HOW TO PASS AN ERA WORTH PASSING

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"In your new code of laws...put it out of the power of the vicious and lawless to use us [women] with cruelty and indignity with impunity." Abigail Adams letter to John Adams, March 31, 1776.

"Resolved, That the women of this country ought to be enlightened in regard to the laws under which they live, that they may no longer publish their degradation by declaring themselves satisfied with their present position, nor their ignorance, by asserting that they have all the rights they want." Seneca Falls Meeting July 19,1848.

Discrimination against women is a fact of life and law, but its constitutional acceptability remains the great American family secret.

On three key occasions, male legislators *deliberately* excluded women as a class from the benefits guaranteed to male citizens by the United States Constitution:

- First, when it was drafted (1776). That was when Abigail Adams wrote to her husband asking "in your new code of laws...put it out of the power of the vicious and lawless to use us [women] with cruelty and indignity with impunity" and he, after ridiculing her request, replied "Depend upon it, we know better than to repeal our Masculine Systems."
- Second, when the Constitution was amended after the Civil War to adopt the 14th Amendment (1868) and the words "male citizens" were inserted, deliberately excluding women, and demonstrating that fact when the 15th Amendment, ratified in 1870, extended to all men — but no women — recognition of their right to vote. The subsequent fifty-year campaign to secure a guarantee of women's right to vote resulted in ratification of the 19th Amendment in 1920. This completed the 15th Amendment, and created the illusion that all was now equal, but it quietly left the 14th Amendment with no counterpart for women. To remedy this omission, suffragist leader Alice Paul drafted the Equal Rights Amendment and began the campaign for ratification on the rationale that women could use their vote to secure constitutional equality.
- Third, when adoption of the Equal Rights Amendment was denied (1982).[1]

Why does the 14th Amendment matter? Because as long as women are denied the legal guarantee of equal protection, laws created, adjudicated, and selectively enforced can continue to privilege men at women's expense and will continue to do so until the Constitution is amended to include an explicit prohibition against discrimination on the basis of biological sex. (Calling sex "gender" fools no one.) Supreme Court Justice Antonin Scalia made it clear: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."

It was men who defeated the Equal Rights Amendment through the power of the institutions they dominate – the academy, the courts, the pulpit, the press, the legislature. Why did they do it? In practical terms, the ERA is resisted for real, not "symbolic," reasons — it would invalidate men's legal power to use sex discrimination to their own advantage. Just because this legal power is not talked about in history or law books does not mean that men are unaware of it. In 1983, for example, when Justice Department attorney William Coleman Jr. argued before the Supreme Court in the Bob Jones University case that a private college's ban on interracial dating violated the 14th Amendment, Justice Powell asked if his arguments applied to sex as well. Coleman assured him,

"No. We didn't fight a Civil War over sex discrimination and we didn't pass a constitutional amendment against it." The justices did not disagree.

Advocating for the ERA on the floor in Congress in 1971, Representative Stewart McKinney of Connecticut, a Republican, exposed the real motive and disposed of the false excuses for opposing the ERA when he said, "Use the draft for an excuse if you like. Use child care. Use anything else. We [men] are simply trying in our own little way to preserve the right to stand up and say, 'We can declare the difference.' "

The accuracy of McKinney's analysis is repeatedly confirmed as courts and legislatures find pretexts for treating men and women differently. Comparisons of 14th Amendment decisions since 1870 consistently show the Supreme Court judging laws that disadvantage classes of men to be unconstitutional while seeing no constitutional barrier to discrimination against women. The only exceptions are token cases, such as *Reed v. Reed* (1971), which affirmed that a woman had the same right as a man to administer the estate of a deceased relative, and cases of sex discrimination against men such as the *Newport News Shipbuilding & Drydock Co. v. EEOC* (1983) case in which the wives of men workers received less maternity coverage than women workers under the employee health plan.

The court tends to follow the pattern set in early decisions when it arbitrarily invoked "the laws of God and Nature" to justify denying Myra Bradwell's right to be licensed to practice law (1872) and Virginia Minor's right to vote (1874). A century later, in *Fitzpatrick v. Bitzer* (1976), the court found it unconstitutional to deny backpay to men state employees who had received unequal early retirement pay based on sex, but ignored this Fourteenth Amendment—Title VII precedent in denying backpay to women in similar pension cases, *City of Los Angeles v. Manhart* (1978), *Arizona v. Norris* (1983), a ruling on which Justice O'Connor provided the swing vote.

