

STATE EQUAL RIGHTS AMENDMENTS REVISITED: EVALUATING THEIR EFFECTIVENESS IN ADVANCING PROTECTION AGAINST SEX DISCRIMINATION

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I. INTRODUCTION

Three decades have passed since fourteen states—inspired by the Federal Equal Rights Amendment (“ERA”) campaign of the 1970s and early 1980s—added ERAs to their state constitutions.¹ In adding these provisions to their constitutions, these states joined three others that already had explicit protection from sex discrimination in their state constitutions.² The language of many of these amendments tracked that of the proposed Federal ERA, and their legislative histories indicate a specific desire to provide more comprehensive protection against sex discrimination than that available

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1. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 21; ILL. CONST. art. I, § 18; MD. CONST. art. I, § 3; MASS. CONST. pt. I, art. 1; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. 2; N.M. CONST. art. II, § 1; PA. CONST. art. I, § 28 ; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1. For the full text and date of adoption of each state ERA, see *infra* Appendix.

2. Two states—Wyoming and Utah—added sex equality guarantees to their constitutions at the same time that they extended the right of suffrage to women in the late nineteenth century. UTAH CONST., art. IV, § 1; WYO. CONST. art. I, § 2. California added a provision to its constitution that expressly prohibited sex discrimination in employment in 1879. CAL. CONST. art. I, § 8. Some states also explicitly provide protection against sex discrimination in public education in their constitutions. CAL. CONST. art. I, § 31(a); HAW. CONST. art. X, § 1; WYO. CONST. art. VII, §10; MONT. CONST. art. 10 § 7.

under the existing Federal Constitution.³ In recent years, additional states have added ERAs to their state constitutions,⁴ and states continue to consider adding them.⁵ Today, twenty-two states have some form of explicit protection against sex discrimination in their state constitutions.⁶

In the 1970s, when most of these state ERAs were adopted, it seemed possible that either through judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment or ratification of the proposed Federal ERA, sex equality would receive rigorous protection under the Federal Constitution. To date, however, efforts to add an ERA to the Federal Constitution have not succeeded, although it continues to be reintroduced in Congress each session.⁷ Moreover, the effectiveness of the Supreme Court's

3. BARBARA A. BROWN, ANN E. FREEDMAN, HARRIET N. KATZ & ALICE M. PRICE, *WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS* 19 (Hazel Greenberg ed., 1977); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 47 (1998).

4. FLA. CONST. art. I, § 1; IOWA CONST. art. I, § 1.

5. Concurrent resolutions of the Senate and the Assembly of New York to amend New York's constitution to explicitly protect against sex discrimination have been introduced in New York. *See* S. 1864, 2005-2006 Leg., Reg. Sess. (N.Y. 2005); A. 3465, 2005-2006 Leg., Reg. Sess. (N.Y. 2005). These resolutions would add the word "sex" to the proscribed classifications listed in New York's equal protection clause. *See* N.Y. CONST. art. I, § 11.

6. In addition to the state constitutions cited in footnotes 1, 2 and 4, the Rhode Island and Louisiana Constitutions, like California's, contain protections against sex discrimination that are explicitly limited in scope. *See* LA. CONST. art. I, § 3 (forbidding sex-based discrimination when it is arbitrary and unreasonable). The Rhode Island Constitution prohibits sex discrimination, but specifically states that it "shall [not] be construed to grant or secure any right relating to abortion or the funding thereof." R.I. CONST. art. I, § 2. In addition, although not commonly listed as one of the state constitutions that has adopted an ERA, the New Jersey Constitution guarantees natural and inalienable rights to all "persons" and defines "person" as meaning both sexes. N.J. CONST. art. I, para. 1 & art. X, para. 4. Although the New Jersey provision does not contain the word "equal," the New Jersey Supreme Court has interpreted it as a prohibition on sex discrimination. *See generally* Karen J. Kruger, *The New Jersey ERA: The Key to Successful Sex Discrimination Litigation*, 17 RUTGERS L.J. 253 (1986); Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 RUTGERS WOMEN'S RTS. L. REP. 69 (1994).

7. Congress passed the Federal ERA on March 22, 1972. The proposed amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1972). The ERA failed by three states to gain the approval of three-fourths (38) of the states by the extended congressional deadline of June 30, 1982. Efforts to add the ERA to the Constitution have been reinvigorated in recent years by the work of legal scholars who have suggested that ratification of the Twenty-seventh Amendment in 1992, more than 200 years after it was originally proposed, may allow ratification of the ERA if three more states approve it. *See* Allison Held et al., *The*

application of the Equal Protection Clause to sex discrimination claims has been limited by various factors, including its reliance on a formal equality model of analysis that primarily protects against discrimination by governmental actors in instances where men and women are similarly situated. This analysis, embedded in constitutional doctrine by an emerging conservative majority, insulates from heightened scrutiny legislation that impacts women more heavily than men or regulates women in areas, such as reproduction, where men and women are biologically different or women are otherwise not similarly situated to men. In light of serious inadequacies in the protection offered by the Federal Constitution, state ERAs remain important legal tools for combating sex discrimination. Indeed, especially in this age of new judicial federalism, in which many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties, state ERAs provide the potential for a more broadly-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Some recent legal scholarship on state ERAs, however, has expressed disappointment at their underutilization by litigators,⁸ and the failure of state courts to interpret ERAs expansively in areas such as abortion and same-sex marriage.⁹ One commentator, Paul Benjamin Linton,¹⁰ has questioned the overall effectiveness of state ERAs, charging that state ERAs have been used to benefit men at the expense of women and that they have ultimately been ineffective “except as symbols” in advancing women’s equality.¹¹

Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 WM. & MARY J. WOMEN & L. 113, 114 (1997). On March 16, 2005, the ERA was reintroduced into Congress. See S.J. Res. 7, 109th Cong. (2005); H.J. Res. 37, 109th Cong. (2005) (proposing a full reintroduction of the ERA). Another resolution, H. Res. 155, 109th Cong. (2005), would verify ratification when three additional state legislatures have passed appropriate legislation.

8. See *infra* note 319 and accompanying text.

9. See *infra* note 320 and accompanying text.

10. Mr. Linton, former General Counsel for Americans United for Life, is the author of three articles on state ERAs. See Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909 (2002); Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907 (1997) [hereinafter Linton, *Making a Difference?*]; Paul Benjamin Linton & Ryan S. Joslin, *The Illinois Equal Rights Provision at Twenty-Five: Has It Made a Difference?*, 21 S. ILL. U. L.J. 275 (1997).

11. See, e.g., Linton, *Making a Difference?*, *supra* note 10, at 940-41; see also *infra* note 374 and accompanying text.

This Article examines the extent to which state ERAs are, in fact, fulfilling their potential for enhancing protection against sex discrimination beyond the formal equality limits of Federal Equal Protection Clause analysis, finding, in direct contrast to Mr. Linton, that state ERAs have been an extremely important tool in advancing sex equality for women. While judicial interpretation has been uneven, in noteworthy instances state courts have interpreted these provisions in rich and expansive ways that extend the scope of protection for sex equality considerably beyond that afforded by the Equal Protection Clause.¹² Part II summarizes the status of the Supreme Court's interpretation of the Equal Protection Clause in sex discrimination cases, highlighting the limits of this analysis. Part III contrasts judicial interpretations of state ERAs with prevailing Equal Protection Clause jurisprudence, highlighting both selected state court decisions that have provided comprehensive protection against sex discrimination and others that have not. Part IV summarizes and responds to recent legal scholarship on state ERAs and identifies factors that have limited the scope of protection afforded by them, including the continuing tendency of some state court judges to rely on the Supreme Court's limited Federal Equal Protection Clause analysis in interpreting their state constitutions. Part V concludes with recommendations for surmounting the obstacles that have hindered their effectiveness, highlighting the role of lawyers, courts, policymakers and citizens in bringing to fruition the positive potential of these important state equality guarantees.

II. THE LIMITS OF SEX EQUALITY JURISPRUDENCE UNDER THE EQUAL PROTECTION CLAUSE

Although the Supreme Court has been divided between a narrow and a much more progressive vision of the meaning of sex equality, in significant respects, the conservative majority of the Court has prevailed in limiting the scope of protection afforded against sex discrimination by the Equal Protection Clause of the Fourteenth Amendment. As a result, the Supreme Court's prevailing sex discrimination jurisprudence is highly selective,

12. This Article focuses exclusively on state constitutional provisions that expressly guarantee protection against sex discrimination. Although not the focus of this Article, courts have interpreted various other provisions in state constitutions as providing protection against gender-based discrimination. These provisions include general equal protection guarantees, prohibitions on unequal privileges and immunities, and due process and privacy guarantees.

identifying “as wrongful only some of the practices and understandings that maintain inequality in the social position of women and men, and obscur[ing]—or affirmatively vindicat[ing] many others.”¹³ The following factors have limited the scope of protection available under the Equal Protection Clause: (1) the requirement of state action; (2) the failure of the Supreme Court to subject claims of sex discrimination to the “strict scrutiny” standard of review applied to claims of race discrimination; (3) the Supreme Court’s application of a formal equality model of analysis that further reduces the protection afforded claims of sex discrimination when men and women are deemed not similarly situated; and (4) the unwillingness of the Supreme Court, absent proof of intentional discrimination, to closely scrutinize facially neutral governmental regulations or policies that disparately impact women. These barriers to broad constitutional protection for sex equality, and the rationale underlying them, are discussed below.

A. State Action

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴ Based on its plain language; history;¹⁵ and public policy rationales of federalism,¹⁶ individual autonomy,¹⁷ and separation of

13. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) [hereinafter Siegel, *She the People*].

14. U.S. CONST. amend. XIV, § 1.

15. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 511-16 (1985) [hereinafter Chemerinsky, *Rethinking*] (explaining that historically the state action requirement made sense because when the Constitution was written it was thought that the common law protected individuals from private infringement of their rights and that therefore the protections of the Constitution need not extend to action by private actors).

16. See, e.g., *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (“[T]he principle that ‘the Constitution created a Federal Government of limited powers,’ while preserving a generalized police power to the States is deeply ingrained in our constitutional history.”); *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 936-37 (1982) (“A major consequence [of the state action requirement] is to require courts to respect the limits of their own power as directed against state governments.”); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 488, 491-92 (2d ed. 2002) [hereinafter CHEMERINSKY, *CONSTITUTIONAL LAW*] (asserting that a primary public policy justification for the requirement of state action is that it “enhances federalism by preserving a zone of state sovereignty”); Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 755 (2002) (“[T]he state action requirement for federal constitutional claims preserves a default of

powers;¹⁸ the Supreme Court has interpreted the Fourteenth Amendment as a prohibition on discriminatory *governmental* action, not *purely private* discrimination by individuals, organizations, employers or businesses.¹⁹ While the Court has defined the concept of state action to include nominally private parties engaged in public functions or closely connected with government,²⁰ in recent years, the conservative majority contracted the

decentralized government. It is principally the states with their plenary powers, not the federal government with its narrower delegated powers, that perform the task of regulating private life.”).

17. See, e.g., *Lugar*, 457 U.S. at 936; see also Kevin Cole, *Federal and State “State Action,” The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 346-47 (1990) (“[T]he federal state-action doctrine preserved individual autonomy by preventing courts from precluding private actors from discriminating in their private lives.”); Sullivan, *supra* note 16, at 755 (“Constitutional immunity for a private sphere fosters normative pluralism; not all associations need to conform to the constitutional norms imposed on government. This view holds that while citizens enjoy robust rights against the state, intimate or expressive groups ought not to be conceived as miniature governments, microcosms of the democratic policy in which members are conceived as rightholders vis-à-vis their groups.”).

18. See Cole, *supra* note 17, at 347 (“In some areas, Congress may regulate private activities when the courts may not Thus, because state action doctrine precludes courts from invoking the Constitution to regulate private conduct that Congress can regulate, the doctrine fosters separation of powers—reserving to the legislative branch the power to regulate private activity.”).

19. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“Since the decision of the Court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct.”) (citation omitted); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (the “Fourteenth Amendment . . . is prohibitory . . . upon the States Individual invasion of rights is not the subject-matter of the amendment.”).

20. The Supreme Court has recognized: (1) private conduct must meet the requirements of the Constitution “if it involves a task that has been traditionally, exclusively done by the government”; and (2) the Constitution applies where the government affirmatively “authorized, encouraged, or facilitated the unconstitutional conduct.” CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 16, at 495-96. The Supreme Court’s state action jurisprudence has been widely criticized by commentators for a variety of reasons, including its failure to guide concrete cases in a meaningful, coherent fashion; an alternative analysis frequently proposed by scholars is “a balancing test that allows courts to weigh the promotion of racial equality against the intrusion on the privacy interest in preserving a sphere of unregulated action.” Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 389-91 (1988). See generally Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Chermerinsky, *Rethinking*, *supra* note 15.

definition of state action in certain cases.²¹ Moreover, in a retreat from suggestions in earlier decisions,²² a majority of the Court has recently insisted that the state action requirement extends beyond the self-enforcing provision of Section 1 of the Equal Protection Clause to legislation enacted by Congress pursuant to its Section 5 enforcement authority.²³ Accordingly, in *United States v. Morrison*, by a vote of five to four, the Court invalidated a provision of the Violence Against Women Act of 1994 (“VAWA”)²⁴ enacted

21. While the Court expansively defined state action to encompass private race discrimination and other conduct by private actors in decisions from the early 1940s through the 1960s, *see* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717 (1961); *Smith v. Allwright*, 321 U.S. 649, 657-58 (1944), some decisions from the Burger and Rehnquist Courts have more narrowly construed the state action requirement. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974); *Moose Lodge v. Irvis*, 407 U.S. 163, 172-73 (1972); *see also* *DeShaney v. Winnebago County Dep’t of Soc. Servs.* 489 U.S. 189, 195 (1989) (finding that the Due Process Clause does not “requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors”). *See generally* CHEMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 16, at 496, 517 (noting that the Burger and Rehnquist Courts have “applied a much narrower definition of state action”). Other opinions, however, indicate signs of a more expansive view of state action. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (finding private entity regulating high school athletics was a state actor based on government’s “entwinement” with its activities); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-26 (1991) (finding state action when private parties exercise peremptory challenges in a civil case in a racially discriminatory manner).

22. *See* *United States v. Guest*, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) (“A majority of the members of the Court expresses the view today that [Section] 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of the Fourteenth Amendment rights, whether or not state officers acting under color of state law are implicated in the conspiracy.”); *id.* at 761 (Clark, J., concurring) (“[T]here now can be no doubt that the specific language of [Section] 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.”).

23. *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (“Just as [Section] 1 of the Fourteenth Amendment applies only to actions committed ‘under color of state law,’ Congress’s [Section] 5 authority is appropriately exercised only in response to state transgressions.”); *United States v. Morrison*, 529 U.S. 598, 599 (2000) (“[T]he Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct.”).

24. Pub. L. No. 103-322, § 40,302, 108 Stat. 1902 (1994) (codified at 42 U.S.C. § 13,981), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000). In enacting the civil

by Congress to remedy pervasive bias against victims of gender-motivated violence in the state justice systems by allowing them to bring a civil lawsuit to redress the civil rights deprivation.²⁵

The requirement of state action, and the Supreme Court's narrow interpretation of it, obviously substantially limits the scope of protection afforded by the Federal Constitution against sex discrimination.²⁶ As several feminist scholars have noted, the state action requirement impacts women more harshly than men since

[t]he major sites of women's oppression—including the nongovernmental workplace and the home—are located in the private sphere of civil society and therefore have historically not been considered appropriate subjects for protection under federal constitutional and civil rights law. Gender inequality arising from disparities in private power is invisible to a system designed to protect individuals from state interference.²⁷

While numerous federal statutes fill the gap by extending protection against sex discrimination to actions by private entities, these statutes are targeted at sex discrimination in specific contexts and, of course, are subject to repeal

rights provision of VAWA, Congress explicitly found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws" and that therefore "a [f]ederal civil rights action . . . is necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

25. The Court held that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to enact the civil rights provision of VAWA. *Morrison*, 529 U.S. at 619, 627. The Court reasoned that the provision was an invalid exercise of Congress's power under Section 5 because it authorized suits against private actors, *id.* at 620-25, and because it was not "congruent and proportional" to the harm it sought to remedy, *id.* at 625-27. For an excellent critique of *Morrison*, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 109-45 (2002).

26. For a detailed discussion of the arguments for and against a federal constitutional sex equality provision that extends to private actors, see Sullivan, *supra* note 16, at 754-59.

27. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *OHIO ST. L.J.* 1, 38 (2000) (footnote omitted); *see also* Tracy E. Higgins, *Democracy and Feminism*, 110 *HARV. L. REV.* 1657, 1673-74 (1997). The narrow scope of protection afforded by the Federal Constitution to victims of domestic violence is also illustrated by the Supreme Court's recent decision in *Town of Castle Rock v. Gonzales*, in which the Court held that an individual has no enforceable property interest for due process purposes in police enforcement of a restraining order. 125 S. Ct. 2796, 2810 (2005).

and amendment by Congress and narrow interpretation and enforcement by federal administrative agencies.²⁸ Moreover, as *Morrison* illustrates, through its federalism jurisprudence, the conservative majority of the Supreme Court has limited the power of Congress to pass laws protecting sex equality and other individual rights even in instances where an abysmal record of state failure in enforcing equality exists.²⁹

28. See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (2000) (prohibiting sex discrimination in educational programs or activities receiving federal funding); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000) (prohibiting, inter alia, discrimination based on sex by certain public and private employers); Equal Pay Act of 1963, 29 U.S.C. § 206 (2000) (requiring “equal pay for equal work” in employment). For a detailed discussion of the ways in which Title IX protects students from sex discrimination more comprehensively than the Federal Constitution, see David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005). Federal antidiscrimination laws, however, are far from comprehensive. See Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953, 964-65 (1996) (noting, for example, that while protection against discrimination based on race, national origin, and disability extends to all federally funded programs, federal law prohibits sex discrimination in federally-funded education programs only).

29. See generally *Morrison*, 529 U.S. 598; JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002) (discussing various Supreme Court decisions in which the Court has restricted the powers of Congress and expanded the concept of state sovereign immunity). For specific examples of federal statutes invalidated, in whole or in part, by the Rehnquist Court on federalism grounds, see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). But see, for example, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), which held that Congress had power under Section 5 of the Fourteenth Amendment to authorize lawsuits against states under Title II of the Americans with Disabilities Act of 1990 to force them to provide access for the disabled to courthouses; and *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 728-40 (2003), which held that passage of Family and Medical Leave Act of 1993 was a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment.

B. Standard of Review

Although it took many decades³⁰ and serious inadequacies still permeate its race discrimination jurisprudence,³¹ the Supreme Court in recent years has

30. Following the adoption of the Equal Protection Clause, the Supreme Court explicitly sanctioned race segregation as constitutionally permissible. *See Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Fifty-eight years passed before the Supreme Court invalidated segregation in public schools in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). It was not until 1967 that the Supreme Court finally invalidated antimiscegenation statutes as violative of the Equal Protection Clause. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1112 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*] (“Only after the Court’s decision in *Loving* . . . could it be confidently asserted that the Court had adopted a categorical presumption against race-based regulation.”).

31. Although the Equal Protection Clause now provides protection against explicitly race-based forms of state action, the Supreme Court’s application of the Equal Protection Clause to reach other forms of race discrimination has been highly limited, thereby immunizing much race discrimination from review. For example, in the area of school desegregation, the Court’s “distinction between *de jure* and *de facto* discrimination insulates certain forms of school segregation from judicial remedy because they cannot be traced to forbidden governmental classifications on the basis of race.” Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1715 (2005). In addition, the Supreme Court has repeatedly held that government policies that have a disparate impact on both minorities and women are constitutional so long as they are not enacted for discriminatory purposes. *See* discussion *infra* Part II.D. Moreover, over the years, the Supreme Court has closely scrutinized and invalidated affirmative action policies that increase the institutional representation of minorities. *See* Cheryl I. Harris, *Equal Treatment and Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1766 (2001) (“The Supreme Court’s insistence on the extension of strict scrutiny to all uses of race, even when deployed to remediate long-standing patterns of racial inequality, represents the repackaging of the formalist precepts about race implicit in the reasoning and holding of the Court’s majority in *Plessy*.”); *see, e.g.,* *Gratz v. Bollinger*, 539 U.S. 244, 270, 275-76 (2003) (applying strict scrutiny and invalidating University of Michigan’s affirmative action policy); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30, 238-40 (1995) (remanding after concluding strict scrutiny should be applied in reviewing a federal affirmative action program); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 510-11 (1989) (applying strict scrutiny, and invalidating municipal affirmative action program). *But see* *Grutter v. Bollinger*, 539 U.S. 306, 326, 334-44 (2003), *reh’g denied*, 539 U.S. 982 (2003) (applying strict scrutiny, and upholding University of Michigan Law School’s affirmative action policy). *See generally* Siegel, *She the People*, *supra* note 13, at 956-57 (arguing that the Supreme Court’s narrow conceptualization of race discrimination ignores the reality that “race inequality in this country was sustained by a complex network of institutions, practices, stories, and reasons that involved both more and less than group-based classifications”).

applied a rigorous standard of scrutiny in reviewing overt facial distinctions based on race under the Equal Protection Clause, requiring the government to justify such classifications by proving that they are necessary to advance a compelling governmental interest.³² The Supreme Court has explained that this rigorous “strict scrutiny” standard of review is applied to “all racial classifications to ‘smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.’”³³ In justifying strict scrutiny review, the Supreme Court has explained that, “‘whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.’”³⁴

Despite the valiant efforts of feminist litigators to convince the Supreme Court to apply the strict scrutiny standard of review to sex-based discrimination, this argument never garnered more than four votes from the Supreme Court.³⁵ In 1976, in *Craig v. Boren*,³⁶ the Supreme Court stated that sex discrimination claims would be reviewed under a less rigorous standard, requiring proof that classifications based on sex “serve important governmental objectives,” and those objectives must be substantially advanced by the use of the sex-based classification.³⁷ Under this “intermediate scrutiny” standard, the government need not, as in the case of race and other suspect classifications, demonstrate “compelling” objectives. Moreover, the availability of less discriminatory alternatives to the sex-based classification is not necessarily fatal to the government’s case.³⁸ While some

32. See, e.g., *Johnson v. California*, 125 S. Ct. 1141, 1146-48 (2005) (finding that strict scrutiny applies to state policy of segregating prisoners by race as they enter new correctional facilities).

33. *Id.* at 1146 (quoting *Croson*, 488 U.S. at 493) (alteration in original).

34. *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 229-30).

35. The Court came closest to adopting the strict scrutiny standard in 1973, but fell one vote shy. See *Frontiero v. Richardson*, 411 U.S. 677, 678, 690-91 (1973) (plurality opinion) (invalidating a rule giving benefits to all spouses of men, but only to economically dependent spouses of women in the Air Force). Four Justices voted for invalidating the provision under the strict scrutiny standard. *Id.* at 688. Four others voted for invalidating it under the rational basis standard. *Id.* at 691 (Stewart, J., concurring); *id.* at 691-92 (Powell, J., concurring). Justice Rehnquist voted to uphold the statute under the rational basis standard. *Id.* at 691 (Rehnquist, J. dissenting).

36. 429 U.S. 190 (1976).

37. *Id.* at 197.

38. Most recently, for example, in *Nguyen v. INS*, the Supreme Court conceded that Congress could have achieved its goals in a sex-neutral fashion but nonetheless upheld a sex-

commentators argue that the Court's 1996 opinion in *United States v. Virginia*³⁹ put more teeth into the intermediate standard of review,⁴⁰ recent precedent casts doubts on that conclusion and indicates that the Justices are sharply divided in their understanding and application of the intermediate standard.⁴¹

based classification in a federal immigration law. 533 U.S. 53, 63-64 (2001); *see also id.* at 81 (O'Connor, J., dissenting) (criticizing the majority for "dismiss[ing] the availability of available sex-neutral alternatives as irrelevant"). For additional discussion of *Nguyen*, *see infra* notes 75-90 and accompanying text.

39. 518 U.S. 515 (1996).

