SEX DISCRIMINATION AND STATE CONSTITUTIONS: STATE PATHWAYS THROUGH FEDERAL ROADBLOCKS

INTRODUCTION

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things. . . .[1]
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> —Concurring opinion, Supreme Court of the United States, 1873

> But at the present day our fundamental law has changed the institutions of this country from "the old law" to a new basis more in conformity with humanity and a purer sense of right. According to our [state] constitution, "all men are created equal"; and the word "man" includes persons of both sexes. Then, the wife is the peer and equal of her husband in all her great rights of life, liberty and the pursuit of happiness.[2]
>
> —Supreme Court of Alabama, 1871

It is easy to forget that federal courts and federal laws have not long been friends and protectors of women. The strides made by women under the protective wing of Title VII[3] may blind one to the fact that discrimination on the basis of sex was added to that statute's list of prohibitions by the law's opponents in an effort to trivialize and destroy it.[4] The victories won by sex discrimination plaintiffs in federal court, in general, overshadow the serious limitations placed on such actions by the Supreme Court. The Court, for example, applied a rational basis test to fourteenth amendment sex discrimination claims as late as 1971,[5] and the full court has yet to recognize sex as a suspect class.[6]

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1. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).
2. O'Neal v. Robinson, 45 Ala. 526, 534 (1871).
3. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).
4. See 110 Cong. Rec. 2577-78 (1964) (introduction of the word "sex" into Title VII moved by Representative Smith, opponent of the Act; colloquy between Smith and Representative Cellar, supporter of the Act); see also id. at 2581, 2584 (remarks of Representative Green).
5. Reed v. Reed, 404 U.S. 71 (1971).
6. The closest it came was in the case of Frontiero v. Richardson, 411 U.S. 677, 682 (1973), when a plurality of four Justices was ready to accord strict scrutiny status to distinctions based on sex. The next year, however, the Court backed away from this construction, applying instead an intermediate test under which a sex-based classification is valid if it is substantially related to the achievement of an important governmental objective. Craig v. Boren, 429 U.S. 190, 197 (1976). See also Aiken, Differentiating Sex From *Sex*: The Male Irresistible Impulse,

And there are signs that federal commitment to women's rights is weakening, still further. Retrenchment in the Supreme Court is seen in the failure to accept pregnancy as a sex-based classification,[7] the decision to permit Congress to ban Medicaid payments for abortions,[8] the objections to affirmative action programs,[9] and even a return to paternalistic notions of the need to protect women from men's bestial nature as grounds for denying women employment.[10] The recent failure to ratify the Equal Rights Amendment (ERA) has already fueled this retrenchment. At least one Supreme Court Justice has stated that any decision on the Court's treatment of fourteenth amendment sex discrimination claims should await ratification or failure of the ERA.[11] Thus, it seems likely that some members of the Court will use the non-ratification of this proposed amendment as a justification for further retrenchment.

Although the news from the federal "front" is not uniformly dismal,[12] even the most optimistic federal observer must acknowledge that an alternate source of protection for equal rights should be considered by today's sex discrimination claimant. Many such claimants ignore the oldest[13] American safeguards of civil rights—the state constitutions and the state courts.

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12 N.Y.U. Rev. L. & Soc. Change 357, 373-75 (1984), discussing use of the intermediate standard in Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981). See generally, Emden, Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths, 43 Alb. L. Rev. 73 (1978); Ginsburg, From No Right to Half Rights to Confusing Rights, 7 Hum. Rts. 12 (1978); Note, The Search for a Standard of Review in Sex Discrimination Questions, 14 Hous. L. Rev. 721 (1977); text accompanying notes 122-29 infra.

7. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (pregnancy discrimination not sex discrimination for equal protection purposes); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (pregnancy discrimination not sex discrimination for Title VII purposes). *Gilbert* was legislatively overruled in 1978 by the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

8. Harris v. MacRae, 448 U.S. 297 (1980).

9. University of Cal. v. Bakke, 438 U.S. 265 (1978). *Bakke*, a leading affirmative action case, dealt with a race-based program. But see id. at 302-03, where Justice Powell indicates that sex-based affirmative action programs may be more likely to withstand judicial scrutiny than are race-based programs.

10. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (Sex is a bona fide occupational qualification for Alabama state prison guards because of the "real risk that . . . inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.").

11. In his concurrence in *Frontiero*, 411 U.S. at 691-92, Justice Powell questioned the wisdom of deciding which equal protection test to apply to sex discrimination cases while "this precise question" was before the American public "in the form of the Equal Rights Amendment." This opinion does not bode well for sex discrimination plaintiffs in light of the recent expiration of the ERA, and it is clearly erroneous. The present analysis of sex discrimination claims under the fourteenth amendment is unrelated to any possible subsequent amendment to the Constitution. If sex is an immutable characteristic, if it is used to discriminate among persons, and if it is unconnected to ability, then it has met the requisites of a suspect class regardless of the passage or defeat of the ERA. To await a kind of national referendum on the issue of sex as a suspect class is to abdicate the Supreme Court's role, laid out in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as final arbiter of the meaning of the Constitution.

12. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1983) (single sex state university violates equal protection); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (employer may not require pregnant employees to take formal leaves of absence).

13. See B. Schwartz, The Roots of the Bill of Rights (1980); Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 380-82 (1980).

Recently, many commentators have called upon all civil rights litigants to assert their state constitutional claims in state court, either in lieu of or in conjunction with any federal claims they may have.[14] Some commentators believe state constitutions form the first line of civil rights defense.[15] Others are motivated by the retrenchment of the Burger Court in various areas of personal liberties.[16] Despite these differences in emphasis, however, both sets of commentators agree that civil rights and criminal defense attorneys rarely take advantage of the possibilities offered by state constitutional protection, and seem unaware that such protections exist.[17]

This Note will show that state courts can offer detours around some of the worst barriers to federal litigation[18] and seek to show how a practitioner can structure an argument convincing a state court to develop such a detour. This Note is limited to those issues which would arise under a federal equal protection claim.[19]

The Note first examines various state equal protection provisions and their roots, and then analyzes four specific barriers faced by federal equal protection claimants—the state action requirement, the failure to recognize challenges to facially neutral statutes, the lower standard of scrutiny for sex discrimination cases, and the federal adherence to stereotypes of women. The Note identifies the major state responses to these barriers, along with innovative and progressive resolutions. Finally, the Note examines various theories state courts have used to justify breaking with federal interpretive norms, and

14. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Douglas, State Judicial Activism—The New Role for State Bills of Rights, 12 Suffolk U.L. Rev. 1123 (1978); Linde, supra note 13.

15. See Linde, supra note 13, at 380-82.

16. See Brennan, supra note 14; Douglas, supra note 14.

17. See Linde, supra note 13, at 387-92.

18. The limits of Supreme Court jurisdiction over constitutional cases decided by state courts and the application of the independent state grounds doctrine are beyond the scope of this Note. See generally Peterkort, The Conflict between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions, 32 Case W. Res. 158 (1981) for a background on this issue; for our purposes, it will be assumed that the substantive guarantees outlined will be implemented free of Supreme Court review.

19. State constitutions offer various protections against sex-based discrimination which are not analogous to a federal equal protection clause shield and are thus beyond the scope of this Note. For example, state privacy clauses are often explicit, see, e.g., Alaska Const. art. I, § 22, rather than drawing the right to privacy from a penumbra of rights implicitly created by a variety of provisions, Griswold v. Connecticut, 381 U.S. 479 (1965). Their separate status provides an excellent argument for extending their protection beyond that provided by the federal privacy right. "Since the citizens of Alaska . . . enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution." Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975). Such provisions might thus be useful in attacking discrimination based on sexual preference. Cf. In re P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (1977), rev'd sub nom. In re Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979) (striking down prohibition of consensual sodomy on the basis of New York's penumbra-derived right of privacy); State v. Bateman, 113 Ariz. 107, 111-12, 547 P.2d 6, 10-11, cert. denied, 429 U.S. 864 (1976). (Gordon, J., dissenting, argued that the federal right of privacy invalidates a ban on consensual sodomy, but failed even to mention the separate state privacy clause).

how those theories can be used by the advocate to spur separate state analysis of equal protection claims. It is hoped that this will encourage advocates to make greater use of the state courts.

