# I

# Constitutional Rights: Equal Protection

This chapter explains how the Constitution and evolving judicial interpretations of it may invalidate both state and federal laws and actions that discriminate on the basis of sex. Although such laws and practices have become rarer since the early 1970s when the Supreme Court first held that the Constitution prohibited certain kinds of sex discrimination, many still remain. The United States Constitution is one of a variety of tools that may be used to dismantle discrimination against women; many state constitutions also provide protection against certain kinds of sex discrimination. Unfortunately, in recent years constitutional arguments have also been used successfully to strike down laws meant to advance women's equality.

While many different sections of the Constitution are useful in fighting for important rights for women, this chapter focuses on the Equal Protection Clause of the Fourteenth Amendment. One problem that has pervaded many of the issues facing women has been the unequal treatment under the law of men and women. Thus, it is essential to understand the equal protection doctrine in order to recognize how it is relevant to different problems women face and in order to know how to apply it vigorously when necessary.

**Where does the U.S. Constitution prohibit laws and government practices that discriminate on the basis of sex?**

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Courts have interpreted this

language to prohibit certain kinds of sex discrimination by state governments and agencies.

**What does the Equal Protection Clause mean?**

The Equal Protection Clause requires states to treat their citizens equally, and advocates have used it to combat discriminatory laws, policies, and government actions. Adopted shortly after the Civil War, the Equal Protection Clause has been invoked often to invalidate policies such as racial segregation in public schools, the denial of voting rights to African-Americans, and racially exclusive public accommodations.[1] It also extends to protect the rights of other groups, such as immigrants, ethnic minorities, and women.

Judges deciding cases under the Equal Protection Clause have over time defined what "equal treatment" demands for different classifications. For instance, state legislatures may not pass laws that single out one racial group for unfavorable treatment, because the Constitution has been interpreted to require equal treatment among racial groups. On the other hand, legislatures may deny rights to fifteen-year-olds that are given to fifty-year-olds, such as driving and voting, if they have a rational reason for doing so. A more difficult question for courts has been in what circumstances the Constitution forbids governments from treating men and women differently. Though rare, there may be instances when real differences between men and women justify governmental decisions to treat them differently. Indeed, treating men and women fairly may sometimes require taking these differences into account. On the other hand, mere stereotypes about the differences between men and women cannot justify differential treatment.[2]

**Does the Equal Protection Clause forbid discrimination by private individuals?**

The Constitution's guarantee of equal protection is limited by the concept of *state action*. In other words, the Fourteenth Amendment only forbids federal, state, and local governments from discriminating, not private actors. This prohibition covers a broad range of activities, but it is still limited to action in which the government is substantially involved. For instance, if a public school official decides to bar women from a physics class, even though there is no law requiring him or her to do so, this would be a prohibited *state action*. But if a private school official made the same decision, that action, although blatantly discriminatory, would not violate the Equal Protection Clause.[3]

Occasionally, courts have categorized a private institution's acts as state action when a government has sufficiently involved itself with or supported the acts, for instance through funding. In addition, a private institution fulfilling functions normally considered governmental, such as running a town, may be said to engage in state action. Thus, if the government provides most of the funds for building a private hospital, or if a private company owns a town where all of its employees live, the courts may say that both the hospital and the company are equivalent to state actors and their activities will have to meet the constitutional standard of equal protection.

Understanding the concept of state action is important. First, where there is no state action, there is no constitutional equal protection claim and women will need other laws, such as the Civil Rights Act, to challenge discrimination. Second, where there is state action, women may be able to challenge discriminatory practices even if no law prohibits the specific acts. For instance, even though no law prohibited single-sex colleges, women students succeeded in integrating the once all-male University of Virginia (UVA) by bringing a constitutional equal protection claim.[4] The Equal Protection Clause was applicable because UVA was a state school, and therefore a state actor.

**Does the Equal Protection Clause prohibit all laws or policies that impact women more than men, even if they do not explicitly differentiate between the two?**

No. The Supreme Court has interpreted the Constitution as only addressing state laws and actions that explicitly treat men and women differently —i.e., that are discriminatory on their face—or that can be shown to have been motivated by a desire to harm women—i.e., intentional discrimination.[5] It is not enough to show that the legislature knew that a law might affect women negatively. It must be shown that the law was passed *because of* that negative effect on women.[6] Because this is extremely hard to prove, most laws or policies that do not clearly treat women and men differently will not raise constitutional equal protection problems. For instance, the Supreme Court has upheld a state law giving preference in civil service jobs to veterans. This law clearly had a disparate impact on women because it effectively locked them out of many jobs. In spite of the discriminatory effect of the law, however, the Court decided that it did not violate the Constitution because it was passed out of a desire to help veterans, not to hurt women.[7] In this way, a law or policy may be unfair in its impact on women, without necessarily raising constitutional equal protection issues.

**How do courts decide which laws and actions violate the Equal Protection Clause?**

In deciding whether a particular law or action violates the Equal Protection Clause, courts have used three distinct tests. These tests are difficult to describe precisely or apply mechanically and therefore, in practice, the facts of the case may be just as important as the particular test employed by the court. The test a court uses depends on the classification that the law or action makes and/or the rights that are affected. For instance, a law that makes a classification by race will be analyzed under a different test than a law making a classification by gender or age.

The three tests are the "rational basis" test, the "strict scrutiny" test, and the "intermediate" or "heightened scrutiny" test. Each looks at (1) the government's purpose in passing the law and (2) the relationship between that purpose and the classification used to accomplish it.

