

# THE EQUAL RIGHTS AMENDMENT: THEN AND NOW

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Far from a dead letter, the Equal Rights Amendment (ERA) is currently pending in both houses of Congress.<sup>1</sup> When Senator Edward Kennedy (D-MA) reintroduced the ERA in the Senate on March 27, 2007, he particularly stressed the economic disparities faced by women and the importance of a national effort to address them.<sup>2</sup> Likewise, the principal co-sponsor in the House of Representatives, Representative Carolyn Maloney (D-NY)—a proud relation, through marriage, of feminist Alice Paul who drafted the original ERA in 1923<sup>3</sup>—stated that “[w]omen are under-represented in government and business, earn less than men, and are nearly

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<sup>1</sup> For accounts of the earlier efforts to obtain ERA ratification in the 1970s and ‘80s, see MARY FRANCES BERRY, *WHY ERA FAILED* (1986); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); and GILBERT Y. STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

<sup>2</sup> *Statements on Introduced Bills and J. Res.*, 153 CONG. REC. S3845 (2007) (statement of Sen. Edward Kennedy on S.J. Res 10).

<sup>3</sup> For a thorough history of the Equal Rights Amendment, see RENEE FEINBERG, *THE EQUAL RIGHTS AMENDMENT* (1986).

twice as poor in old age. It is time to stop stalling and finish what we started 84 years ago.”<sup>4</sup>

The data cited by Representative Maloney are well known. Women make up a small fraction of government positions relative to their absolute numbers in the population. As of January 2008, there were sixteen women in the U.S. Senate, seventy women in the U.S. House of Representatives, and seventy-four women holding statewide elective executive offices.<sup>5</sup> These figures include, among others, eight governors, four attorneys general, eleven state treasurers, and one railroad commissioner.<sup>6</sup> Less than one-quarter of state legislators are women.<sup>7</sup> Women also lag behind men in corporate representation, as women held only 14.8% of all Fortune 500 board seats in 2007 and only 15.4%—a decrease from 2006—of corporate officer positions.<sup>8</sup> Not surprisingly, the gender wage gap persists. According to the most recent analysis, the median weekly earnings ratio of women’s to men’s wages was 80.2 in 2007, and the ratio of women’s to men’s annual earnings was 76.9 in 2005.<sup>9</sup> The Institute for Women’s Policy Research observed that the median weekly earnings ratio has “hovered around 80.0 since 2003,” the median annual earnings ratio has remained “virtually unchanged from 2001,” and “[p]rogress in closing the gender wage gap has slowed considerably since 1990.”<sup>10</sup> Finally, the institute also observed that “older men outearn older women almost two to one,” and

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<sup>4</sup> Press Release, Congresswoman Carolyn Maloney, Senators Kennedy & Boxer, Reps. Maloney & Nadler Begin New Push for Women’s Equality Amendment (Mar. 28, 2007), *available at* <http://maloney.house.gov/index.php?Itemid=61&id=1312&option=content&task=view>.

<sup>5</sup> Ctr. for Am. Women & Pol., Facts on Women Candidates and Elected Officials, <http://www.cawp.rutgers.edu/Facts.html> (last visited Mar. 17, 2008).

<sup>6</sup> Ctr. for Am. Women & Pol., Women in Statewide Elective Executive Office 2008, <http://www.cawp.rutgers.edu/Facts/Officeholders/stwide-current.html> (last visited Mar. 17, 2008).

<sup>7</sup> Ctr. for Am. Women & Pol., Facts on Women Candidates and Elected Officials, *supra* note 5.

<sup>8</sup> Press Release, Catalyst, 2007 Catalyst Census Finds Women Gained Ground As Board Committee Chairs (Dec. 10, 2007), *available at* [http://www.catalystwomen.org/pressroom/press\\_2007\\_census.shtml](http://www.catalystwomen.org/pressroom/press_2007_census.shtml).

<sup>9</sup> Fact Sheet, Inst. for Women’s Pol’y Res., The Gender Wage Ratio: Women’s and Men’s Earnings, (Feb. 2008), <http://www.iwpr.org/pdf/C350.pdf>.

<sup>10</sup> *Id.*

“[o]lder women are almost twice as likely to receive Supplemental Security Income (SSI) government assistance as older men.”<sup>11</sup>

The U.S. Supreme Court is yet another institution with considerable power where women are underrepresented. Justice Ruth Bader Ginsburg’s lone female voice on the Court is a further testament to the fact that equality efforts, which rely on goodwill and voluntary inclusion rather than legal mandates, have fallen short.<sup>12</sup> Ever a feminist strategist, Justice Ginsburg has used her recent opinions to show just how things might be different if a few more women shared in the power of the Court.<sup>13</sup> For example, in *Gonzales v. Carhart*, a constitutional challenge to the intact dilation and extraction method of performing late-term abortions, Justice Ginsburg decried Justice Kennedy’s paternalism; Kennedy had suggested that because some women might come to regret decisions to terminate their pregnancies, the decision should be taken away from them entirely.<sup>14</sup> According to Justice Ginsburg, the Court’s majority opinion reflects “ancient notions about women’s place in the family and under the Constitution . . . that have long since been discredited.”<sup>15</sup> Justice Kennedy’s majority opinion, she wrote, “deprives women of the right to make an autonomous choice, even at the expense of their safety.”<sup>16</sup> Similarly, in

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<sup>11</sup> Tori Finkle et al., *The Economic Security of Older Women and Men in the United States*, BRIEFING PAPER (Inst. for Women’s Pol’y Res., Wash., D.C.), Nov. 2007, available at <http://www.iwpr.org/pdf/BPD480.pdf>.

<sup>12</sup> In a March 2007 address, Justice Ginsburg admitted, “I am feeling blue about being the lone woman on the U.S. Supreme Court bench,” and remarked that as the Court’s term neared its conclusion, “my spirits need a little lifting.” The Ass’n of the Bar of the City of N.Y., *Ruth Bader Ginsburg Distinguished Lecture on Women and the Law: A Conversation with Four Chief Justices*, 62 REC. 255, 256-57 (2007) (emphasis omitted). The underrepresentation of women on the Court likely makes a difference in certain areas, particularly employment discrimination. See Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005). It also serves as a potent symbol of women’s exclusion from positions of governmental power. See generally Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO. J. GENDER & L. 43 (2007).

<sup>13</sup> Indeed, scholars have found that the proportion of women on a deciding bench may affect case outcomes. See, e.g., Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 268 (2006) (noting that “[t]he fraction of women on the bench holds particularly impressive explanatory power.”).

<sup>14</sup> See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (Ginsburg, J., dissenting) (2007).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

*Ledbetter v. Goodyear Tire & Rubber Co.*, a case upholding a rigid application of a 180-day statute of limitations for filing a wage discrimination claim with the Equal Employment Opportunity Commission under Title VII, Justice Ginsburg's dissent stressed the "real world" factors facing women workers who likely remain unaware as their wages slip further and further below their male colleagues'.<sup>17</sup>

Regardless of how many women sit on the Court, an ERA could make a difference in the approach that both male and female justices take in cases where women suffer discriminatory treatment because of sex.<sup>18</sup> The text of the proposed ERA is simple, with its operative language set out in a single sentence: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>19</sup> By adding a specific reference to sex equality to the Constitution, the amendment would result in strict scrutiny for governmental policies that discriminate based on sex and lead to a greater consideration of the particular impact of decisions on women even in the private sector.<sup>20</sup> Inclusion of the amendment would also, over time, put women's constitutional rights on a more stable footing. As the National Organization for Women (NOW) President Kim Gandy put it, "[w]ith such an

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<sup>17</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2185 (2007) (Ginsburg, J., dissenting). A bill that would amend Title VII to address this issue was passed by the House of Representatives. See *Ledbetter Fair Pay Act of 2007*, H.R. 2831, 110th Cong. (2007). A similar bill was introduced in the Senate. See *Fair Pay Restoration Act*, S. 1843, 110th Cong. (2007). However, on April 23, 2008, Republican Senators led a successful effort to block consideration of the bill. See Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

<sup>18</sup> See generally Nat'l Org. for Women, *Who Needs An Equal Rights Amendment? You Do!*, <http://www.now.org/issues/economic/cea/who.html> (last visited Mar. 17, 2008).

<sup>19</sup> H.R.J. Res. 40, 110th Cong. (2007). An earlier version of the ERA was drafted by feminist Alice Paul in 1920 and introduced in 1923. The language was later revised to the present-day version of the ERA. See AlicePaul.org, Alice Paul: Feminist, Suffragist and Political Strategist 4-5, <http://alicepaul.org/images/Alice%20Paulpage%20biography.pdf> (last visited Nov. 4, 2008).

<sup>20</sup> Linda Wharton identified this phenomenon in states with ERAs, where courts import their constitutions' equality concepts into common law. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1237 (2005). See also Roberta W. Francis, *Reconstituting the Equal Rights Amendment: Policy Implications for Sex Discrimination* 6 (Aug. 29, 2001), <http://www.equalrightsamendment.org/APSA%202001.pdf>.

amendment to the Constitution, our fundamental rights and liberties would no longer be subject to the ever-changing political cycles.”<sup>21</sup>

However, like all constitutional provisions, much of the ERA’s ultimate meaning will depend on the legislative debate leading up to the provision’s enactment and on the particular construction it is then given by the executive and the courts. As this Article discusses below, there are some important issues, such as the role of women in combat, which an ERA alone will likely not resolve. Rather than provide a definitive endpoint to these debates, the federal ERA will be part of an iterative process that continues to slowly move national policies away from sex-based inequalities.

It is perhaps because the ERA itself will not resolve sex-based inequality but will simply open the doors to more debate, that its supporters sometimes have difficulty articulating what an ERA will accomplish in the Twenty-First Century. What follows is an effort to assess what the near-term impact of an ERA would be, based on evidence from state ERAs, federal case law, and other sources. This Article’s conclusions may disappoint some ERA supporters who cling to more revolutionary visions of what an equality amendment can accomplish. These observations, originally prepared with a conservative audience in mind, may help focus the debate on exactly what is now at stake in this law and why, even taking these lowered expectations into account, conservative objections to the amendment are ultimately unpersuasive.

## I. THE ERA THEN: PREDICTIONS ABOUT THE ERA’S IMPACT IN THE 1970S AND ‘80S

In 1971, the Yale Law Journal published an important article by Barbara Brown, Thomas Emerson, Gail Falk, and Ann Freedman: *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for*

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<sup>21</sup> Diana Price & Lisa Bennett, New Push for Women’s Constitutional Equality (June 12, 2007), <http://www.now.org/issues/constitution/070612amendment.html> (last visited May 26, 2008). See also Joan Lukey & Jeffrey Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, BOSTON B. J., Jan.-Feb. 2000 at 10, 27 (concluding that “[a]n equal rights amendment would remove any instability and uncertainty regarding judicial protection of the legal equality of women, even as it has developed to this point.”). As one scholar commented concerning this uncertainty, “[a]n increasingly conservative Supreme Court has most recently started cutting back even at the heightened intermediate scrutiny standard, applying it in a way which four dissenting justices in *Nguyen v. INS* called ‘a stranger to our precedents.’” Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 WM. & MARY J. WOMEN & L. 459, 482 (2004).

