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Some Observations On State Equal Rights Amendments

Judith Avner*

Since 1970, sixteen states have added equal rights amendments to their constitutions.1 A review of the legal developments and legislative reforms prompted by these provisions substantially informs the debate concerning possible interpretations of the proposed federal Equal Rights Amendment,2 and the potential of such provisions for securing equality for women.3 While much has been written regarding the potential impact of the proposed Federal ERA,4 the impact of existing state ERAs has not been thoroughly examined.

1. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 3; ILL. CONST. art. I, § 18; MD. CONST., Declaration of Rights, art. 46; MASS. CONST. part I, art. I; MONT. CONST. art. II, § 4; N.H. CONST., Part I, art. II; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 2, 3, art. VI, § 1.

The Louisiana constitution contains a provision to the effect that no law "can arbitrarily, capriciously, or unreasonably discriminate" on the basis of sex. LA. CONST. art. I, § 3. This provision is not considered one of the state ERAs.

2. The proposed Federal ERA reads:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. The Amendment shall take effect two years after date of ratification.


3. Since some states will never adopt an ERA, a federal amendment is an important means of assuring the uniform treatment of women. Moreover, only a federal amendment would extend to the federal government itself, one of the largest employers of women; a federal ERA may also lead Congress to strengthen existing anti-discrimination laws. Finally, it is argued, the symbolic value of incorporating the equal rights principle into the federal Constitution should not be underestimated.


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Yet state ERAs, particularly those whose language parallels that of the proposed federal amendment, are the only realistic guides to possible interpretations of the federal ERA. Although federal courts interpreting the proposed federal ERA would not be bound by state court interpretations of state ERAs, they almost certainly would draw on the experience of ERA states for interpretive guidance.\(^5\)

The failure of the federal ERA ratification campaign has led to a renewal of interest in existing state ERAs, as well as in possible future state ERA ratification efforts. The interest in ratifying new state ERAs raises difficult strategic and political questions for the women's movement. At a time when resources are severely limited and already spread thin, some advocates fear that allocating too much energy to the passage of state ERAs will divert attention and money from the overriding goal of ratification of the federal amendment. While the procedures to amend state constitutions vary widely, state referenda, when required, are extremely costly. A report by the National Organization for Women, noting the passage of only one of five state ERAs considered since 1974, suggests that the split of resources between state and federal ERA ratification efforts may be a contributing factor in the failure of both efforts.\(^6\)

Many, however, argue that until the ERA is part of the federal Constitution, state ERAs will guarantee equality for at least some of our citizens and provide new impetus for the federal ratification campaign.

Certainly the federal amendment is the only means of assuring equality for women and men under law irrespective of geography. Although not a substitute for a federal ERA, as long as women continue to be denied an explicit guarantee of equality in the federal Constitution, full enforcement of state ERAs helps ensure that at least some of this nation's citizens are protected against sex discrimination.

This comment will contribute to the debate by setting forth the evidence supporting this last assertion. After some preliminary observations on the standard of review and the state action doctrine in ERA litigation, this article will trace the impact of these state initia-

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6. National Organization For Women, The Case For the Federal ERA vs. The Case For the State ERA (Feb. 1983), indicated that state referenda in California have cost as much as $7 million; a New York effort is estimated to cost $5-6 million while a similar effort in a smaller state could cost as much as $1 million.
tives through an analysis of judicial interpretations of ERAs in several key areas of law.

My purpose is to suggest that the debate regarding the efficacy of state ERAs largely overlooks the extent to which such initiatives foster a national political and legal environment receptive to the idea of federal equal rights legislation. While the effort to ratify a federal ERA appears to be temporarily stalled, those states with ERAs are currently engaged in the process of giving meaning to their own equal rights provisions. Their history will, in time, be our history.

I. Background

Most state ERAs were enacted in the wake of congressional passage of the federal ERA. Nine of the state amendments closely parallel the federal amendment. The remaining provisions differ slightly from the federal model. The impact of these amendments extends far beyond their bare language. The legislatures of many ERA states, for example, have undertaken a comprehensive reform of state laws to assure conformity with the ERA.

Nevertheless, ERA claims are not extensively litigated. In part, the scarcity of precedent is attributable to the innate conservatism and hesitancy of the bar and bench. Where instances of discrimination are readily apparent and the violated right well established, lawyers tend to rely on established antidiscrimination provisions, rather than on relatively untested state ERAs. In addition, courts often avoid reaching ERA claims by basing their decisions on alternate statutory or constitutional grounds.


8. For example, after ratification of the New Mexico ERA, the legislature established an Equal Rights Committee to oversee legislative implementation of the amendment. In the period between its ratification and the amendment's effective date, the entire New Mexico Code was reviewed and all provisions that would violate the ERA identified. The results were reported in several law review articles: Daniels, The Impact of the Equal Rights Amendment on the New Mexico Criminal Code, 3 N.M. L. Rev. 106 (1973); Schlenker, Tax Implications of the Equal Rights Amendment, 3 N.M. L. Rev. 69 (1973); Ellis, Equal Rights and the Debt Provisions of New Mexico Community Property Law, 3 N.M. L. Rev. 57 (1973); Goldberg & Hale, The ERA and the Administration of Income Assistance Programs in New Mexico, 3 N.M. L. Rev. 84 (1973). Using these articles as a foundation the equal rights committee drafted a package of new laws designed to eliminate discriminatory provisions. A significant number of these bills were enacted. For an interesting review of legislative reform following enactment of state ERAs see Note, State Equal Rights Amendments: Legislative Reform and Judicial Activism, 4 Women's Rights L. Rep. 227-28, 232-36 (1978). See also Pennsylvania Comm'n for Women, Impact of the State Equal Rights Amendment, 9-16 (rev. ed. 1980).
A far more serious and intractable problem in ERA litigation, however, is the confusion surrounding the standard of review and the scope of the state action requirement.

