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Women's Rights and the Proposed Family Protection Act

KAREN FLAX*

In this article, the author examines the potential ramifications of the Family Protection Act, a bill recently introduced in the Senate by Senators Jespen and Laxalt. The author criticizes the bill both as a mechanism for legislatively enforcing the traditional role of women in American society and as a threat to civil liberties in general.

I. BACKGROUND AND AIMS OF THE FAMILY PROTECTION ACT	142
II. THE FAMILY PROTECTION ACT AND THE ABRIDGEMENT OF SPECIFIC RIGHTS OF WOMEN	145
A. <i>The Right to Contraceptives</i>	145
B. <i>The Right to Abortion</i>	147
III. THE FAMILY PROTECTION ACT AND THE FOUNDATIONS OF THE WOMEN'S MOVEMENT	151
IV. THE FAMILY PROTECTION ACT AND CIVIL LIBERTIES BEYOND WOMEN'S RIGHTS	159
V. CONCLUSION	162

The present political climate in Washington threatens the women's rights movement in ways ranging from the defeat of the Equal Rights Amendment to the elimination of affirmative action programs. A commitment to what are called "traditional family values" is central to this conservative attitude. Many conservatives see the women's rights movement as a special threat to these values because the movement seeks to give women the right to assume roles other than those they have historically occupied, such as their roles in the traditional family. The purpose of this article is to show how a specific piece of proposed legislation, the Family Protection Act of 1981,¹ threatens not only the specific rights of women, but also the very foundations of the women's rights movement. Although external to its central concerns, this article will conclude by suggesting how the Family Protection Act jeopardizes civil liberties beyond the immediate area of women's rights.

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1. S. 1378, 97th Cong., 1st Sess., 127 CONG. REC. S6324 (daily ed. June 17, 1981).

I. BACKGROUND AND AIMS OF THE FAMILY PROTECTION ACT

On June 17, 1981, Iowa's Senator Roger Jespen and Nevada's Senator Paul Laxalt introduced the Family Protection Act (FPA) in the United States Senate. As Senator Jepsen remarked, "The purpose of the act is to preserve the integrity of the American family, to foster and protect the viability of the American family by emphasizing family responsibilities in education, tax assistance, religion and other areas related to the family and to promote the virtues of the family."² The opening section of the bill announces both a legislative finding that "certain Government policies have directly or benignly undermined and diminished the viability of the American family,"³ and a legislative intent that henceforth "the policy of the Government of the United States should . . . be directed and limited to the strengthening of the American family and to changing or eliminating any Federal governmental policy which diminishes the strength and prosperity of the American family."⁴

According to its sponsors, a primary aim of the bill is "to restore the responsibilities for strengthening the family to the unit itself" in areas such as education, religion, and domestic relations.⁵ Thus, sections of the bill, beyond the scope of this article, contain provisions for tuition tax credits for parents who send their children to parochial and other private schools.⁶

In addition to the perpetuation of "family values," a secondary aim of the FPA is to strengthen the rights of states by providing for "[a] shift in responsibility from the Federal Government to the State and local government."⁷ Thus, sections of the Act would allow states to suspend school attendance requirements and teacher certification without federal interference.⁸ Other sections

2. *Id.*

3. S. 1378, § 2(b)(3), 127 CONG. REC. at S6329.

4. *Id.* § 2(b)(4), 127 CONG. REC. at S6329.

5. 127 CONG. REC. at S6328.

6. S. 1378, § 201, 127 CONG. REC. at S6330-32 (proposed I.R.C. § 221(a)-(e)). Tuition credits have long been high on the conservative political agenda. Their availability would put the choice of public or private schools within the reach of many who presently cannot afford the latter.

7. 127 CONG. REC. at S6328.

8. S. 1378, § 302(a)(1)-(2), 127 CONG. REC. at S6334-35. These sections provide that: Federal funds shall not be withheld under any provision of Federal law nor shall any provision of Federal law be construed to prohibit—

(1) the right of any State or any State or local educational agency to determine the qualifications required of teachers within the jurisdictions of such agencies, including the right to make a determination that no certification re-

would prevent federal agencies from defining spouse abuse⁹ and child abuse¹⁰ more broadly than they are defined by state laws. Despite these provisions, other features of the FPA would offend a traditional understanding of states' rights, causing doubt as to whether the sponsors have a genuine interest in strengthening states' rights. Paradoxically, although ostensible states' righters, the FPA's sponsors are calling for a new national policy in behalf of family values—a *national* policy in family relations, education, and other areas traditionally left to state control.¹¹ Senator Laxalt calls the proposed Act no less than

an integral part of a process to develop a new awareness of the importance of the family to American society and to develop Federal policies designed to foster and encourage that family. . . . In essence today we are not merely reintroducing a Family Protection Act but we are reaffirming a family protection movement.¹²

As one might expect from this new assertion of federal power, several provisions of the FPA seek to defeat state efforts to view family values and supporting educational structures from a different perspective. Thus, the bill requires the withdrawal of federal funds from any state program that provides contraceptive or abortion services or information to unwed minors without prior parental notification,¹³ or from any entity engaged in "advocating, promoting, or suggesting homosexuality, male or female, as a life style."¹⁴ Moreover, the bill mandates the withdrawal of federal funds from any agency that excludes parents or unspecified "representatives of the community"¹⁵ from participation in curriculum

quirement will be imposed;

(2) the right of any State to set or refuse to set attendance requirements at public or private schools within their jurisdictions, including the right to determine that no such attendance requirement will be imposed.

9. *Id.* § 105, 127 CONG. REC. at S6330. This section provides, "No Federal law, program, guideline, agency action, commission action, directive, or grant shall be construed to abrogate, alter, broaden, or supercede existing State statutory law relating to spousal abuse or domestic relations."

