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**THE LOST LEGISLATIVE HISTORY OF THE EQUAL
RIGHTS AMENDMENT: LESSONS FROM THE
UNPUBLISHED 1983 MARKUP BY THE HOUSE JUDICIARY
COMMITTEE**

PAUL TAYLOR* AND PHILIP G. KIKO**

[T]here has been much debate on the Equal Rights Amendment I must say that I find myself wondering why there is so much debate over what to me is all a very simple proposition, which is that our laws should treat men and women as individuals.

— Representative Don Edwards (D-CA),
Chairman, House Subcommittee on Civil
and Constitutional Rights, 1983

There's a question you hear around, and that is: "Which is worse, ignorance or apathy?" The standard answer is, "I don't know and I don't care." This answer, it seems to me applies to the Equal Rights Amendment. If you ask, "What does it really mean? What will it do to . . . abortion rights, the law of the draft, whether Congress will lose the right it now has to distinguish between

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1. *Markup on H. J. Res. 1, and Amendments Before the H. Comm. of the Judiciary*, 98th Cong. 6 (1983) [hereinafter "1983 House transcript"].

male and female, the role of women in combat?" These are sensible questions of public policy. The answer, when you ask those questions, has to be "I don't know." I don't know. In fact, the answer given by the chief sponsor of the other body [the Senate] was that the courts will decide, the courts will decide.

— Representative Henry Hyde (R-IL), House Judiciary Committee, 1983²

INTRODUCTION

The Equal Rights Amendment³ (ERA) was first introduced in Congress in 1923.⁴ It was passed on to the states by Congress in 1972, but it was not ratified by the required three-fourths of the states prior to its expiration.⁵ In 1983, the ERA was re-introduced.⁶ It was the subject of five hearings in the House Subcommittee on Civil and Constitutional Rights, including one hearing called by the minority.⁷ It was last debated and marked up in the House Judiciary Committee on November 9, 1983. It was later brought up on the House floor under a "suspension of the rules" in which no amendments are allowed, and in which twenty minutes of debate time each was allocated to proponents and opponents.⁸ The ERA subsequently failed to pass the House of

2. *Id.* at 24. Senator Paul Tsongas, a Democrat from Massachusetts, was the chief sponsor of the ERA in the Senate at the time. At a Senate hearing on the ERA, Senator Tsongas was questioned by Senator Orrin Hatch, Republican from Utah and then Chairman of the Senate Constitution Subcommittee. Senator Hatch asked Senator Tsongas questions regarding the effect the federal ERA would have on government funding of abortions, sex integration in public schools, and insurance rates, to which Senator Tsongas replied, respectively, "[t]hat issue would be resolved in the courts," "[t]hese issues are going to be decided in the courts," and "if we pass [the ERA], the issue will end up in court." *The Impact of the Equal Rights Amendment: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary on S.J. Res. 10, 98th Cong.* 24–25, 29 (1985).

3. "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." 1983 House transcript, *supra* note 1, at 5.

4. H.R.J. Res. 75, 68th Cong. (1923).

5. The following states have never ratified the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

6. H.R.J. Res. 1, 98th Cong. (1983).

7. See *Equal Rights Amendment: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong.* 335 (1983) (hereinafter "Equal Rights Amendment House Hearings").

8. Editorial, *ERA, But Not This Way*, WASH POST, Nov. 15, 1983. ("The [Democratic House] leadership has decided to bring the Equal Rights Amendment to the floor under a

Representatives⁹ by the required two-thirds vote¹⁰ in an effort led by Representative F. James Sensenbrenner, Republican from Wisconsin.¹¹

At the outset of the 1983 House Judiciary Committee markup of the ERA—then styled as H.J. Res. 1—Representative Sensenbrenner, who at the time was the Ranking Republican Member of the House Judiciary Subcommittee on Civil and Constitutional Rights, asked, “Mr. Chairman, I ask unanimous consent that the full Committee transcript on H.J. Res. 1 be made an official record to be published for purposes of legislative history.”¹² To this, Chairman Peter Rodino replied, “Without objection, so ordered.”¹³ However, the committee debate was, remarkably, never subsequently published, nor does any record of it reside in the Library of Congress. That is unfortunate, as the debate that ensued was the last committee debate on the ERA in a federal legislative body that passed it since 1972.¹⁴

The ERA was reintroduced in the 110th Congress in the House of Representatives and its supporters vowed to bring it to a vote on the House floor by the end of the legislative session,¹⁵ forcing a new evaluation of the proposal. No action was taken in the 110th Congress but it is expected to be introduced again in the 111th Congress. Such a new evaluation would benefit greatly from an examination of both the 1983 House Judiciary Committee markup of the ERA and history subsequent to 1983. During that 1983 markup, both Republicans and Democrats on the committee raised several questions regarding the legal effects such an amendment would have on the law. As a result, they offered several amendments that, if passed, would have clarified several areas in which the ERA’s broad prohibition on sex discrimination would have applied. All such amendments were

suspension of the rules. That’s a procedure usually reserved for noncontroversial matters. Very limited debate is allowed— only 20 minutes to a side—and no amendments can be considered.”)

9. The Senate did not vote on the ERA in the 98th Congress.

10. It failed by a vote of 278 to 147. 158 CONG. REC. 37,128 (1983).

11. See, e.g., Richard Bradee, *Sensenbrenner leads ERA defeat*, MILWAUKEE J. SENTINEL, Nov. 16, 1983 (on file with author) (“A rebellion against House Speaker Thomas P. O’Neill Jr. (D-Mass.) headed by Rep. F. James Sensenbrenner Jr. (R-Wis.) led to the failure of the Equal Rights Amendment in the House Tuesday. The House fell six votes short of the two-thirds majority needed to approve a constitutional amendment . . . [Sensenbrenner] was floor manager for opponents of the ERA.”).

12. 1983 House transcript, *supra* note 1, at 5.

13. *Id.*

14. Prior to 1983, the most recent committee legislative history focusing on the ERA’s substantive provisions was created when the Senate debated and reported the ERA out to the states on March 22, 1972. See 118 CONG. REC. S9598 (1972).

15. Juliet Eilperin, *New Drive Afoot to Pass Equal Rights Amendment*, WASH. POST Mar. 28, 2007, at A1.

defeated.¹⁶ Yet the issues they raised have not changed. Moreover, the validity of the concerns raised by those who offered the amendments can now be more fully tested against the backdrop of judicial decisions handed down since 1983 by state courts interpreting the same text of the ERA—with its prescription that “equality of rights” shall not be denied on account of sex—as adopted as part of six state constitutions.¹⁷

This article uses a rough transcript¹⁸ to explore several of the amendments offered to the ERA during the 1983 House Judiciary Committee markup and examines the concerns that motivated the sponsors of those amendments, concerns that included the ERA’s effect on government-funded abortions, the military draft and combat policies, same-sex marriage, insurance premiums, and private entities. The article then explores whether those concerns were justified in light of state court decisions interpreting the identical base text of the ERA in the six states that adopted such a state-level ERA as part of their own state constitutions. This article concludes that the concerns of those who offered the amendments to the federal ERA were largely justified and that such concerns remain legitimate regarding the most

16. At the 1983 House Judiciary Committee markup of the ERA, Representative Harold Sawyer (R-Mich.) commented on the manner in which all amendments to the ERA were voted down on party-line votes, stating “[t]he way it’s being handled in the Committee, it’s disgusting. Even if the word ‘equal’ was misspelled, [ERA supporters] wouldn’t change it.” 1983 House transcript, *supra* note 1, at 110.

17. Those states, and the relevant text of the ERA as enacted as part of their state constitutions, are as follows: Colorado, COLO. CONST., art. II, § 29 (“Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.”); Hawaii, HAW. CONST., art. I, § 3 (“Equality of rights under the law shall not be denied or abridged by the State on account of sex.”); Maryland, MD. CONST. Declaration of Rights, art. 46 (“Equality of rights under the law shall not be abridged or denied because of sex.”); New Mexico, N.M. CONST. art. II, § 18 (“Equality of rights under the law shall not be denied on account of the sex of any person.”); Pennsylvania, PA. CONST. art. I, § 28 (“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”); and Washington, WASH. CONST. art. XXXI, § 1 (“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”).

Other states have constitutional provisions that generally prohibit discrimination against women, but they include all manner of qualifying language not contained in the text of the proposed federal ERA. *See, e.g.*, VA. CONST. art. I, § 11 (providing also that “mere separation of the sexes shall not be considered discrimination”); CAL. CONST. art. I, § 31 (exempting “bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting”); R.I. CONST. art. I, § 2 (providing that ERA “shall [not] be construed to grant or secure any right relating to abortion or the funding thereof”).

18. A copy of the proceedings of that 1983 debate, available only in the form of a rough transcript compiled by congressional stenographers, was maintained by co-author Philip G. Kiko, the Republican committee counsel to Representative Sensenbrenner at the time.

recently proposed federal ERA, the language of which is identical to H.J. Res. 1 from 1983.¹⁹

II. THE IMPACT OF THE ERA ON GOVERNMENT-FUNDED ABORTIONS

The Hyde Amendment prohibits the use of federal funds for abortions except in cases of rape, incest, or when the life of the mother is endangered.²⁰ The Supreme Court upheld the Hyde Amendment's abortion funding restrictions as constitutional in *Harris v. McRae*.²¹ Whether the Hyde Amendment would be struck down if the ERA became part of the Constitution was the subject of extensive debate in 1983.

