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The Equal Rights Amendment:

A Stronger Constitutional Protection for Women's Reproductive Rights

By Jan Erickson, Director of Programs, National Organization for Women Foundation

"*Abortion is a sex equality issue. Everyone knows it…*"[1] Catharine MacKinnon

The text of the Equal Rights Amendment:

Section 1. Equality of rights under this law shall not be denied or abridged by the United States or any state on account of sex.
Section 2. The 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.

The Equal Rights Amendment was introduced into every Congress since 1923, at the request of women's suffrage leader Alice Paul and the National Woman's Party, to ultimately be adopted by Congress in 1972, with a seven year deadline for state action. Ratification by at least three-fourths or 38 states was necessary and by 1982, after an extension of three more years added to the deadline, the amendment fell short by three states. The ERA was fought by major insurance companies, universities, college sports associations as well as by conservative political leaders and their organizations. Lawyer and conservative leader Phyllis Schlafly organized a successful opposition effort among conservative women. Their work was instrument in preventing full ERA ratification by three remaining states by 1982.

Responding to lobbying from the opposition, five state legislatures rescinded their ratifications (Idaho, Kentucky, Nebraska, Tennessee and South Dakota). However, since there is no Constitutional provision for rescission in Article V[2], these states remain among the ratified 35. States which have not ratified include Alabama, Arizona, Arkansas, Florida, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia.

The ERA remains unratified even though advocates over many years have lobbied legislatures in various states to approve ratification, with one or the other legislative body passing a ratification bill, but never achieving passed in both houses. If three more states were to approve of ERA ratification at some point, another barrier would have to be mounted; that is, getting Congress to pass legislation repealing the original ratification deadline which appears in the proposing text – not the actual amendment language. But the prospect of a federal equality amendment continues to motivate feminist activists.

[1] MacKinnon, Catharine A. 1987. Unthinking ERA Thinking, *54 U. Chi. L. Rev.* 955 at 1039.
[2] Affirmed in a letter to U.S. Rep. Carolyn Maloney from the Archivist of the United States, David Ferriero, Oct. 25, 2012. Copy transmitted by email attachment from the National Council of Women's Organizations, ERA Task Force to the National Organization for Women.

Since 1995, advocates have rallied in various states, like Arizona, Arkansas, Florida, Illinois, Mississippi, Missouri, Nevada, Oklahoma and Virginia to lobby their state legislatures to ratify the ERA, with limited success. Most often one or the other of the state's legislative bodies has passed a ratification measure, but never passing in both chambers. In 2011, 2012, and 2014, the Virginia Senate passed a bill ratifying the ERA, but the House of Delegates kept a ratification bill blocked in committee. The Illinois Senate approved (39-11) of ratification in May, but the House failed to bring the measure up for a vote during a special session late fall 2014, reportedly just a few votes from the necessary two-thirds of the membership.[3]

An indication of continuing public interest in women's equality, Oregon ERA activists helped pass a ballot measure in 2014 to add an ERA to the state constitution, bringing to a current total of 23 states with their own equal rights amendments. The vote was a sound 63 percent to 37 percent, with populous Multnomah County voting 77 percent in favor. This positive result happened despite a campaign by Oregon ACLU against the ERA, claiming that Oregon's constitution already had sufficient gender protections.[4] (Although four retired Oregon Supreme Court justices signed a letter disagreeing with that position.)

The idea of an equal rights amendment remains popular: a 2012 poll for the Daily Kos/Service Employees International Union (SEIU), posed the question, "Do you think the Constitution should guarantee equal rights for men and women, or not?" Ninety-one percent agreed that the Constitution should contain a guarantee of equal rights between the sexes. A 2001 Opinion Research Corporation commissioned by the ERA Campaign Network of Princeton, NJ found 96 percent of respondents believed that male and female citizens should have equal rights and 88 percent thought that the U.S. Constitution should make that clear. Among the respondents, 72 percent mistakenly thought that the ERA contains an equal rights guarantee.[5]

Denying that the Equal Rights Amendment Would Apply to Abortion

During the national ratification campaign ERA proponents assured the public and lawmakers that the ERA would *not* apply to abortion rights. Leading opponents of the amendment were certain that the ERA would protect abortion rights. Then NOW President Eleanor Smeal and other leaders urged feminist attorneys bringing cases in both federal and state courts to try to restore Medicaid funding for abortions *not* to make the connection.[6] Supporters of the amendment believed that the best strategy was to advocate for the ERA in symbolic and generalized terms.

