COMMENT

Washington's Equal Rights Amendment: It Says What It Means and It Means What It Says

I. INTRODUCTION

More than twelve years ago the voters of Washington State approved the addition of article XXXI to the Washington State Constitution.[1] Article XXXI, most commonly known as the Equal Rights Amendment (ERA), provides that legal rights and responsibilities shall not be denied or abridged on account of sex.[2] In the twelve years since its adoption, few cases have turned on an interpretation of the ERA.[3] The existence of the ERA, however, has strengthened Washington laws[4] that protect

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1. The voters approved article XXXI (the state's equal rights amendment) on Nov. 7, 1972. *See infra* note 38 for the statistical results of the election.

2. WASH. CONST. art. XXXI reads as follows:

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

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

3. Washington courts have interpreted the ERA to decide the following cases: Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983) (county affirmative action plan upheld because ERA allows sex-based classifications intended to eliminate the effects of past discrimination); MacLean v. First N.W. Indus., 96 Wash. 2d 338, 347-48, 635 P.2d 683, 688 (1981) (application of the ERA to a discount ticket pricing policy on "ladies' night" was precluded because the policy did not discriminate on the basis of sex); Seattle v. Buchanan, 90 Wash. 2d 584, 592, 584 P.2d 918, 922 (1978) (lewd conduct ordinance prohibiting exposure of female breasts upheld because the ordinance applied equally to men and women by requiring them to cover parts of their bodies associated with the procreative function); Marchioro v. Chaney, 90 Wash. 2d 298, 305-06, 582 P.2d 487, 491 (1978) (state statute requiring equal representation of both sexes on political committees upheld because it promoted equality and did not discriminate on the basis of sex), *aff'd*, 442 U.S. 191 (1979); State v. Wood, 89 Wash. 2d 97, 103, 569 P.2d 1148, 1151 (1977) (filiation provisions of statute do not violate the ERA because they do not deny the father any rights or create any new responsibilities in him; both parents shared responsibility for the child's support); Darrin v. Gould, 85 Wash. 2d 859, 877, 540 P.2d 882, 893 (1975) (the ERA prohibits the state from forbidding girls to play contact football with boys); Singer v. Hara, 11 Wash. App. 247, 264, 522 P.2d 1187, 1197 (1974) (the marriage statute does not violate the ERA because it requires marriage between persons of the opposite sex).

4. *See, e.g.*, WASH. REV. CODE § 2.36.080 (1983) (forbids exclusion of any citizen

persons from sex discrimination.

The drive for state equal rights amendments began in the 1960s, as legal and political activists started discussing the need for changes in the nation's legal structure that would guarantee equality for all persons.[5] The United States Supreme Court was not viewed as the forum in which sexual equality would be achieved. Historically, the United States Supreme Court's application of the equal protection clause[6] to sex discrimination claims has been characterized by a strong belief in women's "separate place"[7] and by casual review of state legislative classi-

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from jury selection based on sex); WASH. REV. CODE ch. 26.09 (1983) (statute recognizes equal status of spouses and does not favor one over the other); WASH. REV. CODE ch. 26.16 (1983) (treats both spouses as partners and protects both the property earned as a community and that owned separately); WASH. REV. CODE ch. 28A.85 (1983) (statute prohibits discrimination on the basis of sex against any student in grades K-12 of the Washington public schools); WASH. REV. CODE ch. 28B.04 (1983) (establishes guidelines under which the council for post secondary education shall contract to provide services and programs of job training for displaced homemakers); WASH. REV. CODE § 48.30.300 (1983) (prohibits any insurance company from cancelling or refusing to issue an insurance contract on the basis of sex); WASH. REV. CODE § 49.12.175 (1983) (forbids employers from discriminating in the payment of wages between males and females who are similarly employed); WASH. REV. CODE ch. 49.60 (1983) (statute forbids sex discrimination in employment, credit and insurance transactions, places of public resort and accommodation or amusement, and real property transactions).

5. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 874 (1971) [hereinafter cited as Brown]. This article, which is frequently cited in court opinions and other law review articles, explores the changes that are necessary in the legal structure to achieve a unified system of equality. Arguing in favor of a federal constitutional amendment, the authors discuss various methods by which the legal structure could be changed to guarantee sexual equality, trace the development of various ERA proposals in Congress, explain the constitutional framework of the ERA, and provide examples of how the legal structure would change, after ratification of the ERA, in labor legislation, domestic relations, criminal law, and the military.

6. U.S. CONST. amend. XIV, § 1.

7. In Bradwell v. Illinois, 83 U.S. 130 (1872), Justice Bradley stated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141 (Bradley, J., concurring).

See also Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding a state statute that excused women from jury service unless they voluntarily applied; court held that the classification was reasonable because "a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities [as the center of home and family life]"); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding a state statute that provided that no female could be licensed as a bartender unless she was the wife or daughter of a male owner because

fications based on stereotypical views of women.[8] Consequently, the equal protection clause has not always prohibited sex discrimination.[9] Unable to fight sex discrimination adequately under the federal Constitution, advocates of women's rights sought revision of existing discriminatory statutes.[10] Such efforts proved frustrating, however, because of the difficulty of mobilizing the national and state political machinery.[11]

Proponents of equal rights thus turned to a third approach for creating a system of sexual equality: passage of a constitutional equal rights amendment at the federal or state level or both.[12] At both levels of government, proponents and opponents of constitutional amendments have debated the merits of an ERA.[13] The fundamental debate over the issue has focused on how the courts would and should interpret an equal rights provision.[14]

"[t]he [equal protection clause] does not require legislatures to reflect sociological insight or shifting social standards"); Muller v. Oregon, 208 U.S. 412, 421 (1908) (special statutory protection for women in employment held not arbitrary or unreasonable under the fourteenth amendment due process clause because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . [H]ealthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest . . . in order to preserve the strength and vigor of the race").

8. Brown, *supra* note 5, at 876. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 69 (1961) (upholding Florida statute that excluded women from jury service unless they voluntarily applied because women were still regarded as the center of home and family life and should be relieved from their civic duties); Goesaert v. Cleary, 335 U.S. 464, 465-66 (1948) (Michigan statute prohibiting licensing of females as bartenders was upheld because the United States Constitution does not require legislatures to reflect the changing position of women in our society); Bradwell v. Illinois, 83 U.S. 130, 139 (1872) (state bar association rule excluding women from admission to the bar upheld because women were not being denied a privilege or immunity of United States citizenship and thus were subject to exclusive state regulation).

9. Brown, *supra* note 5, at 876. See *infra* note 57 for a discussion of the United States Supreme Court's standard of review for sex discrimination claims under the equal protection clause.

10. Brown, *supra* note 5, at 883. Examples of discriminatory state statutes are those that restrict women's entry into certain occupations and those that give protective labor benefits to women. *Id.*

11. *Id.*

12. *Id.* at 884.

13. *Id.* at 886.