A. Standard of Review

The equal protection clause of the fourteenth amendment, historically invoked in cases alleging sex discrimination, offers uncertain and inconsistent protection against sex bias. Under the fourteenth amendment, classifications based on race or national origin, or classifications implicating a fundamental right, are subject to the rigorous "strict scrutiny" standard of review. The challenged classification is permitted only if the state demonstrates that the classification is justified by a compelling state interest, and is narrowly tailored to meet that interest. The Supreme Court, however, has refused to apply this standard of review to challenges based on sex discrimination. Instead, the Court has articulated a lesser level of scrutiny: To survive constitutional challenge, a sex-based classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." This less stringent standard of review has not, however, produced uniformity in interpretation. As Justice Rehnquist has observed, "the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications." This disagreement has produced unpredictable and often contradictory results.

The absence of a cohesive legal doctrine for evaluating sex dis-

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12. Craig v. Boren, 429 U.S. 190, 197 (1976) (sex-based drinking age differential). This confusion was alleviated somewhat in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (elaborating on the meaning of, and proof required by, the substantial relationship test). However, the sharp division within the Court in Hogan raises serious doubts about the Fourteenth Amendment as an adequate remedy for sex discrimination.
crimination claims under the federal Constitution has bewildered federal and state courts. One state supreme court judge has concluded that there is "no identifiable 'supreme Law of the Land' . . . by which [lower courts] may adjudicate a claim of alleged gender-based discrimination."15

The proposed federal amendment clearly reflects Congressional intent that sex be prohibited as a basis for classification in any law, regulation or governmental policy. This "absolute" standard of review imposes even greater burdens of proof on defendants than the strict scrutiny standard. There are only three permissible departures from this principle of absolute equality: when the constitutional right to privacy is implicated, when the sex-based classification is based on a physical characteristic unique to one sex, and when facially neutral classifications have a disparate impact on women. Even then, Congress intended the strict scrutiny standard to apply to classifications justified under any of the enumerated exceptions. Moreover, these exceptions are to be narrowly construed to avoid creating a statutory gap in the ERA’s mandate of equality. As stated unequivocably in the Senate Committee report: “sex should not be a factor in determining the legal rights of women or of men.”16

The states have, for the most part, followed the federal initiative in determining the appropriate standard of review of gender-based classifications challenged under state ERA’s. The highest courts of Washington, Pennsylvania and Maryland, for example, have concluded that their state ERAs adopt the rigorous absolute standard of

15. Wengler v. Mut. Ins. Co., 583 S.W.2d 162, 168 (Mo. 1979) (Donnelly, J., concurring), rev’d, 446 U.S. 142 (1980). The Missouri Supreme Court in Wengler upheld a statutory scheme providing automatic survivor's benefits to wives, but not to husbands, of workers killed in job-related accidents. 583 S.W.2d at 168. However, the court failed to address the presumption that a woman's financial contribution is less important to the family than a man's. The United States Supreme Court, recognizing both this discrimination and the discrimination against Mr. Wengler which resulted from denial of benefits to him, reversed the Missouri court. Similar interpretive problems have been faced in other states. For example, the equal protection clause of California's constitution, Cal. Const art. I § 7, has been interpreted to hold sex a suspect classification requiring application of strict scrutiny. See Molar v. Gates, 159 Cal. Rptr. 239, 98 CA. 3d 1 (1979). Nevertheless, it is unrealistic to view this route as a viable alternative to a state or federal ERA. Many courts are reluctant to interpret their constitution's guarantees broadly especially when, like the federal constitution, the state equal protection clauses were adopted at a time when sex discrimination generally was acceptable. In addition, if the equal rights amendment requires an absolute standard of review, strict scrutiny offers significantly less protection.

review proposed for the federal amendment. The reasoning of the Maryland Court of Appeals is typical. In *Rand v. Rand*, the Court rejected the opinion of the Attorney General that mere strict scrutiny was appropriate, holding instead that "'[t]he adoption of the ERA in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications.'" The court declared that the language of the Maryland ERA "can only mean that sex is not a factor, in the determination of legal rights" and held that the ERA imposes an absolute standard of review, higher even than the strict scrutiny standard, prohibiting any classification on the basis of sex.

Critics of ERAs frequently assert that they do not significantly increase the legal protections already afforded women. The experience of the states belies this contention. As we have seen, state courts have held that the adoption of an ERA alters, in important ways, the standard of review of allegedly discriminatory conduct. A parallel reevaluation of the state action requirement is occurring.

B. *State Action*

Six state ERAs and the proposed federal ERA apply only to instances where government action is involved. ERAs without such state action provisions could, in theory, reach private discrimination. In practice, however, courts have sometimes insisted on im-


19. *Id.* at 903.

20. *Id.* at 904-905.


22. Section 1 of the amendment states that "Equality of rights under law shall not be denied or abridged by the United States or by any state on account of sex." See supra note 2.

23. For example, the Hawaii provision states that "[e]quality of rights under the law shall not be abridged by the State on account of sex." *Hawaii Const.* art. I, § 3.
posing a state action requirement. The Texas Court of Civil Appeals, in Lincoln v. Mid-Cities Pee Wee Football Association, observed that

[The Texas ERA] guarantees equality in public affairs and in some cases when private conduct becomes so aligned with state function or involvement that it would be unreasonable to conclude that it is purely private discrimination. Yet, this construction does not have the courts and governmental agencies of this state dictating the private actions and relationships of its citizens which apparently reflect their fundamental beliefs.

