Montana Law Review

Volume 39
Issue 2 *Summer 1978*

Article 3

7-1-1978

Equal Rights

Jeanne M. Koester

Follow this and additional works at: https://scholarworks.umt.edu/mlr

 Part of the Law Commons

Let us know how access to this document benefits you.

Recommended Citation
Jeanne M. Koester, *Equal Rights,* 39 Mont. L. Rev. (1978).
Available at: https://scholarworks.umt.edu/mlr/vol39/iss2/3

This Comment is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

II. EQUAL RIGHTS

Jeanne M. Koester

> Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of . . . sex . . . . 1972 Montana Constitution, art. II, § 4.

A. *Introduction*

The 1972 Montana Constitutional Convention unanimously adopted the Individual Dignities section, article II, section 4, of the Montana Constitution.[1] The convention included the equal rights provision quoted above as an "impetus for the eradication of public and private discrimination based on . . . sex."[2]

The United States Constitution presently contains no corresponding equal rights provision. Congress proposed an equal rights amendment to the Federal Constitution in 1972,[3] but as the 1979 deadline for state ratification nears, it remains uncertain whether the necessary thirty-eight states will ratify the amendment.[4] For this reason, the Montana equal rights provision is singularly important since it may remain for a substantial time the sole constitutional provision applicable to the people of Montana which expressly prohibits sex discrimination.

This section of the article will examine two elements of this newly created right to equality between the sexes. It will begin by discussing the scope of the right, focusing upon the question of who is prohibited from discriminating on the basis of sex. It will then consider the weight of the right: to what degree is it capable of holding off conflicting considerations of social policy?[5] Does the right protect individual interests when they collide with the majority's determination of what is proper or desirable? The discussion of weight has two aims. First, it evaluates the Montana supreme court's only treatment of this problem in the 1976 case of *State v. Craig*.[6] Second, it suggests that by assigning proper weight to this right, the court could ensure that equality of rights would not be

1. Proceedings of the Montana Constitutional Convention, 8034 (hereinafter cited as Proceedings).

2. Proceedings at 5059.

3. Proposed amendment XXVII, hereinafter referred to as E.R.A.

4. Thirty-five states have ratified the amendment. Nebraska, Tennessee, Idaho, and Kentucky have attempted to rescind ratification, but the effectiveness of such action remains doubtful.

5. *See* text in general introduction *supra* at notes 6-14.

6. 169 Mont. 150, 545 P.2d 649 (1976).

subject to encroachment by an ever-changing majority. It is in this way that Dworkin suggests we "take rights seriously."

B. *Scope of the Right.*

The language of the equal rights provision is straightforward. It prohibits discrimination against any person on account of sex. It therefore appears that laws, policies, or conduct which distinguish between people solely on the basis of gender are proscribed. In order to understand the intended reach of the equal rights provision, it is necessary to determine not only what constitutes discrimination but also who is prohibited from discriminating. The Montana provision applies to action by both the state and private persons. By prohibiting discrimination by "any person, firm, corporation, or institution,"[7] Montana enacted the most expansive equal rights provision in the nation.

Following debate on the equal rights provision, the convention overwhelmingly defeated a proposed amendment to exclude private action from the scope of article II, section 4.[8] This vote demonstrates a strong convention support for the eradication of private as well as public discrimination.

With one exception, no other state constitution prohibits discrimination by private parties. The Illinois Constitution prohibits private discrimination but the provision is limited to discrimination "in hiring and promotion practices of any employer or in the sale or rental of property."[9]

The Montana provision may also be limited to a certain extent, not by its express language, but by the intent of the framers. During the floor debate on article II, section 4, Delegate Holland inquired whether the private action section of the equal rights provision would ban all-male membership clubs such as the Elks or Masons.[10] Delegate Dahood, chairman of the Committee on the Bill of Rights, responded that it would not affect these private groups. Regardless of the convention's intent, commentators have suggested that the right of association may prohibit states from regulating the membership qualifications of private associations.[11]

To date no appeal has been before the Montana supreme court raising a question related to private action under article II, section 4. In the absence of convention history to the contrary, private dis-

7. MONT. CONST. art. II, § 4.

8. The convention defeated the proposed amendment by a 76 to 13 vote. Proceedings at 5072.

9. ILL. CONST. art. I, § 17.

10. Proceedings at 5065.

11. BROWN, FREEDMAN, KATZ & PRICE, WOMEN'S RIGHTS AND THE LAW 293 (1977).

crimination to which that section pertains should be subjected to the same standard of review as discrimination by the state.

