COMMENTS

Equal Rights Provisions: The Experience Under State Constitutions

Much of the controversy over the proposed Equal Rights Amendment to the United States Constitution concerns how such a provision would be interpreted by federal courts. In the search for an answer to this question, the authors examine the results reached by state courts in the sixteen states that have already adopted provisions substantially the same as the proposed federal amendment. The authors conclude that, while the results have been far from uniform, the emerging trend is toward a level of analysis similar to the strict scrutiny used in race discrimination cases, but with some important differences.

"We hold these truths to be self-evident:
that all men and women are created equal . . . ."
Women's Rights Convention
Seneca Falls, New York, July 19, 1848

So spoke the women of Seneca Falls;[1] the words were borrowed from Jefferson, but the idea that women were the equals of men was new to American thinking. The drive to achieve women's suffrage overshadowed any idea of adopting a national statement of sexual equality. When women's suffrage became a reality in 1920, however, the National Women's Party revived the idea of a formal statement of equality. In 1923, at the seventy-fifth anniversary celebration of the Seneca Falls meeting, it proposed an equal rights amendment to the Constitution. The amendment was introduced in Congress the same year[2] but made little progress. Although it was repeatedly reintroduced during the next few decades, the proposal never commanded much public attention.[3]

1. E. FLEXNER, A CENTURY OF STRUGGLE 75 (1959).

2. "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.

"Congress shall have power to enforce this article by appropriate legislation." H.R.J. Res. 75, 68th Cong., 1st Sess. (1923); S.J. Res. 21, 68th Cong., 1st Sess. (1923).

3. E. JANEWAY, WOMEN: THEIR CHANGING ROLES 128 (1973); I. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN 17 (1973); W. O'NEILL, EVERYONE WAS BRAVE 17 (1969).

In the 1960's, renewed interest in the rights of women produced another attempt to secure a constitutional provision ending discrimination by reason of sex.[4] An Equal Rights Amendment [ERA] was adopted by both houses of Congress in 1971 and submitted to the states for ratification.[5] Of the thirty-eight states required to place it in the Constitution, thirty-five have thus far ratified.[6]

The ratification process has been accompanied by a spirited debate, always intense, and at times even bitter; but all sides agree that the crucial question is how the ERA, once adopted, will be interpreted by the Supreme Court.[7] Specifically, the question is whether, under an ERA, the Court will analyze claims of sex discrimination in the same way it now treats claims of racial discrimination. The Court itself has acknowledged the significance of this question.[8]

While this debate has continued, a parallel but less publicized development has been taking place in a number of jurisdictions. The constitutions of sixteen states now contain some form of guarantee against sex-based discrimination.[9] The decisions of courts in these

4. *Introduction* to THE EQUAL RIGHTS AMENDMENT PROJECT, THE EQUAL RIGHTS AMENDMENT: A BIBLIOGRAPHIC STUDY at xv (1976).

5. *Id.* at xvi. Proposed Amendment XXVII reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

6. As of June 1977, the following states had not ratified the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. Three states, Nebraska, Tennessee, and Idaho, have voted to rescind their ratification, but it is not yet clear whether a state may rescind its ratification of a Constitutional amendment.

7. Legal commentators have also examined this problem. *See, e.g.*, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as Brown, Emerson, Falk & Freedman]; Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971).

8. Frontiero v. Richardson, 411 U.S. 677 (1973). Powell, J., joined by Blackmun, J., and Burger, C.J., said in his concurring opinion that ratification of the ERA would resolve "the precise question" of whether sex, like race, should be identified as a suspect category. *Id.* at 692. If it were so identified, a court would closely scrutinize allegedly discriminatory statutes.

9. The states are: Alaska, Colorado, Counecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. The specific constitutional provision of each appears *infra* in the Appendix.

The Utah and Wyoming provisions appeared in those states' original constitutions. The provisions in Illinois, Louisiana, Maryland, and Montana were added when these states adopted new constitutions. Virginia gained its provision when its old constitution was revised. Thus, not all of the provisions are amendments. Nevertheless, the label "equal rights amendment" or "ERA" will be used throughout this Comment.

states interpreting their constitutional guarantees may cast some light on the larger question of the probable impact of the Federal ERA, should it become part of the Constitution. The impact will depend on how the Court construes the ERA.

State courts examining a statute or a practice challenged on the ground that it violates the state's equal rights amendment have proceeded in one of several ways. First, some courts have avoided construing their state's ERA altogether, either by deciding cases on some other basis or by deferring to the legislature. This approach is exemplified by decisions in Montana and New Mexico.[10]

A second approach that some courts practice is to apply the standard of review traditionally employed by the Supreme Court in equal protection cases under the fourteenth amendment where no suspect classification or fundamental interest is involved. Under this standard, a legislature is permitted wide latitude in treating certain groups of citizens differently from others: a classification will violate the equal protection clause only if it rests on grounds entirely irrelevant to the achievement of the legislative objective.[11] The only constitutional requirement is that there must be some conceivable rational relationship between the classification and the legislative goal.[12] When this standard has been used by courts, legislative classifications based on sex have seldom been disturbed.[13] This "rational basis" standard[14] has been used in most states that do not have ERA's[15] and in three states where an ERA has been adopted.[16]

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10. See text accompanying notes 33-39 *infra.*

11. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

12. The state need not justify the relationship. The Court will not find a relationship arbitrary as long as it can conceive of reasons to justify it. Railway Express Agency v. New York City, 336 U.S. 106 (1949). Goesaert v. Cleary, 335 U.S. 464 (1948), is an example of this standard applied to an instance of alleged sex discrimination. *Goesaert* was overruled by Craig v. Boren, 97 S. Ct. 451 (1976).

13. *E.g.*, Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975) (provision allowing alimony to wives only is not violative of 14th amendment); Warshafsky v. Journal Co., 63 Wis. 2d 130, 216 N.W.2d 197 (1974) (statute letting boys deliver papers at age 12, but girls not until 18 does not violate 14th amendment); Wark v. State, 266 A.2d 62 (Me. 1970) (longer sentences for escaped male prisoners do not violate 14th amendment); Allred v. Heaton, 336 S.W.2d 251 (Tex. App. 1960) (not unconstitutional to deny woman admission to all-male state college).

14. Because of the requirement of a "rational relationship," this term has often been used by courts to refer to this standard of review. *E.g.*, Jefferson v. Hackney, 406 U.S. 535, 546, 549 (1972); Dandridge v. Williams, 397 U.S. 471, 487 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

15. *See, e.g.*, cases cited at note 13 *supra.*

16. The states are Louisiana, Utah, and Virginia. See text accompanying notes 41-57 *infra.*

A third standard of review used by some courts is strict scrutiny. This standard was developed in equal protection cases involving "suspect" categories such as race[17] and alienage[18] or involving such fundamental rights as the right to travel,[19] to vote,[20] or to criminal appeals.[21] Under this standard the challenged statutory classification will be upheld only if it is necessary to advance a compelling state interest and only then if there is no less burdensome alternative.[22] This is a powerful tool for securing the rights of groups that have been subjected to discrimination in the past. Absent an ERA in their state constitutions, however, only two states have identified sex as a suspect classification.[23] To date only one of the sixteen states that have adopted an ERA has applied a strict scrutiny standard, although a number of others have indicated that they would do so in a proper case.[24]