I
STATE EQUAL PROTECTION PROVISIONS

The thirteen[20] original state constitutions served as models for the drafters of the federal Bill of Rights.[21] Many provisions of the original federal Constitution, and of the federal Bill of Rights,[22] closely parallel comparable state provisions.[23] The first ten federal amendments were designed to protect on the federal level what it was assumed the states would continue to protect at the state level.[24] State constitutions were considered, even by the drafters of the federal Bill of Rights, to be the primary protectors of individual rights. As new states entered the Union, they met this responsibility of state government by adopting similar provisions.[25]

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20. In May of 1776, the Continental Congress called upon each colony to provide a constitutional framework for a functioning government as preparation for independence. Seven states subsequently adopted separate declarations of rights as prefaces to their own constitutions. See (in chronological order of adoption) Virginia Declaration of Rights (Va. 1776); Pennsylvania Declaration of Rights (Pa. 1776); Delaware Declaration of Rights (Del. 1776); Maryland Declaration of Rights (Md. 1776); North Carolina Declaration of Rights (N.C. 1776); Massachusetts Declaration of Rights (Mass. 1780); New Hampshire Bill of Rights (N.H. 1783). Four more states incorporated guarantees of fundamental rights into their new state constitutions, although they did not embody these guarantees in a separate declaration. See N.J. Const. of 1776, arts. XXII, XVI, XVIII, XIX, XXII; Ga. Const. of 1777, arts. XXXIX, LVI, LIX, LX, LXI; N.Y. Const. of 1777, arts. XXXVIII, XL, XLI, XLII. Connecticut did not at this time adopt a written constitution, but it did enact a continuation of its colonial charter, and with it, a separate enumeration of rights. Connecticut Declaration of Rights (Conn. 1776). Rhode Island, alone of the thirteen original states, adopted neither a written constitution nor a declaration of rights, thus leaving the total number of colonial documents guaranteeing individual rights at twelve. However, Vermont, though not an original state, in 1777 enacted a declaration of rights which would later serve as part its first constitution. Vermont Declaration of Rights (Vt. 1777). Thus, the framers of the federal Bill of Rights had thirteen colonial models from which to draw. See B. Schwartz, The Roots of the Bill of Rights 231-36 (Va.), 256-61 (N.J.), 262-75 (Pa.), 276-78 (Del.), 279-85 (Md.), 286-88 (N.C.), 289-90 (Conn.), 291-300 (Ga.), 301-13 (N.Y.), 319-24 (Vt.), 325-36 (S.C.), 337-44 (Mass.), 374-79 (N.H.) (1980).

21. See B. Schwartz, supra note 20, at 231-50, 256-314, 319-79.

22. U.S. Const. amends. I to X.

23. E.g., compare U.S. Const. amend. IV with Ala. Const. art. I, § 5; Cal. Const. art. I, § 13; Fla. Const. art. I, § 12; Hawaii Const. art. I, § 7; La. Const. art. I, § 5; Me. Const. art. I, § 5; Minn. Const. art. I, § 10; Mo. Const. art. I, § 15; R.I. Const. art. I, § 6; S.C. Const. art. I, § 10. See generally Brennan, The Bill of Rights and the States, in The Great Rights 65 (E. Cahn ed. 1963).

24. This division of federal and state authority may be blurred to the modern reader who lives in a post-fourteenth amendment world. For a view of this separation through the eyes of a pre-fourteenth amendment scholar, see J. Jameson, The Constitutional Convention: Its History, Powers, and Modes of Proceeding §§ 90-99, at 86-94 (1866).

25. Compare declarations and constitutional provisions cited note 20 supra with Ala. Const. of 1819, art. I; Ill. Const. of 1818, art. VIII; Ind. Const. of 1816, art. I; Iowa Const. of 1846, art. I; Kan. Const. of 1859, Bill of Rights; Ky. Const. of 1792, art. XII; Me. Const. of 1819, art. I; Mich. Const. of 1835, art. I; Minn. Const. of 1857, art. I; Mo. Const. of 1820, art.

The federal equal protection clause, in contrast, is a child of post-Civil War mistrust of state autonomy. State constitutions were deliberately bypassed as the primary level of civil rights protection. The equal protection clause (and the Civil War amendments[26] in general) did not seek to duplicate for federal jurisdiction those provisions already enshrined in state constitutions. Instead, the equal protection clause was designed to fill actual or perceived gaps in the states' commitment to the protection of individual liberties.

