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# ERA, THE SUPREME COURT, AND ALLEGATIONS OF GENDER BIAS

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Some see the proposed Equal Rights Amendment (ERA) as indispensable to womanly freedom in America. For others it is a dangerous effort by a miniscule, militant minority to use the constitution for symbolic self-assertion. Each of these views is buttressed with word-play often more ardent than accurate. A common argument, for example, holds that ERA is necessary to counteract what has been called the Supreme Court's "almost josephic aversion to women."[1] In a famous article published at the end of the Warren Era we were told the justices' approach to women's rights has been characterized, since the 1870s, by two prominent features: "a vague but strong substantive belief in women's 'separate place,' and an extraordinary methodological casualness in reviewing state legislation based on such stereotypical views of women."[2] In support of this and similar charges the following cases are commonly cited:[3] *Bradwell v. State*,[4] sustaining an Illinois rule against the practice of law by women; *Minor v. Happersett*,[5] upholding a Missouri law against female suffrage; *Muller v. Oregon*,[6] which distinguished between men and women with respect to maximum-

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1. This terminology comes from R. HARRIS, THE QUEST FOR EQUALITY 73 (1960).

2. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875-76 (1971).

3. *See, e.g.*, K. DAVIDSON & R. GINSBURG, SEX BASED DISCRIMINATION: TEXT, CASES, AND MATERIALS 4-25 (1974); B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW, CAUSES AND REMEDIES 4-105 (1975); R. HARRIS, *supra* note 1, at 73, Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Note, *Exclusion of Pregnancy from Coverage of Disability Benefits Does Not Violate Equal Protection*, 12 HOUS. L. REV. 488 (1975).

4. 83 U.S. 130 (1873).

5. 88 U.S. 162 (1875).

6. 208 U.S. 412 (1908).

hour legislation; *Goesaert v. Cleary*,[7] the restricting barmaid case; and *Geduldig v. Aiello*,[8] sustaining a California disability insurance program that excluded normal pregnancy. This article will suggest that these decisions (like a few others based thereon)[9] do not even remotely support the charge of "sexism" in the work of the high court.

*Bradwell*, the anti-female-lawyer case, rests with little independent discussion upon its companion decision in the *Slaughter House Cases*[10] decided one day earlier. There lies the key to much of our problem. It is crucial that *Slaughter House* was the first case in which the Court construed the fourteenth amendment—and that the justices who participated therein were not strangers to the national crises, and the discussions, that produced this and the two other Civil War amendments. It is crucial also to understand the circumstances of the case (which, one suggests, have been too often misconceived). After extensive unplanned growth, New Orleans was plagued with numerous small slaughtering establishments within its boundaries. A city effort to mitigate that noxious problem failed when several slaughterers evaded regulation by moving to a river site *above* the city, outside its jurisdiction. Dumping their waste into the river threatened the urban water supply and created the danger of an outbreak of cholera. In this impasse the state intervened. It prohibited all slaughtering in the vicinity except at a designated site on the river *below* the city. There, *following a then familiar tradition*, it induced some entrepreneurs to build *public* slaughtering facilities in exchange for exclusive toll rights for twenty-five years. These facilities were open to all who wished to slaughter for the New Orleans market, subject of course to state-prescribed tolls and health inspection. To dismiss this as a butchering monopoly (which is rather less than accurate), to dismiss it as the evil work of a carpetbag legislature, is to miss the essence of the case. The plaintiffs' position was comprehensive: by virtue of the fourteenth amendment no legislature (carpetbag, or other) could intrude upon what they called "the personal rights of men"—in this case, it seems, the right to continue slaughtering within the boundaries of New Orleans.[11] If this indeed were a fourteenth amendment right or privilege, it would be difficult to imagine what would

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7. 335 U.S. 464 (1948).

8. 417 U.S. 484 (1974).

9. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Williams v. McNair, 401 U.S. 951 (1971), *aff'g* 316 F. Supp. 134 (D.S.C. 1970), referred to in Brown, Emerson, Falk & Freedman, *supra* note 2, at 881.

10. 83 U.S. 36 (1873).

