ARTICLES

THE PATCHWORK QUILT OF GENDER EQUALITY: HOW STATE EQUAL RIGHTS AMENDMENTS CAN IMPACT THE FEDERAL EQUAL RIGHTS AMENDMENT

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INTRODUCTION

"It's taken us 100 years to get here, but we're here . . . . This is for our daughters and granddaughters and people who came before us. This is a victory for all of them."– Eileen Davis[1]

This reaction was echoed from coast to coast on January 27, 2020, when Virginia became the thirty-eighth and final state necessary to ratify the Equal Rights Amendment ("ERA").[2] It was hailed as a monumental day for women's rights, and if symbolism had the force of law, it was. However, symbolism cannot guarantee equality. It is the law that can do that—or should do that. So, as feminists across the country rejoiced on January 27, 2020, legal scholars and lawyers began their work to ensure that the ERA would be enshrined as the Twenty-Eighth Amendment to the United States Constitution. This work is fraught with legal challenges and questions, including questions about the deadline, about the states that purported to rescind their ratification, and about who the archivist of the United States is and why he is involved in all of this.[3] But perhaps the most significant question is: so what? The Equal Protection Clause already guarantees equality under the law for all individuals,[4] so what would the ERA really contribute to the equal rights thrust of the United States Constitution?

This Article looks to state law to try to answer why the ERA is necessary to secure rights for women, the LGBTQ+ community, and gender nonbinary citizens and how the ERA can secure these rights. State law is uniquely relevant to this inquiry because, when the federal ERA stalled in the mid- to late-1970s, states began taking the matter into their own hands by passing state ERAs.[5] In the forty-plus years since the federal ERA was passed by Congress, twenty-nine

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[1] Patricia Sullivan, *'At Last, at Last': Women Who Fought for ERA for Decades Exult at Virginia Vote*, WASH. POST (Jan. 15, 2020) (quoting Eileen Davis), https://www.washingtonpost.com/local/virginia-politics/veteran-era-supporters-exult-as-virginia-becomes-38th-state-to-ratify-measure/2020/01/15/11a2332a-37d5-11ea-9541-9107303481a4_story.html.

[2] Gregory S. Schneider & Laura Vozzella, *Virginia Finalizes Passage of Equal Rights Amendment, Setting Stage for Legal Fight*, WASH. POST (Jan. 27, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-expected-to-finalize-passage-of-era-monday-setting-stage-for-legal-fight/2020/01/27/b178265c-4121-11ea-b503-2b077c436617_story.html.

[3] *See The Equal Rights Amendment: Common Legal Questions*, WINSTON & STRAWN LLP (May 4, 2018), https://www.winston.com/images/content/1/3/v2/137207/ERA-Common-Legal-Questions.pdf; *see also* Robinson Woodward-Burns, *The Person Who Changes the Constitution*, THE ATLANTIC (Jan. 17, 2020), https://www.theatlantic.com/ideas/archive/2020/01/person-who-changes-constitution /605104/.

[4] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

[5] Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144, 144 (1984).

states adopted (or legislatively approved)[6] some form of a general sex equality[7] mandate into their state constitutions.[8] Twelve of these states adopted ERAs that were virtually identical to the federal model;[9] another sixteen adopted equality under the law amendments that specifically mentioned sex discrimination but varied from the federal model;[10] and one state legislature passed an ERA virtually identical to the federal model, but it has yet to be voted on by the general population (as required under the state constitution) for ratification of a state amendment.[11] As a result, both state and federal courts in twenty-eight states have spent forty-plus years interpreting the mandates of these state ERAs.

Accordingly, states have a history of, and expertise in, which ERA statutes work. State courts have already examined many of the questions and claims that might come at a federal level, were the ERA to be written into the federal constitution. These state-level histories and judicial inquiries provide an important lens through which to understand the utility of the federal ERA. Specifically, these state ERAs—and judicial interpretations of them—demonstrate the various levels of scrutiny that are possible when the federal ERA is applied, and how these levels of scrutiny can substantively impact equal rights at the federal level. Additionally, these state ERA decisions have filled, and will continue to fill—even after a federal ERA is enacted—the void that

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[6] NEV. CONST. art. I, § 24 (proposed 2019) ("Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of . . . sex").

[7] Sex and gender are used interchangeably throughout this Article because state ERAs and the court cases interpreting them tend to use the terms interchangeably, although they are distinct concepts. *See What is gender? What is sex?*, CAN. INSTS. OF HEALTH RSCH., https://cihr-irsc.gc.ca/e/48642.html (last updated Apr. 28, 2020).

[8] ALASKA CONST. art. I, § 3; ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 31; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; IOWA CONST. art. I, § 1; LA. CONST. art I, §§ 3, 12; MD. CONST. DEC. OF RTS. art. XLVI; MASS. CONST. pt. I, art. I; MO. CONST. art. VII, § 10; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.H. CONST. pt. I, art. II; N.J. CONST. art. I, para. 1; *id.* art. X, para. 4; N.M. CONST. art. II, § 18; OKLA. CONST. art. II, § 36A; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3.

[9] COLO. CONST. art. II, § 29; DEL. CONST. art. I, § 21; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; MD. CONST. DEC. OF RTS. art. XLVI; MASS. CONST. pt. I, art. I; N.H. CONST. pt. I, art. II; N.M. CONST. art. II, § 18; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; WASH. CONST. art. XXXI, § 1.

[10] ALASKA CONST. art. I, § 3; ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 31; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; IOWA CONST. art. I, § 1; LA. CONST. art I, §§ 3, 12; MO. CONST. art VII, § 10; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.J. CONST. art. I, para. 1; *id.* art. X, para. 4; OKLA. CONST. art. II, § 36A; R.I. CONST. art. I, § 2; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WYO. CONST. art. I, § 3.

[11] NEV. CONST. art. I, § 24 (proposed 2019).

federal equal protection jurisprudence has created because there will still be no federal-level precedent for quite some time.

The bulk of the academic research on the topic of ERAs focuses on the federal ERA—the necessity of it, the impact of it, and the enactment of it.[12] However, this Article focuses more specifically on how state ERAs can serve as a guide for the federal ERA. As such, I primarily reviewed state ERA-specific academic research and case law in the writing of this Article. While the numerous pieces written about the federal ERA do inform this discussion and the background of this Article, the thrust of pieces written thus far on the federal ERA focus more on that provision only, rather than that provision as informed by state ERAs.

This Article examines at length how the interpretation of state ERAs can inform the eventual interpretation of a federal ERA. Unlike other essays that consider the importance of state ERAs, this Article does not focus on just one state's ERA. Rather, it considers the various interpretations by various states of their sometimes identical and sometimes distinct ERAs. Specifically, this Article proceeds in four parts. Part I examines the state ERA landscape. The states are divided into three categories: (1) those that provide no explicit protection for sex in their constitution, (2) those that provide some form of protection, and (3) those that provide protection that is virtually identical to the federal ERA. Part I discusses which of those states have ratified the federal ERA, have purported to rescind the federal ERA, or are still debating the federal ERA today. Additionally, an Appendix follows this Article arranging this information into a chart. Part II then examines how state and federal courts have interpreted these state constitutional provisions to provide for heightened judicial scrutiny. Specifically, Part II focuses primarily on those state amendments that are virtually identical to the federal ERA, discussing the major subject areas in which courts have applied heightened judicial scrutiny. Part III focuses on how state and federal court interpretations of state constitutional law can impact the interpretation of federal constitutional law when the language in both constitutions is virtually identical. Namely, state ERAs will be useful for interpreting the federal ERA because state ERAs provide decisional authority for federal courts to aid in their own decision-making processes. Finally, Part IV examines what the development and interpretation of state ERAs means for the federal ERA if it becomes a part of the United States Constitution.

Ultimately, this Article concludes that, while state and federal court interpretation of the state ERAs may be merely persuasive to courts interpreting the federal ERA, the history of these state ERAs is so entwined with that of the

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[12] *See generally* Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 203 N.W. U. L. REV. 1223, 1240–43 (2009); Julie C. Suk, *Transgenerational and Transnational: Giving New Meaning to the ERA*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 163, 166–67 (2019); Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 383–88 (2017) [hereinafter Suk, *Equal Rights Amendment*].

federal ERA that the resulting judicial interpretations should receive significant weight in the analysis of the federal ERA.

I. THE EMERGENCE OF STATE EQUAL RIGHTS AMENDMENTS

After women gained the right to vote in 1919,[13] the logical next step for women's rights activists was to enshrine gender equality in the United States Constitution.[14] In 1923, Alice Paul became the champion for the women's rights movement when she introduced the first version of the ERA in Seneca Falls at the celebration of the seventy-fifth anniversary of the 1848 Women's Rights Convention.[15] This first version provided that "[m]en and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[16] In 1943, Paul re-drafted the amendment to better reflect the language of the Fifteenth and Nineteenth Amendments, and it was that version of the ERA that Congress passed in 1972.[17] Accordingly, the federal ERA provides that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[18]

Following the federal ERA's passage in 1972, equal rights advocates began working to ensure that the ERA was ratified by the requisite thirty-eight states within the seven-year ratification deadline that Congress had attached to the Amendment.[19] That very first year, twenty-two states ratified the federal Equal Rights Amendment.[20] Eight states followed in 1973.[21] However, between 1973

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[13] U.S. CONST. amend. XIX; Tracy A. Thomas, *From 19th Amendment to ERA*, AM. BAR. ASS'N (Jan. 22, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/from-19th-amendment-to-era/.