The opinion of the Texas Court of Appeals, however, is not dispositive of the issue and should not limit other state ERAs. The narrow construction of the state action requirement by federal courts is intended to protect states' traditional jurisdiction over private actions. States themselves, however, are not under similar constraints in interpreting state action doctrine under their own constitutions, and are empowered to conclude that less state involvement is required under state ERAs than the fourteenth amendment. A state equal rights provision may regulate private conduct which cannot be reached under the fourteenth amendment.

Citing the absence of federalism concerns, state courts have given

25. 576 S.W.2d 922.
26. Id. at 925. In Hartford Accident and Indemnity Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania, the court held that although the Insurance Commissioner had independent statutory authority to reject as unfairly discriminatory Hartford's gender based automobile insurance rates, the Commissioner was justified in looking to the state ERA in evaluating the fairness of Hartford's discriminatory rates. 482 A.2d 542, 547 (Pa. 1984).
27. The Civil Rights Cases, 109 U.S. 3 (1883).
29. See, e.g., Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980) (state may adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution); Serrano v. Priest, 135 Cal. 345, 557 P.2d 929 (1977) (state public school financing system, which conditions availability of school revenues on district wealth, violates state constitutional provisions guaranteeing equal protection of the law), cert. denied, 432 U.S. 907 (1977); but see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. (1973) (similar public school financing system held not violative of equal protection guarantee of 14th Amendment of United States Constitution); Cooper v. Morin, 424 N.Y.S.2d 168, 49 N.Y.2d 69, 399 N.E.2d 1188 (1979) (prohibition of direct contact visits with female pretrial detainees, while not violative of federal constitutional right to due process of law, nevertheless violated state constitution's due process clause), cert. denied, 446 U.S. 984 (1980); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (search of lawyer's office prohibited on grounds of attorney-client privilege, even though warrant based on probable cause, consistent with the Fourth Amendment).
broader interpretations to the state action requirement of their constitutions than federal courts have given to the state action requirement of the federal Constitution. In *Sharrock v. Dell Buick-Cadillac, Inc.* 30 a challenge to a statute authorizing an auto mechanic to foreclose a possessory lien for repairs and storage charges, the New York State Court of Appeals ruled the state action requirement satisfied despite a contrary ruling by the United States Supreme Court under virtually identical circumstances. In rejecting the analysis of *Flagg Brothers v. Brooks*, 31 the New York court noted:

Conspicuously absent from the State Constitution is any language requiring State action before an individual may find refuge in its protections. That is not to say, of course, that the due process clause of the State Constitution eliminates the necessity of any State involvement in the objected to activity. . . . Rather, the absence of any express State action language simply provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision. 32

Thus, there are no significant constitutional constraints on the capacity of state courts to adopt a more flexible definition of state action. Moreover, a liberal approach to state action doctrine may be especially appropriate in cases involving allegations of sex discrimination. Federal courts have often employed a flexible state action standard. 33 Allegations of sexual discrimination should also trigger

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32. 45 N.Y.2d at 160. The court also said:

[T]he mere fact that an activity might not constitute State action for purposes of the Federal Constitution does not perforce necessitate that the same conclusion be reached when that conduct is claimed to be violative of the State Constitution (citations omitted). Indeed, on innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution. (citations omitted). This independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution as well as the long history of due process protections afforded the citizens of this State and, more generally, in fundamental principles of federalism. (citations omitted).


In enacting ERAs state legislatures intended to add sex discrimination to the list of offenses necessitating a lesser degree of governmental involvement to trigger the protective functions of law. Thus, the state action requirement of state ERAs has been satisfied in a variety of contexts that might have produced a contrary result under federal constitutional analysis. A Colorado court, for instance, held the state action requirement satisfied when an all-male baseball team played on a city-owned ballfield. A Pennsylvania court declared the membership policy of a volunteer fire company state action because the company was fulfilling a traditional governmental function.

The state action requirement nevertheless remains an obstacle to a broader application of state ERAs. Charges that insurance rates discriminate against women, for instance, were defeated on state action grounds despite the state insurance commission’s rate-setting

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Footnotes:

34. Without deciding whether sex discrimination was as offensive as race discrimination under the Fourteenth Amendment, the Second Circuit in Weise v. Syracuse University, id., held that classifications based on gender are clearly entitled to constitutional scrutiny based on a lesser degree of government involvement than would be required in non-discrimination claims. Other courts have followed suit. See Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974).


36. Tallon v. Liberty Hose Co., No. 1, No. 4028 (Pa. C.P. Dauphin Cnty., 1980 Term). The case was ultimately resolved through a negotiated settlement in which the company accepted the plaintiff as a member. (Order dated March 8, 1982).

authority. On the whole, however, state ERAs are gradually broadening the state action doctrine, at least in the context of sex discrimination claims. Because of our federal system of government, state ERAs enjoy an inherent advantage over the proposed federal ERA in this area.

The lower state action threshold of state ERAs greatly expands the range of activities within their reach. The heightened standard of review renders expanded judicial scrutiny more exacting. Together, these two characteristics have turned state ERAs into powerful vehicles for social reform. The following sections survey developments in family law, reproductive rights, education and employment in order to examine the extent to which this promise has been realized.

II. Family Law

Family law has long been considered the domain of state courts and state laws. Not surprisingly therefore, the largest number of ERA cases have arisen in this area. Moreover, because federal law plays only a limited role in the regulation of family life, state ERAs will retain a significant role even in the event of ratification of the federal ERA.

Opponents of the federal ERA argue that it will eliminate various protections enjoyed by women under common law. This concern is based on an inaccurate view of women's actual status under traditional family law doctrines. Far from protecting women, family law doctrines have created a confusing web of legal disabilities, partially offset by legal benefits, reinforcing the fiction that women are incapable of caring for themselves. Women are viewed alternately as mental incompetents and more mature persons than men of the same age; as valuable domestic servants of their husbands and as economic incompetents; as needing protection from their husbands' economic selfishness and as needing no protection from their husbands' physical abusiveness.

