1988

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THOMAS I. EMERSON: A PIONEER FOR WOMEN'S EQUALITY

Ann E. Freedman* and Sylvia A. Law**

THOMAS I. EMERSON took women's aspirations for equality under law seriously at a time, in the late 1960's, when very few Americans did so. Robert Bork, by contrast, rejected the notion that the Constitution protects women's equality and liberty at a time, in the late 1980's, when those ideas had become deeply embedded in our culture and law. This essay first describes some of Emerson's major contributions to this sea change in our understanding of gender and the Constitution. We then speculate briefly on the impact of two important, but contradictory events upon the development of constitutional rights of sexual equality: the defeat of the Equal Rights Amendment (ERA or the Amendment) and the rejection of Robert Bork as Supreme Court Justice.

I. EMERSON'S CONTRIBUTIONS TO FEMINIST JURISPRUDENCE.

For two decades Thomas I. Emerson has applied his probing intellect and deep understanding of American constitutional law to extend liberty and equality to women. His support of women's struggles has been creative, energetic and eclectic.

As at other academic institutions, the late 1960's and early 1970's were a time of considerable turmoil at the Yale Law School, and Professor Thomas I. Emerson occupied an unusual position. Emerson, a graduate of the school and looking every bit the part of a traditional New England law professor, was at the height of a career marked by scholarly and professional leadership on most issues being raised by the students: the protection of free speech, the struggle against racism, the struggle for reproductive rights, and the

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* Associate Professor of Law, Rutgers University School of Law, Camden; B.A., Radcliffe College (1968); J.D., Yale University (1971).
** Director of the Arthur Garfield Hays Civil Liberty Program and Professor of Law, New York University; B.A., Antioch College (1964); J.D., New York University (1968). I would like to thank NYU's Filomon D. Greenberg Research Program for supporting my work on this article, and Helen Hershkoff for perceptive comments.
importance of lawyering in the context of political movements (rather than in isolation). When leaders of the second wave of the women's movement needed constitutional experts to testify in favor of the proposed Equal Rights Amendment, it was natural for them to turn to him as someone with a brilliant mind, scholarly credentials, political savvy, a history of activism and a commitment to equality.  

And so in September of 1970, Tom Emerson testified in favor of the Amendment before the House Judiciary Committee. Tom, with characteristic sensitivity, recognized that there were problems with having the theory of an amendment that would promote women's rights elucidated by a male law professor, and so he invited some of his feminist activist students to help him prepare his testimony. When Tom was asked by the Editor-In-Chief of the Yale Law Journal to develop a theory of the Amendment at greater length, he again asked some of the students to work with him. In the summer of 1971, Tom and three of his students published a law review article on the proposed Equal Rights Amendment that was to play a major part in congressional debates on the ERA, and to be read across the country during the course of the state ratification debates.

At the time the article was written, the Supreme Court had just granted certiorari on a series of cases that were to begin the change in equal protection law concerning gender, but the full extent of

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1. Many others also made major contributions to this effort. See Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, nn.3-5 (1971) [hereinafter Brown, et al].


3. These students included Barbara Brown, Gail Falk, Ann Freedman, and Ann Hill, all Yale Law School class of 1971, which was the first class at the law school to include more than twelve women students.

4. Brown, et al, supra note 1, at 871. It is characteristic of Tom that he insisted his student co-authors be given co-equal credit with him and that the authors be listed alphabetically, instead of following the tradition by which professors are listed first, and students after, if at all. This may have been the first time in the history of the journal that student authors' work appeared in the articles section in the front of the magazine.

5. Senator Sam Ervin's attacks on the ERA prominently featured short quotations from the article, and these formed the basis of much anti-ERA propaganda, spreading Emerson's name, if not his intended message, more broadly. Rhode, Equal Rights in Retrospect, 1 L. & INEQUALITY 21 n.77 (1983) [hereinafter Rhode].

the changes the Court would make in the next decade were not generally anticipated. Moreover, because of the Supreme Court's lengthy history of insensitivity toward sexual equality issues and the ambivalence about a strong equality principle reflected in previous legislative debates about the proposed Amendment, supporters of the Amendment were concerned that the ERA itself might be deprived of its power either by weakening legislative amendments or by subsequent judicial interpretation. For example, the Amendment might be interpreted not to apply to pregnancy-based classifications, or to exempt laws that enacted sexual classifications in the guise of protecting or benefitting women.

Tom, drawing on his experience in developing a comprehensive theory of the first amendment and his experience as a litigator of privacy and reproductive rights, recognized the need to develop a coherent theoretical framework for the Equal Rights Amendment. This theory, based on the conceptions of the Amendment's meaning that proponents had already developed, could explain the application of that framework to various concrete problems as a way to give life to its abstractions. Tom and his co-authors hoped that such an effort might serve both to help persuade Congress, the state legislatures and the American people of the need for the ERA, and later to shape the interpretive process in the legislatures and the courts. Thus, Tom brought to the struggle not only the courage and vision to work for the ERA's passage on an equal basis with women and within the women's movement rather than as an isolated academic, but also his deep understanding of the enterprise of constitutional law, and of the process of constitutional change. The resulting article intentionally used a calm academic tone and deliberative approach to the issues to forestall the idea that sexual equality was a radical and dangerous idea. At the same time, it attempted to marshall enough concrete evidence of the harms of sex discrimination and the advantages of change, to make a strong case

7. See, e.g., Brown et al, supra note 1, at 881.
8. The Supreme Court's record on women's rights is reviewed id. at 875-79.
9. Id. at 886-88.
10. Some of these problems have dogged fourteenth amendment jurisprudence. See, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975) (law giving female naval officers more favorable rules concerning forced retirement upheld as compensation for women's inferior opportunities for promotion); Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnancy-related disabilities from state temporary disability insurance program does not violate the fourteenth amendment); Kahn v. Shevin, 416 U.S. 351 (1974) (non-means tested property tax exemption for widows but not widowers upheld as a remedy for employment discrimination against older women).
for the need for the Amendment. It was thus an effort to unite legal scholarship and political advocacy of social justice in the service of women's rights.

While the 1971 Yale article on the ERA is probably Tom's most important contribution to our developing understanding and realization of gender equality, it is not his only gift to that effort. In 1979 he wrote the introduction to Catherine MacKinnon's book, *The Sexual Harassment of Working Women*, an important effort which grappled with the problem at a time when the phenomenon was only beginning to be recognized. Even though MacKinnon and Emerson were developing divergent modes of conceptualizing sexual equality, he lent his support and prestige to this then young and less recognized colleague. Tom's introduction described MacKinnon's theory of sexual equality in terms that are accessible to readers who have difficulty understanding her sometimes dense prose.

Most recently, in 1986, Tom Emerson joined in the highly controversial debate of whether feminists should seek broader state sanction against sexually explicit materials that subordinate or degrade women. Feminist legal scholars have been deeply divided on this question. A person who wanted to continue to enjoy the respect and affection of colleagues and friends who hold sharply, often bitterly, divided views, might well choose to avoid speaking on these issues. Yet, Tom Emerson rejected that easy course and offered an eloquent, feminist defense of traditional first amendment values, cast in a form that is deeply respectful of the concerns of those with whom he disagreed.

Through these years Tom served as an indefatigable and invaluable advisor to scores of feminist students, legal scholars and activists. Each of us have attended meetings in which he was the only man and twenty years the senior of everyone else in the room. For many people, the august role of senior advisor to the women's legal movement could engender arrogance. But Tom is unshakably mod-

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12. The early case law, which represented a series of defeats for women charging their employers with sexual harassment, is discussed and critiqued in MacKinnon's work id. at 57-99. See also Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. REV. 345, 362 n.86 (1980). The first victories in the federal appellate courts were Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) and Tomkins v. PSE&G Co., 568 F.2d 1044 (3rd Cir. 1977).

est, able to hear and learn from others with much less knowledge and experience, and willing to offer his insight in terms that are powerfully cogent and, at the same time, invite disagreement.