The denial of the abortion rights connection, in part, was in reaction to a core message advanced by ERA opponents (who also opposed abortion rights), asserting that the ERA would guarantee abortion rights because denial was clearly sex discrimination. Opponents suggested that ERA leaders were disingenuous in denying the connection and that abortion rights were part of a

[3] See generally www.equalrightsamendment.org
[4] Oregon Equal Rights Amendment Unnecessary, http://aclu-or.org/2014BM_ERA (Accessed on Oct. 15, 2014)
[5] Francis, Roberta W. "The Equal Rights Amendment: Frequently Asked Questions," http://equalrightsamendment.org/faq.htm, (accessed on March 3, 2014)
[6] Davis, Flora. *Moving the Mountain: The Women's Movement in America Since 1960*. P. 399. New York: Simon and Schuster. 1991

Trojan horse of horribles that would eliminate labor protections for women, subject women to the military draft, mandate unisex toilets, prohibit alimony and destroy traditional marriage.

U.S. Senator Orrin G. Hatch, who was chair of the Subcommittee on the Constitution, Senate Committee on the Judiciary, wrote in a 1983 publication, "The connection between the ERA and abortion is not a difficult one to comprehend. Since abortions, by their nature, are limited to women, those laws which relate to abortions are 'suspect' in the same manner as are laws which directly classify men and women in a different manner."

Hatch continued, "The actual impact of this theory is likely to be felt in two respects: First, the 'right to an abortion' already identified by the Supreme Court in its *Roe v. Wade* decision in the Fourteenth Amendment would be made even more absolute in character; second Federal and State laws limiting public funding for abortions would almost certainly be rendered unconstitutional." [7]

Despite this, ERA advocates followed a steady course of avoding specifics about the likely consequences of the amendment. During those hearings, Sen. Paul Tsongas (D-Mass.), a leading ERA advocate, repeatedly responded to frustrated committee members' questions by saying that it would be up to the courts to determine the answer.[8]

ERA opponents have never swerved from their position that the ERA would protect women's abortion rights. As recent as this fall Schlafly lobbied Illinois legislators to vote against ratification because – she said -- the ERA would guarantee abortion rights. Reportedly, several abortion rights opponents who had been in favor of the amendment changed position.

Despite the admonition from ERA leaders to not talk about abortion rights, after the 1982 deadline had passed, a number of feminist lawyers argued that certain states' Equal Rights Amendments protected women against sex discrimination. In New Mexico a challenge to government funding for abortion care for low income women was found unconstitutional under the state ERA.[9] Similar challenges in Pennsylvania, Hawaii, and Massachusetts were argued as violations of the states' Equal Rights Amendments, but not resolved under their ERAs. [10]

How Would the ERA Protect Reproductive Rights?

The 14th Amendment, adopted in 1868 following the Civil War to counter race-based discrimination, has often been suggested to provide adequate protection against sex-based discrimination. Despite the 14th Amendment's existence, women were still denied suffrage for 70 years until adoption of the 10th Amendment. It was another 51 years until the U.S. Supreme Court applied the 14th Amendment for the first time to prohibit sex-based discrimination in *Reed*

[7] Hatch, Orrin W. 1983. *The Equal Rights Amendment: Myths and Realities.* P. 47. Lindon, Utah: Savant Press.
[8] Will, George F. June 2, 1983, Praise the ERA and Pass the Buck, *The Washington Post,* A Sec.
[9] N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 36,375 P.2d 841(filed 1998)
[10] Hatch, Op. cit. p. 49.

v. Reed because the facts of the case did not meet a rational-basis test. In later cases, including *Craig v. Boren*, 1976 and *United States v. Commonwealth of Virginia*, 1996, the Court did not review sex discrimination claims at the strict scrutiny standard of review that the 14th Amendment requires for suspect classifications, such as race, religion and national origin.[11]

Currently, the Court applies heightened (skeptical) scrutiny to cases of sex discrimination and demands extremely convincing evidence to uphold a government action that differentiates on the basis of sex. However sex discrimination claims can still be examined under an intermediate standard of review; that is one that requirement classification substantially advance an important governmental objective (as opposed to having a necessary relation to a compelling state interest as in strict scrutiny).