Despite its federal origin, the equal protection clause has led to various state analogs. Whether through constitutional amendment[27] or through new judicial interpretations of existing statutory or constitutional provisions,[28] the states gradually incorporated the mandate of equal protection into their constitutions. This incorporation reflected the post-Civil War recognition that equal protection of the laws is a fundamental facet of liberty, and the pre-Revolutionary War view that the states are the vanguard in the protection of individual liberties. The patchwork nature of this effort, however, resulted in variation among state constitutional equal protection provisions.

Provisions in state constitutions protecting equality of the laws fall roughly into four categories.[29] First and most familiar are clauses which affirmatively prohibit interference with the civil rights of any individual.[30] For example, the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws."[31] Such clauses most clearly resemble the federal model.

A number of states rest their protection of legal equality on provisions which enumerate the civil rights to which every citizen[32] is entitled but do not

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XIII; Ohio Const. of 1802, art. VIII; Tenn. Const. of 1796, art. XI; Tex. Const. of 1845, art. I; W. Va. Const. of 1872, art. III, § 1; Wis. Const. of 1848, art. I.

26. U.S. Const. amends. XIII, XIV, IV.

27. E.g., Ala. Const. of 1819, art. I.

28. E.g., Howard Sports Daily, Inc. v. Pub. Serv. Comm'n, 179 Md. 355, 358, 18 A.2d 210 213 (1941).

29. It should be noted, however, that some states fall into more than one category. See, e.g., Iowa Const. art. I, §§ 1, 6. (Section I is rights-enumerative, while § 6 is a prohibition on special privileges).

30. Conn. Const. art. I, § 20; Fla. Const. art. I, § 2 (arguably fits both first and second categories); Ga. Const. art. I, § 1, ¶ 2; Hawaii Const. art. I, § 5; Ill. Const. art. I, § 2; La. Const. art. I, § 3; Me. Const. art. I, § 6-A; Md. Const. Declaration of Rights, art. 46 (applies equal protection specifically to women); Mass. Const. pt. 1, art. 1 (arguably fits third category); Mich. Const. art. I, § 2; Minn. Const. art. I, § 2; Mont. Const. art. II, § 4; N.J. Const. art. I, ¶ 5; N.M. Const. art. II, § 18; N.Y. Const. art. I, § 11; Pa. Const. art. I, § 26; S.C. Const. art. I, § 3; W. Va. Const. art. III, § 1 (arguably fits second or third categories); Wyo. Const. art. I, § 3.

31. Ill. Const. art. I, § 2.

32. Most of the older of such provisions specify that the enumerated rights belong to each "man." See, e.g., Ill. Const. art. I, § 1; Iowa Const. art. I, § 1; Nev. Const. art. I, § 1. More recent provisions, however, enumerate the rights of "persons," e.g., Alaska Const. art. I, § 1; Neb. Const. art. I, § 1, or "members of the human race," Wyo. Const. art. I, § 2, or couple the enumeration with a clause making the terms "person" or "persons" include both sexes, e.g., N.J. Const. art. X, ¶ 4.

by their terms prohibit interference with those rights.[33] An example of these "rights-enumerating" provisions is the Colorado Constitution, which declares that "[a]ll persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."[34] The mandatory force of such provisions generally results from judicial interpretation.[35] However, the California Constitution contains a clause which expressly makes all its provisions both mandatory and prohibitory.[36]

The third group of provisions which have been interpreted to provide equal protection prohibits the grant of special privileges to any citizen or group of citizens.[37] The Constitution of the State of Arizona states that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."[38] These "special emoluments" provisions, unlike the previous clauses, have no federal counterparts. Nonetheless, because these provisions are both inherently mandatory and prohibitory, they are closer to the federal equal protection clause than the rights-enumerating clauses. It is but a small semantic shift to read a prohibition of special privileges as a prohibition of special burdens or exclusions.