II. THE DEFEAT OF THE ERA

The 1971 Yale Law Journal article failed to achieve its core purpose of securing an amendment to the United States Constitution to prohibit state sponsored discrimination on the basis of sex. On June 30, 1982, the deadline for ratifying the Equal Rights Amendment passed with only thirty-five of the required thirty-eight states having ratified. Many people have sought to understand why the ERA failed. In this brief tribute, we will present some thoughts on this question and identify areas of agreement and disagreement between our account and those of others. More particularly, we will argue that, despite the defeat of the ERA, Tom Emerson’s Yale article and the campaign of which it was a part had an important impact in promoting acceptance of sexual equality both in Supreme Court

14. There are four major accounts to which we will refer. The first, M.F. BERRY, WHY ERA FAILED, POLITICS, WOMEN’S RIGHTS AND THE AMENDING PROCESS OF THE CONSTITUTION (1986) [hereinafter BERRY], written by a professor of history at Howard University who is a former Commissioner of the United States Civil Rights Commission, analyzes why the ERA failed in the context of prior efforts to amend the constitution and concludes that the causes of the ERA’s defeat included the inherent difficulties of the amendment process, the need for widespread societal support for the substantive changes the Amendment would bring (which often requires many years to obtain, and which must be communicated effectively to legislators in all the states and nationally) and the proponents’ failure to prepare early on for a series of discrete regional battles about the Amendment. The second, J. MANSBRIDGE, WHY WE LOST THE ERA (1986) [hereinafter MANSBRIDGE], by a professor of political science and sociology at Northwestern University who was herself active in the unsuccessful ERA ratification campaign in Illinois, argues that the Amendment was defeated largely because the American public did not want any significant change in gender roles in the society. According to Mansbridge, the Amendment would not in fact have brought about sweeping changes in gender roles in the near future; however, proponents and opponents each for their own reasons exaggerated the impact the Amendment would have, leading to its defeat. MANSBRIDGE, supra at 1-4. The third, Rhode, supra note 5, by a professor at Stanford Law School, analyzes the Illinois ratification effort in some detail and concludes that strategic errors of the proponents coupled with ambivalence of traditional women about the advantages to them of gender equality led to the Amendment’s defeat in that state. The fourth, G. STEINER, CONSTITUTIONAL INEQUALITY, THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT (1985) [hereinafter STEINER], by a senior fellow in the Governmental Studies program of the Brookings Institution, rejects many commonly offered explanations for the Amendment’s defeat, and looks instead to factors that arose during the ratification period, including Senator Sam Ervin’s gain in stature as a result of the Watergate Hearings, the increasing intensity of the abortion debate, and the Soviet invasion of Afghanistan, as well as the proponents’ choice to resort to legislative shortcuts both in an effort to obtain an extension of time to work for the remaining three states needed to obtain ratification and, after the first ratification period expired, to pass the Amendment a second time without crippling amendments to the original text.
doctrine and in more general public attitudes and behavior. The success of the program advocated in that article can be seen in evolving constitutional doctrine under the fourteenth amendment, in changing American public attitudes and behavior in relation to gender roles, and, most recently, in the Senate's rejection of the nomination of Robert Bork to be Associate Justice of the United States Supreme Court.\footnote{15} Women, as well as men who recognize how gender roles constrain them, owe Tom Emerson a tremendous debt of gratitude for his contribution in accomplishing these changes. Indeed, the very success of the movement toward gender equality under law, while far from complete, was paradoxically an important factor leading to the defeat of the ERA.

When Congress proposed the ERA to the states in 1972, 30 states ratified it quickly, generally without controversy or extensive debate. Five more states ratified between 1974 and 1977. Not one state endorsed the Amendment between 1977 and 1982. During the last five years, both proponents and opponents of the ERA mobilized nationally and in unratified states to garner public and legislative support. The ERA campaign became a focal point for national debates about the meaning and desirability of legal equality between women and men.

Gender roles have a profound impact on every aspect of our lives and culture and obviously many factors contribute to a political process as complex as an effort to amend the Constitution to prohibit state sponsored discrimination on the basis of sex. Since the events of the ERA ratification campaign are still fresh, and because they aroused strong emotions in all those who participated, it is unlikely that a definitive account is yet possible. Nonetheless, we believe that analysis of the strengths and weaknesses of the ERA campaign is an important part of the regrouping of feminist forces that is now taking place.

We are also concerned at this early stage that the process of self-examination not prevent us from recognizing certain important ways in which the ERA campaign has contributed to feminist social change, nor blind us to the larger social forces that are at work in the struggle for equality for women.

We believe that three of the most important causes of the ERA's defeat were: 1) the extent to which ERA proponents were victims of their own successes in eliminating the most egregious forms of

\footnote{15. For a discussion on these and other efforts, see Mansbridge, supra note 14, at 88-91. For discussion of the Bork nomination, see infra notes 55-69 and accompanying text.}
sex discrimination from the law during the time that the ERA was being debated; 2) the organizational and political failures of the proponents; and 3) the skill and good fortune of the ERA’s opponents. We shall discuss each in turn.

By the late 1970’s the Supreme Court had interpreted the fourteenth amendment’s equal protection clause to strike down almost all the explicitly gender-based laws and practices on which Congress had focused when it passed the ERA in 1972.\(^{16}\) Thus when the final states were asked to ratify the ERA, the abstract idea of gender equality had, to a significant extent, been incorporated into the Constitution and many sexist laws had been invalidated. In pragmatic terms, the Court had dealt with the relatively easy issues of sexual equality and the ERA would have an immediate concrete impact only in those cases that were regarded by the Court, and the public, as more controversial. Of course, these changes in fourteenth amendment jurisprudence were due, in part, to the ERA struggle which influenced both the legal community’s and the general public’s understanding of sexual equality.\(^{17}\) Nonetheless, in the latter half of the ERA ratification campaign, the proponents had to find a way to educate the public and the legislatures on the more difficult issues, such as the military draft, and the need for legislative review of facially sex-neutral laws with a disparate impact on women. This was not a task for which the campaign for congressional ratification or the easy victories in the early years of the campaign had prepared them.

Tactical and organizational failures of the proponents also contributed significantly to the failure of ratification efforts. While some analysts have placed great emphasis on weaknesses in the public relations aspects of the campaign,\(^{18}\) and a general lack of political sophistication on the part of proponents,\(^{19}\) we are inclined to

\(^{16}\) BERRY, supra note 14, at 86-88; MANSBRIDGE, supra note 14, at 2, 46-7; STEINER, supra note 14, at 38-42.

\(^{17}\) See Justice Brennan’s discussion on this point in his opinion for the Supreme Court in Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973), BERRY, supra note 14, at 86.

\(^{18}\) Rhode, for example, offers a scathing attack on the ERA proponents, arguing that proponents in Illinois were often overly technical, insensitive to the concerns and perspectives of housewives, unable to outmaneuver clever (and often dishonest) opponents in debate or simply extremist. Rhode, supra note 5, at 1, 3-4, 19-24, 43. See also MANSBRIDGE, supra note 14, at 160-63, analyzing political errors made by ERA proponents in Illinois as a result of their relative inexperience within and outside the legislature.