C. *Weight of the Right.*

1. *Introduction.*

The general introduction to this article defined the weight of a right as its ability to resist consideration of social policy in circumstances where a right and social policy conflict.[12] For Dworkin, constitutional rights represent those areas of individual freedom which a particular community has decided should be protected from policy determinations of the majority.[13] A court responds to a constitutional mandate, then, to the extent that it assigns to a right a weight sufficient to actually protect individuals in this way. Courts assign weight by adopting a standard by which claims based upon a particular right are to be reviewed.

The Montana supreme court in *State v. Craig*[14] adopted the same standard for reviewing claims arising under the Montana equal rights provision which the United States Supreme Court at that time applied under the federal equal protection clause. For this reason, the second part of this section will examine the development of federal equal protection sex discrimination standards in an attempt to clarify the meaning and significance of *Craig*.

The third part of this section will discuss a standard of review which would assign a weight to the Montana equal rights provision more appropriate to its status and history. This standard—the equal rights standard—is completely distinct from traditional equal protection standards. The legislative history of the proposed federal equal rights amendment most clearly articulates this standard. For this reason, the third part of this section will examine the equal rights standard through a discussion of the legislative history of the E.R.A.

2. *The Montana Standard of Review.*

Craig is the only case in which the Montana supreme court has articulated a standard by which claims based upon the Montana equal rights provision will be reviewed. Craig, a male defendant, challenged his conviction of sexual intercourse without consent under R.C.M. 1947, section 94-5-503, as the section was worded prior to 1975. The statute then read:

12. *See* text in general introduction *supra* at note 12.
13. R. DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977).
14. 169 Mont. 150, 545 P.2d 649 (1976).

Montana Law Review, Vol. 39 [1978], Iss. 2, Art. 3

> A *male person* who knowingly has sexual intercourse without consent with a *female* not his spouse commits the offense of sexual intercourse without consent. (Emphasis added.)

Section 94-5-503(1) presently reads:

> A *person* who knowingly has sexual intercourse with a *person* not his spouse commits the offense of sexual intercourse without consent. (Emphasis added.)

Chief Justice James T. Harrison wrote the opinion for a unanimous court. The opinion describes the defendant's contention as a constitutional challenge to the statutory sex classification, but the defendant is said to have relied upon the equal protection clause of the fourteenth amendment of the United States Constitution and the "equal protection provision of article II, section 4, 1972 Montana Constitution."[15]

Article II, section 4 in its entirety reads as follows:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The equal protection provision in the second sentence of this section is entirely distinct from the more specific equal rights provision found in the last sentence. Nevertheless, when deciding a sex discrimination claim based upon article II, section 4 of the Montana Constitution, the court chose to ignore the equal rights provision and instead referred to the entire section as the "equal protection provision."[16]

Not having recognized any divergence between the United States and Montana provisions, the court then applied a United States Supreme Court equal protection standard to adjudicate a sex discrimination claim specifically brought under the Montana Constitution. Because the court has interpreted the Montana equal rights provision as coextensive with the federal equal protection clause, it is necessary to review briefly the evolution of the present federal sex discrimination standard.

Throughout this decade, various justices of the United States Supreme Court have applied three different standards to sex discrimination cases brought under the federal equal protection clause of the fourteenth amendment. In *Reed v. Reed*,[17] the Supreme Court

15. *Id.* at 652.
16. *Id.*
17. 404 U.S. 71 (1971).

in 1971 declared the standard to be the rational basis test traditionally applied to economic and social welfare classifications. Under this standard, a sex-based distinction would be invalid only if arbitrary or unreasonable.[18] The court declined to place sex, like race, in the category of a suspect classification which would invoke a stricter scrutiny and require the state to demonstrate a compelling interest in making the sex-based distinction.

Despite its refusal in *Reed* to adopt a strict standard of review, the court declared the Idaho statute, granting preference to male over female relatives in appointing the administrator of a decedent's estate, to be unconstitutional under the articulated rational basis standard.[19] The court in fact has shown more suspicion of sex-related classifications than those within the economic sphere, notwithstanding its articulation of the minimum scrutiny equal protection standard. In a subsequent analysis, Professor Gerald Gunther described the court's unarticulated standard as equal protection "with a bite".[20]

In 1973, a plurality of four justices in *Frontiero v. Richardson*[21] declared sex a suspect classification and applied strict scrutiny. The court invalidated a federal statute requiring husbands of military officers to make specific proof of dependency in order to receive benefits while wives of officers received benefits presumptively. Since *Frontiero,* the Court has decided several sex discrimination cases but has not applied the suspect classification standard of review.[22] Although the Court continues to cite *Reed* as controlling,[23] the language in *Craig v. Boren*[24] pronounces the test in far stricter terms than the original rational basis test:

> Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[25]

In applying this test, the lower federal courts require something between minimum and maximum scrutiny. For example, the Fifth Circuit has concluded that:

> Even though the . . . defendant need not be put to the heavy burden of proving a compelling state interest in order to save a

18 *Id.* at 76.

