Unthinking ERA Thinking

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As June 30, 1982, drew to a close and the Equal Rights Amendment expired unratified, American women did not riot in the streets. They did wipe the asses of children and put them to bed, lurk on streetcorners warily until a car circled and slowed and they got in, finish typing the last page of transcription for the following day, begin the night shift sewing plastic handbags or cleaning downtown offices, fight for their lives as fist met face and lay their lives down as penis sliced in and out and in and out, scurry across the street with their eyes down to avoid the man coming the other way, and give up on covering June’s bills. Not noticing as the shadows disappeared over TVs in mental hospitals and IVs in nursing homes, they removed their mascara, locked their doors if they had them, set their alarm clocks, and let the day go, largely unmarked. A few went to well-behaved demonstrations, largely unreported. In the noise and in the silence, some picked up pens and wrote.

Why an explicit guarantee of women’s equality was rejected as part of the constituting document of the United States is a good question, one it takes some courage to ask. The answers are bound to be as unnerving, challenging, even anguishing as they are crucial and urgent for law and politics. The ERA came to mean the equal-

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ity of the sexes to those who sought it, to those who abhorred it, and to those who found saying it in law somewhat obvious if not yet redundant. It is hard for women to face the fact that we live in a country that rejects our equality. In Canada, when women's demands for good sex equality guarantees in the proposed Charter of Rights and Freedoms were not met, and a national meeting of women to discuss women's rights under the proposed Charter was threatened with cancellation, Canadian women spontaneously rebelled nationwide. Not only was the meeting held; not only were the sex provisions left meaningful; but an additional provision guaranteeing the Charter's rights "equally to male and female persons" was added.\(^1\) Granted, culture and process differ. Still, one wonders why American women, a majority of whom were said to have wanted it,\(^2\) let ERA go so quietly.

Jane Mansbridge's *Why We Lost the ERA* is less an analysis of this loss than an example of the kind of thinking that produced it. This book is not a searching criticism of the approach to law, gender, and politics that failed to mobilize the masses of women in favor of a legal guarantee of their own equality; it assumes it. It is not an indictment of a legal regime that is stacked to require that the sexes already be equal before sex equality can be guaranteed to

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\(^1\) Facts from a conversation with Mary Eberts (Toronto, April 13, 1987) and from Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* 97-105 (1983). This comparison is instructive because nothing, cross-culturally, is quite like women's equality. It is not based on the notion that Canada is exactly like the United States or that the constitutional situations were the same. The resulting Canadian language also provides a useful standard of comparison. Equality Rights under section 15 of the Canadian Charter of Rights and Freedoms provides:

1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28 provides that sex equality rights cannot be overridden by a legislature or Parliament: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

\(^2\) Mansbridge recounts polls in which a majority of both sexes favored the ERA. Jane J. Mansbridge, *Why We Lost the ERA* 16-19 (1986). Throughout, while she carefully compares the results of various wordings of poll questions, Mansbridge takes poll results as true expressions of people's opinions on the questions they are asked. When it comes to sex, people lie a lot. They also say one thing and do another—like say they are for the ERA and then vote against it. Accepting poll results at face value—methodology and wording aside—may be an occupational hazard of the political scientist, but a deeper order of skepticism seems warranted from feminists on sex equality questions. All parenthetical page references are to Jane J. Mansbridge, *Why We Lost the ERA* (1986).
women by law. It is not an inquiry into the way those disempowered by the structure and content of a system designed to exclude them have difficulty making it work for them. Nor is the book an autopsy of crushed hopes or a rallying call against a despair that grows at once more rational and more luxurious daily. It is not even a case study of how a system that seldom recognizes women’s existence, denigrates women’s needs as women,\(^3\) and is hostile to women’s perspective,\(^4\) goes about rejecting a law to guarantee women’s rights. Rather, it is a wake, an almost relieved if mordant celebration of an inert fact: after a long and tormented life, old ERA is dead. “It is beyond harm now” (p. x). Now, we can think about it. Academics seem to prefer their subjects as dead as possible.

