Is There An ERA-Abortion Connection?

LINCOLN C. OLIPHANT

THE SUMMER 1979 ISSUE of *Dialogue* carried an article by Susan Taylor Hansen, "Women Under the Law," which generated several responses, including a letter from Helen Holmes Duncan, published in the Spring 1980 issue. Said Ms. Duncan:

> . . . I was tantalized by Ms. Hansen's statement that "certainly there are many worthy arguments against the ERA," and by her reference to "meaningful discussion of any underlying moral issues." My frustration stems from her decision to leave these areas dangling. I would be personally delighted to find a more complete discussion of such "worthy arguments," and would particularly enjoy an expanded treatment of the underlying moral issues which are apparently perceived by our church leaders.

This response to Ms. Hansen asserts a connection between the Equal Rights Amendment and a certifiably moral issue—abortion. Although asserting a connection, my argument does not depend on whether or not the present amendment is ratified. I believe there is a connection between the way influential supporters of the amendment think about equality and abortion, and I believe that the drive for a particular definition of equality (which includes the right to an unfettered abortion freedom) will continue regardless of the success of the pending amendment.

Hansen's legislative history lesson is some help, but she makes a serious and common error. After cautioning about uncertain interpretations, she states that "Few amendments . . . have had the same wealth of pre-passage legislative discussion of intent as has the ERA in the House of Representa-

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LINCOLN C. OLIPHANT *is a lawyer in Washington, D.C. A fuller treatment of his views will appear in the* Human Life Review.

tives and the Senate."[1] This statement is designed to reassure us that the Amendment's purposes are well-known and that we can rely on the Court to carry out those purposes *and only those purposes*. Unfortunately, we can have no such guarantees, and Hansen provides us with the evidence:

> The Supreme Court, however, has thus far failed to rule that sex is a "suspect classification." To do so would be tantamount to declaring that the denial of legal rights on the basis of sex was unconstitutional under the equal protection clause of the Fourteenth Amendment. It would be the judicial equivalent to ratifying the ERA. . . . The fact that the Court has had ample opportunity to make such a ruling without doing so suggests that it is unlikely to do so in the foreseeable future.[2]

While not saying specifically whether or not the Court ought to perform the "judicial equivalent to ratifying the ERA," Hansen implies as much by quoting Congresswoman Martha Griffiths, who championed ERA in Congress in the early 1970s: "There never was a time when the decisions of the Supreme Court could not have done everything we ask today."[3] Hansen also says (and she should be honored for her candor) that "The Fourteenth Amendment, for example, has far exceeded the originally perceived purpose—elevating the status of blacks—and has come to serve as a tool of justice for many oppressed persons and groups."[4]

ERA proponents cannot have it both ways. They cannot comfort us by telling us of the iron bands of legislative history that will bind the courts (e.g., in the ERA cases) and then cheerily report that courts really do their best work when they break those bands (e.g., in the Fourteenth Amendment cases).

This inconsistency may cause some of the amendment's proponents to pause, but the more sophisticated of them do not need to sort out the inconsistency because of their own view of the Constitution. To these people, the amendment can mean one thing today, another tomorrow. (I am inclined to say that today it means whatever it needs to mean in order to be approved; tomorrow it means whatever is needed to advance some cause.) To such people, abortion rights can as easily be "put" into "equality of rights" as it was put into "Due Process of Law." Of these people, Michael Oakeshott has said,

> "Government" appears as a vast reservoir of power which inspires them to dream of what use might be made of it. They have favorite projects, of various dimensions, which they sincerely believe are for the benefit of mankind, and to capture this source of power, if necessary to increase it, and to use it for imposing their favorite projects upon their fellows is what they understand as the adventure of governing men.[5]

And for these people, Constitutional meaning must change to accommodate their favorite projects.