11. *Id.*, Brief for Plaintiff at 17. In their brief on reargument, at 37-38, plaintiffs recognized the state's "police power" to deal with a common law nuisance, but the law in question they argued "is a sweeping edict, that banishes from three parishes an important and necessary occupation which prevails in every community, an edict which inflicts injury upon hundreds of individuals in their property and their business . . . ." It is noteworthy that the reasonableness of the toll rates was not questioned. 83 U.S. at 65.

not bel And so, as Holmes observed later, there would be "hardly any limit but the sky" upon the meaning of the fourteenth amendment and upon the power of judges to govern thereunder.[12]

The Court met plaintiffs' expansive views head-on. It rejected substantive due process, substantive equal protection, and substantive privileges or immunities—in favor of the view that:

> No one can fail to be impressed with the one pervading purpose found in [all three Civil War amendments], lying at the foundations of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman. . . .[13]

In a word racism was the crux of the Civil War amendments as the Court saw them in that early day. Accordingly just a few years after *Slaughter House* the Court upheld under the fourteenth amendment perhaps the first modern business regulation in *Munn v. Illinois*[14]—but vetoed race discrimination in *Ex parte Virginia*[15] and *Strauder v. West Virginia*.[16]

John A. Campbell who argued so broadly for the butchers had been a member of the Supreme Court, and had resigned at the outbreak of the Civil War to join the Confederacy. Had he not left the bench, and had *Slaughter House* been presented as in fact it was, the four dissenters therein might have had a fifth vote—and American history might have been rather different. Senator Matt Carpenter, who had served prominently in the Congress which proposed the fourteenth amendment, was counsel in opposition to the expansive view. His argument was prophetic. Take care, Your Honors, he said in substance. Consider the consequences of the step now urged upon you. It means you will be compelled to pass upon the wisdom of a host of laws which in the public interest regulate the manner in which business is carried on, such as the licensing of public callings, the control of dangerous occupations, and "all existing laws regulating and fixing the hours of labor, and prohibiting the employment of children, women, and men in any particular occupations or places for more than a certain number of hours per day."[17] Obviously he foresaw the disaster of *Lochner v. New York*[18] *inter alia*.

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12. Baldwin v. Missouri, 281 U.S. 586, 595 (1930).
13. 83 U.S. at 71.
14. 94 U.S. 113 (1877).
15. 100 U.S. 339 (1880).
16. 100 U.S. 303 (1880). Mr. Justice Field who wrote the main dissent in *Slaughter House* dissented also in *Munn*, but voted to uphold race discrimination in *Strauder* and *Ex parte Virginia*, achieving thus a double perversion of the fourteenth amendment.
17. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 181 (1939).
18. 198 U.S. 45 (1905).

Most of counsels' argument in *Slaughter House*, most of the Court's discussion, and most of the main dissenting opinion, rested on the privileges or immunities clause of the fourteenth amendment. *Bradwell*, which turned all but exclusively on that provision, was no more anti-female than *Slaughter House* was anti-butcher. Neither case triggered the fourteenth amendment, because neither involved a problem of race. Both rejected laissez faire—the one with respect to butchering, the other with respect to lawyering. Both entail a federalistic concern that (absent any race problem) local businesses and avocations were within the state police power after, no less than before, the fourteenth amendment. Moreover just as Bradwell lost her privileges or immunities claim, so (with one exception soon overruled) has every *man* who has ever raised the issue.[19]

A *minority* concurring opinion in *Bradwell*, it is true, was highly male-chauvinistic by today's standards—though what was said there probably reflected the general consensus of the day. How did such language get into the *minority* opinion? Those who used it had dissented in *Slaughter House* on laissez faire grounds. Logically they would have had to dissent in *Bradwell*. Lawyering after all is a "business or avocation" and these they had insisted should be substantially free of state interference. To uphold the ban on female lawyers they had to find some reason for not applying laissez faire principles in *Bradwell*. Sexism was the answer. Here is a classic example of one gross error producing another. It is a classic example also of what it would mean to have the Supreme Court abandon *Slaughter House* in favor of judicial free-wheeling as urged by the plaintiffs and dissenters therein. The fact remains, however, that the sexist views in question were minority views, completely at odds with the Court's ratio decidendi—though today's pro-ERA polemists do not always stress that point. It is worth passing notice that while *Bradwell* was pending, "the Illinois legislature . . . passed an act giving all persons, regardless of sex, freedom in selecting an occupation."[20]