*Women*.<sup>22</sup> Written while the ERA was being actively debated in Congress, the article set out a framework for legal analysis of sex discrimination under the proposed Constitutional amendment. Far from sitting on a dusty shelf with other academic writings, *Equal Rights for Women* became a key part of both the Congressional and public ERA debate and was incorporated into the Congressional Record as part of the federal ERA's legislative history.<sup>23</sup>

*Equal Rights for Women* began with the premise that discrimination against women in American society is "deep and pervasive."<sup>24</sup> Examining the legal structure sanctioned by the common law and the Constitution, the authors rejected the claim that women's legal equality can be attained through expansive jurisprudence under the Equal Protection Clauses of the Fifth and Fourteenth Amendments or through piecemeal reform. Instead, they concluded that a new federal constitutional amendment, the ERA, was needed.<sup>25</sup> The basic principle of the ERA, they stated, was that "sex is not a permissible factor in determining the legal rights of women, or of men."<sup>26</sup> Focusing on specific applications of the ERA, the article asserted that "[t]his principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex."<sup>27</sup> Moreover, the authors went further than current race discrimination jurisprudence, which rejects a disparate impact theory under the Constitution, and argued that strict review of "indirect, covert or unconscious sex discrimination is essential to supplement [this] absolute ban."<sup>28</sup> They rejected separate-but-equal

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<sup>22</sup> Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter Brown et al., *Equal Rights for Women*].

<sup>23</sup> 118 CONG. REC. 9517, 9517-22 (1972).

<sup>24</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 872.

<sup>25</sup> *Id.* at 884-86. This conclusion was not uncontroversial, and there was considerable progressive support for a Fourteenth Amendment strategy. See generally Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004) (expanding on the reasoning behind three different approaches to expanding rights for women with respect to the ERA and the Fourteenth Amendment).

<sup>26</sup> *Id.* at 889.

<sup>27</sup> *Id.* at 893.

<sup>28</sup> *Id.* at 900. Writing before the Supreme Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Massachusetts v. Feeney*, 429 U.S. 66 (1976), the authors may not have anticipated that such a disparate impact analysis would be rejected under the Equal Protection Clause.

doctrines, but noted that this may be modified by privacy concerns and limited by the ERA requirement of state action.<sup>29</sup> Affirmative action measures, they speculated, would be available in certain narrow remedial circumstances, consistent with absolute scrutiny.<sup>30</sup> Finally, the authors reviewed the specific impacts of these heightened constitutional equality principles in four areas affecting women—protective labor legislation, domestic relations law, criminal law, and the military—concluding in each case that an ERA would have significant effects on the law.<sup>31</sup>

*Equal Rights for Women* included a number of clear-eyed predictions of how the ERA would be applied. For example, the authors observed that “[t]he Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex,”<sup>32</sup> leaving “couples free to allocate privileges and responsibilities between themselves according to their own individual preferences and capacities.”<sup>33</sup> In the criminal justice arena, the authors noted that the ERA “would require invalidation of laws specially designed to protect women [but which do not equally protect men] from being forced into prostitution.”<sup>34</sup> Likewise, the authors averred that sex discrimination in military registration and assignment, as well as access to the military academies, “will have to be brought into conformity with the [ERA’s] basic prohibition of sex discrimination.”<sup>35</sup> As discussed in greater detail below, some of these predictions have been confirmed under state ERAs. However, a number of these anticipated effects have not come to fruition, but not because of any flaw in the authors’ legal analysis. Rather, the authors, writing in an era with a growing women’s movement and receptive courts, underestimated the relative stasis of more recent decades and the compromises that pro-ERA advocates would make in an effort to maximize the ERA’s support in a more hostile environment.

On March 22, 1972, within a year of *Equal Rights for Women’s* publication, Congress passed the ERA by an overwhelming majority. States

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<sup>29</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 902-03.

<sup>30</sup> *Id.* at 904.

<sup>31</sup> *Id.* at 920-78.

<sup>32</sup> *Id.* at 945.

<sup>33</sup> *Id.* at 953-54.

<sup>34</sup> *Id.* at 964.

<sup>35</sup> *Id.* at 969.

rapidly proceeded to ratify it. Indeed, within a few years, thirty-five states had approved the constitutional amendment.<sup>36</sup> In public opinion polls, a majority of adult Americans said they supported the ERA.<sup>37</sup> As Barbara Brown and her co-authors had observed in 1971, describing the women's movement, "there has come a reawakening and a widespread demand for change."<sup>38</sup>

Yet, the ERA stalled.<sup>39</sup> In her book, *Why We Lost the ERA*, Jane Mansbridge noted that support for the ERA's overarching principle of sex equality remained strong, but ERA opponents like Phyllis Schlafly succeeded in undermining that support by raising the public's concern about the amendment's effects, particularly on the military, marriage, and privacy.<sup>40</sup> Among other things, anti-feminist forces were galvanized by the Supreme Court's 1973 ruling in *Roe v. Wade*, channeling their energy in an effort to defeat the ERA.<sup>41</sup> By June 30, 1982—the extended deadline for state ratification—the count remained at thirty-five, three states short of the necessary three-fourths majority. The amendment failed.

Phyllis Schlafly emerged as a leading opponent of the ERA in the early 1970s.<sup>42</sup> Her organization, STOP ERA (STOP stands for "Stop Taking Our Privileges"), was the central organization opposing the amendment.<sup>43</sup> As Professor Reva Siegel recently observed, Schlafly's "success in mobilizing opposition to the ERA forced the women's movement to take account of her, in ways that shaped its constitutional advocacy for decades."<sup>44</sup> Schlafly "linked together the ERA, abortion, and homosexuality

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<sup>36</sup> See Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 116 (1997).

<sup>37</sup> MANSBRIDGE, *supra* note 1, at 17.

<sup>38</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 872.

<sup>39</sup> See generally MANSBRIDGE, *supra* note 1, at 29, 104. See also Janet K. Boles, *Building Support for the ERA: A Case of "Too Much, Too Late"*, 15 PS 572 (1982).

<sup>40</sup> See MANSBRIDGE, *supra* note 1.

<sup>41</sup> See Mayeri, *supra* note 25.

<sup>42</sup> Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1389-93 (2006).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1390.



in ways that changed the meaning of each, and mobilized a grassroots, 'profamily constituency' to oppose this unholy trinity."<sup>45</sup>

Decades later, Schlafly still cites *Equal Rights for Women* in her speeches and writings opposing the ERA.<sup>46</sup> The anti-ERA arguments of Schlafly and other ERA opponents often focus on expanded roles for women in the military—a claim that *Equal Rights for Women* supports. But Schlafly charges that "[w]e witnessed the ultimate asininity of this 'equality' notion during the Gulf War, when the United States Armed Services shipped into combat tearful breastfeeding mothers of infants only six or seven weeks old."<sup>47</sup> Schlafly also continues to decry the potential impact of the ERA on marriage and male-female relations.<sup>48</sup> ERA advocates, she claims, want "to use the power of the U.S. Constitution to force us into a gender neutral society," in ways that are "contrary to our culture."<sup>49</sup>

Almost forty years after *Equality for Women*'s publication, it seems clear that both Schlafly's claims about the ERA's potential deleterious effects and the authors' assertions about its ability to "transform[] our legal system"<sup>50</sup> are wide of the mark. Among other things, in the intervening years, ERA supporters have significantly scaled back their claims about the ERA's impact in order to make it more legislatively palatable. At the same time, sex discrimination—though alive and well in both the public and private sectors—has become less overt and less susceptible to constitutional challenge, also diminishing the ERA's immediate and direct significance. Yet, as described below, there is still considerable support for the ERA and still an important role for the ERA to play, both directly and indirectly, in protecting women's equality.

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<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Phyllis Schlafly, *Defending Domestic Tranquility from Feminism's Assault on Marriage and Motherhood*, 2 TEX. REV. L. & POL. 293 (1998) (reviewing F. CAROLYN GRAGLIA, *DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM* (1998)).

<sup>47</sup> *Id.* at 300.

<sup>48</sup> Schlafly has stated that the ERA is "a direct attack on traditional social security benefits to the dependent wife in recognition of her role as full-time homemaker." Audio file: *Amending State & Federal Constitutions to Prohibit Sex Discrimination*, presented at the 2007 Annual National Lawyers Convention (Nov. 17, 2007), available at <http://fedsoc.server326.com/audio/2007lawcon/CivilRights-11-17-07.mp3>.

<sup>49</sup> *Id.*

<sup>50</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 979.

## II. WHO SUPPORTS THE ERA?

Despite the ERA's defeat, the concept of equality based on sex continues to enjoy overwhelming support. A 2001 poll conducted by the well-respected Opinion Research Corporation indicated that ninety-six percent of Americans believe that women and men should have equal rights.<sup>51</sup>

Of course, believing in equal rights is different from supporting the ERA. But this same 2001 poll also showed that eighty-eight percent of Americans want the ERA adopted into the U.S. Constitution. In fact, seventy-two percent of respondents thought it was already there!<sup>52</sup> Interestingly, a smaller poll commissioned by Representative Carolyn Maloney in 2002 found similarly strong support for the ERA, with sixty-nine percent of those polled (including fifty-eight percent of those who identified as Republicans) supporting a constitutional amendment including language that provides specific legal protection for women's rights.<sup>53</sup>

These poll results present a challenge for both proponents and opponents of the ERA. ERA supporters must show why the ERA is still needed when most Americans apparently don't realize that it is not already the law. Opponents, on the other hand, must buck the overwhelming support for gender equality.

As a strategic matter, rather than argue head-on against sex equality, ERA opponents continue to focus on specific implementation issues, such as co-ed bathrooms and military combat, where support for sex equality is more equivocal.<sup>54</sup> But these issues had much greater purchase in

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<sup>51</sup> The survey was based on telephone interviews of a national probability sample of 500 men and 502 women, over age eighteen, living in the continental United States. ERA Campaign Network, *Nationwide Study Shows that Americans Want a Constitutional Guarantee of Equal Rights for Women*, <http://www.eracampaign.net/survey.html> (last visited Mar. 17, 2008).

<sup>52</sup> *Id.*

<sup>53</sup> Chris Lombardi, *Women's Equality Day Poll Finds Support for ERA*, WOMEN'S E-NEWS, July 12, 2003, <http://www.womensenews.org/article.cfm/dyn/aid/1018/> (last visited May 26, 2008).