**1.** ***The Rational Basis Test.*** The test the Supreme Court has used in a majority of cases is known as the rational basis test. It is basically a test of reasonableness. Courts ask two questions: (1) Did the state have a reasonable purpose (or "rational basis") for passing the law? and (2) Is there some difference between the two classes or groups of people that makes it reasonable to treat them differently? The law is valid only if the answer to both questions is yes. For example, a government has a legitimate interest in regulating adoption to protect parents and children. However, a law arbitrarily prohibiting people named "Jane" from adopting cannot be understood as rationally related to that purpose. Thus such a law would be invalid under the Equal Protection Clause because it fails the rational basis test.

The rational basis test is the most forgiving and most deferential form of review under the Equal Protection Clause and can be used to avoid a real analysis of a law. While the approach sounds fair, it has often proven virtually meaningless because a court can always find a variety of reasonable purposes for a law. In fact, the Supreme Court has even held that if a court can imagine any conceivable way in which a law or action furthers a legitimate purpose, a law subject to the rational basis test will be sustained.[8] As a result, most laws and policies are upheld under this test.

The Court has occasionally been willing to use the rational basis test to invalidate laws that arbitrarily discriminate between groups of people that for all purposes are indistinguishable and deserve equal treatment.[9] The Court will also sometimes invalidate legislation that was passed because of

hostility toward a particular group.[10] For instance, in *Romer v. Evans,* the Court applied the rational basis test in considering whether the Equal Protection Clause prevents a state from adopting a constitutional amendment prohibiting any type of governmental action designed to protect lesbians and gay men from discrimination. The Court held that a law that imposes such a broad legal disability on a single group, in this case lesbians and gay men, can serve no legitimate state purpose, and the law was found to be invalid.[11]

Cases such as this suggest that rational basis review can result in a critical review of discriminatory laws, but it is important to remember that the vast majority of legislation challenged under this level of review is upheld. The difference in the cases where the rational basis test has been used to strike down laws may be more in the character of the law and whether the Court perceives its purpose as discriminatory. It is likely that the Court will continue to apply the rational basis test in a way that mixes fact with law, making outcomes difficult to predict.

**2. *The Strict Scrutiny Test.*** The second test developed by the Supreme Court is known as the strict scrutiny test and is the test most likely to invalidate a law. It is generally applied to laws that classify on the basis of race or national origin, as well as laws affecting certain fundamental rights, such as the right to vote or the right to have children. The classifications that trigger strict scrutiny are called "suspect classifications." Under this test, the courts ask (1) does the state have a compelling interest in passing the law? and (2) is the legal classification absolutely necessary to accomplish that purpose? Courts will critically examine the state's purpose in passing the law or instituting a policy, and will look closely at whether using a particular classification is the only way of achieving that purpose.

An example of strict scrutiny is found in the Supreme Court's analysis of a Florida law that made sexual conduct between an African-American person and a white person illegal, although the same conduct was not illegal if the two persons were either both African-American or both white.[12] The state of Florida argued that its purpose in passing the law was to maintain sexual decency, but the Supreme Court could not find any differences between persons engaging in interracial sex and those engaging in intraracial sex that made it necessary to single out the first group for criminal punishment. In other words, the classification between the two groups was not necessary in order for the state to achieve its purpose of maintaining sexual decency.

Therefore, the law was invalid because it denied, without a valid reason, the equal protection of law to persons who engaged in interracial sex.

Unlike the rational basis test, the strict scrutiny test requires rigorous examination of laws and policies. As a result, it is extremely difficult to show that a law is valid under the strict scrutiny test, and courts tend to find laws unconstitutional under it. Women's rights advocates have long pushed the Court to consider sex a "suspect classification" and to apply strict scrutiny when examining laws or practices that discriminate on the basis of sex. The Court, however, has never done so.

**3. *The Intermediate Scrutiny Test.*** In 1976, the Supreme Court announced a third equal protection test that, thus far, has been applied most often in cases challenging classifications made on the basis of sex. This test is more demanding than the rational basis test and more forgiving than strict scrutiny and, consequently, is referred to as the "intermediate scrutiny" or "heightened scrutiny" test. It provides that classifications by sex are constitutional only if they (1) serve important government objectives and (2) are closely and substantially related to the achievement of those objectives. A law will not pass this test if the law could be written to achieve the same purpose without referring to sex. Likewise, if the law serves no "important" objectives, it is unconstitutional.

The Supreme Court first applied the new test in *Craig v. Boren*.[13] Prior to this case, challenges to sex discrimination were examined under the rational basis test and often upheld. *Craig v. Boren* involved an Oklahoma law that allowed women aged eighteen and over to purchase 3.2 percent beer, or "near" beer (beer with a lower alcohol content), but did not allow men to purchase it until they were twenty-one. The male plaintiff argued that it violated the Equal Protection Clause to treat eighteen- to twenty-year-old men and women differently. Oklahoma attempted to justify the law to the Supreme Court as a measure to improve traffic safety—an important state objective. After examining Oklahoma's statistics on "driving while intoxicated," the Court concluded that the statistical differences in the behavior of young men and women were too insignificant to justify denying beer to the young men. Thus, although promoting driving safety might be a purpose important to Oklahoma, treating men and women differently in allowing them to buy 3.2 percent beer was not closely and substantially related to the accomplishment of that purpose. Other efforts—such as improved education about the dangers of drinking and driving, and better enforcement of

drunk driving laws—would have a more direct effect on traffic safety. The Supreme Court has applied this same test in considering gender classifications since then.

In 1996, the Court seemed to alter the intermediate scrutiny test established in *Craig* in *United States v. Virginia*, a case that invalidated an all-male admissions policy at Virginia Military Institute (VMI), a state school.[14] In the VMI case, the Court stated that a classification made on the basis of sex was unconstitutional unless the state "at least" demonstrated that the classification was closely and substantially related to an important state purpose, and could show that it had an "exceedingly persuasive justification" for the all-male policy. This language led many observers to conclude that the Court was applying a more demanding standard to gender classifications.