This permutable view of the Constitution was held by the members of the House Judiciary Committee who supported the Equal Rights Amendment. In

the Committee report (signed by, among others, Abner J. Mikva, recently appointed to the United States Court of Appeals for the District of Columbia, the second most powerful court in the nation), the members gave their view of the "legislative history" of the Amendment:

> Because [equality] is a symbolic word, and not a technical term, its enshrinement in the Equal Rights Amendment is consistent with our Nation's view of the Constitution as a *living, dynamic document.*[6]

There are a thousand maxims for legislative interpretation, but none so widely applicable as Lord MacMillan's, which ought to be pondered by supporters of any Constitutional amendment. Said MacMillan, ". . . In construing an Act of Parliament, the legislators who passed it cannot be asked to state on oath what they meant by particular words in it—for which they must often be devoutly thankful."[7] The promise of putting "symbolic words" into the Constitution is that they have imprecise meaning; lawyers and judges give them specific meaning later. This practice may serve to multiply the gratitude of legislators, but it should give no comfort to the people. "Living, dynamic documents" do not mean tomorrow what they meant in their committee reports.

Even to the extent that ERA's legislative history seems to provide details rather than symbols, the details are contradictory. In a recent edition of *America* magazine, Elizabeth Alexander, a lawyer and legal advisor to Catholics Act for ERA, and Maureen Fiedler, a nun and national coordinator of Catholics Act for ERA, explained how abortion and ERA are "separate and distinct." After some obeisance to the fidelity argument, they quote Congresswoman Griffiths and Senator Bayh, and then take this paragraph from the Senate Report:

> The original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.[8]

Setting aside the legislative history, Alexander and Fiedler then give us their conclusion of what ERA will mean for abortion:

> *In these statements, Congress clearly expressed its intention that the Equal Rights Amendment should not be applied to abortion laws since pregnancy and the corollary ability to have an abortion obviously flow from physical characteristics unique to the female sex.* Such a clear statement of intent would be difficult for the Supreme Court or any court to overcome.[9]
>
> Furthermore, *Congress provided the judicial branch with a sound legal basis for excluding abortion from the broad equality mandate of the ERA, by providing an exclusion for unique physical characteristics.*
>
> Abortion is a situation that arises from the unique physical characteristics of pregnancy. In this situation, there is no characteristic that can be shared with the other sex because, of course, men are incapable of

> becoming pregnant and of having abortions. *Where the characteristic is not shared with the other sex, there can be no issue of discrimination based on sex.* Since it is impossible to treat men and women equally in this area, there can be no showing of a purpose or intent to discriminate. . . .[10]

The Alexander-Fiedler conclusion has just one flaw: many of the country's leading ERA experts say it is wrong. This conflict is immensely educational, for it shows how "wrong" one can be even though one has "the legislative history" on one's side.

A brief *amici curiae* was filed in *G. E. v. Gilbert*, 429 U.S. 125 (1976), signed by Thomas I. Emerson of Yale Law School, Barbara A. Brown and Ann E. Freedman of the Women's Law Project and Gail Falk. Brown, Emerson, Falk and Freedman wrote what is probably the most important work on the proposed 27th amendment, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971). Joining the authors of the Yale article were Ruth Bader Ginsburg of Columbia Law School, probably the leading legal writer and scholar on "women's issues," and Melvin L. Wulf and Kathleen Willert Peratis of the American Civil Liberties Union. Mr. Wulf is a prominent Supreme Court practitioner; Professor Ginsburg now sits with Abner Mikva on the D.C. Court of Appeals.

In the judgment of these experts, the General Electric Company, in trying to defend its disability insurance program which did not cover pregnancy, was misusing the legislative history of the Equal Rights Amendment. And what was G. E. saying? It was advancing the Alexander-Fiedler argument: Pregnancy is a "unique physical characteristic" that cannot "be shared with the other sex," so "there can be no issue of discrimination based on sex." In explicitly and comprehensively rejecting the G. E. argument, these leading authorities also destroyed the Alexander-Fiedler view that there can be no ERA-abortion connection:

> *The legislative history of the ERA includes several examples of pregnancy classifications permissible under the amendment.* Among these are "a law providing for payment of the medical costs of childbearing," and "laws establishing medical leave for child-bearing." *These pregnancy classifications are valid not because (as suggested by G. E.) pregnancy classification is outside the scope of the ERA, but because the test applicable under the ERA is satisfied. . . .*[11]
>
> If G. E. were a state employer subject to the ERA, *its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny* appropriate under the amendment. . . .[12]
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> A contextual approach to the legislative history of the ERA reveals the superficiality of the quotation search made by G. E. . . . . [Our analysis] discloses that pregnancy classifications of the kind here at issue would not survive the ERA. . . .[13]

Some of the principals of Catholics Act for ERA may continue to believe that ERA and abortion have no connection, but when the cases reach the

courts advocates like Emerson, Brown, Falk, Freedman and Wulf will be arguing before judges like Ginsburg and Mikva. Paraphrasing Congressman Henry Hyde, I don't think this is a combination the unborn can live with.