40. In *United States v. Virginia*, the Court expressly adhered to the intermediate standard. *Id.* at 532 n.6 ("The Court has thus far reserved the most stringent judicial scrutiny for classifications based on race or national origin . . ."). However, in an opinion by Justice Ginsburg, the Court emphasized that for sex-based classifications to pass muster under the intermediate standard, the state must demonstrate an "exceedingly persuasive" justification, and "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation It must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females." *Id.* at 532. Some commentators have argued that Justice Ginsburg's opinion brought the standard closer to strict scrutiny. *See, e.g.*, Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1182 (1998) (arguing that *United States v. Virginia* represents "a doctrinal progression towards a higher level of scrutiny"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (arguing that "the Court did not merely restate the intermediate scrutiny standard but pressed it closer to strict scrutiny"). Some courts have expressly rejected this suggestion. *See, e.g.*, Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 908 (11th Cir. 1997) (rejecting argument that *United States v. Virginia* changed the level of scrutiny applied to sex-based classifications, and holding that "[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective"); *Cohen v. Brown Univ.*, 101 F.3d 155, 183 n.22 (1st Cir. 1996) ("We point out that *Virginia* adds nothing to the analysis of equal protection challenges of gender-based classifications that has not been part of that analysis since 1979 . . ."). *But see* *Montgomery v. Carr*, 101 F.3d 1117, 1123 (6th Cir. 1996) (citing *Virginia*, 518 U.S. at 531) (noting that *Virginia* "appear[ed] to create a new standard of review for gender-based classifications, requiring an 'exceedingly persuasive justification' on the part of a governmental actor"); *Nabozny v. Podlesny*, 92 F.3d 446, 456 n.6 (7th Cir. 1996) (noting in dicta that *Virginia's* "exceedingly persuasive justification standard" differed from traditional intermediate scrutiny formulation).

41. *See* *Nguyen v. INS*, 533 U.S. 53 (2001). Indeed, the Court's opinion in *Nguyen* appears to undermine the analysis of *United States v. Virginia*. *See* *Nguyen*, 533 U.S. at 74 (O'Connor, J., dissenting) ("While the Court invokes heightened scrutiny, the manner in which

Lower courts,⁴² commentators,⁴³ and even Supreme Court Justices,⁴⁴ have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges in deciding the importance of a state interest and whether the classification is substantially related. Professor Deborah Brake, for example, has argued that “the history of intermediate scrutiny in the lower courts demonstrates widespread confusion and inconsistent results.”⁴⁵ A recent quantitative analysis of equal protection decisions supports these criticisms, finding that, in contrast to the “relatively predictable outcomes” under the strict scrutiny and rational basis standards,

it explains and applies this standard is a stranger to our precedents.”). For additional discussion of *Nguyen*, see *infra* notes 75-90 and accompanying text.

42. *E.g.*, *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987) (“The mid-level review that the Court has applied to [sex-based] classifications provides ‘relatively little guidance in individual cases.’” (quoting Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982))); *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (noting that the various standards of review under the Equal Protection Clause “are at times both difficult to distinguish and to apply,” leading courts “to make defined formulas fit ill-defined circumstances, possibly leading to result oriented decision-making”), *aff’d in part and rev’d in part*, 6 F.3d 990 (3d Cir. 1993).

43. *E.g.*, Brake, *supra* note 28, at 958 (noting that “[l]ower courts have often complained that the intermediate scrutiny standard provides insufficient guidance and leaves broad discretion with individual judges”); Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 187 (2002) (arguing that “intermediate scrutiny is a ‘made up’ rule that has little effect on the outcome of the decisions”); Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 B.B.J. 10, 26 (Feb. 2000) (“‘[I]ntermediate scrutiny’ constituted a malleable, rather indeterminate standard of review, providing little or no guidance for lower courts—or even for future Supreme Court cases.”).

44. For example, in his confirmation hearing for the Supreme Court, Justice Souter stated that “[the intermediate test] is not good, sound protection. It is too loose.” Skaggs, *supra* note 40, at 1190 (quoting Ruth Marcus & Michael Isikoff, *Souter Declines Comment on Abortion*, WASH. POST, Sept. 14, 1990, at A1, A16); see also *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (criticizing intermediate standard for containing phrases “so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments”).

45. Brake, *supra* note 28, at 958, 960-61 (citing cases in which lower courts have applied intermediate scrutiny to reach opposite results regarding: the constitutionality of statutes punishing only male rapists who attack females; the constitutionality of criminal statutes distinguishing between male and female perpetrators who commit the same crime; and the constitutionality of criminal statutes imposing different penalties on men and women for nonsupport of spouses and children).

“when courts apply the intermediate standard, litigants alleging sex discrimination are nearly as likely to win as they are to lose.”⁴⁶

Although the Supreme Court has never clearly explained why it chose to apply a different standard to sex and race discrimination cases,⁴⁷ the limited scope of protection afforded against sex discrimination stems in part from the fact that the source of constitutional protection is the Fourteenth Amendment with its distinct history and purpose relating to race discrimination, as opposed to an Equal Rights Amendment or other constitutional provision with a history and purpose targeted specifically at sex discrimination. As Professor Reva Siegel explains:

The intermediate standard of scrutiny . . . expresses the intuition that sex discrimination is just like race discrimination—but, in the end, not exactly like race discrimination. Commentators commonly invoke several differences between sex and race discrimination to justify this difference in doctrinal standards. First, the framers of the Fourteenth Amendment were thinking about questions of race discrimination, not sex discrimination. Thus, it is appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women; bluntly put, the nation never made a collective constitutional commitment to respect women as equals of men. Second . . . the difference in standards reflects a pervasive

46. Lee Epstein, Andrew D. Martin, Lisa Baldez & Tasina Nitzchke Nihiser, *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL'Y 11, 67 (2004). The authors examined both state court decisions and the decisions of the United States Supreme Court and concluded that their “results underscore the importance of elevating the standard used to adjudicate sex discrimination claims.” *Id.* at 20. The authors found, for example, that when state courts apply the intermediate standard, “the probability that a litigant alleging discrimination will prevail is 47%. . . . This is in contrast to the relatively predictable outcomes generated by rational basis (under which a litigant faces only 20% likelihood of winning) and strict scrutiny (with a 73% probability of success).” *Id.* at 49. The authors also emphasized the impact of the ideology of the judges on outcomes under the intermediate standard: “the more left-of-center (‘liberal’) the court, the more likely it was to apply intermediate scrutiny in a way favorable to the party alleging discrimination.” *Id.*

47. In his concurring opinion in *Frontiero v. Richardson*, Justice Powell expressly declined to characterize sex as a suspect classification explaining that this conclusion with its “far-reaching implications” was “unnecessary” given that the sex-based classification could not survive minimal rationale basis review. 411 U.S. 677, 691-92 (1973) (Powell, J., concurring). Justice Powell also emphasized that, given the pendency of the Equal Rights Amendment, “reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.” *Id.* at 692.

intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination. The case law presents sex discrimination as a problem involving old-fashioned ways of thinking . . . rather than a long trail of state-sponsored coercion. Third, underneath it all, there is a sense that sex discrimination is at root different from race discrimination. Sex distinctions are not always harmful (or based on animus) the way race distinctions are . . . Note how, from this vantage point, *the central constitutional question about sex discrimination is whether it is really like race discrimination.*⁴⁸

While powerful counter-arguments exist that support full constitutional protection for sex equality under the Equal Protection Clause,⁴⁹ explicit constitutional guarantees of sex equality—like those in the proposed Federal ERA and the guarantees expressed in many existing state ERAs—provide courts with direct authority, indeed a mandate, to treat sex-based discrimination as highly suspect.⁵⁰

48. Siegel, *She the People*, *supra* note 13, at 954-56 (emphasis added) (footnotes omitted). In many respects, the intermediate scrutiny standard represents a political compromise within the Court that creates a loophole for approving different treatment of the sexes in areas viewed by some members of the Court as justifying different treatment. *See* Sullivan, *supra* note 16, at 742-47 (“Race and sex discrimination are . . . imperfectly analogous. When faced with such analogical crises, the Supreme Court often splits the difference by striking down some but not all types of challenged law.”).

49. In *Frontiero v. Richardson*, Justices Brennan, Marshall, Douglas and White reasoned that sex-based classifications should be subjected to strict scrutiny because: (1) there is long history of sex discrimination against women; (2) sex, like race and national origin, is an immutable characteristic determined solely by birth and bearing “no relation to ability to perform or contribute to society”; (3) sex is a highly visible characteristic that causes women to continue to face pervasive discrimination; and (4) women tend to be underrepresented in the political process. 411 U.S. at 686-87. The Court also observed that Congress, through statutes addressing sex discrimination, had recognized “that classifications based upon sex are inherently invidious,” and that “this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.” *Id.* at 687-88.

50. *See, e.g.*, Ruth Bader Ginsburg, *Let’s Have E.R.A. as a Signal*, 63 A.B.A. J. 70, 73 (1977) (“The adoption of the equal rights amendment would relieve the Court’s uneasiness in the gray zone between interpretation and amendment of the Constitution.”); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN’S RTS. L. REP. 361, 366 (1992) (“Ratification of the Equal Rights Amendment would give the Supreme Court a clear signal—a more secure handle for its rulings than the [F]ifth and [F]ourteenth [A]mendments.”); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 1585-86 (2d ed. 1988) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW] (“The Supreme Court’s failure to

C. Formal Equality and Real Differences

The inadequacy of the federal constitutional protection afforded against sex discrimination is further exacerbated by the Supreme Court's reliance on a formal equality model of analysis. This analysis stems from the Supreme Court's insistence—applicable to all discrimination claims whether based on race, sex, or other classifications—that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.”⁵¹ Much as it does in the area of race discrimination, this formal equality model substantially limits the scope of protection afforded claims of sex discrimination. Only laws that discriminate against women in situations in which they are similarly situated to men trigger review under even the more modest “intermediate standard” of review. Thus, the Supreme Court has allowed differences in treatment where they correspond to differences between men and women relating to biological or legal status, or other relevant differences.⁵²

In *Geduldig v. Aiello*, for example, the Supreme Court held that the exclusion of pregnancy-related disabilities from a state disability insurance program does not violate the Equal Protection Clause.⁵³ The Court reasoned that the pregnancy exclusion was not discriminatory because, under the disability insurance program, “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”⁵⁴ Since “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics . . .

articulate clearer and more sensitive principles in the area of gender discrimination . . . may be explained in part by the Court's reluctance to overstep what it conceives to be the bounds between constitutional interpretation and constitutional amendment. . . . [An ERA] would add to our fundamental law a principle under which the judiciary would be encouraged to develop a more coherent pattern of gender-discrimination doctrines.”). *See generally* Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (providing comprehensive examination and analysis of the meaning, impact and need for the Equal Rights Amendment).

51. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

52. In these instances, the Supreme Court has been highly deferential to the judgment of the governmental actor (usually the state legislature), requiring only a minimal connection between the sex-based classification and the state's asserted objective. *See, e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981).

53. 417 U.S. 484, 497 (1974).

54. *Id.* at 496-97.

lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis.”⁵⁵ Legal commentators have widely criticized this decision and the Court’s general insistence on formal equality as “injurious to women by ignoring important sex-based differences, or ultimately holding women to standards that have been established principally by men in a sexually unequal past.”⁵⁶ Specifically, commentators have emphasized that by analyzing “pregnancy-based classifications as if pregnancy were merely a physical condition appearing in only one sex,”⁵⁷ the Court ignored the long and troublesome history of women’s disadvantageous treatment in the workplace and elsewhere precisely *because of* their reproductive capacity, thereby perpetuating the subordination of women.⁵⁸ Simply put, the *Geduldig*

55. *Id.* at 496 n.20. The analysis of *Geduldig* was extended to cases under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2000). *See* Gen. Elec. Corp. v. Gilbert, 429 U.S. 125, 145-46 (1976) (holding that the failure to cover pregnancy-related disabilities under a disability benefit plan does not violate Title VII). Congress subsequently enacted the Pregnancy Discrimination Act of 1978 (“PDA”), amending Title VII to include pregnancy classifications within the definition of sex discrimination under Title VII. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)). While the passage of the PDA ameliorates the practical impact of *Geduldig* in the employment context, its rationale continues to be applicable in challenges to pregnancy discrimination under the Equal Protection Clause and certain federal statutes. In *Bray v. Alexandria Women’s Health Clinic*, the Court explicitly relied on *Geduldig*’s reasoning in holding that the practice of denying women access to medical services by blockading abortion facilities did not constitute the “class-based, invidiously discriminatory animus” necessary to prove a violation of the civil rights statute, 42 U.S.C. § 1985(3). *Bray*, 506 U.S. 263, 271 (1993) (noting the continued vitality of *Geduldig*). The Court, in an opinion by Justice Scalia, held that a cause of action was available under § 1985(3) only if private conspirators had discriminated against women as a class. *Id.* at 270. Justice Scalia reasoned that because discrimination on the basis of pregnancy was not discrimination against women “by reason of their sex,” but rather an attempt to save fetal life, there was no cause of action under § 1985(3). *Id.*

56. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 803 (15th ed. 2004). *See generally* Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913 (1983); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

57. David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1883 (1995).

58. *Id.* (“[T]he Court stripped the ability to become pregnant of any social meaning, ignoring the ways in which the legal treatment of pregnancy defines the appropriate roles of women and, consequently, dictates women’s place in society.”); *see also* Deborah A. Ellis, *Protection for Pregnant Persons: Women’s Equality and Reproductive Freedom*, 6 SETON

analysis turns a blind eye to the reality that “the fundamental problem is . . . [the] willingness to transmute woman’s ‘real’ biological difference to woman’s disadvantage.”⁵⁹

The formalistic reasoning of *Geduldig* has also been extended to uphold laws that make sex-based distinctions based on the capacity to become pregnant. For example, in *Michael M. v. Superior Court*,⁶⁰ the Court upheld a California statutory rape law that made only men criminally liable for sexual intercourse with females under eighteen.⁶¹ The Court’s plurality opinion by Justice Rehnquist reasoned that the statute was permissible because men and women were not similarly situated with respect to the State’s asserted goal of preventing teenage pregnancy:⁶²

Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. Because virtually all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.⁶³

As in *Geduldig*, the Court’s formalistic reasoning failed completely to recognize and distinguish between biological differences and “the social consequences of biology.”⁶⁴ The failure to scrutinize carefully the gender distinctions at the heart of the case led the Court to “accept[] and reinforce[]

HALL CONST. L.J. 967, 972 (1996) (“[T]he right to control one’s reproductive life can be seen as the *sine qua non* of personhood, the precursor to the exercise of all other rights. And because only women can become pregnant, women’s equality is violated when reproductive freedom is denied.”).

59. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 50, at 1584.

60. 450 U.S. 464 (1981).

61. *Id.* at 467.

62. As Professor Ann Freedman has pointed out, the State’s asserted goal was dubious: A much more plausible explanation for the [S]tate’s choice to penalize only males for sexual intercourse involving teenage girls was the assumption that when such conduct occurs, males are the aggressors and females are their victims. This explanation of the statute is supported not only by historical evidence about the origins of the law in the nineteenth century but also by contemporary evidence about the kinds of situations in which the law is enforced.

Freedman, *supra* note 56, at 932-33 (footnotes omitted).

63. *Michael M.*, 450 U.S. at 471, 473.

64. Law, *Rethinking Sex*, *supra* note 56, at 1001.

the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness."⁶⁵

The Court's refusal to closely scrutinize sex-based legislative classifications has also been extended to situations in which the perceived differences between men and women were created by law rather than biology. For example, in *Rostker v. Goldberg*, the Supreme Court upheld the exclusion of women from military draft registration because it found that men and women were not similarly situated with regard to the purpose of the draft.⁶⁶ Because the primary purpose of the draft is to call up troops for combat, and women were excluded from combat participation by law, men and women were not similarly situated with regard to the purpose of the draft.⁶⁷ Based on the different legal status of men and women, the Court deferred to the judgments of Congress, ignoring completely the sex stereotypes about the roles and capabilities of women and men underlying both the combat exclusion and the all-male draft.⁶⁸ The Court's reliance on the legally created combat exclusion as the basis for the dissimilarity is troubling. As Professor Ann Freedman has noted, "If legislatures can create 'real' sex differences at will by passing sex-based laws, the [E]qual [P]rotection [C]lause can easily be circumvented."⁶⁹ Moreover, the *Rostker*

65. *Id.* at 1000.

66. 453 U.S. 57, 67 (1981).

67. *Id.*

68. *Id.*

69. Freedman, *supra* note 56, at 939. In *Parham v. Hughes*, the Supreme Court also relied on a legislatively-created difference to justify a second sex-based statute. 441 U.S. 347, 351 (1979). The Supreme Court upheld a Georgia law denying a father (but not the mother) the right to sue for the wrongful death of his nonmarital child because he had not formally legitimated the child pursuant to another Georgia law that gave only fathers this power. *Id.* at 355-56. The Court reasoned that mothers and fathers of illegitimate children were not similarly situated because under Georgia law only a father "can by voluntary unilateral action make an illegitimate child legitimate." *Id.* In dissent, Justice White pointed out,

Only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to. Under the plurality's bootstrap rationale, a state could require that women, but not men, pass a course in order to receive a taxi license, simply by limiting admission to the course to women.

Id. at 361-62 (White, J., dissenting) (footnote omitted); *see also* *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (upholding state law allowing a child to be adopted without notice to the father where the father had not lived with the mother and the child or had not registered intent to claim paternity).

decision, fails utterly to examine the serious gender equality implications of the all-male draft:

On the surface, [*Rostker*] appears to favor women—allowing them to volunteer for the military or not as they so choose, while subjecting men to involuntary registration This facile conclusion vanishes when one asks why males are subjected to this burden. The answer that our government gives the recalcitrant young man is: “It is your duty as a United States citizen.” The message to young women is: “Your citizenship duty is optional, while your brother’s . . . is mandatory.”⁷⁰

In its subsequent decisions in *Mississippi University for Women v. Hogan*⁷¹ and *United States v. Virginia*,⁷² the Supreme Court indicated that the real differences doctrine does not extend to normative generalizations about the sexes. In *United States v. Virginia*, for example, Justice Ginsburg emphasized that in seeking to justify sex-based classifications, government “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁷³ Moreover, “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁷⁴

However, the Supreme Court continued the formalistic reasoning of the *Geduldig/Rostker* line of cases in *Nguyen v. INS*,⁷⁵ a case decided in 2001, in which it upheld a federal immigration law that explicitly distinguished between parents based on sex, making it significantly easier for an out-of-wedlock child born overseas to a United States citizen to claim citizenship through a citizen-mother than a citizen-father.⁷⁶ The Court identified two

70. Arnold H. Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C. L. REV. 87, 95 (1981).

71. 458 U.S. 718 (1982).

72. 518 U.S. 515 (1996).

73. *Id.* at 533.

74. *Id.* at 550.

75. 533 U.S. 53 (2001); *see also* *Miller v. Albright*, 523 U.S. 420, 440 (1998) (asserting that “strong governmental interests justify the additional requirement imposed on children of citizen fathers” under a federal immigration law, 8 U.S.C. § 1409, although a majority of the Court did not resolve the issue on the merits).

76. Under the statute, 8 U.S.C. § 1409 (2000), which governs the citizenship of out-of-wedlock children born outside of the United States to only one U.S. citizen, an unwed citizen mother automatically conveys citizenship to her foreign-born child so long as she meets

important governmental objectives served by the statute.⁷⁷ First, the sex-based classification served the government's interest in ensuring "that a biological parent-child relationship exists."⁷⁸ The Court reasoned that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood."⁷⁹ Whereas paternity is uncertain, "[i]n the case of the mother, the relation is verifiable from the birth itself."⁸⁰ While recognizing that sex-neutral alternatives existed to accomplish the same ends—such as requiring both parents to prove biological parenthood—the Court concluded that the Constitution did not require their use since "the use of gender specific terms takes into account a biological difference between the parents."⁸¹ Second, the sex-based distinction furthered the government's interest in ensuring the opportunity to develop a truly meaningful connection between the child and the citizen parent and, in turn, the United States.⁸² In the case of a citizen-mother, the Court reasoned that this opportunity "inheres in the very event of birth."⁸³ In contrast, "it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity."⁸⁴ These factors create what the Court called an "undeniable difference in the circumstances of the parents."⁸⁵

In a sharp dissent, Justice O'Connor accused the majority of watering down the intermediate scrutiny standard by "hypothesiz[ing] about the interests served by the statute," "fail[ing] adequately to inquire about the actual purposes" of the statute, and "casually dismiss[ing] the relevance of available sex-neutral alternatives."⁸⁶ She also charged that the law was based "not in biological differences but instead in a stereotype—*i.e.*, 'the

certain minimal residency requirements. *Id.* § 1409(c). In contrast, an unwed American father must: (1) prove the existence of a "blood relationship" by "clear and convincing evidence"; (2) provide a written statement that he will provide financial support while the child is a minor; and (3) before the child's eighteenth birthday, formally recognize paternity via legal legitimation, a declaration of paternity under oath, or a court order of paternity. *Id.* § 1409(a).

77. *Nguyen*, 533 U.S. at 62-64.

78. *Id.* at 62.

79. *Id.* at 63.

80. *Id.* at 62.

81. *Id.* at 64.

82. *Id.* at 64-65.

83. *Id.* at 65.

84. *Id.*

85. *Id.* at 68.

86. *Id.* at 78-79 (O'Connor, J., dissenting).

generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with children.”⁸⁷ Finally, Justice O’Connor correctly noted that in analyzing the law’s sex-based classification from the limited and formalistic perspective of biological difference, the Court ignored both the long history of gender biases in laws governing the transmission of citizenship⁸⁸ and the detrimental impact of a scheme that burdens women with the responsibility for unwed children and frees males to ignore parental responsibilities:

Section 1409(a)(4) is . . . paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. . . . Unlike § 1409(a)(4), our States’ child custody and support laws no longer assume that mothers alone are “bound” to serve as “natural guardians” of nonmarital children. The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the “very stereotype the law condemns.”⁸⁹

87. *Id.* at 88-89 (quoting *Miller v. Albright*, 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting)). As Justice O’Connor pointed out, the facts of the *Nguyen* case reveal the inaccuracy of the stereotype asserted by the majority as biological fact. *Id.* The petitioner, Tuan Anh Nguyen, was born in Saigon in 1969. *Id.* at 57 (majority opinion). After the relationship between his American father and Vietnamese mother ended, Nguyen lived with the family of his father’s new Vietnamese partner. *Id.* At the age of six, he came to the United States and was raised by his father. *Id.*

88. See Manisha Lalwani, *The “Intelligent Wickedness” of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707, 739-40 (2002) (tracing origins of § 1409(a) to common law doctrine of coverture, which regarded out-of-wedlock children as the sole responsibility of unwed mothers, while marital children were the property of fathers); Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1680 (2000) (same).

89. 533 U.S. at 92 (O’Connor, J., dissenting) (citation omitted). As one commentator has emphasized, the law seriously impacts children born abroad and out-of-wedlock by allowing fathers to opt out of their financial responsibilities: “[I]f a citizen father actively chooses not to fulfill the requirements for conferring citizenship on his foreign-born out-of-wedlock child, the child is precluded from utilizing domestic child support laws. Consequently, section 1409(a)(4) perpetuates the gender schema of sexual irresponsibility for men.” Lalwani, *supra* note 88, at 740-41. The impact on foreign-born, out-of-wedlock children of American servicemen is severe. See, e.g., Joseph M. Ahern, Comment, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-*

As in past cases, in *Nguyen*, the Court confuses biology with social patterns and sex-based stereotypes, and ultimately accepts and reinforces the stereotype of motherhood as “unshakable responsibility” and fatherhood as “opportunity.”⁹⁰

D. Sex-Neutral Rules that Disparately Impact Women or Men

Finally, as in the case of race-neutral classifications, the Court’s formal equality analysis has also resulted in its refusal to closely scrutinize sex-neutral classifications that are administered in a discriminatory manner or disproportionately impact women or men. Here, again, the reasoning is formalistic: because men and women are similarly situated with respect to rules that treat them equally on their face, the formal mandate of the equal protection clause is satisfied in the absence of direct proof that intentional sex discrimination has occurred. The Court’s decision in *Personnel Administrator of Massachusetts v. Feeney*,⁹¹ exemplifies this analysis. In *Feeney*, the Court rejected a challenge to a Massachusetts policy granting lifetime preference to veterans for state civil service positions.⁹² Although the policy was neutral on its face, because over ninety-eight percent of veterans in Massachusetts were male, “the preference operate[d] overwhelmingly to the advantage of males.”⁹³ Relying on its earlier

Amerasians, 1 PAC. RIM. L. & POL’Y J. 105, 112 (1992) (noting that only fifteen percent of Filipino-Amerasian children have acquired U.S. citizenship through their unwed citizen fathers), *quoted in* Lalwani, *supra* note 88, at 741 n.202.