10. *Id.* § 104, 127 CONG. REC. at S6329. Subsection (a) provides, "No Federal program, guideline, agency action, commission action, directive, or grant shall be construed to abrogate, alter, broaden, or supercede existing State statutory law relating to child abuse."

11. S. BARBER, ON WHAT THE CONSTITUTION MEANS 73-75 (1982).

12. 127 CONG. REC. at 6344.

13. S. 1378, § 102(a)-(b), 127 CONG. REC. at S6329 (proposed General Education Provisions Act § 440A; see 20 U.S.C. §§ 1221-1233h (1976 & Supp. V 1981)); see *infra* text accompanying notes 25-72.

14. S. 1378, § 108, 127 CONG. REC. at S6330.

15. *Id.* § 301(a), 127 CONG. REC. at S6334 (proposed General Education Provisions Act

decisions relating to the study of religion,¹⁶ requires union membership of teachers,¹⁷ or prohibits "parental review of textbooks prior to their use in public school classrooms."¹⁸ These provisions follow the practice of conditioning federal grants-in-aid on state acceptance of national policy, a practice traditionally resented by conservatives as indirect violations of states' rights.¹⁹ The FPA also employs this practice in a provision that prohibits the use of federal funds for the purchase of educational materials that "do not reflect a balance between the status role of men and women . . . [and] the different ways in which women and men live and do not contribute to the American way of life as it has been historically understood."²⁰ In addition, the bill gives "any individual aggrieved by a violation of" section 301(a) of the FPA, a cause of action in federal court "for damages, or for such equitable relief as may be appropriate, or both,"²¹ with such costs and attorney's fees as the courts choose to award.²² This last provision should be particularly offensive to those who espouse the pure states' rights view, in light of the conservative attacks since the Warren Court era on the use of the equity powers of federal courts to promulgate sweeping and detailed rules for the operation of schools, prisons, and other institutions exercising public functions.²³ A federal judge who wishes to use this kind of judicial rulemaking to manipulate uncooperative state and local agencies would have clear authority to do so under the FPA.²⁴ A legislative proposal with these provisions is hardly a genuine move to return power to the states. Forsaking the institutional tenets of traditional constitutional conservatives, the FPA freely uses the tools of constitutional liberals to pursue its aim—a particular idealization of "the American family."

§ 440B(1)).

16. *Id.*

17. *Id.* (proposed General Education Provisions Act § 440B(3)).

18. *Id.* (proposed General Education Provisions Act § 440B(4)); *see infra* text accompanying notes 115-21.

19. *See generally* Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2150 & n.12 (1982) (O'Connor, J., concurring and dissenting, joined by Burger, C.J., and Rehnquist, J.); National League of Cities v. Usery, 426 U.S. 833, 852 & n.17 (1976) (Rehnquist, J.).

20. S. 1378, § 301(b), 127 CONG. REC. at S6334 (proposed General Education Provisions Act § 440C); *see infra* text accompanying notes 72-107.

21. S. 1378, § 301(c)(1), 127 CONG. REC. at S6334.

22. *Id.* § 301(c)(4).

23. *See generally* G. McDowell, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982).

24. S. BARBER, *supra* note 11, at 75.

II. THE FAMILY PROTECTION ACT AND THE ABRIDGEMENT OF SPECIFIC RIGHTS OF WOMEN

Section 102(a) of the FPA would seriously erode the constitutional rights of women to abortions and to the use of contraceptives or to advice about their use. This section provides that

[n]o program, project, or entity shall receive Federal funds, either directly or indirectly, under any provision of law unless such program, project, or entity, prior to providing any contraceptive device or abortion service (including abortion counseling) to an unmarried minor, notifies the parents or guardians of such minor that such contraceptives or abortion services are being provided.²⁵

In order to understand how the FPA relates to constitutional doctrine pertaining to contraception and abortion, a brief discussion of the evolution of Supreme Court case law in these areas is necessary.

A. *The Right to Contraceptives*

The Supreme Court recognized a married couple's right to use contraceptives in *Griswold v. Connecticut*,²⁶ and a single person's right to their use in *Eisenstadt v. Baird*.²⁷ In *Griswold* the Supreme Court struck down a Connecticut statute that prohibited the use of contraceptives by married couples. Writing for the Court, Justice Douglas stated that the law interfered "with a right of privacy older than the Bill of Rights."²⁸ Justice Douglas admitted that this zone of privacy was not specified in the Constitution, but found the right within the "penumbras" of explicit constitutional guarantees such as the first amendment's right of association, the fourth amendment's recognition of privacy in the home, and the fifth amendment's guarantee of freedom from self-incrimination.²⁹

In *Eisenstadt* the Court used the equal protection clause to expand the right of privacy announced in *Griswold*. Although *Griswold* involved the use of contraceptives by married persons, *Eisenstadt* overturned a conviction under a state law banning the distribution of contraceptives to single persons. The Court held that

25. S. 1378, § 102(a), 127 CONG. REC. at S6329.

26. 381 U.S. 479 (1965).

27. 405 U.S. 438 (1972).

28. 381 U.S. at 486.