Finally, state courts have read equal protection guarantees into state due process clauses.[39] The Supreme Court of West Virginia has recognized an "equal protection component" in its state's due process guarantee,[40] which states that "[n]o person shall be deprived of life, liberty or property without

33. Ala. Const. art. 1, § 1; Alaska Const. art. I, § 1; Colo. Const. art. II, § 3; Idaho Const. art. I, § 1; Ill. Const. art. I, § 1; Iowa Const. art. I, § 1; Kan. Const. Bill of Rights, § 1; Me. Const. art. I, § 1; Neb. Const. art. I, § 1; Nev. Const. art. I, § 1; N.H. Const. pt. 1, art. 2; N.C. Const. art. I, § 1; Ohio Const. art. 1, § 1; Okla. Const. art. II, § 2; Or. Const. art 1, § 1; Pa. Const. art. I, § 1; R.I. Const. art I, § 2; Vt. Const. ch. I, art. 1; Va. Const. art. I, § 1; Wis. Const. art. I, § 1; Wyo. Const. art. I, § 2.

34. Colo. Const. art. II, § 3.

35. See, e.g., Picerne v. Diprete, — R.I.—, 428 A.2d 1074 (1981) (*sub silentio* utilizing rights-enumerative clause as equal protection clause).

36. Calif. Const. art. I, § 26.

37. These provisions are known as special emoluments provisions.

38. Ariz. Const. art. 2, § 13. Arizona, like California, adds a clause making this provision of its constitution mandatory. Ariz. Const. art. 2, § 32. See also, Cal. Const. art. I, § 7(b); Conn. Const. art. I, § 1; Ind. Const. art. I, § 23; Iowa Const. art. I, § 6; Ky. Const. Bill of Rights, § 3; N.D. Const. art. I, § 21; Ohio Const. art. I, § 2; Or. Const. art. I, § 20; S.D. Const. art. VI, § 18; Tex. Const. art. I, § 3; Wash. Const. art. I, § 12.

39. See, e.g., State ex rel. Harris v. Calendine, 233 S.E.2d 318, 324 (W. Va. 1977) (construing W. Va. Const. art. III, § 10); see also *Howard Sports Daily, Inc.*, 179 Md. at 358, 18 A.2d at 213 (construing Md. Const. Declaration of Rights, art. 23 and U.S. Const. amend XIV); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 261 Md. 585, 600, 276 A.2d 200, 208 (1971) (same). Mississippi and Nevada have due process clauses, but lack equal protection clauses, Miss. Const. art. III, § 14 and Nev. Const. art. I, § 8, and courts in these states have never ruled on whether the due process clause incorporates a guarantee of equal protection.

40. *Harris*, 233 S.E.2d at 318.

due process of law and the judgment of his peers."[41] The separate enumeration of due process and equal protection by the drafters of the fourteenth amendment to the federal Constitution would seem to indicate that these guarantees are neither identical nor interchangeable. Yet their conceptual proximity, and perhaps a notion that no action of law can truly be "due" if it contains discriminatory distinctions, have enabled courts to imply one of these guarantees from the explicit provision of the other.

One special category of constitutional equal protection requires separate mention here. Sixteen states have adopted Equal Rights Amendments (ERAs) as part of their constitutions,[42] either by amending their equal protection clauses to specifically prohibit the use of gender as a classifying tool,[43] or by adopting versions of the proposed federal amendment.[44] Regardless of form, state ERAs are particularly well-suited to the sex discrimination claim.[45] They will be considered and discussed along with their generic cousins, the state equal protection clauses, through the remainder of this Note.

While there may have been theoretical differences between the various types of state equal protection provisions when framed,[46] subsequent judicial constructions have removed most distinctions.[47] As a result, in all but a very few states,[48] an advocate will find a basis in the state constitution for an equal