90. See Law, *Rethinking Sex*, *supra* note 56, at 996-97 (“When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true. Assertions that it is ‘virtually inevitable’ that the mother will care for the child, assumptions of her ‘unshakable responsibility’ . . . are no different from the ‘old notion’ that motherhood is ‘the noble and benign mission’ of women. The assumption reinforces stereotypes and degrades women.”); see also Lalwani, *supra* note 88, at 739-40 (arguing that the statute upheld in *Nguyen* “maintains the gender schemas of unwed women as sexually responsible and unwed men as sexually irresponsible” by automatically conveying citizenship to the foreign-born out-of-wedlock children of American mothers, but requiring American fathers to take affirmative steps to convey citizenship and thereby allowing them to “skirt their financial responsibility for supporting their children”).

91. 442 U.S. 256 (1979).

92. *Id.* at 280-81.

93. *Id.* at 259.

reasoning in racial discrimination cases under the Equal Protection Clause,⁹⁴ the Court employed a two-fold inquiry:

The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," *but purposeful discrimination is "the condition that offends the Constitution."*⁹⁵

Moreover, the Court narrowly defined the requisite discriminatory purpose, requiring proof that the government *desired* to discriminate, not merely that it took action with knowledge that it would have discriminatory consequences.⁹⁶ Despite the overwhelming disproportionate negative impact on women seeking civil service jobs, the Massachusetts veterans' preference policy met the requirements of the Equal Protection Clause because there

94. In *Washington v. Davis*, which involved an employment exam that excluded four times as many African-Americans as whites, the Court held that race discrimination challenges to facially neutral governmental action require proof of discriminatory purpose to trigger strict scrutiny review under the Equal Protection Clause. 426 U.S. 229, 239 (1976); *see also* *McClesky v. Kemp*, 481 U.S. 279, 298 (1987) ("For this claim to prevail, McClesky would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified."). In contrast, as noted *supra*, if governments implement race-conscious affirmative action policies to increase minority representation in institutions, their actions are subject to strict scrutiny. *See supra* note 31 and accompanying text. *But see* *United States v. Virginia*, 518 U.S. 513, 533-34 (1996) (distinguishing sex-based classifications that are designed to compensate for women's economic and social disadvantage, which are permissible, from those that disadvantage women based on impermissible sex-based stereotypes, which are impermissible). State court decisions considering state ERA-based challenges to affirmative action policies are briefly discussed *infra* at note 377.

95. *Feeney*, 442 U.S. at 274 (emphasis added) (citations omitted).

96. *Id.* at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (emphasis added) (citations omitted)).

was no proof that the State's desire in adopting the law was to disadvantage women.⁹⁷

The Court's refusal to closely scrutinize legal rules for discriminatory impact absent proof of discriminatory purpose poses formidable challenges to litigants. Especially now that legislators and other policymakers have adapted to the Court's modern equal protection jurisprudence,⁹⁸ discriminatory motives are rarely expressed and benign purposes can easily be articulated for most laws.⁹⁹ Moreover, over time the predominant forms of sexism, much like racism, have evolved from overt expressions of discrimination to more subtle forms.¹⁰⁰ Indeed, "many of the forms of state action that are most detrimental to women involve laws and policies that are embedded in sexist stereotypes, but expressed in gender neutral language."¹⁰¹ The impact of the *Feeney* decision is thus increasingly problematic, insulating most forms of facially neutral governmental action from review.¹⁰² As Professor Reva Siegel has documented, the Court's reasoning in this area has, for example, eviscerated the effectiveness of the Equal Protection Clause in protecting against discriminatory marital status doctrines (now

97. In *Feeney* and other cases, the Court reasoned that the requirement of discriminatory purpose was justified by its commitment to deferring to the policy-making function of the coordinate branches. See, e.g., *McClesky*, 481 U.S. at 319 ("McClesky's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."); *Feeney*, 442 U.S. at 272 ("The calculus of effects, the manner in which a particular law reverberates in society is a legislative and not a judicial responsibility.").

98. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 30, at 1135-36 (commenting that the Court's modern equal protection opinions and its doctrines of heightened scrutiny "have created incentives for legislators to explain their policy choices in terms that cannot be so impugned").

99. CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 16, at 685 (citing Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989)).

100. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 30, at 1136-37 (citing sociological and psychological studies of racial bias, which demonstrate that, although racial bias is prevalent among white Americans, they are strongly inhibited in expressing it, and their racism is often unconscious).

101. Sylvia A. Law & Ann E. Freedman, *Thomas I. Emerson: A Pioneer for Women's Equality*, 38 CASE W. RES. L. REV. 539, 552 (1988).

102. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 30, at 1136 (citing 1991 study hypothesizing that the discriminatory purpose standard discourages plaintiffs from bringing intent-based claims, and citing statistics that, "on average, just one or two intent claims are filed per federal district per year"); see also Cohen, *supra* note 28, at 260-71 (comparing the Federal Constitution's formal equality guarantees to Title IX's broader protection against sex discrimination in federally-funded education programs and activities).

expressed in gender-neutral terms), including lenient spousal assault and rape policies:

[W]hen women challenged policies that provided victims of domestic violence less protection than victims of other violent crimes, they had great difficulty proving that the policies discriminated on the basis of sex—despite the fact that it is women who are overwhelmingly the targets of assaults between intimates. Federal courts have repeatedly ruled that facially neutral spousal assault policies do not trigger heightened review under the Equal Protection Clause. Judicial interpretation of the Equal Protection Clause thus has played virtually no role in the campaign to reform the law of rape, to abolish the marital rape exemption, and to alter domestic violence policies, which for the most part has been conducted in legislatures, administrative agencies, and on the streets.¹⁰³

Many scholars have been highly critical of the purpose requirement. Professor Laurence Tribe argues that it is squarely at odds with the goal of the Equal Protection Clause: “The goal . . . is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all [M]inorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”¹⁰⁴ Scholars have also articulated various alternatives to the Court’s narrow purpose requirement, including a standard that would operate much like the disparate effects test used under Title VI and Title VII requiring courts to closely scrutinize the impact of governmental practices that fall disproportionately on one gender.¹⁰⁵

103. Siegel, *She the People*, *supra* note 13, at 1026-27 & n.255 (citing *Shipp v. McMahon*, 234 F.3d 907, 914-15 (5th Cir. 2000); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Navarro v. Block*, 72 F.3d 712, 716-17 (9th Cir. 1995); *Hynson v. City of Chester, Legal Dep’t*, 864 F.2d 1026, 1031 (3d Cir. 1988)); *see also* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that a victim of domestic violence has no enforceable property interest for due process purposes in police enforcement of a restraining order).

104. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 50, at 1516-19.

105. *See, e.g.*, Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 130-31 (proposing that disparate impact based on race should trigger strict scrutiny); Siegel, *Why Equal Protection No Longer Protects*, *supra* note 30, at 1144-45 (suggesting that, once disparate impact is demonstrated, the government must justify its policy via proof that it lacked feasible, less discriminatory means for achieving its objectives); *see also* TRIBE, *AMERICAN*

In sum, these decisions illustrate the multiple barriers to broad constitutional protection for sex equality under prevailing Equal Protection Clause jurisprudence. The next section compares the approach of selected state court decisions in applying and interpreting state ERAs to claims of sex discrimination.

III. AN OVERVIEW OF STATE COURT INTERPRETATIONS OF STATE ERAS

Although judicial interpretation of state ERAs has been uneven, in considering claims of sex discrimination, state court judges have interpreted their own constitutions in rich and expansive ways that extend the scope of protection against sex inequality considerably beyond that afforded by the Equal Protection Clause. Indeed, in each of the four areas discussed above, the specific limits of equal protection analysis have been surmounted in some state court opinions.¹⁰⁶ In other instances, however, state court judges limited the scope of protection afforded under state ERAs.

A. State ERAs and the Requirement of State Action

As discussed *supra* Part II, the state action requirement of the Fourteenth Amendment derives from its text and history as well as concerns of federalism, separation of powers and protection of individual autonomy. In

CONSTITUTIONAL LAW, *supra* note 50, at 1520 (proposing antisubjugation principle in which heightened scrutiny “would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group”); R.A. Lenhart, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 887-90 (2004) (proposing four-part test to determine whether racially disparate impact imposes a risk of stigmatic harm); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 563-80 (1977) (proposing that disparate impact based on race should trigger sliding scale scrutiny). *But see* Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. (forthcoming 2006) (finding that lower court judges—across the political spectrum—disfavored effects test as a useful tool, and proposing political solution in form of “adoption of targeted civil rights statutes” as alternative).

106. This section highlights examples of selected opinions in which courts have either expanded their sex equality jurisprudence, interpreted it as consistent with federal precedent, or otherwise limited its scope. It does not represent a complete catalogue of all judicial decisions construing state ERAs. For a more thorough review of state ERA opinions and their outcomes, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 3-1 to -5 (3d ed. 2000).

contrast, state ERAs have their own unique language and legislative history with regard to state action. Moreover, the federalism concerns that serve as a primary justification for the state action requirement and lead to the Equal Protection Clause's "underenforcement,"¹⁰⁷ plainly do not apply to state constitutions.¹⁰⁸ Separation of powers¹⁰⁹ and individual autonomy¹¹⁰ concerns

107. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978) (arguing that state court adherence to federal judicial constructs is especially inappropriate where institutional concerns such as federalism and judicial competence prevent federal courts from fully enforcing federal constitutional norms).

108. See, e.g., Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144, 150 (1984) (arguing that the state action requirement is less necessary at state level because "[t]he narrow construction of the state action requirement by federal courts is intended to protect states' traditional jurisdiction over private actions"); Beth Gammie, *State ERAs: Problems and Possibilities*, 1989 U. ILL. L. REV. 1123, 1149 (arguing that the federalism concerns underlying federal state action requirement are inapplicable to state ERAs because "[w]hen the citizens and legislature of a state enact an ERA, choosing to prohibit sex discrimination within their state, there is absolutely no invasion of states' rights by the federal government").

109. Professor Kevin Cole argues that separation of powers concerns are "less compelling" in the state context because "state courts resolve private disputes in a nonconstitutional mode more frequently than federal courts do," and therefore "neither institutional competence nor institutional specialization provides persuasive justification for a state state-action doctrine that preserves separation of powers by relegating private disputes to legislatures." Cole, *supra* note 17, at 379-80. Professor Friesen argues that separation of powers concerns may be "overstated" given the fact that state legislatures have the ability to pass statutes that "limit and structure remedies for any newly declared rights . . ." FRIESEN, *supra* note 106, § 9-2(c)(3), at 9-15. Moreover, she notes that if fundamental constitutional interests "are thought to need protection against private invasion, it is appropriate to entrust them to the courts and to inhibit . . . democratic diminution of such rights." *Id.* § 9-2(c)(3), at 9-16. Other commentators have argued that separation of powers concerns are less relevant at the state level because, in some states, judges are elected and therefore are accountable in the political process. See, e.g., William Wayne Kilgarlin & Banks Tarver, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 TEX. L. REV. 1545, 1565 (1990) (arguing that in Texas "the separation-of-powers concerns . . . are not nearly as compelling on a state level, because state court judges are politically accountable for their actions in developing civil rights policy: Texas state court judges are elected and their decisions are more readily subject to political modification by the legislature"); David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 257-59 (1985) (same with regard to the Washington State Constitution).

110. See generally FRIESEN, *supra* note 106, § 9-2(c)(2), at 9-14 to -15 (arguing that frequent references in state charters to "inalienable" rights refer to inherent rights that were

may also be less salient in the state context. Accordingly, as Professor Jennifer Friesen has emphasized, “the question [of whether a state equality guarantee extends to private actors] cannot be fruitfully resolved by imitating [F]ederal [F]ourteenth [A]mendment state action doctrine.”¹¹¹ Rather, subject to the limits posed by the Federal Constitution,¹¹² the question must be approached separately by reference to the text, history and public policies underlying individual state ERAs.

The language of individual state ERAs varies considerably with regard to whether their reach is limited to state action. Montana’s ERA expressly extends to private actors.¹¹³ Rhode Island’s extends to “persons doing business with the state.”¹¹⁴ The Louisiana Constitution contains separate

intended to be protected from both governmental and private interference); Cole, *supra* note 17, at 369-70 (arguing that, in the state constitutional context, “a state action doctrine fosters individual autonomy in none of the ways that the goal is arguably served on the federal level” because, unlike federal courts, “state courts have primary responsibility for developing a general common law” and therefore “remain obligated to explore the merits of competing private claims, and the outcome of that analysis is not preordained by any state action analysis”; thus, “the broad common-law powers of state courts prevent a state state-action doctrine from achieving the policies of notice-giving or merit-shielding).

111. FRIESEN, *supra* note 106, § 9-2(a), at 9-6. *See generally* Cole, *supra* note 17, at 396 (criticizing “underinformed embrace” by state courts of federal state action doctrine in state constitutional law context).

112. Although states have broad power to prohibit sex discrimination by private actors, they are, of course, subject to the “independent federal constitutional constraints such as the freedom of private expressive association.” Sullivan, *supra* note 16, at 756 (noting that under current Supreme Court interpretation “the Boy Scouts or a hypothetical ‘Male Supremacist Society’ might be free to exclude women despite a state law forbidding sex discrimination in public accommodations, but the Rotary Club, or the Jaycees would not”). *Compare* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts’ First Amendment expressive associational rights were violated by application of a state public accommodations law prohibiting them from revoking membership of gay scout leader), *with* Bd. of Dirs. of Rotary Int’l v. Rotary Club, 481 U.S. 537 (1987) (rejecting a First Amendment freedom of association claim challenging law forbidding all-male clubs), *and* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (rejecting First Amendment freedom of association claim challenging a law forbidding all-male organizations).

113. MONT. CONST. art. II, § 4 (“Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of . . . sex . . .”).

114. R.I. CONST. art. I, § 2 (prohibiting discrimination based on gender “by the state, its agents or any person or entity doing business with the state”).

prohibitions on sex discrimination that apply to both governmental actors¹¹⁵ and all actors operating public accommodations.¹¹⁶ On the other hand, five states—Virginia,¹¹⁷ Colorado,¹¹⁸ Illinois,¹¹⁹ Hawaii,¹²⁰ and New Hampshire,¹²¹—expressly limit the scope of their ERAs to governmental actors. The remaining fourteen state ERAs contain more open-textured language, which could be interpreted as extending to private actors. Of these states, six state ERAs—Maryland,¹²² Pennsylvania,¹²³ Massachusetts,¹²⁴ Washington,¹²⁵ Texas¹²⁶ and New Mexico¹²⁷—expressly forbid the denial of equality of rights “under the law.”¹²⁸ Others contain broader language prohibiting the deprivation of undefined “political or civil rights” based on

115. LA. CONST. art. I, § 3 (providing that “[n]o law shall . . . discriminate against a person because of . . . sex”).

116. LA. CONST. art. I, § 12 (providing that “[i]n access to public areas, accommodations, and facilities, every person shall be free . . . from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition”). In *Albright v. Southern Trace Country Club of Shreveport, Inc.*, the Louisiana Supreme Court interpreted this provision for the first time and held that it prohibited a country club, deemed a “public facility,” from denying female members access to a dining area for men only. 879 So. 2d 121, 138 (2004).

117. VA. CONST. art. I, § 11 (prohibiting “governmental discrimination” on the basis of sex).

118. COLO. CONST. art. II, § 29 (prohibiting denial of “[e]quality of rights under the law . . . by the state of Colorado or any of its political subdivisions”).

119. ILL. CONST. art. I, § 18 (prohibiting denial of equal protection of the law on account of sex “by the State or its units of local government and school districts”).

120. HAW. CONST. art. I, § 3 (prohibiting denial of “[e]quality of rights under the law . . . by the State on account of sex”).

121. N.H. CONST. pt. I, art. 2 (prohibiting denial of “[e]quality of rights under the law . . . by this [S]tate on account of . . . sex”).

122. MD. CONST. art. XLVI.

123. PA. CONST. art. I, § 28.

124. MASS. CONST. pt. I, art. 1.

125. WA. CONST. art. XXXI, § 1.

126. TEX. CONST. art. I, § 3a.

127. N.M. CONST. art II, § 1.

128. The language of these six ERAs, like those of Colorado, New Hampshire and Hawaii, is modeled on the Federal ERA. *See supra* note 7. However, these six state constitutions, while referring to “equality under the law,” do not contain any explicit reference to deprivation “by the State.” For additional discussion of the language of the Texas ERA, see *infra* note 160 and accompanying text.

sex,¹²⁹ or otherwise broadly proscribing sex-based discrimination without specifically referring to governmental involvement.¹³⁰ The broad language of these open-textured provisions differs markedly from the language of the Fourteenth Amendment and more readily supports extension to private actors.¹³¹

Judicial interpretation of the language of state ERAs falls into two categories of cases: (1) those considering whether the state ERA directly applies to private actors; and (2) those considering whether the values of state ERAs may be enforced against private actors via existing common law causes of action. In both categories of cases, some state courts have extended the scope of their ERAs beyond the limits of the federal state action requirement.

1. Direct Extension of ERAs to Private Actors

Pennsylvania courts have considered whether its ERA extends directly to private or nominally private actors on several occasions and expansively interpreted the scope of the Pennsylvania ERA on each occasion. In *Hartford Accident & Indemnity Co. v. Insurance Commissioner of the Commonwealth*, the Pennsylvania Supreme Court rejected the attempt of a private insurance company to rely on a requirement of state action.¹³² The case involved a complaint by a male that the Insurance Commissioner had violated the state ERA by approving gender-based rates. In explicitly rejecting the Company's

129. See ALASKA CONST. art. I, § 3 (prohibiting the denial of "any civil or political right" because of sex); CONN. CONST. art. I, § 20 (prohibiting the denial of the "equal protection of the law" and discrimination in the exercise of "civil or political rights" because of sex); UTAH CONST. art. IV, § 1 (providing that males and females "shall enjoy equally all civil, political and religious rights and privileges"); WYO. CONST. art. VI, § 1 (providing both male and female citizens "shall enjoy equally all civil, political and religious rights and privileges").

130. See CAL. CONST. art. I, § 8 (prohibiting disqualification "from entering or pursuing a business, profession, vocation, or employment because of sex"); FLA. CONST. art. I, § 2 (providing that "[a]ll natural persons, female and male alike, are equal before the law" and have certain "inalienable rights"); IOWA CONST. art. I, § 1 (providing "[a]ll men and women are, by nature, free and equal" and have certain "inalienable rights"); N.J. CONST. art. I, para. 1 & art. X, para. 4 (providing that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights" and defining "all persons" as including both sexes).

131. See, e.g., Bruce Altschuler, *State ERAs and Employment Discrimination*, 65 TEMP. L. REV. 1267, 1270 (1992). See generally FRIESEN, *supra* note 106, § 9-2(b)(1), at 9-7 to -10.

132. 482 A.2d 542, 549 (Pa. 1984).

attempt to “employ the state action concept of our federal system” in the context of a state ERA challenge, the court reasoned:

The “state action” test is applied by the courts in determining whether, in a given case, a state’s involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the “state action” doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.¹³³

The court then turned to a close examination of the language of Pennsylvania’s ERA and focusing on the words “under the law,”¹³⁴ concluded that the amendment “circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.”¹³⁵ The court reasoned that the decision of the Pennsylvania Insurance Commissioner, a public official, was both an act “under the law” and constituted “the law.”¹³⁶

Following *Hartford*, the Pennsylvania Superior Court in *Welsch v. Aetna Insurance Co.* extended its rationale to a sex discrimination claim brought by males directly against their private automobile insurance companies.¹³⁷ The plaintiffs claimed that any requirement of state action was met because “they were compelled to obtain insurance coverage in accordance with the laws of the Commonwealth of Pennsylvania.”¹³⁸ In response, the Pennsylvania court again carefully distinguished between the requirements of state action under the Federal Equal Protection Clause and those applicable under the Pennsylvania ERA, finding that although the plaintiffs’ claims did not meet

133. *Id.*

134. Pennsylvania’s ERA provides: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” PA. CONST. art. I, § 28.

135. *Hartford*, 482 A.2d at 549.

136. *Id.*

137. *Welsch*, 494 A.2d 409, 412 (Pa. Super. Ct. 1985).

138. *Id.* at 411.

the federal state action requirement,¹³⁹ the requirements of the ERA were met.¹⁴⁰

These Pennsylvania state court decisions “suggest that Pennsylvania ERA protections against gender discrimination are greater than those protections typically provided in federal cases requiring state action.”¹⁴¹ Significantly, at least two recent federal district court opinions have interpreted these state court decisions as extending the reach of Pennsylvania’s ERA to purely private actors. For example, in *Imboden v. Chowns Communications*,¹⁴² a federal district court, relying on *Welsch*, refused to dismiss a sex discrimination claim against a private employer, holding that the argument that Pennsylvania’s ERA did not extend to private actors was without merit.¹⁴³

The court has also relied on the unique language and history of its constitutional guarantee of sex equality¹⁴⁴ to expand its application beyond federal standards. In *Peper v. Princeton University Board of Trustees*,¹⁴⁵ the

139. *Id.* The court reasoned that “the challenged acts were carried out by the private party on its own initiative under the provisions of the Rate Regulatory Act which permits the fixing of rates based upon measured risk of loss, but were not required by the Commonwealth,” and thus did not satisfy the federal state action requirement. *Id.* (quoting *Murphy v. Harleysville Mut. Ins. Co.*, 422 A.2d 1097, 1102 (Pa. Super. Ct. 1980)). In *Murphy*, the Pennsylvania Superior Court relied on the United States Supreme Court’s decision in *Jackson v. Metropolitan Edison Co.*, in which the Supreme Court rejected the claim that state regulation converted the action of a private utility company into that of the State for purposes of the Fourteenth Amendment. *Murphy*, 422 A.2d at 1100-01 (citing *Jackson*, 419 U.S. 345, 350 (1974)).

140. *Welsch*, 494 A.2d at 412.

141. Phyllis W. Beck & Patricia A. Daly, *Prohibition Against Denial or Abridgment of Equality of Rights Because of Sex*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 715 (Ken Gormley et al. eds., 2004).

142. 182 F. Supp. 2d 453 (E.D. Pa. 2002).

143. *Id.* at 458 (citing *Welsch*, 494 A.2d at 412); see also *Barrett v. Greater Hatboro Chamber of Commerce, Inc.*, No. 02-CV-4421, 2003 WL 22232869, at *4 (E.D. Pa. Aug. 19, 2003) (“[T]here is a purely private right of action under the PERA absent any type of state action . . .”). But see *Mulligan v. Abington Mem’l Hosp., Inc.*, No. 03-6510, 2004 WL 1047796, at *2 (E.D. Pa. May 4, 2004) (refusing to extend Pennsylvania ERA to purely private actor).

144. See N.J. CONST. art. I, para. 1 & art. X, para. 4. For a discussion of the unique language of New Jersey’s ERA, see *supra* note 6 and *infra* note 344.

145. 389 A.2d 465 (N.J. 1978). *Peper* has been the subject of considerable interest among scholarly commentators. See, e.g., John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 847, 888 (1989); Kruger, *supra* note 6, at 260; Elizabeth A.

court, while rejecting claims under Title VII and a state anti-discrimination statute,¹⁴⁶ permitted a female plaintiff to state a claim of sex discrimination under the New Jersey Constitution against Princeton University, a private entity.¹⁴⁷ While not explicitly discussing the state action issue, the court reasoned that if the plaintiff was correct in her allegation that she was not promoted because she was a woman, then she was denied the same rights to acquire property as guaranteed to males under New Jersey's constitutional guarantee that "all persons" have a right to acquire property.¹⁴⁸ The court supported its holding by noting that in 1947, when the language of the New Jersey Constitution was expressly extended to include both sexes, "women were granted rights of employment and property protection equal to those enjoyed by men."¹⁴⁹ The court further found that it "has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation."¹⁵⁰

Peper, Hartford and the other Pennsylvania cases illustrate the potential for using state ERAs to expand protection against sex discrimination in the employment and insurance discrimination areas. In contrast, other state courts considering direct constitutional claims against private actors have specifically declined to extend their ERAs to private actors.¹⁵¹ In Texas, for example, two appellate courts refused to apply the protections of the Texas

Sherwin, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 124-26 (1984-1985); Robert F. Williams, *Equality Guarantees in State Constitutions*, 63 TEX. L. REV. 1195, 1220 n.166 (1985) [hereinafter Williams, *Equality Guarantees*]. However, in New Jersey, *Peper* has "only rarely been cited by the New Jersey courts." Williams, *supra* note 6, at 125. For a discussion of the infrequent use of state equality guarantees, see discussion *infra* Part IV.B.