29. *Id.* at 484.

because *Griswold* protected the right of married couples to use contraceptives, the state could not prevent single persons from using contraceptives without violating the equal protection clause. In reaching this conclusion, the Court stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁰

Finally, in *Carey v. Population Services International*,³¹ the Court invalidated a New York statute that made it a crime, among other things, "for any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years."³² The Court refused to accept the state's proffered interests as compelling. These interests included deterring young people from premarital intercourse,³³ protecting the minor's mental and physical health, and protecting potential life.³⁴ Reaffirming its decision in *Griswold*, the Court stated that the Constitution protected individual decisions concerning childbearing from unjustified intrusion by the state,³⁵ and went on to note, "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."³⁶ With respect to another provision of the statute, which limited the ability to distribute contraceptives to licensed pharmacists, the Court held that the restriction "clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so."³⁷

Considered together, *Griswold*, *Eisenstadt*, and *Carey* demonstrate the Supreme Court's recognition of a right to privacy for unmarried minors in the use of contraceptives. Clearly, the assumption underlying the FPA's parental notification requirement is contrary to the Court's stated policy because this requirement attempts to make the decision to use contraceptives a family matter. In so doing, parental notification effectively breaches minors' pri-

30. 405 U.S. at 453 (emphasis omitted).

31. 431 U.S. 678 (1977).

32. N.Y. EDUC. LAW § 6811(8) (McKinney 1972), quoted in 431 U.S. at 681 n.1. The statute also banned contraceptive sales to anyone over the age of 16 unless distributed by a licensed pharmacist, and prohibited the display or advertisement of contraceptives.

33. 431 U.S. at 694.

34. *Id.* at 690.

35. *Id.* at 687.

36. *Id.* at 693.

37. *Id.* at 689.

vacy in deciding that question for themselves. Although section 102(a) ultimately leaves to minors the actual right to decide whether or not to use contraceptives,³⁸ it substantially burdens that right by forcing disclosure to the minors' parents against the minors' wishes. The intentions of the FPA's sponsors are therefore clear—burdening minors' exercise of the constitutional right to obtain contraceptives in order to discourage teenage sex. One can expect the FPA sponsors to know that, for many minors, merely confronting their parents with premarital sexual activity will present a considerable deterrent to seeking contraceptives or contraceptive counseling. Presumably, the sponsors expect that the limitation of free contraceptives will increase the fear of pregnancy and curb teenage sexual activity. This presumption, however, is flawed. A recent study of teenagers receiving contraceptives from family planning clinics found that of the twenty-five percent of the minors who would stop applying for prescription contraceptives if their parents were notified, only two percent said they would stop sexual activity.³⁹ The other twenty-three percent would probably either use less effective over-the-counter contraceptives, or none at all. The ironic consequence of the FPA's notification requirement, therefore, is likely to be more unplanned adolescent pregnancies, and more abortions.

B. *The Right to Abortion*

The FPA also imposes potential burdens on the constitutional right to abortion. In 1973 the Supreme Court, in *Roe v. Wade*,⁴⁰ recognized the constitutional right of adult women to abortions.⁴¹ Writing for the Court, Justice Blackmun stated that the right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁴² Although, according to Blackmun, the right to abortion is not absolute, it is nevertheless a "fundamental" right. Consequently, its regulation can be justified only on the showing of a compelling state interest and through legislation "narrowly drawn to express only the legitimate state interests at stake."⁴³ The Court found no state interest sufficiently compelling to override a woman's choice to abort before the

38. S. 1378, § 102(a), 127 CONG. REC. at S6329.

39. N.Y. Times, Feb. 26, 1982, at 26, col. 1.

40. 410 U.S. 113 (1973).

41. *Id.* at 154.

42. *Id.* at 153.

43. *Id.* at 155.

third trimester of pregnancy.⁴⁴

In a subsequent decision, *Planned Parenthood v. Danforth*,⁴⁵ a five-to-four vote of the Justices extended this right to minors, invalidating a provision of a Missouri statute⁴⁶ that required an unmarried minor to obtain the written consent of a parent as a prerequisite to obtaining an abortion.⁴⁷ The Court held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the [minor's] pregnancy"⁴⁸ In arriving at this decision, the Court rejected the state's claim that the statute protected parental childrearing rights and strengthened the family unit.⁴⁹ The Court reasoned that because the very existence of the pregnancy had already caused disharmony within the family unit, parental power to veto the abortion decision would not heal the division.⁵⁰ The Court concluded that the parents had no independent interest in the termination of their minor daughter's pregnancy that outweighed her right to an abortion.⁵¹ The majority thus shifted the focus of concern away from the family unit toward the individual minor.

The dissenting Justices⁵² in *Danforth* agreed with the majority's rejection of the state's proffered interest in protecting parental childrearing rights. The dissenters, however, felt that the state's interest in promoting the minor's welfare deserved greater attention.⁵³ They focused on the nature of the abortion decision and the importance of the state's interest in ensuring that the minor makes the decision in her best interest. They concluded that a parental consent requirement is both a traditional and a rational means of

44. *Id.* at 163-64.

45. 428 U.S. 52 (1976).

46. 1974 Mo. Laws 809.

47. 428 U.S. at 72. The statute required the written consent of one parent during the first twelve weeks of pregnancy, unless the abortion was necessary to preserve the mother's life.

48. *Id.* at 74.

49. *Id.* at 75. The lower court upheld the statute on the basis of this rationale. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975).

50. 428 U.S. at 75.

51. *Id.*

52. Justice White, with whom the Chief Justice and Justice Rehnquist joined, dissented from the majority's invalidation of the statute's parental and spousal consent requirements, ban on saline amniocentesis, and requirement of fetal lifesaving measures. *Id.* at 92-101. They concurred, however, in other portions of the Court's opinion. *Id.* at 101. Justice Stevens dissented separately from the invalidation of the parental consent requirement and the ban on saline amniocentesis, but concurred with the rest of the Court's decision. *Id.*

53. *Id.* at 92-93, 102.

