Representative Bella Abzug, is fair game when talking about legislative history. Those are the framers of this amendment. Unless you have very explicit legislative history negating some of the ideas that have been suggested to flow from the words, of the Federal ERA the fact that there have perhaps not been radical changes as a result of State ERA's is not going to make much difference.

I also wish to reiterate a point that has been made by several of the Congressmen, which is that the Federal courts and not the State courts are going to interpret this amendment. Generally, State judges are more accountable; they are closer to the people and closer to local conditions than Federal judges who are appointed with life tenure, and those who are concerned about “government by judiciary” have primarily been concerned with the Federal courts. One of the major problems that has been associated with the ERA over the last 10 years, and one of the major reasons it was defeated the first time, is that people perceive this as a transfer of power over things that are traditionally handled by State legislatures to the Federal courts, and that is something that simply cannot be said about a State equal rights amendment. So we must discuss this equal rights amendment, not others.

Finally, however, some of the horror stories have in fact materialized. To talk about “coed restrooms” when you talk about the problems that have been asserted to do with the ERA is a little bit disingenuous, because, as Governor Lamm suggested, there are some problems which are not quite coed restrooms and yet which are not quite “equal pay for equal work” either; and it is those in between problems that must be addressed.

The problem, it seems to me, with the equal rights amendment is that, as it is currently formulated, and with the current legislative history, it states a slogan, not a principle.

There are several radically different principles that that slogan might embody.

The first one, and what I think is probably the one that 70 percent of the American people in public opinion polls think they are getting, is the rational basis test that you can’t discriminate against women because they are women, or against men because they are men. But, of course, as almost all of the proponents of the equal rights amendment say, that is not actually what we are going to have if we get the equal rights amendment.

We are going to have at least something called strict scrutiny. That is a term of art describing the standard that has been applied to race discrimination under the 14th Amendment; and if we start trying to treat sex like you treat race, we are going to raise problems having to do with “separate but equal” facilities; such as prisons and schools. And many statements by proponents of the equal rights amendment, including the Civil Rights Commission report, as well as the seminal article on the ERA by Professor Emerson and three other authors, suggest that single-sex prisons and single-sex public schools would be impermissible under the ERA.

I don’t know whether it is sound educational strategy to have single-sex public schools or not. I do think it would be possible to have them without saying that either boys or girls were inferior. It is not irrational to recognize that adolescents behave differently
when they are around members of the opposite sex. I don't think that kind of thing ought to be in the Constitution. And yet there is so much legislative history suggesting that the ERA would require a strict scrutiny standard. The Emerson article suggests that there would be an absolute antidiscrimination rule. Single-sex public schools would become unconstitutional, and single-sex prisons would become unconstitutional.

Pennsylvania has the most detailed case law under a State ERA. There was a holding that under a strict scrutiny standard, the Loving v. Virginia case—which says it is unconstitutional to prohibit blacks from marrying whites and whites from marrying blacks—must be applied to a law that said that men could not massage women and women could not massage men in massage parlors. The purpose of the law was to prevent illicit sexual behavior, and the court held that was not a compelling justification. One of the reasons they said it was not compelling was because it discriminated between heterosexual and homosexual conduct, by reaching only the possibility of heterosexual prostitution in massage parlors and not the other. This suggests that the equal rights amendment has something to do with something other than equal pay for equal work.

Similarly, in Pennsylvania the court held it was unconstitutional under the State equal rights amendment to have all boys' and all girls' athletic teams in the public high schools. That will do for a horror story until one comes along.

It strikes me that this is not what the American people think they are getting. I am not saying you can't cure it with lots and lots of legislative history in this committee and in the Congress as a whole, but I am saying that—

Mrs. Schroeder. Mr. Chairman, could I ask the witness a question?

I am a little distressed by what you are saying.

Do you really think we want the equal rights amendment so we can have heterosexual massages?

Mr. Ries. I am not suggesting that that is your motive.

Mrs. Schroeder. I find it very insulting as a woman to listen to that kind of thing.

Mr. Ries. I am sorry. I am trying to address this as a professional and try to tell you what I think it means. I can't say anything about your motives. You know more about that than I do.