146. 389 A.2d at 471-76. The court rejected the state statutory claim because, at the time of the alleged violation, the statute exempted private universities. *Id.* at 474. The court rejected the Title VII claim because the plaintiff had purposefully failed to exhaust her administrative remedies. *Id.* at 475.

147. *Id.* at 478.

148. *Id.* at 477.

149. *Id.*

150. *Id.* at 476; see also *Rojo v. Kliger*, 801 P.2d 373, 388 (Cal. 1990) (noting, without deciding, that previous cases had assumed that California's ERA "covers private as well as state action").

151. See FRIESEN, *supra* note 106, § 9-7, at 9-33 (noting that "[m]ost cases in the equality area have required allegations of government involvement to activate the state constitution"). See generally Altschuler, *supra* note 131, at 1269-73 (discussing court decisions and attorneys general opinions holding that state ERAs limited to governmental action).

ERA to private, nonprofit corporations operating junior football leagues in Texas.¹⁵² Both cases involved girls who challenged their exclusion from participating in junior football.¹⁵³ The plaintiffs argued that any requirement of governmental involvement under the Texas ERA was met because the cases involved teams that practiced and played their games on public school grounds¹⁵⁴ or in publicly-owned parks.¹⁵⁵ While the courts indicated that state action would extend to private conduct affirmatively “encouraged by, enabled by, or closely interrelated in function with state action,” the facts of these cases did not meet this level of state involvement.¹⁵⁶

The reasoning of these Texas courts has been sharply criticized by Justice William Wayne Kilgarlin, a former justice of the Texas Supreme Court.¹⁵⁷ Justice Kilgarlin focuses on the unexamined willingness of these state courts to defer to federal state action doctrine despite the inapplicability of the purposes of that doctrine in the state constitutional law context and without close analysis of the unique language and history of the Texas ERA.¹⁵⁸ With regard to the language of the Texas ERA,¹⁵⁹ Justice Kilgarlin notes that, while including the phrase “under the law,” unlike the Federal ERA and other state ERAs enacted at the same time, the Texas provision

152. See *Lincoln v. Mid-Cities Pee Wee Football Ass’n*, 576 S.W.2d 922, 926 (Tex. App. 1979); *Junior Football Ass’n v. Gaudet*, 546 S.W.2d 70, 71 (Tex. App. 1976). For a thorough discussion and critical analysis of these cases, see Kilgarlin & Tarver, *supra* note 109, at 1557-64.

153. *Lincoln*, 576 S.W.2d at 923; *Gaudet*, 546 S.W.2d at 70.

154. *Lincoln*, 576 S.W.2d at 924 (noting that plaintiff alleged that the teams practiced and played games on fields constructed and maintained by the league on public school grounds); *Gaudet*, 546 S.W.2d at 71 (noting that plaintiff alleged that players usually practiced on school grounds).

155. *Gaudet*, 546 S.W.2d at 71 (noting that plaintiff alleged that games were played in a park owned by the City).

156. *Lincoln*, 576 S.W.2d at 924 (affirming the trial court’s refusal to enter a temporary injunction against the league on ground that there was no abuse of discretion, but noting that the record in the case was still developing); *Gaudet*, 546 S.W.2d at 71 (reversing trial court’s order granting a temporary injunction against the league).

157. See Kilgarlin & Tarver, *supra* note 109, at 1557-64.

158. Justice Kilgarlin and his co-author, Banks Tarver, also argue that application of the federal state-action doctrine to review Texas ERA cases is unjustified because the federalism and separation of powers purposes underlying the federal requirement “are not at all pertinent to state constitutional discourse.” *Id.* at 1559; see *supra* notes 107-09 and accompanying text.

159. TEX. CONST. art I, § 3a (“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).

does not expressly limit its reach to governmental actors.¹⁶⁰ Moreover, an assumption that the Texas Legislature intended to require governmental action is inconsistent with both the structure of the Texas Constitution¹⁶¹ and the legislative history of its ERA, which indicated a legislative intent to extend its reach to private discrimination.¹⁶² In deferring to federal precedent “without any apparent hesitation,” and ignoring the text and legislative intent underlying the drafting and passage of the Texas ERA, Justice Kilgarlin concludes that these courts denied the Texas ERA of its independent meaning.¹⁶³

Similarly, in *United States Jaycees v. Richardet*, the Alaska Supreme Court refused to extend the protections of Alaska’s ERA to a plaintiff who challenged the Jaycees’ exclusion of females from its membership.¹⁶⁴ Summarily rejecting the plaintiff’s reliance on the language of the Alaska ERA, which by its plain terms appeared to extend beyond governmental conduct,¹⁶⁵ the court held that state action was a necessary predicate to an ERA claim because “the American constitutional theory is that constitutions are a restraining force against the abuse of governmental power.”¹⁶⁶ The court then went on to apply federal state action principles and precedent,

160. Kilgarlin & Tarver, *supra* note 109, at 1560; *see supra* note 128 and accompanying text. Compare HAW. CONST. art. I, § 3 (prohibiting denial of “equality of rights under the law . . . by the State on account of sex”), with TEX. CONST. art. I, § 3a (prohibiting denial of “equality of rights under the law” with no limiting reference to discrimination by the State).

161. Kilgarlin & Tarver, *supra* note 109, at 1561. Justice Kilgarlin emphasizes that, unlike other state constitutions and the Federal Constitution, “[t]he Texas Constitution does not speak solely in terms of proscriptions on governmental authority; instead, it affirmatively recognizes the inalienable or natural rights of its citizenry.” *Id.*

162. *Id.* at 1562-63. According to Justice Kilgarlin, the Texas Legislative Council’s 1971 report on the proposed ERA and statements by the ERA’s primary drafter and its primary sponsor in the Texas Senate, all indicate a clear legislative intent to extend its reach to private discrimination. *Id.*

163. *Id.* at 1559.

164. 666 P.2d 1008, 1010 (Alaska 1983).

165. *Id.* at 1011. The court rejected the plaintiff’s argument that the plain language of the Alaska ERA permitted extension to private actors. *Id.* Article I, section 1 of the Alaska Constitution provides that “all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.” ALASKA CONST. art. I, § 1. Article I, section 3 provides: “No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.” *Id.* § 3.

166. *Richardet*, 666 P.2d at 1013.

concluding that neither the Jaycees' use of governmental facilities for free or at reduced rates nor government aid to several Jaycee programs met the state action requirement.¹⁶⁷ In stark contrast to the Pennsylvania Supreme Court's reasoning in *Hartford*, the Alaska Supreme Court in *Richardet* did not closely examine the language and legislative history of the Alaska provision, nor did it consider whether the rationale underlying federal action doctrine was applicable in the state context.

2. ERAs as Sources of Public Policy

An alternative approach to the direct extension of state ERAs to private actors is one in which courts essentially transport the equality values reflected in state ERAs into common law causes of action, thereby effectively enforcing these provisions against private actors without the need to discuss state action. This "private sector constitutional tort" approach has been used successfully in cases involving claims of sex discrimination in employment.¹⁶⁸ In *Rojo v. Kliger*, the California Supreme Court held that the female plaintiffs could bring a claim for wrongful discharge in violation of public policy against a private employer where they were continually subjected to sexual harassment in the workplace and their refusal to tolerate the harassment resulted in their discharge from employment.¹⁶⁹ In defining the public policy of California, the court imported the values reflected in California's constitutional prohibition against sex discrimination in employment and expressly rejected the defendant's attempt to invoke the requirement of state action as a defense:

[W]hether article I, section 8 [of the California Constitution] applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental *public policy* against discrimination in employment—public or private—on account of sex. Regardless of the precise scope of its application, article I, section 8 is declaratory of this state's fundamental public policy against sex discrimination, including sexual harassment No extensive discussion is needed to establish the fundamental *public*

167. *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

168. *See generally* FRIESEN, *supra* note 106, § 9-1(c), at 9-5; *id.* § 9-7(a), at 9-33 to -35.

169. 801 P.2d 373, 375 (Cal. 1990).

interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.¹⁷⁰

In *Badih v. Myers*,¹⁷¹ a California state appellate court extended the reasoning of *Rojo* to allow a claim for pregnancy discrimination against a private employer even though that employer was exempted from the coverage of California's employment discrimination statute because it employed fewer than five individuals.¹⁷² The court reasoned that discrimination based on pregnancy contravened the strong public policy against sex discrimination in employment stated explicitly in California's constitutional equality guarantee.¹⁷³ Opinions in other states have likewise looked to the clear public policy expressed in state ERAs as justification for allowing wrongful discharge claims against private employers in sex discrimination cases,¹⁷⁴ or interpreting statutes liberally with an eye to realizing the sex equality ideals embodied in state ERAs.¹⁷⁵

170. *Id.* at 389 (citations omitted). The California Supreme Court also rejected the defendant's defenses of statutory preemption and failure to exhaust administrative remedies, holding that the state anti-discrimination statute did not supplant the plaintiffs' common law claims, and administrative exhaustion under that statute was not required before asserting nonstatutory causes of action. *Id.* at 383, 387.

171. 43 Cal. Rptr. 2d 229, 231 (Ct. App. 1995).

172. *Id.* at 233. *But see* *Thibodeau v. Design Group One Assocs., LLC*, 802 A.2d 731, 744-45 (Conn. 2002) (declining to allow pregnancy discrimination claim against a small employer on public policy grounds under the Connecticut ERA and Connecticut statutory law).

173. *Badih*, 43 Cal. Rptr. 2d at 233; *accord* *Merrell v. All Seasons Resorts, Inc.*, 720 F. Supp. 815, 821-22 (C.D. Cal. 1989).

174. *See, e.g.,* *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 771-72 (Md. 1991) (Eldridge, J., concurring) (asserting that, although Maryland's ERA may not directly apply to private employers, the ERA nonetheless established a public policy in Maryland that an individual should not be subjected to sex discrimination); *Drinkwater v. Shipton Supply Co.*, 732 P.2d 1335, 1339 (Mont. 1987) (recognizing a tort action for wrongful discharge based on the policy against sex discrimination reflected in Montana ERA, but subsequently superceded by the Montana Legislature's amendment of anti-discrimination statute to make that statute the exclusive remedy for discrimination claims against private employers), *superceded by statute*, MONT. CODE ANN. § 49-2-509(7); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 924 (Pa. 1989) (Zappala, J., concurring) (suggesting that tort of wrongful discharge might expand to encompass sex discrimination based on clear "public policy favoring the equal treatment of employees without regard to sex" expressed in the Pennsylvania ERA); *Roberts v. Dudley*, 993 P.2d 901, 911-12 (Wash. 2000) (Alexander, J., concurring) (asserting that, though the majority relied on a statute to discern a public policy to allow employees to state a common law cause of action for wrongful discharge against small private employer, the

The possibility of imposing constitutional sex equality guarantees on private actors reflected in this innovative line of cases holds great potential for expanding the reach and impact of state ERAs. This approach holds certain practical advantages over proceeding under anti-discrimination statutes, which might require administrative exhaustion or provide defendants with specific statutory defenses. Moreover, as Professor Friesen notes, this approach is more likely to develop positively in the future than efforts to directly extend constitutional provisions to private actors for a variety of reasons:

First, advocates who urge . . . [this approach] are asking courts to act consistently with tradition. Second, judges are often required to consider public interest and public policy, and may feel more comfortable doing justice on a case by case basis than by making broad declarations about the nature of the state's bill of rights. Third, this approach neutralizes the policy concerns about separation of powers and diminution of legislative power Fourth, seeking a resolution of a dispute by resort to non-constitutional grounds is consistent with normal principles of judicial economy and restraint.¹⁷⁶

B. *The Standard of Review Under State ERAs*

Much like the state action determination, the question of what standard of review is applicable to claims under state ERAs is not controlled by federal precedent, which, as discussed *supra* Part II, is tied to the unique history of the Fourteenth Amendment and the Supreme Court's apparent reluctance to overstep "the bounds between constitutional interpretation and

Washington ERA was "another and more powerful source of public policy"); *cf.* *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 16 (N.J. 1992) (finding that the New Jersey Constitution is the source of public policy in determining whether the firing of a "firing of at-will" employee for failing random urine test constitutes wrongful discharge).

175. *See, e.g., Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 549 (Pa. 1984) (reading insurance statute "as excluding sex discrimination [that] would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution"); *cf.* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 458 (2003) (arguing that "although private actors are not bound by individual constitutional rights in the United States, they are indirectly subject to (and may be adversely affected by) them because such rights govern the laws that private actors invoke and rely on against each other").

176. FRIESEN, *supra* note 106, § 9-7, at 9-33.

constitutional amendment.”¹⁷⁷ The majority of courts interpreting state ERAs have recognized this point and approached the question of standard of review by examining the legislative history and purpose of their individual provisions. Based on this analysis, most state courts have interpreted their state ERAs as requiring higher justification for gender-based classifications than the intermediate standard of review used by the Supreme Court in interpreting the Equal Protection Clause. Accordingly, a critical difference between state ERA jurisprudence and federal precedent is the higher standard of review applied to claims of sex discrimination.¹⁷⁸

Most state courts apply a “strict scrutiny” standard of review, requiring proof that sex-based classifications are narrowly tailored to serve a compelling governmental interest and specifically rejecting such classifications if gender-neutral alternatives are available.¹⁷⁹ A handful of

177. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 50, at 1585.

178. While this Article represents a qualitative analysis of the impact of state ERAs, a recent quantitative analysis of state ERAs by Professors Lee Epstein, Lisa Baldez and Andrew Martin concludes that “the presence of an ERA significantly increases the likelihood of a court applying a higher standard of law, which, in turn, significantly increases the likelihood of a decision favoring the equality claim.” Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 246 (2006); *see also* Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 43-45, 47 (1992) (finding both that legal challenges based on state equality provisions have a good likelihood of success when state courts based their decisions solely on state constitutional grounds, and stating “the rate of invalidation is over twice as high as for challenges based on federal or a combination of state and federal grounds”). Importantly, the research of Professors Epstein, Baldez and Martin demonstrates that outcomes in claims under state equality guarantees are also influenced by factors unrelated to judges’ selection of legal standards, including the number of women on the bench and the political ideology of judges hearing the cases. Lisa Baldez et al., *supra*, at 268-71. Thus, they conclude that “formal constitutional provisions [i.e. the addition of an ERA to the Federal Constitution] probably will alter the way courts adjudicate claims of sex discrimination . . . [although] other factors—from the fraction of women composing the court to the position taken by the government over the suit’s resolution to the facts it entails—likely will impact the efficacy (or lack thereof) of an ERA.” *Id.* at 272. For additional discussion of the role of external factors, *see infra* notes 370-72 and accompanying text.

179. FRIESEN, *supra* note 106, § 3-2(e)(1), at 3-21; *see, e.g.*, *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971) (“[S]exual classifications are properly treated as suspect . . .”); *Doe v. Maher*, 515 A.2d 134, 161 (Conn. Super. Ct. 1986) (“At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny.”); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding sex to be a “suspect category” subject to strict scrutiny); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974) (holding that the Illinois ERA “requires us to hold that a classification based on sex is a ‘suspect classification,’ which to be held valid,

other courts have announced an even more stringent “near absolutist” standard, condemning the vast majority of sex-based classifications except where physical differences dictate a different result.¹⁸⁰ In justifying these rigorous standards of review, many of these courts looked to the unique text and legislative history of their state ERAs and found that the very reason for adding these provisions to the Constitution was a specific legislative intent to provide more protection than that afforded under the Federal Constitution or previously afforded under their own state constitution. In *Darrin v. Gould*, for example, the Washington Supreme Court looked to the text, timing and purpose of that state’s adoption of its ERA in 1972 and concluded that an absolute prohibition on sex discrimination was appropriate.¹⁸¹ The court rejected both the standard applied under the Federal Equal Protection Clause and the strict scrutiny standard that had already been applied by Washington courts prior to the adoption of its ERA:

Presumably the people in adopting [the ERA] intended to do more than repeat what was already contained in the otherwise governing constitutional

must withstand ‘strict judicial scrutiny’); *Attorney Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 291 (Mass. 1979) (holding that classification on the basis of sex is subject to constitutional scrutiny demands “‘at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications’”); *LeClair v. LeClair*, 624 A.2d 1350, 1355 (N.H. 1993) (holding that strict scrutiny is applicable to claims based on gender and other suspect classes under New Hampshire equality guarantee); *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987) (holding that the Texas ERA “elevates sex to a suspect classification” and “does not yield except to compelling state interests”).

180. FRIESEN, *supra* note 106, § 3-2(e)(1), at 3-19 to -20 (listing Pennsylvania, Colorado, Washington, Maryland and New Mexico as “absolutist” states); *see, e.g.*, N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 853 (N.M. 1998) (holding that classifications based on sex are “presumptively unconstitutional” and will be subject to “searching judicial inquiry”); *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (“The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities.”); *Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County*, 667 P.2d 1092, 1102 (Wash. 1983) (“The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny.’ The ERA mandates equality in the strongest terms and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling . . .”). Despite its stringent standard of review, the Washington Supreme Court has allowed sex-based affirmative action policies “intended solely to ameliorate the effects of past discrimination.” *Sw. Wash. Chapter*, 667 P.2d at 1102; *cf. infra* note 377 and accompanying text.

181. 540 P.2d 882, 889 (Wash. 1975) (en banc).

provisions, federal and state Any other view would mean the people intended to accomplish no change in the existing . . . law Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.¹⁸²

Similarly, in *People v. Ellis*, the Illinois Supreme Court reasoned that, at minimum, the strict scrutiny standard of review was appropriate given the language and legislative history of the Illinois ERA:

In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the [c]onstitution of 1970 contains [the state ERA] and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights.¹⁸³

In contrast, a minority of states assess the validity of sex-based classifications under their equality guarantees using a standard of review that is much like the federal intermediate standard of review.¹⁸⁴ Courts in two of

182. *Id.*

183. 311 N.E.2d 98, 101 (Ill. 1974); *see also Maher*, 515 A.2d at 160-61 (“To equate our ERA with the [E]qual [P]rotection [C]lause of the [F]ederal [C]onstitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable.”); *Rand v. Rand*, 374 A.2d 900, 905 (Md. 1977) (“[T]he ‘broad, sweeping mandatory language’ of the [state ERA] is cogent evidence that the people of Maryland are fully committed to equal rights for men and women.”); *New Mexico Right to Choose*, 975 P.2d at 851 (“We construe the intent of [the ERA] as providing something beyond that already afforded by the general language of the Equal Protection Clause.”).

184. *See, e.g., Pace v. State ex rel. La. State Employee Ret. Sys.*, 648 So. 2d 1302, 1305 (La. 1995) (“When a statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, it is presumed to deny the equal protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective.”); *see also Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (noting that sex discrimination claims under the Alaska Constitution should be assessed “by considering the purpose of the statute, the legitimacy of that purpose, the means used to accomplish the legislative objective, and ‘then determin[ing] whether the means chosen substantially further the goals of the enactment’” (citation omitted)); *B.C. v. Bd. of Educ. Cumberland Reg’l Sch. Dist.*, 531 A.2d 1059, 1064 (N.J. Super. App. Div. 1987) (noting that under the state constitution it is necessary “to balance [the plaintiff’s] right not to be discriminated against on the basis of sex

these states—Virginia¹⁸⁵ and Utah¹⁸⁶—have done so based on a conclusion that their state equality guarantees are specifically coextensive with the standard applied under the Federal Equal Protection Clause, although with little analysis of the specific text and history of their provisions.¹⁸⁷

Courts in Rhode Island and Florida have also adopted an intermediate standard of review, doing so, however, after specific examination of the legislative history of their provisions. In *Kleczek v. Rhode Island Interscholastic Little League, Inc.*, the Rhode Island Supreme Court examined the distinct legislative history of Rhode Island’s sex equality guarantee, which was added to its constitution in 1986 as part of a revision that also added protection against discrimination based on race and disability, and concluded that it was not a “true ERA” but rather “an adoption of an equal protection and nondiscrimination clause that contains protections similar to the equal protection guarantees contained in the Fourteenth Amendment.”¹⁸⁸ The court noted that: (1) minutes of the constitutional convention established that the intent of the delegates was to add a general equal protection clause that would “catch [the Constitution] up” with prior

with the public need to promote equalization of athletic opportunities and to rectify past discrimination against women in athletics”).

185. *Wilkins v. West*, 571 S.E.2d 100, 111 (Va. 2002) (adhering to an earlier decision in *Archer v. Mayes*, 194 S.E.2d 707 (Va. 1973), and noting that “we will continue to apply standards and nomenclature developed under the Equal Protection Clause of the U.S. Constitution”); *Schilling v. Bedford City Mem’l Hosp. Inc.*, 303 S.E.2d 905, 907-08 (Va. 1983) (applying intermediate standard of review to sex-based classification based on federal precedent); *Archer*, 194 S.E.2d at 711 (holding that state equal rights provision will be given “no broader” interpretation than the Federal Equal Protection Clause).

The authors of an early review of state ERAs concluded that this interpretation of Virginia’s ERA is inconsistent with legislative intent: “The drafters of the equal rights clause, and the Virginia General Assembly in adopting it, expected that a strict standard of review would be applied by the courts.” Lujana Wolfe Treadwell & Nancy Wallace Page, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CAL. L. REV. 1086, 1094-95 (1977) (citing JOINT PRIVILEGES & ELECTIONS COMM. OF THE COMMONWEALTH OF THE GEN. ASSEMBLY, COMMONWEALTH OF VIRGINIA, RATIFICATION OF THE EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 19 (1974)).

186. *Estate of Scheller v. Pessetto*, 783 P.2d 70, 76-77 (Utah Ct. App. 1989) (applying intermediate standard of review drawn from federal precedent).

187. For a detailed critical analysis of this “prospective lockstepping” approach in which a state court borrows a federal standard and announces that it will apply it in future cases, see generally Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping*, 46 WM. & MARY L. REV. 1499 (2005).

188. 612 A.2d 734, 739 (R.I. 1992).

court rulings that had been applying federal equal protection standards¹⁸⁹ and thereby “fill a void that had existed in [Rhode Island’s] Constitution”; (2) legislative committees at the time had considered and tabled all resolutions relating to an ERA “because of problems with language and interpretation”; and (3) in contrast to other states where adoption of ERAs occurred “only after full debate and with notice to all by calling the resolution what it was, an Equal Rights Amendment,” the Rhode Island delegates knew that they were not acting on a true ERA.¹⁹⁰ On this basis, the court concluded that review of sex discrimination claims under the intermediate standard of review was appropriate, reversing the trial court’s use of a strict scrutiny standard to invalidate a rule that prohibited boys from participating in girls’ field hockey.¹⁹¹

Although the Florida Supreme Court has not considered the standard of review under Florida’s ERA, which was adopted in 1998, two lower state courts have rejected the strict scrutiny standard of review. In *Frandsen v. County of Brevard*, a Florida appellate court looked to both the plain language and legislative history of revisions made to article I, section 2 of

189. Prior to the adoption of article I, section II in 1986, the Rhode Island Supreme Court adopted the intermediate standard of review in analyzing classifications based on sex. See, e.g., *Waldeck v. Piner*, 488 A.2d 1218, 1220 (R.I. 1985); *State v. Ware*, 418 A.2d 1, 3 (R.I. 1980) (citing *Craig v. Boren*, 429 U.S. 190, 197-98 (1975)).

190. *Kleczek*, 612 A.2d at 739-40.

191. *Id.* at 741. The Rhode Island Superior Court, relying on the Massachusetts Supreme Court’s decision in *Attorney General v. Massachusetts Scholastic Athletic Ass’n*, 393 N.E.2d 284, 289, 294 (Mass. 1979) (involving identical facts), held that an absolute prohibition of all boys from the sport of field hockey rested on “archaic and overbroad generalizations and assumptions” and that an absolute ban “was totally out of proportion to any danger of girls being displaced from athletics.” *Kleczek v. R.I. Interscholastic League, Inc.*, No. PC 91-5475, 1991 WL 789881, at *6 (R.I. Super. Ct. Sept. 27, 1991) (citing *Mass. Scholastic Athletic Ass’n*, 393 N.E.2d at 294), *vacated by* 612 A.2d 734 (R.I. 1992).