Under the ERA, courts would have to add sex to the list of suspect classifications as protected by the high level of strict judicial review.

A briefing paper prepared by long-time activist and NOW Reference Librarian, Twiss Butler,[12] argues that:

> 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." (Italics added)
>
> 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 E. Lee (U.S. Solicitor General under President Reagan) 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.

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[11] See generally, The Equal Rights Amendment: Unfinished Business for the Constitution, History, http://equalrightsamendment.org/history.htm (Accessed, Mar. 5, 2014)

[12]Butler, Twiss."How to Pass an ERA Worth Passing." Position Paper, No. 760. wwww.equality4women.org (Accessed Oct. 15, 2014)

Re-Assessing an ERA's Potential to Protect Abortion Rights

Some advocates for women's reproductive rights are taking a closer look at a sex equality amendment as a potentially powerful tool to slow if not stop a steady march of federal and state restrictions on abortion care. Properly interpreted, an ERA could protect women's access to reproductive health care, defining any restriction or barrier as a form of sex discrimination. The importance of a durable constitutional protection cannot be discounted as Congress, state legislatures and a hostile judiciary can narrow, eviscerate and even eliminate whatever gains have been made through state and federal laws.

Without an equal rights amendment the U.S. Constitution does not clearly guarantee that rights protected by the Constitution are accorded to all citizens irrespective of sex. Discrimination on the basis of sex does not call for a *strict judicial scrutiny* – only a lesser standard of *intermediate scrutiny* -- because sex is not a *suspect classification*. Under an ERA, when government laws and policies treat women and men differently, these would have to meet the highest standard of justification – that is, proving a *compelling state interest* – in order to be found constitutional. An ERA would provide uniformity and consistency in sex discrimination cases and would serve as an enduring warning to those who would attempt to roll back laws and policies advancing women's equality.

It should be noted that an Equal Rights Amendment would provide a fundamental legal remedy against sex discrimination for both women and men. This clarification of the legal status of sex discrimination is critically important for the courts where decisions still deal inconsistently with these claims.[13]

"Properly interpreted, an equal rights amendment would be a permanent guarantee of basic human rights for women," said NOW President Kim Gandy in 2007 upon the re-introduction of the Equal Rights Amendment in Congress. "With such an amendment to the Constitution, our fundamental rights and liberties would no longer be subject to the ever-changing political cycles."

Gandy continued, "The passage of such an amendment would be a crucial step toward eradicating pervasive gender discrimination in employment, insurance, health care, education, social security and other sectors, and the survival of existing protections, like Title VII (employment discrimination) and Title IX (equal educational opportunities), would not be at the whim of the Congress and the courts.

Currently, NOW's website reminds readers that,

Equality in pay, job opportunities, political structure, social security and education will remain an elusive dream without a guarantee of equality in the U.S. Constitution. The progress we have made — and must continue to make — towards women's equality can be lost at any time because those advances depend on legislation that can be (and has been) weakened or repealed

[13] Francis, Roberta W. "The Equal Rights Amendment – Unfinished Business for the Constitution, Why We Need the Equal Rights Amendment," http://equalrightsamendment.org/why.htm (Accessed March 5, 2014)

by Congress. Although we did not succeed in ratifying the Equal Rights Amendment, winning a constitutional guarantee of equality for women remains one of NOW's top priorities.

