rationale" of *Roe v. Wade* and its "rank[ing] the rights of the mother categorically over those of the fetus" did not perhaps mean that the Court "forsook a more cautious sensitivity to the mutual helplessness of the mother and the unborn that could have accented the need for affirmative legislative action to moderate the clash between the two."<sup>42</sup> These speculations about an obscure, contested, and sometimes unavailable right which provably cannot claim public entitlement suggest that legal scholars understood well before the *Webster*<sup>43</sup> decision that open season had begun on women's so-called constitutional right to abortion.

For example, Tribe's view of "the mother and the unborn" as natural antagonists is one that feminist analysis is now identifying with increasing concern in legislation and litigation. Professor Janice Raymond of the University of Massachusetts cites recent evidence that "abortion rights for women are seriously undermined by the increasing prominence of the fetus and sperm donor in the new reproductive technology scenario."<sup>44</sup> Women, she

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38. *Id.* at 901.

39. *Id.* at 902.

40. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade* (1983), in *FEMINISM UNMODIFIED* 93, 100 (1987).

41. Osborne, *supra* note 27. This 1985 newspaper article reports Emerson's general belief that "there is some danger that the rights of women will be chipped away." *Id.* His implication that women have rights to lose seems incongruent with the prior defeat of the amendment that he had argued was necessary to secure women's constitutional rights. The experts' vague threats on this essential point foster an irrational legal environment for women's interests.

42. Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 342 (1985) (emphasis in original).

43. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

44. Janice Raymond, *The Chilling of Reproductive Choice*, 14 ON THE ISSUES 7, 9 (1990). In reviewing several cases, Raymond points out that, under the banner of sex equality, the rights of fathers

says, should "start questioning the slippery slope [argument] which claims that to oppose new reproductive technologies is to endanger women's right to abortion."<sup>45</sup>

### C. *The Privacy Right to Choose Pornography*

Laws governing pregnancy have traditionally served to enforce the public and private subordination of women to men's authority.<sup>46</sup> The regulatory control of abortion established by *Roe v. Wade* in the name of privacy is consistent with this tradition. Equally traditional is the visual metaphor for this subordination—pornography representing pregnant women as sex in bondage.<sup>47</sup> It is not surprising, therefore, that it occurred to Harvard Law Professor Alan Dershowitz that abortion could be held legally hostage for pornography.

Commenting in 1984 on the Indianapolis anti-pornography ordinance<sup>48</sup> in a syndicated magazine column on law, Dershowitz said:

[T]he issue is one of choice and freedom—much like the debate over abortion. On one side of the scale are practices that some regard as immoral and dangerous (pornography and abortion). On the other side is the right of individuals to choose to engage in such practices. No one would deny either side the right to try to persuade the other that its actions are terrible. The real question is whether we are willing to give one side the prohibitory power of the government to enforce its views against the other.<sup>49</sup>

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are articulated to prevent abortion, a tactic that strengthens the link between the rights of sperm donors and the rights of fetuses. She argues that "technologies such as IVF [in vitro fertilization], embryo transfer, and embryo freezing are extremely invasive to women's bodily integrity . . . [and] focus medical, legal, and media attention on the status and rights of fetuses and men while rendering the status and rights of women at best incidental and at worst invisible." *Id.* at 7.

45. *Id.*

46. See ANDREA DWORKIN, *INTERCOURSE* 147-167 (1987). Dworkin examines the wider context of this tradition in her historical and cultural analysis of laws regulating sexual intercourse. "Society justifies its civil subordination of women by virtue of what it articulates as the 'natural' roles of men and women in intercourse; the 'natural' subjugation of women to men in the act." *Id.* at 149. Specifying that intercourse is subject to extensive regulation, Dworkin says that it cannot be private in the usual sense of privacy as "a sphere of freedom immune from regulation by the state." *Id.* at 147. Yet, she says, "[t]he state can manage a sudden and sensitive respect for privacy when it functions as a prison cell for . . . any civilly inferior person. . . . Privacy in sex means that a man has a right to shield himself from state scrutiny when sexually using civil inferiors." *Id.* at 148.