This has been the experience in Pennsylvania. There was that holding. There was the holding that you have to have coed football and wrestling teams. Those sports were specifically mentioned in the opinion. Therefore, it is not clear that strict scrutiny is going to result in all sweetness and light and no horror stories.

The big issue, and the one that worries me personally a lot more than some of these other things, is the abortion financing issue, which, as Governor Lamm quite honestly suggested, is at least an open one under the equal rights amendment. It is important to remember that the court's decision upholding the Hyde amendment was a 5 to 4 decision, and one of the necessary prerequisites to that decision was that neither poverty nor sex is currently a "suspect classification" meriting strict scrutiny under the U.S. Constitution, according to the Court. If it had been, more than a rational basis would have been necessary to uphold the discrimination between abortion, which is an operation only a women can have, and other operations that men as well as women can have.

I suggest that under a strict scrutiny standard a refusal to fund abortions would be judged similarly to a refusal to treat sickle cell anemia which affects blacks but not whites, while funding cures for diseases that affect everybody else.

I believe that a lot of the feminist groups that are strongest behind the ERA really do think abortion financing is an important issue and would very much like to have it. They see it as an equal protection issue. Several groups, Planned Parenthood and the ACLU and other groups which have been supportive of the equal rights amendment, filed amicus briefs or were litigants in some of the State cases, and they urged that the State ERA's did mandate abortion financing. There was a very instructive paragraph in the Massachusetts Civil Liberties Union Newsletter that said, we really didn't want to bring this issue up before final ratification of ERA because we know it will be used as an argument against ERA. We had to do the best job we could for our clients, and we believe to discriminate against this operation is a violation of the State Equal Rights Amendment, and, therefore, we had to do it. We will see a significant effort by the Civil Liberties Union and other organizations to use the Federal ERA to mandate abortion funding and I am not at all confident that that effort will not be successful.

Another area in which I think there are important differences between the ERA as it might be perceived and some of the things it might actually do is the affirmative action problem, and the problem of a purpose test versus an effects test. The difference between saying that somebody's rights have been violated if they can show that they have been discriminated against, and that a government or private entity has to embark on a massive restructuring of its institutions to achieve certain numbers, certain statistical goals, is a big difference, even in the race area and very controversial there. It is very clear from the statements of ERA proponents, including the Civil Rights Commission, that this would be an affirmative action amendment, not just an individual rights amendment. It would not merely forbid people from discriminating in individual instances, and it would create presumptions in favor of a designated victim class if certain goals had not been reached. I don't think that is something that you ought to pass without giving it a lot of consideration.

The other problem that I think has not really been answered, or rather has answered in contradictory ways, is the State action versus private action problem.

There are many statements of proponents which make it very clear that the ERA is only going to affect State action, not private action. Yet we hear that the equal rights amendment is going to solve the economic problem of women not making as much as men in grocery stores, and so forth, the 59-cents-on-the-dollar problem. You cannot have it both ways. Overwhelmingly, the discriminating employers are private employers. The two cases cited in Colorado that had anything to do with employment discrimination were not decided on the basis of the equal rights amendment, but on the basis of the 14th amendment. Right now, if anybody can go in and
show that the State or Federal Government is discriminating against her in employment, in wages, she will win. If that is what you need the ERA for, you don’t need it.

The only area that they have held that government discrimination is all right, is Members of Congress. Members of Congress can discriminate by sex. That is not something that has been held to be covered by section 1983, and if that’s the only thing you are worried about, I can draft a statute for you in just a minute to take care of that problem, and you don’t need to worry about the equal rights amendment if you are simply trying to put your own house in order.

Marna Tucker testified before the Senate the other day, and she suggested that this is going to have an impact on private sector discrimination. Specifically, she said that the current statutes that affect sex discrimination in the private sector only affect employers with 15 employees or more, and she says that the ERA will change that; that that is a glaring omission that will be cured by the ERA. We have two conflicting principles, then. One is the ERA which only affects State action, and the other would affect private action, and I don’t think it is at all clear. If I were a judge, I would have no basis to choose which would happen, because there are statements on both sides.