19. *Id.*

20. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 18-19 (1972).

21. 411 U.S. 677, 684 (1973).

22. Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

23. *Id.*

24. 429 U.S. 190 (1976).

25. *Id.* at 198.

gender based distinction, it must nevertheless prove a great deal more than was once acceptable under the mere minimal rationality test.[26]

From this history of the United States Supreme Court's treatment of sex discrimination cases we can see that in deciding to apply an equal protection standard, the Montana supreme court had three tests from which to choose: (1) the rational basis test; (2) the middle tier approach termed equal protection with a "bite"; or (3) strict scrutiny. In *State v. Craig,* the Montana supreme court chose to apply the weakest of these standards—the rational basis test.[27] Citing *Reed v. Reed,*[28] the court decided that because "historically such attacks have been by men upon women,"[29] the pre-1975 rape statute did not "arbitrarily" classify on the basis of sex.

Applying the rational basis test under the Montana equal rights provision appears to be inappropriate for three reasons. First, although the court based its decision upon both the federal equal protection clause and article 2, section 4 of the Montana Constitution, the standard it applied is not even an appropriate federal constitutional interpretation. Federal courts now apply a middle tier approach, not the traditional rational basis test.[30] If the court intends the Montana equal rights provision to have the same reach as the federal equal protection clause in sex discrimination cases, it should adopt the middle tier approach.

Second, it must be presumed that the Montana Constitutional Convention had a reason for including an explicit prohibition against sex discrimination in addition to the equal protection provision. As currently interpreted, however, the equal rights provision adds nothing to the guarantee of equal protection. Clearly, then, the rational basis standard does not fulfill the intention of the Convention in adopting the equal rights provision.

Third, the reasonable basis standard allows the right to be weighed against social policy considerations. It permits discrimination solely on the basis of sex whenever there is any reasonable connection between the classification and the objective. Any rational policy consideration, therefore, may outweigh the constitutionally protected right to equality between the sexes. Furthermore, courts traditionally allow legislatures wide leeway when deciding

26. Woods v. Mills, 528 F.2d 321, 324 (5th Cir. 1975); *see also* Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973).

27. 169 Mont. 150, 156, 545 P.2d 649, 652 (1976).

28. *Id.* at ____, 545 P.2d at 653.

29. *Id.*

30. *Supra* note 20; Craig v. Boren, 429 U.S. 190 (1976).

whether a classification is supported by a rational basis. As a result, the right has sufficient weight to repel only the most irrational social policy arguments. The right certainly is not "taken seriously" under such a standard.

Justice Rehnquist's dissent in *Frontiero* illustrates how the rational basis test dilutes the right.[31] In his view, the sex classification withstood the rational basis test because it was reasonably related to a legislative policy of "administrative convenience." If administrative convenience is a sufficient reason for allowing sex discrimination, the purported constitutional guarantee becomes incapable of withstanding virtually any imaginable policy arguments.

The Montana court is not alone in assigning a federal fourteenth amendment standard to the equal rights provision in its state constitution. To date, seventeen state constitutions contain provisions expressly prohibiting sex-based discrimination.[32] The courts of ten of these states have assigned a weight to the right by adopting a standard of review. Three states other than Montana have adopted the rational basis test.[33] One of these three is not pertinent to an interpretation of the Montana provision because the state constitution compelled the adoption of that standard. The Louisiana equal rights provision prescribes its own standard: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ."[34]

Illinois, although also applying an equal protection standard, places sex in the category of a suspect classification.[35] The suspect classification approach assigns more weight to the right than does the rational basis test since discrimination is permitted only if the state can demonstrate a compelling state interest. This test affords more protection to the individual and thereby takes the right more seriously than the rational basis test. The Montana supreme court

31. 411 U.S. 677, 691 (1973). Justice Rehnquist incorporated as reasons for his dissent those stated by Judge Rives in his opinion for the District Court, *Frontiero v. Laird*, 341 F. Supp. 201, 208 (1972).