[14] Thomas, *supra* note 13; *see generally Constitutional Amendment Process*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution#:~:text=The%20Constitution%20provides%20that%20an,thirds%20of%20the%20State%20legislatures (last updated Aug. 15, 2016) (describing the constitutional amendment process as derived from Article V of the United States Constitution).

[15] Alice Paul Inst., *History of the Equal Rights Amendment*, EQUAL RTS. AMEND. (2018) [hereinafter Alice Paul Inst., *History of the Equal Rights Amendment*], https://www.equalrightsamendment.org/the-equal-rights-amendment.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 BOS. B.J. 10, 10 (2000).

[20] Alice Paul Inst., *Ratification Info State by State*, EQUAL RTS. AMEND. (2018) [hereinafter Alice Paul Inst., *Ratification Info State by State*], https://www.equalrightsamendment.org/era-ratification-map (noting that Alaska, California, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin ratified the ERA in 1972).

[21] Lukey & Smagula, *supra* note 19 (noting that Connecticut, Minnesota, New Mexico, Oregon, South Dakota, Vermont, Washington, and Wyoming ratified the ERA in 1973).

and 1976, only three additional states ratified the amendment.[22] Despite the four-year extension of the ratification deadline to June 30, 1982, the women's rights movement fell three states short of meeting the requisite thirty-eight state threshold for the amendment to be adopted.[23]

This failure is often credited to the efforts of Phyllis Schlafly and her organizations, STOP ERA and Eagle Forum.[24] These organizations argued that the federal ERA was overbroad and would eliminate governmental distinctions between men and women, leading to a long list of horribles including a military draft for women, unisex bathrooms, unrestricted abortions, women becoming Roman Catholic priests, and same-sex marriage.[25] Such arguments prevailed in the states that did not pass the federal ERA.[26] This reality highlighted the fact that just because an amendment has popular support, as the ERA did at the time[27] and still does today,[28] does not mean it has sufficient support for ratification by the necessary state legislatures. Instead, "[c]onsensus-building state by state first . . . is necessary for ultimate ratification," as Professor Mary Frances Berry has since suggested.[29] "[W]aging successful state ratification campaigns requires far more attention to state and regional diversity than ERA proponents usually paid."[30]

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[22] *Id.*; *see* Alice Paul Inst., *Ratification Info State by State*, *supra* note 20.

[23] Alice Paul Inst., *History of the Equal Rights Amendment*, *supra* note 15; Alice Paul Inst., *Ratification Info State by State*, *supra* note 20; *see also* Alice Paul Inst., *Frequently Asked Questions*, EQUAL RTS. AMEND. (2018), https://www.equalrightsamendment.org/faq.

[24] Lila Thulin, *The 97-Year-History of the Equal Rights Amendment*, SMITHSONIAN MAG. (Nov. 13, 2019, 4:00 PM), https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/; *see* Clyde Haberman, *Phyllis Schlafly's Lasting Legacy in Defeating the E.R.A.*, N.Y. TIMES (Sep. 11, 2016), https://www.nytimes.com/2016/09/12/us/phyllis-schlaflys-lasting-legacy-in-defeating-the-era.html (defining Schlafly's efforts as "frontal assaults" in which she "ominously warned of an America where husbands would no longer be required to support their wives, where anyone could walk into any public bathroom, where women would join men on the front lines of war, [and] where gay men and women would be given 'the same dignity as husbands and wives.'").

[25] Thulin, *supra* note 24.

[26] *Id.*

[27] *Id.*; *see* Nadine Brozan, *58% in Gallup Poll Favor Equal Rights*, N.Y. TIMES (Apr. 10, 1975), https://www.nytimes.com/1975/04/10/archives/58-in-gall-up-poll-favor-equal-rights.html.

[28] *Three in Four Americans Support Equal Rights Amendment, Poll Shows*, GUARDIAN (Feb. 24, 2020, 10:26 AM), https://www.theguardian.com/law/2020/feb/24/equal-rights-amendment-era-poll-congress.

[29] Mara Braverman, *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution by Mary Frances Berry: Why We lost the ERA by Jane J. Mansbridge*, L.A. TIMES (Nov. 9, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-11-09-bk-24208-story.html.

[30] *Id.*

Ultimately, the stalling and eventual failure to meet the 1982 deadline did not foretell the end of the equal rights movement. Instead, advocates increasingly turned to the states as their hopes for a federal ERA dwindled.[31] This was particularly apparent after the Supreme Court of the United States made clear that gender classifications were subject only to intermediate scrutiny under the United States Constitution.[32]

> Indeed, especially in this age of new judicial federalism, in which many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties, state ERAs provide the potential for a more broadly-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution.[33]

When enacted, some of these state ERAs mirrored the proposed federal ERA, while others were drafted more narrowly.[34] However, regardless of the specific construction, the federal ERA and the desire to enshrine gender equality in the states' and the country's governing documents clearly served as inspiration.[35] While there was, and remains, concern that state ERAs "produce[] a variety of results, and not all of them . . . fulfill[] feminist hopes," this concern did not deter a significant number of states from adopting their own ERAs.[36] Although the exact number of state ERAs varies based on categorization of equal protection provisions in state constitutions,[37] this Article defines three distinct

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[31] *Id.*; Christopher Marquis, *An Equal Playing Field: The Potential Conflict Between Title IX & the Massachusetts Equal Rights Amendment*, 34 B.C. J. L. & SOC. JUST. 77, 85–86 (2014).

[32] *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Mary Patrice McCausland, *Washington's Equal Rights Amendment and Law Against Discrimination—the Approval of the Seattle Sonics' "Ladies' Night"*—Maclean v. First Northwest Industries, Inc., *96 Wn.2d 338, 635 P.2d 683 (1981)*, 58 WASH. L. REV. 465, 466 (1983) ("As prospects fade for the passage of a federal equal rights amendment, proponents of equal rights increasingly look to state law and state courts for their enforcement.").

[33] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1203 (2005).

[34] *See generally* Avener, *supra* note 5, at 146.

[35] *See id.* at 148.

[36] Mayeri, *supra* note 12, at 1286.

[37] *See* Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP L. REV. 907, 908–09 (1997) ("Eighteen states have adopted constitutions or constitutional amendments providing that equal rights under the law shall not be denied because of sex."); Suk, *Equal Rights Amendment*, *supra* note 12, at 383–88 ("Meanwhile, in November 2014, Oregon became the twenty-third state in the United States to add a sex equality provision to its state constitution."); Wharton, *supra* note 33, at 1202 ("Today, twenty-two states have some form of explicit protection against sex discrimination in their constitutions.").

categories for equal protection within state constitutions as discussed below and encapsulated in chart-form in the Appendix.

First, there are states that have no sex-specific equal rights protection in their constitution. These states have constitutions that provide for equal protection for all under the law, but they do not specifically identify sex as a class for which equal protection is guaranteed. Twenty-one states fall into this category.[38] Of those states, fifteen have ratified the federal ERA.[39] However, of those fifteen states, four have purported to rescind their ratification of the federal ERA.[40]

The next category includes states that provide some sort of sex-specific protection in their constitutions. These provisions may take the form of sex-specific nondiscrimination provisions in public employment or accommodations, such as Article I, §§ 8, 31 of California's constitution,[41] or they may take the form of provisions that state "all persons . . . have certain natural and unalienable rights" read in conjunction with provisions that note "persons means people of both sexes," such as Article I, Paragraph 1 and Article X, Paragraph 4 of New Jersey's constitution.[42] This category also includes the odd case of Rhode Island, whose constitution provides that "no otherwise qualified person shall, solely by reason of . . . gender . . . be subject to discrimination by the state,"[43] but whose Supreme Court "does not consider this

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[38] *See generally* ALA. CONST. art. I, § 1; ARK. CONST. art. II, § 2, §18; GA. CONST. art. I, § 1, para. 2; IDAHO CONST. art. I, § 1; IND. CONST. art. I, § 23; KAN. CONST. BILL OF RTS. § 1; KY. CONST. § 3; ME. CONST. art. I, § 1; MICH. CONST. art. I, § 2; MINN. CONST. art. I, § 2; MISS. CONST. art. III, § 32; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 1; TENN. CONST. art. I, § 8; VT. CONST. ch. I, art. I; W. VA. CONST. art. III, § 1; WIS. CONST. art. I, § 1.

[39] *See* Alice Paul Inst., *Ratification Info State by State*, *supra* note 20 (demonstrating that Idaho ratified the federal ERA on March 24, 1972; Indiana ratified the federal ERA on January 24, 1977; Kansas ratified the federal ERA on March 28, 1972; Kentucky ratified the federal ERA on June 27, 1972; Maine ratified the federal ERA on January 18, 1974; Michigan ratified the federal ERA on May 22, 1972; Minnesota ratified the federal ERA on February 8, 1973; New York ratified the federal ERA on May 18, 1972; North Dakota ratified the federal ERA on February 3, 1975; Ohio ratified the federal ERA on February 7, 1974; South Dakota ratified the federal ERA on February 5, 1973; Tennessee ratified the federal ERA on April 4, 1972; Vermont ratified the federal ERA on March 1, 1973; West Virginia ratified the federal ERA on April 22, 1972; and Wisconsin ratified the federal ERA on April 26, 1972).