41. W.Va. Const. art. III, § 10.

42. See Alaska Const. art. I, § 3 (1972); Colo. Const. art. 2, § 29 (1972); Conn. Const. art. I, § 20 (1974); Hawaii Const. art. I, § 5 (1972); Ill. Const. art. I, § 18 (1971); Md. Const. Declaration of Rights, art. 46 (1972); Mass. Const. pt. 1, art. I (1976); Mont. Const. art. 2, § 4 (1973); N.H. Const. pt. 1, art. 2 (1974); N.M. Const. art. 2, § 18 (1973); Pa. Const. art. 1, § 28 (1971); Tex. Const. art. 1, § 3(a) (1972); Utah Const. art. 4, § 1 (1896); Va. Const. art. 1, § 11 (1971); Wash. Const. art. 31, § 1 (1972); Wyo. Const. art. 1, §§ 2, 3 and art. 6, § 1 (1890). Ironically, Utah and Wyoming passed their ERAs during the pioneer era (1896 and 1890, respectively) to attract women settlers to the states, yet these provisions remain two of the most underutilized of the state ERAs. See Note, State Equal Rights Amendments: Legislative Reform and Judicial Activism, 4 Women's Rts. L. Rep. 227, 230 n.51 (1978). Furthermore, both Illinois and Virginia, whose state constitutions contain equal rights provisions, have failed to ratify the federal amendment.

43. See, e.g., Alaska Const. art. I, § 3.

44. Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas and Washington.

45. Section I of the House Joint Resolution proposing the federal ERA states: "Equality of rights under law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess., 8 Stat. 1523 (1971).

46. For example, Rhode Island at one point held that its enumeration of rights clause was merely advisory, and did not provide a basis for judicial equal protection review of legislative and executive actions. State v. Kofines, 33 R.I. 211, 240-42, 80 A. 432, 443-44 (1911). But see *Picerne*, — R.I. —, 428 A.2d 1078 (same clause used as mandatory equal protection clause).

47. See, e.g., *Howard Sports Daily, Inc.*, 179 Md. at 358, 18 A.2d at 213 (due process clause); Owen County Burley Tobacco Soc'y v. Brumback, 128 Ky. 137, 146-49, 107 S.W. 710, 713-14 (1908) (special emoluments/privileges provision); State v. Amyot, 119 N.H. 671, 673, 407 A.2d 812, 813 (1979) (non-mandatory enumeration of rights); West Morris Regional Bd. of Educ. v. Sills, 110 N.J. Super. 234, 247, 265 A.2d 162, 169 (Ch. Div. 1970), rev'd, 58 N.J. 464, 279 A.2d 609, cert. denied, 404 U.S. 986 (1971) (mandatory provision worded somewhat differently from federal equal protection clause).

48. Tennessee seems to have no equal protection or quasi-equal protection provision. See also comments on Mississippi and Nevada, note 39 supra.

protection claim.

II
FEDERAL BARRIERS AND STATE PATHWAYS

State constitutions provide detours around the four greatest barriers faced by a federal equal protection claimant: (a) establishing state action, (b) establishing independent evidence of the legislature's discriminatory intent where a statute is facially neutral, (c) overcoming a lenient standard of scrutiny, and (d) dealing with the federal courts' use of perceived economic, physical and cultural differences between men and women sufficient to justify dissimilar treatment.

A. State Action

The fourteenth amendment equal protection clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[49] Since the 1883 landmark decisions in the *Civil Rights Cases*[50] the Supreme Court has limited the constitutional guarantee of equal protection by holding it inapplicable to purely private action. Although modified during the Warren era to encompass a broader notion of state action,[51] the private action exclusion remains a barrier to federal plaintiffs.[52] Absent state involvement, there is no constitutional protection against discrimination.

Legislation passed by Congress to enforce the fourteenth amendment has partially filled the enforcement gap left by the state action doctrine.[53] However, since laws are subject to repeal and changes in enforcement due to political considerations, a law prohibiting private discrimination is no substitute for a constitutional right of action.[54] Also, claimants may be unable to comply with the administrative procedures required by these anti-discrimination

49. U.S. Const. amend. XIV, § 1, cl. 2.

50. 109 U.S. 3 (1883).

51. See Jones v. Mayer, 392 U.S. 409, 413 (1968) (holding that 42 U.S.C. § 1982 barred all racial discrimination, private as well as public, in the sale or rental of property, and that the statute thus construed was a valid exercise of the power of Congress to enforce the thirteenth amendment); United States v. Guest, 383 U.S. 745, 754-57 (1966) (state involvement in a conspiracy need be neither excessive nor direct in order to create rights under the equal protection clause); United States v. Price, 383 U.S. 787, 794 (1966) ("To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents.").