<sup>54</sup> In retrospect, it is not surprising that the majority of audience questions at the Federalist Society panel focused on co-ed bathrooms and women in the military. Indeed, when one questioner finally asked an open-ended question about the constitutional treatment of pregnancy discrimination, my co-panelists, Phyllis Schlafly and Gail Heriot, professed unfamiliarity with the Supreme Court's rulings, such as *Geduldig v. Aiello*, 417 U.S. 484 (1974), that would exclude pregnancy discrimination from the scope of the Equal Protection

the 1970s than they do today, in an era of government-sanctioned gender-neutral bathrooms<sup>55</sup> and women serving in quasi-combat roles with the blessing of the military establishment.<sup>56</sup> Indeed, the most recent polling on the subject of women in the military found that fifty-five percent of those surveyed favored changing the law to permit women to serve in ground combat positions on the same terms as men, with only forty percent opposing such a change.<sup>57</sup> While ERA proponents will still bear the burden of making a positive case in support of the amendment, it seems unlikely *these* arguments will derail it, particularly since this parade of horrors has not materialized in the many states that have implemented their own state ERAs in the past forty years.

### III. THE ERA'S IMPACT—EVIDENCE FROM THE STATES

#### A. Background on the Development of Current Federal Standards

In 1971, *Equal Rights for Women* concluded that “without a constitutional mandate, women’s status will never be accorded the special concern which race now receives because of the history of the Fourteenth Amendment.”<sup>58</sup>

A constitutional equality amendment was the women’s movement’s first strategy after women attained the franchise; the original ERA was initially unveiled in 1923, only three years after ratification of the Nineteenth Amendment gave women the right to vote in federal elections.<sup>59</sup> Over the next five decades, the amendment was introduced before each session of Congress. In most years, it never reached the full Senate. But in

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Clause. Their refusal to comment effectively took the question off the table and ensured that the focus of the conversation remained on a narrow set of issues.

<sup>55</sup> See Brett-Genny Janiczek Beemyn, Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students, <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Mar. 17, 2008) (listing several state schools, including Ohio University, UCLA, University of California, Santa Barbara, and Washington State University, that provide gender-neutral bathrooms).

<sup>56</sup> Ann Scott Tyson, *For Female GIs, Combat is a Fact: Many Duties in Iraq Put Women at Risk Despite Restrictive Policy*, WASH. POST, May 13, 2005, at A1.

<sup>57</sup> WNBC.com, Exclusive WNBC/Marist Polls: Role of Women in the Military, <http://www.wnbc.com/womenincombat/13314641/detail.html> (last visited Mar. 17, 2008).

<sup>58</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 885.

<sup>59</sup> See AlicePaul.org, *supra* note 19.

1946, after debate on the Senate floor, the ERA commanded a majority of votes, though less than the requisite two-thirds for a constitutional amendment. In 1950 and 1953, the Senate passed the ERA with a rider that nullified its equal protection aspects.

The second wave of the women's movement took hold in the 1960s, and by the 1970s, the ERA ratification campaign was in full swing. At the same time, however, in arguments made by now-Justice Ruth Bader Ginsburg, then of the ACLU Women's Rights Project,<sup>60</sup> the federal courts were being asked to consider whether government-sponsored sex discrimination might violate the Constitution's Equal Protection Clause and, if so, what standards should apply for evaluating the discrimination.<sup>61</sup>

For a time, it appeared that the Fifth and Fourteenth Amendments might be expanded to fully address sex discrimination. But after some false starts, the Supreme Court ultimately answered that sex-based classifications qualified for intermediate scrutiny under the Equal Protection Clause in the 1976 decision of *Craig v. Boren*.<sup>62</sup> This level of review is not as searching as that accorded race discrimination, but more rigorous than that given classifications based on, for example, poverty or age, which are upheld if they are merely rationally related to a legitimate governmental purpose.<sup>63</sup> Under intermediate scrutiny, the government must prove that sex-based classifications are "substantially related" to "important" governmental objectives.<sup>64</sup> Courts applying this standard have required a less-than-perfect fit between governmental ends and means, at times sustaining classifications based on broad sex-based generalizations. For example, in *Kahn v. Shevin*, the Supreme Court upheld a Florida statute providing a property tax exemption for widows but not for widowers, reasoning that widows generally faced greater financial difficulties than widowers.<sup>65</sup>

This differs from the more skeptical strict scrutiny standard, which requires that race-based classifications be "narrowly tailored" to achieve a

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<sup>60</sup> See Deborah A. Widess et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 485 n.101 (2007).

<sup>61</sup> See generally SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 166 (1990).

<sup>62</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 197; *United States v. Virginia*, 518 U.S. 515, 524 (1996).

<sup>65</sup> *Kahn v. Shevin*, 416 U.S. 351, 353-56 (1974).

“compelling” governmental end.<sup>66</sup> This standard requires a near-perfect fit between governmental ends and means in order to sustain the classifications. For example, in the context of employment, the Supreme Court has indicated that it would uphold a race-based affirmative action program only if it were narrowly targeted to respond to specific evidence of historic racial discrimination.<sup>67</sup> Generalized evidence of discrimination is not sufficient.

The intermediate scrutiny standard for sex-based classifications under the Equal Protection Clause has been applied repeatedly and is increasingly viewed as a settled question. Recent efforts to further raise the standard to strict scrutiny, or even to treat that possibility as an open question, have not taken root.<sup>68</sup>

Though it is a lower standard than that applied to race discrimination, intermediate scrutiny has had a significant impact on the incidence of sex-based classifications. Indeed, some scholars have referred to this equal protection analysis as a “de facto ERA”—a phrase that simultaneously acknowledges the great significance of this jurisprudence while also overstating its impact.<sup>69</sup> “Intermediate scrutiny” is not the equivalent of an ERA, but a number of sex-based classifications have nevertheless been struck down under the standard, including the exclusion of men from a public nursing school (*Mississippi v. Hogan*);<sup>70</sup> the use of sex

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<sup>66</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* (*Parents Involved*), 127 S. Ct. 2738 (2007).

<sup>67</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In the area of education, educational diversity is also a permissible rationale, though it must also be narrowly applied to avoid limiting individual opportunities based on the single factor of race. *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>68</sup> See *Harris v. Forklift Systems*, 510 U.S. 17, 26 (1993) (Ginsburg, J., concurring) (“Indeed, even under the Court’s equal protection jurisprudence, which requires ‘an exceedingly persuasive justification’ for a gender-based classification, it remains an open question whether ‘classifications based upon gender are inherently suspect.’” (citations omitted)); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 137 n.6 (1994) (“Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect.”). But see Kevin N. Rolando, Note & Comment, *A Decade Later: United States v. Virginia and the Rise and Fall of “Skeptical Scrutiny”*, 12 ROGER WILLIAMS U. L. REV. 182 (2006) (arguing that for the current Supreme Court, “skeptical scrutiny” no longer exists).

<sup>69</sup> See Siegel, *supra* note 42.

<sup>70</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

as a ground for striking potential jurors (*J.E.B. v. Alabama ex rel. T.B.*);<sup>71</sup> and the exclusion of women from a state-sponsored military academy (*United States v. Virginia*).<sup>72</sup> Most recently, in *Nevada Department of Human Resources v. Hibbs*, the Equal Protection Clause served as the basis for sustaining Congressional authority to enact the Family and Medical Leave Act.<sup>73</sup> Perhaps it is because of these wide-ranging decisions that so many Americans believe that our Constitution already includes an ERA.

Given these results under the Equal Protection Clause, what would change if the ERA were enacted? In 1971, the *Equal Rights for Women* authors had to speculate; there was simply no ERA case law to draw on. Nearly forty years later, however, we now have evidence of the ERA's likely impact. Our federal system provides some concrete answers, since twenty-two states have adopted versions of the Equal Rights Amendment in their own state constitutions.<sup>74</sup> State governments, including state courts, have been implementing these ERAs for more than a generation—and in some cases, more than a century.<sup>75</sup> While the federal ERA will have its own unique meaning, defined by its own legislative history, these state examples give us some real data about the impact of a federal ERA.

## B. Higher Scrutiny of Sex-Based Classifications

First, a federal ERA would almost certainly result in a higher level of constitutional scrutiny for sex-based classifications than the current intermediate scrutiny applied under the federal Equal Protection Clause. *Equal Rights for Women* argued in 1971 that the ERA's "constitutional mandate must be absolute,"<sup>76</sup> rejecting the "suspect classification" analysis

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<sup>71</sup> *J.E.B.*, 511 U.S. 127.

<sup>72</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>73</sup> *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003); see Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006) (discussing *Hibbs* as an equal protection case).

<sup>74</sup> Wharton, *supra* note 20, at 1288 (listing state ERAs).

<sup>75</sup> Many state ERAs were enacted in conjunction with the states' consideration of the federal ERA in the 1970s, but some, like Wyoming's and Utah's sex equality provisions, were included in those states' original constitutions. Some others, like Florida's 1998 amendment adding an explicit mention of "sex" to its constitution's equal protection provision, are more recent. See generally Jeffrey M. Shaman, *The Evolution of Equality in Constitutional Law*, 34 RUTGERS L.J. 1013, 1014 (2004).

<sup>76</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 892.

of race that was already well established at the time. According to the authors, “absolute scrutiny” is dictated by the facial meaning of the federal ERA’s text: “Equality of rights means that sex is not a factor.”<sup>77</sup>

The State of Washington has adopted the absolute scrutiny test under its own state ERA, and has developed a workable analysis of how such a test should be applied.<sup>78</sup> Under Washington’s approach, “discrimination on account of sex is forbidden,” with exceptions only for (1) actual characteristics that distinguish between the sexes; and (2) affirmative action programs designed to alleviate the effects of past discrimination.<sup>79</sup> Under this absolute standard, Washington courts do not engage in the means-ends analysis typical of heightened scrutiny but simply forbid all reliance on sex-based classifications outside of narrowly defined exceptions.<sup>80</sup>

Other states such as Maryland<sup>81</sup> entertained an absolute standard of review for sex-based classifications under their state ERAs. However, perhaps because of their judges’ desires to retain more discretion than was available under absolute scrutiny, or because of the influence of the federal approach to heightened scrutiny, these states have abandoned such a stringent test.<sup>82</sup> Instead, the ERA practice developed by most states suggests that a federal ERA would be construed to require that sex-based classifications meet the strict scrutiny standard.<sup>83</sup> In theory, this is a lower standard than the absolute scrutiny advocated in *Equal Rights for Women*. In practice, because of the exceptions incorporated into the absolute standard, the difference between absolute and strict scrutiny is not great.

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<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.,* *Guard v. Jackson*, 940 P.2d 642 (Wash. 1997) (en banc).

<sup>79</sup> *Id.* at 643-44.

<sup>80</sup> *Id.*

<sup>81</sup> *Rand v. Rand*, 374 A.2d 900, 903-05 (Md. 1977) (following Washington State’s embrace of the “overriding compelling state interest” test, which is higher than strict scrutiny).

<sup>82</sup> *See Conaway v. Deane*, 932 A.2d 571, 680 (Md. 2007).