At the November 3, 1983 hearing on the ERA before the House Subcommittee on Civil and Constitutional Rights, Yale law professor Thomas Emerson, co-author of a seminal article on the ERA that appeared in the *Yale Law Journal* in 1971,²² was asked by Representative Mike DeWine, Republican from Ohio, if the Hyde Amendment would withstand a court challenge under the ERA. Professor Emerson responded that “[i]f [the Supreme Court is] going to overrule the Harris case, [they] would do it by saying the Hyde Amendment is a burden on the right of privacy. They wouldn’t do it under ERA.”²³ Professor Ann Freedman, co-author of the same *Yale Law Journal* article, agreed and said, “The Supreme Court analyzes abortion cases as privacy cases If the Supreme Court were inclined to overturn such a congressional decision as is represented by the Hyde Amendment, they would do it on privacy grounds.”²⁴ This view was reiterated at the 1983 markup of the ERA by Representative Edwards, the chairman of the subcommittee with jurisdiction over the amendment.²⁵ Representative Patricia Schroeder at the time further argued that cases decided under state-level ERA’s had made clear the

19. See H.R.J.Res. 40, 110th Cong. (2007) (providing that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”).

20. See 42 U.S.C. § 1397ee (2000) (“Funds provided to a State under this subchapter . . . may include coverage of abortion only if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest.”).

21. 448 U.S. 297, 326 (1980).

22. Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

23. Equal Rights Amendment House Hearings, *supra* note 7, at 803.

24. *Id.* at 813.

25. 1983 House transcript, *supra* note 1, at 39 (“[I]f the Supreme Court ever overturns any abortion decision, it would be on privacy grounds, not on grounds of sex.”).

ERA would not affect abortion decisions, stating that the case law regarding abortion is predictable.²⁶

Representative Sensenbrenner, however, requested that Congress' independent research arm, the Congressional Research Service (CRS), provide the committee with its own evaluation of the question. As he said at the 1983 markup of the ERA: "The executive summary of the CRS report says that under strict scrutiny the pregnancy classification [in the Hyde Amendment] would probably be regarded to be a sex classification under the ERA."²⁷ Representative DeWine also predicted that "the Hyde Amendment would have a very difficult time under some federal judges surviving the ERA, unless there was an abortion-neutral amendment included therein."²⁸

In the midst of the confusion regarding whether the Hyde Amendment would survive passage of the ERA, Representative Sensenbrenner offered an amendment to the ERA at the 1983 markup that stated, "Nothing in this article shall be construed to grant or secure any right relating to abortion or the funding thereof."²⁹

Representative Edwards argued against the adoption of the amendment, but evidently not against the policy it embodied, on the grounds that "[w]e have accepted this amendment on our legislative history. That is the appropriate way to elucidate it."³⁰ Representative Edwards also explicitly denied that the ERA would prohibit classifications on pregnancy as an unconstitutional instance of sex discrimination. He was asked at the 1983 markup by Representative Hamilton Fish, Jr., the Ranking Republican on the Full House Judiciary Committee from New York, "Under the language of the proposed amendment before us, would the pregnancy classification

26. *Id.* at 43 ("[Y]ou look at the case law, which we have. You can look at it, it is not unpredictable. We know what it will say.").

27. *Id.* at 32. The Congressional Research Service report elaborated that "[w]ith respect to the first issue of standard of review, if strict scrutiny, the most active form of judicial review, is the standard applied [under the ERA], then the answer to the question whether pregnancy classifications are sex-based classifications would seem to be affirmative. It would then follow that the ERA would reach abortion and abortion funding situations. It is very difficult for the government to meet the burden of showing that the classification in question serves a compelling state interest, thus, classifications subjected to active review are almost always invalidated as being violative of the Constitution." Karen J. Lewis, *A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on the Right to an Abortion or to the Funding of an Abortion* 61–62 (Congressional Research Service, Oct. 20, 1983).

28. 1983 House transcript, *supra* note 1, at 22.

29. *Id.* at 35. The Sensenbrenner amendment was later amended to replace the words "grant or secure" with "grant, secure, or deny." *See id.* at 42.

30. *Id.* at 38.

discrimination be based upon sex?"³¹ Representative Edwards replied, "Well, it is a classification based on unique physical characteristics, but *not* on gender or sex."³²

The Sensenbrenner amendment was subsequently rejected by the committee by a vote of 12 to 19.³³ But, as has been previously mentioned, the legislative history to which Chairman Edwards referred was never officially published as promised. Consequently, the ERA's effect on the Hyde Amendment remained unclear when the ERA failed to pass the House by the required two-thirds vote.

Today, however, with the benefit of more recent history, we can see that the concerns of Representative Sensenbrenner and those who supported his amendment proved to be justified. Five years later in 1988, the Colorado Supreme Court held that Colorado's ERA³⁴ prohibits discrimination on the basis of pregnancy. In *Colorado Civil Rights Commission v. Travelers Insurance Co.*,³⁵ that court found as follows: .

The [Colorado Civil Rights] Commission urges that pursuant to the Equal Rights Amendment, Colo. Const. art. II, § 29 . . . an employer discriminates on the basis of sex by providing employees as part of a total compensation package a group health insurance policy providing coverage only for complications of pregnancy and excluding from coverage expenses incurred during a normal pregnancy. We agree

[B]ecause pregnancy is a condition unique to women, an employer offers fewer benefits to female employees on the basis of sex when it fails to provide them insurance coverage for pregnancy while providing male employees comprehensive coverage for all conditions, including those conditions unique to men. This disparity in the provision of comprehensive insurance benefits as a part of employment compensation constitutes discriminatory conduct on the basis of sex The failure to provide coverage for the treatment of pregnancy in an otherwise comprehensive insurance policy discriminates against women on the

31. *Id.* at 30–31.

32. *Id.* at 31 (emphasis added).

33. *Id.* at 51.

34. COLO. CONST. art. II, § 29.

35. 759 P.2d 1358 (Co. 1988).

basis of sex as surely as, for example, the failure to provide coverage for the treatment of prostate conditions in a comprehensive policy would discriminate against men on the basis of sex For the foregoing reasons, we conclude that [the defendant] discriminated on the basis of sex, in violation of the requirements of the Equal Rights Amendment³⁶

Ten years later, in 1998, the Supreme Court of New Mexico took the next step and relied on New Mexico's state-level ERA³⁷ to strike down a state regulation restricting state funding of abortions for Medicaid-eligible women.

In *New Mexico Right to Choose/NARAL v. Johnson*,³⁸ the court found as follows:

Neither the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this Court from affording greater protection of the rights of Medicaid-eligible women under our state constitution in this instance Article II, Section 18 of the New Mexico Constitution guarantees that “[e]quality of rights under law shall not be denied on account of the sex of any person.” We construe the intent of this amendment as providing something beyond that already afforded by the general language of the Equal Protection Clause [C]lassifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment Except in the cases of rape or incest, or when necessary to save the life of the mother, [New Mexico's] Rule 766 denies state funding for abortions even when they are medically necessary. Under the [New Mexico Human Services] Department's regulations, there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to

36. *Id.* at 1361, 1363–65 (citations omitted) (emphasis added). The plaintiff had sued because the insurance policy would cover expenses for pregnancy complications, but not for expenses related to a normal pregnancy. *Id.* at 1359–61.

37. N.M. CONST. art. II, § 18.

38. 975 P.2d 841 (N.M. 1998).

men. Indeed, we can find no provision in the Department's regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy Thus, Rule 766 undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women We determine that Rule 766 employs a gender-based classification that operates to the disadvantage of women and is therefore presumptively unconstitutional. In order to survive the heightened scrutiny that we apply to such classifications, the State must meet its burden of showing that Rule 766 is supported by a compelling justification The Department fails to offer a sufficiently compelling justification for such discrimination in this case.³⁹

If, as the Colorado and New Mexico Supreme Courts have now explained, classifications based on pregnancy constitute unconstitutional sex discrimination under the ERA, then the reasoning underlying the Supreme Court's decision in *Harris v. McRae*,⁴⁰ which upheld the Hyde Amendment, would not be sustainable if the federal ERA were adopted. In the *Harris* case, the Supreme Court noted that "[w]hether freedom of choice [such as the choice of an abortion] that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement,"⁴¹ and that it is rational for Congress to authorize federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions, because "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."⁴²

Those rationales would seem to necessarily break under the stress of a federal ERA. That is because, under the reasoning enunciated by the Colorado and New Mexico Supreme Courts, the ERA, by prohibiting all discrimination based on sex, would indeed "entitle" women to government subsidization of abortions in all instances, if government subsidized medical procedures at all. To do

39. *Id.* at 851, 855–56.

40. 448 U.S. 297 (1980).

41. *Id.* at 318.