Legislatures and courts are rapidly transforming family law, replacing the hierarchical view of the family with one in which the husband and wife are viewed as equal participants in an economic and emotional partnership. The protections afforded women by the common law have not been eliminated; rather, the underlying as-

39. Id. at 384.
sumptions about the relative roles and responsibilities of husband and wife have been altered. A woman is granted economic support from her former husband, not because she is hopelessly frail and dependent, but out of recognition of her contribution to the family unit. New assumptions of equality and interdependence have led to new responsibilities, but women are not losing rights to alimony, child support payments, or child custody. State ERAs are at the forefront of this reappraisal of family law.

A. Marriage and Divorce Laws

1. Age of Marriage

State statutes establishing age requirements for marriage generally fix the minimum age for men from one to three years higher than for women. Based on traditional notions about the relative maturity of men and women, and on assumptions that men require more time for educational and career development, these statutes illustrate how a law may offer a superficial benefit while simultaneously communicating the view that the “benefitted” class is, in fact, a dependent class. State ERAs have invalidated these age differentials. In Phelps v. Bing, the Illinois Supreme Court struck down a statute that allowed a woman to obtain a marriage license without parental consent at age eighteen, with parental consent at sixteen, and at fifteen by court order, while the corresponding ages for men were twenty-one, eighteen and sixteen. Applying the strict scrutiny required by the Illinois ERA, the court found no compelling state interest justifying this disparate treatment of men and women.

2. Domicile

Reflecting the view that a married woman’s identity was inseparable from that of her husband, the common law assumed that the wife’s domicile was that of her husband and imposed upon her the duty to follow him if his choice of domicile was reasonable; her refusal to do so was desertion. This rule was challenged in Palichat v. Palichat, wherein a husband claimed that his wife’s refusal to leave

40. 58 Ill. 32, 316 N.E.2d 775 (1974). Interpreting the statute in light of the Illinois ERA, the Illinois Attorney General, applying a fair and substantial relationship test, reached the same conclusion, stating, “[t]he long-assumed prior maturation of the female as related to the male, socially and intellectually, has been laid to rest by the constitutional enactments and other similar laws. Correspondingly, were the advantage given to the male and withheld from the female, the constitutional repugnancy would be exactly the same.” Op. Ill. Att’y Gen. No. 5-490 (June 30, 1972). The Attorney General further indicated that the nondiscriminatory age for both males and females would be the lesser (18 yrs.). Id. at 9.

41. 37 Beaver County L.J. 71 (Ct. of Common Pleas 1978).
her mother's home to live with him constituted desertion. The court held that the Pennsylvania ERA did not eliminate the common law rule, but made the obligation to provide a suitable home a joint one to be shared in accordance with the capacity and ability of each spouse. Similarly, a husband could no longer sue for divorce based on his wife's decision not to follow him unless the state also permitted the wife to sue for divorce upon her husband's refusal to accompany her to a new home.

3. Grounds for Divorce

Challenges to allegedly discriminatory divorce statutes have usually been based on the fourteenth amendment. State ERAs are an alternative means of challenging such provisions. A Pennsylvania statute permitted a wife, but not her husband, to obtain a special type of separation constituting the legal equivalent of divorce. The ERA formed the basis of several challenges of this provision. The Pennsylvania Supreme Court, in George v. George, declared that any statute by its language applicable to only one sex must apply to both sexes. The statute was held to furnish reciprocal remedies for both spouses.

B. Economic Issues

1. Alimony and Division of Property

State ERAs have been invoked to ameliorate the economic consequences of divorce. Divorce is a primary cause of poverty among women and children. While federal constitutional protections

42. See Brown, Emerson, Falk & Freedman, supra note 3, at 950.
43. PA. STAT. ANN. tit. 23 § 11 (Purdon 1929) (repealed, 1980). The statute provided: Upon complaint and due proof thereof, it shall be lawful for a wife to obtain a divorce from bed and board, whenever it shall be judged . . . that her husband has:
(a) Maliciously abandoned his family; or
(b) Maliciously turned her out of doors; or
(c) By cruel and barbarous treatment endangered her life; or
(d) Offered such indignities to her person as to render her condition intolerable and life burdensome; or
(e) Committed adultery.
This type of divorce did not result in dissolving the marriage. The parties remained legally husband and wife but were permitted to live apart. A second type of divorce, a vinculo matrimonii (from the bond of matrimony), resulted in dissolution of the marriage. This cause of action was equally available to women and men.
45. 487 Pa. 133, 409 A.2d 1 (1979) (holding ERA applicable to this type of divorce action).
46. Almost one-third of all women receiving child support need public assistance. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT, Table 8, at 14 (1979).
reach only the most overt forms of discrimination, state ERAs pro-
vide a basis for challenging state statutes and common law presum-
tions that exacerbate the difficulties facing divorced women. They
have, for example, led to a broad definition of support obligations,
based on current resources, earning power, and non-monetary con-
tributions to family welfare.