\(^{19}\) “On a practical level, the ERA failed because its most active proponents lacked sufficient adeptness, cohesion, and leverage to counteract opposition strategies . . . . [There was] a poverty of both social theory and practical politics within the feminist camp.” Rhode, supra note 5, at 3-4. See also MANSBRIDGE, supra note 14, at 159-62. Steiner, in contrast,
think the most significant problem was the failure to mobilize for an extended series of discrete regional battles over the Amendment until late in the ratification process. Buoyed by a false sense of confidence instilled by the easy victories in the first half of the ratification campaign, proponents tended to underestimate the difficulties of adapting their message to the very different political circumstances and attitudes characteristic of the unratified states.

In our view, however, by far the most important factor in the ERA's defeat was the political effectiveness and good fortune of the anti-ratification forces. To understand this part of the story, it is useful to begin with the origins and political context of the opposition. By the mid-1970's, opposition to the ERA was being mobilized by new right leaders, of whom Phyllis Schlafly was the most prominent. Ms. Schlafly perceived that anti-feminist and anti-abortion sentiment provided a more productive set of issues around which to organize than traditional anticommunism. Ms. Schlafly began her political career in the Republican Party where she focused on international issues and sought to advance a strong anticommunist viewpoint. In 1964, she was instrumental in encouraging the Party to nominate Barry Goldwater for President. When Schlafly turned her attention to the ERA campaign, the time was ripe for a coalition with the anti-abortion movement that arose in response to the Supreme Court's 1973 decision in Roe v. Wade.
Jane Mansbridge notes that these "women's" issues provided a valuable link with fundamentalist churches who proved to be powerful actors in state legislatures, and with traditional homemakers who had not previously been politically active.26 And as Mary Frances Berry comments, "Although anti-ratificationists utilized sophisticated direct mail techniques and were led by a very experienced professional, Phyllis Schlafly, they managed to remain identified as grassroots housewives and homemakers unmotivated by any broad political purposes."

The presence of women in the anti-ERA ranks provided a convenient shield for male legislators to justify their opposition to the ERA, and gave these women an influence out of proportion to their numbers. Despite well-founded claims by proponents that most women supported the ERA and that the ERA would not change constitutional law about abortion, the opposition was able to create the impression of the ERA as a battle among women, and of a strong link between ERA and abortion.28

The considerable political and organizational strengths of this coalition would have counted for little had the opponents been less fortunate in the timing of the ratification campaign, which occurred

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26. MANSBRIDGE, supra note 14, at 5-6.

27. BERRY, supra note 14, at 84. The expanded coalition of anti-ERA activists presented its members as a broad cross section of traditional homemakers opposed to feminism and abortion. A more accurate characterization of most of those involved would be female members of fundamentalist religions mobilized by the male religious hierarchy in conjunction with right-wing political leadership to do grass roots lobbying. According to STEINER, supra note 14, at 46-47, contrary to many post-mortems on the Amendment, frightened traditional housewives, other than women from fundamentalist religious groups, were not a major factor in the Amendment's defeat. Mansbridge reports that in Illinois, STOP ERA began to be effective in 1976 when it was able to expand its support base from highly committed conservatives to traditional homemakers who were members of fundamentalist churches. MANSBRIDGE, supra note 14, at 174-76. "Neither the media, the American public, nor most legislators were aware that most of the women who demonstrated against the ERA at state capitols around the country in the last years of the ERA struggle were fundamentalists brought there by their pastors." Id. at 175.

28. For the proposition that the ERA would not have any practical effect on Supreme Court rulings about abortion, see The Impact of the Equal Rights Amendment, Hearings on S.J. Res. 10 Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st and 2nd Sess., vol. 1, 451-454, summarized at 502 (1983) (testimony of Ann Freedman) [hereinafter Impact Hearings, vol. 1], and Letter to Representative Don Edwards, No. 7, 1983, id. at 624-25. This testimony and other evidence on the point is discussed in MANSBRIDGE, supra note 14, at 127.
during a general shift of political consciousness to the right. The fact that *Roe v. Wade* was decided during the same period, and that the war in Afghanistan made the resumption of the draft appear a more realistic possibility, provided significant impetus to the anti-ratification campaign. In addition, the unratified states were far more conservative than those that had already ratified, and included many legislators who had long been opposed to any increases in the power of the federal courts or the Congress. Finally, other interests, who had much to lose economically if the Amendment was ratified, particularly businesses who feared that the ERA would lend support to the efforts of feminists and their allies to make the workplace more hospitable to people with family commitments, were able effectively, if quietly, to encourage legislators to take an anti-ERA position.

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32. BERRY, *supra* note 14, at 78. Though national poll results supported the ERA, "opposition was still great among Republicans, people living in the Midwest and the South, and among older Americans. Thus, additional ratifications needed to come from the states in which support was identified as weakest." *Id.*

33. BERRY, *supra* note 14, at 66, 68; MANSBRIDGE, *supra* note 14, at 6, 163-64; Rhode, *supra* note 5, at 50.

34. For example, through legislation requiring employers to provide parental and disability leave, and better salaries and benefits for both part-time and lower-paid workers and their dependents. The large gap between the social welfare benefits provided by most industrialized countries in Europe, through a combination of public programs and agreements negotiated between organized labor and employers, and the social welfare benefits provided in the United States, is striking. Employers in the United States are aware that other models exist, and have been vigilant opponents of most efforts to expand government or employer responsibility for the social welfare of employees and their families. While the ERA would not directly require legislation imposing additional costs on private employers, the issues the ERA would raise about the disparate impact of facially neutral policies on women would contribute significantly to a more favorable climate for such initiatives.

35. Insurance companies may also have played a role in opposing ERA ratification in key states, see, e.g., MANSBRIDGE, *supra* note 14, at 150-51, and their opposition has sometimes been attributed to a desire to retain gender-based rates, which have proven highly profitable. *See, e.g.,* MANSBRIDGE, *supra* note 14, at 41; STEINER, *supra* note 14, at 80. *See also* BERRY, *supra* note 14, at 108, discussing the feminists' inability in 1984 to obtain passage of a federal statute aimed at ending sex discrimination in insurance. There is no reason that insurance companies could not make equally substantial profits with gender-neutral rates, however, so we are more inclined to believe that the insurance companies' undoubted role reflects their general political conservatism and resistance both to governmental regulation and
It is important to note the interaction among these factors. The opponents' greater political sophistication and organizational strength in unratified states coupled with the support of powerful conservative political forces gave them credibility in key legislative battles. In addition, because progress under the fourteenth amendment and employment discrimination law greatly reduced the apparent urgency of the case for the Amendment, and because of the volatility of the military and abortion issues, opponents were able to portray the Amendment as either unnecessary or dangerous. Since individual legislators were reluctant to take risks and the Constitution required ratification by three-quarters of the states, once the Amendment became controversial, its chances of being passed were dramatically reduced.

The three factors we have discussed are widely regarded as important by those who have attempted to understand the Amendment's defeat. Nonetheless, our views differ with several of the writers on this question whose work is best known. For instance, we have quite different views than Jane Mansbridge and Deborah Rhode about the extent to which the ERA's defeat was a consequence of ambivalence about equal rights for women on the part of members of the public, and particularly on the part of women in the unratified states. Mansbridge not only argues that public support for the Amendment was much weaker than proponents believed, and indeed was waning during the latter half of the campaign, but also contends that the proponents should have downplayed the significance of the ERA's possible contribution to social change, and

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36. Whether because of the military draft, abortion or of the various other controversial outcomes, such as homosexual marriage, opponents were able to persuade undecided legislators that one or more of these might flow from the Amendment despite proponents' denials. See, e.g., BERRY, supra note 14, at 68, 83-85; MANSBRIDGE, supra note 14, at 111, 112-14. It seems likely that the military draft and abortion were in general the most significant of these forces, as some of the other claimed outcomes (e.g., unisex toilets) were as likely to undermine the ERA opponents' credibility as to persuade legislators. MANSBRIDGE, supra note 14, at 114; STEINER, supra note 14, at 48-9, 58-66 (abortion as a factor), 68-74 (the military draft).