42. *Id.* at 325.

otherwise would be to discriminate based on the ability to become pregnant, and only women can become pregnant.⁴³

Also, under the reasoning of the Colorado and New Mexico Supreme Courts, presumably the same principles they articulated in these state-level ERA cases would apply to strike down the federal ban on partial-birth abortions⁴⁴ and also state laws providing for parental consent or notification before a minor obtains an abortion,⁴⁵ as such abortions can only be sought by women, not men. Such laws, however, are widely supported.⁴⁶

43. The constitutional right to be protected from all sex discrimination under the ERA would trump the “inherently different” nature of abortions because the ERA directs its constitutional protections to those of a particular “sex,” not to those in a particular state of human development.

44. See 18 U.S.C. § 1531 (2000).

45. Such laws are in effect in twenty-seven states. See ALA. CODE §26-21-3 (1992); ARIZ. REV. STAT. ANN. §36-2152 (2003); ARK. CODE ANN. §20-16-801 (2005); FLA. STAT. §390.01114 (2007); GA. CODE ANN. §15-11-112 (2005); IND. CODE ANN. §§16-18-2-267, 16-34-2-4 (2005); IOWA CODE ANN. §135L.3 (2007); KAN. STAT. ANN. §65-6705 (2005); KY. REV. STAT. ANN. §311.732 (2006); LA. REV. STAT. ANN. §40:1299.35.5 (2001); MASS. GEN. LAWS ANN. CH. 112, §12S (2003); MICH. COMP. LAWS ANN. §722.903 (2002); MINN. STAT. ANN. §§645.452, 144.343 (2007); MISS. CODE ANN. §41-41-53 (2005); MO. REV. STAT. §§188.015, 188.028 (2004); NEB. REV. STAT. §71-6902 (2003); N.C. GEN. STAT. §90-21.7 (2007); N.D. CENT. CODE §14-02.1-03.1 (2004); OH. REV. CODE ANN. §§2919.121-.122 (2006); OKL. STAT. ANN. tit.63, §§ 1-740.2-.3 (Supp. 2008); PA. CONS. STAT. ANN. §§3203, 3206 (2000); R.I. GEN. LAWS §23-4.7-6 to -7 (1996); S.D. CODIFIED LAWS §34-23A-1, -7 (2004); TENN. CODE ANN. §37-10-303 (2005); TEX. OCC. CODE ANN. §164.052 (2004); VA. CODE ANN. §16.1-241 (Supp. 2007); and WYO. STAT. ANN. §§35-6-101, 35-6-118 (2007).

46. Regarding partial-birth abortion, over 60% of registered voters favor a ban on partial-birth abortion. Fox News/Opinion Dynamics Poll (February 28–March 1, 2006), http://www.foxnews.com/projects/pdf/FOX221_abortion_web.pdf. Seventy percent of adults favor “a law which would make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a ‘partial-birth abortion,’ except in cases necessary to save the life of the mother.” CNN/USA Today/Gallup Poll (January 10–12, 2003), available at <http://www.pollingreport.com/abortion.htm>.

Regarding parental involvement laws, one recent poll asked respondents “[w]ould you favor or oppose requiring that at least one parent be told before a girl under 18 years of age could have an abortion?” Eighty percent responded “Favor.” CBS News Poll (July 13–14, 2005), available at <http://www.pollingreport.com/abortion.htm>. When asked “[d]o you think a female under age 18 should be required by state law to notify at least one parent or guardian before having an abortion?” 78% responded “Yes,” including 64% of those who identified themselves as “pro-choice.” Fox News/Opinion Dynamics Poll (April 25–26, 2005), http://www.foxnews.com/projects/pdf/poll_042705.pdf. Also, one poll found that 69% of American adults favor a law requiring women under 18 to get parental consent before obtaining an abortion, see CNN/USA Today/Gallup Poll (November 11–13, 2005), <http://www.angus-reid.com/polls/view/10071>. Another poll found that 72% of registered voters favor the same. See Fox News/Opinion Dynamics Poll (April 25–26, 2005), http://www.foxnews.com/projects/pdf/poll_042705.pdf.

III. THE IMPACT OF THE ERA ON THE MILITARY DRAFT AND COMBAT POLICY

Another issue of concern to some at the 1983 markup of the ERA was its impact on the military draft and combat policy. Currently, women are permitted to serve on most combat ships and in combat aviation. However, they are barred from assignment to units “below the brigade level whose primary mission is to engage in direct combat on the ground.”⁴⁷ In addition, the military can exclude women from military positions “if (1) the units and positions [are] required to physically collocate and remain with direct ground combat units, (2) the service secretary attests that the cost of providing appropriate living space for women is prohibitive, (3) the units are engaged in special operations missions, or (4) job-related physical requirements would exclude the vast majority of women.”⁴⁸

Because women are precluded from serving in the vast majority of combat positions, only males are subject to conscription pursuant to a military draft. In 1981, the Supreme Court, in *Rostker v. Goldberg*,⁴⁹ upheld as constitutional the provisions of the Military Selective Service Act that authorized the President to require the registration of males and not females for potential conscription.

The Court stated:

Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. Under 10 U.S.C. § 6015, “women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions,” and under 10 U.S.C. § 8549 female members of the Air Force “may not be assigned to duty in aircraft engaged in combat missions.” The Army and Marine Corps preclude the use of women in combat as a matter of established policy. Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration.⁵⁰

47. U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: TRENDS IN THE OCCUPATIONAL DISTRIBUTION OF MILITARY WOMEN 3 (1999).

48. *Id.*

49. 453 U.S. 57 (1981).

50. *Id.* at 76–77 (citations omitted).

The Court so held, even though, as the dissent pointed out, “military experts acknowledged that female conscripts can perform as well as male conscripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft.”⁵¹

The Court concluded that there was no violation of the Due Process Clause because

[t]he exemption of women from registration is not only sufficiently but also closely related to Congress’ purpose in authorizing registration. The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.⁵²

In *Goldberg*, the Court felt constrained by Congress’s explicit recognition that the issues of registration and combat roles are closely linked. The Senate Report accompanying the Military Selective Service Act states that “the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat.”⁵³ The Court itself recognized that “[t]he purpose of registration . . . was to prepare for a draft of combat troops.”⁵⁴ Were the ERA to require the registering of women, it is therefore quite likely it would also require that women serve in combat positions as well.⁵⁵

Concerned with such a result, Representative Harold Sawyer offered an amendment to the ERA that provided “[N]othing in this article shall be construed to affect any law, policy, or regulation

51. *Id.* at 102–03 (Marshall, J., dissenting).

52. *Id.* at 78–79 (citations omitted).

53. See S. Rep. No. 96-826, at 157 (1980) (quoted in *Goldberg*, 453 U.S. at 68).

54. *Goldberg*, 453 U.S. at 76 (emphasis in original).

55. The Court in *Goldberg* made clear that “[n]one of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.” 453 U.S. at 67. However, the ERA, were it to become part of the Constitution, would certainly govern military registration and combat policies. As Representative Hall said at the 1983 House Judiciary Committee markup of the ERA, “[o]nce the ERA becomes part of the Constitution, the basis for the Supreme Court’s [*Goldberg* decision] would be demolished.” 1983 House Transcript, *supra* note 1, at 107. Representative DeWine also commented, “[t]here was not a single witness that we had in front of us in the [Subcommittee on Civil and Constitutional Rights] who did not agree that if the ERA was passed you are going to have women in combat and you are going to have women who must be drafted.” *Id.* at 132.

relating to the utilization of persons in military combat.”⁵⁶ Representative Hyde, supporting the amendment, said, “I don’t think the American people are ready to have their daughters, their wives and women put in the front lines in combat.”⁵⁷ Representative Clay Shaw, a Republican from Florida, also supported the Sawyer Amendment. He cautioned opponents of the Sawyer amendment who relied on case law as it existed at the time to determine the ERA’s expected effect, stating that the case law will not apply once the Constitution is amended.⁵⁸ Nevertheless, the Sawyer Amendment was defeated by a vote of 11 to 20.⁵⁹

Representative Sam Hall, a Democrat from Texas who later became a federal judge, offered a separate amendment that provided “[N]othing in this article shall be construed to affect any law, regulation, or policy relating to the draft for military service.”⁶⁰ Representative Hyde, supporting the amendment, stated:

[T]oday Congress, the people’s branch, the accountable branch of government, has the option to call up women, to call up men, to call them both up. When ERA gets cranked into the Constitution, the elected branch of the Government that should set and implement public policy loses that option, loses that power. In the War Powers Act we the Congress tell the President how many days he can keep troops in combat. When ERA becomes the law of the land, we turn to the courts across the street, nine people appointed for life, and they will tell us the makeup, the personnel, the composition of those troops.⁶¹

The Hall Amendment was defeated by a vote of 13 to 18.⁶²

While state courts, of course, do not have jurisdiction to address issues regarding U.S. conscription and military combat policies, state courts do and have addressed issues related to the effect of state-level ERA’s on sex integration policies in public schools. The

56. 1983 House transcript, *supra* note 1, at 85.

57. *Id.* at 89.