According to Mansbridge, the ERA lost because its proponents did not play the conventional political game conventionally enough. Feminists did not undermine or abandon our position consistently or loudly enough to assuage the fears of the opposition, did not cave in on sex equality enough, but instead kept giving the impression that guaranteeing sex equality would encourage or even mandate real social change: “[l]egislators in wavering states became convinced that the ERA might, in fact, produce important substantive changes—and the necessary votes were lost” (p. 2). The leadership of the ratification movement is accordingly faulted for lacking that all-American virtue, unprincipled pragmatism. As Mansbridge puts it, “they preferred being right to winning” (p. 122). The volunteer activists, the life blood of the effort, are faulted, by contrast, for wanting to win at all costs, for having such an emotional stake in recognition of women’s full citizenship by their government that it was “worth almost any sacrifice” (p. 132). Mansbridge, who was one of them, portrays the volunteers as pathetic and childish for being wounded by expressions of misogyny (p. 132); their commitment is presented as fanatical, their solidarity likened to that of a religious cult (p. 178-86). Their problem

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\(^3\) For example, Harris v. McRae, 448 U.S. 297 (1980), holds that public funding of medically necessary abortions for indigent women is not constitutionally compelled.

\(^4\) For further discussion, see Catharine A. MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs: J. Women Culture & Soc’y 635 (1983) (on the law of rape). See also American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff’d, 106 S.Ct. 1172 (1986), which holds unconstitutional a law making pornography actionable as a civil rights violation when women are coerced into it, when it is forced on them, when they are assaulted because of it, and when they are subordinated through trafficking in it. This case wraps the male point of view in the first amendment, labeling “viewpoint discrimination” a law that makes pornographers liable for sex discriminatory acts.
was that they "care[d] even more about winning than about being right" (p. 132). It is my experience that when women fail to sell women out—when the opposition fails to get you to commit suicide before they murder you, so to speak—it is said that your failure to submit is a reason you deserve to be destroyed. Too, when you are committed enough to women to be willing to do what it takes to win—a posture once given some dignity by and for men under the phrase "by any means necessary"—people say that you care about winning too much. It seems that women who want to win something that is right should care very passionately neither about winning nor about being right. What is there to care more about in politics? It is worth noting that Mansbridge's book does sincerely intend to be a sympathetic insider's account of the ratification movement.

In many ways, *Why We Lost the ERA* is to the ERA effort what the ERA effort was to sex equality. Both are conventional about law and politics. Both assume that politics as usual sets the real ground rules for politics for women. At the core of both is the same strange resignation garbed as realism: both wear like a tight undergarment the assumption that most Americans do not really want sex equality and that this view cannot be changed, so that to get an equal rights law, something sort of has to be put over on them. Instead of facing the status quo in all its misogyny, and accepting that part of the process of winning involves changing it, both pretend that it doesn't exist while assuming that they can do nothing about it. Apparently both books and laws must get over in the system as it is, although one gets the persistent impression that both this book and this law aspire to something better.

Of course realism is desirable. But accepting the status quo as the only reality that can be, and the other side's myths as characterizing it, is not realism for a political movement for equality; it is suicide. Neither this book nor the ERA effort systematically comprehends that sex inequality is a problem of male dominance, a distinctive political system that—for feminists both to be right and win—calls as much for a new political science as a new politics.

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5 This kind of thinking is evident in Mansbridge's characterization of ERA staffers: "They differed from the rest of the American population in one major respect—they believed in, and wanted to bring about, major changes in the roles of men and women in America" (p. 121).

6 One particularly startling example of this failure to take inequality of power seriously is Mansbridge's analysis that a difference between pro-ERA and STOP ERA forces was that STOP ERA only had to stop something while pro-ERA had to do something (p. 122). The real difference is that STOP ERA had all the power of male supremacy as wind at its back.
Mansbridge imagines neither. For one example, in all her assessments of what influenced (male) legislators to oppose the ERA, she never considers that they might have had a real stake in sex discrimination—an economic, social, psychological, institutional, and sexual stake, the more determinative to the degree that it is non-conscious. ERA's failure is consequently presented not as yet another male victory but as a female defeat. Indeed, both this book and the ERA effort—because they do not face up to male dominance and therefore cannot face it down—condescend to and blame the victim while purporting only concern for her welfare. Mansbridge blames the ERA effort for failing to win more than she blames what it was up against for defeating it, much like ERA activists blamed conservative women for failing to support their version of sex equality more than they blamed what such women were up against for undermining the ERA's appeal to them.7 Neither analyzes how the dispossessed can be maneuvered into doing themselves in, a feature proponents and opponents of ERA share.