Fourth, the courts of two states have applied a standard of review more penetrating than strict scrutiny.[25] Although the standard has been used in only a few cases, it is conceivable that this standard will evolve into a prohibition of all sex-based discrimination that is not based on the unique physical characteristics of each sex.[26]

The Supreme Court[27] has, like many legislators[28] and commentators,[29] anticipated that under an ERA either strict scrutiny or an absolute standard of review will be applied to claims of sex discrimination.[30]

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17. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
18. *E.g.*, Hernandez v. Texas, 347 U.S. 475 (1954).
19. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
20. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
21. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
22. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).
23. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18-20; 485 P.2d 529, 539-40; 95 Cal. Rptr. 329, 339-40 (1971); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1973).
24. See text accompanying note 58 *infra*.
25. The states are Pennsylvania and Washington. See text accompanying notes 83-106 *infra*.
26. *See* Brown, Emerson, Falk & Freedman, *supra* note 7, at 893-96.
27. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).
28. People v. Ellis, 57 Ill. 2d 127, 129, 311 N.E.2d 98, 100 (1974); JOINT PRIVILEGES AND ELECTIONS COMMITTEES OF THE GENERAL ASSEMBLY, COMMONWEALTH OF VIRGINIA, RATIFICATION OF THE EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 19 (1974); Uda, *Equality for Men and Women, Three Approaches: Frontiero, the Equal Rights Amendment and the Montana Equal Dignities Provision*, 35 MONT. L. REV. 325, 334 (1974).
29. *E.g.*, Brown, Emerson, Falk & Freedman, *supra* note 7; Freund, *supra* note 7.
30. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972), where the author speculated that a new standard of equal protection review might be developing in the Supreme Court, one more vigorous in its scrutiny than the old rational relationship formula, but less demanding than "strict scrutiny." It focuses on the means used by a legislature to reach its objective, instead of evaluating the objective itself. Reed v. Reed, 404 U.S. 71 (1971), is one of the cases from which Gunther developed the idea of a new middle-level of scrutiny. At

In spite of such expectations, however, this has not happened in every state with an ERA. Some states have adopted only a rational basis standard of review, while other states, nominally adopting one standard of review, have in fact used a variety of standards, depending on the facts of each particular case.

This Comment will examine the experience of states with ERA's, and attempt to describe the factors that might bear on a state's choice of a standard of review, and explain why states with similar standards arrive at different conclusions when faced with similar facts.

I

THE EXPERIENCE UNDER STATE EQUAL RIGHTS AMENDMENTS

A. States Without an Established Standard of Review

The courts of five states with equal rights provisions have not yet established a judicial standard for reviewing sex-based equal rights claims. Although Wyoming has the oldest equal rights provision, the provision has never been definitively interpreted.[31] In Massachusetts and Hawaii no challenges under recent equal rights provisions have yet reached the appellate level. In New Mexico and Montana, two other states with modern ERA's, the appellate courts have been able to resolve sex-based claims without construing the equal rights provisions.

In New Mexico's only appellate-level ERA decision, *Schaab v.*

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issue in *Reed* was an Idaho statute requiring the selection of a male as administrator of an estate where a male and a female were otherwise equally qualified to serve. The Court found the state's objective—to reduce the workload of probate courts—so insufficient as to amount to the kind of arbitrary legislative choice forbidden by the 14th amendment. In Craig v. Boren, 97 S. Ct. 451, 457 (1976) the Court continued this type of analysis. Citing *Reed*, it stated that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." None of the cases yet decided under state ERA's, however, has used this middle-level standard.

31. As a territory, Wyoming was a pioneer in allowing women the right to vote. When its constitution was drafted in 1889, the delegates to the constitutional convention feared that a clause doing no more than granting women suffrage would fail to achieve its purpose. JOURNAL OF WYOMING CONSTITUTIONAL CONVENTION 348-49 (1889). The drafters added two clauses as a safeguard. First an equality clause was added: "Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and principles." WYO. CONST., art. 6, § 1. Second, a legal rights clause was drafted that listed sex, together with race and color, as classes whose political rights could not be abridged. WYO. CONST., art. 1, § 3. Only one sex discrimination case has been decided directly on the basis of the equality clause. In Ward Terry & Co. v. Hensen, 75 Wyo. 444, 297 P.2d 213 (1956), the court held that the right to property was one of the civil rights guaranteed without regard to sex, but did not articulate its standard of review.

Schaab,[32] the state supreme court gave effect to a challenged alimony statute, reasoning that it treated "husband and wife with exact equality."[33] The court considered the award of alimony to the wife proper because the trial court had treated both litigants as equals.[34] Since neither the statute nor the trial court had in this instance discriminated on the basis of sex, the court was not forced to determine which standard of review is required by New Mexico's ERA.

In Montana, no decision has been based expressly on that state's ERA, although five appellate cases have raised equal rights issues. The supreme court has on three occasions refused to consider the constitutionality of state statutes which allow wives but not husbands to receive alimony. The first two challenges were dismissed on technical grounds.[35] In the third case, the court found that payments made by the husband to his wife were not "alimony,"and therefore did not fall under the challenged statutes.[36] In a fourth case the challenged sentencing statute had recently been revised in accordance with the ERA; the court therefore declared the issue moot.[37]

In the final case considered by the Montana court, the challenged statute limiting the wife's testamentary power was construed in conjunction with a comparable dower statute limiting the husband's testamentary power, with the result that the two sex-defined statutes, read together, treated men and women equally.[38] Thus, despite five challenges based upon the ERA, the Montana courts have not yet decided a case on the basis of that state's ERA. The experience of Montana and the other states with untested ERA's illustrates that enactment of an ERA does not necessarily lead to a swift pronouncement from the state's high court on the status of women's rights. Awaiting the proper case can be a

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32. 87 N.M. 220, 531 P.2d 954 (1974).

33. *Id.* at 223, 531 P.2d at 957.

34. This reasoning reoccurs in ERA cases. Some courts, while acting under provisions requiring sexual equality, in fact assess the woman's economic status by standards different from those used to assess the man's economic status. This double standard within a sex-neutral legal system is most pronounced in child custody cases, where parental qualities and behavior are often evaluated on the basis of stereotyped views of what constitutes a "good mother" or "good father" rather than by looking for the qualities of a "good parent," a sex-neutral concept. *See* Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681 (1974); Marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E.2d 581 (1974).

35. Clontz v. Clontz, 166 Mont. 206, 531 P.2d 1003 (1975); Grant v. Grant, 166 Mont. 229, 531 P.2d 1007 (1975). The court refused to eutertain the husband's constitutional claims because of their failure to notify the state attorney general that a constitutional issue was to be raised, as required by the Montana rules of appellate procedure.

36. Englund v. Englund, 547 P.2d 841, 842 (Mont. 1976).

37. State v. Craig, 545 P.2d 649 (Mont. 1976).

38. Estate of Kujath, 545 P.2d 662 (Mont. 1976).

tedious process. Legislative reform under an ERA may precede court action.[39]

B. *States that Follow a Rational Basis Standard*

A second group of states is applying a standard of review in sex discrimination cases very similar to that traditionally applied in equal protection cases. In Louisiana, Virginia, and Utah, state ERA's have been largely ineffectual in eliminating sex-based categories from statutes. Although the courts of these states employ a similar standard of review, the unique history of each ERA has caused them to reach different results. Thus, a comparison of the results in these states must take into account the legislative history of each state's provision.