<sup>83</sup> *See, e.g.,* *Opinion of the Justices to the House of Representatives*, 371 N.E.2d 426 (Mass. 1977) (applying strict scrutiny to invalidate exclusion of girls from state-sanctioned contact sports); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974) (applying strict scrutiny to invalidate statute that permitted seventeen-year-old boys to be charged as adults but precluded like treatment of seventeen-year-old girls).

Most states have adopted the strict scrutiny approach. A recent survey by Linda Wharton of cases brought under state ERAs found that a heightened level of scrutiny for sex-based classifications was a common thread between the states. According to Wharton, "a critical difference between state ERA jurisprudence and federal precedent is the higher standard of review applied to claims of sex discrimination" under state law.<sup>84</sup> Lisa Baldez, Lee Epstein, and Andrew D. Marin reached the same conclusion in another recent study.<sup>85</sup> Examining all constitutional sex discrimination cases decided by state supreme courts between 1960 and 1999, the authors set out to empirically assess the impact that the presence or absence of an ERA had on the standards used to evaluate sex discrimination claims and on case outcomes. While a number of other important variables were detected, including the number of women on the bench, the authors concluded that "[u]nder every possible scenario . . . courts in states with an ERA are more likely to adopt strict scrutiny than those operating in states lacking the amendment."<sup>86</sup>

However, states are not uniform, and because of their unique histories, not every state with an ERA has adopted strict scrutiny or absolute scrutiny.<sup>87</sup> A few follow federal equal protection law in construing their ERAs and apply intermediate scrutiny.<sup>88</sup> Virginia courts, for example, have held that the state's ERA is no broader than the federal equal protection clause.<sup>89</sup>

The majority of state courts, however, have found that a central reason that their ERA was enacted was to treat sex discrimination with at least the same degree of skepticism as racial discrimination, requiring a higher level of review than intermediate scrutiny.<sup>90</sup>

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<sup>84</sup> Wharton, *supra* note 20, at 1240.

<sup>85</sup> Baldez et al., *supra* note 13, at 271.

<sup>86</sup> *Id.*

<sup>87</sup> *See* Rand v. Rand, 374 A.2d 900, 903-04 (Md. 1977).

<sup>88</sup> Wharton, *supra* note 20, at 1241; *see also* Estate of Scheller v. Pessetto, 783 P.2d 70, 76-77 (Utah Ct. App. 1989) (applying an intermediate standard of review).

<sup>89</sup> Archer v. Mayes, 194 S.E.2d 707, 711 (Va. 1973).

<sup>90</sup> Wharton, *supra* note 20, at 1241. *See generally* Murphy v. Edmonds, 601 A.2d 102, 109 n.7 (Md. 1992); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974); People v. Lann, 633 N.E.2d 938, 951 (Ill. App. Ct. 1994).



A federal ERA would likely receive a similar construction. The U.S. Supreme Court has not had occasion to rule directly on the applicable standard under a federal ERA. However, in dicta, four Justices suggested that the ERA would mandate strict scrutiny for sex-based classifications. The case, *Frontiero v. Richardson*, concerned a federal law that made it more difficult for servicewomen than servicemen to claim their spouses as dependents for purposes of calculating medical benefits and other support.<sup>91</sup> The Court's plurality opinion, written by Justice Brennan but signed by only three other Justices, concluded that the sex-based law should be struck down under the Fourteenth Amendment and applied strict scrutiny comparable to that used to review racial classifications. A fifth vote for this result came from Justice Stewart, but he found the law to be irrational under the lowest standard of review.<sup>92</sup> Justice Powell, joined by Justice Blackmun and Chief Justice Burger, concurred in the result but urged judicial forbearance in extending the strict scrutiny standard to sex-based classifications. The issue should be deferred, Justice Powell wrote, because the "Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution."<sup>93</sup>

There is much to recommend the application of strict scrutiny to sex-based classifications. As even conservative jurists have agreed, intermediate scrutiny is a confusing and ill-defined standard, with some very subjective elements.<sup>94</sup> For example, the question of whether a governmental end is "important" is subject to considerable uncertainty.

A classic example of judicial uncertainty on the application of the intermediate scrutiny standard occurred when the Supreme Court considered the differential treatment of fathers and mothers who seek to sponsor their foreign-born, out-of-wedlock children for citizenship. In

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<sup>91</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>92</sup> *Id.* In *The Brethren*, the authors report that Justice Stewart believed that the ERA would be ratified, but, in the absence of that constitutional amendment, he cast his vote for rational basis review. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 255 (1979).

<sup>93</sup> *Frontiero*, 411 U.S. at 692. At the time Justice Powell wrote, there was every indication that the ERA would garner sufficient support in the states. H.R.J. Res. 208, 92nd Cong. (2d Sess. 1972). See also MANSBRIDGE, *supra* note 1, at 20.

<sup>94</sup> *Craig v. Boren*, 429 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting).

*Miller v. Albright*,<sup>95</sup> Justice Kennedy joined a concurring opinion authored by Justice O'Connor which indicated in dicta that the sex-based classification at issue would not likely pass muster under intermediate scrutiny. Indeed, the two justices noted, "It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny."<sup>96</sup>

Because the Court splintered in *Miller*, there was no precedent on the merits. Three years later, in *Nguyen v. INS*, the identical constitutional issue came before the Court again.<sup>97</sup> This time, Justice Kennedy authored a majority opinion upholding the same sex-based classification under the intermediate scrutiny test. Departing from his prior dicta, he concluded that the statutory scheme was not based on stereotypes, but on real differences between men and women "in relation to the birth process."<sup>98</sup> Yet the *Nguyen* case itself, brought by a father who raised his child from an early age, made clear that any assertion regarding men's and women's different parental capacities and roles was based on generalizations. Further, Justice Kennedy accepted, post hoc, contemporary rationales advanced by the government to justify the law,<sup>99</sup> when the statute actually originated in the ancient notion that fathers have no responsibility for their non-marital offspring.<sup>100</sup> Such after-the-fact rationales are generally not cognizable under intermediate scrutiny.<sup>101</sup> Adhering to her original position, Justice O'Connor registered a vehement dissent, writing that "[n]o one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications."<sup>102</sup> A number of prominent constitutional scholars have agreed with Justice O'Connor.<sup>103</sup>

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<sup>95</sup> *Miller v. Albright*, 523 U.S. 420 (1998).

<sup>96</sup> *Id.* at 452.

<sup>97</sup> *Nguyen v. INS*, 533 U.S. 53 (2001).

<sup>98</sup> *Id.* at 73.

<sup>99</sup> *See Nguyen*, 533 U.S. at 60-64.

<sup>100</sup> *See Miller*, 523 U.S. at 460-71.

<sup>101</sup> *See id.* at 75 (O'Connor, J., dissenting).

<sup>102</sup> *Id.* at 97.

<sup>103</sup> As Laura Weinrib wrote in 2003, "[t]o date, there have been markedly few academic defenses of the Court's decision in *Nguyen* and of the similar arguments in *Miller*. Rather, camps that agree on little else have come together to criticize the majority opinion as sexist, narrow-minded, and patently conservative." Laura Weinrib, *Protecting Sex: Sexual*

In contrast to this unpredictability—with the same Justice analyzing the same issue differently with a lapse of only a few years—subjecting sex discrimination to strict scrutiny would provide consistency across identity-based classifications such as race and sex, providing more guidance for both lower courts and policymakers.

Further, strict scrutiny provides for less judicial discretion because there are fewer circumstances where discrimination can be justified in the face of such scrutiny. Again, empirical studies demonstrate that outcomes of cases subject to strict scrutiny are far more predictable and within a narrower range of possible outcomes. According to one study, under strict scrutiny, a claimant alleging discrimination has a seventy-three percent probability of success, while under intermediate scrutiny, a litigant will prevail only forty-seven percent of the time.<sup>104</sup> The study's authors also concluded that the indeterminacy of the intermediate scrutiny standard of review left considerable room for ideological impact, finding that “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.”<sup>105</sup>

For those concerned about unfettered exercises of judicial discretion, then, strict scrutiny is a preferable standard. Given the apparently settled nature of intermediate scrutiny of sex-based classifications—jurisprudence which itself is built on an expansive judicial interpretation of the clause's text to encompass sex—ratification of a federal ERA appears necessary to achieve strict scrutiny of sex discrimination. The evidence from states' adoption and implementation of strict scrutiny under their ERAs demonstrates that this higher level of scrutiny is entirely workable.

### C. Tailoring Strict Scrutiny to Sex Discrimination

State ERAs also teach us that even though both sex-based and race-based classifications would be subject to strict scrutiny if there were a federal ERA, there would still be distinctions in how the ERA would treat (1) physical characteristics unique to one sex and (2) issues of privacy.

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*Disincentives and Sex-based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 224 (2003).

<sup>104</sup> See Lee Epstein, Andrew D. Martin, Lisa Baldez & Tasina Nitzschke Nihiser, *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL'Y 11, 49 (2004).

<sup>105</sup> *Id.*

These exceptions to the ERA's otherwise strict review encompass two purported impacts of an ERA that are frequently cited by opponents as reasons to oppose its ratification: liberalized access to abortion and co-ed bathrooms. As discussed below, however, the state ERAs provide minimal support for the ERA opponents' arguments.

### 1. Physical Characteristics Unique to One Sex

*Equal Rights for Women* anticipated that unique physical characteristics might be the subject of sex-specific legislation, and argued that such laws would pass muster under the proposed ERA.<sup>106</sup> For example, the authors identified hypothetical laws regulating wet nurses or sperm donations, which would be permissible because they deal "only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women."<sup>107</sup> The authors cautioned that this exception should be construed narrowly to extend only to physical characteristics, not "psychological, social or other" perceived characteristics based on sex.<sup>108</sup> They also observed that "[i]nstances of laws directly concerned with physical differences found only in one sex are relatively rare."<sup>109</sup> The article listed as examples laws establishing medical leave for childbearing (but not childrearing), laws punishing forcible rape, and legislation relating to paternity establishment.<sup>110</sup>

Many state courts have invoked this "unique physical characteristics" exception in construing their ERAs, but not all applications of the principle have adhered to the narrow parameters outlined in *Equal Rights for Women*.<sup>111</sup> For example, a Pennsylvania court upheld prison

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<sup>106</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 893.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 894.

