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## **BUT, MEN AND WOMEN ARE EQUALLY COMPENSATED, RIGHT?**

### ***AN EXAMINATION OF WHY AN EQUAL RIGHTS AMENDMENT IN NEW YORK'S CONSTITUTION WILL END THE WAGE GAP***

BY: AMANDA B. SLUTSKY

#### I. INTRODUCTION

“When women succeed, America succeeds.”<sup>1</sup>

Consider the following scenario: you, a female, worked at the same company for a few years and love your job. But then you find out the coworker in the cubicle next to you, who happens to be a man, is paid a higher salary than you are. You are a little confused at first because both you and your male colleague are doing substantially similar work using the same skill and effort, and you were both hired at the same time as part of a group of former interns lucky enough to be offered full-time employment in this economy. You cannot believe it. You wonder what you did to deserve a lower salary; you are a good employee, all of your projects are completed on time, and your boss raves about your job performance. But, despite this, you are still paid less than the man in the cubicle next to you. What could possibly be the reason? Is it because you are a woman? At many jobs, this would be the very reason, whether implicitly or explicitly.<sup>2</sup> Maybe you did not

<sup>1</sup> Barack Obama, U.S. President, Office of the Press Sec’y, Remarks by the President on Equal Pay for Equal Work, The White House (Apr. 8, 2014). In his speech, President Obama discussed the problem of unequal pay in America.

<sup>2</sup> See generally Sha-Shana N.L. Crichton, *The Incomplete Revolution: Women Journalists-50 Years After Title VII of the Civil Rights Act of 1964, We’ve Come a Long Way Baby, But Are We There Yet?*, 58 HOW. L.J. 49, 52–53 (Fall 2014). The article discusses women in journalism, specifically those employed at *Newsweek*. Some women at *Newsweek* believed they were to blame for the sex-based discrimination in the workplace, but when

“negotiate” your salary as well as the man at the next cubicle; or you plan on having a family, or already do; or maybe you are just the victim of unfortunate cultural stereotypes still present in society.<sup>3</sup>

Despite federal and state legislation, women are nevertheless paid substantially less than men, such that a woman could lose thousands and thousands of dollars over her entire career!<sup>4</sup> Your daughter, sister, mother, friend, or the woman sitting next to you on the subway could be making a mere eighty cents for every one dollar a man makes.<sup>5</sup> Put another way, according to the Department of Labor Women’s Bureau, in 2010, while women’s median annual earnings were a mere \$40,608, men’s median annual earnings were \$52,787.<sup>6</sup> Similarly, in 2011, women earned \$39,600 and men earned significantly more at \$50,078.<sup>7</sup> This trend of men earning more than women persisted again in 2014, such that women earned \$40,168 annually, while men earned \$50,078 annually.<sup>8</sup> This does not seem fair. Although it is 2018, women still face workplace discrimination every single day.<sup>9</sup>

one female employee challenged her salary disparity, she was dismissed as pushy and subsequently fired. *Id.* at 53.

<sup>3</sup> See Debra Groberg, *Negotiating your Worth as a Professional Woman: Pay Disparity Causes and Solutions*, 59 *ADVOC.* 25 (2016) (discussing causes of the wage gap, such as “institutional sexism,” women taking time off to spend time with their families, and women not negotiating their salary).

<sup>4</sup> Joint Econ. Comm. Democratic Staff, *Gender Pay Inequality: Consequences for Women, Families and the Economy*, page iii, (Apr. 2016), [http://www.jec.senate.gov/public/\\_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality—us-congress-joint-economic-committee.pdf](http://www.jec.senate.gov/public/_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality—us-congress-joint-economic-committee.pdf).

<sup>5</sup> Jennifer Calfas, *Women have Pushed for Equal Pay for Decades. It’s Sad how Little Progress We’ve Made*, *TIME*, Apr. 10, 2018, <http://time.com/money/5225986/equal-pay-day-2018-gender-wage-gap/>; see EQUAL MEANS EQUAL, *The Gender Wage Gap*, <http://equalmeanequal.com/the-gender-pay-gap/> (last visited Feb. 20, 2017) (citing the United States Bureau of Labor Statistics and Department of Commerce); see also *Highlights of Women’s Earnings in 2014: Report 1058*, U.S. BUREAU LAB. STAT. 37 (Nov. 2015), <https://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf> (Table 13 provides a year-by-year breakdown of women’s earnings by race, for full-time workers as a percentage of men’s).

<sup>6</sup> *Facts over Time*, U.S. DEP’T LAB. WOMEN’S BUREAU, <https://www.dol.gov/wb/stats/NEWSTATS/facts.htm#two> (last visited Oct. 22, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Women in Majority-male Workplaces Report Higher Rates of Gender Discrimination* PEW RESEARCH CTR., <http://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/> (last visited Oct. 29, 2018).

Sex-based discrimination has, unfortunately, been present in this Country for a very long time. Because of this discrimination, both women and men fought for equality. Starting in the early 1920s, the National Woman's political party advocated for women to have all of the same rights as men and introduced the Equal Rights Amendment ("ERA").<sup>10</sup> The relevant language of the original ERA is "Equality of rights under the law shall not be abridged or denied . . . on account of sex."<sup>11</sup> However, Congress did not respond to this call to action until a later date. In October 1971 and March 1972, the United States House of Representatives and Senate, respectively, passed the ERA to ban sex-based discrimination, and gave Congress the power to enforce this amendment through appropriate legislation.<sup>12</sup> Even though Congress passed the ERA successfully, the Equal Rights Amendment lay dead since three-fourths of the fifty states (thirty-eight states) did not ratify the amendment, as required by the United States Constitution.<sup>13</sup>

A version of the original ERA was introduced in almost every session of Congress from then on, but was continually met with failure.<sup>14</sup> Fast-forward to the 114th session of Congress during the 2015-2016 session, when a new bill was introduced, similar to those in sessions before it.<sup>15</sup> House Joint Resolution 52 ("H.J. Res. 52") is slightly different than the original ERA because it uses the word "women" in the modern bill to clearly protect women from sex-based discrimination and allows Congress and the states to enforce the amendment with appropriate legislation.<sup>16</sup>

Many proponents of the ERA suggest, among other things, it will have a substantial effect on ending the wage gap between men and

<sup>10</sup> *Chronology of the Equal Rights Amendment 1923-1996*, NAT'L ORG. FOR WOMEN, <http://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996/> (last visited Feb. 24, 2017). (Hereinafter "Chronology of the Equal Rights Amendment").

<sup>11</sup> S.J. Res. 21, 68th Cong. (1923).

<sup>12</sup> H.R.J. Res. 208, 92nd Cong. (1971-1972); see *Chronology of the Equal Rights Amendment*, *supra* note 10.

<sup>13</sup> *Chronology of the Equal Rights Amendment*, *supra* note 10.

<sup>14</sup> *The History Behind the Equal Rights Amendment*, THE EQUAL RTS. AM., <http://www.equalrightsamendment.org/history.htm> (last visited Feb. 25, 2017).

<sup>15</sup> See H.R.J. Res. 52, 114th Cong. (2015).

<sup>16</sup> Compare H.R.J. Res. 52 with H.R.J. Res. 208 (1972).

women.<sup>17</sup> An ERA, by its words, would ban sex-based discrimination against both men and women.<sup>18</sup> However, a federal ERA is unfortunately unrealistic at this point, but many state ERAs have already benefitted women and helped shrink the wage gap.<sup>19</sup> Despite this, New York still does not have an ERA. But, in 2015, New York State Senator Kevin S. Parker proposed his own version of an ERA, known as Senate Bill No. 1919 (“S.B. No. 1919”).<sup>20</sup> The new proposal would add “sex” to the second sentence of New York’s equal protection clause.<sup>21</sup> Thus, with S.B. No. 1919, the second clause would state “[n]o person shall, because of race, color, *sex*, creed or religion be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”<sup>22</sup> As of October 28, 2018, the bill was referred to the Judiciary committee.<sup>23</sup> The women of New York patiently wait to see if this Bill passes.