Utah granted suffrage to its women citizens when it was still a territory.[40] To ensure the continuation of this privilege, delegates to the state constitutional convention in 1895 included a clause guaranteeing civil and political rights without regard to sex.[41] But it is unlikely that the all male constitutional convention considered that this clause, despite its broad implications, might have significance in matters other than suffrage.

Over the years, the Utah courts have conformed to the expectations of the provision's drafters. In 1915, the Utah Supreme Court rejected a challenge to an ordinance that required men but not women to either work on county roads or else pay an annual tax.[42] The court stated that a separate classification for women has "always been made and enforced from time immemorial. . . . [F]emales, in the nature of things, cannot respond to all the demands of the state."[43]

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39. For example, Washington has amended 120 sections of its code to comply with that state's ERA. *See* Dybwad, *Implementing Washington's ERA: Problems with Wholesale Legislative Reform*, 49 WASH. L. REV. 571 (1974). In most ERA states the legislatures continue to bring the statutory law into accord with the constitutional mandate. In Texas, however, legislative reform in the area of family law was apparently done without consideration of that state's equal rights amendment. Sampson, *The Texas Equal Rights Amendment and the Family Code: Litigation Ahead*, 5 TEX. TECH. L. REV. 631 (1974).

40. UTAH CONST. art. IV, § 1. The text of this provision appears in the Appendix. While there is some disagreement as to whether art. IV, § 1, should be considered equivalent to an equal rights amendment, the Utah Attorney General's office considers it "a broad grant of equal rights to women and certainly is not limited to just suffrage rights." Letter from E.R. Callister, Jr., Assistant Attorney General, State of Utah to Brenda Hancock, Coordinator of Utah Governor's Commission on the Status of Women (Aug. 30, 1976); letter from Brenda Hancock to Nancy Page (Jan. 21, 1977).

41. 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF UTAH, 407-08, 421-28, 464, 492 (1895).

42. Salt Lake City v. Wilson, 46 Utah 60, 148 P. 1104 (1915).

43. *Id.* at 68-69, 148 P. at 1107.

Sixty years later, with a fidelity to precedent more impressive for its consistency than for its attention to intervening social changes, the Utah courts were still reviewing cases under the equal rights clause along much the same lines. In *Cox v. Cox*,[44] the court rejected a father's claim to custody of his minor children. While conceding that his claim was entitled to the same consideration as the mother's, the court emphasized that the law need not "blindly ignore obvious and essential biological differences."[45]

Because the Utah equal rights provision originated in an era when few people seriously considered women to be the legal or biological equals of men, it is not surprising that the provision has been ineffective in promoting women's equality.

Louisiana is unique in that the provisions of its 1974 constitution expressly dictate the standard of review to be used in sex discrimination cases.[46] Article I, Section 3, of the new constitution defines two standards of impermissible state discrimination. Laws discriminating against racial or religious groups are absolutely prohibited. Laws discriminating on the basis of other factors, including sex, are, however, prohibited only if they are arbitrary, capricious or unreasonable.[47] The adoption of two separate standards was deliberate.[48] The delegates to the constitutional convention explicitly intended that Louisiana courts should apply to sex-based discrimination that which, in the delegates' view, was the traditional equal protection analysis developed by the United States Supreme Court.

The Louisiana courts have followed the mandate of the constitutional drafters, using the traditional societal roles of women to justify sexually discriminatory statutes.[49] They have not examined whether

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44. 532 P.2d 994 (Utah 1975).

45. *Id.* at 996. Most recently in Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974), *rev'd* 421 U.S. 7 (1975), the Utah court found reasonable a statute setting the age of majority for males at twenty-one and for females at eighteen on the basis of the "numerous interesting differences" between the sexes. After reversal by the United States Supreme Court, the Utah court on remand continued to insist that "[t]o judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life." Stanton v. Stanton, 552 P.2d 112, 114 (Utah 1976). The Supreme Court again reversed. 97 S. Ct. 717 (1977).

46. The Louisiana Constitution of 1921 had no equal protection clause.

47. LA. CONST. art. 1, § 3. This provision, the text of which appears in the Appendix, guaranteed equal protection of the state laws to Louisianans for the first time.

48. Hargrave, *The Declaration of Right of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 8 (1974); Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 18 (1975).

49. In this regard the Louisiana courts have been less insistent upon sexual equality than has the United States Supreme Court. *See* Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Craig v. Boren, 97 S. Ct. 451 (1976); Reed v. Reed, 404 U.S. 71 (1971).

women generally have remained in their traditional roles or whether the traditional concepts apply to the parties before the court. For example, in *State v. Barton*,[50] defendant moved to quash a charge of criminal neglect of his wife on the ground that the statute, which applied only to husbands, violated the state ERA. The court rejected his argument, saying that distinctions based on sex were permissible so long as the classification is not unreasonable or arbitrary. Inasmuch as "it presently remains a fact of life that, between two spouses, the husband is invariably the means of support for the couple,"[51] the legislative discrimination against men was reasonable and not in violation of the state constitution.

Traditional roles of women also have been used to justify sexually discriminatory statutes in Louisiana child custody cases. In *Broussard v. Broussard*,[52] a husband challenged the trial court's express preference for the mother in awarding custody. The appellate court found sufficient legal basis for a maternal preference in the "biological connexity" between mother and child and in the mother's traditional responsibility for the day to day care of minor children.[53]

As in Utah, Louisiana courts are without a legislative mandate to require justifications for sexually discriminatory statutes that would meet a strict scrutiny standard. Nevertheless, within the constitutional directive, the courts could require a closer match between the classification and the statutory purpose by examining whether the justifications offered in support of the sex-based classification can be supported by objective data or are merely myths.

Virginia stands out as a state in which a mandate for strict scrutiny in sex discrimination cases has been given to the courts, but the courts have failed to comply. The result is that judicial interpretation of the Virginia ERA has been similar to that of the Louisiana and Utah courts, despite the very different intentions of its drafters.

Virginia gained its equal rights provision in 1971 as part of a major revision of the state constitution. Article I, section 11, enumerated sex along with race, color, and national origin, as a category that was to be free from "any governmental discrimination."[54] 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

50. 315 So. 2d 289 (La. 1975).

51. *Id.* at 291. The dissenting opinion of Justice Barham recognized that male support of the family was not universal. On this basis, he would have found no rational basis for the statute unless criminal liability was also imposed on those wives who left their husbands destitute. *Id.* at 292-93.

52. 320 So. 2d 236 (La. App. 1975).

53. *Id.* at 238.

54. The pertinent part of art. I, § 11 is reprinted in the Appendix.

courts.[55] The Virginia Supreme Court, however, did not conform to these expectations. Instead, the court stated that Virginia's equal rights provision was "no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States" and prohibited only "invidious, arbitrary discrimination upon the basis of sex."[56] The court found the statute exempting certain women from jury duty to be reasonable because "women are still regarded as the center of home and family life."[57] The court thus failed to show the same intolerance toward classifications based on sex as to those based on race or religion. Instead of requiring that the state show a compelling interest to justify the classification, the court relied on traditional views of the role of women in society and applied the least stringent standard of review available.

In general, the courts of Utah, Louisiana, and Virginia have deferred to legislative classifications based on sex. They refuse to examine the assumptions on which the classifications are based, finding them reasonable if they can be justified on any conceivable set of facts. These courts willingly adopt as the norm traditional roles for men and women without examining how well they reflect current societal patterns or the life style of the individual. In these states, the ERA's have been ineffectual in eliminating sex stereotypes embodied in the law. Even where the clear legislative intent is otherwise, as in Virginia, the courts have failed to reconsider their traditional views of women.