37. BERRY, supra note 14, at 3, 69; MANSBRIDGE, supra note 14, at 19.

38. See supra notes 15-33 and accompanying text.


40. Rhode argues that the public was deeply divided, "The source of opposition that conservative leaders tapped was more deeply rooted than feminists generally acknowledged. Anti-ERA sentiment was a reflection [in part] . . . of fundamental ambivalence about the meaning and value of formal equality in a context of societal inequality." Rhode, supra note 5, at 46-47.
instead sought public support for the Amendment as a symbolic gesture of equality with little practical significance, at least in the near term.\textsuperscript{41} Our view, which is closer to that of Mary Frances Berry,\textsuperscript{42} is that to the extent public concern about the Amendment’s effects was a factor in the outcome, it more often reflected misunderstanding of the Amendment’s impact, and a general conservative reaction toward change of any kind, rather than hostility to the effects the ERA would in fact have had.\textsuperscript{43} This is consistent with our view, discussed above, that the powerful political forces aligned against the Amendment in the unratified states, by and large, acted not as representatives of the views of the majority of people, but rather had their own reasons to oppose the Amendment, ranging from interests in expanding the base of the radical right among members of fundamentalist churches to businesses opposing additional moves toward gender equality in the workplace. Furthermore, we dissent most strenuously from the suggestion that the ERA could have been ratified had its effects been downplayed in the way Mansbridge suggests. Only if people believed that the ERA would have positive effects—that the process of re-examination of social structures that the Amendment promised would in fact improve the lot of women and make the society more just—would they be willing to embark on the experiment.

Moreover, while we agree with Mansbridge that people’s abstract commitment to equality is frequently more powerful than their agreement with specific changes that equality might bring, we do not agree that commitment to all the specifics is necessary for the ERA to be adopted. Indeed, if women were able to mobilize in Congress and in most state legislatures to obtain majority support for all the specific changes that the ERA might bring, the counter-majoritarian protection of the ERA would not be needed. In seek-

\textsuperscript{41} Mansbridge, supra note 14, at 2, 4, 36, 56-59.

\textsuperscript{42} Berry’s analysis is in some respects similar to that advanced by Rhode and Mansbridge, see, e.g., Berry, supra note 14, at 83-85, but she suggests that the fears on which opponents capitalized were largely about cultural shocks which were not in fact related to the ERA, but had been made to seem so. Thus, she comments, “[These issues] were, in the sense [the proponents] meant it, irrelevant to the principle of according to women equality of rights in a democracy under the Constitution. But the antiratificationists had succeeded in drawing attention away from the constitutional principle, to traditional family values and roles as the turf on which the battle was fought.” Berry, supra note 14, at 85. See also the analysis advanced by Steiner, who reviews many of the other explanations that have been advanced for the ERA’s defeat, and concludes that major emphasis should be placed on the impact of the draft and the abortion issues on rendering the ERA too controversial to be adopted despite fairly broad majority support for the Amendment. Steiner, supra note 14, at 50-51, 74.

\textsuperscript{43} Supra note 28. See also Berry, supra note 14, at 85.
ing to amend the Constitution, proponents sought supermajority support for a relatively abstract principle of equal rights for women that would later restrict that same majority when it sought to take specific actions inconsistent with sexual equality. The success of their case depended on maintaining public support for the ideal of equality at a more general level, giving only enough examples to show the fairness of women's claims. Had proponents been successful in maintaining control of the terms of debate, they might well have been able to translate the abstract support for equality Mansbridge cites into a victory for the Amendment. And to the extent that proponents were drawn by the opposition into a series of very specific debates about the Amendment's likely impact, they were at a serious disadvantage.44

Another notable area of disagreement with both Mansbridge and Rhode and to a lesser extent with Mary Frances Berry, concerns their belief that, as a result of legal developments since the Amendment was sent to the states for ratification in 1972, the ERA would be primarily of symbolic value, because the legal changes it would make would be minor.45 We disagree with this assessment. The ERA would have had a profoundly important impact on laws and policies that discriminate in fact, but not in words. Many of the forms of state action that are most detrimental to women involve laws and policies that are embedded in sexist stereotypes but expressed in gender neutral language.46 When social as well as legal norms make explicit sexism or racism unacceptable, white male privilege can be preserved through other, slightly more subtle, means. Referral networks that rely on personal relations with in-

44. The proponents in some instances are to be faulted, as Rhode claims, Rhode, supra note 5, at 4, 22-23, in searching for the specifics that would sell the Amendment, rather than recognizing that to a large extent the battle had to be won at a more abstract level. In the main, however, the control of the debate shifted to proponents for the other reasons discussed above, and not because of their own tactical and organizational failures. BERRY, supra note 14, at 85. Mansbridge and Steiner also discuss this problem. MANSBRIDGE, supra note 14, at 116-17; STEINER, supra note 14, at 49-74.

45. See BERRY, supra note 14, at ch. 8, and at 90-93. Mansbridge concludes that "[i]n the short run" the ERA would reach only explicit sex based classifications and hence "would have far less immediate impact on constitutional law than most of its advocates had assumed back in 1972." MANSBRIDGE, supra note 14, at 55. Rhode asserts that the ERA had become primarily symbolic, and that feminists will have to turn away from the ERA to "focus on more concrete responses to structural inequities." Rhode, supra note 5, at 72.

cumbents have the same effect as explicit discrimination. Physical height or strength requirements, or expectations of long hours over a period of years, will, as a practical matter, exclude most women from jobs and public life. Most pervasively,

the old notion that a household was properly composed of a male breadwinner and a female homemaker manifested itself in by-gone days in rules that excluded married women from employment; today it manifests itself more subtly in rules providing benefits to the "primary breadwinner" or head of household. Like machine and tool specifications based on the dimension of the average male body, . . . personnel policies that fail to take account of child-bearing and child-rearing needs also reflect the assumptions that only men, indeed only men in traditionally organized families, belong in the workplace.\(^47\)

When the ERA was proposed in 1972, most courts and scholars believed that the Constitution, as well as Title VII, prohibited state policies and private employment practices that, in fact, discriminated against blacks, even if they were cast in seemingly neutral terms.\(^48\) A central purpose of the ERA, as articulated by Emerson and his young colleagues, was to extend to women the protection from de facto discrimination that was then assumed applicable to blacks.\(^49\)

In 1976, a sharply divided Supreme Court pulled the rug out from under the notion that the fourteenth amendment prohibited state policies that were, in fact, injurious to black people. In Wash-
\[\text{47. Taub & Williams, Will Equality Require More Than Assimilation, Accomodation or Separation from the Existing Social Structure?, 37 Rutgers L. Rev. 825, 836 (1985).}\]
\[\text{48. In 1972, public education was the primary focus of fourteenth amendment equality doctrine. Local school boards, under the scrutiny of federal district courts, were compelled to take affirmative action to eliminate obstacles to desegregation "in a systematic and effective manner," and "with all deliberate speed." Brown v. Board of Educ. II, 349 U.S. 294, 300-01 (1955). The Court reiterated this mandate in the face of "extreme public hostility" from the citizens and elected public leadership of much of the South. Cooper v. Aaron, 358 U.S. 1, 12-13 (1958). By 1964, the Court recognized that "[t]here has been all too much deliberation and not enough speed" in enforcing the constitutional right to an integrated education. Griffin v. County School Bd., 377 U.S. 218, 229 (1964). In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971), for example, the Court observed that the history of segregation "warrants a presumption against schools that are substantially disproportionate in their racial composition."

