

Unite the ERA and Abortion-Access Campaigns!

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Let’s begin by agreeing that a strong Equal Rights Amendment is essential to end sex discrimination and guarantee equal rights to all women.

But what does “equal rights” mean when applied to women as well as to men? When addressing the National Abortion Rights Action League’s first meeting in 1969, NOW president Betty Friedan said

“There are certain rights that have never been defined as rights, that are essential to equality for women and they were not defined in the Constitution that was written only by men. The right of woman to control her reproductive process must be established as a basic and valuable human civil right not to be denied or abridged by the state.”¹

But Friedan’s view that equal rights for women must prohibit barriers to abortion along with all other kinds of pregnancy discrimination presented a problem for leading proponents of the ERA.

They argued that the ERA would “have nothing to do with” certain issues such as gay marriage or drafting women. But the decision to exclude the right to abortion is having the most harmful long-term consequences.

Needing a pretext for excluding legal barriers to abortion from testimony on what the ERA would do, campaign leaders relied on a 1971 Yale Law Journal article by Professor Thomas Emerson.² Without mentioning abortion, the article argues that under the ERA, men and women could be treated differently by laws relating to “unique physical characteristics,” using as examples wet nurses and sperm donors. Emerson later explained that:

* Based on two-page fact sheet “766 Unite ERA and Abortion.”

“The main reason we did not discuss the abortion problem 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.”³

Under this newly-crafted constitutional privacy right, the *Roe v. Wade* decision in 1973 provided limited constitutional protection for abortion rights.

How, why, and when ERA advocates kept sex equality and abortion separate was described by law professor Reva Siegel in her 2007 paper “*Sex Equality Arguments for Reproductive Rights*.”

“After *Roe*, anti-ERA activists began to argue that the ERA would constitutionalize the abortion right...ERA’s advocates responded by doing what they could to separate abortion and sex equality talk...seeking to avoid sex equality reasoning for the right [to abortion] during litigation of the abortion funding cases and through hearings on the extension [in 1978] and reintroduction of the ERA [in 1983].”⁴

In the abortion funding cases, for example, instead of arguing on the basis of sex discrimination, they were argued on the basis of discrimination between high- and low-income women, an argument rejected by the Supreme Court in its 1980 *Harris v. McRae* decision upholding the Hyde Amendment’s prohibition on federal funding for abortion.

The harmful effect of this decision on women’s rights was described by Law professor Catharine MacKinnon:

“Only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion. The denial of funding for Medicaid abortions obviously violates the abortion right...For those who have not noticed, the abortion right has already been lost: this was when [it happened].”⁵

For more than three decades, feminist law professors have been urging: make the natural connection between abortion rights and sex equality.

When ERA was re-introduced in 1983, law professor Rhonda Copelon wrote in *Ms. Magazine*:

“We must work to reintegrate reproductive and sexual rights into the concept of equality....The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation.”⁶

In 1985, then circuit judge Ruth Bader Ginsburg assessed how separating abortion from sex equality harms the abortion right.

“[T]he Court's Roe position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”⁷

In a 1987 book review, professor MacKinnon criticized the separation of ERA from abortion.

“Abortion *is* a sex equality issue. Everyone knows it. ...In her book *Why We Lost the ERA*, Jane Mansbridge bemoans only the extent to which such realities were not able to be fully manipulated out of the ERA debate. But the current lack of success in securing access to federal abortion funding...suggests that denying women's experience...may make not only bad law and lousy politics but also ineffective strategy.”⁸

In 2011 professors Copelon and Law described the current assault on abortion and its meaning for women's equality:

“Federal law denies abortion...to the poor, prisoners, soldiers, diplomats and foreign service officers, Peace Corp volunteers [and Native Americans]. Judge Dooling described the right to choose abortion and the access provided by funding as ‘nearly allied to [a woman’s] right to be,’ [and] Justice Ginsburg added that it is essential to women’s ability ‘to enjoy equal citizenship stature.’”⁹

If there is one all-important lesson to be learned from our fifty-year campaign for a strong constitutional guarantee of equal rights for women, it is that sacrificing principle for political expediency is a losing strategy. In short: for the sake of both issues, make abortion access for all women a major ERA-equality goal.

¹ Greenhouse and Siegel, 2012, [Before Roe V. Wade: Voices That Shaped The Abortion Debate Before The Supreme Court’s Ruling](#) (2d ed. 2012)

² Brown, Emerson, Falk, and Freedman, 1971, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871

³ Twiss Butler, 1991, [Abortion Law: “Unique Problem for Women” or Sex Discrimination?](#) 4 Yale J. L. and Feminism 133.

⁴ Reva Siegel, 2007, [Sex Equality Arguments for Reproductive Rights](#), 56 Emory L.J. 815

⁵ Catharine MacKinnon, 1991 [Reflections on Sex Equality under Law](#), 100 Yale L.J. 1281

⁶ Rhonda Copelon, 1983, *Abortion Rights: Where Do We Go from Here?* Ms. Magazine (October issue)

⁷ Ginsburg, 1985, *Some Thoughts on Autonomy and Equality in Relation to Roe V. Wade*, 63 N.C. L. Rev. 375

⁸ MacKinnon 1987, *Unthinking ERA Thinking*. 54 U. Chi. L. Rev. 759

⁹ Copelon and Law, 2011, [Medicaid Funding for Abortion: The Story of Harris v McRae](#) in *Women & the Law Stories*, Schneider and Wildman, eds.