Because neither this book nor the ERA effort seriously confronts male supremacy as the problem with which ERA had to contend, but accept it implicitly like fish accept water, the book is no clearer in evaluating ERA strategy than the ERA effort was in pursuing it. Was the aim of ERA more to move the powerless or to placate the powerful? On what analysis of sex inequality are these emphases in tension? Is sex equality a real change or isn't it? Is it

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7 See Andrea Dworkin, Right Wing Women (1983), for a cogent feminist analysis of the appeal of the Right to women as women under male dominance. Mansbridge briefly displays a peculiar but not unique opposition to calling the victimized "victims." Equating feminist opposition to violence against women with right-wing protectionism, Mansbridge couples "blame the victim" with "kill the messenger" when she criticizes the National Organization for Women (NOW) for contending that the victimization of women, as evidenced by data on violence against women, substantiated the need for a sex equality law:

The protectionist position led both men and women to expect women to be passive victims. *Victims they became.* As the NOW "Position Paper on the Registration and Drafting of Women in 1980" pointed out, in America in the 1980s, "One rape occurs every five minutes. One out of every four American married women is a victim of wife beating. . . . When the word "protection" is used, we know it costs women a great deal." In rejecting protectionism, feminists urged women to stand on their own feet and wield power in their own right.

(p. 69) (emphasis added) (footnote omitted).

It is impossible to tell from these remarks whether Mansbridge thinks NOW was exemplifying protectionism or opposing it, whether NOW got Sam Ervin and Phyllis Schlafly into their agenda or whether Ervin and Schlafly got NOW into theirs, far less whether the ERA would address rape or battery. The most bizarre feature underlying this analysis, however, is the notion that criticizing the victimization of women makes women into victims, as if women speaking of rape data makes men rape women.
about altering power and powerlessness on the basis of sex or isn’t it? If women are no longer to make 59 cents to men’s dollar, will men make 20 cents less so the sexes can meet around 80 cents or what?

The sense the ERA effort too often communicated of trying to slide one by, its frequent aura of contempt for audiences, the feeling it was hiding its real agenda—none of this was lost on the opposition. But the continual revisions of the public image of what the ERA “would do,” equivocations designed to win over the opposition by reassurance, did effectively vitiate the potentially explosive organizing effect the ERA might have had on those who had the world to gain from actual sex equality. The longer the campaign went on, the more this happened, and the more this happened, the less ERA meant. No amount of PR could keep ERA from communicating to those with power that under ERA, yes, women would matter. Now that would be a change. Opponents knew this no matter how much proponents denied it, but the denying only confirmed what most powerless potential supporters already most deeply felt: nothing can make a difference, surely not a law. Essentially, then, Mansbridge criticizes the ERA effort for failing to follow the very strategy her book documents it pursued: the one that defeated it. The misprision that sex equality can be made nonthreatening and still be real, the misidentification of what women are up against and the resulting waffling, the incredible spectacle of feminists denying that sex equality would make much difference while urgently demanding to be given it, all this made ERA’s most recent demise a major tragedy of lost political possibilities—unmourned in these terms by Mansbridge, however.

Mansbridge recounts the campaign’s search for a sex equality issue that would present the ERA as an appealing solution to some aspect of women’s inequality. She does not ask what made this search so hard and largely futile in a society in which women’s subordination is so pervasive. The reason for ERA’s failure of analysis, and the reason for Mansbridge’s failure to analyze that failure, is that both the ERA—at least its leading interpretation—and Mansbridge—at least here—implicitly apply liberalism to women and call that feminism. Both allow the liberal agenda to set the direction and limits of ERA’s agenda. In a central instance, Mansbridge traces the way the perceived need for a new constitu-

tional provision was undermined as the campaign progressed and more and more sex equality rights were won under the equal protection clause—rights mostly for male plaintiffs, neither notes. Why did the country need a new constitutional amendment to solve a problem that the existing Constitution was already solving? This only posed a problem for a provision that had no legal or political agenda of its own, beyond carrying the conventional liberal interpretation of the equal protection clause to its extreme. Because ERA had none—a fact neither the ERA forces nor this book face—this problem has never really been solved.

