

Aborting the E.R.A.



With friends like the A.C.L.U., the E.R.A. doesn't need enemies.

by Douglas Johnson

Does Democratic control of the U.S. Senate, coupled with the current heightened public interest in the Constitution, create an environment favorable to launching a revival of the Equal Rights Amendment?

Many feminist leaders think so. At a recent Washington press conference, spokeswomen for 16 liberal women's groups said that the E.R.A. was their top legislative priority for the 100th Congress. They predicted overwhelming approval.

Despite their confidence, however, this effort to revive the E.R.A. is certain to fail. The chance that Congress will pass the E.R.A. this year or next is slim. If it were passed, the chance that the amendment would be ratified by the required number of states is zilch. The main reason? Abortion.

Many people used to think that there

was no connection between the E.R.A. and abortion. But the American Civil Liberties Union has changed all that.

Sixteen states have added equal rights amendments to their state constitutions. In four of those states, A.C.L.U. lawyers have argued in court that the state's refusal to pay for abortions under Medicaid constitutes a violation of that state's equal rights amendment. Briefly stated, their argument goes something like this: Abortion is a medical procedure sought only by women; therefore, a law that treats abortion differently from other medical procedures is a form of sex discrimination.

To date, the courts have given a final answer to this argument only in Pennsylvania and Connecticut. In Pennsylvania, a judge accepted the A.C.L.U.'s position, and the state was compelled to pay for elective abortions for a year. The State Supreme Court, whose members are elected, reversed that decision. More recently, in Connecticut, the A.C.L.U.'s victory was more complete. Connecticut's

Medicaid program paid for abortions only to save the mother's life or in cases of rape and incest. Last April, Judge Robert I. Berdon of the Superior Court declared this policy unconstitutional under the state's equal rights amendment and ordered the Medicaid program to pay for all physician-performed abortions.

"Since only women become pregnant, discrimination against pregnancy by not funding abortion ... is sex-oriented discrimination," Berdon ruled, accepting the A.C.L.U.'s argument virtually verbatim.

Berdon's ruling was a stunning breakthrough for the attorneys at the A.C.L.U.'s Reproductive Freedom Project in New York, who masterminded the equal rights amendment abortion linkage. They were given a precedent to use in attacking anti-abortion laws in other states that have equal rights amendments. Already, the Project has published a booklet that encourages E.R.A.-based legal challenges to state laws that require physicians to notify parents be-



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fore performing abortions on minors.

Ironically, however, the Connecticut ruling had another effect: It hammered the final nail into the coffin of the proposed Federal E.R.A., at least in its traditional form.

Connecticut's equal rights amendment is functionally equivalent to the proposed Federal E.R.A., which states that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Therefore, the A.C.L.U.'s equation of sexual equality with abortion rights could just as easily be applied to the Federal version.

Indeed, pro-abortion attorneys now openly admit that they believe the Federal E.R.A. should be interpreted as invalidating anti-abortion laws. As Lynn Paltrow, Reproductive Freedom Project staff attorney, put it in a speech last October: "They [opponents of E.R.A.] say the E.R.A. will lead to funding of abortion. I say, I hope so."

(Such candor is a recent development. Just a few short years ago, conservative activists who suggested a connection between the E.R.A. and abortion funding were regularly ridiculed by feminist leaders and skeptical editorial writers.)

If a Federal E.R.A. were interpreted as the A.C.L.U. desires, in other words, it would invalidate almost every existing Federal and state law dealing with abortion. The Hyde Amendment, which prohibits Federal funding of most abortions, would obviously be declared unconstitutional, as would similar laws in 36 states. According to Federal Judge John T. Noonan Jr., an eminent Constitutional scholar, the E.R.A. would also jeopardize laws in 44 states that allow doctors, nurses and hospitals to refuse to participate in abortions without being penalized. (Abortion-rights lawyers have long criticized such laws as constituting state approval of "discrimination.") Furthermore, the E.R.A. would provide a solid constitutional foundation for legal abortion—a foundation that, according to former Solicitor General Rex Lee, Judge Noonan and others, would endure even if the Supreme Court reversed *Roe v. Wade*.

You may regard these potential outcomes with approval or horror, but my aim is not to discuss the merits of the A.C.L.U.'s position. Rather, I would like to make a political point: Now that everyone understands that the E.R.A. may have such a significant impact on abortion law, it cannot possibly inspire the degree of political

consensus it needs to become part of the Constitution. Although the E.R.A. had problems during its first go-round, its defeat was never a foregone conclusion. But, by creating an undeniable link to abortion, the A.C.L.U. has erected a political obstacle that backers of the amendment will find insurmountable.

Approval of a Constitutional amendment requires an extraordinary degree of political consensus. A two-thirds vote in favor in each house of Congress must be followed by ratification by three-quarters (38) of the states. Ratification in any state requires a favorable vote in both houses of the state's legislature, with the exception of Nebraska, which has a unicameral legislature. Put another way, if as few as 13 of the 99 state legislative houses oppose ratification, the amendment will not become law.

The original E.R.A., approved by Congress in 1972, failed to obtain approval by the required 38 states despite an unprecedented 10-year ratification period. Thirty-five legislatures approved the amendment, with five later rescinding their approval. (The legality of such re-

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scissions is an unresolved legal issue.)