<sup>110</sup> *Id.*

<sup>111</sup> See *Seattle v. Buchanan*, 584 P.2d 918 (Wash. 1978) (asserting that common knowledge tells us there is a real difference between the sexes with respect to breasts and upholding conviction for public exposure of female breasts in face of a challenge under the state's equal rights amendment). But see Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273 (2005) (critiquing the "unique physical differences" exception to ERA).

regulations restricting only males' hair length as permissible differential treatment of men and women under the state's ERA, even though hair length is not a uniquely sex-based characteristic.<sup>112</sup> However, some states have narrowed the exception, adding an additional element to the inquiry. Rather than accept sex-based laws addressing unique physical characteristics at face value, these courts also assess whether such laws have a negative impact on women. If so, they may still run afoul of the ERA, even if they regulate based on real and unique physical differences between the sexes. For example, in *City of Albuquerque v. Sachs*, the New Mexico Court of Appeals upheld a city ordinance that prohibited a woman from showing her breasts in a public place when there was no such prohibition on men.<sup>113</sup> Applying a "searching judicial inquiry," the court applied a two-part test, first inquiring whether the regulation distinguished between males and females on the basis of unique physical characteristics attributable to each, and second, assessing whether the classification operated to the disadvantage of women.<sup>114</sup>

As to the first question, the court cited the similar conclusions of many state courts around the country to determine that, under New Mexico law, women's breasts and men's breasts are unique and distinctive, not only physiologically but also socially.<sup>115</sup> As to the second question, the court noted that if the classification nevertheless operated to women's disadvantage, it might be disallowed under the strict provisions of the New Mexico ERA. However, the court concluded that there was no disadvantage to women arising from laws that ban exposure of female, but not male, breasts.<sup>116</sup>

The second part of the New Mexico court's two-part test is critical to the ERA's efficacy in addressing sex discrimination. Construed too broadly, the ERA's exception for unique physical characteristics could undermine the law's ameliorative impact, since those characteristics might themselves form the basis of the discrimination. For example, a state might promulgate a policy under its ERA of offering breastfeeding rooms in state

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<sup>112</sup> *Wise v. Commonwealth*, 690 A.2d 846 (Pa. Commw. Ct. 1997).

<sup>113</sup> *City of Albuquerque v. Sachs*, 92 P.3d 24 (N.M. 2004). This case is included here not to endorse its outcome, which is a debatable application of the "unique physical characteristics" exception, but to illustrate the two-step review process adopted by the court.

<sup>114</sup> *Id.* at 27-29.

<sup>115</sup> *Id.* at 27-28.

<sup>116</sup> *Id.* at 28.

facilities to women only, because only women breastfeed. Such a policy would comport with New Mexico's two-part test as a classification based on a unique physical characteristic that does not disadvantage women. But suppose the state promulgated a policy of refusing to hire currently breastfeeding women for government jobs. This policy classifies people based on the same unique physical characteristic, breastfeeding. However, it clearly disadvantages women and, under the second part of the two-step test, would run afoul of the state's ERA.

State courts construing state ERAs have generally recognized that when unique physical characteristics are used to disadvantage women, the ERA's purpose is compromised. In taking this view, state courts have rejected the approach taken by the U.S. Supreme Court under the Equal Protection Clause in *Geduldig v. Aiello*<sup>117</sup> and reiterated in subsequent opinions such as *Bray v. Alexandria Women's Health Clinic*.<sup>118</sup> In *Geduldig* and *Bray*, the Supreme Court notoriously concluded that discrimination against pregnant people was gender neutral—it did not constitute sex discrimination. These rulings give governments free reign to use pregnancy-based classifications as a basis for discrimination against women without violating the federal equal protection clause.

Congress rejected the Supreme Court's approach for purposes of Title VII when it enacted the Pregnancy Discrimination Act, but it is beyond Congress's power to undo the Supreme Court's equal protection jurisprudence. *Equal Rights for Women* was published three years before *Geduldig* was decided, so it does not address the issue. State courts construing their state ERAs have, however, indicated that state ERAs should be construed to recognize that discrimination based on a unique sex-based physical characteristic violates the law.<sup>119</sup> Based on this state ERA evidence, we can fairly expect that a federal ERA would have the effect of doing away with the much-criticized and harmful *Geduldig* principle. This is not simply a symbolic change, but would expand women's rights in a number of concrete respects. For example, policies involving civil commitment of pregnant women for alcohol or drug abuse would be more likely to receive heightened scrutiny review in *Geduldig*'s absence.<sup>120</sup>

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<sup>117</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>118</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

<sup>119</sup> See, e.g., *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988) (en banc) (rejecting analysis in *Geduldig* in light of state ERA).

<sup>120</sup> See Erin N. Linder, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873, 893-95

Abortion is one of the unique sex-based characteristics that comes within the ambit of the ERA, yet *Equal Rights for Women* is silent on the issue of abortion.<sup>121</sup> This effort to distance the ERA from the abortion debate was a strategic decision by many ERA supporters in the 1970s and '80s.<sup>122</sup> Current ERA advocates have also sought to minimize the issue.<sup>123</sup>

Judges, however, do not have that option when cases come before them. A number of state courts have reviewed abortion regulations through the lens of their state ERAs. Because *Roe v. Wade* set a federal floor for abortion rights under the Constitution's Due Process Clause in 1973,<sup>124</sup> state ERAs have not been called upon to establish a fundamental right to abortion.<sup>125</sup> However, abortion funding remains an issue of state concern

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(attempting to distinguish *Geduldig*); see Wharton, *supra* note 20, at 1283 ("Cases extending protection to women discriminated against on the basis of pregnancy and reproductive capacity . . . are hardly 'symbolic' advancements in the law.").

<sup>121</sup> Brown et al., *Equal Rights for Women*, *supra* note 22. See also U.S. COMM'N ON CIVIL RIGHTS, THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION (1981) (explaining and supporting the ERA without mentioning abortion or pregnancy).

<sup>122</sup> See Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (criticizing ERA supporters' attempts to separate abortion from the ERA). Professor Law cites the statements of Sen. DeConcini (D. Ariz.) as an example:

I strongly support and am a co-sponsor of the Equal Rights Amendment. I also strongly support pro-life legislation, and have done so throughout my career in the Senate. In my mind, there is no connection whatsoever between the ERA and abortion. I further believe that no such connection could or should be made here.

*Id.* at 1038 n.282 (citing *The Impact of the Equal Rights Amendment upon Abortion Rights: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong., 2d Sess. 65 (1984)).

<sup>123</sup> See, e.g., EqualRightsAmendment.org, Frequently Asked Questions, <http://www.equalrightsamendment.org/faq.htm> (last visited Mar. 17, 2008); Jim Abrams, *Uphill Fight Forecast for Equal Rights Amendment: Support Reduced in House, Senate*, BOSTON GLOBE, Apr. 4, 2007, [http://www.boston.com/news/nation/washington/articles/2007/04/04/uphill\\_fight\\_forecast\\_for\\_equal\\_rights\\_amendment](http://www.boston.com/news/nation/washington/articles/2007/04/04/uphill_fight_forecast_for_equal_rights_amendment) (paraphrasing Rep. Carolyn Maloney, stating that "[i]t's an equal rights issue and has nothing to do with abortion").

<sup>124</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>125</sup> See, e.g., *Doe v. Maher*, 515 A.2d 134, 135 (Conn Super. Ct. 1986) (noting that the case "is not 'a referendum on the morality of abortion' . . . and it does not attempt 'to determine when life begins or at what point a fetus is a person'").

and, as Professor Jeffrey Shaman has observed, “the states are seriously divided in regard to the constitutionality of laws that exclude abortion from subsidized health care services.”<sup>126</sup> While some state court rulings suggest that a federal ERA might open federal abortion restrictions—particularly funding restrictions—to a strict equality review, ERA proponents’ historic lack of enthusiasm about this aspect of the ERA will certainly be a factor in how a federal court will ultimately construe it.

State ERAs have been invoked, both successfully and unsuccessfully, to support government funding of abortions for low income women. Some states with ERAs, notably Connecticut and New Mexico, have applied a strict equality analysis to hold that their constitutions require state funding of medically necessary abortions for low income women.<sup>127</sup> Other states with their own ERAs, like Pennsylvania, Florida, and Texas, have not required such state funding.<sup>128</sup> Further, some states, like New Jersey and Massachusetts, have concluded that funding is required under their state constitutions’ due process clause and privacy analogues.<sup>129</sup> In short, while the presence of an ERA may open the courthouse door to encourage greater scrutiny of abortion regulations, and particularly the issue of whether they may disadvantage women, the presence or absence of an ERA does not seem to be especially probative of how courts will ultimately address these issues.<sup>130</sup>

The New Mexico Supreme Court has given particularly comprehensive consideration to the issue of abortion funding and the ERA. In *New Mexico Right to Choose/NARAL v. Johnson*,<sup>131</sup> the court reviewed New Mexico’s Rule 766, which restricted state funding of abortions to

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<sup>126</sup> Jeffrey Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 1016 (2006).

<sup>127</sup> *Doe*, 515 A.2d 134; N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).

<sup>128</sup> Wharton, *supra* note 20, at 1253; Shaman, *supra* note 126, at 1016; *see, e.g.*, Bell v. Low Income Women of Tex., 95 S.W.3d 253 (Tex. 2002) (abortion regulations do not involve sex-based classification); Fisher v. Dep’t of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036 (Fla. 2001).

<sup>129</sup> *E.g.*, Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

<sup>130</sup> The specific wording of the state’s ERA does not seem determinative either. New Mexico’s ERA, based on the federal model, was construed to require funding, while Pennsylvania’s ERA, with similar wording, was determined to not require state funding.

<sup>131</sup> *N.M. Right to Choose*, 975 P.2d 841.



those necessary to save the life of the mother, to terminate an ectopic pregnancy, or to cases of rape or incest. Plaintiffs challenged the rule arguing that New Mexico's Equal Rights Amendment mandated that the state provide financial support for a broader range of abortion procedures.

The court first noted that strict scrutiny was appropriate even though the rule addressed a physical characteristic unique to women. In making this determination, the court specifically noted the fact that "since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them."<sup>132</sup> The court next looked to the statutory purpose of Rule 766, concluding that it was to provide qualified persons with necessary medical care. Accordingly, the court found that men and women who met a need-based test for Medicaid eligibility were similarly situated and should be assessed under the same standard of medical necessity.<sup>133</sup> However, the court found, Rule 766 "undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women."<sup>134</sup> Because Rule 766 did not apply the same standard of medical necessity to males and females, the rule was presumptively unconstitutional. The court concluded that the interests put forward by the state—costs savings and interest in the potential life of the unborn—were insufficient to justify the measure.<sup>135</sup> As to cost, the expense of an abortion was significantly less than supporting a low income woman in bringing a pregnancy to term.<sup>136</sup> As for the state's interest in potential life, the court observed that Rule 766 was overbroad, since it barred funding for all abortions, not just late term procedures when the state's interest was at its height.<sup>137</sup>

Following the New Mexico model, then, a federal ERA might provide a basis for reassessing the constitutionality of the Hyde Amendment's ban on Medicaid-funded abortion using an equality analysis. Rather than establish a free-standing fundamental abortion right, such an analysis would utilize an equality framework, pitched at a level of generality where men's and women's experiences can be compared—for

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<sup>132</sup> *Id.* at 854 (quoting *Doe*, 515 A.2d at 159).