**Why does it matter which equal protection test a court uses?**

When a court applies a higher level of scrutiny to a law, it is more likely to invalidate discriminatory legislation. For this reason, women's rights groups have pressed for the application of strict scrutiny to all gender-based classifications. However, no majority of the Supreme Court has ever declared sex a suspect classification, like race, that would automatically require "strict scrutiny," although in 1973, four of nine Justices voted to apply this stringent standard to a sexually discriminatory military benefits law.[15] A majority did not emerge for this position, perhaps because some Justices at the time were waiting to see whether an equal rights amendment would pass before applying the strict scrutiny standard.[16]

Meanwhile, the intermediate scrutiny test ensures that the Court will take a more critical look at sexually discriminatory laws than it did in the past using the rational basis test. Although it is an improvement over rational basis analysis, the intermediate scrutiny test still allows courts latitude in deciding whether or not a government action that classifies on the basis of sex violates the Equal Protection Clause. It provides no guarantee that sexually discriminatory laws will be struck down, particularly as the courts, especially the Supreme Court, become more conservative and less concerned with the protection of civil rights and civil liberties in general.[17]

**How does the Constitution treat affirmative action programs that classify on the basis of sex in order to help women?**

This is an important question, and it is largely unresolved. In a 1989 case called *Richmond v. J. A. Croson*, the Court held that strict scrutiny applied

to all state and local race-based affirmative action programs.[18] Six years later, in *Adarand Construction, Inc. v. Pena,* the Court held that federal race-based affirmative action programs are subject to strict scrutiny.[19] In other words, a race-based affirmative action program is only constitutional if it is narrowly tailored to serve a compelling government purpose. In the context of employment, these cases have been understood to mean that a race-based affirmative action program is generally only permitted to remedy the effects of a government's own previous acts of race discrimination.

Neither *Croson* nor *Adarand* discussed the proper level of review for gender-based affirmative action programs sponsored by governments, and as a result there is some confusion among the different states. *Croson* and *Adarand* have led some lower courts to review gender-based affirmative action programs under a strict scrutiny level of review, such as that applied to race-based programs.[20] Other courts have applied intermediate scrutiny to gender-based affirmative action programs, while applying strict scrutiny to race-based programs. For instance, a government can offer certain preferences to women in order to make up for discrimination women might face elsewhere in society, but can only offer preferences to racial minorities if the government itself has previously discriminated against those minorities.[21]

The resulting confusion demonstrates some of the problems with equal protection jurisprudence. Holding all remedial affirmative action programs to the requirements of the strict scrutiny test leads to a very strange result, for under such a system state actions discriminating against women will be subject to a lower level of review than gender-conscious state actions meant to *remedy* that discrimination. However, if gender-based affirmative action is subject to less strenuous review than race-based programs, gender-based remedial programs will probably be upheld more often than those remedying race discrimination. This would be inconsistent with a long history of case law that has defined race discrimination as the most serious and malignant form of discrimination, and would be inconsistent with the purposes of the Fourteenth Amendment. The confusion over which standard of review to use for affirmative action programs also leaves unclear what standard should be applied to programs designed to assist women of color.

**Does the Equal Protection Clause prohibit discrimination on the basis of pregnancy?**

No. The Equal Protection Clause does not protect women against one of the most persistent forms of sex discrimination—pregnancy discrimination.

In fact, in 1974, the Supreme Court did an extraordinary thing. In a case called *Geduldig v. Aiello*, it held that under the Constitution discrimination on the basis of pregnancy is *not* sex discrimination.[22] The case involved a California state-mandated disability program that replaced workers' wages for every type of physical disability that prevented them from working except for disability periods arising from normal pregnancy and delivery. The Court found that the program did not discriminate between men and women, but rather between pregnant and nonpregnant persons, and thus was sex-neutral and subject only to rational basis review.[23] Fortunately, Congress has passed laws that define pregnancy discrimination as a form of sex discrimination in the employment context and in some education contexts. These laws will protect against pregnancy discrimination in many situations. See chapter 2, "Employment: Discrimination and Parenting Issues," and chapter 4, "Education."

**Is it possible to assert the constitutional right to equal treatment without bringing a lawsuit?**

Legal rights can be asserted in informal discussions and negotiations with officials or even in demonstrations and other public events. Merely raising a question of the constitutionality of the actions of public officials will sometimes have an effect on those actions because most public officials do not like to be accused of discrimination. Furthermore, on occasion officials will choose to act in order to avoid being sued. An indication that a woman is ready to pursue a lawsuit may convince officials that she is serious about a claim for fair treatment.

## State Equal Rights Provisions

**Are there any state constitutional provisions that offer more protection from gender discrimination than the U.S. Constitution?**

Yes. Just as the United States has a constitution that guarantees certain rights to its citizens, so do all the states. As of this writing, twenty-three states[24] have constitutions that either explicitly prohibit gender discrimination or contain provisions that have been interpreted to offer more protection from gender discrimination than the U.S. Constitution. Some state constitutional provisions addressing gender discrimination take the form of an equal rights amendment specifically affirming the equality of men and

women. Others do not specifically refer to gender, but have been interpreted by state courts to prohibit gender discrimination along with other forms of differential treatment.

Because of these state constitutional guarantees, a woman may enjoy additional protection from discrimination by governments than that offered by the U.S. Constitution. Whether a particular law or action violates a state constitution, however, turns on how that state's courts have interpreted its constitution and the provision prohibiting discrimination. These interpretations vary widely from state to state.

**How do state constitutional protections differ from those of the federal Constitution?**

Federal constitutional rights can be understood as a floor rather than a ceiling. In other words, states are free to offer more protection to individual rights than the federal government does as long as state rights do not conflict with the federal provisions. For example, although currently there is no Equal Rights Amendment (ERA) in the federal Constitution, states are free to enact similar provisions in their own state constitutions, and several states have done so. State courts are also free to interpret their own constitutions in ways that provide more protection against gender discrimination than the federal Constitution. For instance, several state courts have held that their constitutions require a higher level of review than the intermediate scrutiny demanded by the federal Constitution. As a result, those courts are more likely to strike down gender-based laws under their state constitutions, and have gone beyond the federal constitutional standard to ban almost all gender distinctions in their laws.