C. *States that Apply a Standard of Strict Scrutiny*

The high courts of Alaska, Colorado, Connecticut, Maryland, and Texas have indicated that strict scrutiny must be employed in deciding cases under their state's ERA,[58] although none has yet been presented a

55. JOINT PRIVILEGES AND ELECTIONS COMMITTEE OF THE GENERAL ASSEMBLY, COMMONWEALTH OF VIRGINIA, *supra* note 28, at 19.

56. Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973). The challenged statute exempted women but not men from jury duty if they were legally responsible for the care of a young child or a disabled person. The question has since been mooted by a revision of the statute exempting any "person" with the requisite responsibilities. VA. CODE §§ 8-208.6(26), 8-208.10 (Supp. 1973).

57. 213 Va. at 638, 194 S.E.2d at 710.

58. Wright v. Action Vending Co., 544 P.2d 82 (Alas. 1975) (wife's claim for loss of consortium denied because state's workmen's compensation statute provides exclusive remedy); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973) (rape statute not void under ERA because its distinctions between the sexes not based on sex but on elements of the crime); Page v. Welfare Comm'r, 170 Conn. 258, 305 A.2d 1118 (1975) (regulation that children of working wife not be counted as her dependents in computing her liability for support of indigent parent could not survive *any* equal protection attack); Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (statute forbidding cosmetologists to cut male hair bears no rational relation to any legitimate state purpose); Mercer v. Bd. of Trustees, North Forest

case requiring resolution under the ERA. Yet even these pronouncements leave some significant questions unanswered. Will all classifications based on sex be held discriminatory? If so, what will be required to justify such legislative classifications? Are certain types of cases more likely to persuade courts to validate distinctions based on sex? Will the courts accept notions of the "normal" or traditional role of women to justify distinctions, as states using the rational basis standard of review have done? Until the courts in these states squarely confront an ERA case, such questions will not be answered. The experience of courts in Illinois is, however, relevant to these questions.

The Illinois Supreme Court is the only state court to actually apply strict scrutiny in deciding a case under an ERA.[59] The court looked to the intent of the drafters who had placed the ERA in the new state constitution.[60] The supreme court quoted at length from the convention debates over the ERA in *People v. Ellis*,[61] a case concerning a statute under which female offenders were treated as juveniles up to age eighteen, but males only up to age seventeen. It found that proponents of the ERA wanted women to have the same "type of equality" as had "long been held to apply to blacks."[62] Consequently, the court held that article I, section 18, required that classifications based on sex be considered "suspect." To be held valid, such classifications "must withstand 'strict judicial scrutiny.' "[63] The high court subsequently reaffirmed this view in a similar statutory challenge.[64]

The intermediate appellate courts of Illinois have generally followed the lead of the supreme court in refusing to uphold any sex classification not required by a compelling state interest. They have rejected "maternal preference" as a basis for custody awards, even though the children whose custody was disputed were of "tender

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I.S.D., 538 S.W.2d 201 (Tex. App. 1976) (regulation of male student's hair length by school does not violate ERA because schools may establish rules for children in formative years).

59. People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

60. ILL. CONST., art. I, § 18. The text of this provision appears in the Appendix.

61. 57 Ill. 2d, 127, 130-31, 311 N.E.2d 98, 100 (1974).

62. *Id.*

63. *Id.* at 132-33, 311 N.E.2d at 101. The court found that the challenged age distinction did not meet the test of a "compelling state interest." Prior to adoption of the ERA, Illinois courts had employed the rational basis test to sex-based statutory challenges. *See* People v. Pardo, 47 Ill. 2d 420, 424, 265 N.E.2d 656, 658 (1970), *appeal dismissed sub nom.* Pardo v. Illinois, 402 U.S. 992 (1971).

64. In Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974) the court examined a challenged statute that permitted females to marry at age 18 without parental consent, at 16 with consent, and at 15 with court order. Males were required to be 21, 18, and 16, respectively. The court invalidated the statute because it could find no compelling state interest to justify the distinctions between boys and girls.

years."[65] Similarly, they have refused to prefer a mother over a father when the father claimed custody of an illegitimate child.[66]

In criminal cases, however, the appellate courts have been less consistent in their results. Statutes upheld in one judicial district[67] have been invalidated in another.[68] An example of this is the incest law. The law provides stiffer penalties for a father who commits incest with his daughter[69] than for a mother involved in incest with her son.[70] Most of the appellate districts have recognized that because the incest provisions involve discrimination by reason of sex,[71] *People v. Ellis*[72] requires strict judicial scrutiny of the classification. The courts disagree, however, on whether there is sufficient justification for the incest law's distinctions between men and women.[73]

Two courts have upheld the statute, but on different rationales. In *People v. York*,[74] the court held that stiffer penalties were imposed on fathers, not because they were male—sons and brothers who commit incestuous acts are subject to the lesser penalties—but because a father may more easily abuse his position in the family.[75] The *York* court thus sidestepped the issue of whether the state's interest in the distinction was compelling by finding that it was not, in fact, based on sex. The court in *People v. Williams*[76] did seek to justify the statutory classifications on the basis of a compelling state interest. The court stated that the vast majority of incest cases involve a father's abuse of a daughter,[77] and

65. Randolph v. Dean, 27 Ill. App. 3d 913, 327 N.E.2d 473 (1975); Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681 (1974); Marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E.2d 581 (1974).

66. People *ex rel.* Irby v. Dubois, 41 Ill. App. 3d 609, 354 N.E.2d 562 (1976).

67. People v. Williams, 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975); People v. York, 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975).

68. People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975); People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 312 (1974), *rev'd*, 63 Ill. 2d 433, 349 N.E.2d 50 (1976). On the reversal of *Boyer*, see text accompanying note 82, *infra*.

69. ILL. ANN. STAT. ch. 38, § 11-10 (Smith-Hurd 1972 Supp.). Penalties under this section range from 2-20 years.

70. ILL. ANN. STAT. ch. 38, § 11-11 (Smith-Hurd 1964). This section, which also covers brother-sister incest, provides for penalties of from 1-10 years.

71. People v. Williams, 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975); People v. York, 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975).

72. 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

73. *Compare* People v. Williams, 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975) *and* People v. York, 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975) *with* People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975) *and* People v. Boyer, 24 Ill. App. 3d 761, 321 N.E.2d 312 (1974), *rev'd*, 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

74. 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975).

75. *Id.* at 115, 329 N.E.2d at 846.

76. 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975).

77. Ten out of the 11 appealed cases in Illinois arising from criminal incest convictions involved father-daughter incest. Comment on ILL. ANN. STAT. ch. 38, § 11-11, Committee Comments to the Criminal Code of 1961 (Smith-Hurd 1964).

that this was a more serious social problem since social and psychological harm and unwanted pregnancy are more likely to accompany father-daughter incest.[78] It is unclear, though, to what extent these justifications actually distinguish the situations of sons and brothers or are the result of social stereotypes. Moreover, it is unclear on what basis such "state" interests may be categorized as "compelling."