<sup>133</sup> *Id.* at 856.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 856-57.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

example, examining whether men and women are given similar access to federally-funded medical care.<sup>138</sup>

However, state courts striking down abortion funding restrictions under state ERAs have placed significant weight on specific aspects of the state ERA's legislative history that supported their conclusions.<sup>139</sup> At the moment, the legislative history of the federal ERA would hardly support its application to abortion. The principal House sponsor, Carolyn Maloney, has denied that the ERA encompasses abortion.<sup>140</sup> Major advocacy organizations supporting the amendment—such as the Alice Paul Institute—have expressed similar views.<sup>141</sup> In contrast, ERA opponents have alleged over a period of decades that the ERA will lead to liberalized abortion laws.<sup>142</sup> If an ERA is ultimately ratified over their opposition, a court examining this legislative history could well conclude that the opponents' view did not carry the day and that, despite the powerful logic of the New Mexico decision and others like it, the ERA does not encompass abortion policy and law.

## 2. Privacy

In 1971, the constitutional right of privacy was still a rather new concept, having been articulated by the U.S. Supreme Court in *Griswold v. Connecticut* in 1965.<sup>143</sup> Writing on a relatively blank slate, the *Equal Rights for Women* authors anticipated that the ERA “would have to be applied in a manner that was consistent with individual privacy under the constitutional guarantee.”<sup>144</sup> They suggested that the privacy right would “justify police practices by which a search involving the removal of clothing could be performed only by a police officer of the same sex as the person searched”

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<sup>138</sup> See generally Law, *supra* note 122.

<sup>139</sup> See, e.g., *Doe v. Maher*, 515 A.2d 134, 160 (Conn. Super. Ct. 1986).

<sup>140</sup> Abrams, *supra* note 123.

<sup>141</sup> EqualRightsAmendment.org, *supra* note 123; see also Twiss Butler, *Abortion Law: “Unique Problem for Women” or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133 (1991).

<sup>142</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 418-20 (2007).

<sup>143</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>144</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 900.

as well as “permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces.”<sup>145</sup>

There has been little ERA jurisprudence squarely addressing privacy issues, but the Supreme Court has opined that sex segregation to protect privacy is consistent with even the most rigorous form of intermediate scrutiny. As Justice Ginsburg noted in her majority opinion in *United States v. Virginia*, mandating that the Virginia Military Institute (VMI) open its doors to women, “[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”<sup>146</sup>

In those few instances when states with ERAs have addressed the issue, they have also deviated from the jurisprudence of race-based classifications to permit sex-segregated accommodations when privacy concerns are implicated. For example, the Maryland Attorney General opined that a model homeless shelter was permitted to operate a sex-specific program in the state, despite the Maryland ERA’s strict—or perhaps even absolute—scrutiny regime.<sup>147</sup> According to the Attorney General, “under the model program, homeless women will be given overnight shelter, as well as necessary counseling in order to stabilize their living conditions. These considerations might give rise to reasonable demands for privacy, which may justify restriction of admission to the facility to members of one sex.”<sup>148</sup>

As the *Equal Rights for Women* authors foresaw, no state has mandated co-ed bathrooms under its ERA—though the specter of such facilities is perhaps not so alarming when we consider the increasing presence of co-ed bathrooms in dorms as well as the increased availability of “gender-neutral” bathrooms to accommodate transgender people.<sup>149</sup> An

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<sup>145</sup> *Id.* at 901.

<sup>146</sup> *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). See generally Mary Anne Case, *Changing Room? A Quick Tour of Men’s and Women’s Rooms in U.S. Law over the Last Decade, from the U.S. Constitution to Local Ordinances*, 13 PUB. CULTURE 333 (2001).

<sup>147</sup> 65 Md. Op. Att’y Gen. 108 (1980), 1980 WL 118087.

<sup>148</sup> *Id.* at \*2.

<sup>149</sup> See Patricia Leigh Brown, *A Quest for a Restroom that’s Neither Men’s Room nor Women’s Room*, N.Y. TIMES, Mar. 4, 2005, <http://www.nytimes.com/2005/03/04/national/04bathroom.html> (discussing the quest for gender-neutral restrooms in California).

extensive search has revealed no case brought under any state ERA challenging the norm of public single-sex bathrooms.<sup>150</sup> While the transgender rights movement is putting new pressure to provide private spaces that are not sex-specific, it is unimaginable that a federal ERA would create a universal requirement of co-ed bathrooms.

#### IV. THE ERA'S IMPACT ON EXISTING SEX-BASED LAWS AND PRACTICES—WOMEN IN THE MILITARY, AFFIRMATIVE ACTION FOR WOMEN, AND SEX-BASED IMMIGRATION PREFERENCES

There are only a handful of areas where state and federal laws remain sex-specific. As to one of these areas—women's role in the military, including registration and participation in combat—there is a lively public debate.<sup>151</sup> Similarly, the issue of affirmative action for women has received much public attention, though the companion issue of race-based affirmative action has often overshadowed it. Sex-based immigration preferences have received much less public scrutiny, perhaps because these are buried in obscure volumes of the nation's arcane immigration laws.<sup>152</sup> As discussed below, rather than quickly lead to elimination of sex-based classifications, as *Equal Rights for Women* had predicted, it now appears that the ERA would have distinct and more gently graded impacts in each of these areas.

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See also Logan Steiner, *Trustees Approve Co-ed Bathrooms in Multiple Dorms across Campus: Policy Will Go into Effect Next Year*, STUDENT LIFE (Pomona Coll., Pomona, Cal.), Mar. 11, 2005, available at <http://www.tsl.pomona.edu/index.php?article=550> (announcing approval for campus co-ed restrooms).

<sup>150</sup> For a fascinating history of single sex bathrooms that links them to a more general movement to confine women's social roles, see Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture and Gender*, 14 MICH. J. GENDER & L. 1 (2007).

<sup>151</sup> See Elaine Donnelly, *Constructing the Co-ed Military*, 14 DUKE J. GENDER L. & POL'Y 815 (2007); see also Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303 (2005).

<sup>152</sup> DANIEL A. FARBER ET AL., TEACHER'S MANUAL TO ACCOMPANY CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 55 (3d ed. 2003) (noting that Nguyen concerned an "odd and obscure immigration rule," and rhetorically asking, "Had you ever heard of the *Nguyen* rule before it got to the Supreme Court?").

### A. Women in the Military

*Equal Rights for Women* included a separate section on the military, predicting that the ERA would have a “substantial and pervasive impact upon military practices and institutions,” requiring a “radical restructuring of the military’s view of women.”<sup>153</sup> At the time, women were restricted from the service academies and subjected to more restrictive enlistment standards than men.<sup>154</sup> These policies have changed. Women excel in all of the military academies and they are present in the military itself in increasing numbers, comprising approximately fifteen percent of troops in 2005.<sup>155</sup> Today, women are subject to standardized enlistment criteria and they are performing an ever-widening range of functions. Nevertheless, as in 1971, women are still formally excluded from designated combat positions.<sup>156</sup> In addition, the selective service registration laws exclude women, with some inequitable consequences in states that tie registration to access to student loans and other benefits.<sup>157</sup>

But while the ERA might put a thumb on the scale in favor of military equality, the radical restructuring foreseen by the *Equal Rights for Women*’s authors now seems unlikely. Supreme Court decisions in this area have consistently given considerable deference to the executive and the legislature in the exercise of war powers and authority over the military.<sup>158</sup> For example, in *Rostker v. Goldberg*, the Court accepted at face value the military’s restrictions on women in combat, opining that these restrictions justified the male-only draft.<sup>159</sup> As Linda Wharton has observed, by deferring so entirely to the judgments of Congress, the Court has ignored

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<sup>153</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 969.

<sup>154</sup> *Id.*

<sup>155</sup> Vojdik, *supra* note 151, at 323.

<sup>156</sup> *Id.* at 305.

<sup>157</sup> See Schwartz v. Brodsky, 265 F. Supp. 2d 130, 132 (D. Mass. 2003).

<sup>158</sup> See *Korematsu v. United States*, 323 U.S. 214 (1945). See also *Rostker v. Goldberg*, 453 U.S. 57 (1981).

<sup>159</sup> *Rostker*, 453 U.S. 57. Likewise, while *Nguyen v. INS*, 533 U.S. 53 (2001), did not directly address military policy, Justice Kennedy’s opinion expressed particular concern about the impact on military personnel of striking down a law that limited out-of-wedlock children’s claims on their fathers; the resulting opinion was extremely deferential to government justifications for the law.

“the sex stereotypes about the roles and capabilities of women and men underlying both the combat exclusion and the all-male draft.”<sup>160</sup>

An ERA might provide an occasion for revisiting these policies, which is appropriate given the tremendous social and technological changes since the Supreme Court’s 1973 *Rostker* decision and the level of interest in the issue. Attitudes have changed. Indeed, in the most recent Congressional hearings on the issue, according to one observer, “military leaders sought freedom from the exclusionary policies’ restrictions” in order to expand women’s role in combat.<sup>161</sup> But the outcome is certainly not clear, and given the Court’s tremendous deference to the military, even in areas where military policy is only indirectly affected, it is unlikely that the Court would provide leadership in the area by moving ahead of Congress, the executive, or the military itself in equalizing women’s role in the armed forces.<sup>162</sup>

## B. Affirmative Action

Despite more than two decades during which federal and state affirmative action programs have been under attack and substantially dismantled, sex-based affirmative action programs remain in place in a number of areas. For example, the federal Small Business Administration continues to permit federal contracting set-asides for female-owned businesses where women have been historically underrepresented, such as national security contracting.<sup>163</sup> Likewise, sex-based affirmative action programs have been implemented through court orders to remedy specific instances of discrimination.<sup>164</sup> By raising the level of scrutiny given sex-based classifications, a federal ERA might further restrict the availability of affirmative action for women. Indeed, *Equal Rights for Women*, calling for

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<sup>160</sup> Wharton, *supra* note 20, at 1219.

<sup>161</sup> Alice W.W. Parham, *The Quiet Revolution: Repeal of the Exclusionary Statutes in Combat Aviation—What We Have Learned from a Decade of Integration*, 12 WM. & MARY J. WOMEN & L. 377, 400-01 (2006).

<sup>162</sup> *But cf.* Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL’Y 1061 (2007) (concluding that barriers to women’s participation in combat will not survive strict scrutiny).

<sup>163</sup> See, e.g., Kent Hoover, *Women Dispute Legal Basis for Narrow Set-Asides*, PUGET SOUND BUS. J. (Seattle), Jan. 25, 2008, available at <http://seattle.bizjournals.com/seattle/stories/2008/01/28/smallb3.html>.

<sup>164</sup> See, e.g., *United States v. N.Y. City Bd. of Educ.*, 448 F. Supp. 2d 397 (E.D.N.Y. 2006).