There is a demonstrable wage gap in New York that an ERA could help eliminate. In New York, women make nearly eighty-nine cents for every dollar men make.<sup>24</sup> When compared with the

<sup>17</sup> See Bonnie Grabenhofer & Jan Erickson, *Is the Equal Rights Amendment Relevant in the 21<sup>st</sup> Century?*, NAT’L ORG. FOR WOMEN 3, <http://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/> (last visited Oct. 16, 2018) (discussing how an ERA would protect the progress already achieved and continue to move forward); Alanna Vagianos, *10 Things We Need to do to Close the Wage Gap*, HUFFINGTON POST: WOMEN, (Apr. 14, 2015), [http://www.huffingtonpost.com/2015/04/14/things-we-need-to-do-to-close-wage-gap\\_n\\_7056322.html](http://www.huffingtonpost.com/2015/04/14/things-we-need-to-do-to-close-wage-gap_n_7056322.html) (arguing an ERA could “protect every American’s right equally, without regard to sex or gender.”).

<sup>18</sup> See H.R.J. Res. 208.

<sup>19</sup> See Bruce E. Altschuler, *State ERAs and Employment Discrimination*, 65 TEMPLE L. REV. 1267, 1274–75 (1992) (“it would seem that pay equity suits based on state ERAs would have a better chance of success than those based on Title VII . . . the use of state ERAs to promote either court rulings or legislative enactments to raise wages of traditionally female jobs appears to be a promising approach.”); see also CAL. CONST. art. 1 § 8 (1974) and MD. CONST. art. 46 (1978).

<sup>20</sup> S.B. 1919, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

<sup>21</sup> *Id.* § 1.

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> See *Senate Bill S1919*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2015/s1919> (last visited Oct. 16, 2018) (after it passes the committee, it is added to the floor calendar, then the Senate and Assembly pass it, and finally, the governor signs it).

<sup>24</sup> See *The Fight for Pay Equity: A State Road Map for New York*, AM. ASS’N OF U. WOMEN, [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=Gender\\_Pay\\_Gap\\_New\\_York](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=Gender_Pay_Gap_New_York) (last visited Oct. 16, 2018).

national average of seventy-nine cents,<sup>25</sup> New York is doing pretty well. But, “pretty well” still denotes there is room to improve. Women and their families suffer because of the long-term impacts of the wage gap.<sup>26</sup> The woman in the scenario above—your mom, daughter, friend, sister, or the woman sitting next to you on the subway—could very well be one of the victims of the wage gap, and experience this over her entire career. New York could get closer to and eventually end the wage gap by amending its state constitution to add an ERA.

This Note proposes an ERA for New York’s constitution to end the wage gap between men and women, and uses language from H.J. Res 52 and S.B. No. 1919. To demonstrate why New York needs the amendment, this Note will discuss Maryland’s and California’s ERAs and equal pay laws to establish the benefits of an ERA and how both ERAs and equal pay laws, together, help shrink the wage gap in those states. With an ERA, New York’s courts will analyze sex-based discrimination claims with strict scrutiny, which provides heightened protection because women will be considered a suspect class.

Section II provides background information on the original federal ERA and legislation; California equal pay laws and statistics; Maryland equal pay laws and statistics; and finally, New York equal pay laws and statistics. Section III discusses S.B. No. 1919 and critiques its language and adds language from H.J. Res. 52 to compose a draft ERA. It also explains the strict scrutiny analysis used in sex-based discrimination claims in states with ERAs. A constitutional claim provides an alternate route for women who suffer from gender pay inequality in a more plaintiff-friendly environment. Maryland and California are better able to protect their citizens against workplace discrimination with an

<sup>25</sup> See *The Fight for Pay Equity: A Federal Road Map*, AM. ASS’N OF U. WOMEN (Sept. 2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=Gender\\_Pay\\_Gap\\_New\\_York](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=Gender_Pay_Gap_New_York); Joint Econ. Comm. Democratic Staff, *supra* note 4.

<sup>26</sup> *The Wage Gap: The Who, How, Why, and What to Do*, NAT’L. WOMEN’S LAW CTR., <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/> (last visited Oct. 16, 2018) (“Based on today’s wage gap, a woman who worked full time, year-round would typically lose \$418,800 in a 40-year period.”).

ERA. Thus, an ERA is beneficial because women desperately need the strict scrutiny analysis to end the wage gap.<sup>27</sup>

## II. BACKGROUND

From the time women first entered the workforce, women were paid significantly less than their male counterparts although they were equally or more qualified.<sup>28</sup> Over the years, many offered solutions to the wage gap, ranging from a federal ERA<sup>29</sup> to women improving their negotiating skills,<sup>30</sup> but one solution starts on the state level. Adding an amendment that prohibits sex-based discrimination to New York's constitution would be a powerful addition to current federal and state legislation that prohibit sex-based discrimination in the workplace, and more specifically, it would end the wage gap.

The wage gap between men and women plagues this country. Though there is current federal legislation related directly to unequal pay, the states never approved the original ERA proposed to the United States Constitution. However, some states have their own ERAs. For example, California and Maryland equal pay laws and ERAs together make those states pioneers in ending the wage gap.<sup>31</sup> The wage gap is smaller than the national average in states with an explicit constitutional ban on sex-based

<sup>27</sup> Admittedly, New York is a leader in ending the wage gap; however, New York does not have the support of an explicit ban on sex-based discrimination in its Constitution or receive all of its benefits. See *America's Women and the Wage Gap*, NAT'L P'SHIP WOMEN & FAMILIES (Sept. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>; N.Y. CONST. (amended 2015).

<sup>28</sup> See Beth Rowen, *The Equal Pay Act*, INFOPLEASE, <https://www.infoplease.com/equal-pay-act> (last visited Oct. 16, 2018).

<sup>29</sup> See Alexa Tanney, *Equal Pay For Equal Work; Why The ERA Is So Important*, ELITE DAILY (June 24, 2015), <https://www.elitedaily.com/news/politics/equal-pay-era-streep/1091449>.

<sup>30</sup> See Shelley Zalis, *Get What You Want: The Woman's Guide To Negotiation*, FORBES (Aug. 15, 2018), <https://www.forbes.com/sites/shelleyzalis/2018/08/15/get-what-you-want-the-womans-guide-to-negotiation/#56f0a28b6545>.

<sup>31</sup> See Ben Christopher, *California's gender pay gap: How two proposed laws aim to close it*, CALMATTERS (July 25, 2017), <https://calmatters.org/articles/californias-gender-pay-gap-two-proposed-laws-aim-close/>; *Equal Pay for Equal Work - Employment Standards Service (ESS)*, MD. DEPT OF LAB., LICENSING & REG., <https://www.dllr.state.md.us/labor/wages/equalpay.shtml> (last visited Oct. 16, 2018).

discrimination.<sup>32</sup> Though New York has equal pay laws, the wage gap will continue to exist if New York does not have the ERA's powerful constitutional protection.

*A. Discrimination in the Workplace is Real: It Crosses All Professions.*

Women, regardless of race, were, and are, consistently discriminated against in the workplace, whether it is through unequal pay, sexual harassment, or pregnancy discrimination. The discrimination was so pervasive that Congress and the states enacted legislation to attempt to stop it.<sup>33</sup> This workplace discrimination problem goes back years, and, notwithstanding the passage of the Equal Pay Act in 1963, there is still progress to be made.<sup>34</sup>

This section provides a brief overview of the wage gap in this Country as a whole, how it is calculated, and why it is still a very serious problem. The wage gap is defined as “the difference in men’s and women’s median earnings, usually reported as either the earnings ratio between men and women or as an actual pay gap.”<sup>35</sup> The wage gap is “calculated by dividing the median earnings of full-time, year-round, working women by the median earnings of full-time, year-round, working men, all rounded to the nearest \$100.”<sup>36</sup> When the wage gap is calculated, race, education, work experience, and location are typically accounted for.<sup>37</sup> The

<sup>32</sup> See *America’s Women and the Wage Gap*, *supra* note 27; Leslie W. Gladstone, *Equal Rights Amendments: State Provisions*, CONG. RES. SERV. (Aug. 23, 2004), [https://digital.library.unt.edu/ark:/67531/metacrs7397/m1/1/high\\_res\\_d/RS20217\\_2004Aug23.pdf](https://digital.library.unt.edu/ark:/67531/metacrs7397/m1/1/high_res_d/RS20217_2004Aug23.pdf).