Griggs v. Duke Power Co., 401 U.S. 424 (1971) held that Title VII of the Civil Rights Act of 1964 prohibited private employment practices that had particularly harsh impact on one minority racial group, and that could not be justified by business necessity.

In 1972, many litigants and many lower federal courts believed that the fourteenth amendment guarantee of equality required scrutiny of state policies that in fact had an adverse impact upon blacks. \textit{See, e.g.}, Hawkins v. Shaw, 437 F.2d 1286 (5th Cir. 1970) (striking municipal practice of providing minorities inferior public services).

\[\text{49. See Brown et al, supra note 1, at 898-900.}\]
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In 1979, the standard of proof for women alleging de facto discrimination was made even more stringent. The Court articulated a standard of proof for de facto sex discrimination that requires women to show that the harmful state policy was adopted “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” women.52

Powerful concerns underlie the Court’s reluctance to adopt a broad rule condemning any state policy that has a disparately harsh impact upon women or blacks. Constitutional standards must be judicially manageable, linked to the practical limits of judicial power and sensitive to the need to separate judicial from legislative and administrative functions. Nonetheless, scholarly response to the Supreme Court’s rigid standards of proof in disparate impact cases has been highly critical.53 Many have argued persuasively that the Court adopted too narrow a view of the constitutional requirements for both the plaintiffs’ burden of proof and the defendants’ burden of justification in disparate impact cases. With respect to the burden that a plaintiff must meet to establish discrimination, the Court assumed that only two choices were available to it: to hold that disparate impact alone establishes discrimination or to require a smoking gun of illicit intent. Similarly, with respect to the defendants’ burden of justification, the Court has assumed that if

51. However, the requisite discriminatory purpose can “be inferred from the totality of the relevant facts,” including the fact of discriminatory impact. Id. at 241-42. In subsequent race-discrimination cases, this requirement was satisfied by such objective factors as the foreseeable consequences of an ostensibly neutral policy, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979), and the presence of subjective decision making. Castaneda v. Partida, 430 U.S. 482, 493-97 (1977).
53. See, e.g., Brest, The Supreme Court 1975 Term—Forward: In Defense of the Antidis-


the plaintiff proved a prima facie case of discrimination, the challenged policy could only be justified by the kind of strong showing demanded to support laws incorporating an explicit racial or sexual classification. In the past decade, scholars have richly articulated a number of alternative ways in which the Court might take a more active role in redressing state policies that are neutral in form but discriminatory in fact, while at the same time remaining sensitive to legitimate needs for judiciously manageable standards and legislative flexibility.

The 1970's developments eviscerating the fourteenth amendment racial equality jurisprudence in disparate impact cases made it very difficult for the proponents of the ERA to explain that it would demand careful scrutiny of state policies that are neutral in form but sexual discriminatory in fact. That difficulty stems in part because this branch of equality doctrine demands a complex balancing of legitimate claims for equal treatment against legitimate concerns about the practical limits of judicial power that is difficult to communicate in the slogans of a ratification campaign. But, in addition, the ERA faced political difficulty. Its proponents had no desire to urge that women were entitled to a greater measure of constitutional protection than black people. Rather, most ERA proponents sought common cause between those who struggled against racism and sexism. Many ERA proponents believed that as a practical matter, the ERA's stronger protection against laws that were sexist in impact would have a spillover effect extending stronger protection to blacks injured by laws that were racist in impact. But it was difficult to use the actual words of the ERA to support this pragmatic belief.54

Thus, in sum, we do not believe that the defeat of the ERA reflects a broad rejection of Thomas Emerson's vision that men and women must be treated as equals under the Constitution. Rather, the ERA proponents were victims of their own success in that the program and principles articulated by Emerson were largely incorporated into the fourteenth amendment to eradicate many of the most blatant forms of discrimination in the courts and in the legislatures. Further, ERA proponents made many damaging tactical errors, while its opponents benefited from a coalition with other powerful interest groups and large shifts to the right in the general

54. In the 1983 Senate hearings on the ERA, proponents articulated a nuanced disparate treatment standard that would provide a more vigorous protection for both women and blacks. See Impact Hearings, vol. 1, supra note 27, at 539 (testimony of Ann Freedman); Id. at 770 (testimony of Phyllis N. Segal on the impact of the ERA on veteran's programs).
political climate. Finally, and perhaps most significantly, when the Amendment was considered by the final, most traditional states necessary to ratification, a core open issue was the complex one of the impact of the Amendment on de facto discrimination. That sophisticated issue was not easily communicated or debated in the simplifying terms of the constitutional amendment process.

III. THE MEANING OF THE BORK REJECTION FOR SEX EQUALITY

In 1987 the United States Senate rejected President Reagan's nomination of Judge Robert Bork as Associate Justice of the United States Supreme Court, by the widest margin in history. That act was an extraordinary political and constitutional event in American history. Few Supreme Court nominees have been rejected, even when the Senate was controlled by a party opposed to the President's. In this century, the Senate has consistently operated on the assumption that a President may name Justices to suit his or her constitutional views, and that the Senate may properly reject that choice only if it is dissatisfied with the nominee's personal integrity or competence. No evidence was offered against Judge Bork's intellectual capacity or personal character.

To think about the constitutional meaning of the Senate's rejection of Judge Bork, we must consider, first, the complex factual question of why the Senate refused to confirm him, and, second, the even more difficult question of the significance of this action for constitutional interpretation.

Obviously many factors may have contributed to the defeat of Judge Bork's nomination. The nomination was opposed by a mu-


56. Extensive media coverage of the confirmation probably hurt Bork. Floyd Abrams, a leading lawyer who represents the New York Times, observed that this extensive coverage was largely fortuitus and could easily have been preempted by other major news, e.g. the Gulf war or stock market crash that occurred a few weeks later. Talk to the National Coalition Against Censorship, Dec. 18, 1987. The celebrations surrounding the bicentennial of the Constitution may have created an aura of grandeur about the Constitution that contrasted sharply with Bork's crabbed interpretations of constitutional rights and liberties. Alabama's Senator Heflin, a key swing vote on the Senate Judiciary Committee, may have been influenced by local headlines denouncing Bork as an atheist, as well as by the nominee's positions.
tually supportive alliance of: 1) black voters who, as a result of the
civil rights movement and the Voting Rights Act, hold the balance
of political power in the South and made opposition to Judge Bork
essential to their electoral support; 2) elite establishment liberals
who feared the results of Judge Bork's dogmatic rhetoric; and
3) women, excluded from the community of constitutional protection
by Judge Bork's originalist view of the Constitution.

The nomination of Robert Bork was seen as a serious threat to
several of the constitutional issues to which Thomas Emerson con-
tributed so much, including racial equality and the developing pro-
tection of sexual equality and sexual liberty. The jurisprudence of
original intent advocated by Edwin Meese and Robert Bork is of
particular concern to women because it is relatively plain that
neither the drafters of the original Constitution, nor the drafters of
the fourteenth amendment regarded women as full citizens. For
over fifteen years Judge Bork had forcefully asserted that the con-
stitutional guarantee of equality prohibits only certain limited forms
of racial discrimination and very few other forms of dis-

As we have already discussed, the past fifteen years have been
years of great national debate about the meaning of gender equality.
As a colleague of Emerson's at Yale, Bork taught constitutional
law, in a seminar setting, for more than a decade. Through this

57. Many prestigious organizations, such as the American Civil Liberties' Union and
the Bar Association of the City of New York, which do not ordinarily take positions opposing
Supreme Court nominees, protested the Bork nomination. Forty percent of the faculty mem-
bers of all accredited law schools in the U.S. signed petitions calling on the Senate to reject
him. From Bork to Kennedy, supra note 55, at 38.