The importance of the foregoing is all the more relevant because many "pro-choice" people believe that abortion and childbirth are simply two alternative and equally dignified ways of dealing with pregnancy. Therefore, unless "pro-choice" advocates lose their present advantage in the courts, as the drive for equal rights comes to include protections for women having babies it must also come to include protections for women having abortions. This trend has been seen again and again, and will continue. The proscription of sex discrimination in the 1964 Civil Rights Act came to mean abortion rights. Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational institutions receiving federal funds, came to mean abortion rights. The "Alternatives to Abortion Act" (Title VI of the Health Services and Centers Amendments of 1978) was meant to be an anti-abortion bill but turned out to provide funds only to centers which are willing to counsel on "all options" available to pregnant teenagers. Pro-life counseling centers have refused to counsel abortions and so are excluded. Until pro-life forces can break the weld holding abortion and birth together, each advance for "equal rights" will be an advance for abortion rights.

The classical statement of the abortion-equals-birth mentality was made by federal district judge Jon O. Newman, who said,

> The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions [in the *Abortion Cases*].[14]

Newman's formulation has been held up to parody by Professor John T. Noonan, Jr., of the University of California (Berkeley) Law School who noted that embezzlement and cashing a check, when stripped of their sensitive moral arguments, are simply two alternative ways of withdrawing money from a bank, and prostitution and marital intercourse, when stripped of the sensitive moral arguments surrounding them, are simply two alternative ways of satisfying the sexual instinct.

Judge Newman, we should remember, says that he "gleaned" his stark, amoral formulation from the *Abortion Cases*. It is not surprising, therefore, that several members of the Supreme Court think Newman was right. In dissent in one of the 1977 abortion funding cases, Justice Brennan, joined by Justices Marshall and Blackmun, said:

> Pregnancy is unquestionably a condition requiring medical services. [Citation omitted.] Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. "Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy." [citing Newman][15]

Note that the Justices have omitted Newman's reference to what may be gleaned from the earlier cases. They can say with authority (at least the authority of a dissenting opinion) that "abortion and childbirth . . . are simply two alternative medical methods of dealing with pregnancy."

In the 1980 Hyde Amendment case, *Harris v. McRae*, Brennan, Marshall, and Blackmun again used this argument. After quoting themselves, they add the following,

> In every pregnancy, one of these two courses of treatment is medically necessary. . . . But under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.[16]

It is easy to see how these Justices would think that the Hyde Amendment is unconstitutional: If abortion and childbirth are simply two interchangeable medical procedures, how can Congress rationally fund one procedure and not the other? And if the distinction is irrational, it is not constitutional. In charging Congress with using *coercive incentives*, these three judges—seemingly unable to distinguish abortion from childbirth—also are unable to distinguish coercion from inducement.

In *McRae*, Brennan, Marshall, and Blackmun were joined by Justice Stevens who wrote his own dissenting opinion. We have thus come within a single vote of being told that the Constitution of the United States requires the Congress to pay for abortions if it pays for childbirth, and this because "Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative methods of dealing with pregnancy."[17]

We are not too far, in the courtrooms of this country, from a final decree that abortion and childbirth are in all essential aspects equal. A shift of one vote in McRae would have done it insofar as funding is concerned. And a much more sweeping argument already has been presented to the Supreme Court by the American Civil Liberties Union and Planned Parenthood Federation:

> Since pregnancy is a condition requiring medical attention, [we must] determine whether abortion is a safe response to it at certain medically recognized stages. Neither the choice of live birth nor that of abortion can be considered "unnecessary" under this analysis, despite the fact that those treatments present different outcomes as a result of treatment.
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> An analogous situation is presented by a diagnosis of kidney disease, where the choice of treatment is transplant or dialysis. Each choice produces significantly different outcomes with different effects on the patient's mental and physical health, but this by no means indicates that one choice is less "necessary" than the other. . . . While

> the choice of treatment would be predicted upon consideration of a number of individual factors known only to physician and patient, they would at least not be forced to give overriding consideration to an arbitrary State determination that one form of treatment was more moral (i.e., more "necessary" under a State definition of that term) than the alternative choice.[18]