32. ALAS. CONST. art. 1, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 4; ILL. CONST. art. I, §§ 17, 18; LA. CONST. art. 1, § 3; MD. CONST. art. 46; MASS. CONST. ___; MONT. CONST. art. II, § 4; N.H. CONST. Part 1st, art. 2; N.M. CONST. art. II, § 18, PA. CONST. art. 1, § 28; TEX. CONST. art. 1, § 3(a); UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11, WASH. CONST. art. XXXI, § 1; WYO. CONST. art. 1, § 3.

33. State v. Barton, 315 So.2d 289 (La. 1975); Matter of Baer's Estate, 562 P.2d 614 (Utah 1977); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973).

34. LA. CONST. art. I, § 3.

35. People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98, 101 (1974). The Connecticut court has made no determinative ruling but has indicated that it will apply either the rational basis or suspect classification standard. Page v. Welfare Comm'r, 365 A.2d 1118, 1124 (Conn. 1976). The Texas lower courts are split. The Court of Civil Appeals uses the suspect classification approach. Mercer v. Board of Trustees, N.F.I.S. Dist., 538 S.W.2d 201, 204 (Tex. Civ. App. 1976). The Court of Criminal Appeals uses the rational basis test. Johnson v. State, 548 S.W.2d 700, 703 (Tex. Crim. 1977).

could have applied strict scrutiny in *Craig* and still have upheld the pre-1975 rape statute. The Illinois supreme court upheld a similar statute when applying strict scrutiny by acknowledging a compelling state interest in protecting women from rape by males.[36]

If state courts applied strict scrutiny to discrimination claims based on their state equal rights provisions and then narrowly construed "compelling state interests", the individual would be afforded more protection under his or her state constitution than under the Federal Constitution. This standard, however, is not entirely satisfactory. The right to equality between the sexes is still diluted since the court is permitted to qualify the right with social policy arguments.

The determination of an appropriate standard by which to review equal rights claims is the topic of the following section.

3. *A Proposed Standard of Review.*

In 1972, the same year that Montana adopted its new constitution, Congress submitted the equal rights amendment to the states for ratification. Since the E.R.A. was explicitly referred to in the adoption of article II, section 4, the legislative history of the E.R.A. must be examined in determining a proper standard of review under the Montana equal rights provision.

The Bill of Rights Committee reported to the Montana Constitutional Convention that the equal rights provision was included in article II, section 4 because the committee:

> saw no reason for the state to wait for the adoption of the federal equal rights amendment, an amendment which would not explicitly provide as much protection as this provision.[37]

In 1971, the *Yale Law Journal* published a study that proposed criteria for review of cases brought under the proposed E.R.A., distinct from equal protection standards.[38] Congress incorporated the study into the legislative history of the E.R.A. to explain its intended interpretation of the amendment.[39]

The basic premise of the amendment, according to the study, is that "sex should not be a factor in determining the legal rights of women and men."[40] The legal principle underlying this premise is

36. People v. Medrano, 24 Ill. App. 3d 429, 431, 321 N.E.2d 97, 98 (1974).

37. Proceedings at 5060.

38. Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (hereinafter cited as Brown).

39. S. REP. No. 92-689, 92d Cong., 2d Sess., 11 (1972) (hereinafter cited S. REP.); H.R. REP. 92-359, 92d Cong., 1st Sess. 6 (1971) (hereinafter cited H.R. REP.).

40. S. REP. at 11; H.R. REP. at 6; Brown at 889.

that "the law must deal with the individual attributes of the particular person and not with sterotypes of over-classification based on sex."[41] Differentiation between members of society may legitimately rest upon such characteristics as strength, intelligence, or training, but a classification on the basis of sex rather than on the basis of such traits would be illegal.[42] This guarantee of equal rights is not intended to be qualified by social policy considerations as is permissible under the equal protection standards.[43]

There are two exceptions to this general prohibition against sex discrimination, but they are narrow and do not involve considerations of social policy. First, the equal rights amendment would not override other constitutional protections. Thus the constitutional right of privacy would sanction separate male and female facilities for activities which involve disrobing, sleeping, and personal bodily functions.[44]

Second, dissimilar treatment of the sexes would be permitted concerning matters inextricably linked to physical characteristics unique to one sex.[45] Sperm banks and wet nursing are common examples of matters concerning which legitimate distinctions can be made under the second exception. To discern when a sex classification is properly sheltered by this exception, strict scrutiny should be applied.[46] Specifically, the following inquiries should be made: (1) is the unique physical characteristic closely related to the purpose of the classification? (2) is the state interest in legislating on this particular subject compelling? and (3) if so, is there some other way in which this interest can be satisfied?[47]

Most of the state courts that have adopted an interpretive standard for their state equal rights provision have chosen the equal rights standard suggested by the *Yale Law Journal* study.[48] In each case the state court either cited the study or employed language from it.