58. See Law, The Founders on Families, 39 U. FLA. L. REV. 583 (1987); Nichols, Wal-

59. "The equal protection clause . . . can require formal procedural equality, and, be-
cause of its historical origins, it does require that government not discriminate along racial
lines. But much more than that cannot properly be read into the clause." Bork, Neutral
Principles and Some First Amendment Problems, 147 IND. L.J. 1, 11 (1971). In 1984, as a
judge, he wrote that "[t]he Constitution has provisions that create specific rights. These pro-
tect, among others, racial, ethnic, and religious minorities." Dronenburg v. Zech, 741 F.2d
1388, 1397 (D.C. Cir 1984). Women are conspicuously absent from this list. As recently as
June 10, 1987 he stated, "I do think that the equal protection clause probably should have
been kept to things like race and ethnicity. When the Supreme Court decided that having
different drinking ages for young men and young women violated the equal protection clause,
I thought that was a very—that was not to trivialize the Constitution and to spread it to areas
it did not address." Worldnet Broadcast, as quoted in N.Y. Times, Sept. 21, 1987, at B14,
col. 4.
period he talked and wrote prolifically about the Constitution, in speeches and popular articles.

In his confirmation testimony Judge Bork took positions on sexual equality and reproductive privacy that were flatly at odds with the positions that he had so frequently and forcefully taken in the recent and distant past. For many years he denounced the Supreme Court decisions protecting a woman's right to choose abortion as "unconstitutional" and "a wholly unjustifiable judicial usurpation of state legislative authority."\(^6\) In the confirmation hearings he testified that he had only meant to criticize the reasoning adopted by the Supreme Court and did not necessarily believe that the cases reached the wrong results. Judge Bork's denunciation of Supreme Court protection for core human liberties, such as reproductive freedom, without first considering whether these freedoms might be constitutionally protected on other grounds, suggests he lacked serious concern for civil rights.

While Thomas Emerson always understood that the ideas and work of legal academics can have real impact in the world, Judge Bork sought to characterize his extreme statements as academic speculation, causing no concrete injury to real people. Further, that characterization was belied by his actions as a federal court judge rejecting citizens' constitutional claims premised on the very privacy and liberty rights the Supreme Court has recognized.\(^6\)

In relation to sex equality Judge Bork stated, for the first time at his confirmation hearings, that he accepted that equal protection prohibits "unreasonable" sex-based discrimination.\(^2\) But many

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\(^61\) In Franz v. United States, 707 F.2d 582, addendum to the opinion for the Court, 712 F.2d 1428 (D.C. Cir. 1983) (Tamm, J., Edwards, J., Bork, J., concurring and dissenting), Judge Bork dissented from a decision protecting a father's right to a fair process to determine whether the needs of the government's Witness Protection Program demanded termination of his relation with his children. Judge Bork expressed a barely concealed contempt for the fact that the Supreme Court had afforded any constitutional protection against thoughtless, inept or malicious government action shattering a parent-child relationship.

In Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) he rejected a claim that the constitutional right to liberty and privacy prevents the government from firing a person solely because he engaged in voluntary, consensual homosexual conduct. Judge Bork refused to address the similarities and differences between the case before him and numerous other cases in which the Supreme Court had recognized a constitutional right to privacy. Rather, he simply asserted that the Supreme Court had provided "no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy." 741 F.2d at 1395.

\(^62\) He said, if confirmed, he would evaluate sex based classifications under a "reasonable basis approach that rejects artificial distinctions and discrimination," and strike down
Senators on the Judiciary Committee understood that for most of this century the Supreme Court had applied the "reasonable basis" standard to uphold discriminatory laws that are now, thanks in large part to Emerson's work, understood as blatantly sexist. Judge Bork's "new" vision of equality was utterly unpersuasive, unclear, and either toothless or flatly inconsistent with his long standing views, reiterated in his testimony before the Committee.

Judge Bork and his supporters sought to characterize his views as similar to those of Justice Stevens, who has sought to articulate a more flexible approach to equality jurisprudence. At the heart of Steven's equality analysis is an affirmative, substantive social vision that explores the reality of historic oppression and seeks to include disadvantaged groups in the activities and institutions of the majority. Judge Bork's "new" equality was emphatically not that of Justice Steven's.

Historic discriminations that "no longer seem to anybody to be reasonable." Testimony, September 17, 1987, as reported in the N.Y. Times, Sept. 21, 1987, at B14, col. 4.

63. For example, as recently as 1961, in Hoyt v. Florida, 368 U.S. 57 (1961), a unanimous Court approved a Florida law excluding women from the civic obligation to serve on juries. Gwendolyn Hoyt killed her husband in the white heat of a domestic dispute. She pleaded temporary insanity. An all male jury rejected her claim. She appealed to the Supreme Court, arguing that excluding women from the jury discriminated on the basis of sex and denied her a jury of her peers. The Court, applying the "reasonable basis" approach, upheld the exclusion. The Court reasoned that because a "woman is still regarded as the center of home and family life," it is reasonable to relieve all women—whatever their situation—from the civic obligation of jury service. Id. at 62.

64. Did he mean simply to apply the deferential "rational basis" standard that justified exclusion of women from juries, public life, and responsible work? If that is all he meant, he had not conceded an inch. Or, did he rather accept the Supreme Court's jurisprudence requiring careful scrutiny of laws that hurt vulnerable people or burden fundamental liberties? Or, did he mean that the Supreme Court should be aggressive in reviewing the rationality of all legislative classifications, whether they enforce gender difference or traffic safety?


67. Justice Stevens insists that the Constitution must provide special scrutiny to laws that hurt "a traditionally disfavored class." ("However irrational it may be to burden innocent children because their parents did not marry, illegitimates are nonetheless a traditionally disfavored class in our society. Because of that tradition of disfavor, the Court should be especially vigilant in examining any classification which involves illegitimacy." Mathews v. Lucas, 427 U.S. 495, 520 (1976)). Judge Bork rejects the notion that the Constitution requires special equality scrutiny for particular groups. "Let me say something about why I
The Senators who voted against Judge Bork perceived his general theory of original intent, and his specific positions on issues of special concern to women, as far outside the mainstream of current understanding about the meaning of the Constitution.68

prefer a reasonable basis analysis to a group-by-group analysis. It is not just that the language of the amendment refers to any person, therefore all persons. It is that if one thing is clear about the the [fourteenth amendment, it is that if the Framers of that amendment, the people who ratified it, had no intention of wiping out distinctions between men and women that we would now regard as very discriminatory."


Judge Bork would uphold sexually discriminatory laws that rested on statistical generalizations, such as physical strength, that did not describe individual difference. "[R]ational distinctions cannot be made between men and women, usually except on physical strength or something of that sort, which is the combat example." Bork Confirmation Hearings, supra, at 35. Justice Stevens would require that if an individual woman is strong enough to do a job, she should be allowed to do it.