“absolute” scrutiny under the ERA, opined that affirmative measures for women would not be upheld at all except to serve narrow remedial purposes.<sup>165</sup> Yet affirmative action measures have been upheld even under “absolute” scrutiny.<sup>166</sup> Further, applying contemporary standards of strict scrutiny, such special measures would be available somewhat more broadly—for example, in addition to direct remedial measures, affirmative action policies could be narrowly tailored to enable universities and graduate schools to assemble diverse student bodies.<sup>167</sup>

Still, there is no doubt that since *Equal Rights for Women’s* publication in 1971, the constraints on affirmative action programs have mounted considerably. It is precisely because of these developments that the impact of strict scrutiny review of affirmative action programs for women would not be dramatic—most of these programs have already been cut back considerably and, of those that have not, many can be justified under strict scrutiny.<sup>168</sup> Indeed, in at least one circuit, affirmative action programs for women are already held to a high level of scrutiny, because to do otherwise would create the anomaly of striking down programs for racial minorities while upholding programs for women.<sup>169</sup>

### C. Sex-Based Immigration Preferences

The existing federal law, upheld in *Nguyen v. INS*, discriminates against fathers by denying them the same rights to pass on citizenship to their foreign-born children that are enjoyed by mothers.<sup>170</sup> In particular,

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<sup>165</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 904.

<sup>166</sup> See, e.g., *Nat’l Elec. Contractors Ass’n v. Pierce County*, 667 P.2d 1092 (Wash. 1983) (en banc) (holding that the affirmative action program did not contravene the ERA because it was designed to help women and minorities win contracts in an area in which they were underrepresented due to past discrimination); cf. *Gary Merlino Constr. Co. v. Seattle*, 741 P.2d 34 (Wash. 1987) (en banc) (upholding the affirmative action program because it was designed to remedy past discrimination).

<sup>167</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>168</sup> But see *N.Y. City Bd. of Educ.*, 448 F. Supp. 2d 397 (indicating that portions of the affirmative action program at issue might pass muster under intermediate scrutiny but fail under strict scrutiny).

<sup>169</sup> *Id.* at 441 (surveying split in the circuits); see generally Peter Lurie, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson*, 59 U. CHI. L. REV. 1563 (1992); John Galotto, *Strict Scrutiny for Gender*, *via Croson*, 93 COLUM. L. REV. 508 (1993).

<sup>170</sup> *Nguyen v. INS*, 533 U.S. 53 (2001).

citizen mothers of foreign-born, out-of-wedlock children can sponsor their child for citizenship throughout the child's lifetime. In contrast, the citizen father of such a child must initiate sponsorship before the child turns eighteen, in addition to establishing paternity and providing evidence of economic support for the child prior to that date. The Supreme Court majority upheld this statute based on the government's argument that the distinction between men and women met the intermediate scrutiny standard because the relationship women necessarily have with their offspring is different from that of men.<sup>171</sup> Both of the women sitting on the Court, Justices O'Connor and Ginsburg, dissented, joined by Justices Souter and Breyer.

In this case, strict scrutiny would have made a difference, if only because the government would have been held to its original justification for the statute rather than an after-the-fact rationale.<sup>172</sup> As the legislative history revealed, the statute was a remnant of a time when out-of-wedlock children were deemed to be a mother's sole responsibility,<sup>173</sup> a counterpoint to the doctrine of coverture that gave men sole control of their *marital* family.<sup>174</sup>

Moreover, reversing the result in *Nguyen* would not likely be terribly controversial. The discriminatory statute at issue in *Miller v. Albright* and *Nguyen v. INS* was virtually unknown until these cases reached the Supreme Court,<sup>175</sup> suggesting that only a few individual families felt its impact. Further, there is significant support for equalizing parental responsibilities and rights, a goal that would be furthered by striking down this sex-based classification.<sup>176</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> See Mayeri, *supra* note 25, at 831 (the law upheld in *Nguyen* would likely have "fallen" under strict scrutiny). See also GEOFFREY R. STONE ET AL., *TEACHER'S MANUAL, CONSTITUTIONAL LAW* 139 (5th ed. 2005) (stating that "[i]t is hard to see how" *Nguyen* can be reconciled even with the intermediate scrutiny of *United States v. Virginia*).

<sup>173</sup> See *Miller v. Albright*, 523 U.S. 420 (1998) (Ginsburg, J., dissenting).

<sup>174</sup> See generally Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 *RUTGERS L.J.* 73, 82 (2003).

<sup>175</sup> See FARBER, *supra* note 152, at 55.

<sup>176</sup> For example, the U.N. Convention on the Rights of the Child (CRC), the most widely ratified human rights convention in the U.N. system, provides at Article 18 that: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child." Convention on the Rights of the Child art. 18, Nov. 20, 1989, 1577 U.N.T.S. 3. Several U.S.



In sum, this review of three areas of current sex-based regulation suggests that the federal ERA's effect on existing sex-based laws would not be dramatic. To be sure, replacing the relatively malleable intermediate scrutiny with a strict scrutiny framework would put additional limits on the Court's discretion. These additional constraints would certainly affect judicial decisions in cases such as *Nguyen* where the Court ceded undue deference to the government. In the area of affirmative action, most existing programs can already pass muster under this more exacting standard. But in challenges to women's full participation in the military, the "gun-shy" Court would almost certainly find a basis for upholding the status quo under a theory derived from the *Rostker* case, or perhaps would avoid the issue entirely. In states with ERAs, the constitutional provision has simply not served as a basis for courts to implement policies that go beyond popular consensus, such as mandatory co-ed bathrooms. There is no reason to believe that federal courts would be any bolder in their implementation of the amendment.

## **V. NEW DEVELOPMENTS: SAME-SEX MARRIAGE AND INTERNATIONAL HUMAN RIGHTS LAW**

### **A. The ERA and Same-Sex Marriage**

In 1971, a successful litigation campaign to legalize same-sex marriage was hardly imaginable. Yet, as early as 1974, litigants were unsuccessfully pressing arguments that state ERAs should protect same-sex marriages.<sup>177</sup> Now, such marriages are legal in Massachusetts and California, with quasi-marriage provisions, such as civil unions, adopted by other jurisdictions including Vermont and New Jersey.<sup>178</sup> These new developments have drawn much greater attention to the issue of same-sex marriage.

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courts have found that the CRC's provisions are so widely accepted that they should constitute customary law. *See, e.g., Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002), *rev'd on other grounds sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

<sup>177</sup> *See Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>178</sup> *See, e.g., Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

Throughout the 1970s, Schlafly argued that the ERA would require that same-sex couples be granted the right to marry.<sup>179</sup> Her assertions were supported by credible legal authorities such as Harvard Law Professor Paul Freund, an ERA opponent, who testified before Congress that “if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation.”<sup>180</sup>

Yet while a few state courts have examined same-sex marriage through the lens of a state ERA, the results are mixed and yield little definitive information about the impact of a federal ERA on same-sex marriage rights. Further, as with the issue of abortion, ERA proponents flatly deny that the ERA would have any impact on gay marriage rights. According to one pro-ERA fact sheet published by the Alice Paul Institute, “ERA opponents’ claim that the amendment would require states to allow same-sex marriage is false.”<sup>181</sup>

Only one state court, the Hawaii Supreme Court, has invoked a state ERA in concluding that a state law limiting marriage to a man and a woman was presumptively unconstitutional, in *Baehr v. Lewin*.<sup>182</sup> However, even in this case, the court did not resolve the ultimate issue, and instead remanded the case to the lower court to determine whether “(a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples’ constitutional rights.”<sup>183</sup> The Hawaiian legislature immediately responded to override the court decision with a constitutional amendment, rather than a mere statute, that defined marriage as between a man and a woman.

The Hawaii case stands alone, however. In Massachusetts, which offers a truly equal marriage right to both same-sex and heterosexual couples, the majority of the Supreme Judicial Court confirmed the right to

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<sup>179</sup> William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2140 (2002); Widess et al., *supra* note 60, at 466.

<sup>180</sup> Mayeri, *supra* note 25, at 808; Widess et al., *supra* note 60, at 467 n.29.

<sup>181</sup> Alice Paul Inst., Frequently Asked Questions, <http://www.equalrightsamendment.org/faq.htm> (last visited Mar. 17, 2008).

<sup>182</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *abrogated by* 1997 Haw. Sess. Laws H.B. 117 § 2 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

<sup>183</sup> *Id.* at 82.

same-sex marriage based on the state constitution's fundamental rights doctrine using rational basis review, rather than heightened scrutiny under the state's ERA.<sup>184</sup> California's Supreme Court located the right in the state constitution's equal protection clause, finding heightened scrutiny to be appropriate under that provision without reference to the state's ERA.<sup>185</sup> Likewise, an earlier Alaska Superior Court decision upholding same-sex marriage located the right in the state constitution's privacy clause rather than the state ERA.<sup>186</sup> As in Hawaii, Alaska's judicial ruling was quickly superseded by a constitutional amendment.<sup>187</sup>

In Maryland, a state with a particularly strong ERA, the state's highest court found that denying same-sex marriage did not violate the constitutional provision.<sup>188</sup> Likewise, the Washington State Supreme Court ruled that the state's Defense of Marriage Act, defining marriage as between a man and a woman, did not violate the state's ERA,<sup>189</sup> despite the state's embrace of "absolute scrutiny." In reaching these decisions, the respective courts cited earlier statements from ERA proponents disclaiming the amendment's relevance to same-sex marriage.<sup>190</sup>

In short, given the lack of consistency with which state courts have approached this issue, opponents' claims that a federal ERA will lead ineluctably to Supreme Court approval of same-sex marriage are unfounded. Indeed, ERA supporters' own ambivalence about the issue is

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<sup>184</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>185</sup> *In re. Marriage Cases*, No. S1479999, 2008 WL 2051892 (Cal. May 15, 2008).

<sup>186</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, \*1 (Alaska Super. Ct. 1998), *superseded by* Alaska Const. art. I, § 25 (amended 1999).

<sup>187</sup> Alaska Const. art. I, § 25 (amended 1999).

<sup>188</sup> *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

<sup>189</sup> *Anderson v. King County*, 138 P.3d 963 (Wash. 2006). Further, even if *state* ERAs were found to mandate expanded marriage rights to same-sex couples, the analysis of a *federal* ERA might differ. Under our categorical federal system, issues involving family law issues, including marriage, are generally left to state law. Given that, in the absence of specific legislative history on Congress's intent to permit same-sex marriage nationally, a federal ERA might not be deemed to reach state marriage laws. As with the issue of abortion, ERA proponents generally soft-pedal or outright deny the relevance of the ERA to this issue. *See, e.g.,* Idella Moore, *ERA Has Nothing to Do with Same-Sex Marriage*, WOMEN'S E-NEWS, Jan. 17, 2007, <http://www.womensenews.org/article.cfm/dyn/aid/3035/>.

<sup>190</sup> *Anderson*, 138 P.3d at 988-89; *Conaway*, 932 A.2d at 591; Widess et al., *supra* note 60, at 466-67 (describing such statements).

playing a role in undermining efforts to use the ERA to expand same-sex marriage rights.