Commenting on its state equal rights provision, the Pennsylvania supreme court stated that:

> [T]he thrust of the Equal Rights amendment, is to insure equality of rights under the law and to eliminate sex as a basis for

41. S. REP. at 12.
42. Brown at 889.
43. Brown at 904.
44. S. REP. at 12; H.R. REP. at 7; Brown at 900-02.
45. S. REP. at 12; H.R. REP. at 19; Brown at 893-96.
46. Brown at 894.
47. BROWN, FREEDMAN, KATZ & PRICE, *supra* note 11, at 16.
48. People v. Salinas, ___ Colo. ___, ___, 551 P.2d 703, 706 (1976); Rand v. Rand, ___ Md. App. ___, ___, 374 A.2d 900, 903 (1977); Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882, 893 (1975).

> distinction. The sex of citizens of this Commonwealth *is no longer a permissible factor in* determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman (emphasis added).[49]

Subsequently, the Commonwealth Court of Pennsylvania enlarged this prohibition to clearly distinguish proper from prohibited bases of categorization in the area of interscholastic athletics:

> Nor can we consider the argument that boys are generally more skilled. The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. If any individual girl is too weak, injury-prone, or unskilled, she may, of course be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications. We believe that this is what our Supreme court meant when it said in *Butler* that "sex may no longer be accepted as an exclusive classifying tool (citations omitted)."[50]

There are several good reasons why Montana should adopt the equal rights standard. The language of the Montana provision is straightforward and absolute: "Neither the state nor any person, firm, corporation, or institution shall discriminate . . . ." Had the Constitutional Convention intended that this right be withheld whenever it conflicts with a reasonable policy determination, it could have included the limitation of the Louisiana provision that "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ."[51] Instead, the convention chose an absolute prohibition.

As noted earlier, the Bill of Rights Committee included the equal rights provision because it "saw no reason for the state to wait for the adoption of the federal equal rights amendment, an amendment which would not explicitly provide as much protection as [the state] provision."[52] The legislative history of the E.R.A. clearly indicates that it should be interpreted according to the equal rights standard outlined in the *Yale Law Journal* study. That standard affords far more protection to the individual than do traditional equal protection standards. For that reason, the Montana convention history directs the adoption of the equal rights standard.

Given the history and wording of article II, section 4 of the

49. Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).

50. Commonwealth v. Pennsylvania Interscholastic Athletic Assoc., 334 A.2d 839, 843 (Cmwlth. Ct. 1975).

51. LA. CONST. art. I, § 3.

52. Proceedings at 5060.

Montana constitution, it is evident that the equal rights standard alone is appropriate in applying that provision. Although the Montana supreme court applied a different standard to the provision in *Craig,* the narrow holding of that case is entirely consistent with the application of the equal rights standard. The court held that Montana's pre-1975 rape statute was constitutional. Forcible rape laws which apply only to male attackers and female victims are constitutional under the equal rights standard because they fall within the "unique physical characteristics" exception.[53] Since Craig's conviction need not be overturned for the court to adopt a new standard, there is reason to anticipate that the Montana court may yet adopt the equal rights standard.

The equal rights standard takes seriously the right to equality between the sexes. It assigns to the right a weight sufficient to hold off considerations of social policy. By doing so, it takes seriously the elevation of a principle to the status of an explicitly guaranteed constitutional right. It protects that right in circumstances where the majority may wish to see it diluted.

D. *Conclusion*

Article II, section 4 of the Montana Constitution explicitly prohibits the state and any person, firm, corporation or institution from discriminating on the basis of sex. Yet by adopting the rational basis test traditionally applied under the federal equal protection clause, the Montana supreme court has allowed the constitutional principle of equality to be balanced against considerations of social policy.

The Montana equal rights provision calls for an unequivocal "eradication of public and private discrimination based on . . . sex."[54] Sex discrimination can be eradicated only if the Montana courts fully recognize this new right by rejecting the balancing approach of the equal protection standards, and adopting the equal rights standard of review.

53. People v. Salinas, ___ Colo. ___, ___, 551 P.2d 703, 706 (1976); Brown at 956.
54. Proceedings at 5059.