What has been said above equally disposes of *Happersett*—the female-suffrage case. If it involved no problem of race, it also involved no problem of laissez faire. Still, voting—which it did involve—like local business was a matter plainly reserved for the states. This was one of the major compromises of the Constitutional Convention. Unable to agree upon voter qualifications, the Founders resolved the dispute by leaving the problem entirely to the discretion of each individual state.[21] Whatever may be the view of the man on the street, there is no constitutional connection whatsoever between suffrage and national citizenship. Nothing in the Constitution of the United States gives citizens as such the right to vote, nor does

19. The exception is Colgate v. Harvey, 296 U.S. 404 (1935), *overruled*, Madden v. Kentucky, 309 U.S. 83 (1940).

20. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 3, at 6.

21. U.S. CONST. art. 1, § 2.

anything therein deny it to aliens. Indeed for generations we gave the vote to some aliens; we have always denied it to some citizens—male as well as female. As the *Happersett* Court observed, the fifteenth amendment would not have been necessary if the right to vote had been deemed a privilege of federal citizenship. For the fourteenth amendment plainly gave citizenship to Blacks.

Minor, like Bradwell, based her case not on the equal protection, but on the privileges or immunities clause of the fourteenth amendment. While at first the latter was stressed in litigation, it soon passed into limbo. Both conservative and liberals came to find it had shortcomings. Conservatives, bent on promoting corporate business, soon recognized the disutility of a constitutional provision that covers only citizens. It would seem difficult to get a court to hold that corporations are citizens of the United States (and thus as it was once argued, eligible for the presidency). Liberals also became disenchanted. Citizenship after all is quite accidental. It is people, *i.e.* persons (in the language of the Constitution) who are to be protected. One of the glories of the Bill of Rights is that its shield is not confined to the happenstance of citizenship. Thus for their own separate reasons both conservative and liberals found it expedient to turn from privileges or immunities to due process and equal protection.

Many young activists today feel cheated because the privileges clause has been dismissed in effect as meaningless. Their concern arises from carelessness with respect to history. They have lost nothing. Whatever activist judges—whether on the left or the right—could have read into the intrinsically meaningless privileges or immunities clause, they have proven quite capable of reading into the due process and equal protection clauses of the same amendment. And so it was that in the 1890s and thereafter both wings of *Slaughter House* were abandoned. Laissez faire became the law of the land,[22] and so in effect did racial discrimination under the guise of "separate but equal."[23]

Then came *Muller v. Oregon*[24] which some members of the women's movement—perhaps with tongue in cheek—cite as anti-feminist. This is the case in the Court's darkest laissez faire era in which surprisingly it *upheld* a maximum hour law for women. At the time and long thereafter liberals generally—including such dedicated feminists as Florence Kelley and Jane Addams—considered *Muller* a great victory.[25] Some sophisticated women now deplore *Muller* because there the Court found it not unreasonable for legislators to believe women might be peculiarly vulnerable to long hours of employment. Surely the decision to uphold the law was not unreasonable. Are we with hindsight to fault the Court for

22. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).
23. Plessy v. Ferguson, 163 U.S. 537 (1896).
24. 208 U.S. 412 (1908).
25. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 3, at 39.

reaching the "right" result by "wrong" reasoning—when that reasoning reflected the most enlightened medical and sociological data of the day, garnered in the famous Brandeis brief from all quarters of the western world? All of us—including today's most enlightened women—run the risk that our best thinking may seem quite simple-minded in the light of future intellectual efforts! Was *Adkins v. Children's Hospital*[26] indeed a better decision? There the Court, reverting to type, invalidated a minimum-wage law for women—thus treating men and women equally.