**What level of review do state courts use in gender discrimination cases?**

It depends on the state. As mentioned above, many state courts employ a higher standard of review in gender discrimination cases brought under the state constitutional provisions than the federal courts use in equal protection cases. The higher standard of review used by those courts makes it easier to challenge discrimination in those states, because those states are more likely to strike down gender-based laws.

**Absolute Prohibition on Legal Classifications Based on Gender**

High courts in five states—Colorado, Maryland, Oregon, Pennsylvania, and Washington[25]—have ruled that practically *all* gender-based classifica-

tions are prohibited because their state constitutions impose an absolute standard that eliminates gender as a factor in determining legal rights. This standard is higher even than the strict scrutiny standard in federal cases and the only exception to it is in cases of discrimination based on physical characteristics. For instance, the Pennsylvania Supreme Court declared in one of the first cases interpreting its state ERA that "[t]he thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate gender as a basis for distinction. The gender of citizens . . . is no longer a permissible factor in the determination of their legal rights and responsibilities."[26]

**Strict Scrutiny of Legal Classifications Based on Gender**

In eight states—California, Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, Texas, and Vermont—courts applying the strict scrutiny standard have ruled that gender discrimination should be treated in the same way as race discrimination is treated in federal cases. These states consider gender a suspect classification and apply a strict scrutiny test to gender classifications.[27] A court employing this standard of review will uphold a state legislature's gender-based classification only when the state's "compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose."[28] Vermont does not use the federal language of "strict scrutiny" or "suspect class" but has afforded broad protections against gender-based classifications.[29]

Not all states employing strict scrutiny of gender discrimination under their constitutions have traditional ERAs. Strong gender discrimination prohibitions may also stem from less specific constitutional provisions that have been interpreted by state courts to require gender equality.

**Standards Mirroring Federal Intermediate Level of Review**

Three states that have adopted ERAs explicitly prohibiting gender discrimination interpret these provisions to mirror the intermediate level of protection afforded by the U.S. Constitution for gender-based classifications. The Louisiana Constitution effectively codifies federal equal protection standards of strict scrutiny for race and intermediate scrutiny for gender,[30] and courts employ the language of intermediate scrutiny in equal protection cases involving classifications based on gender.[31] Alaska uses a "sliding scale" ranging from "relaxed scrutiny to strict scrutiny," with the level of scrutiny being determined by how the court assesses the importance of the rights

asserted and how suspiciously the court views the classification scheme.[32] The Virginia Supreme Court has stated that it applies the federal intermediate level of protection to gender classifications.[33] In addition, many states that do not have ERAs also follow the federal standard in interpreting their state constitution's antidiscrimination provisions.

**Unresolved Standards of Review for Legal Classifications Based on Gender**

In six states with an ERA—Florida, Iowa, Montana, New Mexico, Utah, and Wyoming—state courts have not definitively settled on a standard of review. The Supreme Courts of Florida and Iowa have not heard any cases brought under their ERAs and, thus, have not had a chance to interpret them. Montana recognizes that the Supreme Court applies intermediate scrutiny to cases involving gender classifications, and has applied a similar "middle tier" test in some cases. It has not clearly articulated a standard of review for sex discrimination challenges under its state constitution, although the fact that Montana's courts have consistently followed the lead of the Supreme Court in analyzing equal protection cases is a strong indication that it will probably continue to do so if faced with a gender discrimination claim.[34] New Mexico uses a sliding scale standard for cases brought under the state's equal protection clause, and has held that "classifications based on gender" trigger an intermediate review.[35] However, New Mexico's Supreme Court has not reconciled this level of review with the state ERA, which expressly prohibits denial of equal protection on the basis of gender.[36] The Utah Court of Appeals has stated, without further explanation, that the state standard is "at least as stringent as the [federal] equal protection intermediate review for gender discrimination."[37] Finally, Wyoming's Supreme Court has limited the civil rights guaranteed by its state ERA to certain circumstances, including "property, marriage, protection by the laws, freedom of contracts, trial by jury, etc.," but has not settled on a level of review.[38]

**Do any state constitutions prohibit nongovernmental gender discrimination?**

Some states limit their ERAs to prohibit only gender discrimination by state actors. The reach of these provisions in part depends on how state courts define state actors. For instance, some states understand "state actor" to include state agencies, contract agencies that work for the state, and recipients of state funding. Several states, including Hawaii, New Hampshire,

and Virginia, have equal rights amendments that expressly apply only to instances where governmental action is involved.[39] Other state constitutional prohibitions on gender discrimination, however, reach discrimination by private individuals and institutions. For instance, Illinois has two antidiscrimination provisions: one applies only to state action,[40] but the other prohibits discrimination "[by] any employer or in the sale or rental of property."[41] Montana's ERA is very broad and specifically prohibits discrimination by "any person, firm, corporation or institution."[42] Similarly, Pennsylvania has concluded that no state action is necessary to invoke the state ERA,[43] and both Massachusetts[44] and California[45] have found that sexual discrimination in private employment also violates their ERAs.