In any case, the State action barrier may prove to be illusory. The Bob Jones case, only decided about a month ago,— and that is a reason why there has not been any litigation on this under the State ERA’s—suggests that tax exemptions ought to be treated like subsidies, and if that is true, then a lot of things that we previously thought of as private action, such as actions of religious institutions, are going to have to be treated as State action.

Under a strict scrutiny equal rights amendment, there is no good argument that I can think of to say that a school that only admitted women or only admitted men would be any different than a school that admitted only blacks or only whites, and if a private school has got that tax exemption, then that ought to be taken away, logically. I think that there is a big difference between a school that only admits women and a school that only admits blacks, and probably most members of the committee would think that there are differences, but when you buy into strict scrutiny, you are denying yourselves the right to claim that we all know it is different. You might want to consider changes in the language of the equal rights amendment so that won’t happen.

There is no question that the Catholic Church is a sex-biased religion, as that term is currently used in the feminist movement. There is no question that Orthodox Judaism and other religions do discriminate against women. Do you want to take away those tax exemptions?

The equal rights amendment, if you plug in the case law, would have that effect, the strict scrutiny case law would have that effect, and that is the most logical projection. What all this really amounts to is not that I can tell you absolutely that the Federal courts are going to do any of these things, or that the equal rights amendment absolutely needs to do any of these things. The equal rights amendment would be a charter to the Federal courts to go out and do what they think is right in the sexual area, because there is no clear legislative history, and there are so many conflicting statements that would otherwise be authoritative; and that is really why so many people are opposed to it.

You can talk about coed restrooms all you want to, but those are a cartoon illustrating the kinds of problems that might really happen under the equal rights amendment.

It is true, as Senator Tsongas pointed out, that under any amendment, you don’t know what is going to happen at the margins. There are always going to be some marginal questions you don’t know the answers to, and also you really can’t do anything about the judges just violating the clear legislative intent; but the equal rights amendment is different from previous amendments in that there is an awful lot of support among proponents of the amendment for the proposition that the amendment is precisely a charter to the Federal courts to make the rules, a commission to be a continuing sexual constitutional convention. If you do not want that, the best way is to discard the language that has been kicking around for 10 years, and that has all this other legislative history attached to it; come up with new language and new legislative history.

Thank you.

[Professor Rees’ prepared statement follows:]

STATEMENT OF GROVER REES III, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF TEXAS, ON S.J. RES. 10, THE PROPOSED EQUAL RIGHTS AMENDMENT

Mr. Chairman and Members of the Committee: I must begin with what is by now the ritual observation that it is possible to have both a deep commitment to the principle of equal rights under the law and grave reservations about the amendment proposed in this resolution. Unforunately, it appears that such reservations are being taken no more seriously by supporters of the resolution—as bases for discussion and possible compromise—this time than last time. Senator Paul Tsongas, a principal sponsor of the resolution, recently dismissed those who cannot support the E.R.A. in its current form in these words: “History does not treat well those who stand at the court house door. They are remembered by history as not part of the hope and solution of America, but part of the fear and the darkness that reside in all of us.”