Judge Bork perceives laws premised upon sex based stereotypes as "trivial." See discussion of Craig v. Boren, Bork Confirmation Hearings, supra, at 134-36. Justice Stevens, by contrast, understands that stereotyped reactions often have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made, and such classifications are likely to be the result of "habit, rather than analysis." Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting); Michael M. v. Superior Court, 450 U.S. 467, 501 (1981) (Stevens, J., dissenting).

Most fundamentally, Judge Bork perceives constitutional equality as limited by the empirical reality of equal behavior and a social consensus that supports it. "There was a time in this country when the distinction made in Frontiero, that is, we will assume that a woman is a dependent and a man is not, might have seemed some sense. That was a time when women were not in the marketplace. So that they would have to prove that they were in the marketplace." Bork Confirmation Hearings, supra at 142. Justice Stevens understands the vital leadership role that the Court must play in integrating excluded and vulnerable groups in to the mainstream of American society. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

68. For example, Senator Howell Heflin, a conservative Democrat from Alabama and former Chief Justice of the Alabama Supreme Court, explained "I think a lifetime appointment on the Supreme Court is too important to trust to one that you have serious questions about concerning his extremism." S. Roberts, 9-5 Panel Vote Against Bork Sends Nomination to Senate Amid Predictions of Defeat, N.Y. Times, Oct. 7, 1987, at 1, col. 6. Senator Deconcini, a conservative Democrat from Arizona said that Reagan had "selected someone that, indeed, is outside the mainstream of conservatism in this country. He selected him, I think, knowing that he was outside the mainstream, and he attempted, through the White House to sell this person for something that he was not." Id. at B10, col. 1.

An analysis by Linda Greenhouse summarized:

The issue that jelled for the opposition, surprisingly, was privacy. The number of senators who gave prominence to the privacy issue in their speeches opposing Judge Bork was striking. Indeed, the privacy issue underwent a fascinating transformation during the course of this confirmation debate. Before the confirmation hearings began, the word "privacy" in political discourse was widely understood as a metaphor for abortion, a politically dangerous topic. During the hearings, privacy became another metaphor entirely. It came to stand for the whole theme of fundamental rights, the concept of an expansive Constitution in contrast to Judge Bork's view that the Constitution was limited by its precise language and the intent of its 18th century framers.
What then should the Senate rejection of Judge Bork mean for future interpretation of the Constitution? At a minimum the Senate, and the American people, rejected the crude originalist jurisprudence of Reagan and Meese, which Judge Bork was nominated to embody and defend. Further, it seems to us that Professor Ronald Dworkin is correct in seeing an even broader meaning in the Bork rejection:

[M]any of the positions he justified by appealing to original intention — that the Equal Protection Clause specially condemns only racial discrimination, for example, and that the Constitution, in spite of what the Supreme Court has said, contains no general right of privacy — were so thoroughly discredited in the hearings, and proved so generally unpopular, that I doubt that they will any longer be advanced even by lawyers and judges who found them congenial before. That, in itself, may significantly affect the course of constitutional law. The standard of "original intention," as a strict and exclusive limit on the grounds of legitimate Supreme Court decisions, is probably dead.69

Beyond the likely death of "original intent" as a legitimate interpretive tool, it is possible to tell diametrically different stories about the meaning of the Bork rejection. One story denies that the Senate's action has any impact beyond the rejection of crude original intent. The second story, which we prefer, sees the Senate's action as encouraging the Supreme Court to continue its constitutional voyage toward extending liberty and equality to all people.

The first story, the limited view, argues that the rejection of Judge Bork means only that the Constitution protects women from egregiously sexist and deeply unpopular forms of oppression. The most powerful pieces of evidence for a limited reading of the significance of the Bork rejection are: 1) the easy confirmation of President Reagan's nomination of Judge Anthony Kennedy, and 2) the rejection of the ERA.

On January 27, 1988 the Senate Judiciary Committee unanimously approved President Reagan's nomination of Judge Anthony M. Kennedy as Associate Justice of the United States Supreme Court.70 Judge Kennedy's judicial style and philosophy contrast sharply with Judge Bork's. The language of Judge Kennedy's decisions are lawyerly and precise, completely unlike the political rheto-

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69. From Bork to Kennedy, supra note 55, at 36, 40.
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Although both men taught constitutional law and spoke frequently at legal gatherings, Judge Bork chose to address controversial themes in the most provocative terms, while Judge Kennedy tended to offer modulated remarks on more mundane subjects.

On issues of sexual privacy, the style of the two judges' views contrast sharply. Judge Kennedy never broadly challenged the legitimacy of the Supreme Court privacy doctrine that Judge Bork has so dramatically condemned. Each judge has evaluated constitutional privacy claims asserted by servicemen discharged for engaging in private, consensual homosexual activity. Judge Bork refused to consider whether the constitutional right to privacy protected the litigant before him, asserting that the Supreme Court's cases provide, "no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy." Judge Kennedy, by contrast, declined to decide the broad question whether the Constitution sometimes prohibits the state from punishing consensual private homosexual conduct between adults, by protecting such conduct as a "fundamental right." Rather, Judge Kennedy confined his holding narrowly to the special facts before him.

71. In a thoughtful address on unenumerated constitutional rights, he observed the tension between the Supreme Court decision recognizing that the Constitution protects married people's right to use contraceptives and the more recent Supreme Court case refusing to extend constitutional protection to people of the same sex who were prosecuted for private, consensual sexual activity. Griswold v. Connecticut, 381 U.S. 479 (1965) and Bowers v. Hardwick, 106 S.Ct. 2841 (1986). A. Kennedy, "Unenumerated Rights and the Dictates of Judicial Restraint," Speech to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, Palo Alto, California, July 24-August 1, 1986, at 10-12. He further observes that a key issue in both cases involves the power of the majority to enforce moral views on private consensual behavior that does not injure third parties. Id. at 9-10. But, having thus identified major themes and tensions posed by the cases, Judge Kennedy avoided any grand pronouncements or denunciations. Kennedy takes a disturbing narrow view of the function of federal judges in protecting constitutional liberty. "One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system." Id. at 13.


73. "[W]e can concede arguendo that the reasons which led the Court to protect certain private decisions intimately linked with one's personality, see, e.g., Roe v. Wade[ ... and family living arrangements beyond the core nuclear family, see, e.g., Zablocki v. Redhail[ ... suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." Beller v. Meddendorf, 632 F.2d 788, 810 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

74. He stated that "[t]he nature of the employer— the Navy—is crucial to our decision. ... [T]he Supreme Court has repeatedly held that constitutional rights must be viewed
Judge Kennedy, unlike Judge Bork, never expressed doubt that the fourteenth amendment applies to gender discrimination. Rather, in the two constitutional sexual equality cases that Kennedy decided as a circuit court judge, he recited Supreme Court precedent that sex-based classifications may be upheld only if closely related to important governmental interests. Further, Judge Kennedy affirms the need for openness to evolving understanding and protection of gender equality.

Nonetheless, in both privacy and sex-equality cases the bottom line—the result—is often the same with both Judges. Judge Kennedy rejects sexual privacy claims and upholds gender classifications. His sexual equality cases did not persuasively explain why the gender classification is closely related to important state interests. Perhaps even more disturbing, Judge Kennedy’s approach to sexual discrimination claims under Title VII seems to require both explicit evidence of discrimination, and evidence of hostility towards women. Obviously an equality standard that bars only sex-

in light of the special circumstances and needs of the armed forces.” Id. Dissenting from the Ninth Circuit’s subsequent rejection of the suggestion for rehearing en banc, Judge Norris took issue with Kennedy’s uncritical acceptance of the government’s military necessity justification, noting that, “[c]onsidered with proper detachment rather than knee-jerk acquiescence, the military necessity argument is revealed not to be supported by the record.” Miller v. Rumsfeld, 647 F.2d 80, 87 (1981).

