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Women, Politics, and the Nineties: The Abortion Debate

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The Abortion Debate

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The fight for political empowerment of women may finally break wide open over the issues of reproductive freedom. This article posits that while public attention has focused on courtroom attempts to limit Roe v. Wade, *the issues will ultimately be decided in the political arena. Here, Estrich says, the framer of the question may be the ultimate victor. For those on the pro-choice side of the debate, the next election cycle may be their first real opportunity to vote as a bloc and wield real political power.*

It is ironic that women are actively seeking economic equality and empowerment in so many arenas when a single, noneconomic issue may serve to further create underclasses of poor women and limit or interrupt the economic advancement of women at all levels.

The Issue

Reproductive freedom, more than any other issue, will likely define "women in politics" in the 1990s. If in past years the Equal Rights Amendment or a woman on the ticket served as symbols for — unfortunately, perhaps only for — activist women, the issue for the next decade extends beyond symbolism and beyond a committed core of activists. That, in its way, is the good news. The bad news is that it is a fight which most of us never wanted. We are not seeking change. The struggle is only to hold on to a present without which most young women cannot even imagine life.

The issue is choice if you are for it, and abortion if you are against it. Words matter, and I choose mine with care. I am pro-choice.

One can debate endlessly the question of whether *Roe v. Wade*[1] was correctly decided: whether the constitutional right to privacy is broad enough to encompass a woman's choice as to when and whether to bear children. I think it is, and every pro-choice person I know agrees. Every antiabortion person I know thinks it is not. We all claim that our constitutional views are independent of our personal positions on the issue — or at least that's what many antiabortion scholars say. So we respond, "Us too," which we don't

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believe, and they don't believe. The truth, I think, is that if you see abortion as murder, it is hard to think that the Constitution protects it as privacy; but if you don't see it as murder, it is just as hard to imagine a constitutional right to privacy too narrow to embrace it. To me, the constitutional right to privacy is an argument for keeping the government out; but then, I don't see abortion as murder.

The Court Battle

We will continue to fight for choice in the courts, but someday — if not this year, then next or the one after — we must be prepared to lose. The other side will win, not because their arguments are finer or their lawyers smarter, but because they have been winning in the political process. And to the winner go the spoils — in this case, seats on the Supreme Court.

The young and the poor will lose their rights first; that process has already begun. There may not yet be five votes on the Court to completely overrule the *Roe* decision, but there are certainly five votes to restrict abortion access to minors and to single out abortion as the only medical treatment not covered by Medicaid. In coming months we should not be surprised to find five votes for a range of restrictions — from offensive and expensive consent requirements, to waiting periods that especially burden poor and rural women, to medical requirements that make abortions more expensive — that previous Courts considered unconstitutional. The challenge we face in the political arena is to ensure that such results are not viewed by the still-free majority as a sign that this year's heightened awareness of *Roe*'s vulnerability was no more than a false alarm.

I would have preferred to keep winning in the courts, but that is not presently a promising option. Like it or not, in the 1990s we will have the opportunity — and the obligation — to move "choice" into the center stage of American politics, a place it has never occupied.

The Political Arena

In my first presidential campaign, not so many years ago, I remember sitting in a meeting — quietly, since I was the only woman and the youngest person present — as one man suggested that it might be risky for Ted Kennedy to be too closely associated with the Equal Rights Amendment. No one laughed.

Today what we used to call "women's issues" have become family issues, and thus mainstream issues.[2] Today everyone is, at the very least, in favor of equal pay for equal work, and child care is no longer synonymous with a neglectful mother and a breakdown of family values. I would like to think this is because of the power we women have wielded in the political arena, but I would be stretching. It is really because, unfortunately, it takes two incomes for most of us just to keep up. If Ozzie and Harriet were on television today, Harriet — like Roseanne, Mrs. Huxtable, and Murphy Brown — would work.

An Uncomfortable Choice

Neither political party ignores women today. Child-care centers and training programs for women are conventional stops for any politician on the road to the White House, although, to be sure, the stops are not frequent enough. At the risk of oversimplification, it has always seemed to me that the Republicans tend to spend the primaries trying to win men,

and the general election campaign trying to win women. The Democrats do it the other way around. It is part of the process by which both parties try to move to the center.