accomplishing this end.⁵⁴

A qualified parental consent provision in *Bellotti v. Baird*⁵⁵ brought the Court closer to the question whether a state could require parental notification of a minor's abortion decision. In *Bellotti* the Court voided a Massachusetts statute⁵⁶ that required parental consent. If the consent for an abortion was withheld, the statute authorized the minor to appeal the parents' decision to a state judge. In an eight-to-one decision against the Massachusetts law, the majority held that the minor's right to seek judicial authorization did not go far enough to protect the right of "mature minors" to make their own abortion decisions.⁵⁷ Four members of the majority, however, in an opinion written by Justice Powell, described the kinds of state statutes that would pass constitutional scrutiny.⁵⁸ The Justices indicated that they would have accepted the Massachusetts law had it contained sufficient safeguards for the right of mature minors to make their own decisions at some point. The other four members of the majority, in a separate opinion written by Justice Stevens, termed this last suggestion of the Powell opinion merely "advisory."⁵⁹ It was enough for Justice Stevens that the challenged law effectively subjected the minor's decision to secure an abortion to an "absolute third-party veto" in the form of either a parental or judicial veto.⁶⁰

Thus, although *Bellotti* rejected the Massachusetts statute, at least five members of the Court had taken positions that indicated potential approval of parental notification requirements. According to the four members of the Court led by Justice Powell, Massachusetts could have constitutionally required a parental consent stage for all minors seeking abortions as a first step in a process

54. *Id.* at 95.

55. 443 U.S. 622 (1979).

56. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979) provided in pertinent part:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents . . . is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

Id., quoted in 443 U.S. at 625.

57. 443 U.S. at 647-48, 652-56. Justice Powell wrote the Court's opinion, in which the Chief Justice and Justice Stewart joined. Justice Rehnquist also joined in part, but wrote a separate opinion. Justice Stevens also concurred in a separate opinion, in which Justices Brennan, Marshall, and Blackmun joined. Justice White filed a separate dissenting opinion.

58. *Id.* at 643-44, 648-49.

59. *Id.* at 655-56.

60. *Id.* at 654-55.

that eventually recognized the right of mature minors to decide for themselves whether to have an abortion. Presumably, this four-man group would be likely to accept a requirement of parental *notification*, as distinguished from parental *consent*, because notification would have afforded even greater protection for the mature minor's right than the arrangement the Powell group had indicated it was willing to accept. When the four votes that joined in the Powell opinion are added to Justice White's dissent,⁶¹ the stage is set for the Court's subsequent approval of a parental notification requirement. The significance of the Powell opinion was not lost on Justice Rehnquist. In a separate concurrence, he stated that he had joined the Powell opinion solely to avoid "a truly fragmented holding."⁶² He also stated that he would be "more than willing to participate" in a reconsideration of *Danforth* whenever the Court was willing to do so.⁶³ This was a clear signal that the Powell opinion was a step toward weakening the right established in *Danforth*.

The Court finally weakened *Danforth* in the 1981 decision of *H.L. v. Matheson*,⁶⁴ in which the Court sustained a Utah statute requiring a physician to "notify, if possible, the parents" of a minor upon whom an abortion is to be performed.⁶⁵ Writing for the Court, Chief Justice Burger held that "although . . . a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a 'mere requirement of parental notice,' does not violate the constitutional rights of an immature, dependent minor."⁶⁶ The Chief Justice found the law to be justified, because it served "the important considerations of family integrity and protecting adolescents . . . [and providing] an opportunity for parents to supply essential medical and other information to a physician."⁶⁷ In his dissent Justice Marshall argued that the Utah statute unquestionably "infring[ed] upon the constitutional right to privacy attached to a minor woman's decision to complete or terminate her pregnancy."⁶⁸ The mandatory notice requirement was "not a mere disincentive created by the State, but [was] instead an actual state-imposed obsta-

61. *Id.* at 656.

62. *Id.* at 652.

63. *Id.*

64. 450 U.S. 398 (1981).

65. UTAH CODE ANN. § 76-7-304(2) (1978), quoted in 450 U.S. at 400 (emphasis omitted).

66. 450 U.S. at 409 (footnotes omitted).

67. *Id.* at 411 (footnotes omitted).

68. *Id.* at 454.

cle to the exercise of the minor woman's free choice."⁶⁹

The FPA requirement of parental notification before abortion service or counseling may be rendered to a minor is consistent with the *Matheson* decision, and is subject to the same criticism Marshall directed against the majority in that case—that parental notification weakens the right to abortion by burdening it. But the FPA goes considerably beyond the Utah statute, for the bill would burden not only the decision to abort, but also the right to seek abortion referral and counseling. By requiring parental notification prior to abortion referral and counseling, the FPA would give parents an opportunity to exert pressure that might prevent the minor from even acquiring the information she needs to make a reasoned abortion choice. Moreover, the threat of parental notice at this early stage may cause some minor women to delay abortion past the first trimester of pregnancy, after which the health risks significantly increase.⁷⁰ Other pregnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.⁷¹ Many others may forego an abortion and bear an unwanted child, which, given the minor's "probable education, employment skills, financial resources, and emotional maturity . . . may be exceptionally burdensome."⁷² These burdens are obviously intended to deter young women from exercising their constitutional right to safe, legal abortions. Because the FPA's parental notification requirement takes a big step beyond the *Matheson* decision, the Court's reasoning in *Matheson* will not be sufficient to validate the Act.

III. THE FAMILY PROTECTION ACT AND THE FOUNDATIONS OF THE WOMEN'S MOVEMENT

As introduced by Senators Laxalt and Jepsen, section 301(b)

69. *Id.* at 440-41 (footnotes omitted).

70. See *Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 548 (D. Me. 1979) (affidavits showing parental notice "may cause an adolescent to delay seeking assistance with her pregnancy, increasing the hazardousness of an abortion should she choose one."); see also Cates, *Adolescent Abortions in the United States*, 1 J. ADOLESCENT HEALTH CARE 24 (1980).