In contrast, another Illinois appellate court has twice[79] rejected as not compelling the justifications for the statutory classification given in the comment[80] to the incest section of the Illinois Criminal Code. The three reasons there offered for the distinction between men and women—(1) to prevent abuse of family authority, (2) to avoid the risk of genetically defective offspring, and (3) to reflect cultural tradition—were examined in detail and rejected.[81]

The Illinois Supreme Court resolved the dispute between the appellate districts by upholding the distinctions in the statute between father-daughter incest and other forms of incest. It did not, however, settle the more interesting question of how the strict scrutiny standard of review should be applied to distinctions based on physical differences, holding instead that the state's interest in guarding daughters from the potential physical trauma of pregnancy justifies the classification, even under the rational relationship standard.[82]

The Illinois experience suggests that even where the state's highest court has announced the proper standard of review, uniform results are not automatic. The strict scrutiny test involves determining whether there is sexual discrimination and whether justification for the discrimination rests on a compelling state interest. There is still disagreement, though, over what constitutes sex discrimination and over what state interests are compelling.

D. States that Approach an Absolute Standard

The courts of two states, Pennsylvania and Washington, have employed a standard of review requiring greater justification for discriminatory statutes than that required by strict scrutiny. Whether

78. 32 Ill. App. 3d at 551, 336 N.E.2d at 30.

79. People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975); People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 312 (1974), *rev'd*, 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

80. Comment on ILL. ANN. STAT. ch. 38, § 11-11, Committee Comments to the Criminal Code of 1961 (Smith-Hurd 1964).

81. People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975). The court also pointed out that risk of genetic damage was not present at all in incest between fathers and adoptive or step-daughters, yet this is included as a reason for the heavier penalty. *Id.* at 589, 335 N.E.2d at 185.

82. People v. Boyer, 63 Ill. 2d 433, 434, 349 N.E.2d 50, 51 (1976).

the standard of review employed by these courts permits any justification of sex-based discrimination cannot be determined until a broader range of cases has been heard. As in the other states examined, the threshold question has been whether the challenged statute discriminates on the basis of sex.[83] Here, however, this determination has been dispositive because, once discrimination has been established, both states have thus far denied effect to the challenged statute.

Pennsylvania's courts have found that sex discrimination in family law and in criminal sentencing violates the state's ERA. In divorce actions, the courts have eliminated the presumption that the father has the principal burden of supporting minor children,[84] have invalidated a statute that permitted courts the discretion to require husbands but not wives to pay alimony pendente lite,[85] and have eliminated the common law rebuttable presumption that "where a husband obtains his wife's property without adequate consideration, . . . a trust is created in her favor."[86] The courts also have extended to wives the right to recover damages for loss of consortium[87] and have invalidated a statute that required the consent of mothers but not fathers for the adoption of illegitimate children.[88]

In the single criminal case decided by a Pennsylvania court under the ERA, that part of a challenged sentencing statute that prohibited courts from imposing minimum sentences on convicted women while requiring courts to impose minimum sentences on convicted men was invalidated.[89] The effect of the statute was that women were eligible for parole immediately after incarceration, but that men were ineligible until they had served a minimum sentence. As a result of this decision, courts must now give both men and women minimum sentences.

There has been less ERA litigation in Washington than in Pennsylvania. In *Singer v. Hara*,[90] a challenge to Washington's marriage laws

83. The resolution of this question is not always self-evident. In fact, some controversial cases have been dealt with summarily by a determination that disparate treatment of the sexes did not involve discrimination. Most notable in this regard is General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976), in which the Supreme Court found that the challenged insurance plan did not involve sex discrimination in not including coverage for pregnancy. The court reasoned "[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." *Id.* at 409. The Court could instead have viewed the disparate treatment as discriminatory by finding that men were insured against all medical risks and women were not. Thus, resolution of this threshold question will in fact determine the outcome in many cases.

84. Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974).

85. Henderson v. Henderson, 458 Pa. 67, 327 A.2d 60 (1974).

86. Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975).

87. Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

88. Adoption of Walker, 360 A.2d 603 (Pa. 1976).

89. Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974).

90. 11 Wash. App. 247, 522 P.2d 1187 (1974).

by two homosexual men, a court of appeals failed to find discrimination, reasoning that since no one of either sex could marry someone of the same sex, men and women were treated equally. *Singer* demonstrates that when strongly held social values are threatened or high economic costs are at stake, courts will be able to avoid upsetting established practices even under the strictest construction of an ERA by refusing to define the challenged practice as discrimination based on sex.

The larger question of what the ERA demands when a statute does discriminate was addressed by a Washington court in *Darrin v. Gould*.[91] This case and a similar Pennsylvania case, *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*,[92] are the two most far-reaching ERA decisions yet. In each case it was held that a state high school athletic association by-law prohibiting girls from participating in interscholastic sports because of their sex violates the ERA.[93]

In *Darrin*, the Washington Supreme Court declared unconstitutional under that state's ERA a bylaw of the Washington Interscholastic Association that prohibited girls from participating in interscholastic contact football.[94] First, the court held that the regulation did discriminate on the basis of sex, overturning the lower court's finding that " 'the classification . . . is not based on sex per se but upon the nature of the game of football . . . .' "

> "[The lower court's finding] ignores . . . undisputed evidence that WIAA regnlations prohibited girls from playing on boys' football teams . . . regardless of the girls' ability to play and regardless of whether the school had a girls' football team. The classification was clearly one based on sex—not one based on ability to play."[95]

The court then proceeded to reject the three main justifications for the bylaw offered by the defendant. First, the court found little merit in the argument that the majority of girls are not able to compete successfully with boys in contact football. The fact that some boys could not meet team requirements did not disqualify other boys from playing football.[96] Second, in response to the argument that girls would encounter greater

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91. 85 Wash. 2d 859, 540 P.2d 882 (1975).

92. 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975).

93. In *Pennsylvania Interscholastic Athletic Ass'n*, the court found that state funding of high school athletic programs constituted the requisite state action. 18 Pa. Commw. Ct. 45, 49, 334 A.2d 839, 842 (1975).

94. The court selected its standard of review on the basis of its belief that the voters ratifying the ERA must have intended that the state courts be more rigorous in dealing with sex-based classifications than they had been under the strict scrutiny standard used prior to the ERA's ratification. 85 Wash. 2d 859, 871, 540 P.2d 882, 889 (1975). *See* Hanson v. Hutt, 83 Wash. 2d 195, 512 P.2d 599 (1973); WASH. CONST. art. I, § 12.

95. 85 Wash. 2d at 875, 540 P.2d at 891.

96. *Id.* at 876, 540 P.2d at 892.

risk of injury than boys, the court stated that serious injury to the procreative organs is not a substantial risk and that the risk of injury to the average boy is not a reason for denying boys the opportunity to play.[97] Third, the court considered the Association's argument that construing the ERA to permit girls to participate in contact sports would open all athletic teams to both sexes, thus disrupting girls' athletic programs. The court called this argument conjectural because the school in question had no girls' contact football team.[98] In rejecting these justifications, the court clearly indicated that once sex discrimination is found, no broad generalizations about the sexes will be persuasive.

Similarly, in *Pennsylvania Interscholastic Athletic Ass'n*, the court found that a similar challenged classification was discriminatory and summarily held that it violated the ERA on its face.[99] The justifications presented by the Association were that the average girl was more likely to be injured than the average boy participating in co-ed athletics and that fewer girls would have the opportunity to participate if they were forced to compete with boys for limited team positions. These arguments failed to impress the court.