58. *Id.* at 94. (“[W]hen you are talking about existing case law, we have to quit using that expression on this Committee, because the existing case law is going to be gone when you amend the Constitution . . .”).

59. *Id.* at 102.

60. *Id.* at 103.

61. *Id.* at 132–33.

62. *Id.* at 138.

principles that govern such policies will also inform decisions regarding sex integration in other areas of government, including the U.S. military.⁶³

Even prior to 1983, the Pennsylvania and Washington state courts, where state-level ERA's are identical to the proposed federal constitutional amendment, had already held that their respective state ERA's prohibited public schools from segregating boys and girls in athletic events.

In *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*,⁶⁴ the court held that Pennsylvania's state-level ERA⁶⁵ on its face overrode a bylaw of the State Interscholastic Athletic Association that provided that girls could not compete or practice against boys in any athletic contest.

The court stated:

The complaint here specifically challenges the constitutionality of Article XIX, Section 3B of the PIAA By-Laws which states: "Girls shall not compete or practice against boys in any athletic contest" Article XIX, Section 3B of the PIAA By-Laws is unconstitutional on its face under the [Pennsylvania] ERA and none of the justifications for it offered by the PIAA, even if proved, could sustain its legality. We need not, therefore, consider whether or not the By-Law also violates the Fourteenth Amendment to the United States Constitution There is no fundamental right to engage in interscholastic sports, but once the state decides to permit such participation, it must do so on a basis which does not discriminate in violation of the constitution Moreover, even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who

63. This connection was recognized by at least one witness who testified in support of the ERA in 1983. At the November 3, 1983 hearing on the ERA before the House Subcommittee on Civil and Constitutional Rights, Professor Ann Freedman testified that "[i]mportant areas in which the ERA would dictate *different results* . . . are sex discrimination in the military and sex segregation in public schools." Equal Rights Amendment House Hearings, *supra* note 7, at 777 (emphasis added).

64. 334 A.2d 839 (Pa. 1975).

65. PA. CONST. art. I, § 28.

has been relegated to the “girls’ team”, solely because of her sex, “equality under the law” has been denied.⁶⁶

In the case itself, the Commonwealth of Pennsylvania, which was pressing the sex integration claim, was apparently uncomfortable with the notion that boys and girls should be required to compete in the more physical sports of football and wrestling, as its complaint specifically exempted those sports from the purview of the lawsuit.⁶⁷ Regardless, the court found that there was no justification for exempting those sports from the ruling.⁶⁸

Yet, well beyond football and wrestling, the reasoning the Pennsylvania court applied could be applied near seamlessly at the federal level to require, when there is a draft, the drafting of women into military combat roles under a federal ERA. As the Pennsylvania court stated:

The notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-Law in light of the ERA. Nor can we consider the argument that boys are generally more skilled. The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. 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.⁶⁹

66. *Pennsylvania Interscholastic Athletic Ass’n*, 334 A.2d at 840–42.

67. *See id.* at 841 n.2.

68. *Id.* at 843 (finding that “[a]lthough the Commonwealth in its complaint seeks no relief from discrimination against female athletes who may wish to participate in football and wrestling, it is apparent that there can be no valid reason for excepting those two sports from our order in this case.”). Judge Bowman, writing a strongly worded dissent in the case, stated that “it is inescapable in my view that the majority has extruded prior decisions of our Supreme Court to the absonant conclusion that under no circumstances and under no conditions ... can there be a rational basis for distinction or classification as between the sexes, a view not shared even by the plaintiff in this cause of action in excluding the ‘contact sports’ of football and wrestling from the purview of the relief sought.” *Id.* (Bowman, Presiding J., dissenting).

69. *Id.* (citations omitted).

Washington courts apply the same reasoning under their own state-level ERA. In *Darrin v. Gould*,⁷⁰ the Washington Supreme Court held that under its state-level ERA,⁷¹ public high schools in the state could not deny qualified high school students permission to play on the high school football team in interscholastic competition solely on the ground that the students were girls.

The court reasoned:

The question is whether a school district operating a high school in this state may constitutionally deny two of its fully qualified high school students permission to play on the high school football team in interscholastic competition solely on the ground the students are girls. We hold the denial a prohibited discrimination based on sex and reverse Whatever may have been the former law, when [the plaintiffs] in the fall of 1973 were denied permission to play on the high school football team, Washington's [state-level ERA] expressly forbade discrimination based on sex [The Washington state ERA] added something to the prior prevailing law by eliminating otherwise permissible sex discrimination if the rational relationship or strict scrutiny tests were met 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.⁷²

Since 1983, similar reasoning has already subsequently appeared in the Supreme Court's decision in *U.S. v. Virginia*,⁷³ which

70. 540 P.2d 882 (Wash. 1975).

71. WASH. CONST. art. XXXI, § 1.

72. *Gould*, 540 P.2d at 883–85, 889 (citations omitted). In a concurring opinion, Judge Hamilton noted that this result may well not have been anticipated by those who enacted the state-level ERA. *Id.* at 893 (Hamilton, J., concurring) (“With some qualms I concur in the result reached by the majority. I do so, however, exclusively upon the basis that the result is dictated by the broad and mandatory language of . . . Washington's Equal Rights Amendment (ERA). Whether the people in enacting the ERA fully contemplated and appreciated the result here reached, coupled with its prospective variations, 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.”).

73. 518 U.S. 515 (1996).

struck down the male-only admission policy at the Virginia Military Institute (VMI), in which the Court stated “[n]either the goal of producing citizen-soldiers nor VMI’s implementing methodology is inherently unsuitable to women.”⁷⁴

In that case, the Court noted that “it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets,” and that “[t]he parties . . . agree that some women can meet the physical standards [VMI] now impose[s] on men.”⁷⁵ Nevertheless, the Court stated that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁷⁶

The majority opinion in *U.S. v. Virginia*, it should be noted, was written by Justice Ruth Bader Ginsburg. Justice Ginsburg was intimately involved in the preparation of a report published by the United States Commission on Civil Rights in 1977 that advocated the elimination of sex discrimination in the U.S. Code.⁷⁷ The report specifically supported the federal ERA⁷⁸ and recommended the elimination of “sex-discriminatory provisions in the Code”⁷⁹ that contain “either substantive sex-based differentials or terminology inconsistent with a national commitment to equal rights, responsibilities, and opportunities (the equal rights principle),”⁸⁰

74. *Id.* at 520.

75. *Id.* at 540–41 (quotations and emphasis omitted).

76. *Id.* at 550 (emphasis in original).

77. See U.S. COMMISSION ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1977) [hereinafter SEX BIAS IN THE U.S. CODE]. That report was transmitted to the President, the President of the Senate, and the Speaker of the House, in a letter that stated “[a]s some members of Congress are probably aware, the initial research and draft of this report was developed by contractors, Ruth Bader Ginsberg and Brenda Feigan Fasteau, assisted by a group of Columbia Law School students.” *Id.* at iii. The acknowledgements preceding the report state: “[a] report prepared under contract no. CR3AK010 by Brenda Feigan-Fasteau, Ruth Bader Ginsburg, and 15 students from the Columbia Law School, New York City was used as the basis for the Commission study. Ms. Ginsburg is professor of law at the Columbia Law School.” *Id.* at v. The report’s letter of transmittal counseled that “[o]ur study . . . is a guide to you and to the Justice Department for action in erasing sex-based references and sex bias from our most basic laws.” *Id.* at iii.

78. See *id.* at 5 (“The equal rights amendment (ERA) has been proposed as a measure to ensure constitutional protection against all legislative sex discrimination.”).

79. *Id.* at 1.

80. *Id.* at 13.

including provisions exempting women from the draft⁸¹ and from military combat.⁸²

The report's analysis states:

Debate over the equal rights amendment (ERA) makes it clear that proponents envisioned no exemption for the Armed Forces from the principle of equal rights, responsibilities, and opportunity As is indicated in the legislative history of the equal rights amendment, the principle of equal rights, responsibilities, and opportunity as applied to the Armed Forces calls for assignment of men and women on the basis of individual capacity in light of the needs of the services. The principle does not permit formulation of personnel utilization policy on the basis of sex. Instead, strictly job-related standards, including tests of strength and skill where relevant, would determine placement of personnel Implementation of the equal rights principle requires a unitary system of appointment, assignment, promotion, discharge, and retirement, a system that cannot be founded on a combat exclusion for women [A]mendments to the current laws must

81. *Id.* at 19. The seminal article on the ERA published in the *Yale Law Journal* in 1971 similarly argues that:

"[t]he Armed Forces have always been one of the most male-dominated institutions in our society. Only men are subject to involuntary conscription. . . . Until women are required to serve in substantial numbers, stereotypes about their inability to do so will be perpetuated. The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military. Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service These changes will require a radical restructuring of the military's view of women Under the Equal Rights Amendment the draft law will not be invalidated. Recognizing the concern of Congress with maintaining the Armed Forces, courts would construe the Amendment to excise the word "male" from the two main sections of the [Military Selective Service] Act, dealing with registration and induction, thereby subjecting all citizens to these duties. A woman will register for the draft at the age of eighteen, as a man now does. She will then be classified as to availability for induction and training. If she meets the physical and mental standards, and is not eligible for any exemptions or deferments, she will join men in susceptibility to induction."