Although not all ERA's supporters took so limited a view of what they were fighting for, the mainline liberal interpretation of the ERA, one which reduced the problem of the subordination of women to men to a problem of gender classification by law, was never seriously questioned by the pro-ERA movement. Mansbridge never questions it either. This is an approach to sex equality that leaves out the social institutionalization of practices through which women are violated, abused, exploited, and patronized by men socially—in collaboration with the state, but not only or even primarily by the state as such. This approach leaves out practices that have never needed to be enacted into sex classifications in law because they are plenty powerful in civil life, practices that the state is often kept out of by law in the name of individual rights. It is one thing for lawyers to urge this as an interpretation; it is another for a movement to embrace its results and limits as unquestionable; it is still another for a postmortem of the political failure of the measure based on such a theory to accept it so implicitly as not even to consider that its legal theory, and the political strategy based on it, might have contributed to its loss.

Mansbridge acknowledges that the existence of the ERA would have had a political impact that might have changed the way existing laws are interpreted (p. 141). She does not see that ERA's legal impact need not have been confined to being the women's auxiliary of the equal protection clause. As a result, she fails to analyze the specifics of ERA's potential impact so as to take into account what a constitutional amendment could do to the entire balance of forces on the political landscape and hence to specific cases. As ERA doctrine did, Mansbridge assumes that legal

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10 Mansbridge suggests that the approach of Brown, Emerson, Falk, and Freedman was explicitly accepted by feminist lawyers and implicitly accepted by ERA activists (p. 128).
doctrine immaculately produces its own progeny without messy political intercourse. As ERA doctrine did, she assumes a definition of equality doctrine based on comparisons with men. As ERA doctrine did, she assumes an essentially male definition of what issues are sex equality issues. In other words, both not only assume that sex equality issues come down to women's sameness or difference from men rather than to men's dominance over women; both tacitly accept a model of sex equality that is limited to those issues men recognize as equality issues because they arise in contexts in which men now know they sometimes treat other men arbitrarily and irrationally. This approach, while some improvement, nevertheless precludes the distinctive abuses of women as a gender—for example, rape, denial of reproductive control, and prostitution—from being considered sex equality issues at all.

It seems to me that a new constitutional amendment both signals and calls for a new departure. Probably as many people were for ERA as against it because they had a breathtaking vision of all the legal possibilities Mansbridge keeps finding "difficult to imagine." I see no reason to accept her legalistically conventional prognostications about what ERA "would do" over their hopes and fears. Perhaps I see this differently from Mansbridge because I am reading for different purposes and with different premises than she is writing, inasmuch as I do not think the ERA is "politically dead" (p. ix) but only comatose.

All these analytical difficulties converge tellingly in her treatment of the issue of abortion rights. Dominant abortion rights and ERA strategies on reproductive control have been based on treating forced sterilization, maternity leave and related benefits for women, pregnancy surcharges in health insurance, and abortion rights as anything but issues of sex discrimination (except when women are advantaged by them). Mansbridge describes the decision not to litigate the abortion funding case of *Harris v. McRae* on a sex discrimination theory as a political choice to avoid associating sex equality with abortion rights in order to help ERA's chances of ratification (pp. 124-25). Unmentioned is that the choice was also the result of a Supreme Court equal protection decision that discrimination on the basis of pregnancy was not dis-

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12 448 U.S. 297 (1980) (upholding denial of federal funding for abortions against challenges based primarily on the right to privacy and secondarily on discrimination based on indigency).
crimination against women on the basis of sex, but rather a gender-neutral choice not to insure against all the risks that members of that third sex—"pregnant persons"—might face. By the time McRae arrived at the Supreme Court, Congress had repudiated this result under Title VII in the case of pregnancy, but had explicitly excluded abortion and felt it could not change the constitutional result. An Equal Rights Amendment could have.

Instead of acknowledging that no man under existing technology will be personally deprived of needed abortion funding, and reuniting abortion with pregnancy and pregnancy with sex—which is how its benefits and its deprivations are largely experienced by women—both Mansbridge and the ERA effort move heaven and earth to keep them apart in the name of strategy. But once decriminalized, this is exactly the approach that has legalized denial of support for women's reproductive needs. An analysis of reproductive issues that placed them in the context of sex inequality would locate the debate in the context in which the problem is lived: a context of lack of choice by women of the terms of sexual access to our bodies, a context of forced sex. If something were done about male sexual aggression and intrusion on women as the paradigm of sex, there would be no abortion problem as we know it, if only because dramatically fewer abortions would likely be needed. Real sex equality would mean real sexual freedom, including the power to have no mean no, hence the freedom to have yes mean yes. Until then, women need abortions, and are denied access to them, as women in a context of sex inequality, as an act of sex inequality. An ERA could have given women crucial support in such a resituated argument.