In spite of this, rarely does the topic of "choice" appear on the radarscope of national politics. Most men I know, candidates and otherwise, do not like talking about choice (or abortion, if you will). I think it makes them angry or jealous or insecure. I know it makes them uncomfortable. The same is true for many women. Unfortunately, pleasant conversation about more comfortable subjects is a luxury that only those who can count at least five Supreme Court justices solidly in their corner can enjoy. We cannot.

When our Dukakis for President campaign workers tested focus groups of citizens who watched 1988's first presidential debate, the single sequence that made them most uncomfortable was the dialogue between George Bush and Michael Dukakis about criminal penalties for women who have abortions. It was also the only sequence that produced any shift in votes toward Dukakis.

The debate is uncomfortable, but that is because the issue is powerful, or has the potential to be. Not surprisingly, few Americans favor criminal sanctions for women who have abortions. Even President Bush is now with us on this issue, having changed his mind on this matter of principle over breakfast with James Baker the day after the first debate. But keeping women who have abortions out of jail is only the first step. My position — the position that would keep the government out of our private lives — is supported by as many as 80 percent of the population when the question is framed in terms of a right to privacy. Conversely, if the question is posed as "abortion on demand," we lose. This is one of the main problems: those who are against abortion have framed the question too often and for too long.

A Rose Is a Rose

I used to hate it when male politicians, struggling to take my position in a way they could stomach, would begin by telling me that they were "personally against abortion." As opposed to what? Being personally for it? Liking it? Advocating it? What I later came to understand is that they were not answering my question; they were answering the right-to-lifers.

This is one of those debates in which you can tell the winner just by hearing the question. If the issue is choice, the pro-choice side wins; if the issue is abortion, the pro-lifers win. He — or we hope in this case, she — who controls the language wins the argument. Since this is so, if we do not control the Court, we had better control the debate.

Political Tactics

An issue "works" in politics when a candidate's support translates into actual votes from those who agree with him or her. The "abortion" issue has always worked with right-to-lifers, small though their group may be.

I have not always respected the tactics that the antiabortion groups have used to advance their cause, but I have respected their commitment. I have met very few right-to-lifers who have ever voted for a pro-choice candidate. The same is not true of the pro-choice side. We have prided ourselves on not being "single issue" voters. That is to say, we have prided ourselves on our ability to make our position *not* work politically.

I am happy to argue that choice is not a single issue: privacy, autonomy, and sexual equality — which is, ultimately, the ideal we lose if we lose choice — transcend the single-

issue designation. This may be so, but to me it no longer matters. The important point is that I will not support politicians who are not pro-choice. Period. I cannot afford to.

If we are to win this issue, the majority who agree with me must take the same stance. In 1990 it is quite possible that the states will once again be free to limit a woman's right to choose. That means that the 1990 elections for each state senate and house and assembly seat, let alone for the state houses, can be, and must be, referenda on choice.

The right-to-lifers will be organized. They will not be the only ones. The men and women who will regulate abortion if *Roe v. Wade* is overturned or modified will also, as it happens, apportion seats in Congress for a decade to come. Every man I know who is in politics is waiting to see what the pro-choice advocates will do. Some are hoping we will save them; some are hoping we will go away; some are ready to take over and run things for us.

Women's Political Opportunity

For all our progress — and we have much of which we can be proud — women remain at the edges of national politics.[3] The same is true of our issues. It is even truer of our candidates, and of our campaigns. I have fought hard, as many others have, to change that. I would have preferred not to have to face the challenges we will meet in 1990. Nevertheless, our obligation is our opportunity.

As women we have a rare opportunity to wield real political power. Half the population of this country will never vote as a single bloc. Yet if ever there was an issue that could unite the great silent majority of us, it is control over our bodies. If ever there was an issue for which women should be the leaders — speaking, writing, organizing, and most important of all, running for office — it is the issue of our autonomy and our right to sexual equality. If we step up to our obligation and take advantage of our opportunity, we will change forever, more than all the symbols and tokens of the first thises and thats, the face and shape of women in politics.