47. See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 218 (1989). Compare Dworkin's description of bondage iconography of pregnancy pornography, *id.*, with nude photographs of a pregnant actress in *Vanity Fair* magazine. Nancy Collins, *Demi's Big Moment*, *VANITY FAIR*, Aug. 1991 (cover story, at 96); see also W. Speers, *A Nude Pose of Pregnant Demi Moore*, *PHILA. INQUIRER*, July 11, 1991, at 2C.

48. INDIANAPOLIS AND MARION COUNTY, IND., CITY-COUNTY GEN. ORDINANCE No. 24 (Apr. 3, 1984) (amending Human Relations and Equal Opportunity Law, INDIANAPOLIS AND MARION COUNTY, IND., CODE, Ch. 16 (1984)).

49. Alan Dershowitz, *Feminist Fig Leaves*, *THIS WORLD*, July 8, 1984, at 19 (United Feature Syndicate). (Dershowitz published a similar commentary titled *Foolish Fig Leaves* in his law column in

It appears that by becoming gatekeepers to women's pregnancy rights, civil libertarians also become gatekeepers to women's right to a legal defense against harm inflicted by pornography. The more vigorously the "right of privacy" is defended for abortion, the more it legitimizes other "privacy rights" such as unlimited access to pornography, wife battering, and other behavior characterized, however harmful to women, as "sexual" and therefore as "private."

But who is the "we" Dershowitz refers to as making decisions about applying the prohibitory power of government? Certainly not women, who have no claim to the constitutional protection of the First Amendment when they are harmed as women.<sup>50</sup>

Having made his argument, Dershowitz springs his gotcha: "In the abortion debate, most feminists insist on the right to choose. In the current debate over the Indianapolis statute, some feminists would deny that right to those who choose pornography."<sup>51</sup> Thus, any limitation on pornography could cause the loss of women's constitutional right to abortion and feminists would be to blame. This causal linkage is logic, we are to understand, not retaliation.<sup>52</sup>

*Penthouse*, a pornography magazine. PENTHOUSE, Feb. 1985, at 28.)

50. In a Supreme Court brief, advocates for legal recognition of the harm that pornography inflicts on women described the findings of the two lower courts:

Neither court disagreed with the legislative judgment that these harms are based on sex or questioned the conceptualization of these acts as practices of sex discrimination. The only issue has been whether this harm of sex discrimination matters under the Constitution.

The legislative record shows that the pornography industry produces verbal and visual sexual entertainment made from coercion, rape, extortion, exploitation, intimidation, fraud and unequal opportunities . . . Pornography, as defined, and when coerced, forced on individuals, the cause of assault, or actively trafficked, is inseparable from aggression and terror, crimes, torts, and unspeakable indignities. Although men are also victimized and also covered, women and children are its primary targets and victims.

Having accepted this reality, each court ruled that stopping this injustice is not as important to the Constitution as inflicting it.

Jurisdictional Statement at 10, *Hudnut v. American Booksellers Ass'n.*, 475 U.S. 1001 (1986) (No. 85-1090).

Moreover, when *Playboy* (a pornography magazine), the American Library Association, the American Booksellers Association, and the Magazine Publishers Association can sue to suppress factual testimony presented in a federal hearing on pornography, win, and have their censorship viewed as a victory for freedom of speech, there does not seem to be a "real question" any more about which side has already been willingly given "the prohibitory power of the government: to enforce its views against the other." Dershowitz, *supra* note 46. A list of companies was described as "distributors of pornography" in testimony by Donald Wildmon, testifying before the Attorney General's Commission on Pornography in 1985. Nancy Lewis, *Pornography Panel Ordered to Rescind 'Blacklist' Letter*, WASH. POST, July 4, 1986, at A1, A28. When the Commission staff later sent letters to the companies named, asking if they wished to respond for the record, the Commission was sued by the above organizations to prevent publication of the list. By federal court order, the Commission "was barred from including the 'blacklist' of companies in its report." *Id.* at A1.

51. Dershowitz, *supra* note 46.

52. At the New York City hearing of the Attorney General's Commission on Pornography in 1986, pro-pornography women picketers waved signs begging, "Don't take away our right to choose." (Author's personal experience.) In the hearing room, representing *Penthouse* magazine and with a former *Penthouse* Pet at his side, Alan Dershowitz testified as follows:

I am not sitting here telling you what my views on pornography are. I am not going to demean myself . . . by telling you I am for or against it any more than I would tell a hearing on abortion whether I was for abortion or against it. I am for choice.