<sup>33</sup> See generally 29 U.S.C. § 206(d)(1) (prohibiting sex discrimination under the Equal Pay Act); 42 U.S.C. §§ 2000e-2 (prohibiting discrimination based on sex in relation to compensations, privileges, terms, and conditions of employment under Title VII).

<sup>34</sup> Jessie Van Amburg, *Women Are Closing the Wage Gap. Ever. So. Slowly.*, TIME: MOTTO (July 1, 2016), <http://motto.time.com/4390238/gender-wage-gap-pew-analysis/> (“The gender wage gap stubbornly persists despite incremental progress . . .”).

<sup>35</sup> Hannah Fuetsch, *Chapter 546: Another Step to Ensure Equal Pay Doesn’t Wait Another 50 Years*, 47 U. OF PAC. L. REV. 577, 579 (2016).

<sup>36</sup> Sarah Jane Glynn, *Explaining the Gender Wage Gap*, CTR. FOR AM. PROGRESS, 2 (May 19, 2014), <https://www.americanprogress.org/issues/economy/reports/2014/05/19/90039/explaining-the-gender-wage-gap/>.

<sup>37</sup> ELISE GOULD, JESSICA SCHIEDER, & KATHLEEN GEIER, ECON. POLICY INST. WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID



seventy-nine cents wage gap is calculated as described above, but even when the calculation is adjusted to include “college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status,” there is still a sizable seven percent difference that cannot be explained.<sup>38</sup>

Nationally, in 2017, the gender pay gap (wage gap) was twenty-one cents to the dollar, or twenty-one percent.<sup>39</sup> Stated differently, the ratio of women’s to men’s “median earnings . . . was approximately seventy-nine percent.”<sup>40</sup> This Note will use the seventy-nine percent wage gap, but will also mention the eighty cent pay differential as that is the most recent number.<sup>41</sup> Essentially, this means an average working female makes a mere seventy-nine to eighty cents while the average working male makes one dollar. Furthermore, women lose significant amounts of money over the length of their entire careers. For example, a woman could lose as much as \$430,000 over a forty-year career.<sup>42</sup> The wage gap affects women in all fields. This section discusses the legal and nursing fields as examples of how far the wage gap reaches.

LESS THAN MEN AND WHY IT CAN’T BE EXPLAINED AWAY 6 (Oct. 20, 2016), <http://www.epi.org/112962>.

<sup>38</sup> *The Simple Truth About the Gender Pay Gap*, AAUW, 8 (2018 ed.), <http://www.aauw.org/files/2014/03/The-Simple-Truth.pdf>.

<sup>39</sup> Joint Econ. Comm. Democratic Staff, *supra* note 4.

<sup>40</sup> *Id.* (explaining that the 21 percent difference comes from the calculation of women earning 79 percent of what a man earns).

<sup>41</sup> See generally *The Fight for Pay Equity: A State Road Map for New York*, AAUW (Sept. 2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=Gender\\_Pay\\_Gap\\_New\\_York](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=Gender_Pay_Gap_New_York).

<sup>42</sup> Joint Econ. Comm. Democratic Staff, *supra* note 4. “According to the National Women’s Law Center, for the typical woman working full time, year-round, the annual gap would grow to more than \$430,000 over a 40-year period.” When thinking about this number, the impact of \$430,000 (over the 40-year period) could mean the difference between a woman paying her monthly mortgage payments so she and her family could stay in their home, or payments toward her child’s college education. The lifetime difference is a number that cannot simply be ignored nor chalked up to women taking lower paying jobs or spending less time in the work force. Additionally, minority women lose even more than the average for all women. Specifically, African-American women earn \$877,000 less than a white male, and Latina women would earn \$1,007,000 less than white men, both over a 40-year period.

Pay inequality affects women at some of the highest and most prestigious levels. Although these women, some at high-powered law firms, may make a significant amount of money, they make less than their male coworkers while doing substantially similar work.<sup>43</sup> Women working in the law and in nursing, two respected professions, face discrimination solely because they are women, and it is often demonstrated in the form of unequal pay.

Originally, the legal field was dominated by men.<sup>44</sup> Although women have the same education, perform the same work, and possibly work more hours than their male colleagues, female attorneys across the country are paid significantly less than men.<sup>45</sup> According to one study, female partners receive smaller salaries because men receive more credit for bringing in the big cases.<sup>46</sup> Additionally, according to a second study, a female equity partner in a law firm earns only 80 percent of what a male equity partner earns.<sup>47</sup> Some suggest women are paid less than men because they do not negotiate their salaries as much or as well as men because they fear retaliation and punishment.<sup>48</sup> But, there is no reason women should have to face this because “[t]heir skill, experience, and dedication to the law warrants equal pay to the men they work alongside.”<sup>49</sup>

Similar to the legal field, women in nursing fight the same battle against unequal pay. However, unlike the legal field, nine of ten nurses are women.<sup>50</sup> Although nursing is a female dominated profession, male nurses make \$5,000 more than their female

<sup>43</sup> *Repost of the Ninth Annual Survey*, NAT’L ASS’N WOMEN LAWYERS (2015), <http://www.nawl.org/p/cm/ld/fid=506> (last visited Oct. 11, 2018).

<sup>44</sup> See e.g., *Bradwell v. Illinois*, 83 U.S. 130, 140-41 (1872) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

<sup>45</sup> Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. TIMES, (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html> (stating that “there is a 44 percent difference in pay between female partners and their male colleagues”).

<sup>46</sup> *Id.*

<sup>47</sup> NAT’L ASS’N WOMEN LAWYERS, *supra* note 43.

<sup>48</sup> Groberg, *supra* note 3 at 26. This point, however, is beyond the scope of this Note, particularly in light of new proposed legislation in New York.

<sup>49</sup> *Id.* at 27.

<sup>50</sup> Kathleen Elkins, *20 Jobs that are Dominated by Women*, BUSINESS INSIDER, (Feb. 17, 2015, 4:15 PM), <http://www.businessinsider.com/pink-collar-jobs-dominated-by-women-2015-2>.

counterparts.<sup>51</sup> This inequality of pay is so widespread in this field that 2.5 million women are affected by it.<sup>52</sup> Furthermore, the wage gap affects every single specialty, except orthopedics.<sup>53</sup> Additionally, to demonstrate the long lasting effect of the wage gap over the course of a female nurse's thirty year career, she will make \$155,000 less than a male nurse.<sup>54</sup>

Both the legal field and nursing, one male-dominated and the other female-dominated, demonstrate how prevalent and real the wage gap is in our Country.

*B. Federal Protections for Sex-Based Discrimination in the Workplace.*

In 1963, the Equal Pay Act was passed in response to the unfavorable treatment of women at work.<sup>55</sup> The relevant language of the Equal Pay Act bans discrimination “on the basis of sex [when] paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex.”<sup>56</sup> Essentially, an employer cannot pay a woman less than a man when the woman performs a job that uses *substantially equal* skill, effort, and responsibility.<sup>57</sup> According to the Women's Bureau of the United States Department of Labor, equal pay is not just about a paycheck, it includes much more, such as “equal salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for

<sup>51</sup> Scott Maier, *Male Registered Nurses Make Thousands More in Salary Than Female Counterparts*, UNIV. OF CAL. S.F. (Mar. 26, 2015), <https://www.ucsf.edu/news/2015/03/124266/male-registered-nurses-make-thousands-more-salary-female-counterparts>.

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2016); see also Peter Avery, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 849 (2004) (explaining that the statute was enacted with the desire to “eliminat[e] ‘endemic’ wage discrimination against women in the United States.”).

<sup>56</sup> 29 U.S.C. § 206(d)(1).