Life Goes in Strange Cycles

Many of the women who have blazed the trail in politics had little choice in the end, but to stand aside or be pushed there by men. Today, however, it is our issue that stands at center stage, and our leaders, women who have earned their stripes, will stand there too, as they deserve, if not exactly as we planned it.

Many of the women in my generation waited to have children until we had changed the world, or at least found our way in it. We will spend the 1990s producing our families and fighting for the right to abortions we hope never to have.

Many of the next generation have refrained from becoming feminists, thinking they needed no labels and no help. They will discover, I fear and hope, that they no longer have the luxury of standing outside the debate. They must help one another — and themselves — now.

So must we all.

A Postscript

On July 3, 1989, the United States Supreme Court handed down its long-awaited opinion in *Webster v. Reproductive Health Services*,[4] what had come to be known as "*the* abortion

case." The decision was treated as big news, complete with correspondents racing down the Court steps to be first with special reports, evening news anchors excitedly interpreting the decision, and the full complement of morning programs and talk shows devoting their time to the issue. The consensus — in the news shows, on both sides of the political aisle, and with all sides of the debate — was that the Court decision was a major victory for the right-to-lifers and a major setback for the pro-choice position, that it was an open invitation to state legislatures to enact regulations that previously would have been considered unconstitutional. Abortion had, for better or worse, moved to the center stage of American politics, at least for the time being.

This is, of course, where I and others have been predicting it would be. Still, what makes this move so stunning is that it has come as a result of a Court decision which, as even the dissent acknowledged, did not make "a single, even incremental change in the law of abortion." Justice Harry Blackmun, the author of *Roe v. Wade* and its most fervent defender on the Court, concluded that "for today, at least, the law of abortion stands undisturbed." This is not something that was apparent from newspaper and television commentaries in the days following July 3. As one television producer responsible for booking guests told me, "We're not putting any legal scholars on for either side, because they're the only ones who aren't hyperbolic about this decision."

The Issues

Three issues faced the Court in the *Webster* case. The first was the constitutionality of a statutory preamble saying that life begins at conception. The Court majority read the preamble as doing no more than expressing a legislative value judgment. There will be time enough, the Court said, to address the meaning of the preamble should it be applied to regulate abortion in any way; until then, the Court found it unnecessary to pass on its constitutionality.

The second issue was the constitutionality of the Missouri provision making it unlawful for public facilities to be used for abortions or for public employees to assist in abortions, unless necessary to save the life of the mother. Obviously, restricting the availability of public facilities for abortion imposes real burdens on poor and rural women who are exclusively dependent on them. Such discrimination between abortion, itself a constitutionally protected choice, and all other medical services is, to me, a clear violation of the equal protection clause of the Fourteenth Amendment. But the Court, at least since 1977, has never agreed with my reasoning about this. In 1977 it heard the first such cases, which involved a Connecticut Medicaid regulation and a St. Louis, Missouri, public hospital. Again, in 1980, the Court upheld the most restrictive version of the "Hyde amendment" (named for its consistent sponsor, Republican Congressman Henry Hyde of Illinois), singling out abortion as the only "medically necessary" procedure for which the Medicaid program flatly denies federal reimbursement to states. Justice Sandra Day O'Connor, the all-important fifth vote in this case, recognized that while the Missouri statute was not facially unconstitutional under the Court's precedents, it might, if it were broadly applied to any hospital that received any form of public support, fail to pass constitutional muster.

The third issue was the constitutionality of a somewhat contradictory provision requiring physicians to act both as careful and prudent physicians and to perform necessary tests on any fetus of twenty or more weeks' gestation to determine its viability. The lower courts, interpreting the statute as *requiring* viability testing regardless of the physician's

judgment as to its necessity or desirability, held the statute unconstitutional. The Supreme Court reversed, concluding that rather than mandating testing in every case, the statute did no more than require a doctor to use medically appropriate tests, if necessary, to determine whether a fetus is actually viable when its estimated age may be greater than twenty weeks. As so rewritten, the statute — even in Justice Blackmun's view — posed little or no conflict with *Roe*.