71. 477 F. Supp. at 548 (affidavits indicating that minor may turn to illegal abortion rather than have parents notified); see also Kahan, Baker & Freeman, *The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion*, 121 AM. J. OBST. & GYN. 114 (1975) (illegal abortion rate drops when legal abortions available). The minor may also seek to abort herself. *Alice v. Department of Social Welfare*, 55 Cal. App. 3d 1039, 1044, 128 Cal. Rptr. 374, 377 (1976).

72. *Bellotti v. Baird*, 443 U.S. at 642.

of the Family Protection Act provides that

[n]o funds authorized under any applicable program or any provision of Federal law shall be used to secure or promote education materials or studies relating to the preparation of education materials if such materials *do not reflect a balance between the status role of men and women, do not reflect different ways in which women and men live and do not contribute to the American way of life as it has been historically understood.*⁷³

This section also creates a federal cause of action for "any individual aggrieved by a violation" of the provision.⁷⁴ The bill provides "for damages, or for such equitable relief as may be appropriate, or both."⁷⁵ Section 301(c)(2) authorizes equitable remedies beyond injunctive relief "as may be appropriate to carry out the provisions" of the FPA's proposed amendments to the General Education Provisions Act.⁷⁶ Apparently, federal district courts may establish machinery in the schools for the censorship of textbooks—machinery analogous to the far-reaching and detailed remedial plans they have created in school desegregation decisions.⁷⁷ Finally, section 301(c)(3) requires expeditious handling of such suits in the federal district courts. Thus, subsections 301(c)(3)(A) and (B) require the chief judge "immediately to designate a judge . . . to hear and determine the case," to conduct a "hearing at the earliest practicable date and to cause the case to be in every way expedited."⁷⁸ The bill would also award attorney's fees and costs to the prevailing party.⁷⁹

These provisions demonstrate that the FPA's sponsors are seeking to enlist the full authority of the federal judiciary in a national program of textbook censorship for the sake of perpetuating historical stereotypes. Evidence of an intent to perpetuate sexual stereotypes exists not only in the Act's explicit reference to the historical understanding of the "status role" of women, but also in Senator Jepsen's remarks on the floor of the Senate. In these comments he criticized past governmental attempts to eradicate sexual

73. S. 1378, 97th Cong., 1st Sess., § 301(b), 127 CONG. REC. S6334 (daily ed. June 17, 1981) (proposed General Education Provisions Act § 440C; see 20 U.S.C. §§ 1221-1233h (1976 & Supp. V 1981)) (emphasis added).

74. *Id.* § 301(c)(1).

75. *Id.*

76. *Id.* § 301(c)(2).

77. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

78. S. 1378, § 301(c)(3)(A)-(B), 127 CONG. REC. at S6334.

79. *Id.* § 301(c)(4).

and racial discrimination. When he introduced the FPA in July 1981, Senator Jepsen stated,

Under title IX funding, human services professionals have received Federal grants to cure family-related social maladies. A percentage of these funds are being used to finance 15 race desegregation assistance centers and 10 sex-discrimination assistance centers.

The activities of these federally funded centers range from recruiting females or males for employment in jobs not traditionally held by members of their sex to identifying race stereotypes in textbooks and other curricular materials and developing methods of countering their effects upon students.

At best, such design is counterproductive to efforts to treat each minority as an individual rather than each individual as a member of a minority.

Mr. President, I ask, Is the role of the Federal Government to shape the attitudes of the American people? Are we to seek our moral direction from the Federal Government?⁸⁰

From both the wording and legislative history of the Act, it is evident that the FPA encourages sexual stereotyping in textbooks, manifesting a position directly opposed to the very foundations of the women's movement—the view that many traditional economic, political, and social roles exploit women, and that women should be permitted to assume higher status roles in accordance with their individual preferences and abilities.

Casual observers of women's issues may not appreciate the impact of sexual stereotyping on young minds. Psychological research, however, has established that textbooks are a major tool in the socialization of children and have a profound impact on the development of their personalities.⁸¹ Textbooks generally provide the core of the public school curriculum. Teachers rely on them heavily. Because they are printed and presented to children in an authoritative classroom setting, they take on the status of unquestionable truth. Through textbooks school officials, as agents of society, tell children, "This is what we would like you to be." In the mind of a child, this usually becomes a norm or an ideal to be achieved.

80. 127 CONG. REC. at S6327.

81. Child, Potter & Levin, *Children's Textbooks and Personality Development: An Exploration in the Social Psychology of Education*, 60 PSYCHOLOGICAL MONOGRAPHS, No. 279 (1946); Feminists on Children's Media, *A Feminist Looks at Children's Books*, 96 LIBR. J. 235 (1971).

Scholarly studies in this area have found that sexual stereotypes in textbooks impose behavior patterns upon girls that discourage their aspirations and limit their sense of dignity and autonomy.⁸² One report states that "not only are the books a powerful influence in stunting a girl's growth but are giving her the subliminal message that she is an inferior, secondary person."⁸³ Although the books portray boys as creative, ambitious, independent, and adventurous, they depict girls as helpless, incompetent, incapable of independent thought and action, and more willing to give up: "They collapse into tears, they betray secrets; they are more likely to act upon petty or selfish motives."⁸⁴

The portrait of adult women in these textbooks fares no better.⁸⁵ More often than not, the adult women in these books are stay-at-home mothers. One writer who reviewed various studies of the problem summed up the image of adult women in textbooks as follows: "Mother, generally, is as bland as if she had a prefrontal lobotomy—an aproned, perennially cheerful cookie baker about to hand wash a mountain of dishes."⁸⁶

The occupational outlook for women in textbooks employing "historical" stereotypes is equally bleak. These books contain demeaning images of women in both the number and types of jobs women commonly hold.⁸⁷ Only rarely do these textbooks show women in occupations other than teacher, mother, secretary, and nurse.⁸⁸ This lack of adult female role models may make choosing a career difficult for a girl; it may even convey the message that, unlike boys, girls are not supposed to have choices in these matters.