14. *Id.* at 888. Proponents of equal rights amendments argue that courts should interpret such provisions as prohibiting all sex-based classifications except those that protect an individual right to privacy, *id.* at 900, and those based on characteristics found in all members of one sex and in no member of the other. *Id.* at 893. The right to privacy would permit separation of the sexes in public rest rooms, in sleeping quarters of prisons or similar public institutions, and in living conditions of the armed forces. *Id.*

The state courts have dealt with equal rights provisions in a variety of ways. These general approaches can be categorized as follows: (1) avoid the constitutional question; (2) find that any rational relationship between the classification and the legislative goal satisfies the constitutional guarantee; (3) apply the suspect class/strict scrutiny standard used by the United States Supreme Court to review racial classifications; and (4) apply an absolute standard by which all sex-based classifications are prohibited.[15]

The Pennsylvania Supreme Court is the only state court that has adopted an absolute standard of review.[16] When the Washington Supreme Court first applied the ERA, it held that the ERA prohibited all sex discrimination.[17] Since then, however, the court has eroded this absolute prohibition by allowing sex-based classifications intended to promote equal treatment of the sexes.[18] The court thus has modified an absolute prohibition of all sex-based classifications into one that merely prohibits harmful discrimination based on sex. The Washington Supreme Court should follow the Pennsylvania court's example by adhering to the absolute standard and the electoral mandate. Only then will article XXXI have its intended force and meaning.

This Comment begins with a discussion of the ERA's legislative history and the legislature's attempt to bring state statutes into compliance with the ERA upon its passage. Next, judicial interpretations of the new constitutional guarantee are

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The classic example of a law that would allow a constitutional classification based on the unique physical characteristics of each sex would be one regulating wet nurses or sperm donors. *Id.* at 894.

A basic legal principle underlying the ERA is that a law must deal with particular attributes of individuals, not with a classification based on the broad attribute of sex. Legislation that classifies persons based on a physical characteristic unique to a sex does not deny equal rights to the other sex since the regulated attribute does not apply to members of both sexes. On the other hand, legislative classifications of this kind can extend only to physical characteristics and not to psychological, social, or other cultural characteristics found to some degree in members of both sexes. "Differences in treatment attributable to such shared traits must be based upon their existence in the individual, not upon a classification by sex." *Id.* at 893-94.

15. *See generally* Note, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086, 1088-89 (1977). This article surveys the states that have constitutional equal rights provisions and categorizes the way in which each state's courts have interpreted the state ERA.

16. *See infra* text accompanying notes 152-64 .

17. Darrin v. Gould, 85 Wash. 2d 859, 877, 540 P.2d 882, 893 (1975).

18. Marchioro v. Chaney, 90 Wash. 2d 298, 305, 582 P.2d 487, 491 (1978), *aff'd*, 442 U.S. 191 (1979).

compared to the interpretation of the Washington Constitution's privileges and immunities clause.[19] Finally, the Comment compares Washington's standard of review with a similar standard used by the Pennsylvania Supreme Court and argues that the Washington Supreme Court should adopt the absolute standard applied by the Pennsylvania courts.

II. LEGISLATIVE BACKGROUND OF WASHINGTON'S ERA

Representative Lois North introduced a constitutional amendment[20] into the Washington State House of Representatives on January 11, 1972.[21] The proposed amendment simply provided that equality of rights and responsibilities could not be denied or taken away from anyone because of his or her sex.[22] The resolution embodying the amendment also stated that at the next general election Washington voters would decide whether equal rights should be constitutionally guaranteed.[23] The proponents of the ballot measure[24] believed that the ERA would require equal treatment of the sexes under the law; the state could no longer pass laws conferring benefits or placing obligations on one sex and not on the other.[25] Supporters of the ERA assured Washington voters that discriminatory education requirements would become illegal, that the ERA would not require unisex restrooms, and that the ERA would not disrupt

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19. WASH. CONST. art. I, § 12. This provision of the Washington Constitution reads: "*Special Privileges and Immunities Prohibited.* No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." See *infra* notes 58-74 and accompanying text for a discussion of the supreme court's analysis under the privileges and immunities clause, which is analogous to federal equal protection analysis of sex-based classifications.

20. H.J. Res. 61, 42d Leg., 2d Ex. Sess., 1972 Wash. Laws 526.

21. HOUSE JOURNAL, STATE OF WASHINGTON, 2D EX. SESS. 1972, at 50. The engrossed bill was amended to include the words "and responsibility." *Id.* at 295. On Jan. 24, 1972, the house voted 96-3 to adopt H.J.R. 61; on Feb. 10, the senate passed the bill. *Id.* at 295, 793. See *infra* text accompanying notes 112-20 for a discussion of the meaning of the words "and responsibility."

22. H.J. Res. 61, 42d Leg., 2d Ex. Sess., 1972 Wash. Laws 526.

23. *Id.*

24. Proponents included Peter D. Francis, Democratic state senator, Seattle; Lois North, Republican state representative, Seattle; A.J. Pardini, Republican state representative, Spokane; Betty Fletcher, President, Seattle King County Bar Association, Seattle. OFFICE OF THE SECRETARY OF STATE, OFFICIAL VOTER'S PAMPHLET, GENERAL ELECTION TUESDAY, NOV. 7, 1972, at 52 [hereinafter cited as OFFICIAL VOTER'S PAMPHLET].

25. *Id.*

family life.[26]

Opponents of the ERA[27] agreed that women should have equal employment opportunity, should be paid equally for equal work, and should receive equal credit consideration.[28] They argued, however, that the ERA would result in unintended societal consequences such as elimination of preferential insurance rates, integrated high school athletic teams, homosexual marriages, elimination of divorce, welfare, and child custody preferences for women, and mandatory combat duty for military women.[29]

The differences in viewpoints expressed by the proponents and opponents of the Washington ERA reflect the widespread and fundamental debate over how equal rights provisions should be interpreted.[30] Advocates in the Washington Legislature wanted the courts to interpret the ERA subjectively.[31] Under such interpretation, the ERA would permit differentiation between the sexes based upon unique physical characteristics[32] and would also permit laws protecting an individual's constitutional right to privacy.[33] The ERA's opponents, on the other hand, believed that the courts could only interpret the ERA objectively.[34] Under this theory of constitutional interpretation, the courts would construe all sex-based classifications as

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26. *Id.*

27. Senator Jack Metcalf, Republican state senator, Mukilteo; James P. Kuehnle, Republican state representative, Spokane; Mrs. Robert G. Young, State Chairman, H.O.W. League of Housewives, Inc., Bellevue. *Id.* at 53.

28. *Id.*

29. *Id.*

30. *See supra* text accompanying notes 5-14. For an excellent and detailed account of this debate, see Brown, *supra* note 5, at 875-85.

31. JUDICIARY COMMITTEE OF THE WASHINGTON STATE LEGISLATIVE COUNCIL, THE POTENTIAL IMPACT OF HOUSE JOINT RESOLUTION 61—THE EQUAL RIGHTS AMENDMENT—ON THE LAWS OF THE STATE OF WASHINGTON 2, 28 (1972) [hereinafter cited as THE POTENTIAL IMPACT]. The Washington State Legislative Council was created by the legislature and consisted of fifteen state senators and sixteen state representatives. WASH. REV. CODE ANN. § 44.24.010 (1983). One of the council's purposes was to make reports to the legislature and the public with respect to any of its studies of governmental issues and procedures. WASH. REV. CODE ANN. § 44.24.020(5) (1983). The statute authorizing the legislative council was repealed in 1983. 1983 Wash. Laws ch. 52, § 7.