I believe that Senator Tsongas spoke the truth, although perhaps not the truth he intended to speak. First, the fact that the principal supporters of the E.R.A. feel that the only lessons they have to learn from their first defeat pertain to strategy and tactics—that they have apparently not even paused to consider whether the substance of their proposal can be improved—illustrates the lack of any genuine effort on the part of the Senate to learn the lessons of the past. And for those of us who believe that standing in the courthouse door is sometimes an honorable and a necessary task, the Senator’s harsh words are a bracing reminder that the goodness or badness of our actions does not depend on whether we stand with or against the wave of the future. Rather, it depends on who or what is trying to get into the courthouse. I cannot support the resolution in its current form because I do not know what it means. Of course it is true that every constitutional amendment will engender litigation, and that there will always be some litigation at the margins of the intended coverage of the provision whose outcome cannot be predicted. When I say that I don’t know what this proposal means, I refer to more than these unavoidable and relatively trivial phenomena. I mean that if I were a judge deciding a case that was at the very heart of what the E.R.A. is supposed to be about—employment discrimination, for instance, or unequal distribution of government benefits—I would be unable to decide without choosing arbitrarily from a number of conflicting principles, any of which might be the central principle that the Equal Rights Amendment enacts into fundamental law. Because each of these contradictory principles is sometimes said to be the true principle underlying the proposal, there is at this point no Equal Rights Amendment. There are, in fact, at least six different Equal Rights Amendments. Although they are all couched in the same language, I could enthusiastically support some of them and would vigorously oppose others. I hope to
One version of the Equal Rights Amendment would forbid the government to discriminate on a sex-neutral basis. This is the most stringent formulation and the one that the states that ratified the amendment within one year of its first proposal thought they were getting. It would be roughly equivalent to a constitutional enactment of the "national basis" test that the Supreme Court has devised to deal with discrimination by mixed criteria other than race under the Fourteenth Amendment. The anti-E.R.A. "parade of horribles" would have little force against this version of the amendment, since it would forbid only discrimination against women because they are women, or against men because they are men. The military would be free to exclude women from combat duty if it could show that it was doing so because of risk and burdens inherent in a sex-integrated combat force rather than because of preconceptions about women's "place." Single-sex high school classes would not be constitutional, since school boards would be free to recognize that adolescents tend to act differently when they are not, and to choose among educational strategies that react to this fact in varying ways. In short, the only discrimination that would be forbidden would be that which had no rational basis other than the idea that one sex is inherently inferior or less deserving that the other, or which were more burdensome to members of one sex than to another equally effective means of pursuing some rational goal. In my view, this amendment is about the only one that the majority of Americans would know how to enact. It would represent practically no change from the Court's current decisions under the Fourteenth Amendment, but it would be less subject to erosion because it would have a much firmer constitutional basis.

Almost all of the constitutional lawyers who have been associated with the E.R.A., however, and many of its political sponsors as well, have made it clear that they want much more than a "rational basis" test. The most common formulation is that sex would become like race, a "suspect classification" triggering "strict scrutiny." This formula has led to most of the amendment's political problems: If sex had been a "suspect classification," for instance, the Supreme Court would almost certainly have decided that there is a constitutional right to abortion funding. If sex were treated like race, a legislative program that funds other operations but not abortion would be constitutionally identical to a program that funded cures for every disease except anemia, to which only blacks are susceptible. Similarly, "strict scrutiny" strikes down most, if not all, "separate but equal" educational programs. Although proponents of the "strict scrutiny" version of the E.R.A. have attempted to avoid some of the more awkward consequences of their formula by arguing that the "right to privacy" trumps the right to equal protection, I suspect that a white man who argued that his "right to privacy" gave him a right to be separated from black men in restrooms or slum housing in government institutions would find little sympathy in the courts. It is, of course, true that being forced to disrobe in front of members of the other sex is different from being forced to disrobe in front of members of another race. The argument that sex is different from race, however, is the argument that the "strict scrutiny" formula is supposed to take away from all other litigants except those in "privacy" cases. Since the one sex E.R.A. proponents oppose is the one sex that is the victim of discrimination by sex, it is ridiculous to argue that the amendment will cause co-ed restrooms, there must be some other principle that explains this anomaly; but I cannot say what it is. Other and more serious consequences of transporting the jurisprudence of race discrimination into the sex discrimination area would be serious challenges to such institutions as all-female athletic teams and the provision of government benefits to heterosexual married couples that are denied to similarly situated homosexuals.

A third plausible version of the Equal Rights Amendment is that proposed by the four authors of the Yale Law Journal article that is widely regarded as the authoritative legal reference work on the Amendment. This version of the amendment would apparently make sex an even more suspect classification than race. Although the authors state that the source of constitutional, and in other cases they argue that sex classifications would be absolutely forbidden. In addition to resolving all doubt about this, they argue that in the "parade of horribles" as women in combat and male guards in women's prisons—indeed, there could not be any separate women's prisons—this standard would probably eliminate the requirement that discrimination be "purposely" in order to be unconstitutional. Thus any law which had differential impacts on men and women, even if it was formally neutral and served some entirely rational purpose—height requirements in the Marine Corps among other significant examples—would be subject to constitutional scrutiny that is stricter than strict.