Let me add one personal word. It is a disgrace to the memory of *Roe versus Wade* whose

By this quid pro quo, Dershowitz makes it entirely clear that a legal right to privacy for women which is contingent on men's right to use pornography—to violate women's privacy as an act of power—is not a right at all but a gotcha.

Such manipulation of women's right to abortion demonstrates what Emerson and his co-authors called "the large role which generalized belief in the inferiority of women plays in the present scheme of subordination."<sup>53</sup> I fully agree with these authors that no "plan for eliminating sex discrimination" can hope to succeed without directly attacking this belief in women's inferiority and every institution that supports it. I would argue that men's perception of pregnancy as pornography—that is, the objectification and sexually explicit subordination of women—creates a link between liberal men's cooperation with conservative men in maintaining legal control over abortion and their cooperation in legally protecting pornography through obscenity law.

*D. Abortion-Rights Liberals Agree With Anti-Abortion Conservatives:  
Let The Debate Continue*

With the concept of women's bodily integrity reduced to a demand that women trade full acceptance of pornography for limited access to abortion, the 1989 U.S. Supreme Court decision in *Webster v. Reproductive Health Services*<sup>54</sup> came as no surprise. The decision reconfirmed the inherent instability of the constitutional right to privacy when applied to women as a class of persons whose constitutional right to equal protection of the law has repeatedly been denied.<sup>55</sup>

The journalistic frenzy anticipating the *Webster* decision<sup>56</sup> and the legislative and electoral furor<sup>57</sup> following it show how heavily men rely on pregnancy as a prime opportunity for harassing and controlling women. Armies

13th anniversary we celebrate today and which celebrates choice by women as to how to deal with their bodies[,] that so many women purported [sic] to speak for the feminist movement, which they do not speak for, came into this Commission today and urged this Commission on the 13th anniversary of Roe versus Wade to cut back on freedom of choice as to what women and men shall be able to do with their minds, their eyes, their ears, and their bodies.

ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, TRANSCRIPT OF PROCEEDINGS 291 (Jan. 22, 1986).

53. Brown et al., *supra* note 2, at 883.

54. 492 U.S. 490 (1989).

55. Historically this denial has been made three times: first, by the framers of the Constitution as expressed by John Adams, *see text accompanying note 21 supra*; second, in the Fourteenth Amendment's penalty for a state that denies voting rights to any of its "male citizens" who are of voting age, U.S. CONST. amend. XIV, § 2 (implication that women are denied equal protection guaranteed by Fourteenth Amendment was ratified by exclusion of sex from voting rights guaranteed by Fifteenth Amendment), *see KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST* 164, 189-90, 231-34, 249-53 (1988); and finally by state legislators through refusal to ratify the ERA by June 30, 1982, *see William E. Farrell, U.S. Amendment on Equal Rights Beaten in House*, N.Y. TIMES, Nov. 16, 1983, at A1.

56. *Justice Blackmun Says Roe v. Wade Might Be Reversed During '88 Term*, WASH. POST, Sept. 14, 1988, at A3; Al Kamen, *Lawyers Expect High Court To Narrow Abortion Right*, WASH. POST, Feb. 28, 1989, at A1, A5. (Significantly, the continuation on page A5 is headlined *Court Expected To Chip Away On Abortion.*)

57. Dan Balz, *Battle Over Abortion Proceeds on Several Fronts*, WASH. POST, Mar. 22, 1990, at A24.

of legal scholars, politicians, and pundits are pouring through the gap in federal boundaries hacked by *Webster* and rushing into the states with the keen excitement of a gang attack in which men test themselves against each other in pursuit of a common enemy. The battle cries are "life" and "choice." The rhetoric on both sides is pornographic in its invasion of women's privacy, but to speak of abortion laws as inherently sex discriminatory<sup>58</sup> is still treason against ERA orthodoxy.