32. THE POTENTIAL IMPACT, *supra* note 31, at 2. *See supra* note 14 and accompanying text.

33. THE POTENTIAL IMPACT, *supra* note 31, at 2. An example of a law protecting a person's right to privacy while embodying a sex-based classification is one requiring separate restrooms for each sex.

34. *Id.* at 3-4.

unconstitutional.[35]

An absolute standard of judicial review embraces both of these theories of interpretation. Even though the absolute standard prohibits all sex-based classifications, the standard must be applied in a manner consistent with other constitutional rights, including an individual's right to privacy.[36] Additionally, classifications based on the unique physical characteristics of one sex are not discriminatory as long as the characteristics are found in all members of one sex and in no members of the other sex.[37]

The Washington electorate narrowly adopted the new constitutional amendment.[38] Acting upon this rather weak mandate, the state legislature amended existing laws so that all statutory language was sex neutral.[39] However, the rules of construction[40] already explicitly stated that "words importing the masculine gender may be extended to females also."[41] Passage of the act, therefore, was unnecessary.[42] The legislature wanted to show Washington citizens that it was serious about protecting equal rights for women, but its attempt was of little real consequence.[43]

The implementation of the amending act was equally ineffective. The act[44] amended statutes dealing with domestic relations, criminal definitions (such as rape and prostitution), marriage, employment, and pension benefits. Unfortunately, the revisions merely changed words; they did not address the underlying policies or assumptions of the laws.[45] In some instances the sex-neutral language did not necessarily result in equal rights for

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35. *Id.* at 4.

36. Brown, *supra* note 5, at 900.

37. *Id.* at 893. *See also supra* note 14.

38. On Nov. 7, 1972, the Washington electorate voted 645,115 (50.13%) for the ERA; 641,746 (49.87%) voted against the measure, a difference of only 3,369 votes out of 1,286,861 votes cast. A. KRAMER, ABSTRACT OF VOTES, PRESIDENTIAL AND STATE GENERAL ELECTION HELD ON NOVEMBER 7, 1972, at 3 (1972). The outcome was uncertain until all the absentee ballots were counted. Seattle Post-Intelligencer, Nov. 9, 1972, at A5, col. 1.

39. Act of Apr. 24, 1973, ch. 154, 1973 Wash. Laws 1st Ex. Sess. 1118. The act amends 129 state statutes to bring them into conformity with the ERA.

40. WASH. REV. CODE ch. 1.12 (1983).

41. *Id.* § 1.12.050.

42. Dybwad, *Implementing Washington's ERA: The Problem with Wholesale Legislative Revision*, 49 WASH. L. REV. 571, 572 (1974) ("Consequently, except for the psychological value of the statutes drafted to be sex neutral, these amendments will have little impact.").

43. *See infra* notes 44-50 and accompanying text.

44. Act of Apr. 24, 1973, ch. 154, 1973 Wash. Laws 1st Ex. Sess. 1118.

45. Dybwad, *supra* note 42, at 578-79.

women because implicit sex-role assumptions were retained from the original legislation.[46] In domestic relations, in particular, the language changes had little impact on statutory purpose and effect.[47] The man continued to be regarded as the family's primary breadwinner and the person responsible for his wife's and children's financial support.[48] The woman continued to be considered the family's primary caretaker and homemaker, regardless of the family's actual needs and support.[49]

The legislature attempted in good faith to right these wrongs, but the attempt fell far short of addressing the problem that the ERA was adopted to solve. Since this first attempt, however, the legislature has revised existing laws and has passed new laws that strongly protect sexual equality.[50] The ERA expressly states that laws cannot discriminate on the basis of sex. A statute containing sex-neutral language, however, does not end discrimination. The ERA requires that all discriminatory purposes and effects be abolished.

III. The Effect of the ERA on State Equal Protection Analysis

The legislature's immediate attempt to conform state statutes to the ERA did little to achieve true sexual equality. Soon after passage of the ERA, however, the Washington Supreme Court applied a strict standard to sex-based classifications[51] by using the state's privileges and immunities clause.[52] By applying such a standard, the court took a large step toward promoting the sexual equality that the ERA was designed to achieve.

Prior to the passage of the ERA, victims of sex discrimina-

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46. For example, Wash. Rev. Code § 26.20.030 (1983) provides criminal sanctions for parental nonsupport of children. The legislature changed the statutory language so that it was sex neutral, Act of Apr. 24, 1973, ch. 154, § 34(1)(c), 1973 Wash. Laws 1st Ex. Sess. 1118, 1137, but the assumption that the father is the primary breadwinner remains implicit in the statutory language. Dybwad, *supra* note 42, at 580.

47. *See* Dybwad, *supra* note 42, at 577-83.

48. *Id.* at 580. The spousal support statute originally placed an affirmative duty on husbands to provide their wives with necessary food, clothing, and shelter. *Id.* at 581. The assumption that a wife is economically helpless is no longer valid. *Id.* at 582. The amendatory act extended support responsibility to wives as well as to husbands but ignored the underlying assumption justifying the duty to support either spouse. *Id.*

49. *Id.* at 581-82.

50. *See supra* note 4.

51. Hanson v. Hutt, 83 Wash. 2d 195, 201, 517 P.2d 599, 603 (1973).

52. Wash. Const. art. I, § 12.

tion in Washington relied primarily on federal[53] and state[54] constitutional equal protection clauses to challenge governmental actions that classify persons on the basis of their sex.[55] The United States Supreme Court generally reviews sex-based classifications with an intermediate level of scrutiny.[56] The Court examines sex-based classifications to see whether they serve important governmental objectives and whether the discriminatory means employed are substantially related to the achievement of those objectives. If the objectives are important and the means are reasonably related to those objectives, the classification stands.[57]

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53. U.S. CONST. amend. XIV, § 1.

54. WASH. CONST. art. I, § 12.

55. Sex discrimination victims also relied strongly on federal anti-discrimination statutes. Title VII of the 1964 Civil Rights Act prohibits discrimination in employment. 42 U.S.C. § 2000e-2 (1984).

56. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (state statute excluding males from admission to state-supported nursing school violated the fourteenth amendment because the school's policy perpetuated the stereotyped view of nursing as a woman's job and the school failed to show that the sex-based classification was substantially and directly related to the school's objective to compensate for past discrimination against women); Michael M. v. Superior Court, 450 U.S. 464, 472-73 (1981) (California statutory rape law did not unlawfully discriminate on basis of gender because the sex-based classification realistically reflected that the sexes are not similarly situated in certain circumstances, and because the classification bore a fair and substantial relationship to the government's efforts to control the problem of teenage pregnancies); Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981) (Louisiana statute granting husband, as head and master of property jointly owned with wife, the unilateral right to dispose of the property without wife's consent violates the fourteenth amendment because the state failed to justify the classification as a furtherance of an important governmental interest).