75. In United States v. Reiser, 532 F.2d 673 (9th Cir.), cert. denied, 429 U.S. 838 (1976), Kennedy joined a per curiam decision upholding male-only registration for the draft. In United States v. Smith, 574 F.2d 988 (9th Cir.), cert. denied, 439 U.S. 852 (1978), Judge Kennedy upheld a conviction of a man charged with forcible sodomy under a statute providing greater penalties for sexual assault on a man than for sexual assault on a woman. In dicta, he implied that a “fair and substantial relation to an important governmental interest” would be an appropriate standard.

76. In his confirmation hearings Judge Kennedy noted that the judicial system has not had “the historical experience with gender discrimination.” He said, “[T]he law there really seems to me in a state of evolution at this point, and it is going to take more cases for us to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.” Hearings on the Confirmation of Judge Anthony M. Kennedy to the United States Supreme Court Before the Senate Judiciary Comm., 100th Cong., 2d Sess., at 170 (Dec. 14, 1987) [hereinafter Kennedy Confirmation Hearings].

77. In Smith, 574 F.2d at 991, Judge Kennedy looked to “traditions and community attitudes that have prevailed for centuries,” to uphold the sex based classification. Of course many “traditions and community attitudes” that seemed natural and reasonable only 20 years ago are now understood as sexist.

78. In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), a Title VII action in which a class of women employees of the state of Washington claimed that they were discriminated against on the basis of sex in setting of lower wages for job classifications held predominantly by women, the lower court held for the plaintiffs on both a disparate impact and disparate treatment theory. Judge Kennedy reversed saying that disparate impact gives rise to a prima facie violation of Title VII only “where a practice is specific and focused
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ist policies that are explicitly hostile toward women provides them little protection under the law.

In sum, one lesson that could be drawn from the rejection of Judge Bork and the ERA, and the easy confirmation of Judge Kennedy, is that the Senate and the American people support judicial action striking down those laws that are blatantly sexist and hostile to women, as well as those state intrusions on sexual and reproductive privacy that are deeply unpopular and sustained only by a vociferous minority — but no more. Americans like to believe that the Constitution protects grand ideals of liberty and equality, but do not necessarily want these ideals to be vigorously enforced. Thus, one could conclude that Americans prefer a Constitution that obscures, rather than remedies, the reality of sexual and racial bias and oppression. Not only did Judge Bork’s stark articulations not permit enforcement of equality and liberty, they also denied the grand rhetorical vision that our Constitution is fundamentally just and inclusive.

A second, more generous view of the Bork rejection sees it as broadly endorsing a process of constitutional elaboration under which visions of liberty and equality expand in response to a growing ability to hear the voices of the excluded and to understand the social mechanisms of oppression. It is an affirmation of the process that the Supreme Court has undertaken to include women within the body politic through expansion of constitutional rights of liberty, privacy and equality. Although the Senate did not approve any particular Supreme Court holding, it ratified a more general process of reasoned elaboration and expansion of constitutional protection through the Bork vote.

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[so] we can address whether it is a pretext for discrimination." AFSCME, 770 F.2d at 1405. The search for “pretext” misapprehends the meaning of Title VII, which prohibits employment practices that operate to exclude blacks or women even where no hostile animus exists. See Statement of Susan Deller Ross, Professor of Law, Georgetown University Law Center on Behalf of the NOW Legal Defense and Education Fund on the Nomination of Judge Anthony M. Kennedy to the Supreme Court of the United States 15 (Dec. 15, 1987) (Statement before the Senate Judiciary Committee). Similarly, in explaining his membership in clubs that explicitly excluded women, Judge Kennedy argued that the club policies were not "invidious discrimination" because they were not the result of "ill-will" and did not "intend to impose a stigma on such persons. Kennedy Confirmation Hearings, supra note 76, at 50 (response of Judge Kennedy to Senate Judiciary Questionnaire).

79. Indeed, many of the Supreme Court’s most important sexual equality decisions struck down acts of Congress. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (holding unconstitutional a federal law allowing a male member of the uniformed services to claim his spouse as a dependent automatically while permitting the same deduction to a female member of the uniformed services only upon a showing that her spouse was in fact dependent on her).
That vote can be seen as the culmination of a process of structural amendment of the Constitution that has gone on for the past two decades as the Supreme Court, the political branches, and the American people have participated in a profound process of transformation, to bring women within the community of constitutional protection and concern. Professor Bruce Ackerman has argued powerfully that the process of constitutional transformation is not limited solely to the formal process of constitutional amendment.\(^8\)

He examines the Supreme Court decisions of 1937 that affirmed the broad regulatory power of the modern welfare state and that rejected those constitutional decisions that have come to be epitomized by the *Lochner* case. It is misleading, he argues, to characterize the Supreme Court's early twentieth century decisions protecting the economic status quo as simply a constitutional "mistake."\(^8\) Rather, he urges that we see the rejection of *Lochner* as a "process of constitutional creation."\(^2\) The Court's acceptance of the regulatory authority of the modern welfare state was "the final point in the process of structural amendment. It is the moment at which the judges recognized that a new constitutional principle had indeed been ratified by the People, and that the time had come for the serious work of judicial interpretation and implementation to begin."\(^8\)

As we have briefly suggested, the technical jurisprudential tools exist to shift the direction of fourteenth amendment sexual (and race) equality standards to provide greater protection against state policies that reflect and enforce bias through laws cast in neutral

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81. [T]he stories we tell ourselves to build up the constitutional significance of the first two peaks—surrounding the Founding and the Civil War Amendments—differ dramatically from the story we tell to remind ourselves of the constitutional vindication of the activist welfare state. When we look back upon the first two great constitutional solutions, we tell a tale of constitutional creation. In contrast, we interpret the rise of the activist state with a different framework. Here we tell ourselves a myth of rediscovery rather than a tale of constitutional creation. The half century between 1880 and 1930 can then be viewed as a (complex) story about the fall from grace—wherein some of the Justices (not Holmes of course) sinfully strayed from the path of righteousness and imposed their antidemocratic laissez-faire philosophy upon We the People of the United States.

*Id.* at 1052.

82. *Id.* at 1055.

83. *Id.* at 1056. The constitutional transformation that authorized the modern welfare state posed a fundamentally different political issue than the more recent constitutional transformation in relation to gender equality and sexual liberty. In the 1930's the Court authorized majorities to enact legislation to implement community welfare, while the current constitutional transformation protects individuals against majoritarian bias and intrusion.
form. Careful analysis of constitutional text, history, decisions and traditions, as well as the larger moral and political values in which the Constitution is rooted, present a powerful case for the wisdom and justice of such a move. That intellectual groundwork is a necessary underpinning for constitutional change.

The lesson of Thomas I. Emerson’s work for sexual equality suggests that while coherent intellectual and constitutional theory may be necessary for change, it is not alone sufficient. The enormous shifts in constitutional doctrine on sex equality of recent years have occurred in response to popular understanding and pressure for change, as well as in response to theoretical arguments. The defeat of Judge Bork supports further change in the direction of expanded constitutional protection for equality and liberty. The work of Emerson and others provides the intellectual and conceptual framework in which that change could take place. Whether it happens or not depends upon broader, more popular, understanding and struggles. That is not, of course, to say, that the Supreme Court simply interprets the Constitution to reflect popular will. Particularly in securing equality and protecting individual liberty the Court’s role has often been, and should be, one of leadership. The defeat of Judge Bork suggests that the time may now be ripe for the exercise of that leadership.