[40] *See id.* (demonstrating that Idaho purported to rescind their ratification of the federal ERA on February 8, 1977; Kentucky purported to rescind their ratification of the federal ERA on March 20, 1978; South Dakota purported to rescind their ratification of the federal ERA on March 5, 1979; and Tennessee purported to rescind their ratification of the federal ERA on April 23, 1974).

[41] CAL. CONST. art. I, §§ 8, 31.

[42] N.J. CONST. art. I, para. 1; *id.* art. X, para. 4.

[43] R.I. CONST. art. I, § 2.

provision to constitute an 'Equal Rights Amendment.'"[44] Including California, New Jersey, and Rhode Island, there are sixteen states that provide some varied form of sex-specific protection.[45] Of these sixteen states, eleven have ratified the federal ERA,[46] and only one of the eleven has purported to rescind their ratification.[47] These states' provisions are frequently dubbed Equal Rights Amendments,[48] but this analysis finds it necessary to distinguish between these states and those in the remaining category.

The final category includes states that have constitutional provisions that are virtually identical to the federal ERA. They follow the general format of "equality of rights under the law shall not be denied or abridged by the state . . . ."[49] There are twelve of these states.[50] Of these states, all of them have ratified the federal ERA, and none of them have sought to rescind their ratification.[51] Additionally, Nevada's legislature has approved such language

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[44] Andrea J. Faraone, *The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution*, 1 FLA. COASTAL L.J. 421, 443 (2000) (referencing Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 740 (R.I. 1992)).

[45] ALASKA CONST. art. I, § 3; ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 31; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; IOWA CONST. art. I, § 1; LA. CONST. art. I, §§ 3, 12; MO. CONST. art. VII, § 10; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.J. CONST. art. I, para. 1; *id.* art. X, para. 4; OKLA. CONST. art. II, § 36A; R.I. CONST. art. I, § 2; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WYO. CONST. art. I, § 3.

[46] Alice Paul Inst., *Ratification Info State by State*, *supra* note 20 (noting that Alaska ratified the federal ERA on April 5, 1972; California ratified the federal ERA on November 13, 1972; Connecticut ratified the federal ERA on March 15, 1973; Iowa ratified the federal ERA on March 24, 1972; Montana ratified the federal ERA on January 25, 1974; Nebraska ratified the federal ERA on March 29, 1972; New Jersey ratified the federal ERA on April 17, 1972; Rhode Island ratified the federal ERA on April 14, 1972; Virginia ratified the federal ERA on January 27, 2020; and Wyoming ratified the federal ERA on January 26, 1973).

[47] *Id.* (noting that Nebraska purported to rescind their ratification of the federal ERA on March 15, 1973).

[48] *See generally* Faraone, *supra* note 44, at 430 (asserting that Florida adopted "a state Equal Rights Amendment" in November of 1998); Linton, *supra* note 37, at 911–15 (discussing the constitutional scrutiny level applied to gender classifications in states whose constitutional language is not virtually identical to the federal Equal Rights Amendment).

[49] Alice Paul Inst., *History of the Equal Rights Amendment*, *supra* note 15.

[50] *See generally* COLO. CONST. art. II, § 29; DEL. CONST. art. I, § 21; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; MD. CONST. DEC. OF RTS. art. XLVI; MASS. CONST. pt. I, art. I; N.H. CONST. pt. I, art. II; N.M. CONST. art. II, § 18; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; WASH. CONST. art. XXXI, § 1.

[51] Alice Paul Inst., *Ratification Info State by State*, *supra* note 20 (noting that Colorado ratified the federal ERA on April 21, 1972; Delaware ratified the federal ERA on March 23, 1972; Hawaii ratified the federal ERA on March 22, 1972; Illinois ratified the federal ERA on May 30, 2018; Maryland ratified the federal ERA on May 26, 1972; Massachusetts ratified

for their ERA, but the amendment has yet to be voted on by the general population as required for ratification under the Nevada Constitution.[52]

The state constitutions in the final category, and the courts that have interpreted them, form the basis of this analysis. They do so because where the language of a provision is unambiguous on its face, it is the plain language that controls, and where the language of a provision is ambiguous on its face, courts are able to look to persuasive authority to determine the meaning of the language.[53] Therefore, regardless of whether the language of the federal ERA is deemed unambiguous or ambiguous, state courts' interpretations of virtually identical provisions will serve as persuasive authority. Because state courts have interpreted the plain language of state ERAs that are virtually identical to the plain language of the federal ERA, those state court decisions should serve as one of the most persuasive forms of authority in the ultimate interpretation of the federal ERA. In the next section, this Article identifies and discusses which subject areas are most frequently litigated under state ERAs and how courts have applied state ERAs in those areas.

II. INTERPRETATION OF STATE EQUAL RIGHTS AMENDMENTS

By analyzing the subject matter areas in which state ERAs have been most influential, this Article seeks to explore the issues that may be most impacted by the federal ERA. State ERAs have formed the basis for causes of action pertaining to gender classifications in the context of single-sex sports,[54] the medical necessity and funding of abortion,[55] domestic relations,[56] gender-based

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the federal ERA on June 21, 1972; Nevada ratified the federal ERA on March 21, 2017; New Hampshire ratified the federal ERA on March 23, 1972; New Mexico ratified the federal ERA on February 28, 1973; Oregon ratified the federal ERA on February 8, 1973; Pennsylvania ratified the federal ERA on September 26, 1972; Texas ratified the federal ERA on March 30, 1972; and Washington ratified the federal ERA on March 22, 1973).

[52] NEV. CONST. art. I, § 24 (proposed 2019).

[53] Inessa Baram-Blackwell, *Separating Dick and Jane: Single-Sex Public Education Under the Washington State Equal Rights Amendment*, 81 WASH. L. REV. 337, 341–43 (2006).

[54] Commonwealth v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 840–41 (Pa. Commw. Ct. 1975); Marquis, *supra* note 31, at 78; Dawn C. Nunziato, *Gender Equality: States as Laboratories*, 80 VA. L. REV. 945, 965–66 (1994).

[55] *See* N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 844–45 (N.M. 1998); *see also* Alexandria C. Dean, *One State Away: The Need for Ratification of the Equal Rights Amendment in a Justice Kavanaugh, Conservative Court Era*, 10 WAKE FOREST J. L. & POL'Y 1, 12 (2019); Steven Andersson, *The Equal Rights Amendment—A Plumber's Perspective*, 43 N.Y.U. REV. L & SOC. CHANGE HARBINGER 99, 103–04 (2019).

[56] *See* Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) ("[T]he right of support depends not upon the sex of the petition but rather upon need in view of the relatively financial circumstances of the parties."); *see also* Nunziato, *supra* note 54, at 954–55.

insurance rates and coverage,[57] and, prior to 2015, same sex marriage.[58] These are subject matters that federal litigants frequently avoid and neglect because the intermediate scrutiny standard is applied to gender discrimination under the federal constitution.[59] As there is currently no federal ERA, the Equal Protection Clause alone has informed the level of scrutiny applied to gender discrimination.[60] Many view the intermediate scrutiny standard applied under the Equal Protection Clause as insufficient to address systemic gender inequality.[61]

However, states, armed with their respective ERAs, have been able to elevate the level of scrutiny applied in cases of gender-based classifications.[62] For example, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, and Texas all apply strict scrutiny to gender classifications under their state ERAs.[63] This is primarily because "under federalism, state courts can expand rights under state constitutions when federal courts restrict or contract them."[64] Furthermore, states have argued, and state courts have

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[57] *See* Pa. Nat'l Org. for Women v. Commonwealth, 551 A.2d 1162, 1163–64 (Pa. Commw. Ct. 1988); *see also* Bartholomew v. Foster, 541 A.2d 393, 395–96 (Pa. Commw. Ct. 1988); Nunziato, *supra* note 54, at 962–63.

[58] *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); *see also* Phyllis W. Beck & Patricia A. Daly, *Pennsylvania's Equal Rights Amendment Law: What Does it Portend for the Future?*, 74 TEMP. L. REV. 579, 580 (2001).

[59] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (adopting the intermediate scrutiny standard for sex-based classifications under the Equal Protection Clause by stating that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[60] *Id.*

[61] *See* Lukey & Smagula, *supra* note 19, at 10 ("Seventeen years later, as we approach the year 2000, recent developments in Supreme Court equal protection jurisprudence lead many to ask: do we still need an ERA? The answer is yes."); *see also* Kristina M. Mentone, *When Equal Protection Fails: How the Equal Protection Justification for Abortion Undercuts the Struggle for Equality in the Workplace*, 70 FORDHAM L. REV. 2657, 2660 (2002); Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 400 (2015) ("The application of the Equal Protection Clause to sex discrimination claims is limited by various factors, including the Court's failure to subject claims of sex discrimination to the 'strict scrutiny' standing of review; the Court's formalistic requirement that men and women must be 'similarly situated' for any heightened scrutiny standard to apply; and the Court's unwillingness to recognize discrimination claims based upon a theory of disparate impact.").