Before Pennsylvania adopted the ERA a married woman who was
legally separated from her husband could not obtain financial sup-
port greater than one-third of his net income. In Holmes v. Holmes,47
a husband sought to enforce this income limit against his wife, a full-
time homemaker throughout their thirty-year marriage. The court
rejected the rule as inconsistent with the Pennsylvania ERA and or-
dered the husband to pay his wife a much larger sum. The court
observed that the old rule reflected "an ingrained sexist philosophy
whereby a man's labor for money was somehow thought to be more
valuable than a woman's work as a homemaker."48

At common law, household goods acquired during a marriage
were presumptively owned by the husband. The wife bore the bur-
den of proving her financial contribution to their acquisition. This
presumption was invalidated in DiFlorido v. DiFlorido.49 The court re-
jected the notion that ownership should be based solely on proof of
financial contribution,
since to do so would necessitate an itemized accounting whenever a
dispute over household goods arose and would fail to acknowledge the
equally important and often substantial nonmonetary contributions
made by either spouse.50 (citations omitted)

Recognizing the value of services furnished to the marriage by the
homemaker, the court reasoned:
With the passage of the Equal Rights Amendment, this Court has
striven to insure the equality of rights under the law and to eliminate
sex as a basis for distinction. Since "the law will not impose different
benefits or different burdens upon the members of a society based on
the fact that they may be man or woman" (citations omitted) we un-
hesitatingly discard the one-sided presumption confronted today.51

2. Child support
State ERAs have invalidated laws that assign child support obliga-

48. Id. at 197.
50. Id. at 179.
51. Id.
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tions only to fathers. However, courts have not required equal financial contributions by both parents. Such a rule would ignore both the value of the custodial care provided by women and the disparate financial positions of the sexes. In Conway v. Dana, the Pennsylvania Supreme Court rejected the argument that a child's welfare is best served by placing the principal burden of financial support on the father merely because of his sex without regard to the actual circumstances of the parties:

In the matter of child support we have always expressed as the primary purpose the best interest and welfare of the child. This purpose is not fostered by indulging in a fiction that the father is necessarily the best provider and that the mother is incapable, because of her sex, of offering a contribution to the fulfillment of this aspect of the parental obligation...We can best provide for the support of minors by avoiding artificial division of the panoply of parental responsibilities and looking to the capacity of the parties involved.

Since Conway, Pennsylvania courts impose child support obligations consistent with each parent's capacity to contribute. Courts in Maryland and Washington have followed suit. Contrary to the fears of ERA opponents, custodial parents are not forced to obtain employment to meet child support obligations. Child care is recognized as having a value equal to the financial contribution of the non-custodial parent. In Commonwealth ex rel. Wasiolek v. Wasiolek, a father's claim that the ERA required his former wife to return to work to help support their three children was rejected. Courts in Texas and Colorado reached similar conclusions.

54. Id. at 326.
59. See Friedman v. Friedman, 521 S.W.2d 111 (Tex. Civ. App. 1975) (upholding lower court's consideration of the nonmonetary services to be rendered).
60. In re Marriage of Trask, 580 P.2d 825 (Colo. 1978) (pregnant woman not required to obtain paid employment in order to contribute financially to support of child of previous marriage).
61. In 1981, only 15% of divorced women were awarded alimony; only two-thirds of these women actually received some payment, the mean amount being $3,000. Only 59% of divorced and separated women with children under 21 were supposed to receive child support in 1981; less than one-half of these mothers received full payment, and the mean payment received was only $2,110. BUREAU OF THE CENSUS, U.S. DEP'T. OF COM-
C. Child Custody

Until recently, child custody decisions were based on the tender years doctrine, which assumed that the child’s best interests would be served by awarding custody to the mother.\(^{62}\) While the professed goal was to determine what was best for each child, this judicial presumption was invoked indiscriminately. States with ERAs have replaced the tender years doctrine with a more thoughtful analysis of the child’s needs and the parents interests.

The Pennsylvania Supreme Court, in *Commonwealth ex rel. Spriggs v. Carson*,\(^ {63}\) held the tender years presumption constitutionally invalid on the basis of the ERA.\(^ {64}\) The court declared:

> Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature . . . or merely as a makeshift where the scales are relatively balanced . . . such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction. . . . Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the Court.\(^ {65}\)

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\(^{62}\) At common law, a father had a virtually absolute right to custody that could be denied only where danger to the child or corruption of the father were proven. This was based on the English tradition that the father was entitled to the services of his children, in return for which he was responsible for their support and maintenance. Thus, when the parents separated, this theory was carried over into the custody determination. *Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D.L. REV. 471, 478 (1979) (hereinafter cited as *Weitzman & Dixon*). By the nineteenth Century American courts and legislatures had departed from the common law rule of paternal preference and permitted awards to either parent. *Weitzman & Dixon, supra*, at 479.

It was not until the twentieth century that courts began to exploitly favor the mother in custody proceedings mother. *Mnookin, Child-Custody Adjudication: Judicial Functions In the Face of Indeterminancy*, 39 LAW & CONTEMP. PROBS., 226, 235 (1975). *See also* *Weitzman & Dixon, supra* at 479-85. Although theoretically rebuttable, the presumption was extremely difficult to overcome. An Idaho court, for example, declared that the maternal preference “needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it.” *Krieger v. Krieger*, 81 P.2d 1081, 1083 (Idaho 1938). A Maryland court referred to the mother-child relationship as a “primordial” maternality. *Kirstukas v. Kirstukas*, 286 A.2d 535, 538 (Md. Ct. Spec. App. 1972). The Utah Supreme Court found the presumption inherent in traditional patterns of thought. *Cox v. Cox*, 532 A.2d 994, 996 (Utah 1975). *Weitzman and Dixon also cite support for the maternal preference presumption from various psychologists and experts in child development. Weitzman and Dixon, supra, at 481, 48 nn.38-42, 482-83.*


\(^{64}\) This position was articulated in an opinion in which only three justices joined. Three other justices concurred in the result, but did not write a concurrent opinion.