## B. The ERA and Foreign Affairs

In addition to limiting judicial discretion and potentially increasing equality between men and women in positive ways, a federal ERA would enhance U.S. standing among peer nations and further isolate those nations that maintain sex discrimination as a matter of public policy. From an international perspective, the U.S. record on women's rights is undistinguished. The United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>191</sup> We have never had a female president, women are underrepresented in the federal Congress, and women lag in a number of other areas: according to the latest U.S. Census, for example, female-headed households are disproportionately poor.<sup>192</sup> To top it off, our Constitution offers no specific sex equality protection.

The international community is aware of this, and some are intent on using it to criticize the United States on the international stage. For example, the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992. Having done so, it is required to submit periodic reports to the Human Rights Committee, which reviews state parties' compliance with the covenant. The ICCPR commits the United States to "ensure the equal right of men and women to the enjoyment of all civil and political rights," including "equal protection" from sex discrimination.<sup>193</sup> The Human Rights Committee most recently reviewed U.S. compliance with these obligations in 2006. The committee's concluding observations following the review specifically criticized the U.S. failure to adopt more comprehensive laws addressing sex

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<sup>191</sup> As Catherine Powell has noted, by not ratifying CEDAW, "the United States keeps company with Iran and Sudan." Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 354 (2005).

<sup>192</sup> Nat'l Poverty Ctr., *Poverty in the United States: Frequently Asked Questions*, <http://www.npc.umich.edu/poverty/> (last visited Mar. 17, 2008).

<sup>193</sup> International Covenant on Civil and Political Rights arts. 3 & 26, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

discrimination. The committee advised the United States to “take all steps necessary . . . to ensure the equality of women before the law.”<sup>194</sup>

The Human Rights Committee was equally critical in its initial review of U.S. compliance in 1995. During a hearing in which Assistant Attorney General Deval Patrick represented the U.S. State Department, committee member Cecilia Medina Quiroga of Chile suggested that the United States was in violation of the covenant because the ERA was not ratified.<sup>195</sup> This concern was reiterated in the Human Rights Committee’s concluding observations, where the committee observed that “despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender.”<sup>196</sup>

The ERA’s absence from U.S. law is particularly glaring in light of the constitutional provisions adopted by sister nations, such as Canada and the nations of Europe, that specifically address sex-based discrimination.<sup>197</sup> As one scholar recently observed, “the protection afforded to women in American jurisprudence is far from being consistent with the standards of protection for women in other western countries, or the protections afforded to women in international law through CEDAW.”<sup>198</sup>

By the same token, the U.S. failure to explicitly bar sex discrimination provides comfort to those nations that continue to oppress women, giving them a certain degree of immunity from U.S. criticism. Supporters of CEDAW ratification have argued that until the United States ratifies CEDAW, “many governments will take their commitments less

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<sup>194</sup> U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee*, ¶ 28, U.N. Doc. CCPR/C/SR.2395 (July 27, 2006).

<sup>195</sup> James Tucker, *UN Trashes U.S. at Rights Confab: Want to Know How Terrible the U.S. Is? Ask the UN*, THE SPOTLIGHT (Wash., D.C.), Apr. 17, 1995, at 1 (on file with author); U.N. Human Rights Committee, *Summary Record of the 1401st Meeting*, ¶ 50, U.N. Doc. CCPR/C/SR.1401 (1995); Telephone Interview with Yolanda Wu, Staff Attorney, NOW Legal Defense and Education Fund, Mar. 29, 1995.

<sup>196</sup> U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 270, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (Apr. 6, 1995).

<sup>197</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); European Convention on Human Rights art. 14, Nov. 4, 1950.

<sup>198</sup> Stopler, *supra* note 21 at 481.

seriously.”<sup>199</sup> The absence of full domestic constitutional protections for women in the United States may have a similar effect. Certainly, it allows other nations to score an easy point against the United States in the human rights propaganda wars. For example, during the United Nations Fourth World Conference on Women, held in Beijing in 1995, then-First Lady Hillary Rodham Clinton and other conference participants criticized China’s human rights record.<sup>200</sup> In response, the Chinese government issued a detailed report arguing that women are better off in China than in the United States, specifically pointing out that “China’s Constitution . . . specifies equal rights for women, which the American one does not.”<sup>201</sup>

Real implementation of CEDAW in the United States would admittedly entail changes in U.S. law. As Kathleen Sullivan has noted, CEDAW’s provisions are different in orientation from U.S. constitutional protections for gender equality.<sup>202</sup> In contrast to American constitutional law, which typically adheres to general norms of formal equality and promotes judicially enforceable negative rights as against the state, CEDAW is “specific, asymmetric, extended to private action and positive rights, and culturally aspirational.”<sup>203</sup> Further, CEDAW’s vision of substantive equality is broader than, and in some respects, different from, U.S. law.<sup>204</sup> For example, CEDAW requires that “States Parties shall . . . provide special protection to women during pregnancy in types of work

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<sup>199</sup> Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 717 (2004) (citing *Convention on the Elimination of All Forms of Discrimination against Women*, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: *Hearing before the Senate Comm. on Foreign Relations*, 107th Cong. 5 (2002)).

<sup>200</sup> Seth Faison, *Beijing Says Women Have It Better in China than in U.S.*, N.Y. Times, Sept. 10, 1995, <http://query.nytimes.com/gst/fullpage.html?res=990CE5DE1F3DF933A2575AC0A963958260>.

<sup>201</sup> *Id.*

<sup>202</sup> Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 762 (2002); see also Schneider, *supra* note 199, at 722.

<sup>203</sup> Schneider, *supra* note 199, at 722.

<sup>204</sup> See generally Powell, *supra* note 191 (noting that opponents of CEDAW have framed these differences as a “culture clash” in order to block U.S. treaty ratification).

proved to be harmful to them.”<sup>205</sup> The United States has taken a completely different approach to this issue. The Supreme Court held in *UAW v. Johnson Controls, Inc.* that Title VII forbids sex-specific fetal protection policies in workplaces, finding such special protection to constitute sex discrimination.<sup>206</sup>

In contrast to these provisions of CEDAW, the ERA is identifiably *our* law. It is drafted in a way that is consistent with our venerable Constitution—it can be easily integrated with other provisions of the document. Furthermore, the legislative history and interpretation of the ERA reflect our domestic debate and decision making. It will also go a long way in answering those who criticize the United States’s failure to provide adequate domestic legal protection from sex discrimination.

Of course, we can ignore these international critiques, and take the position that the United States can stand alone as an exception to universal human rights standards that include equality based on sex. But, in a globalized world, the United States’s failure to adopt basic legal standards of gender equality, whether through a domestic ERA or through CEDAW, cannot fend off scrutiny, either from our own citizens or from others around the world, for long. If we want to provide leadership as a nation in the area of human rights or other areas of international law, our failure to fully embrace gender equality even within our own borders and in our own Constitution may undermine our efforts. As historian Mary Dudziak has chronicled, this was a lesson that the United States learned in the 1950s with regard to race; then, our domestic history of racial apartheid became fodder for the international disparagement of the United States.<sup>207</sup>

## CONCLUSION

The ERA’s major contribution to women’s equality would be to subject government-sanctioned sex-based classifications to strict scrutiny review. This would have an impact in a number of areas affecting women, particularly those involving discrimination on the basis of unique physical characteristics such as pregnancy. However, given the absence of supportive legislative history, courts could well stop short of applying this

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<sup>205</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 11 § 2(d), Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>206</sup> 499 U.S. 187 (1999).

<sup>207</sup> MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 119-25 (2000).

framework in the abortion context. Likewise, courts would likely avoid expansive rulings in areas involving women in the military or same-sex marriage.

If a federal ERA is ratified, it is certain that lawyers will make strong arguments that the amendment protects abortion rights, extends same-sex marriage, and expands women's participation in the military. Possibly, some of these arguments will prevail. However, any special concern about judicial activism in these arenas is misplaced. We can predict where the federal ERA is headed by looking at the general reception that state ERAs have received in their states when courts have ruled on controversial issues. There is virtually *no* evidence that courts have construed the ERA more expansively than was intended when the ERA was enacted.

No state ERA has been repealed. While the same-sex marriage ruling in Massachusetts prompted a legislative battle, that effort did not result in the repeal of the ERA or of the state equal protection clause that formed the basis for the decision. Rather, the debate focused on developing new constitutional language to redefine marriage. The same is true in Hawaii in the wake of that state's same sex marriage ruling. The outcome of the Hawaii Supreme Court case came under attack and the state constitution was amended to redefine marriage, but the state ERA survived. This is telling.

States frequently amend constitutions. The Iowa Constitution has been amended an average of once every three years since its adoption, Alabama's constitution has been amended 618 times since 1819, and California's has been amended around 500 times.<sup>208</sup> In the states there is a real give-and-take between legislators, courts, and the electorate. If state citizens believed that ERAs were being misconstrued by courts or other branches of government, surely there would have been a serious repeal effort.

This evidence from the states is predictive of what a federal ERA would bring. The ERA will result in strict scrutiny for sex-based classifications, and a different way of looking at unique physical characteristics. Aside from these concrete results, the ERA's social impact should not be minimized. As Linda Wharton notes, "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

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<sup>208</sup> Robert Maddex, *State Constitutions of the United States*, CONG. Q., 1998, at xxxi (state-by-state chart).



mobilizing individuals to work for needed reform.”<sup>209</sup> But the ERA will not accomplish everything. In litigation, the presence or absence of an ERA will not always be the decisive factor; there are many factors that contribute to a court’s decision, including the number of women on the bench!<sup>210</sup>

The effects of ERA ratification will not likely be dramatic, but will be positive for women, particularly women whose experience of discrimination is beyond the reach of Title VII and the Equal Protection Clause. Non-ratification, however, results in serious short- and long-term consequences. Among these is the continued denial of full and explicit constitutional recognition of women, the attendant diversion of energy toward obtaining such recognition, and continued undermining of U.S. efforts to assist women abroad. Given this, the price of not ratifying it is simply too high to pay.

*Equal Rights for Women* stressed that, consistent with our “other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process,” the ERA supplies a “legal framework upon which to build a coherent body of law.”<sup>211</sup> It is the open latticework of the provision—to which ERA opponents vehemently object—that allows for continued debate, development, and implementation of the law in furtherance of equal rights. For example, there are significant differences of opinion on women’s role in combat. The ERA does not directly prejudice that issue, but provides a new framework for the debate, which reflects overwhelming consensus in the United States that women and men are entitled to equal treatment under the law. In essence, it shifts the presumption to those who support sex-based equality, while putting the burden of proof and persuasion on those who oppose it. On this point, the *Equal Rights for Women* authors were exactly right, as much now as they were then: “The transformation of our legal system to one which establishes equal rights for women under the law is long overdue.”<sup>212</sup>

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<sup>209</sup> Wharton, *supra* note 20, at 1285.

<sup>210</sup> See Epstein et al., *supra* note 104; Peresie, *supra* note 12.

<sup>211</sup> Brown et al., *Equal Rights for Women*, *supra* note 22, at 979.

<sup>212</sup> *Id.*