[62] Wharton, *supra* note 33, at 1240.

[63] Linton, *supra* note 37, at 911–12.

[64] Albert M. Rosenblatt, *Always in the Direction of Liberty*, 90 N.Y. ST. B.A. J. 25, 25 (2018); *see* Katherine Jones, *On Account of Sex: How Massachusetts's Equal Rights Amendment Can Protect Choice*, 28 B.U. PUB. INT. L.J. 53, 56 (2019) ("As a sovereign state, Massachusetts has the authority to be more protective of individual liberties and more

interpreted, the adoption of a state ERA as indicative that neither state nor federal equal protection analysis is sufficient regarding gender-based classifications.[65]

On this basis, two states with ERAs that are virtually identical to the federal ERA, Pennsylvania and Washington, have adopted an absolutist standard for gender classifications.[66] Meaning that "if the classification is based on sex, it is invalid, unless it is based upon physical differences between the sexes."[67] The remaining states with ERAs virtually identical to the federal Equal Rights Amendment that do not apply an absolutist standard to gender discrimination tend to apply strict scrutiny, "requiring proof that sex-based classifications are narrowly tailored to serve a compelling governmental interest and specifically rejecting such classifications if gender neutral alternatives are available."[68] Additionally, even states that have some form of sex-specific protection in their constitution, but with language differing from the federal ERA, tend to apply strict scrutiny to gender classifications under their varied ERAs. Section II.A discusses how Pennsylvania and Washington arrived at their absolutist standard and how that standard has affected their interpretation of gender classifications in a variety of subject matter areas. Section II.B acknowledges the states that have applied strict scrutiny, discusses why they did so, and analyzes how the application of strict scrutiny has impacted litigation in a variety of subject matter areas.

A. *The Absolutist Standard*

Pennsylvania and Washington are the only two states that apply the absolutist standard to gender-based classifications under their ERAs.[69] Pennsylvania adopted a state ERA in 1971, and "[s]hortly after adoption . . . the Supreme Court of Pennsylvania signaled that it would interpret the ERA to mean that no distinction may be made under the law of Pennsylvania based solely on

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restrictive of state power in making gender-based classifications than the federal government").

[65] Faraone, *supra* note 44, at 427 (stating that by passing a state Equal Rights Amendment, voters "expressed their intent to treat gender as a suspect class, subject to a level of scrutiny higher than the federal, intermediate standard").

[66] Linton, *supra* note 37, at 911.

[67] *Id.*; *see* Baram-Blackwell, *supra* note 53, at 339–400.

[68] Wharton, *supra* note 33, at 1211; *see* Linton, *supra* note 37, at 911–12; *see also* Faraone, *supra* note 44, at 442 ("Nine states apply strict scrutiny to gender-based classifications under their Equal Rights Amendments. These states are: 1) California, 2) Connecticut, 3) Hawaii, 4) Illinois, 5) Maryland, 6) Massachusetts, 7) New Hampshire, 8) New Mexico, and 9) Texas."); Wharton, *supra* note 33, at 1240 ("[M]ost state courts have interpreted their state ERAs as requiring higher justification for gender-based classifications than the intermediate standard of review used by the Supreme Court in interpreting the Equal Protection Clause.").

[69] *See* Baram-Blackwell, *supra* note 53, at 343–44; Linton, *supra* note 37, at 911.

gender."[70] Likewise, Washington adopted a state ERA in 1972, and three years later, in 1975, the Supreme Court of Washington articulated an absolutist standard for gender-based classifications in *Darrin v. Gould*.[71]

1. Pennsylvania's Absolutist Standard

The Pennsylvania Supreme Court first adopted the absolutist standard for gender discrimination in the case of *Henderson v. Henderson*.[72] In that case, the court unequivocally asserted that:

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities.[73]

This interpretation of the Pennsylvania ERA led the court to hold that spousal support "depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties."[74] The court, again, acknowledged this absolutist view in *Commonwealth v. Butler*,[75] when it asserted "[t]hat one person (assuming equality of considerations as, for example, prior criminal record or rehabilitative progress) should be eligible for parole at a different time than another person solely because of his or her sex is discrimination of the most obvious sort."[76] Therefore, a statute which required the trial court to not fix a minimum sentence when sentencing women and to fix a minimum sentence when sentencing men was unconstitutional by way of Pennsylvania's ERA.[77]

In this way, the Pennsylvania Supreme Court utilized their ERA to "eliminate[] certain presumptions of the common law."[78] For example, the court eliminated the doctrine of coverture, which presumed that a wife's crime was the product of her husband's coercion.[79] Additionally, the court eliminated certain presumptions pertaining to marital property and granted women more autonomy over the household property.[80] Another win for women's economic equality occurred when the court declared that "sex-based gender classifications

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[70] Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. L. 743, 744–45 (1994) (emphasis omitted).

[71] Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

[72] Beck & Baker, *supra* note 70, at 745.

[73] Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974).

[74] *Id.*

[75] Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974).

[76] *Id.* at 856

[77] *Id.* at 859.

[78] Beck & Baker, *supra* note 70, at 749.

[79] *Id.*

[80] *Id.* at 749–50.

pertaining to insurance rates are unconstitutional,"[81] after they were challenged by the parents of a boy whose insurance rates were in part based on his sex. In doing so, the court reaffirmed that "[t]he only types of sexual discrimination that have been permitted in this Commonwealth are those which are 'reasonably and genuinely based on physical characteristics unique to one sex.' All other types of sexual discrimination have been outlawed in this Commonwealth."[82]

These changes were demonstrative of the court's view "that the ERA was the result of certain changes equalizing the positions of men and women, rather than an instrument in effecting such changes," and "[t]he role of the courts was simply to bring the law up to date in recognition of these already extant societal changes."[83] Thus, even though ERA litigation in Pennsylvania has been quite active, the resulting judicial interpretations are better viewed as a reactive acknowledgment of changes in the law and society, rather than as proactive implementation of changes on the forefront of social progress. Emphasizing such a view, Pennsylvania Superior Court Judge Phyllis Beck opined that "Pennsylvania has not led the way in ERA law . . . . Rather, Pennsylvania has been cited as the prime example of a state whose ERA has not created the significant change predicted by the adoption of an ERA," even though the state does adhere to an absolutist view of constitutional scrutiny.[84]

2. Washington's Absolutist Standard

On the other hand, "Washington has been one of the most insistent [states] on giving broad effects to" its ERA.[85] This is particularly evident from the Washington Supreme Court's detailed discussion of the purpose of the ERA and its subsequent ruling in *Darrin v. Gould*.[86] In *Darrin*, the court considered whether denial of permission for girls to play on a boys' football team constituted sex discrimination, and if the denial was discriminatory, was it prohibited by law?[87] Considering their own ERA, the court stated that:

> Const. art. 31, provided the latest expression of the constitutional law of the state, dealing with sex discrimination, as adopted by the people themselves. Presumably the people, in adopting Const. art. 31, intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based

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[81] Bartholomew v. Foster, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988).

[82] *Id.* (quoting Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 125 (Pa. 1985)).

[83] Beck & Baker, *supra* note 70, at 747.

[84] Beck & Daly, *supra* note 58, at 579 (emphasis omitted).

[85] McCausland, *supra* note 32, at 468.

[86] Darrin v. Gould, 540 P.2d 882, 889 (Wash. 1975); *see* McCausland, *supra* note 32, at 468.

[87] *Darrin*, 540 P.2d at 884.

on sex was permissible under the rational relationship and strict scrutiny tests.[88]

As a result, the court concluded that "under our ERA discrimination on account of sex is forbidden."[89] Accordingly, the court held that the rule "forbidding qualified girls from playing on the high school football team in interscholastic competition cannot be used to deny the Darrin girls, and girls like them, the right to participate as members of that team."[90]

In theory, the court, by its own words in *Darrin*, articulated an absolutist standard—discrimination on the basis of sex was illegal—no ifs, ands, or buts. However, the Washington Supreme Court has since articulated two limited footnotes to the *Darrin* rule.[91] "When . . . the matter regulated or prohibited relates to a physical characteristic peculiar to one sex, and not common to both, the discrimination may be valid."[92] This is because the discriminatory behavior in that case is motivated more by an individual's physical capabilities than their gender. Additionally, "sex-based distinctions are permissible as part of an affirmative action program intended solely to ameliorate the effects of past discrimination"[93] because the purpose of such distinctions is not to discriminate. Furthermore, and prior to the United States Supreme Court's decision in *Obergefell v. Hodges*,[94] the Washington Supreme Court also clarified that "to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict judicial scrutiny to determine a compelling state interest."[95] Accordingly, the court recognized, not an exception for same-sex marriage, but that same-sex marriage existed outside of the *Darrin* framework entirely because "the classification does not result in different treatment for men and women."[96]

Both Washington and Pennsylvania apply unique ERA analyses, because they are the only two of twelve states that have ERAs virtually identical to the federal ERA *and* that have chosen to apply an absolutist standard. Thus, more instructive in the analysis of how state ERAs will impact the federal ERA,

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[88] *Id.* at 889 (clarifying that in adopting Const. art. XXXI, the people intended to adopt a level of scrutiny higher than that already provided for under the equal protection clause of the Washington Constitution).