Brown, *supra* note 22, at 967, 969-71 (1971).

82. SEX BIAS IN THE U.S. CODE, *supra* note 77, at 25, 26.

include . . . [e]qual opportunities and requirements for enlistment . . . and in relation to any draft.⁸³

The report also supports the elimination of the terms “fraternity and sorority chapters”⁸⁴ and the sex-integration of the Boy Scouts and the Girl Scouts.⁸⁵

Were the federal ERA to become part of the Constitution, then, there would seem little doubt that Justice Ginsburg, the author of the decision in *U.S. v. Virginia*, would find that it requires that any draft also include women, and that they serve in combat roles.

At least one poll indicates there is popular support for allowing women to serve in combat roles,⁸⁶ but current popular support for the *drafting* of women into combat positions remains unclear. Some at the 1983 House markup of the ERA cautioned that enactment of the federal ERA, by requiring the drafting of women into combat positions, would result in a situation in which women (who constitute a majority of the electorate) would be constitutionally denied the opportunity to decide on whether they should be drafted into combat.⁸⁷ By the same argument, under the ERA, women would also be denied the opportunity to vote for legislation that might refine the manner in

83. *Id.* at 25–26, 32.

84. *Id.* at 169.

85. *Id.* at 145–46, 219–20. The report found that “[t]he Boy Scouts and Girl Scouts, while ostensibly providing ‘separate but equal’ benefits to both sexes, perpetuate stereotyped sex roles to the extent that they carry out congressionally-mandated purposes.” *Id.* at 145–146.

86. A USA Today/Gallup Poll of 1,028 adults nationwide, conducted September 7–8, 2007, found that 74% of those surveyed believed women should be allowed to hold combat jobs in the U.S. armed forces. USA Today/Gallup Poll (Sept. 7–8, 2007), *available at* www.pollingreport.com/defense.htm. Much different results followed a 1980 Gallup poll in which only 22% of those surveyed supported women serving in combat roles. *See* MARTIN BINKIN, WHO WILL FIGHT THE NEXT WAR? THE CHANGING FACE OF THE AMERICAN MILITARY 48 (1993). However, the 2007 Gallup Poll did not ask respondents whether they supported the *drafting* of women into combat roles. USA Today/Gallup Poll (Sept. 7–8, 2007), *available at* www.pollingreport.com/defense.htm.

87. Representative Carlos Moorhead, a Republican from California, at the 1983 House Judiciary markup of the ERA, said “I have great confidences in [women’s] abilities in every way, shape, or form, but I don’t want to force those women into the service, or force those women into combat . . . that want to raise their families I think society is better served by giving them that freedom of choice rather than letting a few who are militant on this subject say, grab them all” 1983 House transcript, *supra* note 1, at 97. Representative Hyde also stated that “today Congress, the people’s branch, the accountable branch of government, has the option to call up women [for military service], to call up men, to call them both up. When ERA gets cranked into the Constitution, the elected branch of the Government that should set and implement public policy loses that option, loses that power.” *Id.* at 132.

which women are utilized in combat roles, should such refinements be deemed necessary in light of subsequent experience.⁸⁸

IV. THE IMPACT OF THE ERA ON TRADITIONAL MARRIAGE

Although the issue of same-sex marriage was not the subject of an amendment offered to the ERA at the 1983 House Judiciary Committee markup, the prospect of the ERA's requirement of same-sex marriage was the subject of some discussion at the hearings held on the ERA just prior to the markup.

At the October 20, 1983 hearing before the House Subcommittee on Civil and Constitutional Rights, former Representative and federal judge Charles Wiggins said that if the ERA were adopted “[b]ecause private litigants select the factual setting in which issues are framed, we truly cannot discount the bizarre cases. For example, it is not unthinkable that the question of . . . [l]itigation involving homosexual marriages, may not be thrust upon the courts by ingenious private litigants pursuing their own interests.”⁸⁹ At the same hearing, Phyllis Schlafly of the Eagle Forum asked “Would ERA prohibit [states] from denying marriage licenses to homosexuals and lesbians . . . ?”⁹⁰

Those questions were answered in 1993 by the Hawaii Supreme Court, which relied on Hawaii's state-level ERA⁹¹ to strike down Hawaii's law that granted marriage licenses to only couples

88. Kingsley Browne, who recently published a book on the subject of women's serving in combat roles, has summarized his conclusions regarding existing research on the issue as follows: “I argue that those who believe there are no substantial tradeoffs involved in including women in combat roles are wrong. Inclusion of women in those roles results in a segment of the force that is physically weaker, more prone to injury (both physical and psychological), less physically aggressive, able to withstand less pain, less willing to take physical risks, less motivated to kill, less likely to be available to deploy when ordered to (partly, but not exclusively because of pregnancy), more expensive to recruit, and less likely to remain in the service even for the length of their initial contracts. Officers and NCOs [non-commissioned officers] must reassign physical tasks (or do them themselves) because women cannot get them done fast enough, if at all. The fact that women, in general, are less effective warriors is only part of the problem. The more fundamental problem comes from the mixing of men and women in combat forces . . . Women frequently are placed in units with men who do not trust the women with their lives and who do not bond with women the way that they do with other men.” Posting of Kingsley Browne to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_12_02-2007_12_08.shtml#1196697012 (Dec. 3, 2007, 10:50am); *also see generally* Kingsley Browne, Co-Ed Combat: The New Evidence that Women Shouldn't Fight the Nation's Wars (2007).

89. Equal Rights Amendment House Hearings, *supra* note 7, at 351.

90. *Id.* at 392.

91. HAW. CONST., art. I, § 3.

consisting of one man and one woman. In *Baehr v. Lewin*,⁹² the Hawaii Supreme Court held that Hawaii's law restricting marriage licenses to opposite sex couples "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. As such, [it] establishes a sex-based classification."⁹³

The court based its holding on Hawaii's ERA, stating that "[i]n light of . . . the presence of article I, section 3—the Equal Rights Amendment—in the Hawaii Constitution . . . we hold that sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that [Hawaii's marriage law] is subject to the 'strict scrutiny' test,"⁹⁴ which, upon remand, the state law was determined not to have met.⁹⁵

Also worth noting is that Massachusetts' state-level ERA is very similar to that in effect in Hawaii. Massachusetts' ERA provides, "Equality under the law shall not be denied or abridged because of sex . . ."⁹⁶ In *Goodridge v. Department of Public Health*,⁹⁷ a concurring Justice of the Massachusetts Supreme Judicial Court relied on Massachusetts' ERA, and cited the Hawaii Supreme Court's decision in *Baehr*, in holding that traditional marriage restricted to unions between one man and one woman is unconstitutional. In that case, concurring Justice Greany stated:

Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides: ". . . Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." . . . The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical

92. 852 P.2d 44 (Haw. 1993).

93. *Id.* at 64 (citations omitted).

94. *Id.* at 67.

95. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct., Dec. 3, 1996) (stating "the court specifically finds and concludes, as a matter of law, that Defendant has failed to sustain his burden to overcome the presumption that [Hawaii's marriage law] is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest"), *aff'd*, 950 P.2d 1234 (Haw. 1997) (unpublished table decision).

96. Mass. CONST. Part I, art. I. As such, it differs from Hawaii's ERA at *supra* note 91, and that of the other states whose ERA's contain language identical to that of the federal ERA only in that Massachusetts' ERA omits the words "of rights" after "equality."

97. 798 N.E.2d 941 (Mass. 2003).

restriction of a fundamental right. The restriction creates a straightforward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under art. 1 Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. See *Baehr v. Lewin*, 74 Haw. 530, 564, 852 P.2d 44 (1993) (plurality opinion) (Hawaii marriage statutes created sex-based classification) [W]hen an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of art. 1 has occurred.⁹⁸

Judge Greaney's concurrence, it should be noted, was the essential vote securing the court's 4-3 decision that struck down traditional marriage in Massachusetts.

Polls nationwide show that the issue of same-sex marriage remains controversial, and opposition to same-sex marriage ranges between 56%⁹⁹ and 63%.¹⁰⁰ Yet these cases in Hawaii and Massachusetts demonstrate that the recognition of same-sex marriages may well be required under a federal ERA, rendering invalid statutes and constitutional amendments in place in the vast majority of states and at the federal level.¹⁰¹

98. *Id.* at 970–71 (Greaney, J., concurring).

99. Gallup Poll, May 8–11, 2006, available at <http://www.gallup.com/poll/1651/Homosexual-Relations.aspx> (last visited Mar. 25, 2008).

100. Quinnipiac University Poll, Nov. 13–19, 2006, available at <http://www.pollingreport.com/civil.htm> (last visited Mar. 12, 2008).