Over the years, the NOW leaders have said that an ERA must advance the rights of all women, including women of color and LGBTQIA persons, and it must provide the power to more effectively seek redress for women's economic marginalization and reverse the accelerating trend of restricted access to reproductive health care**.**

In 1994 the National Organization for Women held a strategy summit on an equality amendment and adopted the following language (as slightly amended by a later resolution and excerpted here) in a working draft:

CONSTITUTIONAL EQUALITY FOR ALL WOMEN

1995

WHEREAS, the National Organization for Women (NOW) is staunchly committed to constitutional equality for all women; and

WHEREAS, the recent pointed attacks on affirmative action, welfare, health care, lesbian and gay rights, and reproductive rights, led by Congress, serve as a stark reminder that legislative action alone will never ensure equality; and

WHEREAS, an effective Constitutional strategy requires a broad-based coalition of activists from diverse communities and organizations;

THEREFORE BE IT RESOLVED, that the National Organization for Women (NOW) adopt the following as a working draft:

> 1) Women and men shall have equal rights throughout the United States and every place and entity subject to its jurisdiction; through this article, the subordination of women to men is abolished;
>
> 2) All persons shall have equal rights and privileges without discrimination on account of sex, race, sexual orientation, marital status, ethnicity, national origin, color and indigence;
>
> 3) This article prohibits pregnancy discrimination and guarantees the absolute right of a woman to make her own reproductive decisions including the continuation or the termination of pregnancy;
>
> 4) This article prohibits discrimination based upon characteristics unique to, or stereotypes about any class protected under this article. This article also prohibits discrimination through the use of any facially neutral criteria which have a disparate impact based on membership in a class protected under this article;
>
> 5) This article does not preclude any law, program or activity that would remedy the effects of discrimination and that is closely related to achieving such remedial purpose;
>
> 6) This article shall be interpreted under the highest standard of judicial review;

7) The United States and the several states shall guarantee the implementation and enforcement of this article…

Through additional resolutions at later national conferences NOW activists fashioned a more comprehensive list of desired protections and guarantees under a constitutional equality amendment: a recognized right to abortion care that is not limited by medically-unnecessary restrictive state and federal laws, contraceptive access and other reproductive health care services that overcome so-called conscience refusals, a vigorous prevention of pregnancy discrimination, full recognition of same-sex marriage in all states, prohibition of all forms of discrimination against LGBTQIA individuals, a strengthening of Title VII prohibitions against race discrimination when it involves women of color who suffer doubly from discrimination, and a clearer prohibition against sex-based discrimination in the hiring, pay and promotion of women.

Some critics of the Constitutional Equality Amendment have said that the working draft language is too proscriptive and by implication may omit other important protections. Rather than specifics, broad principles for basic human and civil rights in Constitutional amendments are best, their application to be defined through debate to guide lawmakers and jurists.

Numerous additional resolutions adopted at National NOW Conferences since 1995 continue to affirm support for full ratification of the 1972 ERA and for an alternative Three State Strategy which would remove the ratification deadline from the preamble in the 1972 legislation.

Recent Congressional Efforts to Advance the ERA

Many activists see a simpler path to ratification in gaining just three more states' ratification of the 1972 amendment to achieve the required total of 38 states. Legislation to remove the 1972 amendment's ratification deadline was sponsored in the 113th Congress by Sen. Ben Cardin (D-Md.) (S.J. Res. 15) with 35 co-sponsors and Rep. Jackie Speier (D-Calif.) (S.J. Res. 113, with 147 co-sponsors. Presumably, these resolutions will be re-introduced in the 114th Congress.

The traditional (1972) Equal Rights Amendment was introduced in the 113th Congress by Sen. Robert Menendez (D-New Jersey) (S.J. Res 10), but the real surprise was an ERA introduced by Rep. Carolyn Maloney (D-New York) containing different language that may be more effective in pursuing women's equality (that will be discussed later). Maloney's legislation, along with Sen. Menendez' bill, was a "start-over" approach, requiring a national ratification effort to gain 38 states – a prospect that is not likely to succeed in the near term with a majority of state legislatures currently under Republican control.