[89] *Id.* at 893.

[90] *Id.*

[91] *See* Baram-Blackwell, *supra* note 53, at 339–40; McCausland, *supra* note 32, at 469–70.

[92] Seattle v. Buchanan, 584 P.2d 918, 934 (Wash. 1978) (Horowitz, J., dissenting) (considering an ordinance prohibiting the exposure of female breasts in public).

[93] Baram-Blackwell, *supra* note 53, at 340; *see* McCausland, *supra* note 32, at 469–70 (citing Marchioro v. Chaney, 582 P.2d 487 (Wash. 1978)).

[94] Obergefell v. Hodges, 576 U.S. 644 (2015).

[95] Singer v. Hara, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974).

[96] McCausland, *supra* note 32, at 470; *see Singer*, 522 P.2d at 1187.

perhaps, is the impact of state ERAs in state courts that apply a strict scrutiny standard of judicial review.

B. *The Strict Scrutiny Standard*

Seven of the states with ERAs virtually identical to the federal model have definitively endorsed strict scrutiny as the level of constitutional analysis required for gender-based classifications.[97] Another two states, Colorado and Delaware, have state courts on the record suggesting that strict scrutiny is the applicable standard.[98] Colorado has not definitively adopted a specified level of scrutiny but has stated that gender-based classifications should receive the "closest judicial scrutiny."[99] Delaware's ERA recently became effective on January 16, 2019, so no court precedent clearly identifies a specific level of scrutiny as of yet.[100] However, in an opinion dating back to 1980, a Delaware Court of Chancery noted that the "proposed equal rights amendment to the U.S. Constitution would mandate the use of a strict judicial scrutiny standard in cases of alleged sexual discrimination."[101] Thus, Delaware's ERA, with its identical language, may also mandate strict scrutiny. Finally, the last of the twelve states whose ERA includes language virtually identical to the federal ERA,[102] Oregon, adopted their ERA in November 2014, and there have been no recorded cases applying any level of scrutiny to gender-based classifications.[103] However, the case law from states whose courts have applied strict scrutiny to gender-based classifications remains instructive.

1. Strict Scrutiny Analysis and Abortion Access

Restrictive abortion laws have been struck down by some states that apply strict scrutiny to gender classifications.[104] For example, in *New Mexico Right to Choose/NARAL v. Johnson*, the New Mexico Supreme Court was confronted with the question of whether the New Mexico Health Services Department's "rule prohibiting state funding for certain medically necessary abortions denies Medicaid-eligible women equality of rights under the law."[105] The court concluded that such a rule violates New Mexico's ERA "because it results in a

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[97] *See* Linton, *supra* note 37, at 911–12 (noting that Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, and Texas have all adopted strict scrutiny for gender discrimination under their respective ERAs); *see also* N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 851 (N.M. 1998).

[98] *See* People v. Green, 514 P.2d 769, 770 (Colo. 1973); Trs. of Univ. of Del. v. Gebelein, 420 A.2d 1191, 1194 n.7 (Del. Ch. 1980).

[99] *Green*, 514 P.2d at 770.

[100] *See* DEL. CONST. art. I, § 21.

[101] *Gebelein*, 420 A.2d at 1194 n.7.

[102] *See supra* text accompanying note 50.

[103] *See* OR. CONST. art. I, § 46.

[104] Dean, *supra* note 55; *see* Stephens, *supra* note 61, at 419.

[105] N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 844 (N.M. 1998).

program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs."[106] The court found that the existence of New Mexico's ERA was the "culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in" the state.[107] This finding meant that New Mexico's ERA "afford[ed] greater protection of the rights of Medicaid-eligible women" in the state than is authorized by either of the applicable federal laws: the Hyde Amendment or the Equal Protection Clause.[108]

Even in states with ERAs that are not virtually identical to the proposed federal ERA, courts have applied strict scrutiny, consistent with their ERAs, to strike down restrictive abortion laws.[109] For example, in *Doe v. Maher*, the Superior Court of Connecticut recognized that "since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination."[110] The Superior Court went on to assert that "[i]t is absolutely clear that the framers intended that [such] discrimination would come within the purview of the sex discrimination prohibited by Connecticut's ERA and should be subject to heightened judicial review."[111] The court then clarified that the "heightened judicial review" they alluded to is strict scrutiny under the Connecticut ERA.[112]

While it is disputed among scholars as to what these cases ultimately mean for abortion rights,[113] and some states have certainly disagreed with New Mexico and Connecticut's interpretation,[114] it is clear that states applying their ERAs

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[106] *Id.*; *see* Linton, *supra* note 37, at 911–12 (noting that strict scrutiny requires that "sex-based classifications are narrowly tailored to serve a compelling governmental interest and specifically rejecting such classifications if gender neutral alternatives are available").

[107] *N.M. Right to Choose/NARAL*, 975 P.2d at 852.

[108] *Id.* at 851.

[109] Dean, *supra* note 55, at 12.

[110] Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

[111] *Id.* at 160 ("It is therefore clear, under the Connecticut ERA, that the regulation excepting medically necessary abortions from the Medicaid program discriminations against women, and, indeed, poor women.").

[112] *Id.* at 161 ("At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny. Surely the effect of the ERA was to raise the standard of review."); *see* Stephens, *supra* note 61, at 421 ("It is therefore clear, under the Connecticut ERA, that the regulation excepting medically necessary abortions from the Medicaid program discriminates against women, and indeed, poor women." (quoting *Maher*, 515 A.2d at 160)).

[113] Andersson, *supra* note 55, at 103–04 ("What this case does not stand for is that enactment of the ERA requires states to allow abortions at will or to publicly fund abortions.").

[114] *See* Bell v. Low Income Women of Tex., 95 S.W.3d 253, 263 (Tex. 2002); *see also* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 126 (Pa. 1985).

have not hesitated to ensure that such a determination does not turn on the sex of an individual, at least as it pertains to the definition of medical necessity.[115]

2. Strict Scrutiny and Access to Sports

Access to sports and gender-specific sports teams is another setting where state ERAs have been particularly influential. "In the arena of school athletics, the interpretation of state ERAs has served . . . to open up all-male teams to female membership" particularly in states that have ERAs virtually identical to the federal ERA and apply either the absolutist or strict scrutiny standard.[116] In Massachusetts, a state with an ERA that is virtually identical to the federal ERA, the state ERA has also served to "require[] the state's sports teams allow boys to try out for girls' teams."[117] The Massachusetts Supreme Judicial Court, in reconciling these two lines of precedent, asserted that "even if equal rights provisions could be viewed primarily as a means of eradicating discrimination against women, they tend to protect men as well, because disadvantages suffered by males are often premised on a 'romantic paternalism' stigmatizing to women."[118] Even where physical differences are identified as a justification for sex-discrimination in sports, the Massachusetts Supreme Judicial Court has asserted that:

> The general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases, approach those of the most talented men. Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed (where males have some biologic advantages) to produce athletic results. Classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo "archaic and overbroad generalizations."[119]

As a result, "any rule which classifies by sex alone is subject to close examination under the concept of equal protection of the laws, as that has been

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[115] Andersson, *supra* note 55, at 103 ("The case stands for the proposition that a state cannot have one definition of 'medical necessity' for men and a different one for women.").

[116] Nunziato, *supra* note 54, at 967–68; *see* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 289 (Mass. 1979) ("Judging from decisions around the country, we think the view we expressed as to wholesale exclusion of girls from boy's interscholastic teams where no girls' teams were provided would be accepted by the courts in jurisdictions having ERA."); *see also* Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 430 (Mass. 1977) ("A prohibition of all females from voluntary participation in a particular sport under every possible circumstance serves no compelling State interest."); Darrin v. Gould, 540 P.2d 882, 889 (Wash. 1975).

[117] *See Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 284; Marquis, *supra* note 31, at 78.

[118] *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 290.

[119] *Id.* at 293 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

strengthened by the popularly adopted ERA," and strict scrutiny has been applied to it.[120] Therefore, it is clear that, at least regarding middle and high school sports, state ERAs can prohibit gender discrimination against both girls and boys in a significant way.[121]

3. Strict Scrutiny and Equal Access

Applying more exacting constitutional scrutiny under state ERAs has resulted in state courts making more far-reaching decisions impacting domestic relations and insurance coverage.[122]

In the domestic relations realm, "states have rejected statutory presumptions that mothers are more fit custodians and that fathers have the primary child support obligation, and have required gender-neutral duties of child support for children born out of wedlock."[123] Furthermore, "fathers of children born outside of marriage have gained the right, previously held only by mothers, to withhold consent from their child's adoptions."[124] Additionally, the Massachusetts Supreme Judicial Court struck down a portion of a regulation that imposed a criminal sanction on a man found guilty of fathering a child out of wedlock but not to the woman who mothered the child on the basis of strict scrutiny.[125] While domestic relations are often deemed primarily within the purview of states, the interpretation of these state ERAs could certainly impact the interpretation of the federal ERA, particularly where the language utilized in both the state and federal provisions are virtually identical.[126]

In addition to altering domestic relations jurisprudence, "state ERA litigation has also changed the permissibility of gender-based insurance rates and

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[120] *Id.* at 296.