Sometimes it is hard to tell from the wording of a state constitutional provision whether it reaches private acts of gender discrimination or not. Occasionally a state constitutional provision expressly reaches some kinds of private action and prompts the assumption that it does not reach others. A constitutional provision may appear to require state action, but state courts will nevertheless interpret it to have a broader reach.[46] Finally, in those cases where a state constitutional provision does not expressly require governmental action, some advocates have successfully argued that state equal rights provisions may regulate private conduct that usually cannot be reached under the Fourteenth Amendment.[47]

**Do any state constitutions prohibit discrimination that is unintentional?**

Perhaps. As noted, the Equal Protection Clause of the U.S. Constitution applies only to situations of intentional discrimination or facial discrimination. It is not yet clear whether the same limitation applies to all state constitutional antidiscrimination provisions. Some state courts have suggested that policies that are not intended to discriminate against women, but that nonetheless disproportionately burden women, may be challenged under state constitution ERAs. However, there have not yet been any instances where such a theory has been successful.[48] There have been very few cases brought under state equal rights amendments using the disparate impact theory, but some courts have suggested that such a claim may be possible,[49] and Oregon's court of appeals has indicated that its constitution also protects its citizens from unintentional discrimination.[50] Therefore, advocates should not abandon disparate impact as evidence of discrimination under state constitutional equal rights provisions.

**What kinds of gender discrimination cases have been brought under state constitutional provisions?**

**Family Law**

Most cases have arisen in the area of family law, perhaps because family law is considered the domain of state courts and state laws. For example, state ERAs have been used to invalidate different age minimums for marriage for men and women,[51] to provide reciprocal grounds for divorce for husbands and wives,[52] and to invalidate common law presumptions that property acquired during marriage belongs to the husband.[53]

**Discrimination in Education**

State ERAs have also been used to improve girls' educational opportunities, both in the classroom and in school athletic programs. For example, advocates used the Pennsylvania ERA to successfully challenge the "men only" admissions policy of a city high school.[54] The Pennsylvania ERA was also used to challenge the exclusion of women from the Pennsylvania Interscholastic Athletic Association.[55] Washington's ERA was also used to obtain better funding for female athletic programs at a state university.[56] See chapter 4, "Education."

**Economic and Employment Discrimination**

State ERAs have also been used to fight economic discrimination against women. For example, in Pennsylvania the ERA was used to eliminate gender differences in insurance rates,[57] and in Colorado the state ERA was used to challenge an employer health insurance policy that did not cover medical expenses associated with normal pregnancy.[58] In employment discrimination, states have differed on whether their ERAs cover sexual harassment. In Pennsylvania, a district court decided that the state constitutional ERA does not provide protection against sexual harassment,[59] but in Montana, the state Supreme Court held that the state's equal protection provision in conjunction with the Human Rights Commission provides the only remedy for sexual harassment.[60] Maryland has invalidated prohibitions on women holding certain jobs,[61] while California's ERA focuses specifically on employment and has been used to invalidate many different forms of gender discrimination.[62] See chapter 2, "Employment."

**Affirmative Action**

State constitutional equal rights provisions create an interesting dilemma for courts when they review affirmative action programs. Affirmative ac-

tion programs generally give some assistance to a historically disadvantaged group, such as women. On the other hand, ERAs and other equal rights provisions generally require formal equality, meaning that politicians, state actors, and some private actors are unable to take actions that categorize people on the basis of gender, race, or another protected characteristic. Affirmative action programs, however, depend on such categories in order to remedy years of discrimination and institutionalized prejudice. Because affirmative action programs categorize people by race or gender, the Equal Protection Clause of the federal Constitution has been used to strike down some affirmative action programs as illegally discriminatory.[63] Surprisingly, few affirmative action programs have been challenged under state constitutions. California has found that an affirmative action program in the Department of Corrections did not violate the equal rights provision of its state constitution,[64] but the state later amended its constitution to specifically prohibit any affirmative action by state actors.[65] Washington used an alternative approach to reconcile equal rights and affirmative action by holding that affirmative action programs do not implicate the state's ERA so long as the law favoring one gender is intended solely to ameliorate the effects of past discrimination.[66]

**Can state constitutions be used to expand reproductive rights?**

Yes, state constitutional ERAs can be a source of expanded protections for reproductive rights, as detailed in chapter 6, "Reproductive Freedom." As that chapter notes, state constitutional protections for privacy, liberty, and ERAs can all be sources of expanded rights, where the courts are willing to see their state constitutional protections as independent of the federal Constitution.

**Can ERAs be used in other forms of advocacy besides litigation?**

Yes. In some states the passage of the ERA spurred the state legislature to reform state laws to make sure they conformed with the requirements of the ERA. For example, after the ERA was enacted in New Mexico, the legislature established an equal rights committee that reviewed all New Mexico laws and recommended revisions to eliminate discriminatory provisions. Most of the recommendations were eventually adopted.[67]

Furthermore, the presence of an equal rights amendment in a state can be a valuable tool in legislative and administrative advocacy. For example, the women's coalition in Montana, the first (and so far only) state to pass a law prohibiting gender-based insurance rates, used that state's Equal Rights

Amendment as one of the policy reasons why the legislation should be adopted.

State court interpretations of state constitutional provisions may influence other states.[68] For instance, Vermont cited Oregon's interpretation of its constitutional prohibition of gender discrimination when deciding that Vermont's constitution required a high strict scrutiny standard of review for gender distinctions.[69]

State courts' interpretations of their constitutions may also influence the federal judiciary in its interpretation of the U.S. Constitution.[70] For instance, California's adoption of strict scrutiny review for gender classifications in 1971 is considered to be one of the decisions that led the way for the U.S. Supreme Court to begin invalidating laws that discriminated on the basis of gender.[71]

As more states enact their own equal rights amendments and their courts use a higher level of review for gender-based discrimination, federal courts, including the Supreme Court, may feel some pressure to improve the constitutional protections afforded to women. In the absence of a federal Equal Rights Amendment, this may be the best alternative to ensure equality for women across the country.