Unfortunately, all three versions of an Equal Rights Amendment have little chance of being adopted in the 114th Congress which will have increased Republican majorities, 246 to 188 (and one race undecided), in the House and 54-44 (plus two Independents) in the Senate -- soon to be under Republican control. A two-thirds vote is required for Congressional approval of a

Constitutional amendment; for the Cardin-Speier legislation, only a simple majority of each house would be necessary for passage. No need to mount a very challenging national ratification effort would be involved -- just ratification by three more states.

As to the question as whether Congress has the authority to extend or extinguish time limits is addressed in a law journal article, "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States." In that article the authors argue that several U.S. Supreme Court decisions (*Dillon v. Gloss*, 1921 and *Coleman v. Miller*, 1939) and the fact that Congress voted to extend the ERA time limit and to accept the Madison Amendment's 203-year ratification period as "sufficiently contemporaneous," it is likely that Congress has the power to legislatively adjust or repeal the time limit constraint on the ERA if it so chooses, to determine whether or not state ratifications after the expiration of a time limit in a proposing clause are valid, and to promulgate the ERA after the 38th state ratifies.[14]

Roberta W. Francis, co-chair of National Council of Women's Organizations' (NCWO) ERA Task Force, notes that the debate over passage of resolution approving of the Three State Strategy could provide a platform for exploring the larger issue of whether time limits on the ratification of constitutional amendments are themselves unconstitutional, a claim presented by some constitutional scholars with credible legal support, such as "Why Time Limits on the Ratification of Constitutional Amendments Violate Article V", authored by Mason Kalfus. (*University of Chicago Law Review*, Vol. 66, No. 2 (Spring, 1999).

New Language for an Equal Rights Amendment

Failing full ratification of the 1972 ERA, new language proposed in Rep. Carolyn Maloney's (D-New York) Equal Rights Amendment legislation (H.J. Res. 56, 113th Congress) offers a better approach to identifying discrimination and facilitating corrective action, perhaps even for expanding women's reproductive rights. Rep. Maloney adds a simple sentence to Section 1:

Section 1. **Women shall have equal rights in the United States and every place subject to its jurisdiction**. Equality of rights under this law shall not be denied or abridged by the United States or any state on account of sex.
Section 2. The 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.

[14] Held, Allison L., Sheryl L. Herndon, and Danielle M. Stage. "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States." *William & Mary Journal of Women and the Law* (Vol.3, No. 1*)*, Spring (1997). (Summary by Roberta W. Francis, Co-Chair, NCWO ERA Task Force.)

Law Professor and feminist legal theorist Catharine A. MacKinnon points out, ""Women shall have equal rights," if correctly interpreted, could remedy the effective shut out from the legal system most women still face today in these two fundamental engines of sex inequality in a way that existing law, interpreted as it has been, is intrinsically incapable of doing." "The language identifies who is being discriminated against and heightens the possibility of guaranteeing rights to all women even when the discrimination against them isn't exactly based on sex,"[15] MacKinnon explains.

The new language states a positive right to women's equality and places the responsibility for assuring equal rights for women on governments. That seems a far better path to equality than a negatively-framed ERA which makes it necessary for women to first be equal to men to prove discrimination.

But it is far from certain that Rep. Maloney's legislation can be enacted in the near term. The challenge is for activists to successfully carry out another national campaign to achieve Congressional approval of the new ERA and steer its successful ratification through 38 states. Given the increased political power of conservative lawmakers, how likely is that to happen?

The recognition of the value of a federal Equal Rights Amendment in protecting women's reproductive rights has evolved over time. Four decades after the *Roe* decision it is abundantly clear that women need a stronger and more durable protection for their reproductive rights that only a constitutional amendment could provide. As we are edging closer to an even further narrowing of the abortion right and perhaps a ban on abortions after 20 weeks gestation upheld by the conservative majority on the U.S. Supreme Court, the issue is all the more urgent. Denial of access to reproductive health care *is* sex discrimination and an equal rights amendment should enable women's rights activists to define it as such.