[121] *Id.* at 289; *see Darrin*, 540 P.2d at 889; *Opinion of the Justices to the House of Representatives*, 371 N.E.2d at 430.

[122] Nunziato, *supra* note 54 (identifying ways in which state courts have used state ERAs to strike down gender-based classifications in domestic relations and insurance rate contexts).

[123] *Id.* at 954–55; *see* Rand v. Rand, 374 A.2d 900, 905 (Md. 1977) ("Applying the mandate of the E.R.A. to the case before us, we hold that the parental obligation for child support is not primarily an obligation of the father but is one shared by both parents.").

[124] Nunziato, *supra* note 54, at 955; *see In re* McLean, 725 S.W.2d 696, 697–98 (Tex. 1987) ("When a child is born to a woman not married to the child's father, she automatically exercises all of the rights, duties, and privileges of the parent child relationship. Circumstances are different for a man who is not married to the child's mother: the father has all of those parental rights, duties, and responsibilities *only if the mother consents*. . . . A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet a higher burden of proof solely because he is male.") (emphasis added).

[125] *See* Commonwealth v. MacKenzie, 334 N.E.2d 613, 615 (Mass. 1975).

[126] *See supra* Part II (examining ways in which differing interpretations of state ERAs impact interpretation of the federal ERA).

insurance coverage."[127] For example, in *Bartholomew v. Foster*, the Commonwealth Court of Pennsylvania held that because "[t]he thrust of the Pennsylvania Equal Rights Amendment is to insure equality under the law and to eliminate sex as a basis for distinction," the law that authorized insurance companies to assign gender-based insurance rates was unconstitutional.[128] However, this seemingly broad pronouncement has not been ratified in many other states with ERAs virtually identical to the federal model. Thus, whether the federal ERA would be interpreted to go so much further than its application in the majority of those states is questionable.[129]

C. *The State Action Doctrine*

"The language of individual state ERAs varies considerably with regard to whether their reach is limited to state action."[130] As states evaluate whether their individual ERAs require state action, they have seemingly divided into two camps: "(1) those considering whether the state ERA directly applies to private actors; and (2) those considering whether *the values* of state ERAs may be enforced against private actors via existing common law causes of action."[131]

Pennsylvania and Texas have both looked to the specific language of their state ERAs (which are virtually identical to each other and the federal model)[132] and have differed as to whether state action is required.[133] In *Hartford Accident and Indemnity Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania*, the Supreme Court of Pennsylvania held that the rationale of the state action doctrine was irrelevant to its application of its own ERA because its ERA is state constitutional law, and, therefore, is not subject to the federal state action doctrine.[134] "As such it circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statues, regulations, ordinances and other legislation as well as decisional law."[135] In contrast, in *Lincoln v. Mid-Cities Pee Wee Football Association*, the Texas Supreme Court, citing the intent of the legislature and

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[127] Nunziato, *supra* note 54, at 962; *see* Bartholomew v. Foster, 541 A.2d 393, 398 (Pa. Commw. Ct. 1988).

[128] *Bartholomew*, 541 A.2d at 398; *see* Hartford Accident & Indem. Co. v. Ins. Comm'r of Pa., 482 A.2d 542, 549 (Pa. 1984).

[129] *See infra* Part I (describing the persuasive value state court decisions have when interpreting the federal ERA).

[130] Wharton, *supra* note 33, at 1229.

[131] *Id.* at 1231 (emphasis added).

[132] *Compare* PA. CONST. art. I, § 28, *with* TEX. CONST. art. I, § 3a.

[133] Wharton, *supra* note 33, at 1234–35.

[134] Hartford Accident & Indem. Co. v. Ins. Comm'r of Pa., 482 A.2d 542, 549 (Pa. 1984).

[135] *Id.*; *see* Welsch v. Aetna Ins. Co., 494 A.2d 409, 412 (Pa. Super. Ct. 1985) ("[W]e reverse the lower court in its conclusion that appellants failed to allege state action as to its claim of an E.R.A. violation. Such an averment is no longer necessary in light of the Supreme Court's pronouncement in *Hartford*.").

Texan citizens when the ERA was adopted and ratified, asserted that the Texas ERA did not proscribe purely private sex discrimination.[136] The court went on to assert that by enacting the ERA, "the legislature and citizens of this state desired to distill the myriad of federal doctrines concerning discrimination into a single simplified guarantee of sexual equality in governmental and public affairs. We cannot believe that by enacting the amendment they intended to have their private conduct regulated by the state."[137] Accordingly, the Texas ERA guarantees equality only in public affairs, or in the rare case that private conduct becomes so entangled with a state function that the private action becomes effectively a state action.[138]

On the other hand, states like California have applied the ERA values approach and determined that the values that underlie the state ERA apply in various common law contexts.[139] Applying ERA values in this context, the California Supreme Court has held that "[r]egardless of the precise scope of its application, Article I, Section 8 is declaratory of this state's fundamental public policy against sex discrimination, including sexual harassment . . . ."[140] Therefore, whether the Equal Rights Amendment "applies exclusively to state action is largely irrelevant" because it "unquestionably reflects a fundamental public policy against discrimination in employment—public or private—on account of sex."[141]

While the states have exercised significant discretion on the question of state action, the interpretation of the federal ERA will almost certainly be subject to the state action requirement. The Supreme Court held that the Fourteenth Amendment's prohibition on the deprivation of life, liberty, or property without due process of law is subject to a state action requirement because the Amendment begins "nor shall any State . . . ."[142] Similarly, the federal ERA

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[136] Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 926 (Tex. Civ. App. 1979). *See* Junior Football Ass'n of Orange v. Gaudet, 546 S.W.2d 70, 71 (Tex. 1976) ("The words 'under the law' in the above article of the Texas Constitution require that the discrimination complained of is state action or private conduct that is encouraged by, enabled by, or closely interrelated in function with state action." (citation omitted)).

[137] *Lincoln*, 576 S.W.2d at 925.

[138] *Id.*

[139] Wharton, *supra* note 33, at 1237–39 nn.174–75 (referencing Connecticut, Maryland, Montana, New Jersey, and Washington as states which have looked to the policy expressed in state ERAs to justify their decisions to root out gender based discrimination).

[140] Rojo v. Kliger, 801 P.2d 373, 389 (Cal. 1990) ("No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.").

[141] *Id.*

[142] The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the

prohibits the denial of equality of rights on account of sex, "by the United States or by any state."[143] It is the prohibition of action by the state in the Fourteenth Amendment that makes discrimination under it subject to the state action doctrine.[144] Likewise, the federal ERA purports to prohibit discrimination by the state. Based on the plain language of the proposed amendment, its similarities to the Fourteenth Amendment, and the Court's previous interpretation of the Fourteenth Amendment's language, the federal ERA includes a state action requirement whereas some state ERAs do not.[145]

As discussed in Section II.B.2, states have exercised great freedom in defining the scope of and interpreting their Equal Rights Amendments. States exercise this discretion for two main reasons: (1) they have a popular mandate that "reflects an important social and political movement in our society,"[146] and (2) state sovereignty affords them the power.[147] State sovereignty allows state constitutions to protect individual rights, such as the right to be free from sex discrimination, more stringently than the federal constitution currently does. Without a federal ERA, the Constitution reduces the analysis for such gender discrimination to merely intermediate scrutiny.[148] Knowing and recognizing this, the question then becomes, what happens when the citizens of the United States adopt an amendment that has been providing more substantive protection at the state level for decades? How can that subsequent adoption be influenced by the evolution of the law at the state level over the last several decades?

III. HOW THE INTERPRETATION OF IDENTICAL STATE LAW CAN IMPACT FEDERAL LAW

State court decisions can serve as persuasive authority when the time comes to interpret the federal ERA. A decision by a court of last resort is binding, dictating mandatory application in all courts within the same jurisdiction.[149] A decision by an intermediate appellate court is binding on trial courts when the court of last resort is silent on the issue.[150] A decision by a court of another

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privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.").

[143] Alice Paul Inst., *History of the Equal Rights Amendment*, *supra* note 15.

[144] *See The Civil Rights Cases*, 109 U.S. at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

[145] *Id.*

[146] Wharton, *supra* note 33, at 1273.

[147] Jones, *supra* note 64, at 70–71.

[148] *Id.* at 71.

[149] DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 11–13 (Carolina Acad. Press 2d ed. 2009).

[150] *Id.*

jurisdiction, however, is merely persuasive authority.[151] The most persuasive non-mandatory case authorities are:

> [T]he dicta of governing courts . . . and the holdings of governing courts in analogous cases. Next are the holdings of courts of appeals coordinate to the court of appeals whose law governs your case; next, the holdings of trial courts coordinate to your court; finally . . . the holdings of courts inferior to your court and courts of other jurisdictions.[152]

These principles become difficult to apply where no mandatory authority exists, in the context of an un-interpreted law. Meaning that the only authority to consider is that least persuasive form of authority: "the holdings of courts inferior to your court and courts of other jurisdictions."[153] Such would be the case if the federal ERA were fully enshrined in the United States Constitution.