When a constitutional right, such as women's right to vote, is clearly acknowledged, there is little argument about exercising it. In an interview at a Capitol Hill abortion-rights gala featuring a screening of the film *The Handmaid's Tale*,<sup>59</sup> U.S. Senator Chuck Robb indicated the role of *Roe v. Wade* in the suppression of women's right to equal protection of the law. Robb said: "I think you will see an ebb and flow between those on both sides of the [abortion] issue . . . But I don't think it's ever going to be resolved."<sup>60</sup> Robb is right. As long as women allow abortion to remain legally a "unique problem for women," abortion rights will not be resolved. To participate on either side of the debate on the present terms is to be a party to sexual harassment of women and denial of their right to bodily integrity.

What is needed is to identify abortion laws—laws that treat abortion differently from other standard medical procedures, including laws codifying *Roe v. Wade*<sup>61</sup>—as discrimination on the basis of pregnancy and therefore as sex discrimination, thus directly confronting the question of how the United States Constitution must respond when women are discriminated against as women.

And finally, it is necessary to re-direct public discussion to the source of both the pregnancies and the discrimination. Why, for example, doesn't "safe sex" mean condoms for contraception? Why, in fact, was "condom" a dirty word until it occurred to the Surgeon General that a heterosexual man could die of AIDS?<sup>62</sup> And why, in a country where use of a product is normalized

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58. In *Planned Parenthood v. Casey*, No. 90-1662, 1991 U.S. App. LEXIS 24792 (3d Cir. Oct. 21, 1991), the Third Circuit accepted Associate Justice Sandra Day O'Connor's "undue burden" standard as "the law of the land" in upholding most provisions of the severely restrictive Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1983 & Supp. 1991). The standard identifies abortion as a "limited fundamental right" and allows regulations which "may inhibit abortions to some degree." Such an argument demonstrates that the scope for jurisprudential gimmickry is boundless when equal protection is not at issue. Kathryn Kolbert, an attorney for the American Civil Liberties Union's Reproductive Rights Project who represented the plaintiff Planned Parenthood, said the decision effectively overturned *Roe v. Wade* and might be appealed to the Supreme Court, but she did not indicate what the constitutional basis for the appeal would be. See Michael D. Hinds, *Appeals Court Upholds Limits for Abortions*, N.Y. TIMES, Oct. 22, 1991, at A1, A16.

59. *THE HANDMAID'S TALE* (Cinecom Entertainment Group 1990) depicts an Orwellian view of a right-wing takeover of women.

60. Roxanne Roberts, *At the Screening, a Political Message*, WASH. POST, Mar. 9, 1990, at D2.

61. Codification of the *Roe v. Wade* decision to establish a legal right to abortion was enacted in 1990 in Connecticut and has been proposed in other states. CONN. GEN. STAT. § 19a-602 (1990); National Abortion Rights Action League (NARAL), (Potential) Abortion Related Ballot Measures: 1992 Electoral Cycle (Oct. 1991) (on file with the *Yale Journal of Law and Feminism*).

62. For some years, an "epidemic" of teen pregnancy has evoked journalistic handwringing and slyly

by advertising, are condom advertisements banned by network television and major newspapers—without objection from organizations which claim to be for women's reproductive rights and against censorship? Moreover, why were manly upper arms not chosen as the appropriate site for implanting "six matchstick-sized [contraceptive] capsules"?<sup>63</sup> Lastly, as a modest and not entirely frivolous proposal, why not reframe the abortion issue as a crisis of men's uncontrolled fertility which only the most severely restrictive measures can resolve? Such an approach could cut off the abortion debate right now.

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pornographic illustrations showing girl children with guilty expressions and big bellies. Although as Surgeon General, Dr. C. Everett Koop opposed abortion and never advocated pregnancy-prevention education in schools, his anti-AIDS campaign not only pushed sex education and condom use to prevent disease but also saw abortion as a "possibility" to be tactfully mentioned to a pregnant AIDS victim. See *Surgeon General Urges AIDS Testing Prior to Pregnancy*, THE PATRIOT (Harrisburg, Pa.), Mar. 25, 1987, at A5.

63. Malcolm Gladwell, *Science Confronts Ethics in Contraceptive Implant*, WASH. POST, Oct. 31, 1990, at A1, A14.