Despite considerable political mythology to the contrary, anti-abortion sentiment was not a major factor in the battle over ratification of the original E.R.A. Pro-life opposition was important in only a handful of legislatures, and only during the final years of the ratification effort. Twenty-two of the 35 states that approved the amendment did so even before the Supreme Court's *Roe v. Wade* ruling provoked a national anti-abortion movement. Twelve more states approved the E.R.A. before government funding of abortion became a volatile issue in 1976.

But the A.C.L.U.'s success in entangling the E.R.A. with abortion has drastically changed the ratification prospects for the amendment in its second go-round. If Congress submits the traditional E.R.A. wording to the states again, the amendment will be rejected in many of the same legislatures that ratified it with little fuss during the early 1970s.

In at least 10 of those ratifying states, one or both legislative houses are now strongly anti-abortion, reflecting the politically energetic anti-abortion organizations that have developed over the past 10 years. These states are Idaho, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Pennsylvania and South Dakota.

In addition, anti-abortion sentiment would all but guarantee rejection of the E.R.A. in most, if not all, of the 15 state legislatures that never ratified the original amendment. The major anti-abortion groups, which worked against the E.R.A. in only a few of these states during the 1972-82 ratification campaign, would be far more active in galvanizing opposition this time.

In a second ratification fight, single-issue anti-abortion political organizations, most of which are federated in the National Right to Life Committee, would be joined by several large religious bodies that mounted no significant opposition to the E.R.A. during the 1972-82 campaign. Among these would be the affiliate denominations of the National Association of Evangelicals, a church group with 47,000 member churches that should not be confused with the religious right.

Most of the nation's Roman Catholic bishops would also be allied with the anti-

E.R.A. coalition. The E.R.A. enjoyed substantial public support from members of the Catholic hierarchy during the 1970s, but the A.C.L.U.'s legal efforts have changed that. Following the A.C.L.U.'s initial success in using Pennsylvania's equal rights amendment as a pro-abortion legal weapon, the National Conference of Catholic Bishops announced that it would "have no alternative but to oppose" the E.R.A., unless it is amended to prevent it from affecting abortion laws.

Growing opposition by the Catholic bishops and other pro-life forces has already effectively halted the addition of equal rights amendments to state constitutions. Since 1982, anti-abortion sentiment has been primarily responsible for defeating state equal rights amendments in legislatures in Minnesota, Rhode Island, Wisconsin and New York. To the surprise of many political observers, even voters in Maine (1984) and Vermont (1986) rejected equal rights amendments. In both states, contentious public debates centered on the abortion issue, and bitter feminist leaders gave anti-abortion forces much of the credit (or blame) for the surprising outcomes.

As University of Vermont professor of political science Garrison Nelson told *The New York Times* after the Vermont vote: "If the E.R.A. can't win in Vermont, it can't win anywhere, because the right conditions were present."

Absortion has become the albatross around the E.R.A.'s neck. The current Congress is unlikely to approve an amendment that may be construed as supporting abortion or state funding of abortion. The E.R.A.'s only chance of passage by this Congress hinges on whether its proponents agree to a revision that will make the amendment inapplicable to abortion.

A modification of this sort was first proposed in 1983 by Congressman F. James Sensenbrenner, a Wisconsin Republican who, although a conservative, voted to ratify the E.R.A. when it came before the Wisconsin legislature in 1972. The Sensenbrenner clause would revise the E.R.A. to explicitly state that it would not "grant, secure or deny any right relating to abortion or the funding thereof." This revision would not change the cur-

rent legal status of abortion, nor would it permit the E.R.A. to be employed for anti-abortion purposes. It would simply render the E.R.A. neutral on abortion.

When the E.R.A. last came before the House of Representatives in 1983, feminist leaders recognized that the Sensenbrenner clause would command majority support. To prevent this, they persuaded then-Speaker Tip O'Neill to permit only a single up-or-down vote on the traditional language. They were stunned when the E.R.A. was defeated by six votes, with many anti-abortion Democrats and E.R.A. co-sponsors voting against it.

It is unlikely that an unamended E.R.A. will fare any better in this Congress. Over 60 liberal and moderate House members consistently vote against abortion, and the A.C.L.U. has made it impossible for them to plausibly argue that there is "no connection" between the E.R.A. and abortion.

Moreover, many pro-choice Congressmen think that an E.R.A. is needed for reasons that have nothing to do with abortion. In growing numbers, they are recognizing that the E.R.A. is doomed for the foreseeable future unless it is revised to remove it from abortion politics. Even pre-eminent liberal Congressman Barney Frank of Massachusetts recently wrote on a National Right to Life Committee questionnaire that he would support the Sensenbrenner clause "if necessary to pass E.R.A."

For the anti-abortion movement, blocking the traditional E.R.A. is a purely defensive effort. Anti-abortion leaders find the Sensenbrenner solution appealing because it would allow them to forget about the E.R.A. and redirect their full energies to more affirmative goals.

The E.R.A. is at a critical juncture. If a sufficient number of pragmatic pro-choice Congressmen were to accept the Sensenbrenner solution, the E.R.A. could be restored to political viability. If, on the other hand, Congress resubmits the E.R.A. to the states without the Sensenbrenner revision, the anti-abortion forces will be waiting in the state legislatures, and it will all be over but the shouting. ●

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