As federal courts, and even state courts, begin interpreting a newly enacted federal ERA, they would have only the words of the ERA and outdated and conflicting legislative history on the amendment.[154] Without more, the next logical place for interpreting courts to look would be to courts of last resort in other jurisdictions that have interpreted language virtually identical to the federal ERA.

While interpretations of the language of states' ERAs often conflict on specific issues, courts have been consistent in their discussions of the purposes of state ERAs. State ERAs were universally enacted with the singular purpose of moving towards a society free from sex discrimination.[155] For example, such a purpose motivated the Pennsylvania Supreme Court's decision in *Henderson v. Henderson*, in which the court held that "[t]he thrust of the Equal Rights Amendment is to . . . eliminate sex as a basis for distinction" under the law.[156] Further, this purpose guided both the Washington Supreme Court in *Darrin v. Gould* to hold that the denial of permission for girls to play on a boy's football

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[151] *Id.*

[152] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 53 (2008).

[153] *Id.*

[154] Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism*, 14 YALE L. & POL'Y REV. 237, 268 (1996) ("The search for original intent of the failed Equal Rights Amendment is particularly complex because the intentions of both its proponents and opponents must be assessed, and as asserted by Alexander Bickel, 'legislative motives are nearly always mixed and nearly never professed.'").

[155] *See* Beck & Daly, *supra* note 58, at 594 ("The intangible benefit of an ERA is perhaps most valuable. It is based on the fact that with an ERA we have formally recognized that as citizens, women and men are equal partners who share both the benefits and the burdens of society. This acknowledgement not only prompts the implementation of policies and approaches for the benefit of men and women, but it becomes one of our core beliefs and with that defines us as a nation.").

[156] Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974).

team was illegal sex discrimination,[157] and the New Mexico Supreme Court to hold that the state's ERA reflected an "evolving concept of gender equality" in the state.[158] In most significant cases applying state ERAs, the opinions include broad discussion of the policy and purposes behind the enactment of the state ERA.[159] Those same purposes will impact the interpretation of the federal ERA.

IV. THE INTERPRETATION OF STATE ERAS IMPACT ON THE INTERPRETATION OF THE FEDERAL ERA

While state interpretations of state ERAs will only be persuasive to courts interpreting the federal ERA, federal courts will be unable to argue with the sheer quantity of authority addressing the underlying purpose of the ERA. "In any given state, the federal constitution represents a floor for basic freedoms, and the state constitution is the ceiling."[160] In the context of the ERA, the question becomes: what happens when the ceiling becomes the floor? What happens when sex equality, which has been the ceiling under state ERAs, becomes the floor encapsulated within the federal Constitution? The answer to that question should be informed by judicial interpretation of state ERAs.

First, the implementation of a federal ERA should result in the application of strict scrutiny to claims of sex discrimination. Of the states that have ERAs that are virtually identical to the federal model, the majority apply strict scrutiny analysis to sex discrimination.[161] These states recognize, as any federal court interpreting the ERA must recognize, that the enactment of an ERA inherently means that the status quo of constitutional scrutiny—intermediate scrutiny—is no longer acceptable or applicable.[162] Therefore, intermediate scrutiny should be inapplicable. However, it also seems as though the absolutist standard utilized by Pennsylvania and Washington would also be inapplicable.[163] Should

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[157] Darrin v. Gould, 540 P.2d 882, 893 (Wash. 1975).

[158] N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 852 (N.M. 1998).

[159] *See id.* at 852–53; *see also* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 289–90 (Mass. 1979); *Darrin*, 540 P.2d at 893.

[160] Faraone, *supra* note 44, at 429.

[161] *See* Linton, *supra* note 37, at 911–15 (noting that Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, and Texas have all adopted strict scrutiny for gender discrimination under their state ERAs).

[162] Wharton, *supra* note 33, at 1241–42 ("Presumably the people in adopting [the ERA] intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state . . . . Any other view would mean the people intended to accomplish no change in the existing . . . law . . . . 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." (quoting *Darrin*, 540 P.2d 882, 889) (first alteration in the original)).

[163] *See supra* Part III (discussing Pennsylvania state ERA interpretation); *see also Darrin*, 540 P.2d at 889 ("In the absence of Const. art. 31, it might have been argued . . . sex

the absolutist standard be inapplicable, courts interpreting the federal ERA would still allow state ERAs to be a ceiling—to offer more protection than the federal standard, a trademark of federalism.[164] Accordingly, courts interpreting a federal ERA would likely fall between intermediate scrutiny and the absolutist standard, likely around strict scrutiny or branching out into the realm of undue burden analysis.

The impact of applying a heightened level of constitutional scrutiny would likely vary according to the issue in front of the court. For example, gender discrimination in collegiate sports is currently regulated in part by Title IX.[165] Therefore, a court may look to the state court interpretation of state ERAs to determine how Title IX may need to be altered to better ensure equality of sex under the law. States have been very active on this front.[166] Thus, the adoption of a federal ERA would necessarily require courts to review the regulations of collegiate athletes contained in Title IX and articulated by the NCAA under a new lens, that of strict scrutiny. Additionally, while domestic relations and insurance are typically seen as state law issues, in these and other areas "[a]n ERA, as a constitutional amendment, would expand the congressional authority

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classifications are valid if they bear a rational relationship to the purpose of the classifications especially if they survive the strict scrutiny test. Whatever doubts on that score might have been formerly entertained, Const. art. 31 added something to the prior prevailing law by eliminating otherwise permissible sex discrimination if the rational relationship or strict scrutiny tests were met.").

[164] Faraone, *supra* note 44, at 429 ("Sometimes this federalist system of government causes the United States Supreme Court to exercise restraint in recognizing a right or utilizing a higher standard of scrutiny for several reasons. First, under the federalist system, the states have traditionally had the power to make important decisions regarding many basic rights. Second, the Supreme Court's precedent is binding on all fifty states. Therefore, once the Supreme Court makes a decision to recognize a right or to utilize a higher standard, the states are no longer free to experiment with alternative approaches. Third, the U.S. Supreme Court may realize that its ruling would be appropriate in one state, yet inappropriate in another because of the unique character of each individual state. Lastly, the U.S. Supreme Court is often unfamiliar with the local problems, conditions and traditions in each state.").

[165] *Athletics*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html#:~:text=The%20Title%20IX%20regulation%20contains,for%20members%20of%20both%20sexes (last visited Feb. 21, 2021) ("The Title IX regulation contains specific provisions governing athletic programs and the awarding of athletic scholarships. Specifically, if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes. In determining whether equal athletic opportunities are available, [the Office of Civil Rights] considers whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.").

[166] *See* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 289 (Mass. 1979); *see also* Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 430 (Mass. 1977); *Darrin*, 540 P.2d at 889.

to legislate."[167] Specifically, scholar Catherine MacKinnon asserts that a federal ERA could give Congress the authority the Supreme Court said Congress lacked to regulate gender-motivated violence and domestic violence under the Violence Against Women Act.[168] Allowing Congress to legislate in this area, and looking to state court interpretations of state ERAs in the domestic relations and criminal law fields could allow the Supreme Court to affect these areas of the law in ways it never has before.

No analysis of the potential impact of a federal Equal Rights Amendment would be complete without addressing the way in which a federal Equal Rights Amendment could impact access to medically necessary and Medicaid-funded abortions. However, this area does remain one of the murkiest when trying to anticipate the Supreme Court's response. For example, federal abortion restrictions could continue to exist in their own realm and be subject to an undue burden analysis, even where those restrictions pertain to the definition of medical necessity, as was illustrated in *Bell v. Low Income Women of Texas* case.[169] In the alternative, "[i]f state Equal Rights Amendments can protect a woman's right to choose an abortion, then a federal Equal Rights Amendment can likely offer the same protections on a more widespread basis."[170] The *New Mexico Right to Choose/NARAL v. Johnson* and *Doe v. Maher* cases illustrate this concept.[171] Whether the current Supreme Court would go so far anytime soon after the enactment of the federal ERA, however, remains to be seen.[172]

What is clear is that if the Supreme Court interprets a federal ERA broadly it "can significantly disrupt the remaining manifestations of general inequality, such as pay inequity; women's economic disadvantages related to pregnancy, maternity, and caregiving; women's underrepresentation in positions of economic and political power; and violence against women."[173] The federal legal "patchwork quilt" that currently exists to address sex inequality could be mended by Congress, under the single veil of a federal ERA.[174] But in order for these necessary disruptions and mending to occur, the federal ERA must "stretch beyond strict scrutiny, disparate impact, and other familiar antidiscrimination

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[167] Catherine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J. L. & GENDER 569, 578 (2014).

[168] *Id.* at 576–77.

[169] Bell v. Low Income Women of Tex., 95 S.W.3d 253, 263 (Tex. 2002).

[170] Dean, *supra* note 55, at 13.

[171] *See generally* N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).