## Constitutional Limits on Antidiscrimination Laws

**Other than the Equal Protection Clause, what other constitutional provisions affect women's rights and women's equality?**

The Equal Protection Clause is not the only constitutional provision that affects women's rights. The right to privacy is derived from several constitutional amendments and has been used to establish women's rights to decide when and if to have a child, use birth control, and choose an abortion, and thus control their own bodies.[72] See chapter 6, "Reproductive Freedom." The Nineteenth Amendment guarantees a woman's right to vote. Additionally, the Due Process Clause of the Fourteenth Amendment, which says that no person may be deprived of life, liberty, or property without due process of law, may also be used to protect women against discrimination in some situations. For example, this provision has been used to invalidate mandatory leave policies for pregnant women.[73]

In recent years, however, the Supreme Court has made clear that while the Constitution can be an important weapon to fight discrimination against

women, it can also be used to invalidate federal laws meant to promote women's equality. Several Supreme Court cases have held that under the Eleventh Amendment of the Constitution, states cannot be sued under various federal antidiscrimination laws. The text of the Eleventh Amendment states that federal courts cannot hear cases brought against a state by citizens of another state or a foreign country, but over the years, many judges have interpreted it more broadly to mean that states cannot be sued by anyone in federal court or under federal law without their consent, with a few important exceptions. One of these exceptions occurs when the federal law is directed at remedying and preventing discrimination that violates the Equal Protection Clause. In such a circumstance, the federal law may be enforced against a state without its consent, if Congress is clear about its intention to do so and the remedy against the state is proportional to the discrimination the law addresses. So far, however, the Supreme Court has held that state employees cannot sue their employer for damages under the Age Discrimination in Employment Act or the employment discrimination provisions of Title I of the Americans with Disabilities Act.[74]

Fortunately, laws designed to remedy discrimination against women have fared somewhat better. In 2003, the Supreme Court decided that state employees denied their rights to take leave to care for family members under the Family and Medical Leave Act (FMLA) could sue the state for money damages.[75] This was an important decision that reaffirmed Congress's power to design laws addressing discrimination at the state level and the federal level and ensured that some victims of discrimination could still have their day in court.

In *Nevada Department of Human Resources v. Hibbs*, the Court acknowledged that the FMLA was passed with the recognition that the burdens of caring for infants and for sick family members fall disproportionately on women, making it more difficult for them to succeed in the workforce. It reasoned that the FMLA attempted to address this reality by protecting the jobs of individuals who needed time off work to tend to certain family responsibilities, and by ensuring that such leave was available to men as well as to women. The Court then went on to hold that the federal court remedy was an appropriate exercise of congressional power given evidence of the persistence of the stereotypes among employers that caregiving was a woman's responsibility, not a man's, and the accompanying discrimination, in spite of previous attempts to address sex discrimination through Title VII of the Civil Rights Act and the Pregnancy Discrimination Act. With this decision, the rights of state employees to enforce the FMLA and certain

other laws seeking to ensure that state employers treat their employees in a nondiscriminatory way have been preserved.

**Are there other constitutional limits on federal laws meant to promote women's equality?**

Yes. The federal government is a government of limited powers. This means that Congress can only pass a law if the Constitution specifically gives it the power to do so. The Equal Protection Clause, as mentioned above, is one provision often interpreted to allow legislation affecting state practices. The Commerce Clause,[76] which gives Congress the power to pass laws regulating interstate commerce, has also been used to provide the authority for many different kinds of legislation on issues affecting the economy and thus, by extension, interstate commerce. Antidiscrimination laws such as Title VII of the Civil Rights Act of 1964 were enacted under Congress's Commerce Clause power.

In the 1990s, however, for the first time in over fifty years, a bare majority of the Supreme Court began to strike down some federal legislation as exceeding Congress's powers under the Commerce Clause.[77] This new trend in jurisprudence has limited to some extent the federal government's power to pass many sorts of social legislation. For instance, in 2000 the Supreme Court invalidated a portion of the federal Violence Against Women Act (VAWA), a decision of great concern to women's rights advocates throughout the country.

The VAWA,[78] passed in 1994 and reauthorized in 2005, stated that individuals had a civil right to be free from gender-motivated violence[79] and provided a means for victims of such violence, most often women, to go to court to seek damages from their attackers. In *United States v. Morrison,*[80] the Supreme Court held that the VAWA civil rights remedy was simply beyond Congress's powers and therefore unconstitutional. Even after noting that Congress had made extensive findings as to the economic costs of violence against women, the Court held that gender-motivated violence did not substantially affect interstate commerce, and thus the Commerce Clause did not give Congress the power to pass laws on the subject. The Court also reasoned that questions of violence and of family law, like that addressed by the VAWA civil rights remedy, were "truly local" and inappropriate subjects of federal legislation.

This case remains disturbing for women's advocates, for it limits the power of the federal government, which has traditionally been the protector

of civil rights in this country. By categorizing matters related to the family as "truly local" and suggesting that the federal government has no power to legislate in these areas, the Supreme Court may be cordoning off from federal law issues that are very important to women's equality, such as domestic violence.

## Notes

1. *See, e.g.,* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
2. Stanton v. Stanton, 421 U.S. 7 (1975).
3. The decision might violate other laws. See chapter 4, "Education," for a discussion of Title IX of the Education Amendments of 1972.
4. Kirstein v. Rector & Visitors of Univ. of Va., 309 F. Supp. 184 (1970).
5. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979), *remanded to* 475 F. Supp. 109 (D. Mass. 1979), *aff'd,* 445 U.S. 901 (1980).
6. Such actions or laws may violate other federal laws, but not the Constitution. See chapter 2, "Employment," and chapter 4, "Education."
7. *Feeney*, 442 U.S. at 281.
8. FCC v. Beach Commc'ns, 508 U.S. 307 (1993) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . [A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").
9. Jimenez v. Weinberger, 417 U.S. 628 (1974) (equal protection clause is violated by discriminatory laws relating to the status of birth where classification is justified by no legitimate state interest, compelling or otherwise).
10. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) ("bare congressional desire to harm a politically unpopular group [in this case "hippies"] cannot constitute a legitimate governmental interest" such as will sustain a legislative classification against an equal protection challenge).
11. Romer v. Evans, 517 U.S. 620 (1996); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (using the rational basis test to strike down a zoning ordinance that required special use permits for group homes for the mentally retarded, when the requirement appeared to rest solely on an irrational bias against the mentally retarded).
12. McLaughlin v. Florida, 379 U.S. 184 (1964).
13. 429 U.S. 190 (1976).
14. 518 U.S. 515 (1996).