The research of social scientists in this field thus suggests that the types of textbooks and other educational materials for which

82. See N. FRAZIER & M. SADKER, *SEXISM IN SCHOOL AND SOCIETY* (1973); *WOMEN ON WORDS & IMAGES, DICK AND JANE AS VICTIMS: SEX STEREOTYPING IN CHILDREN'S READERS* (1972); Stewig & Higgs, *Girls Grow up to be Mommies: A Study of Sexism in Children's Literature*, 98 *LIBR. J.* 236 (1973); U'Ren, *The Image of Woman in Textbooks*, in *WOMAN IN SEXIST SOCIETY* 218 (1971).

83. Note, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles*, 24 *HASTINGS L.J.* 1191, 1200 (1973) (quoting *WOMEN ON WORDS & IMAGES, DICK AND JANE AS VICTIMS: SEX STEREOTYPING IN ELEMENTARY SCHOOL READERS* 6 (1970)).

84. U'Ren, *supra* note 82, at 223.

85. See Note, *supra* note 83, at 1201.

86. MacPherson, *Challenging the Books That Teach Girls "Their Places,"* *Washington Post*, June 14, 1971, § G, at 1, col. 1.

87. *WOMEN ON WORDS & IMAGES*, *supra* note 82, at 6, 48-49, 53.

88. *Id.* at 53. Even when the books portray women in traditionally "female" occupations, they are not likely to show women acting autonomously.

the FPA sponsors are calling convey a restrictive and damaging picture of women that causes girls to have lowered aspirations and reduced potential.

Is it constitutional for a governmental entity to deliberately pursue a policy of perpetuating these stereotypes? This general question embodies two more specific kinds of questions—those concerning Congress's power to grant or withhold funds, and those concerning the constitutionality of laws that expressly mandate sexual stereotyping. Both kinds of questions are present in the typical situation envisioned by the FPA: the dutiful censorship of textbooks and other educational materials by state agencies followed by the grant of federal funds. Under prevailing precedent, Congress may indeed be able to withdraw federal funds for the purchase of uncensored textbooks.⁸⁹ With or without federal funds, however, states cannot actually mandate sexual stereotyping in textbooks without offending the equal protection clause.⁹⁰ Thus, the Constitution may prevent the states from complying with the FPA and its eligibility requirements for certain federal funds. This anomalous possibility emerges when one attempts to bring together current judicial doctrine concerning funding and legislative classifications based on sexual stereotypes.

The FPA's threat to withdraw funds for the purchase of uncensored textbooks bears some similarity to the Hyde Amendment's⁹¹ denial of federal Medicaid funds for most abortions. A sharply divided Court upheld the Hyde Amendment in *Harris v. McRae*.⁹² The Court reasoned that the right to choose an abortion did not include an entitlement to funding, and that Congress could therefore grant or refuse funds as it wished, without burdening the individual's right to choose to have an abortion.⁹³ If Congress can constitutionally refuse funds to those who exercise their right to have abortions, it may be able to withhold funds from both state textbook purchases and programs that honor the right to equal protection of the laws. Arguably, in both cases Congress would not be denying funds to which anyone has a *right*. Although a question remains as to whether Congress can condition the receipt of

89. See *Harris v. McRae*, 448 U.S. 297 (1980).

90. This article does not address the question whether such a scheme would offend the first amendment's prohibition against prior censorship. See *infra* text accompanying notes 107-13.

91. Pub. L. No. 96-123, § 109, 93 Stat. 926 (amending subchapter XIX of the Social Security Act, 42 U.S.C. § 1396 (1976 & Supp. II 1978)).

92. 448 U.S. 297 (1980).

93. *Id.* at 316-17.

federal funds on an agency's willingness to deny equal protection of the law, a state agency cannot constitutionally deny equal protection of the laws.⁹⁴ Our question, therefore, is whether mandated sexual stereotyping in educational materials would violate the state's obligation to provide equal protection. The answer appears to be in the affirmative.

Admittedly, a majority of the Supreme Court has been unwilling to make gender a suspect classification for purposes of equal protection analysis.⁹⁵ Race, not gender, is seen as the paradigmatic suspect classification. When a governmental entity discriminates on the basis of race, the judiciary will closely scrutinize its action to ensure the presence of a compelling governmental purpose and rational basis between the effect of the action in question and its alleged purpose.⁹⁶ When economic and social legislation does not implicate fundamental rights, the federal judiciary exercises a relaxed level of scrutiny, which amounts to no meaningful review at all, although in theory some of this legislation could be so totally lacking in rationality as to warrant judicial condemnation.⁹⁷

The Supreme Court has held that gender classifications lie between these two extremes and that these classifications warrant a "heightened" but nonetheless "intermediate" level of scrutiny. In what remains the leading precedent in this area, *Craig v. Boren*,⁹⁸ Justice Brennan reviewed the controlling principles:

To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. . . . [Prior cases] have rejected administra-

94. Nor can Congress take affirmative, direct action (other than the withholding of funds, perhaps) that denies equal protection of the laws. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). Fourteenth amendment equal protection criteria typically have been applied to federal action under the due process clause of the fifth amendment. In *Bolling*, which was decided on the same day as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court held that racial segregation in District of Columbia schools violated the due process clause of the fifth amendment. The principle established in *Bolling* has been extended to the national government's acts of gender discrimination. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating federal statutory discrimination between the rights of servicemen and servicewomen to claim their respective spouses as dependents for purposes of medical and other benefits).