[172] *See* Jones, *supra* note 64, at 78–79 ("Even if a federal ERA existed, it is not clear that it would protect women's right to choose."); *see also* Stephens, *supra* note 61, at 422–23 ("the United States Supreme Court consistently refuses to recognize discrimination based on women's reproductive capabilities as sex discrimination.").

[173] Suk, *Equal Rights Amendment*, *supra* note 12, at 384–85.

[174] Jessica Neuwirth, *Time for the Equal Rights Amendment*, 43 N.Y.U. REV. L & SOC. CHANGE HARBINGER 156–57 (2019).

tools to which ERA proponents continue to cling," and state courts continue to apply.[175] Such an extension requires not only broad interpretation of a federal ERA by federal courts based on state court interpretations of their own ERAs but also a Congress willing to fill in the equality gaps with meaningful legislation.

CONCLUSION

In order to determine the potential impact of the enactment of the federal ERA,[176] it is critical to look at the sources of law that would govern its interpretation. One of the most significant sources of law is state court interpretations of their ERAs particularly where the state ERA is virtually identical to the federal ERA. While these state interpretations may vary from state to state, they remain instructive for many reasons: (1) they lend insight to how the plain language of the text will be read; (2) they explore historical context under which the ERA was enacted; (3) they analyze public policy purposes of the amendment; and (4) they provide broader knowledge of the movement to pass the ERA and the women's rights movement. Therefore, even as the federal ERA remains ensnared in litigation,[177] hope endures in the women's equality movement that more widespread gender equality will be achieved as more and more states continue to enact their own ERAs[178] and ratify the federal ERA.[179] These enactment and ratification actions further promote the purpose of the Equal Rights Amendment: ensuring that equality under the law on the basis of sex is a right of each American.

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[175] Suk, *Equal Rights Amendment*, *supra* note 12, at 385.

[176] Mayeri, *supra* note 12, at 1234 ("The question is not 'whether' the ERA will become part of the Constitution, but 'when.'" (quoting Phyllis N. Segal, *Women Won't Be Satisfied with Piecemeal Reform*, L.A. TIMES, July 18, 1982, at E5)).

[177] Sarah Rankin & Michelle L. Price, *Democratic AGs Sue to Force U.S. to Adopt ERA in Constitution*, A.P. NEWS (Jan. 30, 2020), https://apnews.com/4913397a57f671c62989a1a5ec10df17 (referencing Virginia v. Ferriero, 466 F. Supp. 3d 253 (D.D.C. 2020)).

[178] *See* OR. CONST. art. I, § 46 (noting Oregon passed their Equal Rights Amendment in 2014); *see also* Kevin Hayes, *Equal Rights Amendment Now Official in the Delaware State Constitution*, WDEL (Jan. 17, 2019), https://www.wdel.com/news/equal-rights-amendment-now-official-in-the-delaware-state-constitution/article_e2bec41c-1a05-11e9-816d-e71f67c5bc61.html.

[179] Alice Paul Inst., *Ratification Info State by State*, *supra* note 20 (noting Nevada ratified the federal ERA in March of 2017; Illinois ratified the federal ERA in April of 2018; and Virginia ratified the federal ERA on January 27, 2020).

Appendix

State	Equal Protection Constitutional Provision	State ERA Categorization	Federal ERA Ratification Status
Alabama	ALA. CONST. art. I, § 1	No Sex-Specific Protection	Unratified
Alaska	ALASKA CONST. art. I, § 3	Some Sex-Specific Protection	Ratified – 4/5/72
Arizona	ARIZ. CONST. art. II, § 36	Some Sex-Specific Protection	Unratified
Arkansas	ARK. CONST. art. II, §18	No Sex-Specific Protection	Unratified
California	CAL. CONST. art. I, §§ 8, 31	Some Sex-Specific Protection	Ratified – 11/13/72
Colorado	COLO. CONST. art. I, § 29	Protection Virtually Identical to Federal ERA	Ratified – 4/21/72
Connecticut	CONN. CONST. art. I, § 20	Some Sex-Specific Protection	Ratified – 3/15/73
Delaware	DEL. CONST. art. I, § 21	Protection Virtually Identical to Federal ERA	Ratified – 3/23/72
Florida	FLA. CONST. art. I, § 2	Some Sex-Specific Protection	Unratified
Georgia	GA. CONST. art. I, § 1, para. 11	No Sex-Specific Protection	Unratified
Hawaii	HAW. CONST. art. I, § 3	Protection Virtually Identical to Federal ERA	Ratified – 3/22/72
Idaho	IDAHO CONST. art. I, § 1	No Sex-Specific Protection	Ratified – 3/24/72 Purported to Rescind Ratification
Illinois	ILL. CONST. art. I, § 18	Protection Virtually Identical to Federal ERA	Ratified – 5/30/18
Indiana	IND. CONST. art. I, § 23	No Sex-Specific Protection	Ratified – 1/24/77
Iowa	IOWA CONST. art. I, § 1	Some Sex-Specific Protection	Ratified – 3/24/72
Kansas	KAN. CONST. BILL OF RTS. § 1	No Sex-Specific Protection	Ratified – 3/28/72
Kentucky	KY. CONST. § 3	No Sex-Specific Protection	Ratified – 6/27/72 Purported to Rescind Ratification
Louisiana	LA. CONST. art I, §§ 3, 12	Some Sex-Specific Protection	Unratified
Maine	ME. CONST. art. I, § 1	No Sex-Specific Protection	Ratified – 1/18/74

Maryland	MD. CONST. DEC. OF RTS. art. XLVI	Protection Virtually Identical to Federal ERA	Ratified – 5/26/72
Massachusetts	MASS. CONST. pt. I, art. I	Protection Virtually Identical to Federal ERA	Ratified – 6/21/72
Michigan	MICH. CONST. art. I, § 2	No Sex-Specific Protection	Ratified – 5/22/72
Minnesota	MINN. CONST. art. I, § 2	No Sex-Specific Protection	Ratified – 2/8/73
Mississippi	MISS. CONST. art. III, § 32	No Sex-Specific Protection	Unratified
Missouri	MO. CONST. art. VII, § 10	Some Sex-Specific Protection	Unratified
Montana	MONT. CONST. art. II, § 4	Some Sex-Specific Protection	Ratified – 1/25/74
Nebraska	NEB. CONST. art. I, § 30	Some Sex-Specific Protection	Ratified – 3/29/72 Purported to Rescind Ratification
Nevada	NEV. CONST. art. I, § 24 (PROPOSED)	Protection Virtually Identical to Federal ERA	Ratified – 3/21/17
New Hampshire	N.H. CONST. pt. I, art. II	Protection Virtually Identical to Federal ERA	Ratified – 3/23/72
New Jersey	N.J. CONST. art. I, para. 1; N.J. CONST. art. X, para. 4	Some Sex-Specific Protection	Ratified – 4/17/72
New Mexico	N.M. CONST. art. II, § 18	Protection Virtually Identical to Federal ERA	Ratified – 2/28/73
New York	N.Y. CONST. art. I, § 11	No Sex-Specific Protection	Ratified – 5/18/72
North Carolina	N.C. CONST. art. I, § 19	No Sex-Specific Protection	Unratified
North Dakota	N.D. CONST. art. I, § 1	No Sex-Specific Protection	Ratified – 2/3/75
Ohio	OHIO CONST. art. I, § 2	No Sex-Specific Protection	Ratified – 2/7/74
Oklahoma	OKLA. CONST. art. II, § 36A	Some Sex-Specific Protection	Unratified
Oregon	OR. CONST. art. I, § 46	Protection Virtually Identical to Federal ERA	Ratified – 2/8/73
Pennsylvania	PA. CONST. art. I, § 28	Protection Virtually Identical to Federal ERA	Ratified – 9/26/72
Rhode Island	R.I. CONST. art. I, § 2	Some Sex-Specific Protection	Ratified – 4/14/72

South Carolina	S.C. CONST. art. I, § 3	No Sex-Specific Protection	Unratified
South Dakota	S.D. CONST. art. VI, § 1	No Sex-Specific Protection	Ratified – 2/5/73 Purported to Rescind Ratification
Tennessee	TENN. CONST. art. I, § 8	No Sex-Specific Protection	Ratified – 4/4/72 Purported to Rescind Ratification
Texas	TEX. CONST. art. I, § 3a	Protection Virtually Identical to Federal ERA	Ratified – 3/30/72
Utah	UTAH CONST. art. IV, § 1	Some Sex-Specific Protection	Unratified
Vermont	VT. CONST. ch. I, art. I	No Sex-Specific Protection	Ratified – 3/1/73
Virginia	VA. CONST. art. I, § 11	Some Sex-Specific Protection	Ratified – 1/27/20
Washington	WASH. CONST. art. XXXI, § 1	Protection Virtually Identical to Federal ERA	Ratified – 3/22/73
West Virginia	W. VA. CONST. art. III, § 1	No Sex-Specific Protection	Ratified – 4/22/72
Wisconsin	WIS. CONST. art. I, § 1.	No Sex-Specific Protection	Ratified – 4/26/72
Wyoming	WYO. CONST. art. I, § 3	Some Sex-Specific Protection	Ratified – 1/26/73