<sup>57</sup> See *id.*; see also *Facts about Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> (last visited Oct. 21, 2018).

travel expenses and benefits.”<sup>58</sup> The Equal Employment Opportunity Commission enforces the Equal Pay Act’s ban on sex-based discrimination.<sup>59</sup>

One year after the Equal Pay Act, the pinnacle Civil Rights Act of 1964 was enacted to ban discrimination on the basis of sex, race, religion, and national origin.<sup>60</sup> The relevant portion of the Civil Rights Act is Title VII. Title VII makes it “an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .”<sup>61</sup>

Yet, although there is the Equal Pay Act and Title VII, this Country continues to have a sizable wage gap. Although the impact of these Acts has been meaningful, there is still so much work to be done.<sup>62</sup>

Then, in 2009, the United States made another stride towards ending the problem after the 2007 Supreme Court case, *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>63</sup> Lilly Ledbetter, a nineteen year employee at Goodyear, was consistently given lower raises when compared to her male coworkers.<sup>64</sup> She brought a claim under Title VII, which contains a time-bar on discrimination claims.<sup>65</sup>

<sup>58</sup> U.S. DEP’T OF LABOR, WOMEN’S BUREAU, A GUIDE TO WOMEN’S EQUAL PAY RIGHTS 1-2 (Apr. 2012), [https://www.dol.gov/wb/resources/equal\\_pay\\_guide\\_employee.pdf](https://www.dol.gov/wb/resources/equal_pay_guide_employee.pdf).

<sup>59</sup> See Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978), reprinted in 42 U.S.C. § 2000e-4 (2018); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 57.

<sup>60</sup> See generally 42 U.S.C. § 2000, *et seq.*

<sup>61</sup> *Id.* § 2000e-2(a)(1) (emphasis added).

<sup>62</sup> Hillary E. Crawford, *7 Equal Pay Statistics that Every Woman Should Have at the Tip of Her Tongue Today*, BUSTLE (Apr. 12, 2016), <https://www.bustle.com/articles/154135-7-equal-pay-statistics-that-every-woman-should-have-at-the-tip-of-her-tongue-today> (“Equal Pay Day . . . represents how far into the year women *still* have to work to make as much as men earned the previous year.”) (emphasis in original).

<sup>63</sup> See Barack Obama, U.S. President, Office of the Press Sec’y, *Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act Bill Signing*, The White House (Jan. 29, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-lilly-ledbetter-fair-pay-restoration-act-bill-signin>. (Hereinafter “Obama’s Lilly Ledbetter Speech”)

<sup>64</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-22 (2007); Obama’s Lilly Ledbetter Speech, *supra* note 63 (“Over the course of her career, she lost more than \$200,000 in salary, and even more in pension and Social Security benefits – losses she still feels today.”).

<sup>65</sup> *Ledbetter*, 518 U.S. at 623-24.

Because of this, the Supreme Court unfortunately held that Ledbetter's claim was time-barred because she did not file it within 180 days of the discriminatory act.<sup>66</sup> President Barack Obama, upset by the Court's 2007 decision, signed the Lilly Ledbetter Fair Pay Act of 2009.<sup>67</sup> The Act overruled the Court's decision. Now, a discriminatory act occurs when an employer signs a woman's paycheck that is not equivalent to a man's paycheck or "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation or other practice . . ."<sup>68</sup>

When someone brings a sex-based discrimination claim, federal courts analyze these claims with intermediate scrutiny because there is not a federal ERA to require strict scrutiny.<sup>69</sup> Associate Supreme Court Justice Ruth Bader Ginsburg set out the intermediate scrutiny analysis in her majority opinion in *United States v. Virginia*.<sup>70</sup> Under intermediate scrutiny, the state must demonstrate an "exceedingly persuasive justification" for its gender-based discrimination.<sup>71</sup>

<sup>66</sup> *Id.* at 642-43.

<sup>67</sup> *Lilly Ledbetter Fair Pay Act*, NAT'L WOMEN'S LAW CTR. (Jan. 29, 2013), <https://nwlc.org/resources/lilly-ledbetter-fair-pay-act/>.

<sup>68</sup> 42 U.S.C. § 2000e-5(e)(3)(A) (2018). President Obama created the National Equal Pay Taskforce in 2010, which is composed of four federal agencies, including the Equal Employment Opportunity Commission, Department of Justice, Department of Labor, and the Office of Personnel Management to protect workers in both the private and public sectors and end the wage gap between men and women. NAT'L EQUAL PAY TASKFORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 22, 29 (June 2013), [https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\\_pay\\_task\\_force\\_progress\\_report\\_june\\_2013\\_new.pdf](https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf).

<sup>69</sup> See *United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

<sup>70</sup> See *id.* at 532-33. In this case, Virginia Military Institute only admitted men into its program to produce citizen-soldiers. *Id.* at 520. Women attempted to apply to the program, but were told the Virginia Military Institute is a male-only school; so, these applicants filed a complaint alleging the policy violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 523. The Court held that Virginia violated the Equal Protection Clause and that the school admit women who are capable of all of the activities required of cadets. *Id.* at 558.

<sup>71</sup> *Id.* at 531. Intermediate scrutiny is not as protective as strict scrutiny; strict scrutiny requires a more searching review; the government should have a "compelling governmental interest, and must have narrowly tailored the law to achieve that interest." *Strict Scrutiny*, CORNELL LAW SCHOOL: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last visited Oct. 14, 2018).

### *C. The Nonexistent Federal ERA.*

The fight for equal pay and a federal ERA has gone on for decades. Alice Paul, the leader of the National Women's Party,<sup>72</sup> helped two Congressmen draft the original Equal Rights Amendment.<sup>73</sup> From 1923 to 1970, the Equal Rights Amendment was re-introduced into every Congressional session.<sup>74</sup> The proposed original ERA states the following:

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

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

Section 3. This amendment shall take effect two years after the date of ratification.<sup>75</sup>

Finally, in 1971, it was approved by the House of Representatives, and then approved by the Senate in 1972.<sup>76</sup> This happened with the help of Representative Martha Griffiths, who filed a discharge petition, forcing the House of Representatives to discuss and vote on the ERA.<sup>77</sup> However, Congress placed a seven-year time limit for the states to ratify the ERA.<sup>78</sup>

<sup>72</sup> *Historical Overview of the National Woman's Party*, LIBRARY OF CONGRESS: AM. MEMORY, 1-2, <https://www.loc.gov/collections/static/women-of-protest/images/history.pdf> (last visited Oct. 14, 2018). The National Woman's Party focused on many causes, including the suffrage movement and the Equal Rights Amendment. *Id.* at 2-3, 5.

<sup>73</sup> Chronology of the Equal Rights Amendment, *supra* note 10. While a federal ERA would be ideal, this Note specifically argues for an ERA in New York's Constitution. But to understand why New York needs one, it is important to go through the history of the original federal ERA and federal legislation protecting women in the workplace, and also where federal law fell short.

<sup>74</sup> *Id.*

<sup>75</sup> *The Equal Rights Amendment: Unfinished Business for the Constitution*, EQUAL RIGHTS AMEND., <http://www.equalrightsamendment.org> (last visited Oct. 17, 2018).

<sup>76</sup> *Martha Griffiths and the Equal Rights Amendment*, THE CENTER FOR LEGISLATIVE ARCHIVES, <https://www.archives.gov/legislative/features/griffiths/> (last visited Oct. 17, 2018).

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

<sup>78</sup> Chronology of the Equal Rights Amendment, *supra* note 10.

In 1977, the National Organization for Women pushed to eliminate the time-bar set by Congress.<sup>79</sup> Unfortunately, even with an approved extension, time ran out and only thirty-five of the necessary thirty-eight (3/4) states ratified the ERA.<sup>80</sup> After the required number of states failed to ratify the ERA, it was reintroduced in every session of Congress from 1985 to 1992, and then again from 1997 to the present.<sup>81</sup>

In 2015, Representative Carolyn Maloney, a New York native, stepped up in the fight for the much-needed ERA.<sup>82</sup> She introduced many different versions of the ERA in Congress, ten times thus far.<sup>83</sup> Most recently, in the 114th Congressional Session (2015–2016), she introduced House Joint Resolution Bill 52 (“H.J. Res. 52”), which slightly alters the original ERA from the 1970s.<sup>84</sup> The language of the ERA is as follows:

Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. 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. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

<sup>79</sup> *Id.*

<sup>80</sup> *ERA Extension: Update on the Arguments*, THE HERITAGE FOUND. (July 27, 1978), <https://www.heritage.org/the-constitution/report/era-extension-update-the-arguments>

<sup>81</sup> See, e.g., S.J. Res. 24, 105th Cong. (1997–1998), S.J. Res. 30, 106th Cong. (1999–2000), H.J. Res. 32, 107th Cong. (2001–2002), H.J. Res. 31, 108th Cong. (2003–2004), H.J. Res. 31, 109th Cong. (2005–2006), H.J. Res. 31, 110th Cong. (2007–2008), H.J. Res. 31, 111th Cong. (2009–2010), H.J. Res. 31, 112th Cong. (2011–2012), S.J. Res. 10, 113th Cong. (2013–2014), and S.J. Res. 16, 114th Cong. (2015–2016); see also Chronology of the Equal Rights Amendment, *supra* note 10.