The shift in focus from a prohibition of purposeful discrimination to differential impact brings us to a whole host of Equal Rights Amendments, including equal protection principles that have been labeled the "equal outcomes model," the "equal respect model," and the "affirmative action model," that I will lump together as American versions of the "proportionate representation" of the Yale Law Journal article observed, "[p]rotection against indirect, covert or unconscious sex discrimination is essential to complement the absolute ban on explicit sexuality discrimination. . . . Past discrimination in education, training, economic status and other areas has created differences which could readily be seized upon to perpetuate discrimination under the guise of policies that do not formally or consciously discriminate. . . . All the variants of the Equal Rights Amendment have made it clear that they wish to impose on governments at all levels an affirmative obligation to bring about a "non-sexist society." The monetary costs of this enterprise to the governments on whom the obligation will be imposed, and the monetary and non-monetary costs to individuals who are adversely affected by affirmative action programs, as well as the restructuring of social institutions that will be necessary to achieve a "non-sexist society" measured by the percentages of women in various occupations, positions, and income levels, will be proportionately greater than the costs of such programs for minority groups with fewer members. One picture of a "non-sexist society" has been presented by Professor Richard Wasserstrom: "On the attitudinal and conceptual level, the assimilatization ideal would require the eradication of all sex-role differentiation. . . . A nonsexist world might conceivably rationalize sex as a matter of preference, but any kind of sexually exclusive preference would be either as anomalous as or statistically fortuitous as is a sexual preference connected with eye color in our society today."--

The question is whether it is desirable to have society in which sex-role differences are to be retained at all. The straightforward way to think about that question is to ask what women themselves will want of the extremely varied and the range of opportunities that they might expect from the future development of the "nonsexist society" that the proponents of the E.R.A. premise say about what may be right about any nonassimilatization ideal."

The fifth possible Equal Rights Amendment is the "private action" model. It has been brought in a year of activism and a year of activism with the second amendment, as a tool for achieving gender equality. Tucker of the Women's Legal Defense Fund testified last month before the Senate Judiciary Committee that Title VII of the 1964 Civil Rights Act contains a "glimmering omission" in that it "fails to protect the employees of employers of fewer than 15 employees. I thought that the provisions to which Ms Tucker referred applied only to private employers, and yet Ms. Tucker cites the "glimmering omission" of those with fewer than 15 employees as one that "clearly calls for the remedy of an Equal Rights Amendment. One way in which the Equal Rights Amendment could impose obligations on employers might be by empowering Congress to enact legislation affecting such employers, but it is no more clear that Congress would have such power under the E.R.A. enacted under existing constitutional provisions, and in any case Ms Tucker's citation of Congress in this area is unfair, because the Equal Rights Amendment now contains a version that is more limited in its scope than the E.R.A. would cure suggests that she must have something other than Congress action in mind. Another possibility is the expansion of the definition of "private action" to cover, for instance, institutions receiving government benefits, tax exemptions, or licenses. This would call into question the constitutionality of single-sex private colleges, and might also cause religious institutions such as the Roman Catholic Church to question their status under the Equal Rights Amendment. But in any event the "private action" version is a far narrower version of the E.R.A. than some other versions. The amendment of the E.R.A. that is most likely to be adopted is the one that will require all public and private employers to treat employees of both sexes equally.
Catholic Church which retain an all-male ministry to lose their tax exemptions. Those who argue that such tax exemptions are required by the First Amendment are referred to the Court's recent decision in the Bob Jones case. If sex discrimination is to be treated like race discrimination, the Catholic Church has exactly the same constitutional right to its tax-exempt status as the racially discriminatory religious schools. Yet another court has held that churches can be affected by the Equal Rights Amendment would be through remedies designed to compensate for past government discrimination. Just as schoolchildren who are not themselves the defendants in desegregation suits must bear some of the costs of the busing remedies imposed as a result of such suits, the government might be required to restructure its activities in such ways as to penalize private parties (e.g., employers with fewer than what is deemed the appropriate number of women) in the course of compensating members of the designated victim class. In short, the "state action" limitation could—in the absence of action by Congress to eliminate the possibility before proposing the Amendment to the states—prove illusory. Indeed, private employment discrimination, the most powerful arguments that have been made on its behalf amount to false advertising. And if it can reach private employment discrimination, then important cases are raised about what other kinds of non-governmental conduct will be illegalized by the Amendment.