In *Massachusetts Scholastic Athletic Ass’n*, the Massachusetts Supreme Court emphasized that under the strict scrutiny standard sex-based classifications were impermissible given the availability of gender-neutral alternatives. 393 N.E. 2d at 294 (noting that absolute ban “represents a sweeping use of a disfavored classification when less offensive and better calculated alternatives appear to exist,” and noting alternative of gender-neutral height, weight, skill standards and option of creating separate boys’ field hockey team if large number of boys become interested). In contrast, the Rhode Island Supreme Court, though sending the case back to the trial court for its assessment, intimated its belief that the exclusion of boys satisfied the intermediate standard of review. *Kleczek*, 612 A.2d at 739. The case thus illustrates how the application of different standards of review may be a determinative factor in the ultimate outcome of the case.

the Florida Constitution in 1998.¹⁹² The 1998 revisions added protection against discrimination based on both sex and national origin, but did so in two different sentences: “All natural persons, *female and male alike*, are equal before the law and have inalienable rights No person shall be deprived of any right because of race, religion, *national origin*, or physical *disability*.”¹⁹³ The court also reviewed the commentary of the Constitution Revision Commission and found that an “initial proposal ‘would have added ‘sex’ to the list of protected classes [along with race, religion, national origin and physical disability],’ but some members objected that such an amendment could lead Florida courts to conclude that it required same-sex marriages”¹⁹⁴ To address these concerns, the Florida Legislature removed “sex” from the list of classes protected in the final sentence of article I and, instead, extended protection against sex-based discrimination via the “*female and male alike*” language.¹⁹⁵ The Constitution Revision Commission’s report explained their intention for this change as follows:

The intent of . . . [this proposal], as adopted, was to affirm explicitly that all natural persons, female and male alike, are equal before the law. The proposal as adopted is not intended, and should not be construed, to confer any right to same-sex marriages in this state. Many in the body were concerned that the proposal as it was originally proposed . . . would have opened the door to same-sex marriage in Florida. That was not an acceptable result to many members of the Commission. Consequently, the purpose in amending the original proposal and adopting it in its amended form was to assure that the proposal would not be deemed in any way to countenance same sex marriages.¹⁹⁶

The Commission report also specifically stated that the addition of “national origin” to the listing of protected classes “will require strict scrutiny of classifications based upon the place of a person’s birth, ancestry or

192. 800 So. 2d 757, 759-60 (Fla. Dist. Ct. App. 2001).

193. FLA. CONST. art. I, § 2 (revisions emphasized). The term “physical handicap” was changed to “physical disability.” *Id.*

194. *Frandsen*, 800 So. 2d at 759.

195. *Id.* at 758.

196. *Id.* at 759 n.4 (first and second alterations in original) (quoting Florida Constitution Revision Commission, *Statement of Intent*, JOURNAL OF THE FLORIDA CONSTITUTION REVISION COMMISSION (1977-1978)).

ethnicity.”¹⁹⁷ The *Frandsen* court concluded that “based on this different treatment of ‘sex,’ on the one hand, and ‘national origin’ and ‘physical disability,’ on the other, it must be concluded that classifications based on sex are not subject to strict scrutiny”¹⁹⁸ The court then applied the intermediate standard of review to uphold the sex-based classification before it.¹⁹⁹ In 2004, a second Florida appellate court, relying entirely on *Frandsen*, rejected the strict scrutiny standard with no independent analysis.²⁰⁰

While the standard of review adopted by the Rhode Island Supreme Court in *Kleczek* is at least grounded in some relevant legislative history, the reasoning of the Florida courts is not. The legislative history of the Florida provision does indicate a clear legislative intent not to extend protection to same-sex marriage. However, the *Frandsen* court’s conclusion that the Florida delegates intended a wholesale rejection of strict scrutiny in other fact settings involving sex discrimination is at odds with the apparent original and overarching legislative desire to expand Florida’s protection against sex discrimination beyond that contained in existing interpretations of state and federal law.²⁰¹ Since existing Florida case law already applied the intermediate scrutiny standard,²⁰² the *Frandsen* court’s interpretation means that it essentially added nothing to the governing constitutional standards for sex discrimination in Florida. This conclusion is contradicted by the analysis of at least one early legal commentary on the 1998 revisions, which concludes, based on a detailed analysis of the legislative record and documents distributed to guide the public in their understanding of the revisions, that “both the Commissioners and the voters were aware of the

197. *Id.* (quoting Florida Constitution Revision Commission, *supra* note 196).

198. *Id.* at 759-60.

199. *Id.*

200. *Choice for Women, Inc. v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970 (Fla. Dist. Ct. App. 2004), *review denied*, 885 So. 2d 386 (Fla. 2004).

201. This conclusion is directly supported by the fact that the original draft revisions placed “sex” in the list of proscribed classes subject to strict scrutiny review along with race, religion, national origin and physical disability. Changes to this proposed wording were made only to ensure that same-sex marriage did not receive protection. In this regard, the drafters were especially concerned with the Hawaii Supreme Court’s interpretation of its state ERA as providing protection against bans on same-sex marriage. *See Baehr v. Lewin*, 852 P.2d 44, 63-67 (Haw. 1993). Drafting the 1998 revision so that it contained language distinctly different from Hawaii’s was apparently in the mind of the drafters. For a discussion of *Baehr* and the application of state ERAs in same-sex marriage challenges, see *infra* Part III.E.

202. *See, e.g., Kendrick v. Everheart*, 390 So. 2d 53, 56 (Fla. 1980); *Brown v. Dykes*, 601 So. 2d 568, 569 (Fla. Dist. Ct. App. 1992).

ERA's intent to provide greater rights to women and of the probability that the strict scrutiny standard would apply to gender classifications."²⁰³ The author notes, for example, that unlike the Rhode Island record examined in *Kleczek*, the Florida record indicates that those involved in its amendment proceedings viewed the 1998 revision as an ERA, specifically referring to it as an "equal rights proposal."²⁰⁴ A more careful, detailed analysis of the legislative record in Florida by the courts thus may have warranted a different result.

C. Formal Equality and Real Differences

Although some state court decisions have followed the path of the Supreme Court in applying a formal equality approach to protection under their state ERAs, in noteworthy instances, others have moved beyond formalistic reasoning and employed a substantive equality model that closely scrutinizes all sex-based classifications, including those relating to biological differences, to assess their discriminatory nature and impact. Decisions relating to reproductive autonomy and the rights of unwed parents illustrate this expansive approach.²⁰⁵

203. Andrea J. Faraone, *The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution*, 1 FLA. COASTAL L.J. 421, 441 (2000).

204. *Id.* at 444.

205. Formal equality principles have also been rejected in some state ERA challenges involving other issues, including segregation in athletics. *See, e.g.*, *Attorney General v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 293 (Mass. 1979) (invalidating association rule barring boys from playing on girls' teams, and stating that "classifications on strict grounds of sex, without reference to actual skill differentials . . . would merely echo 'archaic and overbroad generalizations'" (citation omitted)); *Commonwealth v. Pa. Interscholastic Athletic Ass'n*, 334 A.2d 839, 842 (Pa. 1975) (striking down a rule excluding girls from practice or competition with boys in intramural sports, and noting "even where separate teams are offered for boys and girls in the same sport, the most talented girls may still be denied the right to play at that level of competition which their ability might otherwise permit them"); *see also Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682, 709 (1983) (invalidating single-sex admission policy of public high school, and noting that "under Pennsylvania's ERA, the separate-but-equal concept under the [E]qual [P]rotection [C]ause of the Fourteenth Amendment . . . does not have currency"), *appeal quashed by* 478 A.2d 1352 (Pa. Super. Ct. 1984).

1. Reproductive Autonomy: Pregnancy and Abortion

State ERAs have been successfully used in a variety of factual contexts to challenge laws and policies that discriminated against women on the basis of pregnancy. In *Colorado Civil Rights Commission v. Travelers Insurance Co.*, the Colorado Supreme Court held that excluding the costs of normal pregnancy care from an otherwise comprehensive insurance coverage constitutes sex discrimination in violation of the Colorado ERA.²⁰⁶ The court began its analysis by specifically rejecting the United States Supreme Court's analysis in *Geduldig v. Aiello*²⁰⁷ and *General Electric Co. v. Gilbert*,²⁰⁸ emphasizing that, after Colorado's adoption of an ERA in 1972, "[r]eliance on the *Gilbert* rationale is particularly inappropriate . . . in light of the fact that Colorado constitutional provisions provide additional prohibitions against sex discrimination not present in the United States Constitution."²⁰⁹ In contrast to the United States Supreme Court's conclusion in *Geduldig* and *General Electric* that men and women are not similarly situated with respect to pregnancy, the Colorado Supreme Court reasoned that:

[B]ecause pregnancy is a condition unique to women, an employer offers fewer benefits to female employees on the basis of sex when it fails to provide them insurance coverage for pregnancy while providing male employees comprehensive coverage for all conditions, including those unique to men. This disparity in the provision of comprehensive insurance benefits as a part of employment compensation constitutes discriminatory conduct on the basis of sex, and is essentially no different in effect than if the employer had provided female employees a lower wage on the basis of sex.²¹⁰

206. 759 P.2d 1358, 1359 (Colo. 1988) (en banc). The group insurance policy limited coverage to costs relating to the complications of pregnancy, but excluded expenses incurred during a normal pregnancy. *Id.* at 1359 n.2.

207. 417 U.S. 484 (1974); *see supra* notes 53-59 and accompanying text.

208. 429 U.S. 125 (1976); *see supra* note 55 and accompanying text.

209. *Colo. Civil Rights Comm'n*, 759 P.2d at 1363.

210. *Id.* (citations omitted).

State ERAs have also provided protection against pregnancy-based discrimination where an employer reassigned a pregnant worker to lesser duties²¹¹ or discharged her because of pregnancy.²¹²

The guarantee of equality at the heart of state ERAs is also clearly implicated by laws that single out abortion services for prohibition or restriction:

Because only women obtain abortions, the direct impact of abortion restrictions falls on a class composed *only* of women, while men are able to protect their health and exercise their pro-creative choices free of governmental interference. Restrictive legislation coerces only women to continue their pregnancies to term. Only women bear the harmful consequences of dangerous, illegal abortions, where the state has made safe, legal abortions unavailable. By restricting a woman's right to choose abortion, the state conscripts women's bodies into its service, forcing women to continue their pregnancies and involuntarily bear children.²¹³

Most state ERA challenges in this context have focused on state laws restricting public funding for abortion.²¹⁴ Challenges under the Federal Constitution to restrictions on public funding for abortion have uniformly failed, and the Supreme Court has explicitly permitted states to discriminate

211. *E.g.*, Allison-LeBlanc v. Dep't of Pub. Safety, 671 So. 2d 448, 452-53 (La. Ct. App. 1995) (holding that automatic reassignment of pregnant police officer to administrative duty or leave violates Louisiana ERA).

212. *E.g.*, Merrell v. All Seasons Resorts, Inc. 720 F. Supp. 815, 823 (C.D. Cal. 1989) (rejecting *Geduldig*, 417 U.S. 484, and concluding "pregnancy-discrimination is a form of sex discrimination under article I, section 8 of the California Constitution"); Badih v. Myers, 43 Cal. Rptr. 2d 229, 233 (Ct. App. 1995) (same).

213. Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1167-68 (1993).

214. Under the Federal Constitution, the main source of protection from laws restricting abortion is the Due Process Clause of the Fourteenth Amendment. In *Roe v. Wade*, the Supreme Court held that the right to choose abortion is a fundamental right, protected by the strict scrutiny standard of review. 410 U.S. 113, 154 (1973). Nineteen years later, in *Planned Parenthood v. Casey*, the Supreme Court cut back on constitutional protection for abortion, adopting a new, more permissive "undue burden" standard to judge the constitutionality of restrictions on abortion. 505 U.S. 833, 837 (1992). *See generally* Kolbert & Gans, *supra* note 213, at 1151-56.

between childbirth and abortion in their allocation of funds.²¹⁵ In contrast, challenges under state ERAs²¹⁶ or other state constitutional guarantees²¹⁷ have successfully invalidated restrictions on public funding for abortion in

215. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that a state participating in Medicaid program is not required by the United States Constitution to fund medically necessary abortions even where it funds childbirth); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that a state participating in Medicaid program is not required by the United States Constitution to pay for non-therapeutic abortions even where it pays for childbirth); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989) (upholding bans on performance of abortions in public hospitals).

216. Two courts have relied on state ERAs in striking down restrictions on public funding for abortion. *See Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (invalidating Connecticut's restrictions on funding medically necessary abortion services based on Connecticut's ERA and its due process guarantee); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998) (invalidating New Mexico's restrictions on funding medically necessary abortion services based on New Mexico's ERA); *cf. Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (finding that a New Jersey funding restriction constitutes denial of equal protection by discriminating between Medicaid-eligible pregnant women "for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary" and thereby "impinges upon the fundamental right of a woman to control her body").

217. *See, e.g.*, *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 908 (Alaska 2001) (invalidating Alaska's restriction on public funding of abortion based on state constitutional guarantee of "equal rights, opportunities and protection under the law"); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 32, 37 (Ariz. 2002) (invalidating Arizona's restrictions on public funding of medically necessary abortion services based on the equal privileges and immunities clause of the Arizona Constitution); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798-99 (Cal. 1981) (invalidating California's restrictions on public funding medically necessary abortion services based on constitutional guarantee of privacy); *Humphreys v. Clinic for Women*, 796 N.E.2d 247, 259-60 (Ind. 2003) (requiring limited additional public funding of certain medically necessary abortions based on state constitution's privileges and immunities clause); *Moe v. Sec'y of Admin.*, 417 N.E.2d 387, 390 n.4, 397 (Mass. 1981) (invalidating a state ban on public funding of medically necessary abortion services based on declaration of rights clause guaranteeing due process of law); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995) (invalidating Minnesota's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of privacy); *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982) (invalidating New Jersey's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of equal protection); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658, 665-67 (W. Va. 1993) (invalidating West Virginia's restrictions on public funding of medically necessary abortion services based on express constitutional right to safety and due process of law).

many states.²¹⁸ State ERA challenges have been successful where state courts have been willing to abandon the formal equality analysis of federal precedent and extend greater protection for abortion rights under state equality provisions. The 1998 decision of the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson* best illustrates this independent approach.²¹⁹ In holding that New Mexico's restrictions on state Medicaid funding for medically necessary abortions²²⁰ violated the state ERA, the court reasoned that distinctions based on pregnancy, although a physical characteristic unique to women, must be subject to close scrutiny.²²¹ The court flatly rejected the reasoning of the United States Supreme Court in *Geduldig*, emphasizing that it "would be error . . . to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex."²²² Instead, the court reasoned that New Mexico's ERA demanded that it look "beyond the classification to the purpose of the law"²²³ and to whether the law operates to the disadvantage of women. The court emphasized that "[t]he question at hand is whether the government has the power to turn the capacity [to bear children], limited as it is to one gender, into a source of social disadvantage."²²⁴ In this regard, the court noted that New Mexico's funding ban was part and parcel of a long history in which "women's biology and ability to bear children have been used as a basis for discrimination against them."²²⁵ The court also noted that the record in the trial court established "profound [potential] health consequences" of

218. As recently noted by the Arizona Supreme Court:

The majority of states that have examined [restrictions on Medicaid funding for abortion] have determined that their state statutes or constitutions offer broader protection of individual rights than does the United States Constitution and have found that medically necessary abortions should be funded if the state also funds medically necessary expenses related to childbirth.

Simat Corp., 56 P.3d at 35.

219. 975 P.2d at 859.

220. New Mexico's rule prohibited state funding of medically necessary abortions for Medicaid-eligible women except when necessary to save the life of the pregnant woman, when necessary to end an ectopic pregnancy or when the pregnancy was the result of rape or incest. *Id.* at 844.

221. *Id.* at 853-55.

222. *Id.* at 854.

223. *Id.*

224. *Id.* (quoting Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 33 (1992)).

225. *Id.* (quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Sup. Ct. 1986)).

pregnancy.²²⁶ Finally, the court found that the New Mexico law discriminated against women by singling them out for distinctly different treatment than men with respect to medically necessary medical services:

[T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision . . . that disfavors any comparable, medically necessary procedure unique to the male anatomy. . . .

Thus, [the regulation] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.²²⁷

Applying what it described as “searching judicial scrutiny,” the court found that the State had produced no compelling justification for its discriminatory treatment of pregnant women seeking abortion.²²⁸

The *New Mexico Right to Choose* decision is noteworthy for its thorough and careful analysis of whether divergence from federal precedent was appropriate in light of “distinct characteristics” of New Mexico law. The New Mexico Supreme Court examined both the text of the New Mexico ERA and its history and meaning in the context of protection from sex discrimination under New Mexico law from territorial times to present.²²⁹ With respect to the New Mexico ERA, the court noted that it was passed in 1973 “by an overwhelming margin” and represented a culmination of a series of state constitutional amendments “that reflect an evolving concept of gender equality.”²³⁰ Based on the distinctive text and legislative history of the New Mexico ERA, the court found that the ERA was added to New Mexico’s constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the Federal Constitution.²³¹ Thus, the court concluded that “the federal equal protection analysis [was] inapposite with respect to [the] claim of gender

226. *Id.*

227. *Id.* at 856.

228. *Id.* The court began with the premise that sex-based classifications are “presumptively unconstitutional,” and required the State to provide a compelling justification for using one. *Id.* at 853. The court found that State’s asserted interest in reducing the cost of medical assistance was insufficient justification given that the costs of carrying a pregnancy to term (funded under the state Medicaid program) are typically much greater than the expense of providing an abortion. *Id.* at 856.

229. *Id.* at 852-53.

230. *Id.* at 851-52.

231. *Id.* at 851-54.

discrimination” before it.²³² Having put federal precedent aside, the court went on to undertake an analysis that scrutinized the New Mexico funding cut-off from a substantive equality perspective that focused on the multiple ways in which the cut-off contributed to women’s subordination.²³³

In contrast to the New Mexico Supreme Court, other courts have explicitly declined to find protection for abortion funding under their state ERAs.²³⁴ In *Bell v. Low-Income Women of Texas*, for example, the Texas Supreme Court held that the Texas Medical Assistance Program’s restrictions on abortion funding for indigent women did not violate the Texas ERA.²³⁵ Unlike the New Mexico Supreme Court, the Texas Supreme Court refused to find that the State’s decision to single abortion out for different treatment involved a sex-based classification:

[I]t is true that the funding restrictions only affect women, but that is because only women can become pregnant. If the State were to deny funding of all medically-necessary pregnancy-related services, the classification might be comparable to [an] overt gender-based classification The classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves potential life, has no parallel treatment method.²³⁶

Having concluded that no discriminatory facial classification was involved by relying upon the United States Supreme Court’s decisions in *Feeney* and other cases, the Texas Supreme Court required proof that the funding restriction was based on an invidious discriminatory purpose.²³⁷ Finding that the plaintiffs had failed to demonstrate a purpose to discriminate because of sex, the court refused to apply heightened scrutiny and reviewed the Texas law only to determine whether it was rationally related to a legitimate government purpose.²³⁸ In addition to its outcome, the *Bell* opinion also differs from the *New Mexico Right to Choose* opinion in its reliance on

232. *Id.* at 851.

233. *Id.* at 857-58.

234. *See, e.g.*, *Choice for Women, Inc. v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004), *review denied*, 885 So. 2d 386 (Fla. 2004); *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114, 126 (Pa. 1985).

235. 95 S.W.3d 253, 266 (Tex. 2002).

236. *Id.* at 258.

237. *Id.* at 258-60 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979)).

238. *Id.* at 264.

federal precedent. While noting that the Texas ERA was ““designed expressly to provide protection which supplements the federal guarantees of equal treatment”” and insisting that federal precedent was therefore not controlling, the Texas Supreme Court went on to rely heavily—indeed almost exclusively—on it.²³⁹

2. Unwed Parents

State ERAs have also frequently been used to mount successful challenges to a variety of state laws that make sex-based distinctions regarding the rights and responsibilities of unwed parents and their children. In *Guard v. Jackson*, the Washington Supreme Court relied on the state ERA to invalidate a statute that required the father, but not the mother, of an illegitimate child to have regularly contributed to the support of a minor child in order to recover for the child’s wrongful death.²⁴⁰ The court began by noting that the United States Supreme Court’s reasoning in *Parham v. Hughes*,²⁴¹ upholding a similar statute, “provides no guidance to this court’s consideration under the ERA.”²⁴² Instead, the court reviewed the statute under the rigorous standard of review adopted in *Darrin v. Gould*,²⁴³ which allows sex-based classifications only where actual differences justify it. The court concluded that, given the statute’s purpose of allowing compensation “for the loss of love and companionship of a child,” no actual differences justified barring a father from recovering damages, because “the capacity to suffer loss when a child dies is not unique to mothers.”²⁴⁴

Similarly, in *Estate of Hicks*, the Illinois Supreme Court relied on the Illinois ERA to strike down a provision allowing only mothers to inherit from illegitimate children who die intestate.²⁴⁵ The court rejected the State’s argument that the sex-based distinction was legitimately based on biological differences between mothers and fathers and applied the strict scrutiny

239. *Id.* at 257 (quoting TEXAS LEGISLATIVE COUNCIL, 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED FOR ELECTION 24 (1972)). The Texas Supreme Court relied heavily on *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993), *Harris v. McRae*, 448 U.S. 297 (1980), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

240. 940 P.2d 642, 645 (Wash. 1997).

241. 441 U.S. 347 (1979); *see supra* note 69 and accompanying text.

242. *Guard*, 940 P.2d at 643.

243. 540 P.2d 882 (Wash. 1975) (en banc); *see supra* note 181 and accompanying text.

244. *Guard*, 940 P.2d at 645.

245. 675 N.E.2d 89, 99 (Ill. 1996).

standard of review to assess the statute.²⁴⁶ The court reasoned that distinguishing between mothers and fathers was not necessary to achieve the State's goal of giving effect to the presumed intentions of a deceased child.²⁴⁷ Instead, the court found that the statute was based on overbroad and impermissible generalizations about parental roles and behavior:

[The statute] is based upon the presumption that a particular parent will be involved or uninvolved in his illegitimate child's life simply because that parent happens to be a man or a woman. Not all mothers assume sole responsibility for their illegitimate offspring, and not all fathers abandon such offspring. In fact, by employing a gender-based classification, [the statute] may actually thwart the legislature's desire to effectuate an illegitimate child's presumed intent [The statute] allows a mother who abandons her illegitimate child at birth to inherit from that child, while denying surviving fathers the opportunity to inherit even where there is conclusive evidence that they were objects of their child's affection.²⁴⁸

In *In re McLean*, the Texas Supreme Court relied on the Texas ERA to strike down a statute that required a father, but not a mother, to prove it was in the best interest of a child born out of wedlock that he be recognized as a parent.²⁴⁹ The court began its opinion by emphasizing that the adoption of the Texas ERA required it to review the case on independent state constitutional grounds:

We decline to give the Texas Equal Rights Amendment an interpretation identical to that given state and federal due process and equal protection guarantees. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the Texas Equal Rights Amendment was adopted in 1972. If the due process and equal protection provisions and the Equal Rights Amendment are given identical

246. *Id.* at 93.

247. *Id.* at 94. The court found that the State's goal could be achieved in a gender-neutral manner by allowing intestate succession by any parent who has acknowledged and supported his child. *Id.*

248. *Id.*

249. 725 S.W.2d 696, 698-99 (Tex. 1987); *see also* R. McG. & C.W. v. J.W. & W.W., 615 P.2d 666, 672 (Colo. 1980) (asserting that Federal Equal Protection Clause and state ERA required that natural fathers be given the same period of years as mothers to assert their paternity).

interpretation, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility.²⁵⁰

Applying a standard of strict scrutiny to assess the validity of the statute, the court found that while the state had a significant interest in protecting the welfare of a child born to a mother not married to the child's father, that interest could be served without discriminating on the basis of sex: "A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet a higher burden of proof solely because he is male."²⁵¹

These cases are noteworthy because, in squarely rejecting harmful stereotypes and assumptions about the roles and responsibilities of parents, they reject the unreflective biological determinism reflected in Supreme Court decisions such as *Parham* and *Nguyen*.