101. As of this writing only Massachusetts recognizes same-sex marriage, and that was the result of a judicial ruling. See *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003). The following states recognize marriage as only a union between one man and one woman, under either state statutes or under state constitutional provisions: Alabama, ALA. CODE amend. 774 (2005); Alaska, ALASKA CONST. art. I, § 25 (2006); Arizona, ARIZ. REV. STAT. ANN. § 25-101 (2007); Arkansas, ARK. CONST. amend. 83, § 1 (2007); California, CAL. FAM. CODE § 308.5 (2004); Colorado, COLO. CONST. art. II, § 31 (2007); Connecticut, CONN. GEN. STAT. Ch. 815e §§ 46b-20–46b-38h (2007); Delaware, DEL. CODE ANN. title 13, § 101 (1999); Florida, FLA. STAT. ANN. § 741.212 (2005); Georgia, GA CONST. art. I, § 4 (2007); Hawaii, HAW. CONST. art. I, § 23 (2005); Idaho, IDAHO CONST. art. III, § 28 (2007); Illinois, 750 ILL. COMP. STAT. § 5/212 (1999); Indiana, IND. CODE § 31-11-1-1 (2007); Iowa, IOWA CODE ANN. § 595.2 (2001); Kansas, KAN. CONST. art. XV, § 16 (2006); Kentucky, KY. CONST., § 233A

V. THE IMPACT OF THE ERA ON INSURANCE RATES

The impact of the ERA on insurance pricing also concerned some Members of the House Judiciary Committee at the 1983 markup of the ERA. Insurance is a mechanism for distributing the risk of loss in which the insurer agrees to assume the insured's risk in exchange for a premium paid by the insured. Premiums are usually based on statistical aggregates such that certain classes of people who are at a higher risk of loss tend to pay higher premiums, and those who are at a lower risk of loss tend to pay lower premiums. For example, insurers often determine that young women should pay lower premiums for auto insurance than young men because they pose less risk on the road.¹⁰² One state, California, even requires the use of gender-specific tables for life insurance and annuities,¹⁰³ which is designed to ensure that women buying life insurance receive the full benefit of their greater life expectancies.

The Supreme Court has upheld discrimination based on sex, as a constitutional matter, in the context of insurance programs provided the discrimination is motivated by a non-invidious intent. In *Geduldig v. Aiello*,¹⁰⁴ the Court stated that

(2006); Louisiana, LA. CONST. art. XII, § 15 (2008); Maine, ME. REV. STAT. ANN. tit. XIX-A, § 701 (1998); Maryland, MD. CODE ANN., FAM. LAW § 2-201 (2006); Michigan, MICH. CONST. art. I, § 25 (2007); Minnesota, MINN. STAT. ANN. § 517.01 (2006); Mississippi, MISS. CONST. art. XIV, § 263A (2005); Missouri, MO. CONST. art. I, § 33 (2008); Montana, MONT. CONST. art. XIII, § 7 (2007); Nebraska, NEB. CONST. art. I, § 29 (2006); Nevada, NEV. CONST. art. I, § 21 (2005); New Hampshire, N. H. REV. STAT. ANN. §§ 457:1-2 (2007); New Jersey, N. J. STAT. ANN. § 37:1-1 (2002); North Carolina, N. C. GEN. STAT. ANN. § 51-1.2 (2007); North Dakota, N.D. CONST. art. XI, § 28 (2007); Ohio, OHIO CONST. art. XV, § 11 (2004); Oklahoma, OKLA. CONST. art. 2, § 35 (2008); Oregon, OR. CONST. art. XV, § 5a (2007); Pennsylvania, 23 PA. CONS. STAT. ANN. § 1704 (2001); Rhode Island, R.I. GEN. LAWS §§ 15-1-1 to -2 (1996); South Carolina, S.C. CONST. art. XVII, § 15 (2007); South Dakota, S.D. CONST. art. XXI, § 9 (2007); Tennessee, TENN. CONST. art. XI, § 18 (2007); Texas, TEX. CONST. art. I, § 32 (2007); Utah, UTAH CONST. art. I, § 29 (2007); Vermont, VT. STAT. ANN. tit. 15, § 8 (2002); Virginia, VA. CONST. art. I, § 15-A (2007); Washington, WASH. REV. CODE § 26.04.010 (2005); West Virginia, W. VA. CODE § 48-2-603 (2004); Wisconsin, WIS. CONST. Art. XIII, § 13 (2007); Wyoming, WYO. STAT. ANN. § 20-1-101 (2007).

Also, the federal Defense of Marriage Act provides that only marriages that are a union of one man and one woman shall be recognized under federal law. *See* 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

102. *See* Jill Gaubling, *Race, Sex, and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646, 1652, 1661 n.95 (1995).

103. *See* CAL. INS. CODE § 790.03(f).

104. 417 U.S. 484 (1974).

“While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.”¹⁰⁵

In that case, the Court found that the insurer’s discrimination based on sex was not invidious discrimination against women because it was employed as a cost containment measure.¹⁰⁶

Concerned that such precedents—and the principle that market-based insurance rates based on gender classifications generally—might be overturned by the ERA, Representative Sawyer offered an amendment to the ERA at the 1983 House Judiciary Committee markup that stated “Nothing in this article shall be construed to deny insurers the right to consider a person’s sex in the establishment of insurance rates or benefits.”¹⁰⁷ Representative Edwards argued against the amendment, on the belief that insurance is “a very complicated subject” and, therefore, should not be mentioned in the Constitution.¹⁰⁸ Representative John Seiberling, a Democrat from Ohio, argued that the ERA, if adopted, would not affect insurance rates, stating, “if, in fact, it is found that women as a group

105. *Id.* at 496–97 n.20. See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (reaffirming that *Geduldig* held that an exclusion of pregnancy from a disability benefits plan otherwise providing general coverage is not gender-based discrimination under the Fourteenth Amendment). In response to the *Gilbert* decision, Congress subsequently amended Title VII to, in some instances, statutorily “prohibit sex discrimination on the basis of pregnancy” in passing the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978).

106. *Geduldig*, 417 U.S. at 495 (“It is evident that a totally comprehensive program would be substantially more costly than the present program . . .”).

107. 1983 House transcript, *supra* note 1, at 77. Representative Sawyer, in arguing for his amendment, stated “I am offering this amendment in that Michigan is one of four states that tried, and has . . . a unisex insurance law prohibiting a discrimination by reason of sex The result has been an unmitigated disaster as far as women are concerned. To give you an example of what has happened, since women, despite the common conception, are much safer drivers than many drivers and men . . . , the rates for young single women for automobile insurance increased between 13 percent and 127 percent as a result of the enactment of that law It’s a very unfair situation for women to be put through that. Insurance companies calculate their rates not on social things, they calculate them on actuarial statistics It’s not a question of discrimination, it’s a question of actuarially setting rates.” *Id.* at 77–78.

108. *Id.* at 79–80.

have longer life or less accident rates [than men], that could be a valid distinction, even under this [amendment].”¹⁰⁹

Representative Sensenbrenner supported Representative Sawyer’s amendment, stating, “Unless the Sawyer Amendment is adopted, we will be constitutionalizing classic occasions for insurance.”¹¹⁰ Also, Representative Hyde argued that, if the ERA were adopted, “insurance rates will become a constitutional question, because it affects gender”¹¹¹ Representative Sawyer’s amendment was rejected by voice vote.¹¹²

Just a year after the 1983 House Judiciary Committee hearings on the ERA, the Pennsylvania Supreme Court, in *Hartford Accident and Indemnity Co. v. Insurance Commissioner*,¹¹³ held that, in light of the Pennsylvania ERA’s clear and unqualified prohibition of discrimination under the law based upon gender, it was valid for the state insurance commissioner to disapprove of an automobile insurer’s discriminatory gender-based rates on the ground they were unfair.

The court stated:

[The plaintiff] established at an evidentiary hearing that, as a twenty-six year old unmarried male with an unblemished driving record, he was obligated to pay One Hundred Forty-eight Dollars (\$148) more in annual premiums than would a similarly situated female insured for identical coverage. [The defendant] sought to justify its rating plan on the ground that actuarial data indicated that male policyholders in [the plaintiff’s] age group are more likely to incur accident losses than female policyholders in the same age group. The Commissioner, interpreting the Rate Act’s prohibition of “unfairly discriminatory” rates in light of this Commonwealth’s public policy against sex discrimination as embodied in the Equal Rights Amendment, concluded that Hartford’s gender-based rates were “unfairly discriminatory” and therefore invalid The Commissioner concluded that he was compelled to interpret the statutory prohibition against “unfairly discriminatory” rates in a manner consistent

109. *Id.* at 82–83.

110. *Id.* at 83.

111. *Id.* at 81.

112. *Id.* at 84–85.