The Equal Rights Amendment has social significance far beyond issues of equal access and pay. John Adams's conviction that "masculine systems" would be endangered if men could no longer de-dignify and abuse women with impunity holds true centuries later. A 1977 rape study found that "All unequal power relationships must, in the end, rely on the threat or reality of violence to protect themselves." In a very real sense, then, the Equal Rights Amendment is needed to correct a profound constitutional imbalance that promotes violence against women.

The Equal Rights Amendment is legally essential because, without clear acknowledgement of women's right to equal protection by state and federal laws, sex discrimination is not unconstitutional. Abstruse legal discourse about "standards of review" ultimately must yield to the bleak reality that hard-won laws against sex discrimination do not rest on any constitutional foundation and can be enforced fully, inconsistently, or not at all. Women seeking enforcement of these laws must not only convince the court that discrimination has occurred under the provisions of that particular law, but that it matters constitutionally. As legal scholar Catharine MacKinnon observes, "It is not difference that is important, but what difference difference makes." I am reminded here of the distinguished male supporter of the Equal Rights Amendment who thought that it should not apply to the tax status of single sex schools because, he said, "We need to cherish the differences."

To clarify confusion about standards of review, the ERA should require a strict scrutiny standard of review which would disallow legal distinctions – facial or disparate impact (intentional or not) – on the basis of sex, consistent with the 14th Amendment standard for race. The so-called "absolute" standard cited by legal scholar Rex Lee in opposing the ERA is not only more abstract than it sounds, but might well be argued to limit interpretation of the ERA to facial ("formal")

equality and block its application to instances of disparate impact in the same way that current demands for a "color-blind Constitution" seek to outlaw affirmative action.

The ERA should aim to redefine sex equality from a man-to-man or woman-to-man standard of comparison to a human standard encompassing the range of physical characteristics and situations of both sexes. By prohibiting discrimination on the basis of sexual orientation, it would repudiate the sex-stereotyping (gender role assignment) and polarization that is the basis for all sex discrimination.

ERA – GOING FORWARD

It is not enough to know why the Equal Rights Amendment is essential to secure women's right to full citizenship. We also need to consider how a renewed campaign could improve on earlier efforts. This is not to disparage the work of those who fought so hard for the amendment, but only to recognize that it did not pass and we have much to learn from that experience, as well as from the Suffrage campaign and the currently successful campaigns to give same-sex marriages equal legal status with opposite-sex marriage. (One cautionary lesson for women from the successes of marriage equality campaigns is that *men* as well as women are being harmed. But arrangements by which *women alone* are being harmed, as in pregnancy discrimination, represent a much greater challenge to change.)

We are long overdue in taking up the task of reevaluating the strategy used by the ERA campaign of 1972-1982, both for the state amendments that were passed and the federal amendment that was denied. We need to look critically at the way the amendment was defined and how the campaign was designed.

Political scientists and historians have studied the defeat of the ERA, concentrating mainly on legislative maneuvers and opinion polls. Too often, their conclusions are drawn in a way that does not acknowledge the fact that women cannot use their vote in their own interest if their issues are never publicly presented with seriousness and dignity. Students researching the ERA in periodical and newspaper indexes frequently report that archives contain far more articles against ERA than for it.

Because the 1972-1982 campaign was heavily focused on immediate legislative action, its proponents chose a stunningly weak strategy of agreeing to avoid any interpretation of what the ERA would do that would be politically hazardous to handle.[2] This approach excluded legal barriers to abortion from coverage under pregnancy discrimination – the most invasive form of sex discrimination. Worse still, separating abortion itself from all other aspects of pregnancy targeted abortion to be stigmatized and intensified pressure on women to placate men by expressing opposition to it. Ultimately, separation has worked to maneuver advocates into isolated campaigns to "save" that fabulous invalid ***Roe v. Wade*** rather than to demand an end to pregnancy discrimination and recognition of women's right to bodily integrity as a human right under an equal protection guarantee.