Abortion is a sex equality issue. Everyone knows it. Denial of access to abortion denies women, and only women, a final act of control over the reproductive consequences of male sexuality as it largely seals women's lack of control over their time, which is what a life is made of. Mansbridge bemoans only the extent to which

13 Pauline Bart has characterized "pregnant persons" as the third sex. Pauline Bart, In the Best Interests of the Sperm: The Pregnancy of Judge Sorkow, Conference on the Sexual Liberals and the Attack on Feminism (speech, New York, April 4, 1987).
16 For further discussion, see Privacy v. Equality: Beyond Roe v. Wade, in MacKinnon, Feminism Unmodified at 93 (cited in note 11).
17 Rumor has it that even organized crime knows, and opposed ERA because it wanted to make abortion illegal again, having made a lot of money from it and having used it to control their prostitutes.
such realities were not able to be fully manipulated out of the ERA debate (p. 118). But the current lack of success in securing access to federal abortion funding, in making the abortion right real for those who otherwise have least access to it, suggests that denying women's experience and ignoring gender divisions in legal doctrine may make not only bad law and lousy politics but also ineffective strategy.\textsuperscript{18} It is even worth considering that here, as elsewhere, Mansbridge may attribute ERA's death to failing to go far enough in the direction that killed it.

Neither the ERA effort nor this book inquires into whether an ERA that addressed the deep realities of women's condition might have mobilized the kind of uprising of women that only a deeply changed vision of society is able to do. In a teleological approach to political explanation, when Mansbridge asks why ERA failed, she does not look at what did not happen but only at what did. What

\textsuperscript{18} I came across other analytic and informational lacunae as well. For example, in the discussion of discrimination in auto insurance, Mansbridge buys the insurance lobby line that sex discrimination benefits women when she assumes that sex-based auto insurance rates are to women's financial advantage (pp. 41, 151, and accompanying notes). NOW documented in 1982, however, that sex-based auto insurance rates for women overcharged women by 30 percent. Because men, on average, drive more miles than women, see NOW advertisement, N.Y. Times (East Coast edition, June 3, 1982), unisex rates—sex-declassified, the conventional ERA solution—are even less of a solution, because under them, women pay auto insurance at the rate at which men need it. Thus unisex rates are immensely profitable for insurance companies and costly for women. Pennsylvania NOW v. State Farm Mutual Auto Insurance Co., No. R86-9-6 (1987) (unisex auto rates challenged as sex discriminatory). Further, Mansbridge suggests that Title VII was eliminating sex discrimination in pensions and thereby made ERA unnecessary in this context. But she does not mention that both of the major Supreme Court cases on this issue—in a break with the usual practice—refused to give retroactive relief, leaving in place existing plans that had been found to have discriminated against women. Compare Title VII cases where women were harmed and denied retroactive relief, Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), and Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), with Title VII cases where men were harmed and granted retroactive relief, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