15. Frontiero v. Richardson, 411 U.S. 677 (1973). The Court invalidated the requirement that women in the military prove their husbands' dependency in order to get medical and housing benefits, while men received them automatically for their wives. The decision's sweeping language—"women's legal status was once like that of slaves"; "romantic paternalism" has "put women not on a pedestal, but in a cage"—should have added to its impact but was never accepted by the full Court.

16. *Id.* at 692 (Powell, J., concurring).

17. *See, e.g.*, Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53 (2001) (finding reasons to differentiate citizenship requirements for children born abroad to unmarried male and female citizens); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding California statutory rape law criminalizing sex with underage girls, but not underage boys).

18. City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

19. 515 U.S. 200 (1995).

20. Vogel v. Cincinnati, 959 F.2d 594, 599 (6th Cir. 1992) (applying strict scrutiny to a program designed to remedy both race and gender discrimination).

21. Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (finding two levels of review: one for race and one for gender).

22. 417 U.S. 484 (1974).

23. It is less clear how the Court would rule on a state law that specifically burdens pregnant women, as opposed to one that denies them a benefit. Even if such a law were held not to violate the Equal Protection Clause, in certain circumstances it might still violate the Constitution. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Supreme Court held that a school board violated the Due Process Clause of the Fourteenth Amendment when it required all pregnant school teachers to take unpaid maternity leave beginning in their fifth month of pregnancy because such a requirement arbitrarily burdened exercise of fundamental decisions about having a family. Other burdens imposed only on pregnant women might also constitute Due Process Clause violations.

24. Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Oregon, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

25. *See, e.g.,* Colo. Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1988) (en banc) ("This constitutional provision . . . requires that legislative classifications based exclusively on sexual status receive the closest judicial scrutiny."); State v. Burning Tree Club, Inc., 554 A.2d 366 (Md. 1989); *see also* Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 840 (Md. 1985); Rand v. Rand, 374 A.2d 900, 903 (Md. 1977); Hewitt v. State Accident Ins. Fund Corp. (*In re* Williams), 653 P.2d 970, 977–78 (Ore. 1982); Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (per curiam); Darrin v. Gould, 540 P.2d 882, 888 (Wash. 1975).

26. *Henderson*, 327 A.2d at 62.

27. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539–41 (Cal. 1971); Paige v. Welfare Comm'r, 365 A.2d 1118 (Conn. 1976); Baehr v. Lewin, 852 P.2d 44, 67–68 (Haw. 1993), *reconsideration granted in part* 875 P.2d 225 (Haw. 1993), *superseded by constitutional amendment* Haw. Const. art. I, § 23; People v. Ellis, 311 N.E.2d 98 (Ill. 1974); Att'y Gen. v. Mass. Interscholastic Athletic Assn, Inc., 393 N.E.2d 284 (Mass. 1979); Buckner v. Buckner, 415 A.2d 871 (N.H. 1980); In Interest of McLean, 725 S.W.2d 696, 698 (Tex. 1987); Baker v. State, 744 A.2d 864 (Vt. 1999).

28. Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980); *see also McLean*, 725 S.W.2d at 698 ("Our reading of the Equal Rights Amendment elevates gender to a suspect classification.").

29. *Baker*, 744 A.2d at 864.

30. La. Const. art I, § 3 (2005) ("No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, gender, culture, physical condition, or political ideas or affiliations.").

31. Pace v. State, 648 So.2d 1302, 1305 (La. 1995) (finding a classification on the basis of gender unconstitutional unless that classification "substantially furthers an important government objective").

32. Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 357 (Alaska 1988).

33. Archer v. Mayes, 194 S.E.2d 707, 710 (Va. 1973) (holding that equal protection provision under Virginia state constitution is no broader than the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution); Schilling v. Bedford City Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983).

34. Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1312–14 (Mont. 1986), *superseded by amendment as stated in* Zempel v. Uninsured Employers' Fund, 938 P.2d 658 (Mont. 1997); *see also* Arneson v. State, 864 P.2d 1245, 1247 (Mont. 1993) (discussing state's intermediate scrutiny test).

35. Marrujo v. N.M. Highway Transp. Dep't, 887 P.2d 747, 751 (N.M. 1994).

36. N.M. Const., art. 2, § 18 (2006).

37. *In re* Scheller v. Pessetto, 783 P.2d 70, 76 (Utah Ct. App. 1989) (citing Pusey v. Pusey, 728 P.2d 117 (Utah 1986)).

38. *See* Ward Terry & Co. v. Henson, 297 P.2d 213, 215 (Wyo. 1956) (defining civil rights covered by the Wyoming ERA); Johnson v. State Hearing Exam'rs Office, 838 P.2d 158, 164–67 (Wyo. 1992) (discussing the various levels of review); *see also* Paul Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?* 70 Temple L. Rev. 907, 911–15 (1997) (discussing state standards of review).

39. *See generally* Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 Yale L. & Pol'y Rev. 144, 149–50 (1984) [hereinafter Avner, *Some Observations*]; Majorie Heins, *The Marketplace and the World of Ideas: A Substitute for State*

*Action as a Limiting Principle under the Massachusetts Equal Rights Amendment*, 18 Suffolk U. L. Rev. 347 (1984).