57. Craig v. Boren, 429 U.S. 190, 197 (1976) (Court struck down Oklahoma statute defining the beginning of majority as age 18 for women and as age 21 for men because the sex-based classification and the state's interest in traffic safety were not substantially related). The Supreme Court refuses to consider sex a suspect class. Suspect classifications are reviewed with strict judicial scrutiny; states must have a compelling interest for the classification. The Court originally accorded special treatment to racial classifications because of the central purpose of the fourteenth amendment. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124-25 (1969). Other traits, such as alienage and national origin, have received similar treatment. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Oyama v. California, 332 U.S. 633, 640 (1948) (national origin). Judicial intervention to review suspect classifications has been justified as a way to protect minority groups. *Developments in the Law—Equal Protection*, *supra* this note, at 1125. But when some groups in the community are politically important, legislative decisions expressing the will of the majority are not proper. "[W]hen politically disadvantaged minorities are affected, the legislative judgment should be more critically regarded, for such disadvantaged groups wield less influence in legislative councils than their proportion in the population would seem to warrant." *Id.* Arguably, sex-based classifications also fit the suspect classification criteria and should be subjected to strict scrutiny. Until early in the 20th century, women were not allowed to vote and were dis-

In *Hanson v. Hutt*, decided in 1973, the Washington Supreme Court declined to apply this intermediary standard to the state equal protection clause, choosing instead to identify sex as an inherently suspect classification.[58] Such identification meant that any sex-based classification was subject to strict scrutiny by the courts and would be upheld only if it satisfied a compelling governmental interest that could not be achieved by less discriminatory classifications.[59] In *Hanson*, the Washington Supreme Court applied the strict scrutiny standard because Washington voters had recently adopted the ERA, an expression of the will of the people that all sex-based classifications should be prohibited.[60] The *Hanson* court held that a statute denying unemployment benefits to pregnant women[61] was unconstitutional.[62] *Hanson* was decided on equal protection grounds because the plaintiff did not raise the ERA issue.[63] The court concluded that the statute discriminated on the basis of sex because only women can become pregnant.[64] The classification thus placed a heavier economic burden on women seeking unemployment compensation.[65]

After finding that the statute was discriminatory, the court declared the sex-based classification inherently suspect, reasoning that "[s]ex . . . is an immutable trait, a status into which the class members are locked by the accident of birth . . . [and] the characteristic frequently bears no relation to ability to perform or contribute to society."[66] Because the court considered sex a suspect classification, it subjected the challenged statute to

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couraged from participating in many aspects of political, business, and social life. Sex, just like race, is an immutable characteristic with which persons are born. Like race, sex has no correlation to an individual's abilities. Thus, because statutory classifications based on sex bear no relationship to the state's purpose, they would be struck down under a strict scrutiny analysis.

58. Hanson v. Hutt, 83 Wash. 2d 195, 201, 517 P.2d 599, 603 (1973) ("[W]e hold that the classification based on sex contained in [the statute] is inherently suspect and therefore must be subject to strict judicial scrutiny.").

59. *Id.* at 201-02, 517 P.2d at 603.

60. *Id.* at 200-01, 517 P.2d at 603.

61. WASH. REV. CODE ANN. § 50.20.030 (1962), *repealed by* Act of June 27, 1975, ch. 228, § 18, 1975 Wash. Laws 1st Ex. Sess. 753.

62. *Hanson*, 83 Wash. 2d at 202, 517 P.2d at 603.

63. *Id.* at 198, 517 P.2d at 601. The case was pleaded in Aug. 1971, before adoption of the ERA in Nov. 1972.

64. *Id.* at 198, 517 P.2d at 601-02.

65. *Id.* at 198, 517 P.2d at 602.

66. *Id.* at 199, 517 P.2d at 602 (quoting Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971)).

a standard of strict judicial scrutiny.[67] Upon application of this standard, the court found no compelling state interest in the sex-based classification.[68] The reluctance of potential employers to hire pregnant women did not provide a rational basis for denying unemployment benefits to those women.[69]

Ironically, the adoption of the Washington ERA may have led to the demise of the *Hanson* standard. The supreme court refused to apply the strict scrutiny test to sex-based classifications recently in *Southwest Washington Chapter, National Electrical Contractors Association v. Pierce County*, a challenge to a county affirmative action plan.[70] The court concluded that while it could interpret the state privileges and immunities provision to place more stringent limitations on affirmative action than the United States Supreme Court would impose under the equal protection clause, it found no compelling reason to do so.[71] Instead, the court ruled that Washington's ERA provided the standard that should be applied.[72] Moreover, the court expressly retreated from its earlier interpretation of article I, section 12 that imposed a strict scrutiny standard on sex-based classifications.[73] According to the court, "[t]he ERA alone now governs our review of sex-based classifications."[74]

IV. Judicial Review Under the ERA

In *Hanson*, the Washington Supreme Court expanded its

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67. *Hanson*, 83 Wash. 2d at 201, 517 P.2d at 603.

68. *Id.* at 202, 517 P.2d at 603. The state asserted that pregnant women are not genuinely attached to the labor market, thus justifying the classification of women as persons ineligible for unemployment benefits. However, the supreme court found "ample evidence to support the trial court's finding that pregnant women are attached to the labor market and that there is no medical basis in fact for their disqualification." *Id.* at 201, 517 P.2d at 603.

69. *Id.* ("[T]he attitude of potential employers is not an appropriate rationale to use as a basis for disqualifying a class of claimant for unemployment insurance.").

70. 100 Wash. 2d 109, 667 P.2d 1092 (1983).

71. *Id.* at 127, 667 P.2d at 1102.

72. *Id.* ("The ERA . . . is a very different animal from the equal protection clause—indeed, it has no counterpart in the federal constitution. The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under the traditional 'strict scrutiny.' ").

73. *Id.* at 128 n.3, 667 P.2d at 1102 n.3. ("Of course, an affirmative action program for members of one sex must still satisfy the requirements of the federal constitution. We hold only that no additional limitations are imposed by the [privileges and immunities clause of the] state constitution.").

74. *Id.*

analysis of the federal equal protection[75] and state privileges and immunities clauses[76] by requiring strict judicial scrutiny of suspect sex classifications.[77] The court, however, severely restricted this interpretation in *Southwest Washington Chapter*.[78] Earlier, the supreme court had confronted the inconsistency between the ERA and the privileges and immunities clause in *Darrin v. Gould*.[79] The *Darrin* court stated that article XXXI of the Washington Constitution added substance to the prior prevailing law by eliminating sex discrimination that could pass the rational relationship or strict scrutiny tests.[80] The court said that the people of Washington State must have intended to do more than adopt already existing constitutional law governing sex discrimination because they voted for the broad, sweeping language of the ERA.[81]

In *Darrin*, the court held that a statewide interscholastic athletic association regulation prohibiting girls from playing high school contact football with boys violated the ERA.[82] The court found that the regulations discriminated against girls because of their sex, not because of their ability to play football.[83] The girls who challenged the regulation had met all of the eligibility requirements, including participation in sufficient practice sessions, but the athletic association denied them the opportunity to play in games. The association justified the regulation by arguing that the risk of injury was too great and that allowing girls to play on boys' teams would disrupt girls' athletic programs.[84] These arguments, in the court's opinion, were insufficient to provide an acceptable basis for the sex-based classifica-

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75. U.S. CONST. amend. XIV, § 1.

76. WASH. CONST. art. I, § 12.

77. *See supra* notes 68 & 72 and accompanying text.

78. 100 Wash. 2d 109, 667 P.2d 1092 (1983).

79. 85 Wash. 2d 859, 540 P.2d 882 (1975).

80. *Id.* at 871, 540 P.2d at 889.