These three issues are all that was actually *decided* in *Webster*. It is not, of course, all that was said. Chief Justice William Rehnquist, writing for three members of the Court, made clear that he was ready to jettison *Roe*'s trimester approach, which is a reasonable-sounding way to jettison *Roe*'s real protection by the sleight-of-hand method. *Roe* holds that the state's interest in protecting potential human life is not sufficiently "compelling" to enter the balance and justify regulation until viability, which occurs during the third trimester of pregnancy, or close to it. By jettisoning the trimester approach and finding the state's interest as compelling in month one (potential potential life) as it is in month nine (potential life), the plurality in the Court would, in effect, leave it to the legislatures to "balance" a woman's interest against the state's, subject only to some toothless review of its "rationality." But note that it does this without saying that women have no rights in theory — only, perhaps, in practice.

From the looks of things, the plurality approach was crafted by the Chief Justice in the hope of commanding five votes for an opinion that would have more than earned all the hoopla that this one garnered. He failed. Justice O'Connor would not go along with the outstretched sleight of hand, insisting that the case could and should be decided according to settled precedent. Her insistence earned her nothing less than the derisive scorn of Justice Antonin Scalia, who recognized that the Rehnquist position would effectively overrule *Roe*, even though he would prefer to do it more explicitly. In his concurring opinion, however, he made no effort to disguise his contempt for what he saw as Justice O'Connor's determination "to avoid almost any decision of national import."

In the end, the July 3 decision found the abortion question where most Court watchers thought it would be — with four firm votes to undermine *Roe*'s protection, but with Justice O'Connor holding more firm than many thought she would. My legal colleagues whispered that it was actually better than they expected; my political allies went on television to say that the sky was falling.

Post-Webster: Defining the Political Debate

The danger of false complacency in the pro-choice movement — the concern that a decision like the one we actually were handed in *Webster* would lead all the newly activated or about-to-be-activated to conclude that the political efforts of the past months had been much ado about nothing — was plainly avoided. For the first time ever, I found myself needing to calm people down rather than egg them on.

The greater danger is that when you say often enough that the sky is falling, it will. Legislators who have been happily hiding behind the Supreme Court and "the law of the land" line have lost their cover, if not because of what the Supreme Court actually did, then because of what it has been portrayed as having done.

In reality, it is not what the Supreme Court did on July 3, but what all of us did on November 8, 1988, that requires a redefining of the abortion debate. Justice O'Connor deserves some praise (which, unfortunately, the hype hasn't permitted) for holding as firm to precedent as she did in *Webster*. But even if she resists the pull of the plurality in the

next round of cases, the average age of the *Webster* dissenters is well over eighty. It is only a matter of time, Justice Blackmun lamented, until "a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law."

So while the lawyers will continue to argue in the Court that *Roe* is alive and nothing has changed, pro-choice activists must define the political debate to take account of the very real losses that have occurred in this arena. The challenge in the days ahead is to structure the battle so that those in the pro-choice movement are *for* women's rights, not simply *against* a range of restrictions — restrictions that, considered separately, sound reasonable but, when taken together, make women's rights once again the province of the privileged. It is too easy for the other side to couch their efforts as nothing more than reasonable regulation, not prohibition, to adopt the same sleight of hand that just barely failed in *Webster*. No wonder even Dan Quayle was quoted as urging the pro-life movement to concentrate on regulations rather than prohibitions. Divide and conquer. In politics, and still just barely on the Court, the clearer the fight and the more women who are burdened by it, the stronger the pro-choice majority. This means, ultimately, that women must stand together and insist on equal treatment — as we should.❧

Notes

1. In its 1973 decision in *Roe v. Wade* 410 U.S. 113, the Supreme Court legalized abortion.
2. See Mary Jane Gibson's article in this volume for a discussion of a subject that has become an economic, mainstream issue.
3. See Cathleen Douglas Stone's article in this volume for a further discussion of the level of participation of women in politics.
4. *Webster v. Reproductive Health Services* 109 S.Ct. 3040 (1989).

This has always been a man's world, and none of the reasons hitherto brought forward in explanation of this fact has seemed adequate.

— Simone de Beauvoir
Le Deuxième Sex