<sup>82</sup> See generally Carolyn B. Maloney, *Women’s Issues*, <http://maloney.house.gov/issues/womens-issues> (last visited Oct. 17, 2018).

<sup>83</sup> Carolyn B. Maloney, *Commemorating Women’s Equality One Day a Year Isn’t Enough; Congresswoman Maloney Joins Hochul, and Quinn to Call for Passage of the Equal Rights Amendment and Release New Report Outlining Inequalities Women Face in the Economy Today* (Aug. 26, 2015), <http://maloney.house.gov/media-center/press-releases/commemorating-women-s-equality-one-day-a-year-isn-t-enough-congresswoman>.

<sup>84</sup> H.R.J. Res. 52, 114th Cong. (2015).

Section 3. This amendment shall take effect two years after the date of ratification.<sup>85</sup>

It was resolved by the Senate and House of Representatives, two-thirds of each House concurring therein.<sup>86</sup>

#### *D. State Constitutions and State Equal Pay Laws.*

While much progress was made, the federal system, on its own, did not go as far as many hoped it would. Thus, states, such as California and Maryland, used their state ERAs and equal pay laws to bring their states closer to ending the wage gap. This section will discuss California and Maryland's ERAs, equal pay laws, and statistics to demonstrate how both states use their "equal pay toolbox" to have some of the smallest wage gaps and toughest laws in the country. This section will also discuss current New York equal pay laws and statistics.

##### 1. California: The Toughest Equal Pay Laws in the Country.

California is one of many states that bans sex-based discrimination in its constitution.<sup>87</sup> There are two clauses in California's constitution that ban sex-based discrimination.<sup>88</sup> Article I Section 8 states, "a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of *sex*, race, creed, color, or national or ethnic origin."<sup>89</sup> This clause was added to the Constitution in 1879.<sup>90</sup> Additionally, California amended its constitution once again in 1996 with Section 31.<sup>91</sup> Section 31 provides, "the state shall not

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Although there is a federal need, this Note does not argue for the federal ERA but rather uses H.J. Res. 52's language to supplement New York Senate Bill No. 1919.

<sup>87</sup> *See generally* ALA. CONST. art. I, § 1; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; IOWA CONST. art. I, § 1; LA. CONST. art. I, § 3; MASS. CONST. part 1, art. 1; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.H. CONST. pt. 1, art. 2; N.J. CONST. art. X, para. 4; N.M. CONST. art. II, § 18; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; R.I. CONST. art. I, § 2; 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.

<sup>88</sup> *See* CAL. CONST. art. I § 8 (1879) (emphasis added); CAL. CONST. art. I § 31 (1879).

<sup>89</sup> CAL. CONST. art. I § 8 (1879) (emphasis added).

<sup>90</sup> *See id.* (emphasis added).

<sup>91</sup> *See* CAL. CONST. art. I § 31 (1879).



discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>92</sup>

Additionally, California has an Equal Pay Act, which, as amended in 2015 with the California Fair Pay Act, currently states “[a]n employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility.”<sup>93</sup> Something unique about California’s law is, although it only applies to California workers, employees can compare their wages to substantially similar employees in other states, such as New York.<sup>94</sup> With the new amendment, employers will need to demonstrate women are paid a different wage from men based on something other than sex, such as “job-related factors.”<sup>95</sup> Additionally, this amendment is considered by some to be model legislation the rest of the country and federal government should follow.<sup>96</sup>

California’s equal pay laws, in particular its recent Fair Pay Act, are considered the toughest in the country.<sup>97</sup> As of 2014, California has one of the smallest wage gaps in this Country based on full-

<sup>92</sup> *Id.*

<sup>93</sup> CAL. LAB. CODE § 1197.5(a) (2015) (amended 2018).

<sup>94</sup> *See id.*; see Wendi S. Lazar, *Will New Legislation Cure the Gender Pay Gap?; Employees in the Workplace*, 256 N.Y. L. J. No. 28 (Aug. 10, 2016).

<sup>95</sup> § 1197.5; see Kurt Ozreck, *Calif. Gov. Signs Equal Pay Law Touted as Toughest in US*, L.360 (Oct. 6, 2015), <https://www.law360.com/articles/711707/calif-gov-signs-equal-pay-law-touted-as-toughest-in-us>.

<sup>96</sup> *See* Patrick McGreevy and Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 6, 2015, 8:15 PM), <http://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html> (further explaining that, aside from substantially similar work between men and women, employers are not allowed to pay the genders unequally despite a differentiation in titles and work sites); *see also* Mark E. Terman and Shavaun Adams Taylor, *Strict New California Fair Pay Act Will Become Effective January 1, 2016*, NAT’L L. REV. (Oct. 12, 2015), <https://www.natlawreview.com/article/strict-new-california-fair-pay-act-will-become-effective-january-1-2016> (discussing the additions to the Fair Pay Act, such as an employee’s ability to bring a claim comparing wages to another employee at a different facility and another job as long as it fulfills the “substantially similar” requirement, and includes recommendations to employers to ensure they comply with the new defense burden set out).

<sup>97</sup> *See* Bourree Lam, *The U.S.’s ‘Strictest’ Equal Pay Law is About to Go into Effect*, ATLANTIC (Dec. 31, 2015), <https://www.theatlantic.com/business/archive/2015/12/california-fair-pay-2016/422292/> (reporting on California’s new Fair Pay Act and its requirements).

time, year-round employment.<sup>98</sup> More specifically, according to a study completed by the Joint Economic Committee Democratic Staff, women in California make 15.8 percent less than men, or alternatively, make 84.2 cents for every one dollar a man makes.<sup>99</sup> According to the National Partnership for Women and Families, in April 2016, full-time working women in California lost a combined total of 39 billion dollars a year because of the wage gap.<sup>100</sup> However, the Joint Economic Committee Democratic Staff study supports the argument that there is a direct relationship between tough equal pay laws, an ERA, and smaller pay gaps between men and women.<sup>101</sup> While these numbers demonstrate there is still work to be done, it is important to recognize California's wage gap is significantly smaller than the majority of states in the country.<sup>102</sup>

## 2. Maryland: Equal Pay for Equal Work.

Like California, Maryland's Constitution bans sex-based discrimination.<sup>103</sup> Specifically, it states "[e]quality of rights under the law shall not be abridged or denied because of sex."<sup>104</sup> Article 46 was added to the Maryland Constitution in 1972, and interestingly, sex is the *only* type of discrimination explicitly banned in that document.<sup>105</sup> The Maryland ERA allows state courts to analyze gender-based discrimination and wage claims using "at least strict scrutiny."<sup>106</sup> Additionally, the Maryland ERA

<sup>98</sup> Joint Econ. Comm. Democratic Staff, *supra* note 4, at 8.

<sup>99</sup> *Id.*

<sup>100</sup> *California Women and the Wage Gap: Fact Sheet*, NAT'L P'SHIP for WOMEN & FAMILIES (Apr. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2016-ca-wage-gap.pdf> (The National Partnership for Women and Families is an organization advocating for fairness in the workplace, access to healthcare, and reproductive health and rights).

<sup>101</sup> See Joint Econ. Comm. Democratic Staff, *supra* note 4, at 9 ("There appears to be a correlation between strong equal pay laws and smaller gender pay gaps.").

<sup>102</sup> *Id.* (California has the eighth lowest wage gap out of the fifty states).