> The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. . . . If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely on the basis of her sex without regard to her relevant qualifications.[100]

The court concluded that none of the proposed justifications for the by-law, "even if proved, could sustain its legality."[101]

Whether the Pennsylvania and Washington courts are requiring only a closer fit between the assumptions on which statutory classifica-

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97. *Id.*

98. *Id.* at 877, 540 P.2d at 892. Because the court did not reject the underlying premise, future cases may raise the issue of separate but equal treatment of the sexes. The United States Supreme Court recently considered this issue when it affirmed by an equally divided court, Justice Rehnquist taking no part in the decision, a Third Circuit case holding that school district regulations establishing gender-based classifications for admission to college-preparatory high schools do not violate the equal protection clause of the Constitution where two single-sex schools offer equal educational opportunities and where attendance at either the girls' or boys' school is voluntary. Vorcheimer v. School District of Philadelphia, 45 U.S.L.W. 4378 (U.S. April 12, 1977), *aff'g* 532 F.2d 880 (3d Cir. 1976). Although this case arose in Pennsylvania and its ERA was pleaded, the district court refused to exercise pendant jurisdiction to consider it, stating that Pennsylvania case law was inadequately developed in the area of education. 400 F. Supp. 326, 332-33 (E.D. Pa. 1975).

99. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 50, 334 A.2d 839, 842-3 (1975).

100. *Id.* at 50, 334 A.2d at 843.

101. *Id.* at 48, 334 A.2d at 841.

tions are based and the sex-based classifications themselves, or are absolutely prohibiting sex as a legal category[102] is still open to speculation. The fact that both courts were willing to consider the justifications for the sex classification offered by the defendants indicates that neither court has gone so far as to create an absolute ban.[103] Apparently neither court has adopted a sex-blind standard analagous to the color-blind standard articulated by Justice Harlan in his dissenting opinion to *Plessy v. Ferguson.*[104] Under a sex-blind or absolute standard, a court could uphold as constitutional a sex-based statute, such as the Washington law prescribing that marriage be between persons of the opposite sex, only by defining the statute as not involving sex discrimination.[105] A court that is unable to construe the challenged statute as non-discriminatory would be forced to invalidate it under an absolute standard. As the law now stands in Washington and Pennsylvania, if a case arises that presents persuasive justifications for different treatment of the sexes—for example, one based on widely held moral values, high economic costs, or the unique physical characteristics of the sexes—a court of either state could hold the statute valid under its ERA and its case law.

If the standard now being employed in Washington and Pennsylvania primarily requires a better fit between the sex-based classification and the reasons justifying it, then this standard might be described as creating a presumption of unconstitutionality. Where this presumption is employed, it cannot be rebutted by unsubstantiated generalizations about differences between the sexes or by proven differences between the sexes that do not hold true for all or a high percentage of the members in a given sex-category. This standard would require functional categories[106] before a distinction could be given effect.

102. In *Welfare of Hauser*, the court stated in dicta that *Darrin* construes the ERA to create "an absolute prohibition against discrimination *based on* sex." 15 Wash. App. 231, 239, 548 P.2d 333, 337 (1976) (emphasis in original). The possibility of this interpretation has provoked critical comment. *E.g.*, 14 DUQ. L. REV. 101, 106 (1975); Note, *Commonwealth v. Pennsylvania Interscholastic Athletic Association: A Stride Toward Equality of the Sexes or a Misstep?*, 37 U. PITT. L. REV. 234, 240 (1975).

103. Instead of creating an absolute ban on sex-based distinctions, the cases may support two other conclusions: (1) that the justifications offered were unpersuasive, or (2) that the state's policy of sex neutrality as articulated by the ERA outweighs the justifications presented. The impact of *PIAA* and *Darrin* remains ambiguous. Furthermore, the *Darrin* decision emphasizes that the evidence presented by the Association was unsatisfactory *as evidence*: it was conjectural, "scintilla evidence . . . insufficient to support a finding." 85 Wash. 2d 859, 874, 540 P.2d 882, 892 (1975). This could be read to imply that a justification supported by substantial evidence might overcome the presumption of unconstitutionality created by the initial finding of sex discrimination.

104. 163 U.S. 537, 559 (1896).

105. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

106. Whereas sex-based categories are usually a shorthand way of classifying an objective factor: strength, breadwinner, authority figure, etc., functional categories would describe these factors directly in order to define the class affected by the statute.

II

STATE ERA'S AND BEYOND

A. Factors Producing Inconsistent Results

Courts from state to state have given very different meanings to equal rights provisions that appear quite similar on the surface. Various standards of judicial review are being employed. Where the standards are nominally the same, they may produce different results in similar cases. In states using a rational basis standard of review, the traditional, stereotyped social roles of the sexes constitute a rational basis sufficient to uphold a discriminatory statute.[107] In states where courts have adopted strict scrutiny, as they have in a plurality of enacting states, the sex discriminations most obviously based solely on social stereotypes are not surviving.[108] As the basis for the distinctions approaches the actual or presumed physical differences between men and women, however, these courts begin to waver in their commitment to equality between the sexes.[109] Finally, two states have taken the position that virtually no distinctions between the sexes are valid under an ERA.[110] But even this standard may prove to be less than absolutely prohibitive of the use of sexual classifications.[111]

Certain variables may account for the differences between the states. First, the historical origin of an equal rights provision may influence a court's perception of its intended function. Two states, Utah and Wyoming, have had equal rights provisions since the 1890's. In both states these provisions were enacted to serve as a bulwark for the state's pioneering guarantees of women's suffrage, and not for any broader purpose.[112] It is not surprising, therefore, to find that their equal rights provisions are being interpreted more narrowly than recently adopted ERA's.[113] In addition Utah's interpretation of the rights guaranteed to women must be influenced to some extent by the traditional role assigned to women by the Mormon Church, the most power-

107. See text accompanying notes 44-52, *supra.*

108. *E.g.*, Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1975); People *ex rel.* Irby v. Dubois, 41 Ill. App. 3d 609, 354 N.E.2d 562 (1976).

109. People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975).

110. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975). Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

111. *See* Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); text accompanying note 89, *supra.*

112. See note 35 *supra*, and text accompanying notes 40-41 *supra.*

113. There has been no recent litigation involving Wyoming's ERA. A case arising in the future could cause the state's high court to update its interpretation. See note 31 *supra.*

ful social and political force in the state. As a consequence of these two factors, the Utah Supreme Court will permit "old notions" about sex roles to justify different treatment of the sexes.[114]

Historical origins alone, however, do not in all cases explain a state court's adherence to a rational basis standard of review. Equal rights provisions were added to the Louisiana and Virginia constitutions during the height of the women's movement. But while the constitutional drafters in Louisiana wanted a traditional standard of review, and the drafters in Virginia wanted the courts to examine sex classifications carefully,[115] the courts of both states have readily accepted sex stereotypes as a justification for statutory differences. The conservative Southern culture and the region's high esteem for the traditional role of women must be advanced as a possible explanation for the courts' interpretation of their ERA's. Since stereotypes and "old notions" of sex roles provide the rational basis needed to uphold a statute, the ERA in these states has to a large extent been neutralized.

Where a strict scrutiny standard, or a standard which goes beyond strict scrutiny, has been adopted, the decisions produce a more complex pattern. Certain types of discriminatory statutes are easily found in violation of an ERA. Where rights or benefits are available to, or restrictions are imposed upon, one sex at a different age than the other, the classifications are not likely to be sustained;[116] the discrimination is obvious, while the state interest is slight or non-existent. Consequently, courts feel especially competent to replace the legislative decision with their own.