The sixth and most likely Equal Rights Amendment reads simply, "The federal courts shall make whatever rules they believe are desirable to implement their own vision of a society in which men and women are properly treated." This is rather clearly the version in which Senator Tsongas believes: In answer to questions at the Senate Judiciary Committee Hearings, he stated that he has not been asked the Supreme Court to resolve. When asked about the impact of the E.R.A. on abortion funding restrictions, single-sex colleges, and the tax exemption of the Catholic Church. He later said that he was not clear as to whether there was any "denominator in the same way for laws coming out with that kind of excitability"—even the basic question of whether a "rationally" or "obviously" sex discrimination in a selection process would be enough is still unanswered. The question Senator Tsongas was content to leave to the courts. Nor is the Senator alone in his view of judicial discretion: in a 1977 article entitled "Let's have the E.R.A. as a Signal," Professor Ruth Bader Ginsburg, now a federal judge, stated that the E.R.A. would be a signal to the Supreme Court. In a proposal that "articulate general principles and develop the coherent opinion pattern lacking in the multiple-part sex discrimination area. The Court would be constrained only by the requirement that "so far as laws and officialdom are concerned, males and females will be free to grow, develop, and aspire in accordance with their individual talents, preferences, and capacities."

The problem with the Equal Rights Amendment is that it states a slogan rather than a rule. Since there is strong support in the legislative history for each of a number of conflicting principles, a proposal and ratification at this point would be an invitation to the courts to amend the Constitution as they see fit, choosing from among the competing legislative histories in order to rationalize the desired result. While it is true that every set of constitutional framers must anticipate judicial legislation, it is not clear that the E.R.A. would make the Supreme Court more likely to do so. After all, it is the first time that Congress and state legislatures have deliberately abdicated their responsibility to decide which fundamental principles they wish to constitutionalize and which they do not. And there is a real danger that the majority of the American people might acquiesce in ratification by their representatives because they believe in one version of the Amendment—probably the "rational basis" version affecting only purposeful government discrimination—only to find themselves governed by a quite different provision embodying affirmative action requirements, illegalization of private conduct, and hyperstricture of single-sex schools, heterosexual marriage, and abortion funding restrictions.

If one were to include the inclusion of women in the Constitution and to eliminate invidious sex discrimination by governments, it is not likely to be achieved by proposing this language, which has been associated for too long with a very different agenda. A national constitutionalizing the "rational basis" test, with language making it clear that the amendment shall not be construed to effect certain results, would achieve these goals with few of the risks of undesirable results associated with the current version—and without commissioning the federal courts as a continuing sexual constitutional convention. Moreover, precisely because it would not have these undesirable effects, a "moderate" Equal Rights Amendment would stand a far better chance than the current "radical" proposal of ratification by the states.
Mr. REES. If we had the 14th amendment to do over again, there are a lot of people at least who would say let’s have a 14th amendment that guarantees equal rights for blacks and does not give the Federal courts a chance to decide that there is a fundamental right to abortion, and cases like that. What we are trying to do is to get the good things that the ERA is supposed to do without, for instance, getting abortion financing.

Mr. KASTENMEIER. We may differ on policy grounds about what we would like to see, but the point I am making is that the very general sweep of some amendments to the Constitution has been useful in this Republic in vindicating rights, and sometimes it took a long time for it to come about. That is perhaps where we differ, you and I.

Thank you, Mr. Chairman.
Mr. EDWARDS. Mr. Sensenbrenner.
Mr. SENSENBERNER. I would like to talk about the abortion financing question, because the surveys that I have seen indicate that the support for not using tax dollars for financing elective abortions is about as strong as the support for the ERA as a slogan, and I am concerned that the ERA might be used as a bootstrap to expand abortion rights.