<sup>103</sup> See MD. CONST. art. 46 (1972).

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*; see also Awilda R. Marquez, *Comparable Worth and the Maryland ERA*, 47 MD. L. REV. 1129, 1163-64 (1988).

<sup>106</sup> See *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817, 840 (Md. 1985) (noting that Maryland's ERA "makes sex classifications subject to at least the same scrutiny as racial classifications."); see also Marquez, *supra* note 105 at 1180 (explaining that in Judge

proves to be a “powerful tool” to stop unequal pay between men and women, as it only requires a showing of a discriminatory effect or unequal distribution of benefits between the genders.<sup>107</sup>

In addition, Maryland has two important statutes, which supplement its ERA. First, the Maryland Code of Human Relations prohibits an employer from discriminating against an individual in reference to “compensation, terms, conditions, or privileges because of the individual’s . . . sex . . . [or] gender identity.”<sup>108</sup>

Furthermore, in May 2016, Maryland Governor Larry Hogan signed the Equal Pay for Equal Work Act.<sup>109</sup> Similar to California’s Fair Pay Act, the Equal Pay for Equal Work Act is hailed as an example of what equal pay laws should look like.<sup>110</sup> This statute protects people from sex-based discrimination, but also includes “gender identity” to protect transgender men and women.<sup>111</sup> Maryland protects employees from discrimination in any occupation in several ways. First, an employer cannot discriminate between employees and pay wages to one sex or gender identity lower than employees of the other sex or gender identity when these employees perform work of “comparable character.”<sup>112</sup> Second, an employer cannot provide less

Eldridge’s decision in *Burning Tree*, the pay scheme that produces a wage gap fails when it cannot be justified by a compelling governmental interest).

<sup>107</sup> See Marquez, *supra* note 105 at 1181, 1186–87 (arguing Maryland’s ERA is a “unique and powerful tool” to help close the wage gap in the state and provides a remedy to the sufferers of gender-based wage discrimination).

<sup>108</sup> See MD. CODE ANN., STATE GOV’T § 20-606(a)(1)(i) (West 2014) (this section also prohibits discrimination on the basis of race, religion, color, age, national origin, marital status, sexual orientation, genetic information, and disability).

<sup>109</sup> See Fenit Nirappli, *Here’s why equal-pay activists are looking toward Maryland*, WASH. POST (May 27, 2016), [https://www.washingtonpost.com/local/md-politics/heres-why-equal-pay-activists-are-looking-toward-maryland/2016/05/27/9c82ce48-2134-11e6-8690-f14ca9de2972\\_story.html?utm\\_term=.8ebc9ff2b9e2](https://www.washingtonpost.com/local/md-politics/heres-why-equal-pay-activists-are-looking-toward-maryland/2016/05/27/9c82ce48-2134-11e6-8690-f14ca9de2972_story.html?utm_term=.8ebc9ff2b9e2).

<sup>110</sup> See *id.*; see also Brian W. Steinbach, *Maryland Expands State Equal Pay Act and Broadens Employees’ Right to Discuss Wages*, NAT’L L. REV. (May 23, 2016), <https://www.natlawreview.com/article/maryland-expands-state-equal-pay-act-and-broadens-employees-right-to-discuss-wages>.

<sup>111</sup> See MD. CODE ANN., LAB. & EMPL. § 3-304(b)(1) (West 2016); see also *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN (2018), <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>. (defining gender identity as “one’s innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves.”).

<sup>112</sup> See § 3-304(b)(1)(i).

employment opportunities based on sex or gender identity.<sup>113</sup> Additionally, Maryland protects employees in both public and private sectors.<sup>114</sup>

In Maryland in 2005, the median earnings for men were \$41,221, while women were paid a mere \$29,590.<sup>115</sup> By 2015, men's median earnings were \$46,509 and women earned a median wage of \$35,647.<sup>116</sup> As reported by the National Women's Law Center in February 2016 and the Joint Economic Committee Democratic Staff in April 2016, women in Maryland earned 85.4 cents for a single dollar a man makes.<sup>117</sup> Overall, women in Maryland lose about \$344,160 over a forty-year career because they are paid less than their male counterparts.<sup>118</sup> While these numbers are large, they are relatively low compared to many states across the country and the national average.<sup>119</sup> Maryland separates itself from other states with its ERA and equal pay laws, which help close the wage gap between men and women in Maryland.

### 3. New York: The Smallest Wage Gap, but Where is the ERA?

The New York State Constitution does not have an explicit ban on sex-based discrimination like both California and Maryland do. The New York Constitution has an equal protection clause, but an

<sup>113</sup> See § 3-304(b)(1)(ii).

<sup>114</sup> See § 3-301(b)(1).

<sup>115</sup> See MEDIAN EARNINGS IN THE PAST 12 MONTHS (IN 2015 INFLATION-ADJUSTED DOLLARS) BY SEX FOR THE POPULATION 16 YEARS AND OVER WITH EARNINGS IN THE PAST 12 MONTHS, U.S. CENSUS BUREAU (2015), [https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15\\_1YR/B20002/0400000US24](https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B20002/0400000US24).

<sup>116</sup> See MEDIAN EARNINGS IN THE PAST 12 MONTHS (IN 2005 INFLATION-ADJUSTED DOLLARS) BY SEX FOR THE POPULATION 16 YEARS AND OVER WITH EARNINGS IN THE PAST 12 MONTHS, U.S. CENSUS BUREAU (2005), [https://factfinder.census.gov/bkmk/table/1.0/en/ACS/05\\_EST/B20002/0400000US24](https://factfinder.census.gov/bkmk/table/1.0/en/ACS/05_EST/B20002/0400000US24).

<sup>117</sup> See *Long Overdue: Equal Pay for Maryland's Women and Families*, NAT'L WOMEN'S L. CTR., 1 (Feb. 2016), <https://nwlc.org/wp-content/uploads/2015/04/Co-B-Long-Overdue-Equal-Pay-for-Marylands-Women-and-Families.pdf>. (breaking down earnings by sex and by county in Maryland); see also Joint Econ. Comm. Democratic Staff, *supra* note 4, at 8.

<sup>118</sup> See *Long Overdue: Equal Pay for Maryland's Women and Families*, *supra* note 117, at 1; see also Joint Econ. Comm. Democratic Staff, *supra* note 4, at 8 (Maryland ranks fourth out of fifty states and the District of Columbia).

<sup>119</sup> See *The Wage Gap By State for Women Overall 2016*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/resources/wage-gap-state-women-overall-2016/> (last visited Oct. 22, 2018).

explicit ban on sex-based discrimination is missing.<sup>120</sup> Specifically, Article 1 Section 11 currently provides

[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination . . . by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.<sup>121</sup>

However, New York took a step in the right direction when State Senator Kevin S. Parker proposed an ERA, known as Senate Bill No. 1919 (“S.B. No. 1919”).<sup>122</sup> The new Section 11 would provide that “[n]o person shall, because of race, color, *sex*, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”<sup>123</sup> S.B. No. 1919 is currently with the Judiciary Committee in the New York State Legislature.<sup>124</sup>

Although sex-based discrimination is not banned in New York’s constitution, it is banned in New York’s Human Rights Law (“NYHRL”). Section 296(1)(a) states it is unlawful “[f]or an employer or licensing agency, because of an individual’s . . . sex . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.”<sup>125</sup>

Additionally, New York enacted an equal pay provision to its Labor Law. Section 194 prohibits employers from paying employees at a wage rate less than that of the opposite sex in the same establishment for “*equal work* on a job the performance of which requires *equal* skill, effort and responsibility, and which is performed under similar working conditions . . . .”<sup>126</sup> New York’s equal pay laws are analyzed under a framework similar to the one

<sup>120</sup> See N.Y. CONST. art. 1 § 11 (amended 2001).

<sup>121</sup> *Id.*

<sup>122</sup> See S.B. 1919, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

<sup>123</sup> *Id.*

<sup>124</sup> See *id.*

<sup>125</sup> N.Y. EXEC. LAW § 296(1)(a) (McKinney 2018).