The statute at issue in *Goesaert v. Cleary*[27] denied barmaid licenses to all women except the wives and daughters of male bar owners. Challenged by a female owner and a barmaid, the measure was upheld as within allowable legislative discretion. Standing alone, the decision may be doubtful. What its critics often fail to recognize is that it was one of a series of decisions[28] by the Roosevelt Court reacting—perhaps overreacting—to the "old Court's" substantive due process and equal protection abuses. For a period of over twenty years beginning before *Goesaert* until late in the Warren era only one measure was held invalid on substantive due process or substantive equal protection grounds. That exception, *Morey v. Doud*,[29] plainly a sport, was later overruled.[30] As late as 1961 the Warren Court without dissent used the hands-off rule of the barmaid and related cases to reject even a claim of religious freedom.[31] What all these cases mean (together with the contemporary desegregation cases[32]) is in effect a return to *Slaughter House* and the historic purpose of the fourteenth amendment. Here too, as usual, women were treated no differently from men. The only exception is *Muller* which gave females preferential treatment.

In *Geduldig v. Aiello*[33] the Court found no gender discrimination in a California employee disability insurance program which denied coverage for normal pregnancy. It did however cover abnormal pregnancies and virtually all other disabilities, including prostate problems which are as peculiarly masculine as pregnancy is feminine. This later point seems meaningless, though counsel and dissenters made something of it. The insurance program did indeed cover purely male sickness, but it also equally

26. 261 U.S. 525 (1923).
27. 335 U.S. 464 (1948).
28. The leading cases are Williamson v. Lee Optical, 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947).
29. 354 U.S. 457 (1957).
30. City of New Orleans v. Dukes, 427 U.S. 297 (1976).
31. McGowan v. Maryland, 366 U.S. 420 (1961).
32. The landmark case is Brown v. Board of Education, 347 U.S. 483 (1954).
33. 417 U.S. 484 (1974).

covered purely female *sickness*. In this respect both men and women had equal protection for their different gender ailments.

Indeed so far was the program from discrimination against women that the Supreme Court could observe:

> [T]he appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, "women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits." Several *amici curiae* have represented to the Court that they have had a similar experience under private disability insurance programs.[34]

Now to the real point which the Supreme Court made at best only imperfectly. The challenged classification did not divide men and women into separate categories and treat them differently. For, even if we accept the view that "discrimination" against *some* women is discrimination against womankind, there is still this difficulty: a woman denied insurance is hurt no more than her mate, who after all by law is fiscally responsible for her care. The loss in question is a *joint* or *family* loss. The classification thus is gender neutral.[35] In fiscal matters too, which is all that is here involved, pregnant women do not tango alone! Or to change the figure, California's insurance sauce for the goose is sauce for the gander. If the money cost of pregnancy were not a burden on *both* males and females, *i.e.* if in fact it fell exclusively upon women, it would be unfair to ask male workers to pay insurance premiums to cover that risk. Women workers in that case ought to pay special increased premiums to cover the risk which is said to be an exclusively female matter. The point is of course pregnancy is not an exclusively female matter—fiscally or otherwise.

Finally there is no evidence of gender motivation in the California program. The concern in excluding normal pregnancy—a relatively high cost item—was to maintain the fiscal integrity of the program at premium levels affordable by all workers.[36] Yet why normal pregnancy instead of heart attack (also a relatively high cost item)? Surely it is one thing to require all workers to pay via premiums for sickness that may fall fortuitously upon any one of them; but something quite different to compel fellow workers to pay for the often *intended* results of self-serving private conduct. Sickness yes; but not healthy pregnancy that is either intentional, or

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34. *Id.* at 497 n.21 (citation omitted). See also the discussion *id.* at 493.

35. The California program's distinction between normal and abnormal pregnancy reflects the difference between health and sickness. The abnormalcy coverage was added only after the program had been challenged as discriminatory against women. The addition apparently was not necessary to save the program. *See* General Electric v. Gilbert, 429 U.S. 125 (1976), where the goose-gander equation would seem dispositive as in *Geduldig*.

36. 417 U.S. at 492-95.

the result of a *calculated* effort to fool nature. In short, apart from rape, pregnancy is always willful as compared to a heart attack. Moreover, given *Roe v. Wade*,[37] which some women fought so valiantly to attain, disability due to pregnancy is now voluntary as a matter of constitutional law.[38] Whatever else one may think of California's classification as a policy choice, there is no evidence of anti-female bias either in motive or effect. In short there was no "showing that [the California] distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against [females]."[39] Surely then there was no equal protection, and equally no ERA, problem.[40] The same perhaps cannot be said of California's

37. 410 U.S. 113 (1973).