81. *Id.* Four justices grudgingly concurred in the result:

> With some qualms I concur in the result reached by the majority . . . . Whether the people in enacting the ERA fully contemplated and appreciated the result here reached . . . may be questionable. Nevertheless, in sweeping language they embedded the principle of the ERA in our constitution, and it is beyond the authority of this court to modify the people's will. So be it.

Id. at 878, 540 P.2d at 893 (Hamilton, J., concurring).

82. *Id.* at 877, 540 P.2d at 893. ("[T]he WIAA rule discriminating against girls on account of their sex violates Const. art. 31 . . . .").

83. *Id.* at 875, 540 P.2d at 891.

84. *Id.* at 875-76, 540 P.2d at 892.

tion.[85] The court found the overriding compelling state interest to be that "[e]quality of rights and responsibilities under the law shall not be denied or abridged on account of sex."[86] Sex discrimination under the Washington ERA is forbidden.[87]

The court inserted some flexibility into this absolute rule, however, in *Seattle v. Buchanan*,[88] when it examined a Seattle "lewd conduct" ordinance[89] prohibiting the exposure of female breasts in public. The court upheld the ordinance against an ERA challenge.[90] The court reasoned that female and male breasts are different; all females and all males differ in this characteristic.[91] The challenged ordinance applied alike to women and men by requiring every person to cover those parts of the body that are intimately associated with the procreative function.[92] The court agreed with the local legislative body that female breasts are associated with sexual arousal.[93] Additionally, the city had a rational purpose for the ordinance—protecting the public morals.[94] A dissenting opinion, agreeing with this por-

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85. *Id.* at 877, 540 P.2d at 892-93. "There is no finding that what may be true for the majority of girls is true in the case of the Darrin girls . . . or girls like them." *Id.* at 875, 540 P.2d at 892.

86. *Id.* at 877, 540 P.2d at 893.

87. *Id.*

88. 90 Wash. 2d 584, 584 P.2d 918 (1978).

89. The challenged ordinance reads in pertinent part:

A. As used in this section a "lewd act" is:
   1. An exposure of one's genitals or female breasts;
   2. The touching, caressing or fondling of the genitals or female breasts; or
   3. Sexual intercourse as defined in Section 12A.06.070 A7;
   4. Masturbation; or
   5. Urination or defecation in a place other than a washroom or toilet room.

B. A person is guilty of lewd conduct if he intentionally performs any lewd act in a public place or at a place and under circumstances where such act could be observed by any member of the public.

SEATTLE, WASH., MUNICIPAL CODE § 12A.10.070 (1980).

90. The plaintiffs contended that the ordinance created an unconstitutional sex-based classification because there is an insufficient difference in appearance between the breasts of men and women to justify a law forbidding the exposure of women's and not men's breasts. *Buchanan*, 90 Wash. 2d at 588, 584 P.2d at 919. *Cf.* Bolser v. Liquor Control Board, 90 Wash. 2d 223, 231, 580 P.2d 629, 633 (1978) (upholding a Liquor Control Board regulation prohibiting entertainers in licensed premises from exposing their breasts or buttocks because the regulation applied to male and female entertainers equally).

91. *Buchanan*, 90 Wash. 2d at 591, 584 P.2d at 921.

92. *Id.* at 592, 584 P.2d at 922.

93. *Id.* at 589, 584 P.2d at 920.

94. *Id.* at 590, 584 P.2d at 920.

tion of the majority opinion, explained that when a matter that is regulated or prohibited applies to a physical characteristic peculiar to one sex and not common to both, the classification may be valid.[95] Thus, the ERA does not apply to classifications based on unique physical characteristics of either sex.[96] The purpose of the ERA is to prohibit classifications by sex absolutely when characteristics are shared by members of both sexes.[97]

The Washington Supreme Court allowed an exception to that absolute prohibition when it again examined the ERA in *Marchioro v. Chaney*.[98] The plaintiffs[99] challenged a state statute requiring the state Democratic committee to consist of one committeeman and one committeewoman from each county.[100] The statute also directed the state and county committees to choose a chair and vice chair of opposite sexes.[101] The plaintiffs argued that the ERA, after *Darrin*, forbade *any* classification based on sex.[102] The state supreme court, however, disagreed. The court replaced the *Darrin* standard with a different absolute standard: not any classification, but *discrimination* based on sex is prohibited.[103] The court said that the legislature had adopted the statute to ensure actual as well as theoretical equality of rights for women.[104] Under such a statute, neither sex may predominate.[105] The equal rights amendment, the court reasoned, does not guarantee one sex superiority over the other sex.

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95. *Id.* at 616, 584 P.2d at 934 (Horowitz, J., dissenting).

96. Brown, *supra* note 5, at 893.

97. See *supra* note 14 and accompanying text for a discussion of exceptions based on the unique physical characteristics of either sex.

98. 90 Wash. 2d 298, 582 P.2d 487 (1978), *aff'd*, 442 U.S. 191 (1979).

99. The plaintiffs were Democratic Party state central committee members and state Democratic Party members. Ironically, the challengers included Karen Marchioro, the chair*woman* of the King County Democratic Committee.

100. WASH. REV. CODE § 29.42.020 (1983).

101. *Id.* §§ 29.42.020-.030.

102. *Marchioro*, 90 Wash. 2d at 304, 582 P.2d at 491.

103. *Id.* at 305, 582 P.2d at 491.

> Under the equal rights amendment, the equal protection/suspect classification test is replaced by the single criterion: Is the classification by sex discriminatory? or, in the language of the amendment, Has equality been denied or abridged on account of sex? In the language of *Darrin*[,] . . . "under the ERA *discrimination* on account of sex is forbidden."

Id. (quoting Darrin v. Gould, 85 Wash. 2d 859, 877, 540 P.2d 882, 893 (1975)) (emphasis in original).

104. *Marchioro*, 90 Wash. 2d at 306, 582 P.2d at 491. "The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes." *Id.* at 306, 582 P.2d at 492.

105. *Id.*

It guarantees only equality of treatment.[106] Moreover, and most important, the court stated that if this statute violated the ERA, the very purpose of the ERA—to achieve equality of rights and responsibilities between the sexes—would be defeated.[107]

The court distinguished a statute promoting equality (such as the one challenged in *Marchioro*) from one granting special benefits to women and not to men.[108] Those statutes exclude one sex in favor of another and, therefore, are not comparable to the statute challenged in *Marchioro*.[109] The *Marchioro* statute simply required that the committee be composed of an equal number of men and women. This, the court reasoned, would neither abridge nor deny rights on account of sex.[110] The statute itself mandated equality, which is what the ERA requires.[111]

In addition to its recognition of a different type of absolute standard, a significant aspect of the *Marchioro* opinion was its analysis of two words included in Washington's ERA that appear in no other state ERA. Washington's ERA declares that not only equality of *rights* but equality of *responsibility* shall not be denied or abridged on account of sex.[112] The *Marchioro* decision is the only Washington case in which the supreme court has interpreted the meaning of the words "and responsibility" in the ERA. The legislature approved the addition of the words by the house committee without question,[113] and Washington citi-

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106. *Id.* at 305, 582 P.2d at 492.

107. *Id.* at 306, 582 P.2d at 493. "The ironic result of plaintiffs' theory would be to abolish a statute which mandates equality by invoking a provision of the constitution passed to guarantee equality." *Id.* at 306, 582 P.2d at 492.