The avoidance strategy also shrank from correctly defining discrimination on the basis of sexual orientation as sex discrimination – a ruse that did not deter opponents from pointing to the obvious inconsistency. The avoidance strategy prevented discussion of the military draft/compulsory military service issue in terms of the way men exploit the presumption that they would serve if called upon as a pretext for claiming their inherent right to full citizenship and adult status in the society while denying that right to women. It drew no attention to the way men reward themselves for military service with educational benefits, pensions, and veterans' preference in employment. The campaign strategy failed to confront the institutionalized difference-mongering that treats single-sex schools as "benign discrimination" (like exclusion of women from the draft)

and would allow such schools to maintain their tax-exempt status, in defiance of Title IX and undercutting 14th Amendment decisions against racial segregation in both public and private schools. And last, it failed to challenge with damning facts yet another false "benign discrimination" argument – that women benefit from sex discrimination in insurance and thus would be hurt by "forced equality" under ERA. (The NOW Insurance Project exposed the falsity of this claim as early as 1982. Its groundbreaking analysis continues and is documented at www.centspermilenow.org)

ERA supporters' timid campaign strategy not only failed to pass the Equal Rights Amendment (which, had it passed, would have been too compromised to be very effective), but it also perversely signaled to opponents that the issues ERA supporters insisted had "nothing to do with" the ERA could be used to oppose women's rights from that time on right up to the present day. It forced proponents to betray the very issues for which they should have been standing tall, even to the point of adopting Phyllis Schlafly's contemptuous term for them as "a parade of horribles." I prefer to call them the "gotcha!" issues, but all the gotchas can easily be refuted.

The ERA did not "fail" or get "lost" as historians Mary Frances Berry and Jane Mansbridge have put it in their book titles. Men defeated it to retain the many privileges that sexism bestows on them. Over time, that defeat split ERA advocates into two approaches, neither of which can succeed in gaining a strong guarantee of women's right to equal protection of the law.

The first is used by those who liked the former "clean amendment," which said that those five presumably dirty equality issues I have just mentioned could be set aside and dealt with after the ERA was adopted. This approach is often used in reaching a working consensus to push legislation on complex issues where there is no real standard of equality, as in farm price supports, tax or health insurance packages, etc. It is, however, the wrong way to establish a basic constitutional principle prohibiting sex discrimination and protecting women's human rights.

Under the name ERA Coalition, women's rights organizations and activists are currently pursuing two strategies: Under the "3-State Strategy" activists have chosen to try to get three more states to ratify the amendment. (They argue that adoption of the 200-year-old "Madison" amendment in 1992, regulating congressional salary increases, invalidates the use of time limits on amendments to the federal Constitution.) But this strategy would mean that these ratifications in 3 states would be done on the same legislative-history basis that the previous 35 state ratifications were done, according to the 1972 limited interpretation of sex equality. They assume, however, that ratification would be followed immediately by court challenges as to its validity, which is hardly a conclusive result. More importantly, however, it would leave the most contentious sex discrimination issues unresolved.

The second approach is to reintroduce a reworded "New ERA" for approval by 2/3rds of Congress followed by ratification by 3/4ths of the states.[3] This approach however, has not yet reanalyzed why laws treating abortion differently from other medical procedures are sex discrimination. It has not examined *Roe v. Wade* as a lawyer's workaround that legalized abortion on men's terms, but allowed continued harassment of pregnant women. It does not notice that the Gay Rights movement has abandoned the shaky "right of privacy" and moved on to demand equal protection of the law, leaving lesbians, like women subject to racial discrimination, only the possibility of protection under the men's umbrella.

The 3-State Strategy supporters continue to seek legislative hearings in states they regard as possible for ratification. Typically in such hearings, lawmakers easily rebut their arguments by referring to the usual "gotcha!" issues - abortion, auto insurance, etc. for which advocates have no substantive answers. Answering that hurting women is "the price of equality" does not explain

why men get equality gratis as a constitutional birthright. Asserting that ERA has "nothing to do with" these core issues is disingenuous and rightly draws opponents' fire.

Issues are controversial because they are important, so bending a sound and workable sex discrimination interpretation out of shape to avoid controversy or to build coalitions seems self-defeating. Having had many opportunities (including the Suffrage campaign[4]) to learn the power of the men's establishment and its propaganda ministry, the press,[5] to trivialize, vilify, discredit, and silence the efforts of feminists for social change, we would be wiser to concentrate on promoting a vigorous grass roots dialogue among women throughout the state or the country, in every circumstance of race, country of origin, economic class, cultural background, and sexual orientation, a process of mutual education on what sex discrimination and equality means in the real world, and build that experience into the interpretation (not the wording) of what the ERA would address. This kind of woman-to-woman communication would not only provide the basis for a coherent legislative history, but would also result in a far better informed and strongly committed constituency for the amendment, and one far more likely to press politicians to respond than years of state-legislature-bound lobbying could do.