Political Landscape is a Factor

Though abortion rights opponents were active following the Roe decision, it wasn't until the mid-1990s that serious restrictions on women's access to abortion in state and federal law began to escalate. Since 1995, the number of restrictive measures adopted in the states has risen dramatically and opponents of women's reproductive rights have consolidated their control in state legislatures. Because Republicans captured re-districting following the 2010 Census re-apportionment, they have a lock on legislative majorities in 30 states[16] and in the U.S. House of Representatives. This hold for the 30 states will likely continue through the 2020 census, decennial re-apportionment and related re-districting. Republican control of many legislative bodies may continue through the 2020 decade depending upon the outcome of Congressional and

[15] MacKinnon, Catharine A., "Toward A Renewed Equal Rights Amendment: Now More Than Ever." *Harvard Journal of Law and Gender* Vol. 37, (2014): P. 578

[16] StateScape- Legislative Control 2014, http://www.statescape.com/resources/partysplits/partysplits.aspx

state legislative races and any future demographic shifts. Thus, efforts to secure ratification by 38 states required by the traditional or "start over" approach for the Equal Rights Amendment would face little chance of success.

The Republican capture of U.S. Senate control in the 2014 general election will likely last for one (two-year) Congressional Session because a many of the Senate seats up for re-election in 2016 represent Democratic-leaning states. It may be then that progress could be made in the Senate with hearings and a possible consideration of ERA legislation, whether it's a traditional bill or the Three State Strategy bill. Sen. Cardin, chief sponsor of the Three State Strategy bill, indicated an interest in trying to schedule a hearing during the 113th Congress. But, how a Republican-controlled House would deal with an ERA bill is another question.

Regardless of what happens at the federal level, there is always the continuing need for activists to be organizing and lobbying in their state legislatures. The most expeditious path, as noted, is to attain ratification in three more states and then press Congress to remove the 1972 deadline. Close observers believe that if ERA activists are successful in gaining three more states' ratifications that our opponents will bring a lawsuit to prevent official recognition of full ratification. As indicated, several unresolved Constitutional questions about Congressional authority to impose deadlines on the length of time to achieve full ratification could be part of the Supreme Court's consideration of a ratified ERA beyond the 1982 deadline.

Sex Equality Approach to Reproductive Rights

In 1985, Ruth Bader Ginsburg, an early legal advocate for women's rights and famously now one of three Supreme Court female justices, wrote "that in separating abortion from sex equality, [T] 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." [17]

The late Rhonda Copelon who was Associate Professor at CUNY Law School, Queens College wrote in 1982 that "we must work to reintegrate reproductive and sexual rights into the concept of equality. Abortion is essential to women's rights to bodily integrity, privacy, free expression and association, and the freedom from involuntary servitude. Without the ability to decide whether and when to bear children, women lack a prerequisite to equality. The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation." [18]

In *United States v. Vuitch* (1971), A Brief for Human Rights of Women, Inc., submitted by the Washington Office for Social Concern et.al succinctly summarized the core problem: Restrictive

[17] Ginsburg, Ruth Bader, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63. *N.C. L., Rev. 375,* (1985): p. 386

[18] Copelon, Rhonda, "Abortion Rights: Where Do We Go From Here?," *Ms. Magazine*, October, 1983

abortion law "denies women, as a protected class, the equal protection of the law guaranteed by the Fifth Amendment in that it restricts their opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted, and also arguing that the abortion statute violates the Thirteenth Amendment on grounds that "[t]here is nothing more demanding upon the body and person of a woman than pregnancy and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later."

Yale Law professor Reva B. Siegel, who has examined the question of social organization impacting law and sexuality, asserts that the government must regulate in a manner that recognizes the equality of the sexes,

> "A sex equality analysis of reproductive rights views the social organization of reproduction as playing a key role in determining women's status and welfare and insists – custom notwithstanding – that government regulate relationships at the core of the gender system in ways that respect the equal freedom of men and women. Whatever sex role differences in intimate and family relations customs may engender government may not entrench or aggravate these role differences by using law to restrict women's bodily autonomy and life opportunities in virtue of their sexual or parenting relations in ways that government does not restrict men's. On this view, laws imposing gender-specific burdens on women's sexual and parenting relations are constitutionally suspect.[19]

Prof. Siegel adds, "Control over whether and when to give birth is practically important to women for reasons related to a gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes is fair to enforce, yet is unwilling institutionally to redress."