D. Disparate Impact

Although there are relatively few reported decisions involving disparate impact claims, some courts have also been willing to extend the protection of state ERAs to facially neutral laws or policies that disproportionately impact men or women.²⁵² The Pennsylvania Supreme Court's 1975 decision in *DiFlorido v. DiFlorido*²⁵³ is one early example of an expansive interpretation of a state ERA to reach a classification that was neutral on its face but disproportionately disadvantaged women. The court first invalidated a Pennsylvania common law rule that made household goods acquired during a marriage presumptively the property of the husband.²⁵⁴ Next, the court went on to find invalid the trial court's alternative sex-neutral presumption that the actual purchaser of marital property is the owner.²⁵⁵ In rejecting the notion that ownership should be based solely on proof of financial contribution, the

250. *In re McLean*, 725 S.W.2d at 697 (citation omitted).

251. *Id.* at 698.

252. It is important to note, however, that, in addition to judicial decisions, state ERAs have inspired legislative and executive action prohibiting sex-neutral rules that disparately impact women. See *infra* notes 384-85 and accompanying text. Professor Abernathy's recent findings regarding the reluctance of federal judges to apply disparate impact standards highlight the importance of these political solutions for sex-neutral rules that disproportionately impact women. See Abernathy, *supra* note 105.

253. 331 A.2d 174 (Pa. 1975).

254. *Id.* at 179.

255. *Id.*

court reasoned that this “would necessitate an itemized accounting whenever a dispute over household goods arose and would fail to acknowledge the *equally important* and often substantial non-monetary contributions made by either spouse.”²⁵⁶ Noting that the ERA demanded that the law not impose “different benefits or different burdens” on members of either sex, the court held that household goods acquired during the marriage must be presumed to be held jointly by the couple unless specific proof was presented to overcome that presumption.²⁵⁷

More recently, in *Kemether v. Pennsylvania Interscholastic Athletic Ass’n, Inc.*, a federal district court, relying on precedent from Pennsylvania’s state courts, sustained a favorable jury verdict based on a disparate impact claim under Pennsylvania’s ERA.²⁵⁸ The case involved a claim by a female basketball referee that the Pennsylvania Interscholastic Athletic Association (“PIAA”) discriminated against her on the basis of sex by refusing to assign her to officiate at boys’ interscholastic basketball games during regular season play.²⁵⁹ The plaintiff also alleged that the PIAA limited eligibility to officiate at boys’ post-season playoff games to officials who officiated at ten regular season varsity boys’ games.²⁶⁰ The plaintiff argued that because of the ten-game rule and the inability of women to obtain assignments to regular season boys’ games, female officials were effectively precluded from officiating at boys’ postseason games.²⁶¹ The court expressly rejected the defendant’s claim that Pennsylvania’s ERA did not extend to PIAA’s facially neutral policy regarding post-season games: “[W]hile a practice may purport to treat men and women equally, if it has the effect of perpetuating discriminatory practices, thus placing an unfair burden on women, it may violate the ERA.”²⁶² The court also rejected the defendant’s claim that plaintiff had failed to provide evidence of disproportionate effect, noting both that “the record . . . [was] replete with evidence to the contrary,” and that “[i]t was known to PIAA that, because of the ten-game rule and the inability of women to obtain assignments to regular season boys’ games, female officials were only ever eligible to officiate girls’ playoff games.”²⁶³

256. *Id.*

257. *Id.* at 179-80.

258. No. Civ. A. 96-6986, 1999 WL 1012957, at *20 (E.D. Pa. Nov. 8, 1999).

259. *Id.* at *1.

260. *Id.* at *2.

261. *Id.*

262. *Id.* at *20.

263. *Id.* at *19.

Importantly, in these cases, neither court imposed a requirement—like that applicable under *Personnel Administrator of Massachusetts v. Feeney*²⁶⁴ and other Federal Equal Protection Clause precedent—that the plaintiffs demonstrate discriminatory purpose. Under *Feeney*, these plaintiffs could not have prevailed absent proof that the defendants *desired* to discriminate; proof that they took action with knowledge of the consequences, accepted by the court in *Kemether*, would not have been sufficient.²⁶⁵ In these and other cases,²⁶⁶ claims under state ERAs have enjoyed expanded protection against sex discrimination beyond the constraints of federal precedent.

In contrast, the Texas Supreme Court's opinion in *Bell v. Low-Income Women of Texas*,²⁶⁷ represents a far more restrictive interpretation and application of a state ERA in the context of a claim viewed by the court as facially neutral. Repeatedly citing *Feeney* and other federal precedent, the Texas Supreme Court held that Texas's restriction on Medicaid funding for medically necessary abortions was facially neutral and therefore not subject to close scrutiny absent proof that Texas lawmakers acted with an explicit "purpose to discriminate because of sex":

264. 442 U.S. 256 (1979); *see supra* notes 91-97 and accompanying text.

265. *See supra* note 96 and accompanying text.

266. *See, e.g.*, *Hardy v. Stumpf*, 112 Cal. Rptr. 739 (Ct. App. 1974) (asserting that a challenge to height and weight requirements in employment under constitutional equality provision need not demonstrate discriminatory intent, and holding that if requirements pose discriminatory impact, such requirements are invalid unless "demonstrably related to job performance"); *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817, 826 (Md. App. Ct. 1985) (recognizing that "statute may be couched in gender neutral terms and still have an unconstitutional discriminatory purpose and effect," but finding no state action sufficient to trigger protection of Maryland ERA); *Buchanan v. Dir. of Div. of Employment Sec.*, 471 N.E.2d 345, 348 (Mass. 1984) (recognizing availability of claim of disparate impact under Massachusetts ERA, although plaintiffs did not make out requisite proof of disparity); *Snider v. Thornburgh*, 436 A.2d 593, 601 (Pa. 1981) (noting that "'facially neutral . . . policies which have the practical effect of perpetuating . . . discriminatory practices'" may violate the ERA, but finding no state action (quoting *Gen. Elec. Corp. v. Human Relations Comm'n*, 365 A.2d 649, 658 (Pa. 1976))); *Pa. Nat'l Org. for Women v. Commonwealth Ins. Dep't*, 551 A.2d 1162, 1167 (Pa. Commw. Ct. 1988) (noting in challenge to insurance commissioner's approval of equal automobile insurance rates for men and women that the plaintiff could not "prove 'de facto' discrimination by insisting without some support that the insurers' rate-making practices have a discriminatory effect"); *State v. Brayman*, 751 P.2d 294, 305 (Wash. 1988) (recognizing merits of a disparate impact theory of sex discrimination).

267. 95 S.W.3d 253 (Tex. 2002); *see discussion supra* notes 235-39 and accompanying text.

“Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward . . . women as a class.” The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender. . . . [T]hat might be true if the State refused to fund medically necessary pregnancy-related services. But, other than abortion, the [Texas law] does fund all medically necessary pregnancy-related care.²⁶⁸

Finding no proof of such invidious intent, the court evaluated the Texas law under the highly deferential rational basis standard of review, readily concluding that it rationally furthered the state’s legitimate purposes of providing funding where federal reimbursement was available and “encouraging childbirth and protecting potential life.”²⁶⁹ In contrast, the strict scrutiny standard employed by the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson* would have required the State to provide compelling justification for its funding restriction and to demonstrate why that goal could not be achieved via less discriminatory means.²⁷⁰ Numerous courts applying this standard have invalidated discriminatory funding bans, finding no compelling justification for denying medically necessary health care to poor women who need abortions.²⁷¹

E. Sexual Orientation and Formal Equality

Finally, state court opinions demonstrate that state ERAs may provide protection from discrimination based on sexual orientation that goes well beyond that available under the Federal Constitution. The United States Supreme Court’s own decision-making in this area has been sparse. In 1996,

268. *Id.* at 263-64 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993)).

269. *Id.* at 264.

270. 975 P.2d 841, 855 (N.M. 1998).

271. *See, e.g.*, *State v. Planned Parenthood of Alaska*, 28 P.2d 904, 915 (Alaska 2001) (“The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program.”); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 33 (Ariz. 2002) (“Promoting childbirth is a legitimate state interest, but it seems almost inarguable that promoting and actually saving the health and perhaps eventually the life of a mother is at least as compelling a state interest.”).

the Supreme Court in *Romer v. Evans* held that a Colorado constitutional amendment prohibiting all legislative, administrative or judicial actions designed to protect gays and lesbians violated the Equal Protection Clause.²⁷² The Court held that the Colorado provision could not survive minimum rationality scrutiny.²⁷³ In 2003, in *Lawrence v. Texas*,²⁷⁴ the Court used rationality review to strike down a law banning same-sex sodomy under the Due Process Clause,²⁷⁵ expressly declining to rest its reasoning on the Equal Protection Clause.²⁷⁶ The Supreme Court has never expressly decided whether sexual orientation is a suspect or quasi-suspect classification warranting application of heightened scrutiny.²⁷⁷ Nor has the Supreme Court considered whether discrimination against gays and lesbians is a form of sex-based discrimination, warranting heightened scrutiny under *Craig v. Boren*.²⁷⁸

The sex discrimination argument has frequently been made in state constitutional law challenges to laws restricting marriage to opposite-sex

272. 517 U.S. 620, 632 (1996).

273. *Id.*

274. 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), in which it had upheld Georgia's criminal ban on sodomy. *Lawrence*, 539 U.S. at 578; *cf.* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that the Boy Scouts' First Amendment expressive associational rights were violated by application of New Jersey's public accommodations law to prohibit them from revoking membership of gay scout leader).

275. *Lawrence*, 539 U.S. at 578. The Court never reached the question whether to apply heightened scrutiny, finding that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

276. *Id.* at 574. Justice O'Connor concurred solely on equal protection grounds, but carefully distinguished the marriage question. *See id.* at 585 (O'Connor, J., concurring). Professor Pamela Karlan has suggested that the majority avoided the Equal Protection Clause because of its

fear[] that if it struck down Texas's statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.

Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1460 (2004).

277. The majority of lower court rulings have rejected the argument that sexual orientation deserves heightened scrutiny. *See generally* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 482 & n.50 (2001) (collecting cases). Federal courts use the rational review standard to scrutinize claims of discrimination based on sexual orientation, sometimes invalidating the challenged governmental action, and sometimes upholding it. *Id.* at 484-85 nn.68-69 (collecting cases).

278. 429 U.S. 190 (1976).

couples. Although state ERAs have not provided the legal basis for recent victories in Vermont²⁷⁹ and Massachusetts,²⁸⁰ in the Hawaii Supreme Court's landmark 1993 ruling in *Baehr v. Lewin*, the court relied on the Hawaii ERA in holding that its prohibition on same-sex marriage established a sex-based classification that could only pass muster if the state could satisfy the strict scrutiny standard.²⁸¹ The *Baehr* court employed a straightforward formal equality analysis to reach this result reasoning essentially that because Hawaii's law allowed men to marry women, but prevented women from marrying women, it denied women (and vice versa men) the ability to do something that men could do and therefore constrained women's (and men's) choice of marital partners because of sex.²⁸² The court supported its reasoning by analogizing to the Supreme Court's 1967 holding in *Loving v. Virginia*²⁸³ that the Equal Protection Clause forbids the criminalization of marriage between persons of different races.²⁸⁴ On remand, a trial court invalidated the statute after finding that the state had not proven that the marriage statute was supported by a compelling governmental interest.²⁸⁵ The court's ruling, however, never went into effect because Hawaii voters amended the Hawaii Constitution to allow the state legislature "the power to

279. *Baker v. State*, 744 A.2d 864 (Vt. 1999). The Vermont Supreme Court held that Vermont's exclusion of same-sex couples from the benefits and protections of marriage violated the common benefits clause of the Vermont Constitution. *Id.* at 886. The court expressly rejected the argument that restricting marriage to opposite-sex couples established a sex-based classification. *Id.* at 880 n.13. For additional discussion of the majority opinion in *Baker*, see *infra* notes 295-300 and accompanying text.

280. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Massachusetts Supreme Court held that limiting marriage to opposite-sex couples violated the individual liberty and equality guarantees of the Massachusetts Constitution. *Id.* at 969. While noting that the Massachusetts Constitution specifically forbids sex-based discrimination, the majority declined to decide whether sexual orientation is a suspect classification. *Id.* at 961 n.21.

281. 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment as stated in* *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to article I, section 23 of the Hawaii Constitution rendered the challenge moot).

282. *See id.* at 60, 67-68.

283. 388 U.S. 1 (1967).

284. *Baehr*, 852 P.2d at 68 ("Substitution of 'sex' for 'race' and article I, section 5 [of Hawaii's Constitution] for the [F]ourteenth [A]mendment yields the precise case before us together with the conclusion that we have reached.").

285. *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

reserve marriage to opposite-sex couples.”²⁸⁶ No subsequent final appellate decisions have adopted the *Baehr* court’s sex discrimination rationale. However, concurring opinions of supreme court justices in Massachusetts²⁸⁷ and Vermont²⁸⁸ and trial court opinions in Maryland,²⁸⁹ Alaska²⁹⁰ and Oregon²⁹¹ accepted the argument in same-sex marriage challenges, and a few opinions have done so in other contexts.²⁹²

286. HAW. CONST. art. I, § 23; *see Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to the state constitution rendered the challenge moot).

287. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (relying on the Massachusetts ERA).

288. *Baker v. State*, 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (relying on Vermont’s common benefits clause). For additional discussion of this opinion, see *infra* notes 306-08 and accompanying text.

289. *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *3-7 (Md. Cir. Ct. Jan. 20, 2006) (holding that Maryland’s same-sex marriage prohibition constitutes discrimination based on sex in violation of Maryland’s ERA).

290. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *5-6 (Alaska Super. Ct. Feb. 27, 1998) (finding a fundamental right to choose a “life partner” under the Alaska Constitution, and noting, in dicta, that the restriction of marriage to opposite-sex couples also “implicate[s] the Constitution’s prohibition of classifications based on sex or gender” in violation of the Alaska ERA). The case was subsequently dismissed after the Alaska Constitution was amended to define marriage as a union between a man and a woman. ALASKA CONST. art I, § 25; *see Brause v. State* 21 P.3d 357, 358 (Alaska 2001).

291. *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *6 (Or. Cir. Ct. Apr. 20, 2004) (holding that the effect of Oregon’s denial of marriage to same-sex couples “is to impermissibly classify on the basis of gender,” as well as sexual orientation, in violation of the privileges or immunities clause of the Oregon Constitution). The ruling was subsequently reversed after the Oregon Constitution was amended, effective December 2, 2004, to define marriage as a union between a man and a woman. *See Li v. State*, 110 P.3d 91, 102 (Or. 2005).

292. *Snetsinger v. Mont. Univ. Sys.*, 325 Mont. 148, 173 (2005) (Nelson, J., concurring) (asserting that denial of health benefits to same-sex partners of employees by state university is sex-based discrimination in violation of Montana ERA). For additional discussion of this opinion, see *infra* note 309-10 and accompanying text.

In other cases, lower court opinions accepted the sex discrimination argument, but the decisions were subsequently overruled or affirmed on other grounds by higher courts. *See, e.g., Picado v. Jegley*, No. CV-99-7048 (Ark Cir. Ct. Mar. 23, 2001) (accepting sex discrimination argument as basis for invalidating Arkansas sodomy ban), available at <http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf>, *aff’d on other grounds*, 80 S.W.3d 332, 334 (Ark. 2002) (striking Arkansas sodomy ban on privacy and equal protection grounds and, finding that Arkansas statute impermissibly discriminates on the basis of sexual orientation and fails rationality review); *Lawrence v. State*, Nos. 14-99-00109-

Other state courts have squarely rejected the sex discrimination argument in a variety of cases.²⁹³ In direct contrast to *Baehr*, several state courts have used a formal equality analysis to reason that prohibitions on same-sex marriage do not involve impermissible sex-based classifications because: (1) they apply equally to men and women in the sense that both men and women are precluded from marrying same-sex partners;²⁹⁴ (2) they are not motivated by purposeful sex-based discrimination;²⁹⁵ and (3) they are based upon “the unique physical characteristics” of the sexes.²⁹⁶ These courts explicitly rejected *Baehr*’s analogy to *Loving*. In the 1974 decision in *Singer v. Hara*, for example, the Washington Court of Appeals dismissed *Loving* as inapposite, reasoning that gender, unlike race, is an essential element of marriage: “[M]arriage [by definition], as a legal relationship, may exist only between one man and one woman.”²⁹⁷ More recently, in *Baker v. Vermont*,

CR & 14-99-00111-CR, 2000 WL 729417 (Tex. Ct. App. June 8, 2000) (accepting sex discrimination argument applied to Texas sodomy ban), *withdrawn and overruled*, 41 S.W.2d 349 (Tex. Ct. App. 2001) (en banc), *rev’d by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

293. See Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 534 & n.84 (2001) (noting that “[t]he sex discrimination argument has usually been rejected by the courts,” and citing federal and state cases).

294. See *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974).

295. See *Baker*, 744 A.2d at 880 n.13.

296. *Singer*, 522 P.2d at 1195. The court reasoned that “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race,” and that “it is apparent that no same-sex couple offers the possibility of the birth of children by their union.” *Id.* Accordingly, Washington’s denial of same-sex marriage fell within the “unique physical characteristics” exception to that state’s ERA. *Id.*; see also *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (upholding Minnesota’s prohibition on same-sex marriage because “[t]he institution of marriage as a union of man and woman, uniquely involve[s] the procreation and rearing of children within a family” (citation omitted)), *appeal dismissed*, 409 U.S. 810, 810 (1972).

297. *Singer*, 522 P.2d at 1191. In 2004, two lower courts ruled that Washington’s prohibition on same-sex marriage violated its state constitution. See *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities clause of the Washington Constitution); *Anderson v. King County*, No. 04-2-04964-4, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 04, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities and due process clauses of the Washington Constitution). Appeals in these cases are pending before the Washington Supreme Court. In *Anderson*, the court noted that “[t]he Equal Rights Amendment argument presented by plaintiffs is an intriguing one,” but noted that it was bound by the Washington Court of Appeals’s rejection of the argument in

the Vermont Supreme Court also rejected the analogy to *Loving* as “misplaced.”²⁹⁸ The *Baker* court emphasized that the United States Supreme Court was able to look beyond the facial neutrality of the miscegenation ban in *Loving* because it found that “its real purpose was to maintain the pernicious doctrine of white supremacy.”²⁹⁹ Relying on the *Feeney* discriminatory purpose standard, the court reasoned that, in contrast, on the record before it, there was insufficient evidence “to demonstrate that the authors of marriage laws excluded same-sex couples *because of* incorrect and discriminatory assumptions about gender roles.”³⁰⁰

Given the limits of formal equality analysis reflected in the reasoning of *Singer*, *Baker* and other cases rejecting the sex discrimination argument, some legal scholars have suggested that those advancing this argument must go beyond the mechanical analysis of *Baehr* to a more substantive equality analysis that recognizes the ways in which discrimination against gays and lesbians perpetuates sex stereotypes, subordinates women and enforces heterosexual norms.³⁰¹ These arguments have been well developed by legal scholars. Professor Andrew Koppelman, for example, has compellingly articulated the argument that, just as miscegenation laws enforce a code of white supremacist preservation of a “superior” race, laws that discriminate against gays and lesbians reinforce both gender stereotypes about proper male and female behavior and the hierarchy of males over females:

Much of the connection between sexism and [homophobia] lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual’s supposed deviance from traditional sex roles. . . .

Most Americans learn no later than high school that of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one’s sex is the imputation of homosexuality. . . .

Singer. *Anderson*, 2004 WL 1738447, at *11. In *Castle*, the court likewise noted that it was bound by the *Singer* decision, but referred to it as a “weak reed” and emphasized that it “cries out for reexamination by a higher court.” 2004 WL 1985215, at *2-3.

298. See *Baker*, 744 A.2d at 880 n.13.

299. *Id.*

300. *Id.* (emphasis added).

301. See, e.g., Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 406-12 (2001); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 18-23 (1994).

This common sense meaning shares certain implicit, rather ugly assumptions with the miscegenation taboo. Both assume the hierarchical significance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist, only for the sake of male gratification.³⁰²

Professor Sylvia Law has also cogently demonstrated that negative attitudes towards homosexuality preserve “traditional concepts of masculinity and femininity, and those traditional concepts in turn sustain particular political, market and family structures”³⁰³:

Sexism and heterosexism are tightly linked. Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. They do not fit. Such persons, particularly if they are comfortable with their sexuality and reasonably content and successful in their work and family life, invite heterosexual people to explore whether their own sexual orientation is innate, “freely chosen,” or simply the socially comfortable course of least resistance.

. . . .

At its core, secular opposition to homosexual expression and feminism rests on a defense of traditional ideas of family stability. Gay people and feminists violate conservative ideology of family in many ways. Most obviously, gay people engage in non-marital sex involving no immediate potential for procreation. More importantly, when homosexual people build

302. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234-36 (1994) (first emphasis added) (citations omitted); see also ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53 (2002); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145, 158-60 (1988).

303. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender.³⁰⁴

Although the anti-subordination arguments of Professors Koppelman, Law and other scholars³⁰⁵ have for the most part not been adopted in judicial opinions, the seeds of these more nuanced arguments are reflected in at least two recent concurring opinions in state constitutional law challenges to discrimination against gays and lesbians. In her concurring and dissenting opinion in *Baker v. Vermont*, Justice Johnson argued that Vermont's exclusion of same-sex couples from the benefits and protections of marriage should be subject to heightened scrutiny as a "suspect" or quasi-suspect classification based on sex.³⁰⁶ Significantly, Justice Johnson viewed Vermont's opposite-sex marriage limitation as "a vestige of the sex-role stereotyping" that historically has pervaded marriage laws.³⁰⁷ She specifically cited the long history of subordination of women within marriage via laws that enforced economic dependency and treated married women as legal incompetents.³⁰⁸

More recently, in a concurring opinion in *Snetsinger v. Montana University System*, Justice Nelson argued that the Montana University System's exclusion of health benefits to partners of gay and lesbian employees constituted a sex-based classification in violation of the Montana ERA.³⁰⁹ Citing Professor Koppelman, Justice Nelson emphasized that the purpose and effect of the challenged restriction was essentially to force individuals into traditional gender roles:

[T]he entire focus of laws directed at gays and lesbians is sex. Majoritarian morality and prevailing political ideology are offended by the fact that

304. *Id.* at 210, 218.

305. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 153-72 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 218-28 (1999) [hereinafter ESKRIDGE, GAYLAW]; Sunstein, *supra* note 301, at 17-23.

306. 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

307. *Id.* at 906.

308. *Id.* at 908-09.

309. 325 Mont. 148, 173-74 (2005) (Nelson, J., concurring).

people of the same sex have sexual relations with each other. This offense translates into laws and policies that explicitly or implicitly demonize homosexuals and make them a disfavored class.³¹⁰

Baehr and other decisions demonstrate that state ERAs may support successful legal challenges to laws and policies that discriminate against gays and lesbians. Although some legal scholars, including those sympathetic to lesbian and gay rights, have disagreed with the use of the sex discrimination argument and advised that it “should be used with caution,”³¹¹ others have compellingly demonstrated the advantages of the argument and championed its use as one additional “arrow in the quiver”³¹² in ongoing efforts to challenge discrimination against gays and lesbians. Professor Koppelman, for example, emphasizes that the sex discrimination argument has important analytic and moral strengths that support its use, along with other arguments, by gay and lesbian rights advocates.³¹³ Although the

310. *Id.* at 173 (citing KOPPELMAN, *supra* note 302, at 53-54).

311. *E.g.*, Stein, *supra* note 277, at 515. Professor Stein argues that the sex discrimination argument is sociologically and theoretically flawed because “there are actual and significant differences between sexism and homophobia in contemporary America” in that homophobia, unlike sexism, “remains entrenched in our society.” *Id.* at 499. He further reasons that the sex discrimination argument is morally flawed because it “mischaracterizes the core wrong” of laws that restrict the rights of gays and lesbians by failing to recognize that they “violate principles of equality primarily because [they] discriminate on the basis of sexual orientation, *not* because they discriminate based on sex.” *Id.* at 503. While conceding that the sex discrimination argument has certain practical advantages, he reasons that it is unlikely to persuade judges and could lead to backlash that would weaken protections against sex discrimination. *Id.* at 507-14. For a detailed response to Professor Stein, see KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 302, at 534-38.

For other criticisms of the sex discrimination argument, see, for example, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997); Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 31-38 (1994); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 217-20 (1998); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 240-45 (1998); and Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 62-94.

312. KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 302, at 538; *see also* ESKRIDGE, GAYLAW, *supra* note 305, at 218-28; ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 305, at 153-72.

313. KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 302, at 534-38.

argument has met with considerable judicial resistance,³¹⁴ as reflected in the recent concurring opinions in *Baker* and *Snetsinger*, highlighting the dynamic of gender oppression and heterosexism that underlie laws that restrict gays and lesbians may strengthen the claim and enhance its probability of success.

IV. EVALUATING STATE ERAS

Although state ERAs were the subject of considerable scholarly interest from the mid-1970s through the mid-1990s,³¹⁵ relatively little legal scholarship has focused on them in the past decade. The scant scholarship of the past decade has focused primarily on the experience of ERAs in specific states³¹⁶ and the application of ERAs in specific areas.³¹⁷ While nearly all of

314. Professor Koppelman suggests that the argument has frequently been rejected by judges for three reasons: (1) it is "simply not understood"; (2) it strikes observers as a "mere trick"; and (3) its potential impact is too broad for judges to accept. *Id.* at 536.

315. See generally Altschuler, *supra* note 131; Avner, *supra* note 108; Phyllis W. Beck, *Equal Rights Amendment: The Pennsylvania Experience*, 81 DICK. L. REV. 395 (1977); Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. LAW 743 (1993); Susan Crump, *An Overview of Equal Rights Amendments in Texas*, 11 HOUS. L. REV. 136 (1973); Dawn-Marie Driscoll & Barbara J. Rouse, *Through a Glass Darkly: A Look at State ERAs*, 12 SUFFOLK U. L. REV. 1282 (1977); Gammie, *supra* note 108; Leo Kanowitz, *The New Mexico Equal Rights Amendment*, 3 N.M. L. REV. 1 (1973); Kilgarlin & Tarver, *supra* note 109; Kolbert & Gans, *supra* note 213; Kruger, *supra* note 6; Awilda Marquez, *Comparable Worth and the Maryland ERA*, 47 MD. L. REV. 1129 (1988); Mary McCausland, *Washington's Equal Rights Amendment and Law Against Discrimination*, 58 WASH. L. REV. 465 (1983); Dawn Nunziato, *Gender Equality: States as Laboratories*, 80 VA L. REV. 945 (1994); Kevin Francis O'Neill, *The Road Not Yet Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 5 (1993); Peter Saucier, *The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342 (1980); Rodic Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Developments, 1978-1982*, 20 HOUS. L. REV. 1321 (1983); Sherwin, *supra* note 145; G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism*, 9 HASTINGS CONST. L.Q. 919 (1982); Treadwell & Page, *supra* note 185; Williams, *Equality Guarantees*, *supra* note 145; Williams, *supra* note 6.

316. See, e.g., Phyllis W. Beck & Patricia A. Daly, *Pennsylvania's Equal Rights Amendment Law: What Does It Portend for the Future?*, 74 TEMP. L. REV. 579, 582-89 (2001) (surveying recent cases decided under Pennsylvania ERA); Faraone, *supra* note 203, at 432-42 (analyzing legislative history of 1998 Florida ERA, and concluding that strict scrutiny standard of review is applicable); Wolfgang P. Hirczy de Mino, *Does an Equal Rights Amendment Make a Difference?*, 60 ALB. L. REV. 1581, 1588-93 (1997) (surveying cases

these recent articles have concluded that state ERAs have advanced protection against sex-based discrimination,³¹⁸ some commentators have expressed disappointment at the underutilization of ERAs by litigators³¹⁹ and the failure of state courts to interpret ERAs in such a way as to advance sex

decided under Texas ERA); *see also* Beck & Daly, *supra* note 141, at 707 (providing comprehensive survey and analysis of history and impact of the Pennsylvania ERA).

317. *See, e.g.*, Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN'S L.J. 191, 209 (2001) (proposing the use of state ERAs in challenging welfare provisions that deny incremental benefits to children born into families receiving welfare benefits); Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9, 35 (2003) (arguing that state ERAs "present a potentially powerful tool" for challenging disparities female offenders face in the juvenile justice system); Linton, *Same-Sex Marriage Under State Equal Rights Amendments*, *supra* note 10, at 961-62 (reviewing potential application of state ERAs to prohibitions on same-sex marriage, and concluding "[n]othing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions should invalidate [them]. . . . [S]uch laws are gender neutral and do not have a discriminatory impact on either men or women."); Rachel Weissmann, *What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions*, 1999 ANN. SURV. AM. L. 129, 166 (arguing that state ERAs and other state constitutional provisions "provide a unique legal landscape that is well worth cultivating" in crafting challenges to restrictions on minors' access to abortion).

318. *See, e.g.*, Beck & Daly, *supra* note 316, at 594 (concluding that the Pennsylvania ERA provides both genders with important tangible and intangible benefits, including rigorous scrutiny of sex-based classifications and formal recognition in the Commonwealth that "women and men are equal partners who share both the benefits and burdens of society," but noting that "the state ERA has not markedly changed the social fabric of the Commonwealth"); Hirczy de Mino, *supra* note 316, at 1607-09 (evaluating judicial interpretation of the Texas ERA in variety of contexts, and concluding that the Texas ERA has been an effective tool in challenging sex discrimination); Kaufman, *supra* note 317, at 193 ("[S]tate ERAs can be effective in eradicating the sex discrimination that will survive scrutiny under the Federal Constitution."). For a comprehensive quantitative study of state ERAs, see Lisa Baldez et al., *supra* note 178.

319. *See, e.g.*, Beck & Daly, *supra* note 316, at 583 (noting diminishing use of ERA in Pennsylvania); Hirczy de Mino, *supra* note 316, at 1588 (citing twenty-seven cases decided over two decades, and noting that "the volume of significant precedent setting litigation engendered by adoption of the ERA in Texas is rather moderate"); Kaufman, *supra* note 317, at 193 ("[State ERAs] offer a fruitful, yet underutilized, foundation for enforcing women's rights where federal protections fail."); Levick & Sherman, *supra* note 317, at 35 (noting state ERAs are "not used frequently").

equality jurisprudence in specific areas.³²⁰ One commentator, Paul Benjamin Linton, has questioned their overall usefulness charging that state ERAs have benefited male litigants more often than female litigants and function essentially as mere symbols of equality.³²¹ Relatively little of this recent scholarship has addressed the specific reasons for either the substantive shortcomings of ERAs or their underutilization by litigators.³²² Yet, identifying and addressing these underlying issues is essential if state ERAs are to achieve their full potential in the future. This section addresses these issues, identifying obstacles that have hindered the effectiveness of state ERAs and responding to some of the recent commentary on them.

A. The Continuing Problem of Unexamined Reliance on Federal Precedent

The decisions highlighted in Part III illustrate that in many important respects state ERAs provide more comprehensive protection against gender discrimination than that afforded under the Federal Equal Protection Clause. Some state courts have extended the scope of their ERAs beyond the limits of federal state-action constraints, reaching private actors and persons loosely affiliated with the state.³²³ The majority of state courts have applied the rigorous strict scrutiny or an even stricter standard to review claims under their state ERAs³²⁴—a standard unavailable at the federal level. Moreover, in important and meaningful ways, some state courts have reached beyond the constraints of formal equality to a far more substantive analysis that evaluates sex-based classifications in the context of a long history in which biological differences between the sexes have been used to discriminate and

320. See, e.g., Beck & Daly, *supra* note 316, at 594 (noting that Pennsylvania has not issued “bold rulings” in area of abortion rights or same-sex marriage).

321. Linton, *Making a Difference?*, *supra* note 10, at 940-41 (describing outcomes in litigation under state ERAs throughout the country, and concluding that ERAs have been “[ineffective] except as a symbol” because “women have brought relatively few cases,” and most cases have involved discrimination against men (citation omitted)); Linton & Joslin, *supra* note 10, at 284 (concluding that the Illinois ERA has mainly been used to challenge “statutes, ordinances or common law doctrines that discriminated against men in favor of women”).

322. For a comprehensive survey and analysis of state ERAs, including recent decisions, see FRIESEN, *supra* note 106, § 3-2; see also Jeffrey Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1063-70 (2003) (reviewing decisions under state ERAs).

323. See *supra* notes 132-50, 170-75 and accompanying text.

324. See *supra* notes 179-83 and accompanying text.

with a focus on the negative impact of sex-based classifications on both men and women. This substantive equality analysis has resulted in decisions at the state level that: provide constitutional protection against pregnancy-based discrimination;³²⁵ prohibit the denial of medically necessary health care to poor women;³²⁶ reject rules that are based on harmful sex-based stereotypes about parental roles;³²⁷ and closely scrutinize a variety of classifications that have a disparate impact on the basis of sex.³²⁸

The emergence during the early 1970s of the “new judicial federalism,”³²⁹ in which state court judges have increasingly relied on their state constitutions to expand individual rights and liberties, has supported this development of state ERAs as independent, broad-based sources of protection.³³⁰ Yet, as decisions highlighted in Part III illustrate, an obstacle in the path of enhancing the scope of their protection is the continuing tendency of some state courts to conform their interpretations of these provisions to conventional Federal Equal Protection Clause analysis. This tendency—flagged over two decades ago by Professor Robert Williams and other constitutional law scholars³³¹ as a potential obstacle to the effectiveness of

325. See *supra* notes 206-12 and accompanying text.

326. See *supra* notes 216-33 and accompanying text.

327. See *supra* notes 240-48 and accompanying text.

328. See *supra* notes 252-66 and accompanying text.

329. See generally Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); TARR, *supra* note 3; G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV., at xiii (1996).

330. The new judicial federalism emerged during the early 1970s and was encouraged by U.S. Supreme Court Justice William Brennan. See Tarr, *New Judicial Federalism*, *supra* note 329, at 1097. In a frequently cited article in the Harvard Law Review, Justice Brennan admonished: “[S]tate courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Justice Brennan subsequently called the new judicial federalism “[t]he most important development in constitutional jurisprudence of our times.” William J. Brennan, Jr., Special Supplement, *State Constitutional Law*, NAT’L L.J., Sept. 29, 1986, at S1.

331. See, e.g., Williams, *Equality Guarantees*, *supra* note 145, at 1213 (noting that despite the powerful mandate of state ERAs “most jurisprudence under these new provisions is dominated by federal equal protection analysis”); see also Tarr & Porter, *supra* note 315, at 950 (“Even when litigants have raised claims in state courts, those courts tend to rely on federal law either explicitly, by basing decisions on relevant federal statutes or cases, or

state ERAs—is illustrated by state action decisions such as the Alaska Supreme Court’s in *United States Jaycees v. Richardet*,³³² in which the court imported the federal state action requirement without independent analysis and without considering closely the text of Alaska’s ERA or whether the policy concerns underlying that requirement apply in the state constitutional context. Likewise, the Texas Supreme Court’s decision in *Bell v. Low-Income Women of Texas*³³³ placed heavy, unexamined reliance on the formal equality analysis of the United States Supreme Court in determining both what constitutes a sex-based classification and how to assess classifications that disparately impact women. Preoccupied with federal precedent, the Texas Supreme Court did not undertake a truly independent analysis in which it examined the Texas funding restriction in light of the meaning and purpose of the Texas ERA.

State constitutional law scholars have frequently criticized this tendency of state courts reflexively to rely on federal precedent in interpreting their own constitutions.³³⁴ State constitutions are not a mere reflection of the Federal Constitution, but rather differ in their text and history and serve as independent sources of state law. Institutional concerns, such as federalism, that underlie federal decisions may be inapplicable to state courts.³³⁵ Moreover, “institutional environments and histories vary dramatically from state to state” and may require³³⁶ state judges to employ different strategies

indirectly, by using the Supreme Court’s equal protection methodology when interpreting the state constitution[s].”).

332. See *supra* notes 164-67 and accompanying text.

333. See *supra* notes 235-39 and accompanying text.

334. See, e.g., FRIESEN, *supra* note 106, § 3-1(c), at 3-8 (“The federal method of equal protection analysis has greatly influenced state judges applying various state equality guarantees, even when state texts have a radically different text and history than the [F]ourteenth [A]mendment’s clause.”); TARR, *supra* note 3, at 208 (“[T]oo many states continue to rely automatically on federal law when confronted with rights issues. Even when they interpret state guarantees, too many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs.”). Scholars have been especially critical of the “unreflective adoptionism” or “kneejerk lockstepping” approach in which state courts apply “federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome.” Williams, *Case-by-Case Adoptionism or Prospective Lockstepping?*, *supra* note 187, at 1505.

335. See *supra* notes 107-08 and accompanying text.

336. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975-76 (1985) (“State judges confront institutional environments and histories that vary dramatically from state to

in enforcing constitutional norms. Therefore, as Justice Hans Linde of Oregon emphasizes, “the right question [in interpreting these independent state charters] is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand.”³³⁷ Although Supreme Court decisions are a “valuable source of guidance, state courts are responsible for construing state law, and need not justify their decisions by reference to any federal benchmark.”³³⁸

These observations are especially apt in the context of state court interpretation of state ERAs. The language and legislative history of these provisions differs markedly from that of the Federal Equal Protection Clause. Indeed, as many state courts have recognized,³³⁹ most of these provisions were added to state constitutions to overcome the very limits posed by the historical and doctrinal underpinnings of the Equal Protection Clause. In this sense, many are mandates for a high level of constitutional protection against sex discrimination. As Professor Robert Williams wrote over two decades ago, “Adoption of these provisions through popular referenda reflects an important social and political movement in our society. . . . [S]tate ERAs seem to direct, rather than just record, social change.”³⁴⁰ Their presence in state constitutions “is unmistakable evidence of societal action, of the choice whether to enact an idea into law. To bury such choices under a theory of noninterpretive adjudication deprives political action of its constitutional significance.”³⁴¹

state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges’ instrumental impulses and judgments differ.”).

337. Hans S. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

338. FRIESEN, *supra* note 106, § 1-6, at 1-40. *See generally* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1063-64 (1997) (“State constitutional provisions need not, and should not, be reduced to a ‘row of shadows’ through too *much* reliance on federal precedent. Swinging the pendulum in the other direction, however, where too *little* reliance on federal precedent will ‘render State practice incoherent,’ is also unnecessary.”).

339. *See supra* notes 181-83 and accompanying text.

340. Williams, *Equality Guarantees*, *supra* note 145, at 1213.

341. Linde, *supra* note 337, at 195; *see also* Hans S. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 253 (1972) (“[C]onstitution [is] directly obligatory on government, with judicial review as a consequence rather than as a source of obligation.”); Hans S. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125,

Independent interpretation of state ERAs, however, does not necessarily mean that state courts will in every instance extend protection beyond that provided under the Federal Equal Protection Clause.³⁴² Rather, it means that state judges must employ a careful process, which includes a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, past judicial interpretations, its “place in the state’s overall constitutional design,”³⁴³ its relation to earlier state constitutional provisions,³⁴⁴ and provisions in other state constitutions.³⁴⁵ Decisions such as the New Mexico Supreme Court’s in *New Mexico Right to Choose*,³⁴⁶ the Washington Supreme Court’s in *Darrin v. Gould*³⁴⁷ and the Colorado Supreme Court’s in *Colorado Civil Rights Comm’n v. Travelers Insurance Co.*³⁴⁸ reflect this kind of careful, independent analysis. Importantly, in considering text and history of state ERAs, these decisions do not reflect narrow literalism or rigid originalism,³⁴⁹ but rather reflect a genuine

131 (1970) (“[W]hat the judicial decision [making] applies was first a political decision that others deemed worthy of constitutional magnitude.”).

342. Given the text and distinct history of many state ERAs, this will likely be the outcome in the vast majority of cases. However, the language of state ERAs vary and the legislative history is not the same in every state.

343. TARR, *supra* note 3, at 209.

344. Dr. G. Alan Tarr has pointed out, for example, that if New Jersey’s equality guarantee were viewed in the abstract, without reference to its preceding constitutional provision, one would not understand its language or significance: “Whereas the 1844 version acknowledged that ‘men’ possessed various natural rights, the 1947 version recognized that the rights pertain to all ‘persons.’ By substituting the gender-neutral ‘persons’ for the gendered ‘men,’ the constitution emphasized that women enjoyed the same rights as men.” Tarr, *supra* note 3, at 202.

345. *Id.* at 189-209.

346. *See supra* notes 218-34 and accompanying text.

347. *See supra* note 243 and accompanying text.

348. *See supra* notes 206-10 and accompanying text.

349. Analysis of, and reliance on, the text and history of state constitutions “has been an integral part of the New Judicial Federalism.” Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 86 (2001) [hereinafter Williams, *Old Constitutions*]; *see also* Stephen E. Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989) (noting analysis of state constitutional history “is valuable whether or not one subscribes to a jurisprudence of original intent”). Dr. G. Alan Tarr has pointed out that, in contrast to federal constitutional history, “given the frequency of amendment and revision,” many state constitutional provisions are “relatively recent”; the greater availability of their documentary record facilitates the discovery of the drafters’ intentions. TARR, *supra* note 3, at 196. Moreover, examination of the

commitment to independent analysis that remains faithful to the equality values underlying these provisions.³⁵⁰

B. Underutilization by Litigators

Commentators have correctly noted that realization of the full potential of state ERAs has been hampered by the fact that they have not been frequently used by litigators.³⁵¹ Moreover, the use of state ERAs appears to be diminishing. For example, Judge Phyllis Beck, an expert on the Pennsylvania ERA, points out that “since 1994, Pennsylvania courts have published less than one case per year discussing the state ERA.”³⁵² This phenomenon may, in part, be attributable to the fact that during the past thirty years numerous statutes and regulations targeted at sex discrimination have created alternative avenues for relief in some specific contexts.³⁵³ In addition, as already noted, over time the predominant forms of sexism have evolved from overt expressions of sex discrimination to more subtle forms, which are more difficult to challenge given the potential lack of receptivity of courts to disparate impact claims.³⁵⁴

history and text of state constitutions is often used “to justify an interpretation of the state constitution that was more protective, or recognized greater rights, than those available at the federal level.” Williams, *Old Constitutions*, *supra*, at 86. For example, Professor Williams points out that in the majority opinion in *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding Vermont’s constitution entitled same-sex couples to the same benefits and protections as opposite-sex couples), Chief Justice Amestoy used state constitutional history not “as an attempt to discover original intent in its strict sense . . . [but] rather; as a wide-ranging survey of the egalitarian impulses of the Revolution.” Williams, *Old Constitutions*, *supra*, at 79-80.

350. See *Baker*, 744 A.2d at 874 (“Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.”).

351. See *supra* note 319 and accompanying text.

352. See, e.g., Beck & Daly, *supra* note 316, at 579.

353. See FRIESEN, *supra* note 106, § 3-2(a), at 3-12 to -13. Professor Friesen also points out that “because issues of legal equality for women have gained a meaningful amount of political attention in recent times, outmoded, discriminatory statutes and regulations have often been repealed or modified without the need for a court challenge.” *Id.* (footnotes omitted). As discussed *infra*, much of this reform of statutes and administrative regulations came about as the result of the passage of state ERAs. See *infra* notes 384-86 and accompanying text.

354. The number of sex discrimination cases brought under the Equal Protection Clause has likewise diminished over time. See MARY BECKER, CYNTHIA GRANT BOWMAN &

While these factors provide a partial explanation for the under use of state ERAs, they do not fully explain the phenomenon. As the cases discussed in Part III illustrate, there continues to be a strong need for the protection of ERAs in many areas. Moreover, the problem of underutilization of state ERAs is not a new one.³⁵⁵ Nor is it limited to state ERAs.³⁵⁶ Although, as cases challenging bans on same-sex marriage and prohibitions on Medicaid funding for abortion illustrate, resort to state constitutional law guarantees has increased in recent years, the problem of over-reliance on the Federal Constitution in framing individual rights claims has dogged the field of state constitutional law.³⁵⁷

State constitutional law scholars have offered several explanations for the underutilization of state constitutional law claims. First, while the receptivity of law schools to training in state constitutional law is steadily improving, legal education and legal resources have tended to focus on federal constitutional law and therefore lawyers are less comfortable and knowledgeable in the state constitutional law arena.³⁵⁸ As Professor Friesen has pointed out, “[a]n advocate wishing to know how Pennsylvania and other

MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS* 83 (2d ed. 2001) (“[T]he number of cases brought under the formal equality standard applicable in sex cases—which thus far recognized sex discrimination only when overt—has declined over time.”).

355. Tarr & Porter, *supra* note 315, at 950 (noting “paucity” of sex discrimination claims brought under state ERAs in 1970s as compared to cases brought under the United States Constitution, and finding that “litigant preference for federal law and forums . . . has led to federal dominance in the field of gender discrimination”).

356. Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 ANN. SURV. AM. L. 211, 220 (2003) (noting that “[d]espite the development of the New Judicial Federalism nearly two generations ago, lawyers still fail to properly argue the state constitutional grounds where available” and that, as a result, many state courts fail to reach the state constitutional argument).

357. TARR, *supra* note 3, at 167 (citing Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 44 (1992)). This study showed that “[i]n over half the courts’ civil liberties cases, litigants continued to challenge state laws exclusively on the basis of the [F]ederal Constitution, and in only 17 percent of those cases did they challenge state laws exclusively on state constitutional grounds.” *Id.*

358. Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 31-34 (1993) (citing relatively small percentage of law professors who teach a course in state constitutional law and small number of legal texts and other state constitutional law resources, but noting trend of increasing awareness of the importance of state constitutions in law schools and greater availability of textbooks and law journal resources).

northeastern states have treated the issue of abortion funding under their bill of rights . . . would get no help from the leading national treatise, despite its promising title, *American Constitutional Law*.³⁵⁹ Educated in federal law, legal advocates may be less likely to bring claims under state constitutional law and, when they do, “will inevitably be tempted to use federal law as a reference point for the construction of state remedies for constitutional rights.”³⁶⁰

Second, obstacles to adequate remedies in state judicial systems may discourage claims under state constitutions. Many states still do not allow private actions for damages for violations of state constitutional rights, although there is a growing trend towards recognizing such actions.³⁶¹ As a result, state ERAs have primarily been used to obtain injunctive relief, rather than as a grounds for recovering damages. In addition, in contrast to claims brought under federal law,³⁶² the prospects of obtaining court awarded attorneys’ fees in cases brought solely on the basis of claims under state constitutional law are dim. Most states do not have statutes that permit state courts to award attorneys’ fees to a party prevailing on a claim under state constitutional law.³⁶³ In the absence of such statutes, attorneys’ fees are not available for plaintiffs proceeding solely on state constitutional law grounds unless the state court can be convinced to award fees based on its equitable powers.³⁶⁴

359. *Id.* at 31.

360. See Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1272 (1985).

361. See FRIESEN, *supra* note 106, §§ 7-1 to 7-7-7(b)(22); Friesen, *supra* note 360, at 1269-70; see also *Dorwart v. Caraway*, 58 P.3d 128, 133 (Mont. 2002) (noting that by 1998, twenty-nine states either by statute or implied judicial cause of action had recognized causes of action for violation of state constitutional rights; seven states have specifically rejected such causes of action).

362. At the federal level, fee-shifting is permitted for prevailing parties under numerous statutes. The primary federal fee-shifting statute is the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C § 1988 (2004), which permits the award of attorneys’ fees to a party, other than the United States, who prevails under certain federal statutes, including § 1983, which allows civil rights suits against the state or a person acting under the authority of state laws.

363. See generally FRIESEN, *supra* note 106, §§ 10-1 to -6; Friesen, *supra* note 360.

364. See FRIESEN, *supra* note 106, § 10-3, at 10-5 to -7. In addition, plaintiffs who bring claims under both state constitutional law and federal law may be able to obtain fees under the Civil Rights Attorney’s Fee Awards Act, 42 U.S.C. § 1988. FRIESEN, *supra* note 106, § 10-1, at 10-2. Where suits combine claims under § 1983 and state constitutional law, the prevailing practice in the federal courts is to award fees pursuant to § 1988 as long as

The experience of the plaintiffs in *New Mexico Right to Choose/NARAL v. Johnson*³⁶⁵ illustrates the difficulty of convincing a court to award fees in the absence of a statute. Following their groundbreaking victory in obtaining abortion funding for poor women under New Mexico's ERA, the plaintiffs were denied attorneys' fees by the New Mexico Supreme Court.³⁶⁶ The court joined the majority of states in refusing to adopt a "private attorney general" exception that would allow fees in the absence of a statute when litigation protects important societal interests.³⁶⁷ Ironically, as one commentator has noted, while the New Mexico Supreme Court expanded the availability of judicially enforceable rights under its state constitution in its abortion funding ruling and other cases, "it fail[ed] to facilitate and encourage the bringing of such cases" by exercising its equitable power to award fees in cases that succeed in vindicating important constitutional rights.³⁶⁸ Unless plaintiffs seeking protections from sex discrimination can bear their own legal costs or obtain pro bono legal services, the unavailability of attorneys' fees may be a strong disincentive to proceeding in state court under a state ERA claim and may partially contribute to their underutilization in the courts.³⁶⁹

plaintiff's claims under § 1983 were "substantial" enough to confer subject matter jurisdiction on the federal court. *Id.* State courts vary in whether they adhere to this practice. *Id.* §§ 10-3, 10-6. Some state courts follow the "relatively generous" federal practice. *Id.* § 10-1, at 10-3. Other state courts "may either reach out to decide and reject the federal claim, thus erasing the presumed justification for section 1988 fees, or they may treat an adjudicated federal claim as superfluous . . . , thus finding no justification for an award of federally based attorneys fees." *Id.*

365. See *supra* notes 219-33 and accompanying text.

366. N.M. Right to Choose/NARAL v. Johnson, 986 P.2d 450, 451 (N.M. 1999).

367. *Id.* at 452-53; see Allison Crist, *No Private Attorney General Exception to the American Rule in New Mexico: New Mexico Right to Choose/NARAL v. Johnson*, 31 N.M. L. REV. 585, 593 (2001).