108. An example of a statute conferring special benefits on women is protective labor legislation. Until 1973 the Washington labor statute established special conditions and wages for women and children that were not required for men. WASH. REV. CODE ANN. § 49.12.010-.230 (1962), *repealed by* Act of June 26, 1975, ch. 228, § 18, 1975 Wash. Laws 1st Ex. Sess. 753. The statute provided in part:

> 49.12.010. *Declaration.* The welfare of the state of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

This section was amended in 1973 to read "all employees." Act of Sept. 24, 1973, ch. 16, § 2, 1973 Wash. Laws, 2d Ex. Sess. 14. Employers were required, for example, to provide their female employees with seats, so that the women could rest during the day. The "protective" provisions of the statute were repealed as well. *Id.* § 19.

109. *Marchioro*, 90 Wash. 2d at 307, 582 P.2d at 492.

110. *Id.* at 306, 582 P.2d at 492.

111. *Id.* at 307, 582 P.2d at 492.

112. *Id.*

113. *Id.*

zens approved the ERA language as presented to them. The *Marchioro* court interpreted the responsibility clause to mean that each sex is required to share in conducting political affairs through the statutory state committees.[114] Thus, a statute requiring men and women to share equally the benefits *and obligations* of public activity is permissible under article XXXI. "When the state, by statute, mandates an equality of responsibility, it is hardly appropriate for this court to hold this statutory mandate to be stricken from the very constitutional provisions which approve it."[115]

Justice Horowitz strongly dissented from the majority opinion in *Marchioro*.[116] He argued that equality of numbers (as required by the statute) is not the same as equality of rights and responsibilities.[117] Achieving equality of numbers means that once a woman is elected to one party office, all other women lose the right to seek the other office.[118] Furthermore, the statute does not guarantee that the best-qualified candidate will get the second office if the other position is held by a person of the same sex.[119] The dissent argued that the statute's classification was obviously sex-based and had no relationship to each person's abilities to perform his or her duties.[120]

The *Marchioro* court, therefore, qualified the stringent ERA standard enunciated in *Darrin* that prohibited all sex-based classifications. The *Marchioro* decision prohibited only discrimination resulting from sex-based classifications.[121] A few years

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114. *Id.* at 308, 582 P.2d at 493.

115. *Id.*

116. The supreme court split 5-4 in *Marchioro*. Justices Dolliver, Rosellini, Brachtenbach, Williams, and Hicks formed the majority. Justices Stafford, Wright, and Utter concurred with Justice Horowitz' dissent.

117. *Marchioro*, 90 Wash. 2d at 316, 582 P.2d at 497 (Horowitz, J., dissenting).

118. *Id.* at 317, 582 P.2d at 497.

119. *Id.* ("All women desiring to seek and hold the remaining office are denied the right to do so *merely because* of their sex.") (emphasis in original).

120. *Id.*

121. The supreme court again applied this qualification in a recent case in which building contractors challenged a Pierce County affirmative action plan. Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983). Pierce County had developed an affirmative action plan intended to correct the underrepresentation of women and minorities in the county work force. The court held that the plan did not violate the state ERA because the ERA "mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for *any* state interest . . . . This absolute mandate does not, however, bar affirmative governmental efforts to create equality in fact." *Id.* at 127, 667 P.2d at 1102 (emphasis in original).

later, the supreme court again expressed its unwillingness to apply the ERA in a case of alleged sex discrimination. In *MacLean v. First Northwest Industries*,[122] a male sports fan challenged the defendant's practice of selling discount professional basketball tickets to women on "ladies' night."[123] The fan argued that the discount prices violated the state's Law Against Discrimination.[124] The supreme court disagreed, reasoning that: (1) the plaintiff suffered no actual damage; (2) the plaintiff benefited from the special prices because the ticket purchase was community property shared with his wife; (3) the defendant did not discriminate solely on account of sex because it gave discount prices to other groups, including the military, in which males predominate; (4) the plaintiff was not made to feel unwelcome; and (5) "most fans" favored the pricing policy.[125] The court refused to determine the constitutionality of the pricing policy under the ERA because "[t]o decide important constitutional questions upon a complaint as sterile as this would be apt to erode public respect for the Equal Rights Amendment and deter rather than promote the serious goals for which it was adopted."[126]

Justices Utter[127] and Dolliver[128] dissented strongly from the majority analysis in *MacLean*. Justice Utter argued that the right to full enjoyment section in the Law Against Discrimination[129] does not require a person to show actual damages because any discrimination harms the state generally.[130] Justice Dolliver criticized the majority for minimizing the plaintiff's claim while ignoring the discriminatory nature of the defendant's practice.[131] He believed that the defendant discriminated against males and

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A sex-based affirmative action plan must be intended solely to eliminate the effects of past discrimination and must rest on a rationally-based conclusion that such effects remain. *Id.* at 128, 667 P.2d at 1102. In *Southwest Wash. Chapter*, the court found that the only conceivable basis for the plan was to ameliorate the effects of past discrimination. Thus, the court unanimously upheld the Pierce County affirmative action plan. *Id.*

122. 96 Wash. 2d 338, 635 P.2d 683 (1981).

123. *Id.* at 340-41, 635 P.2d at 683-84.

124. *Id.* at 341, 635 P.2d at 684. The Law Against Discrimination is codified at WASH. REV. CODE ch. 49.60 (1983).

125. *MacLean*, 96 Wash. 2d at 345, 635 P.2d at 686.

126. *Id.* at 348, 635 P.2d at 688.

127. *Id.* (Utter, J., dissenting).

128. *Id.* at 353, 635 P.2d at 691 (Dolliver, J., dissenting).

129. WASH. REV. CODE §§ 49.60.030(1)(b), .040 (1983).

130. *MacLean*, 96 Wash. 2d at 351, 635 P.2d at 689-90 (Utter, J., dissenting).

131. *Id.* at 353-54, 635 P.2d at 691 (Dolliver, J., dissenting).

that sufficient state action existed to apply the ERA.[132] The majority's argument that plaintiff's claim was "sterile" and not what the voters had in mind when they adopted the ERA was pure speculation; ticket-price differentials based on sex could easily have been one of many activities that the voters hoped would end.[133]

The precedential value of *MacLean* is minimal because of its questionable application of the Law Against Discrimination.[134] The *MacLean* case is a striking example of how lightly the Washington Supreme Court can treat sex discrimination claims. The court avoided the ERA question and trivialized the claim as one in which the plaintiff did not suffer from the ticket-pricing policy. By describing the plaintiff's claim as "sterile" and

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132. *Id.* at 356, 635 P.2d at 692 (Dolliver, J., dissenting). Justice Dolliver analogized the state action found by the United States Supreme Court in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), to the circumstances in *MacLean*.

In *Burton*, the City of Wilmington leased some building space to a restaurateur who discriminated against blacks. The city was responsible for the building maintenance, payable out of public funds. The Supreme Court found sufficient state action because "profits earned by discrimination [in pricing policies] not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U.S. at 724. Thus, the city's lease was held to be in violation of the fourteenth amendment. *Id.* at 726. Similarly, the City of Seattle leased one of its public facilities to the defendant while reserving the right to sell merchandise and also requiring the defendant to hire city ticket-takers. Seattle thus clearly benefited from this lease as did the city in *Burton*. *MacLean*, 96 Wash. 2d at 355-58, 635 P.2d at 692-93 (Dolliver, J., dissenting).