38. The dissenters in *Geduldig* observe that some voluntary disabilities, *e.g.*, some cosmetic surgery and sterilization, are insured. 417 U.S. at 499. These however are in toto admittedly low cost items. If their inclusion in the program amounts to constitutionally significant asymmetry, then surely the remedy is to veto them, not to compel by judicial fiat the inclusion of bankrupting normal pregnancy—simply for symmetry purposes. For, as the Court recognized, insurance for disability due to normal pregnancy is "so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions, if these disabilities are included." *Id.* at 493.

39. Geduldig v. Aiello, 417 U.S. 484, 497 (1974).

40. Congress indeed in proposing ERA seems to have provided in advance for the *Geduldig* decision:

> The legal principle underlying the equal rights amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

Equal Rights for Men and Women, S. REP. NO. 92-689, 92d Cong., 2d Sess. (1972). This and much of the pro-ERA discussion in Congress rests on Brown, Emerson, Falk & Freedman, *supra* note 2, part III. *See, e.g.*, the discussion *id.* at 893:

> *B. Laws Dealing with Physical Characteristics Unique to One Sex*
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> The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation it might be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not, however, deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

premium schedule which, as noted above, seems to put an unjustified burden upon men (entirely apart from the normal pregnancy problem).[41]

The ultimate conclusion must be obvious: to the extent that ERA rests on alleged Supreme Court bias against women in these oft-cited cases it is without foundation. The matter may be put more broadly. With two innocent exceptions both since abandoned,[42] *Geduldig* is the only (allegedly anti-female) equal protection case that women have lost in the Supreme Court. Whether that decision sprang from sexism, neutral principle, or whatever, surely there is no reason to believe the result would be different under ERA.[43] The latter does not define what it prohibits any more clearly than does the equal protection clause. Both of course outlaw anti-female discrimination, but both leave the definition thereof, the application of abstract principle to concrete circumstances, as well as the problems of methodology and judicial remedy ultimately to judges. Thus *in both contexts* there is plenty of room for male chauvinism, if the Supreme Court is—as charged—so inclined. The point is: ERA no less than equal protection would allow judges a wide range of discretion in both substance and procedure—discretion that may be used to promote or frustrate the ideals of the women's movement. It will not do to argue that ERA would be helpful in cases like *Geduldig* (the female's only equal protection "defeat") on the ground that it would trigger "strict scrutiny."[44] For ERA—like equal protection in this context—could not trigger anything in a case wherein the Court finds (as in *Geduldig*) no gender classification. Nor is there any reason, one suggests, for believing that even in appropriate cases josephic judges would find ERA any more trigger-happy than the equal protection clause.

Finally it is at least arguable that the Court has begun to treat gender as a suspect classification when women are the victims[45]—and uphold "benign discrimination" in their favor.[46] On that basis it might follow that

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41. *See* text accompanying note 34 *supra.*

42. Hoyt v. Florida, 368 U.S. 57 (1961), upheld a state law making jury service voluntary for females, though it was compulsory for males. This decision was in effect overruled in Taylor v. Louisiana, 419 U.S. 522 (1975). As to *Goesaert*—the other alleged anti-female decision—*see* text accompanying note 27 *supra.* It was disapproved in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976). Those who find in Forbush v. Wallace, 405 U.S. 970 (1972), *aff'g* 341 F. Supp. 217 (M.D. Ala. 1971), an invidious anti-female decision may want to consider the comments in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 3, at 582.

43. *See* note 40 and accompanying text *supra.*

44. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 658 (1975).

45. Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

46. Califano v. Webster, 430 U.S. 313, 316-17 (1977), and the cases there cited.

men would be the chief beneficiaries of ERA.[47] For benign discrimination in favor of women—like one-sided "strict scrutiny"—is after all gender discrimination against men.

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47. *See* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 90-91 (1976).