368. Crist, *supra* note 367, at 599.

369. Of course, in some cases, state ERA claims may be successfully brought in federal court as supplemental claims allowing fees under federal law. This is not an option, however, in cases in which past United States Supreme Court precedent has rendered a claim under the Federal Constitution insubstantial, such as *New Mexico Right to Choose/NARAL v. Johnson*. Thus, in the very cases in which relief under a state ERA is most needed, fees are likely not available.

C. The Role of External Factors in Judicial Decision-Making

A variety of external factors also influence outcomes under state ERAs. As in the case of other constitutional guarantees and legal rules, courts interpret ERAs in the context of political factors, majoritarian cultural norms and individual ideologies that may influence outcomes. Indeed, as noted above, a recent quantitative study of state ERAs showed that factors such as the particular facts of the case, the proportion of women on the bench, the political ideology of individual judges, and the sex of the litigant influence the outcome in claims under state ERAs.³⁷⁰ These external factors may be especially relevant when ERAs are used to challenge more controversial governmental policies such as restrictions on abortion and same-sex marriage.³⁷¹ Thus, the mere presence on the books of an ERA does not automatically guarantee an outcome in litigation that advances sex equality. Nonetheless, as many of the decisions discussed in Part III reflect and the quantitative assessment documents,³⁷² though these external political factors are undoubtedly relevant and influential, the presence of a state ERA often makes a significant difference in increasing the likelihood of judicial interpretations that advance sex equality principles. Moreover, as discussed below, the impact of state ERAs on executive and legislative decision-making, as well as their cultural and symbolic value, is extremely important.

370. See Lisa Baldez et al., *supra* note 178, at 268-71.

371. In Pennsylvania, for example, where the state ERA has otherwise been extremely effective in advancing sex equality in many areas, a challenge brought in the mid-1980s to the cut-off of public funding for abortion was unsuccessful. See *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985).

As popular support for abortion rights and gay marriage increases, courts are more likely to issue favorable opinions. Indeed, in the area of abortion funding, the number of favorable state court decisions has increased significantly since the 1980s. See *supra* notes 216-17 and accompanying text.

372. See Lisa Baldez et al., *supra* note 178 (“[W]hile ERAs do not have a direct effect on judicial decisions, they do, even after controlling for other relevant factors, increase the probability of a court applying a higher standard of law to adjudicate claims of sex discrimination. And the application of a higher standard of law, even after controlling for other relevant factors, increases the probability of a court reaching a disposition favorable to litigants alleging a violation of their rights.”).

D. Extending Protection to Both Males and Females

Finally, several commentators have noted that male plaintiffs have frequently been the beneficiaries of protection against sex discrimination in state ERA challenges.³⁷³ Paul Benjamin Linton is alone among these commentators in suggesting in two frequently-cited articles that the application of state ERAs to protect men somehow diminishes their value, renders them harmful to women and ultimately ineffective “except as symbols.”³⁷⁴ Pointing out that courts have invalidated statutes and rules that “traditionally favored women over men,” such as the tender years presumption in custody cases, Mr. Linton concludes that “the ultimate irony in the adoption of the equal rights provision is that women have given up ‘privileges’ they have always enjoyed for ‘rights’ that were never in jeopardy.”³⁷⁵

Mr. Linton’s conclusions are misplaced. First, the mere fact that males are the immediate beneficiaries of court outcomes in some cases³⁷⁶ does not

373. Beck & Daly, *supra* note 316, at 594 (noting that “[t]he judicial decisions under the [Pennsylvania] ERA continue, at least in part, to have the pragmatic effect of improving the condition of men more than women,” but concluding that “[t]he ERA provides both genders with tangible and intangible benefits”); Hirczy de Mino, *supra* note 316, at 1608-09 (noting that Texas ERA has protected men against sex discrimination sometimes “at the expense of women,” but concluding that “[r]ecognizing men’s parental rights claims to be on par with those of women is entirely consistent with the idea of jettisoning the separate sphere doctrine . . . and ceasing to define women in terms of their reproductive function”).

374. Linton, *Making A Difference?*, *supra* note 10, at 941 (“The ultimate irony of the adoption of equal rights amendments . . . is that in many respects women have given up ‘privileges’ they always enjoyed in exchange for ‘rights’ that never were in jeopardy. Whether the symbolism of having enshrined a statement of equal rights under law in the constitutions of eighteen states was worth this price is a question women who live in those states must answer for themselves.”); Linton & Joslin, *supra* note 10, at 284 (noting that courts have invalidated a range of statutes and common law rules that traditionally favored women over men).

375. Linton & Joslin, *supra* note 10, at 284.

376. Mr. Linton does not provide comprehensive quantitative data to support his conclusion that “most of the litigation brought under state equal rights provisions to date has involved statutes [or] ordinances . . . that discriminated against . . . men in favor of women.” Linton, *supra* note 10, at 940. Assuming that this assertion is correct, the litigation track record of claims by men under the Federal Equal Protection Clause is similar. The majority of the sex discrimination cases heard by the Supreme Court under the Equal Protection Clause have been brought by men. See BECKER ET AL., *supra* note 354, at 81 (noting that from 1971 through the end of 2000, of the twenty-nine constitutional sex discrimination cases that the Supreme Court decided, men brought eighteen, and women brought eleven). The

mean that the principles established in those cases do not also inure to the ultimate benefit of women and society at large. In many instances, rules that appear to benefit women “promote attitudes and expectations about women, including their dependency or status as victims, that disadvantage them across a wide spectrum of social contexts.”³⁷⁷ State ERA decisions invalidating rules that disadvantaged the fathers of illegitimate children in the context of wrongful death actions and inheritance rights, discussed in Part III,³⁷⁸ illustrate this principle. The sex-based classifications invalidated in those cases, like those upheld in *Nguyen*, all serve to perpetuate and reinforce stereotypes about the role and responsibilities of mothers and fathers that are ultimately harmful to both men *and women* and their children:

In taking responsibility for children women act as independent moral agents. When the Supreme Court assumes that “biology” dictates that women care for infants, it is impossible to attach moral value to the woman’s actions or to acknowledge the human and social worth of the nurturing that women do. When the [Supreme] Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is

predominance of male litigants thus reflects not an inherent defect in ERAs, but rather, more likely, the practical reality that men have greater economic resources than women to bear the costs of litigation. The unavailability of attorneys’ fee awards under most state ERAs may exacerbate the imbalance between male and female litigants. *See supra* notes 362-69 and accompanying text (discussing court-awarded attorneys’ fees). Moreover, a recent quantitative analysis of state ERA decisions found that when women do bring claims, they are more likely to prevail in state ERA claims than men. *See Lisa Baldez et al., supra* note 178, at 268 (“[T]he probability of the court finding discrimination is nearly .50 when a woman brings the suit; it dips to about a third for all other litigants.”).

377. KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 118 (3d ed. 2002). In contrast, some policies, such as affirmative action policies in the employment context, explicitly advantage women solely to ameliorate the effects of past discrimination and increase female representation in institutions. Although few cases have considered the validity of sex-based affirmative action policies under state ERAs, the Washington Supreme Court has refused to invalidate these policies under its state ERA. *See Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County*, 667 P.2d 1092, 1103 (Wash. 1983) (finding that a county affirmative action plan that gave preferences to businesses owned by minorities and women does not violate the Washington ERA); *Marchioro v. Chaney*, 582 P.2d 487, 492-93 (Wash. 1978) (finding that statutes mandating that both men and women hold responsible positions in state political parties do not violate the Washington ERA).

378. *See supra* notes 240-51 and accompanying text.

more likely that these generalizations will continue to be true. Assertions that it is “virtually inevitable” that the mother will care for the child, assumptions of “unshakeable responsibility” and the “undeniable social reality that . . . the mother is *always* . . . the custodian of the child,” are no different from the “old notion” that motherhood is “the noble and benign” mission of women. The assumption reinforces stereotypes and degrades women.³⁷⁹

Similarly, Mr. Linton’s conclusion that state ERA decisions invalidating the tender years presumption in child custody cases³⁸⁰ harm women is simplistic. As numerous feminist legal scholars have pointed out, while “[t]he maternal preference made it easier for women to leave marriages without losing custody and affirmed their centrality in childrearing,” it also “encouraged the maintenance of traditional dichotomous gender roles in marriage, confining women to domesticity and stigmatizing those who did not conform.”³⁸¹ Moreover, “because the maternal preference was based on ideologies about women’s proper role, a judge had wide discretion to penalize a mother who had deviated from traditional homemaker norms”³⁸² The “privilege” of the tender years presumption thus came with powerful negative ramifications for women, which Mr. Linton’s analysis completely ignores. Sex-neutral custody standards that are applied in a non-biased fashion and that seek to undermine, not perpetuate, traditional gender roles are ultimately far more beneficial to women, men and society at large.³⁸³

379. Law, *supra* note 56, at 996 (footnote omitted).

380. While some state ERAs provided a legal basis for invalidating the tender years presumption in some states, *see, e.g.*, Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639-40 (Pa. 1977), the complex social and political changes of the 1960s and beyond made abandonment of the maternal preference inevitable. Today, the vast majority of explicit sex-based custody preferences have been eliminated from the law via legislative action or judicial decision-making. BARTLETT ET AL., *supra* note 377, at 487.

381. BARBARA A. BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHONDA COPELON, DEBORAH L. RHODE & NADINE TAUB, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY* 1223-24 (2d ed. 1996) (citing DEBORAH L. RHODE, *JUSTICE AND GENDER* 155 (1989)).

382. *Id.* at 1224.

383. There is considerable thoughtful debate among legal scholars, including feminist scholars, about what standard should be applied in determining child custody. Many scholars have criticized the best-interests of the child standard. *See, e.g.*, Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181-82 (1986); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229-30 (Summer 1975). Most feminist scholars support sex-neutral alternatives, including, for example, a primary

Second, Mr. Linton's assessment of the value of state ERAs is utterly devoid of context. By failing to evaluate state ERAs in the broader context of their effectiveness at advancing sex equality jurisprudence beyond the constraints of federal equal protection analysis, his analysis ignores the myriad ways, detailed in this Article, in which courts have advanced legal protection for women beyond that available under federal law by employing substantive equality analyses that focus on the harmful effects of sex-based classifications. Cases extending protection to women discriminated against on the basis of pregnancy and reproductive capacity, for example, are hardly "symbolic" advancements in the law. Moreover, Mr. Linton's evaluation of the impact of state ERAs also ignores entirely the tremendous statutory reform and executive action that came about as a result of the passage of state ERAs. In Pennsylvania, for example, upon ratification of the ERA in 1971, the Governor immediately appointed a commission on the status of women to review Pennsylvania law for sex bias, which led to the passage in 1978 of a package of nineteen statutes implementing the mandate of its ERA and ultimately to the repeal or revision of over 140 discriminatory laws.³⁸⁴ At

caretaker presumption, *see, e.g.*, Martha Albert Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988), or a standard that allocates custodial responsibility in proportion to the share of responsibilities each parent assumed before the divorce, *see, e.g.*, Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 478-82 (1999); Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615, 639-41 (1992). Professor Mary Becker has argued for a maternal deference standard, not based on the original justification that women's caretaker role is biologically determined, but because such a standard recognizes women's greater emotional commitment to children and better protects women's economic interests. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-58 (1992).

384. PENNSYLVANIA COMMISSION FOR WOMEN, IMPACT OF THE PENNSYLVANIA STATE EQUAL RIGHTS AMENDMENT: A REPORT ON THE IMPACT OF THE STATE EQUAL RIGHTS AMENDMENT IN PENNSYLVANIA SINCE 1971, at 11-16 (1980). The nineteen new laws mandated that all existing Pennsylvania statutes should be interpreted as "sex-neutral"; amended the Pennsylvania Human Relations Act by adding the word "sex" to those classes protected in public accommodations; and corrected inequities in various areas, including divorce, criminal law, treatment of rape victims, the military code, probate and estates, and tax assistance and rebates. *Id.* For a detailed history of Pennsylvania's Equal Rights Amendment, *see* SUSAN RUBINOW GORSKY, MARCH TO EQUALITY: WOMEN IN PENNSYLVANIA'S 300 YEAR HISTORY 16-36 (1982). Moreover, the Pennsylvania Supreme Court has held that ambiguities in all statutes must be read in light of the public policy against sex discrimination expressed in

the executive level, the Pennsylvania Attorney General issued a flurry of opinions on a wide range of topics, including the right of women to use their birth names, the elimination of minimum height requirements for state troopers, and prohibitions on gender discrimination in insurance.³⁸⁵ In addition, state agencies and departments, such as the Pennsylvania Department of Education and the Department of Insurance, issued regulations prohibiting discrimination in specific areas.³⁸⁶ This reform, like so much of the case law described in this Article, inured to the direct benefit of women.

Finally, while totally ignoring the real practical impact and value of state ERAs, Mr. Linton also mistakenly trivializes their symbolic value. The choice of the citizens of individual states to add explicit protection against sex discrimination to their constitution affirms fundamental principles of human dignity, equality and liberty at the core of American democracy. This unequivocal commitment to gender equality has powerful implications beyond the outcomes in individual cases. The law operates “as a system of cultural and symbolic meanings” and the very presence of legal norms affects us—“through communication of symbols—by providing threats, promises, models, persuasion, legitimacy [and] stigma.”³⁸⁷ State ERAs make crystal clear that the principle of sex equality is so important that it is “deemed worthy of constitutional magnitude.”³⁸⁸ As Justice Ginsburg emphasized nearly thirty years ago in the context of the Federal ERA, they serve “as a forthright statement of our moral and legal commitment to a system in which neither sons nor daughters are pigeonholed . . . because of sex.”³⁸⁹ Moreover, this textual clarification is vitally important:

Text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims about the Constitution’s meaning.

Pennsylvania’s ERA. *See* Hartford Accident & Indem. Co. v. Ins. Comm’r of the Commonwealth, 482 A.2d 542, 549 (Pa. 1984).

385. PENNSYLVANIA COMMISSION FOR WOMEN, *supra* note 384, at 4-7.

386. *Id.* at 7-8.

387. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 6 (1994).

388. Hans S. Linde, *Without “Due Process”*: *Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 131 (1970).

389. Ginsburg, *supra* note 50, at 73.

In our constitutional culture, elected officials and ordinary citizens understand themselves as authorized to make claims about the Constitution's meaning and regularly act on this understanding in a wide variety of social settings and through an array of practices, only some of which are formally identified in the text of the Constitution itself.³⁹⁰

Although not fully quantifiable, the Pennsylvania experience demonstrates that the very presence of an ERA will have a ripple effect through states, sensitizing both elected officials and citizens and mobilizing action to effectuate the values enshrined in its constitutional commitment to sex equality. Moreover, even where courts fail to interpret ERAs fully and effectively, litigation under state ERAs may have the effect of raising public consciousness about sex discrimination and mobilizing individuals to work for needed reform.³⁹¹ The cultural and symbolic meanings of state ERAs are thus profoundly important.

V. RECOMMENDATIONS AND CONCLUSION

While judicial interpretation of state ERAs has been inconsistent, state court decisions of the past three decades powerfully demonstrate that they provide the potential for a more broad-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Especially at a time when the United States Supreme Court is likely to become increasingly conservative as President Bush adds replacements to the Court, state ERAs are extremely important sources of protection against sex-based discrimination. Meaningful implementation of any law, however, is not guaranteed by its mere passage. Judges, lawyers and others play a critical role in shaping constitutional meaning and enhancing the effectiveness of constitutional guarantees. If the positive potential of state ERAs is to be fully realized, lawyers, courts, legislative policymakers and citizens themselves must participate in the hard work of giving them vitality and potency. As Professor Robert Williams has noted, as the New Judicial Federalism has matured to its "third stage,"

390. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 345 (2001).

391. In the area of pay equity, for example, Professor McCann has argued that "legal norms significantly shaped the terrain of the struggle over wage equity; and, concurrently, that litigation and other legal tactics provided movement activists an important resource for advancing their cause." McCann, *supra* note 387, at 4.

considerable challenges and difficult work confront those involved in this “evolving phenomenon.”³⁹²

Lawyers must make claims under state ERAs and must do so in terms independent of federal analysis. As courts and constitutional law scholars have emphasized, in briefing and analyzing state constitutional law claims, lawyers must break the habit of arguing state constitutional claims in the defensive language of federal jargon and instead must base arguments on the specific text, history and meaning of state provisions.³⁹³ For example, in its famous opinion in *State v. Jewett*,³⁹⁴ the Vermont Supreme Court admonished:

One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted: “People do not claim rights against self-incrimination, they ‘take the fifth’ and expect ‘Miranda warnings.’ . . . All claims of unequal treatment are phrased as denials of equal protection of the laws.”³⁹⁵

As Professor Friesen has counseled, “One way to break the state tie is to imagine a world in which there is no federal law.”³⁹⁶ In the case of state ERAs, for example, this would entail breaking free of the constraints of *Feeney* in arguing disparate impact claims, avoiding the automatic assumption that federal state action principles apply, and, most importantly, proceeding from the premise that sex equality jurisprudence rests on a model of substantive rather than formal equality. These arguments may be supported by the innovative work in recent years of commentators who have urged the use of state ERAs in areas such as reproductive autonomy,³⁹⁷

392. For a thoughtful reflection on the issues and challenges currently arising in the “third stage” of the New Judicial Federalism, see Williams, *supra* note 356, at 219-23.

393. FRIESEN, *supra* note 106, § 1-8(c), at 1-60 to -61; *see also* Friesen, *supra* note 358, at 28 (“Even when state constitutional claims are briefed, they are often wrapped in the recycled language of balancing ‘tests’ or other federally inspired formulas for judicial review . . .”).

394. 500 A.2d 233 (Vt. 1985).

395. *Id.* at 235; *see also* Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991) (urging counsel to engage in a detailed and specific independent analysis of the Pennsylvania Constitution).

396. FRIESEN, *supra* note 106, § 1-(c), at 1-61.

397. *See, e.g.*, Kolbert & Gans, *supra* note 213; O’Neill, *supra* note 315; Weissman, *supra* note 317.

public benefits,³⁹⁸ pay equity,³⁹⁹ juvenile justice⁴⁰⁰ and other cutting-edge issues of sex discrimination, including challenges to single-sex schools.⁴⁰¹

Lawyers and litigants cannot act alone. Legislators and other public policy makers must support and facilitate the use of state equality provisions by enacting statutes that permit direct suits for damages for violations of state constitutional rights and, equally importantly, provide prevailing parties with attorneys' fees. Moreover, as the cases discussed in this Article demonstrate, the language and legislative history of these provisions matter. The option of amending constitutional guarantees is readily available much more at the state level than the federal level. Some existing state ERAs may benefit from amendments that strengthen and clarify their meaning.⁴⁰² States that are currently considering the addition of ERAs to their constitutions must write them in language that expresses the mandate of sex equality broadly and clearly; legislative intent regarding state action, standard of review and scope of coverage must also be clearly stated.

Citizens, in turn, can play a vital role by mobilizing to support legislative reform, insisting on gender and racial diversity in their state judiciaries and electing judges who will interpret state ERAs fully and effectively. Scholars can also support the enhanced use of state ERAs by additional scholarship that demonstrates their usefulness in advancing sex equality in specific contexts and fully exposes the weaknesses of existing federal equal protection analysis.

Finally, state court judges play a critical role in ensuring the vitality and integrity of state ERAs. In interpreting and applying them, state judges must include a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, relevant precedent and its relation to earlier state constitutional provisions. Through this kind of

398. See, e.g., Kaufman, *supra* note 317.

399. See, e.g., Altschuler, *supra* note 131; Marquez, *supra* note 315.

400. See, e.g., Levick & Sherman, *supra* note 317.

401. See, e.g., *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682, 707-11 (1983), *appeal quashed* by 478 A.2d 1352 (Pa. Super. Ct. 1984) (finding that denying girls admission to a public high school in Philadelphia violated both the Federal Equal Protection Clause and the state ERA, and explicitly rejecting "the separate-but-equal concept" as violative of the state ERA). See generally Nancy Levit, *Separating Equals: The Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999) (arguing against single-sex schooling); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69 (1997) (same).

402. For a discussion of the choices "a hypothetical set of feminist drafters face if they were to constitutionalize women's equality," see Sullivan, *supra* note 16, at 747-62.

careful, contextualized analysis, reflected in decisions such as the New Mexico Supreme Court's in *New Mexico Right to Choose* and others discussed in this Article, state court judges honor the distinctiveness of their state constitutions and respect the political action that led to passage of these amendments.

APPENDIX

Alaska:

"No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin. The legislature shall implement this section."

ALASKA CONST. art. I, § 3 (1972).

California:

"A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

CAL. CONST. art. I, § 8 (1879).

"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

CAL. CONST. art. I, § 31(a) (1996).

Colorado:

"Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

COLO. CONST. art. II, § 29 (1973).

Connecticut:

"No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex."

CONN. CONST. art. I, § 20 (1974).

Florida:

“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”

FLA. CONST. art. I, § 2 (1998).

Hawaii:

“Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.”

HAW. CONST. art. I, § 3 (1972).

“No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” HAW. CONST. art. I, § 5 (1978).

“There shall be no discrimination in public education institutions because of race, religion, sex or ancestry”

HAW. CONST. art. X, § 1 (1978).

Illinois:

“The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.”

ILL. CONST. art. I, § 18 (1971).

Iowa:

“All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”

IOWA CONST. art. I, § 1 (1998).

Louisiana:

“No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.”

LA. CONST. art. I, § 3 (1974).

“In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.”

LA. CONST. art. I, § 12 (1974).

Maryland:

“Equality of rights under the law shall not be abridged or denied because of sex.”

MD. CONST. DECL. OF RTS. art. 46.

Massachusetts:

“All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”

MASS. CONST. pt. 1, art. I (1976).

Montana:

“The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”

MONT. CONST. art. 2, § 4 (1972).

“No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin.”

MONT. CONST. art. 10, § 7 (1889 (ratified); 1978 (amended)).

New Hampshire:

“All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”

N.H. CONST. pt 1, art. 2 (1974).

New Jersey:

“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

N.J. CONST. art. I, para. 1 (1947).

“Wherever in this Constitution the term ‘person,’ ‘persons,’ ‘people’ or any personal pronoun is used, the same shall be taken to include both sexes.”

N.J. CONST. art. X, para. 4 (1947).

New Mexico:

“No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.”

N.M. CONST. art. 2, § 18 (1973).

Pennsylvania:

“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”

PA. CONST. art. 1, § 28 (1971).

Rhode Island:

“All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity

doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.”

R.I. CONST. art. I, § 2 (1986).

Texas:

“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.”

TEX. CONST. art. I, § 3a (1972).

Utah:

“The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equality, all civil, political and religious rights and privileges.”

UTAH CONST. art. IV, § 1 (1896).

Virginia:

“The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.”

VA. CONST. art. I, § 11 (1971).

Washington:

“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”

WASH. CONST. art. XXXI, § 1 (1972).

Wyoming:

“In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.”

WYO. CONST. art. I, § 2 (1890).

“Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.”

WYO. CONST. art. I, § 3 (1890).

“The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equal enjoy all civil, political and religious rights and privileges.”

WYO. CONST. art. VI, § 1 (1890).

“In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color.”

WYO. CONST. art. VII, § 10 (1890).