52. State action has been addressed recently in § 1983 actions, and the Court has held that the scope of the doctrine is identical in the § 1983 and equal protection contexts. E.g., Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982). Thus, where state action has served as a barrier to a § 1983 litigant, equal protection claims are similarly endangered. See id.; Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

53. See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-17 (1976) (no discrimination in employment); Equal Pay Act of 1963, 29 U.S.C. § 206 (1976) (no gender discrimination in wages and salaries).

54. This has traditionally been one of the strongest arguments in favor of the federal ERA as well. See H. Kay, Sex-Based Discrimination 162 (2d ed. 1981).

statutes.[55] Finally, the federal government, judiciary, and the federal bureaucracy charged with administering civil rights laws have become more conservative.[56] Thus, while federal statutes provide some protection, they do not negate the serious impact of the state action doctrine on the victim of private discrimination.

State courts are not bound to accept the federal requirement of state action when interpreting their equal protection provisions.[57] Nonetheless, the few states which have directly addressed the issue have followed the federal model;[58] the doctrine may be legitimated by its longevity alone. When state courts consider abandoning the state action doctrine, they often hold that the explicit language of their state constitution mandates acceptance of the state action requirement.[59] Thus, Connecticut courts have incorporated a state action requirement into their equal protection clause because it speaks specifically of the equal protection "of the laws."[60] Similarly, Texas courts have interpreted their state ERA as requiring a showing of state action because it protects equality "under the law."[61] State courts sometimes go to great lengths to find a state action requirement in their state constitution. In *Dorsey v. Stuyvesant Town Corp.*,[62] the New York Court of Appeals severely strained the provisions of the state's equal protection clause in its search for such a requirement. Article I, section II of the New York Constitution reads:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race,

55. Title VII requires that a claimant pursue administrative remedies through the E.E.O.C. before filing suit. 42 U.S.C. § 2000e-5(e) (1976). Some plaintiffs are unable or unwilling to incur the costs of such a procedure. See Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 389 A.2d 465 (1978).

56. An effective, if unorthodox, example of this administrative retrenchment is provided by a television commercial aired under the auspices of the E.E.O.C. In it, Rafael Septien, the great placekicker for the Dallas Cowboys *and a Hispanic*, expresses pride in holding his job because of ability and not because of his ethnic origin. Ostensibly, this is a commercial in favor of equal employment opportunities; in reality it reflects an attack on affirmative action programs.

57. Schreiner v. McKenzie Tank Lines and Risk Management Serv., 408 So. 2d 711, 715 (Fla. Dist. Ct. App. 1982), aff'd, 432 So. 2d 567 (Fla. 1983).

58. Lockwood v. Killian, 172 Conn. 496, 499, 375 A.2d 998, 1001 (1977); see *Schreiner*, 408 So. 2d 711; Pattie A. Clay Infirmary Ass'n v. First Presbyterian Church, 605 S.W.2d 52 (Ky. Ct. App. 1980); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 915 (E.D. Mich. 1977) (federal court interpreting Michigan State Constitution); Moore v. City of Pacific, 534 S.W.2d 486, 495 (Mo. Ct. App. 1976); Junior Football Ass'n v. Gaudet, 546 S.W.2d 70 (Tex. Civ. App. 1976); see also Cluff v. Farmers Ins. Exch., 10 Ariz. App. 560, 563, 460 P.2d 666, 669 (1969) (privacy clause has state action requirement); cf. Brisbin v. E.L. Oliver Lodge No. 335, 134 Neb. 517, 279 N.W. 277 (1938) (upholding discriminatory union contract provision on the theory of individual freedom to contract; may also implicitly rest on lack of state action).

59. See *Schreiner*, 408 So. 2d at 715; Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 924-25 (Tex. Civ. App. 1979).

60. Conn. Const. art. I, § 20 (amended 1974) (emphasis added) (interpreted as containing a state action requirement in Lockwood v. Killian, 172 Conn. 496, 375 A.2d 998 (1977)).

61. Tex. Const. art. I, § 3a (amended 1972) (interpreted as having a state action requirement in *Lincoln*, 576 S.W.2d at 924-25).

62. 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950).