\(^{65}\) 368 A.2d at 639-640. *See also* Md. ANN. CODE art. 72A, § 1 (1983) ("in any cus-
Despite the decline of the maternal preference presumption, women continue to be awarded custody in the great majority of cases.\textsuperscript{66}

III. Reproductive Rights

In \textit{Roe v. Wade},\textsuperscript{67} the United States Supreme Court established the right of a woman, in consultation with her physician, to choose to terminate her pregnancy by abortion. The Court's decision was based on concepts of personal privacy grounded in the due process guarantees of the Constitution. The privacy/due process approach of \textit{Roe} is largely limited to the right to choose an abortion.\textsuperscript{68} The Court has not extended the same due process analysis to federal

\footnotesize{tody proceeding, neither parent shall be given preference solely because of his or her sex”); McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (Md. Ct. Spec. App. 1978) (chancellor should not have applied maternal standard). The State Supreme Court has not addressed the constitutionality of the presumption since adoption of the State ERA, but most of the state's appellate courts have held that each parent has an equal right to custody and have examined each case on its facts. See, e.g., Marcus v. Marcus, 401, 320 N.E.2d 581 (Ill. 1974). However, despite an ERA challenge, one appellate court has upheld the use of the maternal preference as one of several factors considered by the trial court. Randolph v. Dean, 27 Ill. 327 N.E.2d 473 (Ill. 1975). In Atkinson v. Atkinson, 402 N.E.2d 831 (Ill. 1980), the court rejected the claim by a father challenging an adverse award of custody that, \textit{inter alia}, the custody determination, based in part on sex, was in violation of the Illinois ERA. In light of the ample evidence reflecting the fitness of both parents to have custody, the appellate court upheld the original custody award. The father's appeal was dismissed by the Illinois Supreme Court, 87 Ill. 2d 174, 429 n.32 N.E.2d 465 (Ill. 1981) (appeal dismissed in part, affirmed in part) cert. denied, 456 U.S. 905 (1982).

\textsuperscript{66} See, e.g., Cooke v. Cooke, 319 A.2d 841 (Md. Ct. Spec. App. 1974). However, several commentators have noted that over the past decade there has been a significant increase in awards of custody to fathers who have sought it. See, e.g., Woods, Been, Schulman, \textit{Sex an Economic Discrimination in Child Custody Awards}, 16 CLEARINGHOUSE REV. 1130 (1983); Polikoff, \textit{Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations}, 7 WOMENS RIGHTS L. REP. 235, 236-237 (1982). Indeed, these commentators highlight the often punitive view several courts have taken towards mothers who are in the paid workforce and therefore cannot themselves be full time child-rearers, women who do not have the same level of financial resources as their husbands and who are less well-educated than their husbands. Commentators have suggested that a gender-neutral “primary caretaker” presumption be developed to assure appropriate account is given to the work of those who have served as primary caretakers of the children. \textit{Id.} at 241-243. At least one court has adopted the primary caretaker presumption. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). See Neely, \textit{The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed} 3 YALE L. & POL’Y REV. 167 (1985) (discussing primary caretaker presumption).

These commentators reject the alternative explanation that self-selection by fathers is the reason for increases in awards to fathers who have sought custody. (If only those fathers who are highly likely to win custody due to the mother's condition or conduct seek custody, then it is inevitable that the percentage of awards to fathers will increase). According to Polikoff, “case analysis reveals nothing unusual (and certainly nothing compelling) about those fathers that pursue custody.” Polikoff, \textit{supra}, at 236 n.18.

\textsuperscript{67} 410 U.S. 113 (1973).

\textsuperscript{68} See Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). Some commentators have urged that abortion issues, particularly those related to funding, be analyzed, and restrictions eliminated, under an equal protection-based theory.

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funding of abortions, reasoning that the Constitution requires only that no additional obstacles be placed in the path of a woman seeking an abortion.\textsuperscript{69}

Public funding of abortion is perhaps the principal area in which state courts have departed from federal constitutional analysis. State courts have held their own due process and equal protection clauses applicable to the public funding of abortions.\textsuperscript{70} State ERAs have been used in conjunction with other constitutional provisions to challenge public funding restrictions. In \textit{Doe v. Maher}, for example, a Connecticut court invalidated a statute restricting state Medicaid funding for abortions as violative of the state constitution's due process clause.\textsuperscript{71} The Court addressed the plaintiff's ERA and equal protection claims in a footnote.\textsuperscript{72}

A similar claim based on the Massachusetts ERA was advanced in \textit{Moe v. Secretary of Administration & Finance}.\textsuperscript{73} The Massachusetts Supreme Judicial Court held that the state legislatures plan to restrict medicaid funding to only those abortions needed to prevent the mother's death violated the state constitution's due process clause,\textsuperscript{74} but declined to address the ERA claim.

\textit{Fischer v. Department of Public Welfare},\textsuperscript{75} is the only case to have ruled directly on the applicability of a state ERA to a prohibition on government funding of abortions. The court's invalidation of the restriction relied primarily on the state equal protection clause which,

\textsuperscript{69} See Harris v. McRae, 448 U.S. 297, 316 (1980). Explicitly rejecting the assertion that a denial of funding for certain medically necessary abortions infringed upon a woman's right to choose, the Court stated:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in \textit{Wade}, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.


\textsuperscript{71} No. 19 68 74, at 50 (Conn. Super. Ct. Oct. 9, 1981). The court noted that it "is unable to reconcile the mandate and logic of the Supreme Court in \textit{Roe v. Wade}, (to which at least eight of the Justices of the Supreme Court adhered as of the date \textit{McRae} was decided) with the \textit{McRae} decision.''

\textsuperscript{72} Id. at 80 n.15.

\textsuperscript{73} 417 N.E.2d 387 (Mass. 1981).

\textsuperscript{74} 417 N.E.2d 282, 402-404.

the Legislature . . . may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.' (\textit{quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW}, 15-10, at 933 n.77 (1978)).