<sup>126</sup> N.Y. LAB. LAW § 194(1) (McKinney 2016) (emphasis added).

used for the federal Equal Pay Act.<sup>127</sup> Under New York's Labor Law, the employee must show "(i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar working conditions."<sup>128</sup> Furthermore, employers must prove the difference in pay is related to job performance, not sex.<sup>129</sup>

Even with New York's legislation, the pay gap, as of March 2018, is eleven percent, meaning a woman only makes 89 cents for every dollar a man makes.<sup>130</sup> While New York's wage gap is relatively low compared to the national average of seventy-nine/eighty cents to the dollar, women in New York, like all women nationwide, will feel the wage gap for their entire lives. Furthermore, although New York City is a business hub with many high-powered positions, women across all fields throughout the State are paid substantially less than their male colleagues.<sup>131</sup> According to the National Partnership for Women and Families, in New York, full time working women will on average lose a combined total of almost \$20 billion every year, solely because they are paid less than men.<sup>132</sup>

Although this wage gap may seem small, the impact on New York women is substantial. If the wage gap did not exist, a New York woman could provide a year's worth of food to her family or live in her apartment for another six months.<sup>133</sup> The wage gap affects single family income homes just as much, if not more than two-family income households.<sup>134</sup> In New York, over one million

<sup>127</sup> See *Rose v. Goldman, Sachs & Co., Inc.*, 163 F. Supp. 2d 238, 243 (S.D.N.Y. 2001) ("Claims for violations of the Equal Pay Act and the New York State Equal Pay Law may be evaluated under the same standard.").

<sup>128</sup> *Tulino v. City of N.Y.*, 2016 WL 2967847 6 (S.D.N.Y. May 19, 2016) (citation omitted) (quoting *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999)).

<sup>129</sup> See § 194(1)(d); see also Wendi S. Lazar, *Will New Legislation Cure the Gender Pay Gap? Employees in the Workplace*, N.Y. L. J. (Aug. 9, 2016), <https://www.law.com/newyorklawjournal/>.

<sup>130</sup> See NAT'L WOMEN'S L. CTR., *supra* note 119.

<sup>131</sup> See *New York Women and the Wage Gap*, NAT'L P'SHIP FOR WOMEN & FAMILIES (Apr. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2016-ny-wage-gap.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

family households are led by women, with twenty nine percent of those homes falling below the poverty level.<sup>135</sup> With an ERA and equal pay laws, women in New York will no longer be victims of the wage gap. Adding an ERA could mean the difference between a woman living in her apartment for another six months or living on the street.<sup>136</sup>

### III. ARGUMENT

New York should amend its constitution to add an ERA because it will help end the wage gap between men and women. Specifically, New York should adopt S.B. No. 1919, with some alterations. With an ERA, New York will finally be in line with California, Maryland, and the many other states with ERAs. With the proposed ERA (and even S.B. 1919 on its own), New York will (1) apply “strict scrutiny” for sex-based discrimination claims; (2) prevent sex-based discrimination in the future; and (3) ultimately end the wage gap between men and women. First, Section A will discuss, critique, and add to S.B. No. 1919’s language. Lastly, Section B will discuss strict scrutiny and its heightened protection in New York state courts.

#### *A. Proposal: A State Constitutional Amendment.*

New York State Senate Bill No. 1919 would amend Article 1 Section 11 of New York’s Constitution. Currently, Article 1 § 11 states, “No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”<sup>137</sup> S.B. No. 1919 adds the word “sex” between “color” and “creed.”<sup>138</sup> S.B. No. 1919 is an ERA and would be a step in the right direction. However, adding language from H.J. Res. 52<sup>139</sup> would provide even more protection for women.

<sup>135</sup> *Id.*

<sup>136</sup> *See id.*

<sup>137</sup> N.Y. CONST. ART. 1, § 11 (McKinney 2002).

<sup>138</sup> S.B. 1919, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

<sup>139</sup> *See generally* H.R.J. Res. 52, 114th Cong. (2015).

Using some portions of H.J. Res. 52, Article 1 § 11 would have language broad enough to cover the classes it already covers, but also protect against all types of sex-based and gender identity-based discrimination. Therefore, Article 1 § 11 should state

Section 1: No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

Section 2: No person shall, because of race, color, sex, gender identity, creed or religion, be subjected to any discrimination in his or her civil rights by any person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Section 3: Women shall have equal rights under the law.<sup>140</sup>

Section One uses “no person,” which protects all people, including men and transgender men and women. Furthermore, Section Two adds “gender identity” to S.B. No. 1919, which expands the ERA’s scope to protect transgender men and women and people who identify as a man or woman.<sup>141</sup>

Section Three might seem superfluous because of Section Two, but Section Three’s language, which comes from H.J. Res. 52, provides an extra protection similar to Maryland’s ERA.<sup>142</sup> The term “women” “addresses a concrete group of people, not an abstract right;”<sup>143</sup> thus, it protects women of all races and religions and transgender women, and also prevents discrimination solely based on being or identifying as a woman. Additionally, it protects women when sex-based discrimination might not necessarily be the driving force.<sup>144</sup> For example, a scenario where sex-based discrimination is not the “main claim” might involve race-based discrimination or other forms of discrimination as the primary

<sup>140</sup> See generally NY CONST. ART. 1, § 11 (McKinney 2002); see also S.B. 1919.

<sup>141</sup> See generally NY CONST. ART. 1, § 11; S.B. 1919; see also S.B. 502, 240<sup>th</sup> Leg., Reg. Sess. (N.Y. 2017).

<sup>142</sup> See MD. CONST. ART. 46 (West 1978) (“[e]quality of rights under the law shall not be abridged or denied because of sex.”).

<sup>143</sup> Catherine A. MacKinnon, *Toward a Renewed Equal Rights*, 37 HARV. J. L. & GENDER 569, 578 (2004) (discussing how the term “women” explicitly identifies the group that is intended to be protected by the ERA).

<sup>144</sup> *Id.*



focus, and the sex-based discrimination is almost incidental.<sup>145</sup> According to Catharine A. MacKinnon, Representative Maloney's resolution, by its terms, "encourages legislation for equality rights," and thus, frees women from "sex discrimination."<sup>146</sup> Moreover, adding the phrase "under the law" means plaintiffs do not have to prove there was state action, which is required in almost all constitutional claims, both federal and state-wide.<sup>147</sup> Therefore, Section Three will provide extra support for women because they can reach private employers and not just state actors.

*B. Strict Scrutiny to End the Wage Gap.*

As mentioned in S.B. No. 1919's Justification, New York courts will adopt strict scrutiny in sex-based discrimination cases because, with the amendment, sex would be a suspect classification.<sup>148</sup> Strict scrutiny is an extremely tough standard for defendants to overcome.

Currently, New York only has statutory protection for sex-based discrimination. Courts analyze statutory equal pay claims using the same analysis federal courts use for Equal Pay Act claims in which women claim they are not compensated the same as their male coworkers.<sup>149</sup> This is the main way to rectify the discrimination women face at work. But by adopting an ERA, New York women will have an alternate route for relief. The ERA could fill any loopholes in federal and state equal pay laws.<sup>150</sup> Women who were discriminated against because of their sex or gender identity and suffer unequal pay will now have a constitutional claim to resolve the issue.

<sup>145</sup> See *Id.* (stating that, for example, "discrimination against women of color could be said to be based on their sex, but also on their race . . .").

<sup>146</sup> *Id.* at 579.

<sup>147</sup> See Altschuler, *supra* note 19 at 1278. ("several state ERAs may reach private employers.").

<sup>148</sup> S.B. 1919, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

<sup>149</sup> See *Pfeiffer v. Lewis Cty.*, 308 F. Supp. 2d 88, 88 (N.D.N.Y. 2004) ("New York's Equal Pay Act is analyzed under the same standards applicable to the federal Equal Pay Act.").

<sup>150</sup> Avilda R. Marquez, *Comment: Comparable Worth and the Maryland ERA*, 47 MD. L. REV. 1129, 1186 (Summer 1988) (noting that Maryland state law fills in any holes that the federal law failed to respond to).