95. The argument that sex is a suspect classification had been adopted by four members of the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

96. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

97. For a recent statement of the rational basis standard of review, see *New Orleans v. Dukes*, 427 U.S. 297 (1976).

98. 429 U.S. 190 (1976).

tive ease and convenience as sufficiently important objectives to justify gender-based classifications. . . .

[These cases] have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. . . . Hence, "archaic and overbroad" generalizations concerning the financial position of servicewomen, and working women, could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.⁹⁹

The Court may have deviated slightly from the spirit of *Craig* in recent cases that upheld male-only registration for the military draft¹⁰⁰ and state laws that defined statutory rape as a crime that only males can commit.¹⁰¹ But if the Court has, in fact, deviated from *Craig*, it has not even begun to weaken that decision to the point where it would allow mandated programs of sexual stereotyping in textbooks and other educational materials.

This is evident from Justice Rehnquist's majority opinion in the all-male draft case, *Rostker v. Goldberg*.¹⁰² In upholding the all-male registration scheme, Justice Rehnquist was careful to review the legislative history of a 1980 congressional decision to exclude women from draft registration. His aim was to show that the registration scheme was anchored in the permissible purpose of excluding women from combat.¹⁰³ He concluded that the legislative history "clearly establishe[d] that the decision to exempt women from registration was not the 'accidental byproduct of a traditional way of thinking about women.'"¹⁰⁴ In this statement Rehnquist quoted language from *Califano v. Webster*,¹⁰⁵ a case upholding a provision of the Social Security Act giving women an advantage over men in computing certain benefits. The per curiam opinion in *Webster* upheld the provision as a means of compensating women for past economic discrimination. The *Webster* opinion pointedly stated:

99. *Id.* at 197-99 (citations omitted).

100. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

101. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981).

102. 453 U.S. 57 (1981).

103. *Id.* at 75-79.

104. *Id.* at 74.

105. 430 U.S. 313, 320 (1977) (per curiam).

The more favorable treatment of the female wage earner enacted here was not a result of "archaic and overbroad generalizations" about women, or of "the role-typing society has long imposed" upon women, such as casual assumptions that women are the "weaker sex" or are more likely to be child-rearers or dependents. Rather, "the only discernible purpose of [§ 215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women."¹⁰⁶

Similar language appears in other cases from Justices who, like Justice Rehnquist, have opposed strict scrutiny of gender-based classifications. For example, writing for the Court in 1975, Justice Blackmun voided a Utah statute making young women ineligible for child support at an earlier age than their brothers, stating that

we perceive nothing rational in the distinction drawn by [the statute]. . . . This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is . . . desirable . . . is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.¹⁰⁷

As long as the Court continues to reaffirm the principle implicit in these passages, it is impossible to see how it could uphold laws that mandate programs of sexual stereotyping in textbooks used in public and governmentally supported schools. Even assuming that Congress would be permitted to cut off funds to states and other entities that refused to stereotype, the states and their agencies could not practice stereotyping in any event. The FPA, therefore, through section 301(b) would force the states into the Hobson's choice of surrendering federal funds or violating the equal

106. *Id.* at 317 (citations omitted) (brackets in original).

107. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (citations omitted).

protection clause.

IV. THE FAMILY PROTECTION ACT AND CIVIL LIBERTIES BEYOND WOMEN'S RIGHTS

The Family Protection Act poses constitutional problems beyond the more immediate concerns of the women's movement. An examination of some of these other problems lends credence to a long-standing claim of the women's movement that opposition to women's rights is rooted in opposition to constitutional rights in general. Accordingly, the protection of women's rights is an integral part of a broad civil libertarian commitment.

For example, section 106(b) of the FPA prohibits the use of any funds of the Legal Services Corporation in any proceeding or litigation "which seeks to procure an abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, or to compel State or Federal Government funding for an abortion."¹⁰⁸ Section 106(c) also prohibits Legal Services funds from being used in any litigation involving divorce or adjudication of homosexual rights.¹⁰⁹ Finally, section 305 prohibits Legal Services funds from being used in litigation involving busing solely for the achievement of racial quotas or for the purpose of desegregation.¹¹⁰ In view of their historical background, these four provisions manifest a hostility toward constitutional challenges by the poor against certain federal and state policies. Yet the right to bring constitutional challenges in the courts is a right of United States citizenship and essential to the rule of law. The Supreme Court has stated,

It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, . . . to the subtreasuries, land offices, and courts of justice in the several States." . . .

108. S. 1378, 97th Cong., 1st Sess., § 106(b), 127 CONG. REC. S6330 (daily ed. June 17, 1981) (proposed Legal Services Corporation Act § 1007(b)(8); see 42 U.S.C. § 2996f (1976 & Supp. II 1978)).

109. *Id.* § 106(c) (proposed Legal Services Corporation Act § 1007(b)(11)-(12)).

110. *Id.* § 305, 127 CONG. REC. at S6335-36 (proposed Legal Services Corporation Act § 1007(b)(9)).

. . . The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.¹¹¹

FPA defenders may point out that these provisions merely extend the rationale of *Harris v. McRae*¹¹² to other areas. The FPA provisions do at least that much, but these provisions are potentially more injurious to constitutional rights than *Harris*. *Harris* reached a substantive conclusion about funding; it in no way sought to obstruct or express hostility to further challenges to its substantive conclusions. The decision in *Harris* is as open to continuing attacks in the courts as are any other judicial decisions, and these attacks may result in an eventual reversal. The provisions of the FPA, on the other hand, not only pursue certain substantive policies about such issues as busing and abortion, but also seek to discourage constitutional challenges to those substantive conclusions. By actively discouraging court challenges, the FPA provisions manifest a sentiment far more hostile to constitutional rights and institutions than the *Harris* decision. Writing for the majority in that case, Justice Stewart found it necessary to identify the legislative purpose behind the decision to withhold Medicaid funds for abortions:

the Hyde Amendment, by encouraging childbirth . . . is rationally related to the legitimate governmental objective of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions . . . Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid.¹¹³

One can wonder how the Court might rationalize the withdrawal of Legal Services funds from those who would test the policies of the FPA. Will the Court be willing to misrepresent the purposes that motivate the FPA? Will the Court state that these provisions represent a policy of reducing the level of litigation in federal courts without seeking evidence of such a policy in other federal legislation? If these provisions are upheld, then one can ex-

111. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868)).