Rigid views of proper paternal and maternal roles rarely persuade these courts, especially in the area of family law. Old rules denying to fathers custody of their children or denying alimony or attorney's fees to a needy ex-husband have failed to meet the constitutional test.[117] Similarly, statutes or practices based on the presumption that the male is every family's sole breadwinner are generally held invalid.[118]

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114. *E.g.*, Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974), *rev'd*, 421 U.S. 7 (1975), *enforced*, 552 P.2d 112 (Utah 1976), *rev'd*, 97 S. Ct. 717 (1977).

115. *See* notes 48 and 55 *supra*.

116. *See* People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974); Texas Woman's University v. Chayklintaste, 521 S.W.2d 949 (Tex. Civ. App.) *rev'd on other grounds*, 530 S.W.2d 927 (Tex. 1975) (requirement that women students under 23 must live in officially provided on-campus housing, while male students were not provided with similar housing, nor similarly restricted, was found to violate the Texas ERA by discriminating against both groups).

117. Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 482, 317 N.E.2d 681, 683-84 (1974); Marcus v. Marcus, 24 Ill. App. 3d 401, 407, 320 N.E.2d 581, 585 (1974); Minner v. Minner, 19 Md. App. 154, 310 A.2d 208 (1973); Lipshy v. Lipshy, 525 S.W.2d 222 (Tex. App. 1975).

118. *But see* People v. Elliott, 186 Colo. 65, 525 P.2d 457 (1974) (court suggests that liability for felony non-support will be extended to wives in a proper case); Fried-

Sex-based distinctions in criminal sex offense statutes are least likely to be found in violation of an ERA. With one exception,[119] no rape, statutory rape, incest, or similar statute has been invalidated, even though the courts may explicitly recognize the differential treatment of men and women under the statute.[120] Several factors may contribute to the courts' reluctance to invalidate these statutes. First, defendants in sex offense cases do not ordinarily provoke much sympathy. Under such circumstances, a court might very well hesitate to reverse a conviction on equal protection grounds. Second, if the rape or incest statute were invalidated, a void would be left in the criminal code until the legislature adopted new provisions. The prospect of "crimes" not chargeable under an existing statute would be unacceptable to the public as well as to the courts. The third, and most justifiable, reason why the courts let discriminatory sex offense statutes stand is that these classifications may be seen as based on actual physical differences between the sexes. Under many of the rape statutes, for example, the crime is expressly defined in terms of forced intercourse by a male with a female victim.[121] There is no converse physical act. Furthermore, forced intercourse with a female victim may result in an unwanted pregnancy. For most courts, this is sufficient reason to uphold the statutory discrimination.[122]

Other types of statutes involving physical differences between the sexes give courts great difficulty in determining the proper outcome under the state ERA. It is here that the judicial techniques developed in equal protection cases involving claims of racial discrimination seem most likely to prove inadequate, for while it is generally agreed that there are no functional differences between individuals of different races, it is clear that there are irreducible functional differences between men and women.

The first difficulty is determining whether or not the statutory distinction is based on a physical difference. The "biological connexity" between mother and infant may justify a maternal preference in one

man v. Friedman, 521 S.W.2d 111 (Tex. App. 1975) (both parents must support their children, but services as well as money count towards meeting the support obligation). *See also* Butler v. Butler, 347 A.2d 477 (Pa. 1975); Sampson, *supra* note 39, at 636-37.

119. People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 97 (1974), *rev'd*, 63 Ill. 2d 433, 349 N.E.2d 50 (1976). See text accompanying notes 69-82 *supra*.

120. People v. Salinas, 551 P.2d 703 (Colo. 1976); People v. Medrano, 24 Ill. App. 3d 429, 321 N.E.2d 97 (1974).

121. *E.g.*, COLO. REV. STAT. § 40-22-25(1)(a) (1963); TEX. PENAL CODE § 21.02 (a) (Vernon 1974).

122. *E.g.*, People v. Medrano, 24 Ill. App. 3d 429, 321 N.E.2d 97 (1974); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975). This justification has also been used to uphold discriminatory incest statutes. *E.g.*, People v. Williams, 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975).

court's child custody case, while another court may perceive this to be a social stereotype. Different minimum marriage ages for men and women in one court may be viewed as based on different ages of biological maturation; another court may view them as arising from societal standards of appropriate and acceptable teenage behavior. Similarly, differences in size and strength may be seen as sexually determined physical characteristics that are valid for drawing distinctions based on sex, or they may be perceived as insufficiently related to sex and therefore impermissible.[123] Thus far the courts have little guidance in determining whether a statute is based on physical or societal sex differences under ERA's.

The second difficulty is determining whether acknowledged physical differences between the sexes in fact justify the statutory discrimination. Must every male or every female possess the presumed characteristic in question? Will evidence that a significant majority possesses it suffice? Even where sex-based classifications are founded upon generalizations that are true for all members of the sex, will any kind of disparate treatment be permissible? These are hard questions both for courts and legal analysts, and no single explanation can account for the different results reached under the ERA's of the various states.

One final factor to note is that, although the idea of the ERA is closely associated in the public mind with the feminist movement, the large majority of appellate litigants claiming violations of their rights under a state ERA have, so far, been men.[124] It is easy to see why this is so. Many of the challenged statutes were so-called "protective" statutes enacted to provide financial support for women traditionally dependent

123. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). While variations in size and strength exist within each sex and therefore cannot be used to justify sexually discriminatory treatment, certain physical characteristics exist exclusively within one sex. Physical characteristics such as the ability to become pregnant and the ability to impregnate are the clearest examples of such physical differences. The United States Supreme Court has, however, rejected the argument that discrimination based on pregnancy violates the Constitution. The Court held that such discrimination is also between pregnant and non-pregnant women and thus not discrimination based on sex. Geduldig v. Aiello, 417 U.S. 484 (1974); Gilbert v. General Electric, 97 S. Ct. 40 (1976).

124. In Colorado, for example, four out of the five ERA cases thus far have had male plaintiffs. People v. Salinas, 551 P.2d 703 (Colo. 1976); People v. Barger, 550 P.2d 1281 (Colo. 1976); People v. Elliott, 186 Colo. 65, 525 P.2d 457 (1974); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973). In Sylvara v. Industrial Comm'n, 550 P.2d 869 (Colo. 1976) a female plaintiff raised the constitutional issue. Similarly, of four Maryland ERA cases, three were brought by a man. Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975); Colburn v. Colburn, 20 Md. App. 346, 316 A.2d 283 (1974) and Minner v. Minner, 19 Md. App. 154, 310 A.2d 208 (1973). In the fourth case, cosmetologists of both sexes were seeking to cut male hair. Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973).

on their husbands. Others reinforced commonly held assumptions: mothers are better caretakers of young children than fathers, the family authority figure is the father, girls mature earlier than boys, etc. To the extent that women were protected by these statutes, they have placed burdens on men, and so men have sought to overturn them. In addition, many of the statutes challenged in these cases were, in fact, discriminating against men. This is especially true of those statutes based on traditional social assumptions, such as that men provide the family income while women are financially dependent. Moreover, judicial practices such as the preference for placing children in the custody of the mother are also overtly discriminatory.