The discussion of pornography contains egregious factual errors, although they may not be Mansbridge's fault. The footnote on the pornography ordinances Andrea Dworkin and I conceived and drafted states that we "tried to read [those who opposed our ordinance] out of the feminist movement" (p. 309 n.16). We did point out that pimps are not feminists and defending them is not feminism, which is not the same. Contrary to Mansbridge's implication, we only "pressed" (id.) municipalities to pass our ordinance when and where expressly requested. Our law does not allow women to sue "on a tort basis" (id.) but on a sex discrimination basis. Our law does not cover material that is "sexually graphic" (id.). It is said our legislation "was explicitly not gender neutral; it addressed itself only to men's oppression of women" (id.). The legislation expressly provides that men who can show harm may sue also. The ordinance is expressly sex-specific in its identification of a sex-specific harm, and expressly gender neutral in its overall design. I am told, however, that this paragraph was edited by the publisher without Mansbridge's knowledge or permission and does not reflect her views on the ordinance.
if sex equality were not limited, as the ERA effort and this book assume, to the way the white male liberal cabal of lawyers, publishers, professors, the media, and their "domesticated" feminists have defined it? What if, instead, issues of sexual abuse of children, denial of the abortion choice, rape, battery, prostitution, pornography, and sex-based de facto job segregation were core examples around which a critique of the denial of civil rights to women were forged? What if, when we talked ERA, we talked about state complicity in male violence against women through writing and administering rape laws from the viewpoint of the reasonable rapist; misogynist police practices in domestic violence calls that relegate assault on women to the lowest category of concern; collaboration of law enforcement and law itself in the terrorization and stigmatization of child victims of sexual abuse, many of them girls; biased enforcement of biased laws against prostitution so that prostitutes (most of them women) are harassed and violated while pimps and johns (men) are allowed to ensure that prostitution, something men made a crime, will continue to exist for their pleasure; useless and dangerous obscenity laws that cover for the pornography industry, provide its design format, and decry pornography in public while nonenforcement and built-in unenforceability guarantee its availability in private, ignoring documented harms to women from its production and consumption? What if we called all this "state action" in the sex equality area?

What if, when we talked ERA, we criticized the legal standards under Title VII that essentially assume that the status quo is nondiscriminatory, stacking the burden of proof so that the tools we are given embody the problem they are supposed to solve? What if, when we talked ERA, the equal protection requirement that discrimination be proved intentional were criticized as a protection for bigots, a good many of whom so sincerely believe that women are a lower form of life that hurting us never crosses their minds as they hurt us, who do not even take account of our human

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19 These harms were documented in Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Gov't Operations Committee of the Minneapolis City Council (Dec. 12-13, 1983) (statements by researchers, clinicians, scholars, victims, and other citizens documenting and debating pornography's harms to women).

20 Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) (defendant need merely "articulate" a legitimate, nondiscriminatory reason for a hiring decision to defeat a prima facie case); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (plaintiff must prove by a preponderance of the evidence that the defendant's proffered reason was merely a pretext for discrimination).
existence enough to form an intention to discriminate against us?\textsuperscript{21} What if, when we talked ERA, we talked about how it might support laws that recognize abuses of women that have never been recognized, abuses just now coming out of our silence, abuses that have previously been guaranteed as rights to men under existing law, abuses like pornography? Just as slaves once had nothing to weigh against the laws that made them property, women abused through pornography now have nothing—nothing of comparable constitutional magnitude—to weigh against the laws that make them "speech."\textsuperscript{22}

Strikingly consonant with the general direction of this critique is the original language of Alice Paul’s Equal Rights Amendment as submitted in 1923: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."\textsuperscript{23} The comparatively backwards and bloodless 1943 revision—"Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex"\textsuperscript{24}—arguably introduced the structural liberalism that undermined ERA legally and politically. In 1923, equal rights were to be affirmatively granted to men and women by name. Period. In 1943, equality of rights in a category called sex were to be precluded from denial by government. No one was given rights where government was not already involved. Women and men became "sex," an abstraction, equality of which already seemingly existed somewhere where government was not.

Suppose the original language and the stance it suggested had been pursued. Might we have been able to mobilize women’s sex-based physical and economic insecurity and vulnerability and desperation? Women’s sex-based personal indignity, sex-based boredom, and sex-based despair? Women’s sex-based fear and invisibility and hopelessness and exhaustion and self-hate? If that were loosed, what could stand against it? If the question is more why we did not win than why we lost, could not the failure to mobilize women’s pain and suppressed discontent be at

\textsuperscript{21} Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) requires that sex discrimination be intentional to violate the equal protection clause.

\textsuperscript{22} American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 106 S.Ct. 1172 (1986) makes women speech.


\textsuperscript{24} Proposed Equal-Rights Amendment New Form, 79th Cong., 2d Sess. (Feb 2, 1944), in 90 Cong. Rec 1039 (Jan. 10-Feb. 8, 1944) (referring to the 1943 revision).
least part of the answer? At a minimum, I believe that this real damage of sexism is what women were dealing with the night ERA went down, too submerged in the problem probably even to notice the passing of what might have helped in its solution—especially since almost no one who took up pens and wrote, then or since, has even mentioned that it might have helped.