133. *MacLean*, 96 Wash. 2d at 355-56, 635 P.2d at 693 (Dolliver, J., dissenting).

> It may be that application of the Equal Rights Amendment to the "promotional" activity of defendant is not the sort of thing the voters had in mind when they adopted HJR 61. Then again, an equally persuasive argument could be made that ticket price differentials based on sex were indeed one of a number of activities which they hoped to end. It is idle to speculate. No evidence of any kind exists.

Id. at 358, 635 P.2d at 693.

134. The court should not have applied the Law Against Discrimination in this case because neither the public accommodations section nor its definition of "full enjoyment" contains any mention of sexual discrimination. Note, *Washington's Equal Rights Amendment and Law Against Discrimination—The Approval of the Seattle Sonics' "Ladies' Night"*, 58 WASH. L. REV. 464, 474 (1981).

The public accommodations section prohibits discriminatory pricing in places of public accommodations. WASH. REV. CODE § 49.60.215 (1983). "Full enjoyment" is defined as the right to purchase any service or item in a public accommodation. *Id.* § 49.60.040. The *MacLean* court was wrong to read "sex" into that section of the Law Against Discrimination. Note, *supra* this note, at 474. Washington courts follow the rule of statutory construction requiring that they not read into a statute matters that are not there, nor modify a statute by construction. *Id.* at 474-76. Perhaps the legislature did not wish to declare promotional pricing schemes, such as the one in *MacLean*, as violations of the Law Against Discrimination. *Id.* at 475. "The court should not have imposed its judgment in place of the legislature's." *Id.*

"apt to erode public respect for the [ERA]," the court itself eroded public respect for our judicial and political systems. In earlier ERA cases, the state supreme court had already recognized a public mandate to outlaw discriminatory sex-based classifications.[135] The *MacLean* decision ignored this mandate and suggested that some sex-based classifications are acceptable.

The *MacLean* court also seemed to suggest that sex discrimination claims made by men are less important than those raised by women. The court's indifference toward men's claims itself violates the letter and spirit of the ERA. If the court continues to dismiss such claims lightly, it will be discriminatorily applying the law. The ERA should protect men as well as women from sex discrimination.

The state supreme court may have a chance to clarify its ERA standard by applying it to university women's athletics. A recent superior court decision, *Blair v. Washington State University*,[136] held that Washington State University (WSU) discriminated against women athletes and their coaches in violation of the ERA, the Law Against Discrimination,[137] and the equal pay statute.[138] Several WSU women athletes and coaches sued the university because of discriminatory athletic programs and compensation. The plaintiffs contended that the university denied them an equal education and equal employment opportunities as compared to male athletes and coaches participating in the same sports.[139] Judge Philip H. Faris of Whitman County ordered WSU to treat women's athletic programs and men's programs equitably.[140] He also enjoined WSU from future discrimination,[141] ordered damages to the women athletes as compensation for WSU's failure to provide clothing and awards,[142] increased scholarship allocations,[143] and awarded the women coaches use of complimentary cars.[144] However, the judge did not find discrimination in the other terms and conditions of the

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135. See *supra* text accompanying notes 79-115 for further discussion of the development of the state supreme court's standard of review under the ERA.

136. No. 28816 (Whitman County Super. Ct. Jan. 3, 1983) (memorandum opinion).

137. WASH. REV. CODE ch. 49.60 (1983).

138. WASH. REV. CODE § 49.12.175 (1983).

139. *Blair*, No. 28816, slip op. at 1 (memorandum opinion).

140. *Id.* at 7 (judgment and decree).

141. *Id.*

142. *Id.* at 2-3.

143. *Id.* at 9-10.

144. *Id.* at 5-6.

coaches' employment because WSU had hired the women with different expectations than it had for the coaches of the four high-priority men's sports (football, basketball, baseball, and track).[145]

The *Blair* plaintiffs have appealed the superior court decision directly to the Washington Supreme Court.[146] They contend that the university should be forced to include the football program budget in the total amount allocated to men's and women's sports.[147] The decision of the trial court distinguished between men and women athletes by allowing the university to budget more for men's than for women's sports. The court recognized that when women entered intercollegiate athletics, men's sports had already developed into sophisticated, business-like programs. Men's sports have become commercialized and therefore require more funding.[148] By applying the absolute ERA standard and forbidding all sex-based classifications, the supreme court should reject the trial court's allocation scheme and include the football program in the total budget that must be apportioned between men's and women's athletic programs.

The Washington Supreme Court should abolish the *Blair* distinction between men's and women's athletic budgets. The distinction discriminates against women by decreasing their opportunities to compete among themselves and with athletes at other schools. The obvious message to women athletes is that the university is willing to support them to a certain extent, but not as much as it supports male athletes, especially football players. The university's budgeting practice meets neither the absolute standard forbidding all sex-based classifications nor the *Marchioro* standard forbidding discriminatory sex-based classifications. The WSU classification violates the ERA.

The foregoing description of cases interpreting the ERA

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145. The judge stated in the order of injunction that 37.5% of the university's financial support for its entire sports program had to be allocated to women's athletic programs. *Id.* at 7. (The football program is exempt from calculation of the university's athletics budget.) The order directed the university to increase this amount by 2% each year until the total equals the percentage of female WSU undergraduates. *Id.* The athletic scholarship allocations are to be calculated in the same manner (again, excluding football). *Id.* at 9-10. The judge also ordered the establishment of a committee to develop sex equity policies that will ensure equality in participation, funding, facilities, and compensation. *Id.* at 11.

146. Telephone interview with Leslie Owen, Director of the Northwest Women's Law Center (Sept. 12, 1984).

147. *Id.*

148. *Blair*, No. 28816, slip. op. at 2.

suggests that the time has come for Washington courts to develop a clear constitutional standard. The Washington Supreme Court stated in *Darrin* that the ERA prohibits all sex-based classifications.[149] In *Marchioro*, the court qualified the absolute standard by holding that statutes intended to promote equality are valid.[150] A return to an unqualified standard is necessary to ensure equal protection of both sexes. The supreme court may someday be asked to interpret the ERA in a case of a sex-based classification that protects individual privacy.[151] The absolute standard is consistent with an interpretation that allows such sex-based classifications. A classification that separates private areas used by men and women for their personal needs would be characterized not as one based on sex but as one based on the individual's right to privacy regardless of sex.

V. The Pennsylvania Standard of Review

In developing a strong, consistent judicial standard of review under Washington's ERA, the Washington courts should consider how the Pennsylvania courts have interpreted that state's ERA.[152] The Pennsylvania courts have developed a standard that is stronger than Washington's. All the leading Pennsylvania ERA cases have absolutely prohibited any classification based on sex.[153]

The Pennsylvania Supreme Court has held consistently that sex may no longer be accepted as an exclusive classifying tool.[154] Such a distinction has no rational or proper foundation in law.[155] As one court noted:

> The thrust of the equal rights amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction . . . . The law will not impose different benefits or different burdens upon the members of a society based on the

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149. *Darrin*, 85 Wash. 2d at 877, 540 P.2d at 893.

