Law professors urge:
End a basic form of sex discrimination by Uniting the ERA and Abortion-Access campaigns!

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A constitutional right to abortion is essential to women's equality - 1969

Betty Friedan, NOW President, addressed the National Abortion Rights Action League's initiating meeting,

> 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…when that Constitution 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 ERA legislative history said abortion is *not* a sex equality issue - 1971

The authoritative 1971 Yale Law Review[2] article on the meaning of the Equal Rights Amendment (ERA) written by Prof. Thomas Emerson and students does not mention abortion, but holds that under the ERA men and women could be treated differently by laws relating to reproductive organs termed "unique physical characteristics." In a 1974 letter Emerson confirmed that this exception means that ERA would not apply to laws on 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]

And ERA activists kept sex equality and abortion separate after *Roe* - 1973

Law professor Reva Siegel in her 2007 paper *Sex Equality Arguments for Reproductive Rights* wrote:

> [A]fter *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 [1978] and reintroduction of the ERA [1983].[4]

Geduldig decision agreed: pregnancy discrimination is *not* sex based - 1974

The Supreme Court's majority opinion in the case *Geduldig v. Aiello* distinguished it from previous cases which found sex discrimination by laws unconstitutional under the 14th Amendment's Equal Protection clause.

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.…Normal pregnancy is an objectively identifiable physical condition with unique characteristics.…The [insurance benefits] program divides potential recipients into two groups—pregnant women and nonpregnant persons.

Because it's not unconstitutional for government to discriminate against women on the basis of pregnancy, then it's also not unconstitutional for government to discriminate against women on the basis of abortion.

Finally came a major abortion-access loss by *Harris* funding decision - 1980

Law Professor Catharine MacKinnon described the effects of the *Harris v. McRae* decision upholding the Hyde Amendment's prohibition of government funding for abortion:

> 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 this right.…For those who have not noticed, the abortion right has already been lost: this was when [it happened].[5]

Logic of the ERA connection to abortion funding is easy to see – 1983

Senator Orrin Hatch said in his anti-ERA book *The Equal Rights Amendment: Myths and Realities*, 1983

> 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.
>
> 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.

Rep. Henry Hyde testified against the ERA before the Senate Subcommittee on the Constitution, May 1983.

> If sex discrimination were treated like race discrimination, government refusal to fund abortions would be treated like a refusal to fund medical procedures that affect members of minority races.

Law professors urge: Connect abortion with sex equality and the ERA

Rhonda Copelon made a plea to integrate abortion and ERA when ERA was re-introduced in 1983

> 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 1984 Sylvia Law notes the split between sex equality and abortion and calls for their unity.

> In the 1970's we began the divergent movements to create a different social construct of sex equality and reproductive freedom. We can, if we choose, move toward a more unified understanding of the ways in which the law perpetuates sex-based restraints on human equality and liberty.[7]

In 1985, Ruth Bader Ginsburg assessed how separating abortion from sex equality weakens 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.[8]

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

> Abortion *is* a sex equality issue. Everyone knows it. …[In her book] 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.[9]

In 2011 Copelon and Law describe 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," to which Justice Ginsburg added that it is essential to women's ability "to enjoy equal citizenship stature."[10]

In short: Make abortion access an ERA-equality goal

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[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] Sylvia A. Law, 1984, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 at 1039.
[8] Ginsburg, 1985, *Some Thoughts on Autonomy and Equality in Relation to Roe V. Wade*, 63 N.C. L. Rev. 375
[9] MacKinnon 1987, *Unthinking ERA Thinking.* 54 U. Chi. L. Rev. 759
[10] Copelon and Law, 2011, *Medicaid Funding for Abortion: The Story of Harris v McRae*.in Women & the Law Stories, Schneider and Wildman, eds.