113. 482 A.2d 542 (Pa. 1984).

with the strong public policy against gender-based discrimination under law as expressed in Pennsylvania's Equal Rights Amendment [I]t was appropriate for the Commissioner to look beyond actuarial statistics in evaluating the fairness of [the defendant's] discriminatory rates. Since those rates were based on the gender of the insured, the Equal Rights Amendment was necessarily relevant The Commissioner, as a public official charged with the execution of the Rate Act and sworn to uphold the Constitution and laws of this Commonwealth, was constrained to conform his analysis of Hartford's rate plan and his interpretation of . . . the Rate Act to [Pennsylvania's ERA].¹¹⁴

Concurring and dissenting judges in the case went out of their way to express varying degrees of dismay with what the state-level ERA required. Judge Flaherty, stated in his concurring opinion that "[he wrote] separately to emphasize that, were it not for the Equal Rights Amendment, . . . resort to gender-based insurance rate classifications would not be 'unfairly discriminatory' under [the Rate Act], since such classifications may indeed be actuarially sound."¹¹⁵ Judge Hutchinson, also concurring, stated:

No causal connection is shown on this record. What does appear is only a statistical correlation between sex and the incidence of auto accidents. This correlation simply provides a convenient measuring rod for setting rate differentials occasioned by other factors not so easily identified or quantified. Such considerations of convenience are not enough to stand in the face of our ERA [W]ithout the Pennsylvania ERA, or some other affirmative statement of legislative policy, the Insurance Commissioner would lack the authority to redefine the statutory phrase 'unfairly discriminatory' in the face of the insurance industry's long standing

114. *Id.* at 544, 546–547, 549 (citations omitted). The reasoning of the court in that case consequently runs contrary to that employed by the Supreme Court in *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974) (stating that “[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis . . .”).

115. *Hartford Accident*, 482 A.2d at 550 (Flaherty, J., concurring).

practice of utilizing gender based rate differentials. *We are obligated to affirm his action only because the ERA objectively demonstrates, in the most forceful possible way, the feeling of the people of this state that sex discrimination is unfair.*¹¹⁶

Judge McDermott, in dissent, stated:

Young women drivers, for actuarial purposes, have hitherto constituted a class Insurance premiums were computed according to their actuarial experience as a class: being less accident prone, they received the concomitant benefit of lower premiums In this case, [the defendant] presented evidence showing that there was a direct relationship between the higher rate charged to young men and the risk young men pose on the highway. Undisputed statistical evidence revealed that young males are more likely to be involved in automobile accidents than similarly situated female drivers. For example, in the 25-29 age group, there were 7.28 accidents per one hundred licensed male drivers in Pennsylvania compared to only 2.96 accidents per one hundred licensed females. The average loss for insured vehicles also evidences the disparity: In the 17-20 age group, unmarried females experience an average loss of \$195, while similarly

116. *Id.* at 550–51 (Hutchinson, J., concurring) (emphasis added). Judge McDermott, in dissent, pointed out that the court’s decision contradicted the intent of the Pennsylvania legislature, remarking that:

[I]t is significant that the Legislature, following the passage of the Equal Rights Amendment in 1971, had the opportunity on two occasions to outlaw the usage of gender-based classifications in insurance rates but specifically chose not to do so. In 1974, the Legislature revised the Unfair Insurance Practices Act, prohibiting discrimination based on sex. But the prohibition did not extend to the setting of rates “if made or promulgated in accordance with the appropriate rate regulatory act.” The 1974, No-Fault Act also prohibited discrimination on the basis of sex, but specifically exempted rate promulgation from that prohibition. The No-Fault Act was repealed by the Legislature this year and was replaced with the Motor Vehicle Financial Responsibility Law which does not contain an anti-discrimination section. We note also that the Commissioner adjudicated this case in the face of an Insurance Commission regulation which prohibits insurers from denying benefits or coverage on the basis of sex, but specifically, “does not prohibit insurers from differentiating in premium rates between sexes where there is sound actuarial justification.”

Id. at 554 (McDermott, J., dissenting) (citations omitted).

situated males show an average loss of \$255. Given these facts, the use of gender in classifying insurance rates was actuarially sound and not unfair or unreasonable.¹¹⁷

Ironically, one of the most prominent organizations supporting the federal ERA, the National Organization for Women (NOW),¹¹⁸ came to regret its own requirements of unisex insurance rates, and it went so far as to file a lawsuit, unsuccessfully, to reverse the Pennsylvania courts' determination that the Pennsylvania ERA requires unisex rates. In *Bartholomew v. Foster*,¹¹⁹ the court found that, under the Pennsylvania ERA, any insurance rates based on gender are unconstitutional except those "reasonably and genuinely based on physical characteristics unique to one sex,"¹²⁰ and that "[t]he ability to operate a motor vehicle is not a physical characteristic uniquely related

117. *Id.* at 551, 553 (McDermott, J., dissenting) (citations omitted). Judge McDermott also pointed out how prohibiting the use of gender classifications was unfair to women, stating that "Indeed, to exclude the use of gender in the classification of automobile insurance rates violates the intended definition of 'unfairly discriminatory' . . . and unfairly treats as alike those who are, at least on the highways, demonstratively different. This will translate into excessive rates for young women and inadequate rates for young men who, according to actuaries, pose a far greater insurance risk." *Id.* at 553. Judge Zappala, also in dissent, stated:

If the insurance rates here had been determined without reference to the projected loss experience of male and female drivers, the rates would be unfairly discriminatory. It is not unfairly discriminatory, however, to treat individuals who are not in the same position differently. It is self-defeating to suggest that similar individuals should be treated as such not only where differences do not exist, but also that they should be treated as the same where differences undeniably do exist. We are presented here with differences which exist, not those which are presumed or manufactured to reinforce social prejudices. By treating a class without reference to the actual characteristics of the class, the majority in fact adopts the discriminatory analysis which it has previously abhorred.

Id. at 557 (Zappala, J., dissenting) (emphasis added).

118. The National Organization for Women had consistently opposed attempts to amend the federal ERA in any way, arguing that existing case law in states with identically worded ERA's was indication enough regarding how a federal ERA would be interpreted. When Judy Goldsmith, the president of the organization, appeared on the ABC News program "This Week with David Brinkley," she said the following: "We've thought about it [accepting amendments to the ERA] a number of times, and always rejected the possibility . . . [T]he reality is that there is [sic] constitutional and legal principles that can help us to determine in advance what the outcome is likely to be on that whole range of questions, and beyond that, there are 16 state ERAs that have been in effect laboratory situations for testing what the effect of the [federal] ERA will be. Many of them are worded exactly the same as the federal ERA, and none of those terrible things [opponents have predicted] have occurred in those states." *This Week with David Brinkley* ABC-TV, (ABC television broadcast July 13, 1983).

119. 541 A.2d 393 (Pa. 1988).

120. *Id.* at 397.

to one's sex."¹²¹ Just two months after that decision, NOW brought suit in *NOW v. Commonwealth*,¹²² alleging that the number of miles driven by an insured should be taken into account by an insurer when setting rates, because if such miles were not taken into account, the effect was to hurt female drivers, who tended to drive fewer miles and who should consequently be charged lower insurance premiums. But the court upheld the ruling of the insurance commissioner and let the challenged rate structure stand.¹²³ As one commentator has pointed out, "The significant changes in insurance rates wrought by the ERA [in Pennsylvania] have thus had the unexpected effect of benefiting men more than women."¹²⁴

Judges in Washington and Maryland, both states with state-level ERA's nearly identical to the federal ERA, have also found that it requires the elimination of insurance pricing that discriminates based on sex.¹²⁵

VI. STATE ACTION AND THE ERA'S APPLICATION TO PRIVATE ENTITIES

At the 1983 House Judiciary Committee markup of the ERA, Representative Dan Lungren, a Republican from California, offered an amendment to the proposal that provided "Nothing in this Article shall be construed to relate to private . . . educational institutions."¹²⁶ Representative Lungren offered that amendment in part because he

121. *Id.* (concluding that "we must declare that sex-based gender classifications pertaining to insurance rates are unconstitutional").

122. 551 A.2d 1162 (Pa. 1988).

123. *Id.* at 1167 ("[W]e find that the [Insurance] Commissioner correctly concluded that the insurers' practice of charging a uniform rate as between men and women did not violate the ERA.").

124. PHYLLIS W. BECK AND PATRICIA A. DALY, *Prohibition Against Denial or Abridgment of Equality of Rights Because of Sex*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 726 (Ken Gormley et al. eds., 2004).

125. See *Roberts v. Dudley*, 993 P.2d 901, 911 (Wash. 2000) ("I concur with the views expressed by Justice Sanders in the majority opinion he has crafted for the court. I write separately simply to indicate that, in my view, another and more powerful source of public policy against sex discrimination can be found in this state's Equal Rights Amendment (ERA).") (Alexander, J., concurring); *Watson v. Peoples Sec. Life Insurance Company*, 588 A.2d 760, 771 (Md. 1991) ("Article 46 of The Maryland Declaration of Rights provides that '[e]quality of rights under the law shall not be abridged or denied because of sex.' Although this constitutional provision may not directly apply to private employers, it nonetheless establishes a public policy in Maryland that an individual should not be subjected to sex-based discrimination.") (Eldridge, J., concurring in part and dissenting in part).