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the court concluded, was violated by the singling out of persons in need of medically necessary services. Mindful of appellate review, however, the court expressed its view on all other constitutional issues raised. With regard to the state ERA, the court noted that:

while the Petitioner's argument under the ERA is not as strong as their equal protection argument, it is meritorious and sufficient in and of itself to invalidate the statute in that those statutes do unlawfully discriminate against women with respect to a physical condition unique to women.76

A subsequent ruling by a Pennsylvania Commonwealth Court overruled the ERA claim while striking down the funding restriction on privacy considerations. This decision is pending before the Pennsylvania Supreme Court.

Though ERA claims are being raised more frequently, most state courts continue to ground abortion decisions in privacy/due process concepts. Courts may soon be willing, however, to entertain ERA claims in this sensitive area.

IV. Education

State ERAs have been used to challenge discriminatory policies in public education. They have assumed an especially prominent role, in part, because federal efforts to combat gender-based discrimination through Title IX and the fourteenth amendment77 have been less than successful.

Title IX, which prohibits sex discrimination in educational institutions, is a limited statutory prohibition. It has always been limited to schools that receive federal money.78 In twelve years it has been amended and weakened three times.79 The inaction of federal enforcement agencies 80 has further lessened its impact.81 Moreover,

76. Id. at 21.
77. See infra note 80.
78. 20 U.S.C. § 1681(a) (1982) states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."
80. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, ENFORCING TITLE IX (1980).
81. During the Grove City College litigation, for example, the Reagan Administration pulled back sharply from the position taken by the Carter Administration—that Ti-
in *Grove City College v. Bell*, the Supreme Court severely narrowed the scope of Title IX by holding that federal financial aid to a school’s students, by itself, does not bring the entire school within its reach. The Court held that only that part of the school’s educational program directly affected by federal funding was subject to Title IX.

Nowhere is the contrast in the efficacy of federal antidiscrimination provisions and state ERAs more dramatic than in education. In *Vorchheimer v. School District of Philadelphia*, the all-male admissions policy of Central High School was challenged on federal equal protection grounds. The Third Circuit held that, because the educational opportunities offered by Central and the all-female Girl’s High School were essentially equal, the gender-based admissions policy did not offend the Equal Protection Clause. In *Newberg v. Board of Public Education*, on the other hand, the Pennsylvania ERA was used successfully to challenge the identical admissions policy of the same Central High School. The plaintiffs in *Newberg* argued that Central’s superior computer and science facilities, course offerings, extensive library, large private endowment, and reputation for excellence were unequaled by any other Philadelphia public school, including all-female Girl’s High, and that the exclusion of women denied them a unique and valuable educational experience. The court agreed, holding that the separate-but-equal doctrine of the fourteenth amendment as applied in *Vorchheimer* was not applicable to a case alleging violations of the State ERA. State ERAs have been effective in other challenges to sexually exclusive admissions policies. New Mexico’s Attorney General recently concluded that the state’s ERA mandated the admission of women to an all-male high school program affiliated with the state-operated New Mexico Military Institute. The Attorney General noted that

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84. 532 F.2d 880 (3rd Cir. 1976) *aff’d by an equally divided Court*, 430 U.S. 703 (1977).
86. *Id.*
87. 75 Op. N.M. ATT’Y GEN. 193 (1975). The school offered a six-year combined high school/college program. Although women could take college-level course, only men could earn a high school diploma, receive free tutoring, be eligible for scholarships
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"[the Institute's] utilization of sex as a criterion for admission as a cadet clearly is banned by this amendment." 88

State ERAs have also been used to challenge the exclusion of female athletes from school athletic programs. In *Commonwealth v. Pennsylvania Interscholastic Athletic Association*, 89 the ERA was the basis for a challenge to the exclusion of women from the activities of the Pennsylvania Interscholastic Athletic Association (PIAA). The PIAA justified its policy by asserting that since men are more athletic and less injury-prone than women, the latter, given the competitive requirements of high school athletics, would be afforded fewer opportunities to participate if permitted to compete with boys. The court rejected this argument:

The notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-Law in light of the ERA. Nor can we consider the argument that boys are generally more skilled. The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. . . 90

State ERAs have been used to challenge other forms of unequal treatment in education. In *Texas Woman's University v. Chayklintaste*, for example, the Texas Court of Appeals held that the ERA forbade the practice of requiring all undergraduate women students under the age of twenty-three to live on campus while permitting male students to live off campus. 91

State ERAs also enjoy certain remedial advantages over Title IX. In *Blair v. Washington State University*, 92 female athletes and coaches recovered damages and received injunctive relief, remedies not available under Title IX, 93 on the basis of a state ERA. Plaintiffs argued that the University had violated the ERA by drastically un-

and live on campus. It is important to note that military schools are exempted from coverage by Title IX, 20 U.S.C. § 1681(a) (1982); thus, the New Mexico ERA was able to reach beyond Title IX in this case.

88. 75 Op. N.M. Att'y Gen. at 196.
89. 334 A.2d 839 (1975).
90. *Id.* 843. In the year since this ruling, Pennsylvania boys and girls have enjoyed substantially greater opportunities to participate in interscholastic sports, as the number of school programs has increased. From 1973 to 1981, the number of female participants increased in basketball, soccer, track and field, gymnastics, softball, field hockey and lacrosse. See, Nat'l Federation of State High School Associations, Sports Participation Surveys, (1973) & (1981).
93. Termination of the defendant's federal funding is usually the only remedy available for Title IX violations. 20 U.S.C. § 1682 (1982).
derfunding female versus male athletic programs. The court agreed, enjoined the university from future discrimination, and awarded a significant sum in damages to the plaintiffs. 94

Finally, state ERAs may provide a means of addressing discrimination in the vocational education system, which remains largely sex-segregated. 95 The dual tracking system, through which boys are channelled into trade and industrial courses, while girls are encouraged to take courses preparing them for clerical jobs or homemaking, cannot be explained by peer pressure, student preference, or parental discretion. State ERAs place an affirmative duty on states to completely eliminate discrimination. 96

V. Employment

Since 1964, plaintiffs have relied primarily upon Title VII of the Civil Rights Act to pursue claims of employment discrimination. 97 Title VII prohibits employment discrimination on the basis of race, color, national origin, religion or sex. Title VII applies to almost all employers, public or private, having at least fifteen employees, whose business affects commerce. 98 State ERAs apply only to public employment.