While federal courts only apply “intermediate scrutiny” to gender discrimination constitutional claims,<sup>151</sup> many states with ERAs use “strict scrutiny;”<sup>152</sup> thus, “requiring proof that sex-based classifications are *narrowly tailored* to serve a compelling governmental interest.”<sup>153</sup> Some state courts, like Washington and Illinois, justify their use of heightened scrutiny based on the unique legislative history of ERAs<sup>154</sup> and the need to protect the “legislative intent to provide more protection” than under federal and state laws.<sup>155</sup> Although many state ERAs have varying language, almost all of these states use “heightened protection [for] sex-based discrimination.”<sup>156</sup> This standard is what the federal court system uses to analyze race-based claims.<sup>157</sup>

An explicit ban on sex-based discrimination gives plaintiffs who suffer pay inequality a better chance of succeeding in court because it requires courts to apply a higher standard of scrutiny.<sup>158</sup> If New York amends its Constitution, women would be explicitly protected in the amendment based on the country’s history of discrimination and hostility towards women, and their treatment as inferior citizens. With the heightened scrutiny that comes with adopting an ERA, women in New York who are paid less than men will have a better chance of succeeding in court.

<sup>151</sup> REVA B. SIEGEL, *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 313 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

<sup>152</sup> Ilya Somin, *Be Careful What You Wish For: The Revived Equal Rights Amendment May Surprise Its Supporters*, *LEGAL TIMES* (June 4, 2007), [https://www.law.gmu.edu/assets/files/faculty/Somin\\_ERA\\_OpEd.pdf](https://www.law.gmu.edu/assets/files/faculty/Somin_ERA_OpEd.pdf).

<sup>153</sup> Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 *RUTGERS L. J.* 1201, 1240 (2004) (emphasis added) (further describing the critical difference between the levels of scrutiny in federal and state courts with ERAs).

<sup>154</sup> *Id.* at 1241 (describing the approach used by courts in Washington and Illinois; and stating there “was a specific legislative intent to provide more protection . . .”).

<sup>155</sup> *Id.* at 1242 (discussing an example of a case in Illinois, where the court determined that the “language and legislative history of the Illinois ERA”).

<sup>156</sup> See Risa E. Kaufman, *State ERAs in the New ERA: Securing Poor Women’s Equality by Eliminating Reproductive-Based Discrimination*, 24 *HARV. WOMEN’S L. J.* 191, 195 (2001) (the use of heightened scrutiny goes back to the purpose behind the various ERAs, which is to protect women from sex-based discrimination).

<sup>157</sup> See *Loving v. Va.*, 388 U.S. 1, 14 (1967); see also Kaufman, *supra* note 156 at 194–95 (“Under the Equal Protection Clause of the Fourteenth Amendment, courts treat discrimination on the basis of sex less rigorously than discrimination based on race: sex-based discrimination is valid if supported by an ‘exceedingly persuasive justification.’”).

<sup>158</sup> See generally Wharton, *supra* note 153 at 1240.

As mentioned above, state ERAs, like Section Three of the draft ERA, have the potential to reach private actors beyond the state action required in federal constitutional claims.<sup>159</sup> Not requiring state action makes it easier for women to bring sex-based discrimination claims and get relief. Additionally, it may motivate employers to stop discriminating and change their methods because women now have the constitution behind them.<sup>160</sup> The breadth of the proposed ERA goes beyond what other constitutional amendments allow. This sends a message to employers that New York takes pay inequality seriously.

Thus, with the established heightened scrutiny, a woman can bring an equal pay claim under the ERA and NYLL. Based on New York's current strict scrutiny analysis for race-based claims,<sup>161</sup> New York courts would analyze sex-based discrimination claims under the ERA as follows: (1) there is a suspect classification; (2) if there is a suspect classification, strict scrutiny applies; and (3) the government must prove "the legislative end is justified by a compelling governmental interest."<sup>162</sup> The first part of the analysis would be easily satisfied because the draft ERA automatically designates women as a suspect class. Furthermore, because Section Three of the draft ERA bypasses state action, the third part of the strict scrutiny analysis would require any employer to prove it has a compelling interest that justifies its decision to pay female employees less than male employees. The employer can prove this by demonstrating the work is not substantially similar or the employer has a justifiable reason that is narrowly tailored for the pay disparity. This looks like NYLL's analysis, but the compelling justification is tougher to prove than a typical EPA claim, and the court will go through a more rigorous analysis to ensure the

<sup>159</sup> Altschuler, *supra* note 19 at 1278.

<sup>160</sup> See Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144, 166–67 (1984) ("State ERA litigation has also played an important educational role, often forcing the legal system to take a closer, more sympathetic look at the problems confronting women."); see also Wendi S. Lazar, *Will New Legislation Cure the Gender Pay Gap?: Employees in the Workplace*, N.Y. L. J. (Aug. 9, 2016), <http://www.outtengolden.com/file287/download?token=MWijlnz->.

<sup>161</sup> See *Allen v. Town of N. Hempstead*, 469 N.Y.S.2d 528, 532 (N.Y. Sup. Ct. 1983).

<sup>162</sup> *Id.*

employer's interest is narrowly tailored to its reason for paying a woman less than a man.

To demonstrate the analysis, consider the following hypothetical. A female nurse at a private hospital discovers that her fellow male nurse makes \$5,000 (annually) more than she does. Both nurses graduated in the same year from universities of similar caliber, have comparable work experience, and work as nurses in the same medical specialty at the same level for the same supervisor. This supervisor determined the nurses' salaries and has been known to make gender-based comments towards women. Under the analysis for the proposed ERA, the female nurse is a member of a suspect class because of her gender. Second, because a woman is a suspect class, strict scrutiny applies. Third, the hospital would then have to prove that it (and the supervisor) had a compelling reason for the significant pay disparity and that its interest is narrowly tailored. The hospital might satisfy the third step with proof of a justifiable reason or that the work is different. But, the court in this case would go through this analysis meticulously to really determine if the pay disparity is actually based on work capabilities and not gender. Moreover, because of the strict scrutiny, the female nurse is in a plaintiff-friendly environment with a high probability of winning.

Alternatively, the analysis would be a bit different under NYLL. First, the hospital pays the female nurse \$5,000 less than the male nurse. Second, both nurses perform the same tasks in the same medical specialty. Third, both nurses perform under similar work conditions for the same supervisor. The hospital would then just simply argue that the pay differential is based on work performance or some other loose reason, and that would be it; the court would not go through a meticulous analysis to determine if the hospital's interest is narrowly tailored.

Thus, the draft ERA would lead to an increase in sex-based discrimination claims because the ERA provides a better solution and result than the NYLL or NYHRL alone.<sup>163</sup>

<sup>163</sup> N.Y. CONST. Art. XIX § 1 (amend. 2001). A constitutional amendment is also a better solution because constitutional amendments are extremely difficult to repeal. In New York, a constitutional amendment can be proposed by a constitutional convention, or in the senate and assembly, who then refer it to the attorney general to issue an opinion. *Id.* Next, the amendment must be approved by the majority in the senate and assembly, and then the

## IV. CONCLUSION

The message should be clear: men and women deserve to be paid equally. New York's legislation, while substantial, is not enough because there is still a sizable wage gap. New York should follow California and Maryland, among many other states, and add an ERA to end sex-based discrimination, specifically to end the wage gap. The draft ERA goes beyond typical constitutional amendments and bypasses the state action requirement, and also explicitly protects transgender women. With the draft ERA, New York and its courts are armed with drastically more power to help employees who face this type of discrimination. An ERA in New York's Constitution will allow the courts to use strict scrutiny to analyze sex-based discrimination claims, and give women an alternate route to stop their employers from paying them less than someone of the opposite sex. The next time you look at your sister, daughter, mother, or friend, or think about the women in the scenarios above or the woman sitting next to you on the subway, remember she could pay six more months of rent if she was not a victim of the wage gap.<sup>164</sup>

amendment will be referred to the next legislative session and agreed upon by a majority of both houses. *Id.* Finally, after all of this, the people will approve and ratify the amendment. *Id.* If something is proposed as a bill, the final step is the governor's signature. *Id.*

<sup>164</sup> *New York Women and the Wage Gap Fact Sheet*, NAT'L P'SHIP WOMEN & FAMILIES (Apr. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2016-ny-wage-gap.pdf>.