The ACLU and Planned Parenthood thus argue that deciding whether to give birth or to abort is like deciding whether to have your failing kidney replaced by transplant or renewed by dialysis. It is hard to imagine a *less* analogous situation, but these influential pro-abortion groups can no longer comprehend distinctions between rejected, surgically dismembered babies and failing, surgically replaced kidneys. And when the state tries to say, "Damn it, this is wrong, there *is* a difference between kidneys and babies and we will pay only for kidneys," this is termed an "arbitrary determination"! If ERA is ratified, I believe that such habits of thought will be transformed into Constitutional law.

I have come, ineluctably and possibly irreversibly, to the conclusion that there *is* an ERA-abortion connection. As more and more people reach the same conclusion, the Amendment's prospects will diminish. This is as it should be, for if ERA means abortion, it does not mean progress, it does not mean liberty, it does not mean "rights." Abortion means death: it remains only for us to know what the Equal Rights Amendment means. In one very important regard, I believe I know.

NOTES

[1]Susan Taylor Hansen, "Women Under the Law," *Dialogue* XII:2 (1979): 88. Since committee reports are the best source of legislative history, and since the Senate and House Judiciary Committees supported different versions of an amendment (notably, the House Committee supported the Wiggins Amendment) and wrote their reports about different language, it is very difficult to see how the legislative history of ERA can be described in terms of praise.

[2]Ibid., 86-7.

[3]Ibid., 87.

[4]Ibid, 88.

[5]Michael Oakeshott, "On Being Conservative," quoted in William F. Buckley, Jr., ed., *American Conservative Thought in the Twentieth Century* 94 (1970).

[6]H. Rpt. No. 92-359, 92nd Cong., 1st Sess. 8 (Separate Views) (1971). (Emphasis added.)

[7]Lord MacMillan, "Law and Language," in *Law and Other Things* (1931), p. 164.

[8]Elizabeth Alexander and Maureen Fiedler, "The Equal Rights Amendment and Abortion: Separate and Distinct," *America* (April 12, 1980), 314, 315-16.

[9]People who are as concerned about abortion as I presume Catholics Act for ERA claims to be, ought, after the *Abortion Cases*, to be utterly incapable of uttering such a sentence as this last one. The Court had no problem at all in overcoming an entirely adequate history of the Fourteenth Amendment and abortion. John Hart Ely, Professor of Law at Harvard Law School, wrote the following about the Court's allegiance to legislative history:

> What is frightening about *Roe* is that this super-protected right [of abortion] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they in-

> cluded, or the nation's governmental structure. . . . And that, I believe . . . is a charge that can responsibly be leveled at no other decision of the past 20 years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking. (John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 Yale L.J. (1973): 920, 935-937.)

[10]Alexander and Fiedler, 316. (Emphasis added.)

[11]Brief for Women's Law Project and American Civil Liberties Union as *amici curiae*, 13–14, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). (Emphasis added.)

[12]Ibid., 19. (Emphasis added.) [13]Ibid., 21.

[14]*Roe v. Norton*, 408 F. Supp. 660, 663, n. 3 (D.C. Conn. 1975).

[15]*Beal v. Doe*, 423 U.S. 438, 449 (1977) (Brennan, J., dissenting).

[16]*Harris v. McRae*, —U.S.—, slip opinion p. 5 (1980) (Brennan, J., dissenting).

[17]Dr. André E. Hellegers, Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics, Georgetown University, has responded to this whole notion about as well as anyone. Said Dr. Hellegers in an appearance before the Senate Committee on Human Resources,

> The logic of the Supreme Court escapes me as a physician. This is the Court which holds [in the *Abortion Cases*] that it does not know when human life begins in the womb. For the purposes of allowing abortion the Court, therefore, treats the fetus as if it were just a tumor. But for the purposes of disability benefits [in *General Electric Co. v. Gilbert*] the fetus may *not* be treated as a tumor, for, if it were a tumor, the woman would qualify for disability benefits. (Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. [1977] p. 77.)

[18]Brief for American Civil Liberties Union and Planned Parenthood Federation of America, Inc., as *amici curiae*, 11-12, *Beal v. Doe*, 423 U.S. 438 (1977).