At the same time, those statutes and practices which have hindered women's employment and educational progress to a large extent fall under the Federal Civil Rights Acts.[125] Suits based on educational or employment discrimination would not be brought in state courts, nor would the issue of a state ERA be raised. Thus we find many cases involving ex-husbands trying to avoid paying alimony or attorney's fees[126] or involving fathers seeking custody of their children,[127] but few cases involving women denied equal employment opportunities or other job-related benefits.[128]

B. Toward an Ideal Standard

The various standards of review used by the courts in states with ERA's inevitably raise one question: How can courts best implement the policy of treating individuals as equals regardless of their sex? They must do no less than treat sex as a suspect classification, requiring the state to make a substantial showing that a distinction based on sex is justified by an important state interest. They can do no more than absolutely prohibit the use of sex as a tool of legal classification. The best approach lies between these two.

Traditional strict scrutiny, a balancing process which weighs the goal of equal rights for women and men against other state policies and

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125. 42 U.S.C. § 2000e-2 (1971), Civil Rights Act of 1964 § 703, *as amended by* Educational Amendments Act of 1972 § 901, 20 U.S.C. § 1681 *et seq.* (1976).

126. Lane v. Lane, 35 Ill. App. 3d 276, 340 N.E.2d 705 (1975); Minner v. Minner, 19 Md. App. 154, 310 A.2d 208 (1973); Cooper v. Cooper, 513 S.W.2d 229 (Tex. App. 1974).

127. King v. Vancil, 34 Ill. App. 3d 831, 341 N.E.2d 65 (1975); Marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E.2d 581 (1974).

128. *E.g.*, Sylvara v. Industrial Comm'n, 550 P.2d 869 (Colo. 1976). Plaintiff challenged a state rule denying unemployment insurance benefits until 13 weeks after termination of pregnancy as violating the 14th amendment equal protection clause and Colorado's ERA. The court found the rule unconstitutional under the 14th amendment and did not reach the ERA issue.

interests, is not the best method for achieving sexual equality because it is too flexible. Under such a test courts determine both the amount of weight given sexual equality and the degree and kind of proof necessary to show a substantial state interest in the classification. The values of the individual judge can too easily circumvent the policies behind the ERA. Until strict scrutiny is uniformly applied in its most rigorous form, the strict scrutiny standard will produce some disappointing results.

Arguments in favor of an absolute ban on sex-based discrimination have been presented by Brown, Emerson, Falk, and Freedman in their leading article on the federal ERA.[129] Their analysis focuses on four premises which, they argue, underlie the ERA and mandate its construction as an absolute prohibition. First, the administrative technique of grouping or averaging individuals into classes should not be acceptable where the factor of sex is concerned. Second, no exception to a policy of equal treatment should be allowed, since unequal treatment cannot be confined to a single area. "Equal rights for women . . . is a unity."[130] Third, they argue that there is no objective basis on which to justify differential treatment of men and women. "Not only is such a system inevitably repressive of one group, but it affords no standard of comparison between different groups."[131] Fourth, if the legislatures and courts could determine when differential treatment is justified, the status of women would remain unchanged, since these institutions "maintain the existing system of discrimination . . . ."[132]

An absolute prohibition of sex-based classifications would create some problems of its own; consequently, it is not clear that this standard would be most desirable to equal rights proponents. First, it would undoubtedly eliminate affirmative action;[133] second, it fails to recognize biological and other differences between the sexes which make certain limited differences in legal treatment acceptable;[134] and third, it allows courts to treat issues of sexual classification summarily and thus ignore present underlying social and economic realities,[135] such as the existence of different employment and educational opportunities for men and women, differing wage rates for men and women, and different parental role conditioning of men and women. Some of these problems might be dealt with through carefully prescribed exceptions to the prohibition,

129. Brown, Emerson, Falk & Freedman, *supra* note 7, at 890.

130. *Id.* at 891-92.

131. *Id.* at 892.

132. *Id.*

133. *See* Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 131 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977).

134. Brown, Emerson, Falk & Freedman, *supra* note 7, at 893-900.

135. *See, e.g.*, Butler v. Butler, 347 A.2d 477 (Pa. 1975).

but the question of who would define such exceptions is troublesome, as is the inflexibility of such a legal construct.

Because courts acting under an ERA are not limited to the standards of review developed under the Equal Protection Clause, they can develop new standards designed to achieve the policy of the ERA, equality for women and men. To define a new test is beyond the scope of this Comment, but it is suggested that the ideal standard would lie between strict scrutiny and an absolute ban. Such a test could establish a strong presumption that any sex-based classification was unconstitutional. In order to sustain the sex-based classification, the state would have to show that no other basis of classification would achieve the purpose behind the statutory distinction. Such a standard would require a closer match between the sex classification and the purpose of the distinction than strict scrutiny now requires.

The method used by the Supreme Court of Washington in *Darrin*[136] could be interpreted as such a new standard. The Court carefully examined the challenged regulation to determine its purpose. It then analyzed each of the several purposes for the regulation argued by the athletic association. The analysis consisted of first determining the particular characteristics important to the classification's purpose, such as strength and proneness to injury, and then looking at both the excluded and included classes to see whether or not the divider—sex—matched the characteristics. The court found that the match was far from perfect. There are strong females and weak females, and there are strong males and weak males. The court found that because a sex-based regulation was not necessary to and did not achieve any of the stated goals, it was unconstitutional. Such a standard of review would focus attention on the purpose of the statute and on the reasoning of the legislature in creating the classification. An effective ERA should encourage this type of thorough judicial inquiry.

CONCLUSION

The case law under state equal rights provisions reveals that decisions emerge from many sources, including, but not limited to, the standard of review applied. Other factors clearly influence decisions, but the standard of review adopted provides the framework within which the courts must resolve ERA claims now and in the future. The experience in the states reveals that passage of an Equal Rights Amendment forces all but the most stubborn of courts to apply a standard of strict scrutiny in reviewing sexually discriminatory statutes and actions.

136. 85 Wash. 2d 859, 540 P.2d 882 (1975); see text accompanying notes 94-98, *supra*.

The concept of sexual equality in America, proclaimed at Seneca Falls 129 years ago, has now become a strong force in American politics and law. The federal Equal Rights Amendment has been passed by Congress and needs the votes of only three more states to become a part of the Constitution. Sixteen states have enacted their own Equal Rights Amendments and are adjusting their legal systems to the mandate for sexual equality. Legislatures in many states, both those with and those without ERA's, are revising state statutes to make them sex-neutral. The concept of sexual equality is now unquestionably a part of our law.

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APPENDIX

ALAS. CONST., art. I, § 3. 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.

COLO. CONST., art. II, §29. 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.

CONN. CONST., art. I, § 20. 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.

HAWAII CONST., art. I, § 21. 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.

ILL. CONST., art. I, § 18. Equal protection of the laws shall not be denied or abridged on account of sex.

LA. CONST., art. I, § 3. 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 a crime.

MD. CONST., Declaration of Rights, art. 46. Equality of rights under the law shall not be abridged or denied because of sex.

MASS. CONST., pt. 1, art. I. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MONT. CONTS., art. II, § 4. 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.

N.M. CONST., art. II, § 18. 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.

PA. CONST., art. I, § 28. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

TEX. CONST., art. I, § 3a. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

UTAH CONST., art. IV, § 1. 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 equally all civil, political and religious rights and privileges.

VA. CONST., art. I, § 11. . . . and that 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.

WASH. CONST., art. XXXI, § 1. Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

WYO. CONST., art. I, § 3. 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 circumstances or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

WYO. CONST., art. VI, § 1. 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 equally enjoy all civil, political and religious rights and privileges.