You mentioned in the course of your testimony that there have been lawsuits in several States, including Massachusetts, and one of the questions I was going to ask the Speaker, had he stayed around, was whether he would support a specific amendment which I plan to offer that says that the ERA has nothing to do with either expanding or contracting abortion rights.

Do you think such an amendment is necessary in order to foreclose that door from being open by someone who wishes a court to do so?

Mr. REES. Absolutely. Even on the abortion issue, itself, which the court has decided based on a right to privacy that they found in the 14th amendment, many of the academic articles that have been written suggesting better formulations or more plausible formulations for the abortion right have focused on equal protection. So even if the court were willing to overrule the privacy ground, to the extent that sex is treated like a race under the Constitution, you can’t say the equal rights amendment would not have anything to do with abortion. Groups like the Civil Liberties Union will be arguing that it does. The responsible thing to do is to foreclose the issue now, rather than waiting for the courts to decide.

Mr. SENSENBERNER. I have a second question. Roe versus Wade did allow a prohibition against abortions during the third trimester of pregnancy based upon the fact that the fetus is viable and the inherent dangers to medically perform abortion during the last 3 months of pregnancy.

Do you believe that that part of Roe v. Wade would be subject to a constitutional attack and there could be no restrictions up until the moment of birth if the argument is accepted by the court?

Mr. REES. Both sides in the recent abortion opinions did not have much use for the trimester formulation. That was what Roe v. Wade created, and Justice O’Connor in her recent dissent suggested that it is on a collision course with itself because viability is moving back and medical technology is moving forward, and so forth. I really can’t say what the courts would do on that question, but I don’t think it is totally ridiculous to think that the courts would do what you suggest. Bella Abzug, for instance, who was a strong advocate of the ERA, also reacted very strongly against Roe v. Wade because she said that in the third trimester, where the baby is viable and could be saved if it were born, even in that case the woman has a fundamental right to decide what she wants to do with her own body, and she saw it as an equal rights issue. I think there would be people arguing that. I can’t say whether the courts would buy it.

Mr. SENSENBERNER. As you know, there have been some court decisions relative to the fact that the father does not have the right to prohibit his spouse or the woman who is bearing the child that desired to have an abortion; if that is the woman’s desire, do you think the ERA would have any effect on that, if it should be ratiﬁed?

Mr. REES. If it did, that would be positive from my point of view, and perhaps it is only my extreme pessimism about the Federal courts that makes me think they would find an exception somewhere.

Roe v. Wade—logically if you can’t have discrimination between men and women you could say that that means the father has equal rights. But I think that the courts would simply say that it is the woman who is carrying it in her body. Somebody has to make the final decision. If the wife wants an abortion, and if you let the husband veto it, he makes the final decision, and you are discriminating against the woman, and if you have to discriminate against somebody it should be the person who is not carrying the fetus in his body.

Mr. SENSENBERNER. The questions that you have raised indicate that perhaps we ought to consider section 2 that says what this thing should not do if the committee should pass it out.

Mr. EDWARDS. Mrs. Schroeder?
Mrs. SCHROEDER. I think one of the things you did is, just as we put one cartoon to bed you bring some more out. There is a tad of that in what you are doing.

But I want to point out a couple of things that are very important. You missed the fact that in Colorado part of the reason we don’t have a lot of case law on job opportunities for women is because the legislature changed the laws. We did not force people to go into court, and if you look at the equal rights amendment at the Federal level, we are talking about doing the same thing. Two years to change the law, with computer and everything, we hope to do that, so we don’t have to go to court and do it on a case-by-case basis. I think that is important to point out, and many States have done that.

Mr. REES. Many States have done it, and many States have done it that don’t have State ERA’s, and many have done it that have ERA’s, but are not strict scrutiny ERA’s.

I am not suggesting the equal rights amendment would not have that effect. I am suggesting the effect is superfluous, because that can be done under the equal protection clause.

Mrs. SCHROEDER. I disagree. There are many things that the equal rights amendment helps you to do, because it motivates the