As a practical reference, the 1972-1982 wording of the amendment is appropriately brief, comprehensive, harmonious with previous amendments (13th, 14th, 15th, and 19th---all of which were presented without any time limit), and without any known legal disability. It reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The name change proposed by Congresswoman Carolyn Maloney is unnecessary; it is change to a stronger interpretation that really matters.

While it is highly desirable, it is not crucial to elect more women to get the votes for the ERA. Politicians of either sex will generally vote for whatever they believe their continuance in office requires. Besides, pro-ERA politicians too often tended in the last ERA campaign to act as gate-keepers by refusing to deal with difficult issues. The often-cited “Yale Law Journal” article (YLJ 80, No 5, April 1971) by Yale law professor Thomas Emerson, et al. that was intended to provide the basis for the legislative history of the amendment exemplifies this strategy of avoidance. For example, it does not mention abortion but refers vaguely to privacy rights found elsewhere in the constitution. (If women had any rights protected by the constitution beyond the right to vote, why would we need an ERA?) It also allows two exceptions – immutable physical characteristics and compelling state interest – that could easily be used to disable almost any equality provision.

Similarly, the composition of the Supreme Court is irrelevant, since what drives a law’s meaning is what most people believe that it means.

As the Suffrage and Marriage Equality campaigns have shown, there is no way to circumvent this grassroots process by political and legal stratagems, or sophisticated testimony by expert witnesses. It is not tricks, compromises, polls, or hoopla but rather the visibility of an honest advocacy that would validate a campaign for constitutional recognition of women’s equal rights and convince women to ally themselves with it. They must see that the amendment will uphold their dignity, safety, full citizenship, and freedom as women.

One thing is certain: important issues do not stand still. Currently abortion is increasingly stigmatized and access to abortion under the privacy right is in retreat. Proponents’ exclusion of abortion accessibility from the dignity of a sex discrimination claim under the proposed ERA certainly contributes to this losing trend.

To pass an ERA worth passing requires nothing less than enlarging the way that women are permitted to think[6] about equality and their entitlement to it. It means advocates holding up an uncompromised picture for all to see of what equality would look like if it applied to women as

well as to men. This can only be done through public dialogue freely pursued. The power of "masculine systems" to frame issues so as to conceal men's self-interest in maintaining inequality can not be underestimated. Nevertheless, the only way to advance great issues is to move them through the fire of controversy.

One fact, however, remains always clear – a strong constitutional guarantee of women's right to equal protection of the law is absolutely essential if laws against sex discrimination are to have any real enforcement and the women of this country are to have constitutional support at both state and federal levels for their human and civil rights. And securing that guarantee is what American feminists must be about.

* This article is adapted from a presentation at the NY State NOW Conference on October 15, 2005. It is available online at *www.equality4women.org.*

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[1] Equal Rights Amendment approved by Congress in March 1972 and sent to the States for ratification.

Section 1. Equality of Rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

[2] See Twiss Butler, Abortion Law: "Unique Problem for Women" or Sex Discrimination? 4 Yale Journal of Law and Feminism, 133 (Fall, 1991). Available at www.equality4women.org.

[3] New ERA introduced by Representative Carolyn Maloney in 2013 (H.J. Res.56):

Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3.This amendment shall take effect two years after the date of ratification.

[4] Kathleen Barry, Susan B. Anthony: A Biography of a Singular Feminist, New York University Press, 1988.

[5] Women cannot use their vote in their own interest if their issues are never publicly presented with seriousness and dignity. (See, for example, Chapter 10, The ERA as Catfight, in Susan J. Douglas's WHERE THE GIRLS ARE, Times Books, 1994)

[6] The need to rethink the meaning of ERA was expressed succinctly by the title Unthinking ERA Thinking of a 1987 law review article by Catharine MacKinnon reviewing Mansbridge's book on the defeat of the ERA. (MacKinnon's insightful article was republished in her 2005 anthology WOMEN'S LIVES UNDER MEN'S LAWS.)