126. 1983 House transcript, *supra* note 1, at 139.

was concerned that the state action doctrine¹²⁷ could be used to impose the ERA's requirements on even private schools that receive some public funds. Representative Lungren stated:

It seems to me that the impact of the [ERA] on private educational institutions warrants serious scrutiny. The expansion of the State action doctrine with respect to racial classifications under the 14th amendment is a possible foreshadowing of its applicability to gender-based classifications.¹²⁸ It must be remembered that proponents of the [ERA] have argued that [proposition] to obtain the same protection afforded by the courts with respect to racial-based classifications. Dr. Dona Shalala, the president of Hunter College, was selected by ERA proponents to testify at the Senate hearings December 13, 1983 on the impact of the ERA upon private . . . education. She testified, "I do not know of any institution in the country in which there is not public involvement."¹²⁹

Representative Edwards opposed the amendment because he believed that both the legislative history and the committee report would address those issues.¹³⁰ Just a year after the 1983 House Judiciary Committee debate, however, Representative Lungren's concern that the ERA would be interpreted to apply to private entities was validated by the Pennsylvania courts, whose analysis of the Pennsylvania ERA went well beyond traditional state action doctrine.

In 1985, the Pennsylvania Superior Court in *Welsch v. Aetna Insurance Co.*,¹³¹ held that the Pennsylvania ERA's reach extended to a sex discrimination claim brought by males directly against their private automobile insurance companies¹³² on the grounds that "all

127. "State action" is defined as "anything done by a government; esp., in constitutional law, an intrusion on a person's rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action . . ." BLACK'S LAW DICTIONARY 1444 (8th ed. 2004).

128. 1983 House transcript, *supra* note 1, at 139. The reference here is to a line of cases in which the Supreme Court has stated that classifications based on race must be viewed in light of the Fourteenth Amendment, which was created to eliminate race discrimination arising from state actions. *See, e.g.,* *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

129. 1983 House transcript, *supra* note 1, at 139-40.

130. *Id.* at 145. Again, however, neither the 1983 markup transcript nor any committee report accompanying the ERA was ever published.

131. 494 A.2d 409 (Pa. Super. Ct. 1985).

132. *Id.* at 412.

state and local government entities and officials [including state insurance regulators that regulate private insurers] are bound by the prohibition against sex discrimination embodied in the ERA in their formulation, interpretation, and enforcement of regulations, ordinances, and statutory as well as decisional law.”¹³³ That decision, according to one leading commentator, “suggest[s] that Pennsylvania ERA protections against gender discrimination are greater than those protections typically provided in federal cases requiring state action.”¹³⁴

Even more recently, two federal district courts have interpreted Pennsylvania state court decisions as extending the reach of Pennsylvania’s ERA to purely private actors. In *Imboden v. Chowns Communications*,¹³⁵ a federal district court, relying on *Welsch*, refused to dismiss a sex discrimination claim against a private employer, holding that the argument that Pennsylvania’s ERA did not extend to private actors was without merit.¹³⁶ And in *Barrett v. Greater Hatboro Chamber of Commerce, Inc.*,¹³⁷ the court stated that “there is a purely private right of action under the [Pennsylvania] ERA absent any type of state action. . . .”¹³⁸

CONCLUSION

Some may argue that any need for the ERA today would seem to have diminished in light of more recent Supreme Court jurisprudence handed down since 1983. Since then, the Supreme Court has significantly ratcheted up the standard the government must meet in order to discriminate based on sex.

In *U.S. v. Virginia*,¹³⁹ the Court stated that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁴⁰ The Court also stated, “The burden of justification is demanding and it rests entirely on the State.”¹⁴¹ As Justice Rehnquist noted in his concurrence in that case, the Court had in effect made the government’s burden

133. *Id.*

134. Beck, *supra* note 124, at 715.

135. 182 F. Supp. 2d 453 (E.D. Pa. 2002).

136. *Id.* at 458 (citing *Welsch*, 494 A.2d at 412).

137. No. 02-CV-4421, 2003 WL 22232869 (E.D. Pa. Aug. 19, 2003).

138. *Id.* at *4.

139. 518 U.S. 515 (1996).

140. *Id.* at 531.

141. *Id.* at 533.

more difficult than it had been previously. As Rehnquist wrote, “that phrase [exceedingly persuasive justification] . . . was first used . . . as an observation on the difficulty of meeting the applicable test, not [as the majority opinion used it] as a formulation of the test itself.”¹⁴² Justice Scalia, in dissent, pointed out that the standard governing review of the government’s actions that discriminate based on sex that had previously been in place was “a standard that lies between the extremes of rational basis review and strict scrutiny. We have denominated this standard ‘intermediate scrutiny’ and under it have inquired whether the statutory classification is substantially related to an important governmental objective.”¹⁴³ Yet in *U.S. v. Virginia*, Justice Scalia pointed out that the majority in that case had “execute[d] a *de facto* abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for . . . decades,”¹⁴⁴ and replaced it with an even higher standard.

Be that as it may, amid calls for the ERA’s renewed passage from Congress, it is worth noting the judicial decisions that have been handed down since the ERA was last debated in Congress in 1983 in states whose state-level ERA’s are identical to the federal ERA.

During that debate in 1983, Representative Sensenbrenner said:

As we all know, the first submission of the equal rights amendment failed to be ratified by 38 State

142. *Id.* at 559 (Rehnquist, J., concurring).

143. *Id.* at 570–71 (Scalia, J., dissenting) (internal quotations and citations omitted).

144. *Id.* at 574 (Scalia, J., dissenting). See also Jody Feder, *Sex Discrimination and the United States Supreme Court: Developments in the Law* 3–4 (Congressional Research Service, RL20253, 2007) (“In *U.S. v. Virginia*, the Court conducted a *more searching form* of intermediate scrutiny to find unconstitutional the exclusion of women from the Virginia Military Institute (VMI). Although the Court reiterated that a classification must be substantially related to an important government interest, the Court *also required* the state to establish an ‘exceedingly persuasive justification’ for its actions.”) (emphasis added).

In light of this development, it is worth noting that at the 1983 House Judiciary Committee markup of the ERA, Representative Edwards went to great pains to argue that even the adoption of the federal ERA would *not* lead to the integration of the Virginia Military Academy, which the Supreme Court subsequently required even absent a federal ERA in *U.S. v. Virginia*. At the 1983 markup, Representative Hall asked Representative Edwards “I can think offhand of the . . . Military Academy, VMI, one of just several that are for male students only. Would [the ERA] prohibit those colleges from continuing to operate as a single-sex college?” 1983 House transcript, *supra* note 1, at 148–49. Representative Edwards replied, “I believe the gentleman is describing a private school, without heavy State or Federal involvement, and it would not apply, the ERA would *not* apply.” *Id.* at 149 (emphasis added). To which Representative Lungren replied, ironically in hindsight, “It will be very nice in the U.S. Supreme Court to cite the soothing comments of the gentleman from California, Mr. Edwards, as to what we intended or did not, but I would suggest that the Supreme Court makes the ultimate decision and we will have no appeal from that.” *Id.* at 151.

legislatures In my opinion, that failure was a direct result of the amendment's proponents' inability to answer critical questions on many emotional and social issues that it raised. These include questions such as whether women would be drafted into the military should Congress decide at some future time to reinstate conscription; whether homosexual marriages would be legalized; whether the amendment would mandate equal auto and life insurance premiums for men and women; and whether ratification of the ERA would require taxpayer funding of non-elective abortions¹⁴⁵

Representative Sensenbrenner's notion was disputed by Representative Pat Schroeder, a Democrat from Colorado, who said at the time, "we have many states, such as mine, Colorado, that have passed the exact same language as the Equal Rights Amendment and have a long case history that puts many, many, many of the . . . arguments to bed."¹⁴⁶

Since 1983, however, many more cases have been handed down under state-level ERAs, and Representative Sensenbrenner's questions have been much more fully answered in large part by judges in six states the constitutions of which contain ERAs nearly identical to that proposed for the federal Constitution. In New Mexico, judges have relied on the ERA to require government funding of abortions, and, in Colorado, judges have relied on the ERA to hold that pregnancy classifications constitute unconstitutional sex discrimination. Judges in Pennsylvania and Washington have relied on the ERA to require the integration of boys and girls in athletic events at public schools under a rationale that undermines the Supreme Court's analysis in *Rostker v. Goldberg*, which upheld the male-only military registration system. Judges in Hawaii have relied on the ERA to require the recognition of same-sex marriages. And judges in Pennsylvania, Washington, and Maryland have relied on the ERA to prohibit sex classifications in insurance pricing.

There are many unknowns regarding the future consequences of any constitutional amendment,¹⁴⁷ but state judges in states that have

145. Equal Rights Amendment House Hearings, *supra* note 2, at 2.

146. 1983 House transcript, *supra* note 1, at 12.

147. Research has shown that among the many variables that govern decisions under the ERA is the gender composition of the courts. As one recent study concluded, "the presence of an ERA [in state constitutions] significantly increases the likelihood of a court applying a

ERA's nearly identical to the proposed federal ERA have substantially clarified, for good or ill, what the consequences of the adoption of a federal ERA would be.

higher standard of law, which in turn significantly increases the likelihood of a decision favoring the equality claim." Lisa Baldez, Lee Epstein, & Andrew D. Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 243 (2006). The same study found that, in states with ERA's, the greater the fraction of female judges on the bench, the higher the likelihood that a higher standard would be applied to prevent sex discrimination. *See id.* at 268 ("The fraction of women on the bench holds particularly impressive explanatory power. As that fraction increases, ... the probability of applying a higher standard of law soars, even after controlling for the presence of an ERA.").