150. *Marchioro*, 90 Wash. 2d at 306-07, 582 P.2d at 492.

151. *See supra* note 33.

152. Pa. Const art. I, § 28 provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

153. *See infra* notes 158-64 and accompanying text.

154. *See, e.g.*, Commonwealth v. Butler, 458 Pa. 289, 300-02, 328 A.2d 851, 856-57 (1974) (struck down as unconstitutional a portion of the criminal sentencing act that barred the trial court from fixing minimum sentences for women).

155. Hopkins v. Blanco, 457 Pa. 90, 94, 320 A.2d 139, 141 (1974) (under ERA both wife and husband have right to recover for loss of consortium).

fact that they may be man or woman.[156]

The Pennsylvania courts have adopted and consistently applied an absolute standard of review, unqualified by exceptions.

The Pennsylvania ERA was approved in May 1971,[157] about eighteen months before the Washington voters adopted their ERA. The courts of both states have faced some of the same issues. Both states' courts have held that girls cannot be prohibited from playing interscholastic sports with boys;[158] that both parents, not just the father, are responsible for financial child support;[159] and that wives, as well as husbands, should be allowed to recover damages for loss of consortium.[160] Additional Pennsylvania cases have covered a wide range of issues affecting a great number of people. For example, the Pennsylvania courts have decided that the state cannot require only a husband to pay alimony during divorce proceedings[161] or deny a father a voice in whether his child will be put up for adoption.[162] The state also cannot discriminate by denying workers' compensation benefits to widowers,[163] or by requiring pregnant teachers to take an entire year for maternity leave.[164]

Several possible explanations exist for this disparity in the willingness of the respective courts to interpret broadly their ERA provisions. The Washington courts are inclined to avoid the constitutional issue of discrimination when a statute addresses the discriminatory practice.[165] Pennsylvania's statu-

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156. Henderson v. Henderson, 458 Pa. 97, 100, 327 A.2d 60, 61 (1974) (statutory provision requiring husband to pay wife's alimony pendente lite, attorneys' fees, and expenses in a divorce action violates the ERA).

157. PA. CONST. art. I, § 28.

158. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 51, 334 A.2d 839, 842 (1975); Darrin v. Gould, 85 Wash. 2d 859, 877, 540 P.2d 882, 893 (1975).

159. Conway v. Dana, 456 Pa. 536, 541, 318 A.2d 324, 326 (1974); State v. Wood, 89 Wash. 2d 97, 103, 569 P.2d 1148, 1151 (1977).

160. Hopkins v. Blanco, 457 Pa. 90, 94, 320 A.2d 139, 141 (1974); Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 96, 614 P.2d 1272, 1275 (1980).

161. Henderson v. Henderson, 458 Pa. 97, 100, 327 A.2d 60, 62 (1974).

162. Adoption of Walker, 468 Pa. 165, 170, 360 A.2d 603, 605 (1976).

163. Oknefski v. Workmen's Compensation Appeal Bd., 63 Pa. Commw. 450, 458, 439 A.2d 846, 849 (1981).

164. West Middlesex Area School Dist. v. Commonwealth, 39 Pa. Commw. 58, 65, 394 A.2d 1301, 1303-04 (1978).

165. For example, in *MacLean*, the court applied the Law Against Discrimination, found the defendant's ticket-pricing practice did not discriminate, and held that the plaintiff could not recover damages. The court refused the plaintiff's request to resolve the dispute under the ERA. *MacLean*, 96 Wash. 2d at 347-48, 635 P.2d at 688. See *supra*

tory framework concerning discrimination resembles Washington's,[166] but the Pennsylvania Supreme Court has been more willing to reach the constitutional issue in sex discrimination cases. Because the Pennsylvania Supreme Court maintains that all classifications based on sex are prohibited, a decision easily follows when the justices are presented with a valid discrimination claim. For that reason, the Pennsylvania Supreme Court may be less reluctant than the Washington Supreme Court to resolve a case under the ERA.

Another possible explanation for the differing types of ERA decisions in the two states is that the Pennsylvania legislature did not immediately conform its statutory law to the new constitutional standard. For instance, at the time *Henderson v. Henderson*[167] was decided, the divorce statute provided that only husbands were required to pay alimony. Not until 1980 did the legislature amend its divorce law to base alimony payment on each spouse's ability to pay.[168]

A practical explanation for the differences could lie in the way Washington and Pennsylvania attorneys plead their clients' sex discrimination claims. Attorneys in Pennsylvania may allege violation of the ERA more frequently because they can be confident that the supreme court will review the allegation. Attorneys in Washington do not yet have a full understanding of how the supreme court would handle any given fact situation, so they rely on strong statutory laws such as the Law Against Discrimination.[169]

In order to allow judicial development of the ERA standard, the Washington Supreme Court should not hesitate to reach the

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text accompanying notes 122-26 for additional discussion of *MacLean*.

166. Washington and Pennsylvania both have statutes prohibiting sex discrimination in employment, public accommodations, housing, real estate, and credit transactions. *See* 43 PA. CONS. STAT. ANN. §§ 951-955 (Purdon 1964 & Supp. 1984); WASH. REV. CODE §§ 49.60.010-.030 (1983). Both statutes prohibit discrimination in the private sector, but the application of both state ERAs has been limited to government activities. *See* Hartford Accident & Indem. Co. v. Insurance Comm'r, 65 Pa. Commw. 236, 243, 442 A.2d 382, 385 (1982) (court found sufficient state action when the insurance commissioner exceeded statutory authority by affirmatively using sex as a factor to determine insurance rates); MacLean v. First N.W. Indus., 96 Wash. 2d 338, 347-48, 635 P.2d 683, 687-88 (1981) (court required a showing of state action to maintain an action under the ERA).

167. 438 Pa. 97, 327 A.2d 60 (1974).

168. 23 PA. CONS. STAT. ANN. §§ 501-07 (Purdon Supp. 1984). "The court may allow alimony as it deems reasonable to either party . . . ." *Id.* § 501(a).

169. WASH. REV. CODE ch. 49.60 (1983).

constitutional question in sex discrimination cases. After all, the constitution is the supreme law of the state. The absolute standard of review could be simply and consistently applied in most cases—any legislative classification based on sex violates the ERA.

VI. Conclusion

In its ERA decisions so far, the Washington Supreme Court has failed to apply consistently the constitutional mandate of the ERA. The court has recognized that the voters intended the ERA to end sex discrimination and that the ERA should be stronger than constitutional standards existing at the time it was adopted,[170] but the court has also succeeded in eroding that mandate by finding irrational exceptions. The Washington Supreme Court should follow the example set by the Pennsylvania Supreme Court and apply an absolute standard. Absolutely *no* sex-based classifications, except those based on an individual right to privacy, are valid. Article XXXI has no force or meaning in Washington unless the state supreme court interprets the words of the ERA literally.

Patricia L. Proebsting

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170. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). *See supra* text accompanying notes 79-87.

> Presumably the people in adopting Const. art. 31 intended to do more than repeat what was already contained in the otherwise governing [federal and state] constitutional provisions . . . . Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination . . . . Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping mandatory language of the Equal Rights Amendment.

Id. at 871, 540 P.2d at 889.