However, because Title VII was designed primarily to combat discrimination on the basis of race, color, religion and national origin, 99 its effectiveness in instances of sex discrimination is comparatively limited. State ERAs, in contrast, are specifically

94. In addition to awarding monetary and injunctive relief, the court ordered the establishment of a special committee to ensure that the order of the court would be obeyed. Blair v. Washington State University, No. 28816 at 10.


96. Where a school system shaped the programs through past official segregation by sex, the state should be called upon to correct the results of its prior discriminatory policies.

97. 42 U.S.C. 2000e (1982). In general, but particularly right after its passage, courts have construed Title VII liberally. For example, they recognized that the measure was intended to bar not only overt discriminatory treatment, but also facially neutral employment practices that have a discriminatory impact on a protected class. See, e.g., Griggs v. Duke Power Co., U.S. 424 (1971). However, recent government reluctance to enforce Title VII through the initiation of “pattern and practice suits” by the EEOC, coupled with some judicial decisions narrowly construing the law, may curtail Title VII’s future effectiveness. See County of Washington v. Gunther, 452 U.S. 161 (1981); but see Hishon v. King & Spaulding, 104 S. Ct. 2229 (1984) (sex discrimination in partnership consideration covered under Title VII).


State Equal Rights Amendments designed to address sex discrimination. Title VII allows an employer to make an employment decision on the basis of a gender-specific physical characteristic if it is deemed a "bona fide occupational qualification." No analogous exception exists in the unambiguous language of the state ERAs. Thus, ERAs have a far greater potential for redressing persisting patterns of employment discrimination than existing federal law.

State ERAs have prompted major legislative reforms in employment law. The Illinois legislature, for example, broadened an accidental death benefits law to allow benefits to surviving male and female spouses of covered workers. Connecticut and Illinois repealed legislation limiting the number of hours women could work. Pennsylvania's Attorney General concluded that a section of a statute prohibiting girls from working as newspaper carriers violated the ERA and thus had been impliedly repealed.

ERA opponents frequently contend that such provisions, rather than expanding employment opportunities for women, may instead require the abandonment of existing affirmative action plans designed to redress discrimination against women. This has not proven true. In Southwest Washington Chapter National Electrical Contractor's Association v. Pierce County, the Washington Supreme Court considered a challenge to an affirmative action plan favoring minority and women's business enterprises in county public works contracting. The court held that the absolute standard mandated by the Washington ERA did not "bar affirmative governmental efforts to create equality in fact." The court reasoned that

As long as the law favoring one sex is intended solely to ameliorate the effects of past discrimination, it simply does not implicate the ERA.

In contrast, Title VII offers only limited protection to employees hired via affirmative action policies in the event of employment re-

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105. Id. at 1102. The Court found the plan to be consistent with the federal Constitution's equal protection clause.

106. Id. See also Brown, Emerson, Falk & Freedman, supra note 4, at 904.
ductions. Generally, such reductions are based on a “last hired, first fired” principle. Bona fide seniority systems are exempt from Title VII, but not from state ERAs.

In Pennsylvania, the ERA was used to challenge staff reductions in the Office of Vocational Rehabilitation. Despite an existing affirmative action program, the government intended to abide by an established seniority system in carrying out proposed staff reductions. This would have drastically reduced the percentage of female professional staff. In response to the resulting lawsuit, the state decided to recall, with full back pay and benefits, more than half of the women discharged. The percentage of women in the professional workforce remained unchanged.

The concept of pay equity or comparable worth, predicated on a theory of alleged unfair wage discrimination in jobs held primarily by women as compared to jobs held primarily by men, is ripe for ERA litigation. Although Title VII permits sex-discrimination challenges to wage differentials between jobs that are “substantially equal,” plaintiffs bear the difficult burden of proving intentional discrimination. State ERAs expand the scope of available remedies. A cause of action can be based on job evaluation studies indicating that predominantly female positions are paid less than predominantly male positions, despite an equal rating on the evaluations. This disparate impact would be actionable under state ERAs, without a showing of discriminatory intent.

VI. Conclusion

As we have seen, state ERAs play a critical role in the ongoing efforts to improve the legal status of women. The brief history of these constitutional provisions illustrates the wisdom of relying on state initiatives to pursue rights not recognized or treated sympathetically at the federal level. State courts provide viable forums for women seeking to vindicate their rights.

State ERA litigation has also played an important educational role, often forcing the legal system to take a closer, more sympa-

110. AFSCME v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983); the plaintiff union, on behalf of female state employees, challenged the state wage system on state ERA as well as Title VII grounds. The ERA claims were not decided.
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thetic look at the problems confronting women. As the focus of wo-
men's campaign for equality shifts from eradicating overt forms of
sex discrimination to reaching more subtle forms of discrimination
state ERAs will play an increasingly prominent role.

In addition to contributing to the development of substantive
rights, state ERAs are an integral aspect of the debate surrounding
ratification of the proposed federal equal rights amendment. The
ERA states are, in a very real sense, laboratories. Their experiences
demonstrate the potential effectiveness of a federal equal rights
amendment, and undercut the catastrophic predictions of oppo-
nents of the federal amendment.