112. 448 U.S. 297 (1980).

113. *Id.* at 325.

pect a misrepresentation of congressional purposes, for it is unlikely that a Court officially committed to constitutional supremacy would allow Congress to discourage constitutional challenges to its substantive policies and enactments.

Other provisions of the FPA present a clear threat to yet another constitutional right—academic freedom.¹¹⁴ Subsections 301(a) and (b) of the Act provide a cause of action if an educational institution receiving federal funds bars parents from visiting their children's classroom,¹¹⁵ prohibits parents from reviewing textbooks prior to their use in public schools,¹¹⁶ or promotes educational materials that the sponsors of the Act perceive to denigrate the role of women as it has been historically understood.¹¹⁷ These provisions might be contrasted with the Supreme Court's longstanding opposition to prior censorship¹¹⁸ and its more recent opposition to policies "that cast a pall of orthodoxy over the classroom."¹¹⁹

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."¹²⁰

The foregoing provisions of the FPA, therefore, hardly jibe with "that free play of the spirit" that the Supreme Court has said "teachers ought especially to cultivate and practice."¹²¹

Finally, in what is destined to be one of the FPA's most controversial provisions, section 404(a) provides that "[e]ach individual shall have the right to participate in the free exercise of voluntary prayer or religious meditation in any public building or in any

114. See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1965).

115. S. 1378, § 301(a)-(b), 127 Cong. Rec. at S6334 (proposed General Education Provisions Act §§ 440B-440C).

116. *Id.* § 301(a).

117. *Id.* § 301(b).

118. See *New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 238 U.S. 697 (1931).

119. *Keyishian v. Board of Regents*, 385 U.S. at 603 (footnotes omitted); see also *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

120. 385 U.S. at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

121. 385 U.S. at 601 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

building which is supported in whole or in part through the expenditure of Federal funds."¹²² Section 405(a) creates a federal cause of action for "[a]ny individual aggrieved by violation of this title."¹²³ Clearly, this is an attempt on the part of the FPA's sponsors to do indirectly what they cannot do directly according to the underlying principle articulated by the Supreme Court in *Engle v. Vitale*¹²⁴ and *Abington School District v. Schempp*.¹²⁵ Moreover, this provision conflicts with the Supreme Court's recent action in *Brandon v. Guilderland Board of Education*.¹²⁶ In *Brandon* a lower court held that a school board's refusal to permit high school students to conduct communal prayer meetings on school premises did not violate the students' first amendment rights to freedom of religion, speech, or association. The Supreme Court subsequently denied certiorari.¹²⁷

V. CONCLUSION

To opponents and supporters alike, the Family Protection Act is a sharp departure from prevailing federal policy and constitutional doctrine. Because this is such a radical proposal, one might expect that time will transform it into something more moderate. But this has not yet happened. The proposal now before the Senate is a version of a bill proposed by Senator Laxalt in 1979;¹²⁸ no moderating trend is evident in the 1981 bill. Aspects of our current political situation make it equally likely that advocates of these proposals will persist in the years ahead.¹²⁹ For example,

122. S. 1378, § 404(a), 127 CONG. REC. at S6336.

123. *Id.* § 405(a).

124. 370 U.S. 421 (1962) (denominationally neutral prayer offered by the New York State Board of Regents for use in public schools violated the establishment clause).

125. 374 U.S. 203 (1963) (reading of prayers or from the Bible as part of devotional exercises in public schools violates the establishment clause).

126. 102 S. Ct. 970 (1981).

127. *Id.* Ironically, § 404(a) also conflicts with a mainstay of conservative constitutional jurisprudence, *The Civil Rights Cases*, 109 U.S. 3 (1883), for the provision assumes that under § 5 of the fourteenth amendment, Congress can directly define the right to freedom of religious expression, without confining itself to the prohibition of state action in violation of civil rights. For a discussion of the controversy over *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and Congress's power to enact legislation enforcing constitutional rights, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1096-104 (1980). See also Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

128. S. 1808, 96th Cong., 1st Sess., 125 CONG. REC. 13,272 (1979).

129. Thus, parts of the present bill have been recently introduced in the Senate as separate bills. FPA §§ 401-406 have been introduced in the Senate as S. 1577, 97th Cong.,

President Reagan's Secretary of Health and Human Services has formally proposed a rule that would require federally funded family planning services to notify the parents of minors receiving oral contraceptives or prescription birth control devices—a rule that effectively will apply to minor females only.¹³⁰ These conservative proposals could easily generate a debate as acrimonious and divisive as any since the constitutional controversy over the New Deal's recovery program. For this reason the FPA warrants the immediate critical attention of constitutional scholars.

1st Sess., 127 CONG. REC. S9101, S9118-19 (daily ed. July 31, 1981). FPA § 105 has been introduced in the Senate as S. 1578, 97th Cong., 1st Sess., 127 CONG. REC. S9101, S9119-20 (daily ed. July 31, 1981). Several FPA provisions dealing with tax credits have also been enacted in the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 94 Stat. 172.

130. N.Y. Times, Feb. 20, 1982, at 8, col. 1; *see also* 47 Fed. Reg. 7699-701 (1982).