40. Ill. Const. art. I, § 18 (2006).

41. Ill. Const. art. I, § 17 (2006).

42. Mont. Const. art. II, § 4 (2005).

43. Bartholomew *ex rel.* Bartholomew v. Foster, 541 A.2d 393, 396 (Pa Commw. Ct. 1988) (concluding that the Pennsylvania ERA has no state action requirement).

44. O'Connell v. Chasdi, 511 N.E.2d 349 (Mass. 1987).

45. Rojo v. Kliger, 801 P.2d 373, 388 (Cal. 1990).

46. *Colo. Civil Rights Comm'n*, 759 P.2d at 1358 (finding private employer and insurance company discriminated on basis of sex in violation of state equal rights amendment and discrimination statute).

47. *See, e.g.*, Burning Tree Club v. Bainum, 554 A.2d at 822; *Darrin*, 540 P.2d at 891 (finding state action because the interscholastic sports system used public funds); Hartford Accident & Indemn. Co. v. Ins. Comm'r, 482 A.2d 542, 549 (Pa. 1984). There are strong policy reasons why a state constitutional provision might be interpreted to prohibit more private discrimination than the federal Constitution. The federal state action doctrine is based in part on federalism concerns and is narrowly construed to protect the states' traditional jurisdiction over private actions. That rationale is arguably irrelevant to the interpretation of a state constitution. *See* Laurence H. Tribe, American Constitutional Law 1691 (1988).

48. One scholar has persuasively argued that all state ERAs should apply to intentional and unintentional types of discrimination. In support of her position, she points to the fact that commissions established by states to ensure statutory compliance with constitutional equal rights provisions have defined the scope of their mandate to include facially neutral laws that have a potentially discriminatory impact. *See* Phyllis Segal, *Sexual Equality, the Equal Protection Clause, and the ERA,* 33 Buff. L. Rev. 85 (1984). For examples of cases where disparate impact theory has to date been unsuccessful *see, e.g.,* Commonwealth v. King, 372 N.E.2d 196 (Mass. 1997) (rejecting equal protection challenge to prostitution statute based on argument that most prostitutes are female); Wendt v. Wendt, 757 A.2d 1225 (Conn. App. Ct. 2000) (establishing an equal protection challenge requires a showing of intentional or purposeful discrimination); *see generally* William C. Duncan, *"The Mere Allusion to Gender": Answering the Charge That Marriage Is Sex Discrimination*, 46 St. Louis U. L.J. 963, 968–70 (2002) (discussing equal protection caselaw and theory).

49. E.g., Snider v. Thornburgh, 436 A.2d 593, 601 (Pa. 1981).

50. Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 447 (Ore. Ct. App. 1988) (regarding denial of insurance policies to same-gender couples).

51. Phelps v. Bing, 316 N.E.2d 775 (Ill. 1974).

52. George v. George, 409 A.2d 1 (Pa. 1979).

53. DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975).

54. Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682 (Pa. Com. Pl. 1983). This case illustrates the usefulness of a state ERA as the same admissions policy at the same school had been unsuccessfully challenged previously under the federal Equal Protection Clause. Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

55. Commonwealth v. Pa. Interscholastic Athletic Ass'n., 334 A.2d 839 (Pa. Commw. Ct. 1975).

56. Blair v. Wash. State Univ., 740 P.2d 1379 (Wash. 1987).

57. Bartholomew *ex rel.* Bartholomew v. Foster, 563 A.2d 1390 (Pa. 1989).

58. *Colo. Civil Rights Comm'n*, 759 P.2d at 1358.

59. Hawthorne v. Kintock Group, No. 99 Civ. 3763 (GDH), 2000 WL 199356 (E.D. Pa. Feb 14, 2000).

60. Chance v. Harrison, 899 P.2d 537 (Mont. 1995).

61. Turner v. State, 474 A.2d 1297 (Md. 1984) (invalidating prohibition on female "sitters" at bars).

62. Hardy v. Stumpf, 112 Cal. Rptr. 739 (Cal. Ct. App. 1974) (invalidating height and weight requirements for the Police Department); Badih v. Myers, 43 Cal. Rptr.2d 229 (Cal. Ct. App. 1995), *review denied* Oct. 19, 1995.

63. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *Croson*, 488 U.S. 469; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

64. Minnick v. Dep't of Corr., 157 Cal.Rptr. 260 (Cal. App. Ct. 1979).

65. Cal. Const., art. I, § 31 (Known as Proposition 209, its name under state referendum, it states that "the state shall not discriminate against, or give preferential treatment to, any individual group on the basis of race, gender, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

66. Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092 (Wash. 1983) (en banc).

67. *See* Avner, *Some Observations*, *supra* note 39 at 146 n.8.

68. *See Baker*, 744 A.2d at 878 n.10 (citing Oregon's standard of review in Hewitt).

69. *See Baker*, 744 A.2d at 892 (Dooley, J., concurring).

70. *Craig,* 429 U.S. at 208 (discussing different states' review of gender discrimination when shifting from rational basis review to intermediate scrutiny).

71. *Id.* (citing *Sail'er Inn v. Kirby*, 485 P.2d at 539 (striking down a provision of the state's business and professional code that prohibited the hiring of women as bartenders under strict scrutiny review)).

72. Roe v. Wade, 410 U.S. 113 (1973); *see generally* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330 (1985); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade,* 63 N.C.L. Rev. 375 (1985).

73. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (finding mandatory leave policies for pregnant women unconstitutional under the Due Process Clause of the Fourteenth Amendment); *see also* T. B. DeLouth, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 Berkeley Women's L.J. 96 (1999) (discussing due process concerns as relating to the criminalization of substance abuse while pregnant).

74. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

75. Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003).

76. U.S. Const, art. I, § 8 (2006).

77. United States v. Lopez, 514 U.S. 549 (1995).

78. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 20, 28, and 42 U.S.C.).

79. 42 U.S.C.A. § 13981 (2005).

80. 529 U.S. 598 (2000).