Prof. Siegel continues,

> The sex equality approach to reproductive rights opposes laws restricting abortion or contraception to the extent that such laws presuppose or entrench customary, gender differentiated norms concerning sexual expression and parenting. Today, more who espouse the sex equality approach to reproductive rights oppose legal restrictions on abortion because (1) whatever the asserted fetal-protection rationale, in actual practice legal restrictions on abortion have reflect entrenched customary, gender-differentiated norms concerning sexual expression and parenting; (2) they have conscripted the lives of the poor and vulnerable women for …without similarly constraining the privileged; (3) they have punished women for sexual activity without hold men commensurately

[19] See generally, Siegel, Reva B. "Sex Equality Arguments for Reproduce Rights: Their Critical Basis and Evolving Constitutional Expression" *Emory Law Journa*l. Vol. 57, No. 4. (2007): 815-821 (A discussion forum)

responsible; and (4) they have used law to coerce, but not support, women in childbearing.

The analytical framework Professor Siegel outlines suggests that most attention be paid to the social as well as physical aspects of reproductive relations, urging jurists to be skeptical of traditions, conventions, and customs that shape sex and family roles of men and women. To be kept in mind is the still-prevalent double standard with regard to sexual activity outside of marriage, the coercion of women into sexual relations which lead to relationships in which women are deprived of dignity, health, happiness and freedom as men are not.

She notes that, " Role differentiating often imposes more burdens on women: parenting and other care-giving or household management which prevent women from gaining education and market experience that are valued – as parenting and homemaking are not. This path obviously limits women's earning capacity. The core consideration in a sex equality approach to reproductive rights considers control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class.

Writing in *What Roe v. Wade Should Have Said*,[20] a 2007 review of alternative arguments to support the abortion right and drawing from an amicus brief submitted in the *Roe v. Wade* case, Prof. Siegel draws from other sources to note that "…abortion restrictions of the sort contained in the Texas and Georgia statutes violate equal citizenship guarantees of the Fourteenth and Nineteenth Amendments. Restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact the men are unable to see women in any role other than that of the mother and wife… (Brief of the Amci Curiae New Women Lawyers et. al at 224, 32)

".. The Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. [But] abortion laws, in their real practical affects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment. (First Amended Complaint at 6-7, *Women of Rhode Island v. Israel* (D.R.I. June 22, 1971).

Such statutes violate the equal citizenship principle because they compel pregnant women to assume the role and to perform the work of motherhood, without acknowledgement or recompense, in a society still organized on the understanding that those who do the primary work of bearing and rearing children are a dependent class, not full participants in those activities that

[20]Balkin, Jack, ed. *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite American's Most Controversial Decision*, New York University Press, 2005

society most highly values and centrally associates with citizenship." (New Women Lawyers et. al. 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18)

Prof. Siegel concludes her opinion,

> "Now as before, individuals may form their own judgments about the morality of abortion and determine when, if ever, they believe recourse to the practice to be appropriate. But they may not invoke the power of the state to make choices for others.
>
> These are choices that the Constitution protects as women's alone. Given the way this nation has historically treated citizens who bear and rear children – a history that still powerfully shapes attitudes and practices in America today—government may give support to pregnant women, but it may not coerce them to give birth.
>
> For those reasons, government may not deny women effective access to abortion, and all regulation of the practice must be consistent with principles of equal citizenship."[21]

Conclusion: Because the regulation of women's reproductive capacities has become excessive and access to abortion is increasingly limited, a more durable protection of the abortion right must be established. Our view is that this can be best achieved through an Equal Rights Amendment for which the meaning and intent is made abundantly clear. That is, prohibiting or constraining women's access to abortion care is sex discrimination and therefore unconstitutional as would be a denial of funding for abortion care or other limitations on the provision of care.

[21] Ibid., Pat II, p. 82