> color, creed or religion, be subjected to any discrimination in his civil rights *by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.*[63]

Clearly, this provision provides explicit constitutional protection for victims of private discrimination. Yet the Court of Appeals virtually negated the second sentence of section II by artificially limiting the definition of the term "civil rights." In *Dorsey*, black plaintiffs brought suit after being denied housing in a development corporation housing project. The court found that the prohibitions on private discrimination were limited by section II to denials of "civil rights,"[64] defined as including only those civil rights "already denominated as such in the constitution itself, in the Civil Rights Law, or in other statutes."[65] The court held that the right of equal access to housing was not a civil right because New York lacked a fair housing law, and in fact had explicitly rejected proposals which added the right to housing to its Civil Rights law.[66] Finally, the court ruled that the plaintiffs were relegated to the first sentence of the section which, by its terms, included a state action requirement.[67] The New York Court of Appeals thus limited constitutional protection to the protection currently provided by statute.

Dorsey demonstrates the bias, even in state courts, in favor of a state action requirement. A strong desire to mold the interpretation of the New York Constitution to federal tests and standards runs throughout the *Dorsey* opinion.[68] Given this bias, even plaintiffs in states whose equal protection provisions contain no mention of state action—such as the enumeration of rights states—should be aware that a showing of state action will probably be required of them.[69]

At least one state has overcome this bias. In *Peper v. Princeton University Board of Trustees*,[70] the Supreme Court of New Jersey implicitly rejected the state action requirement. Plaintiff brought an employment discrimination claim against defendant, a private university, under the state anti-discrimination statute, Title VII, and the New Jersey Constitution.[71] The court ruled that the plaintiff lacked a state statutory claim[72] because the statute in question had, at the time of the alleged violation, exempted purely private universities from its coverage.[73] The plaintiff's Title VII claim was also denied because

63. N.Y. Const. art. I, § 11 (emphasis added).
64. *Dorsey*, 299 N.Y. at 531, 87 N.E.2d at 548.
65. Id.
66. Id. at 531, 87 N.E.2d at 549.
67. Id. at 530, 87 N.E.2d at 548.
68. Id. at 531-35, 87 N.E.2d at 549-51.
69. Of course, the claimant could argue in state court for a broader concept of state action, similar to that adopted by the Warren Court at the federal level. See cases cited in note 51 supra.
70. 77 N.J. 55, 389 A.2d 465 (1978).
71. Plaintiff actually advanced twelve grounds for jurisdiction, but the court found that only these three were colorable. Id. at 66, 389 A.2d at 471.
72. Id. at 73, 389 A.2d at 474.
73. Id. at 67, 389 A.2d at 471.

she had "purposefully" failed to pursue her E.E.O.C. administrative remedies.[74] Faced with a case of purely private discrimination, for which there was no statutory remedy, the court turned to plaintiff's claims under the New Jersey Constitution. The court did not hold explicitly that a state action problem was involved, finding instead that "this Court has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation."[75] The court then pointed to cases which held that one of those protected rights was to "engage in such lawful business or occupation as [one] may choose, free from hindrance or obstruction by [others]."[76] Finally, the court held that in 1947 when the language of the New Jersey Constitution was made gender-neutral,[77] "women were granted rights of employment and property protection equal to those enjoyed by men."[78] Thus, plaintiff had a constitutional right to employment free from the interference of her employer's discriminatory attitudes and practices. Any discrimination against her on the basis of her sex was a violation of constitutional protections which the courts, as well as the legislature, had a duty to enforce. The plaintiff had stated a cognizable constitutional claim without demonstrating any state involvement.[79]

There are limits to the precedential value of *Peper* for use in other states. The *Peper* court's precise holding, that the state court has the power to enforce the rights guaranteed by the constitution against all violators, even absent implementing legislation, necessitates an examination of the nature of the protected constitutional right. The clause relied on in *Peper* as the basis of the right, an enumeration of rights clause, states that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[80] Thus, the plaintiff in *Peper* had a general right to equal protection enforceable against anyone. However, in a state whose equal protection clause guarantees the "equal protection of the laws" or prohibits specific acts by the state government, the nature of the citizens' right is very different. In such states, the constitution does not grant a general right to equal treatment which a court can enforce against other private parties; it provides only a guarantee of equal legislative and executive treatment enforceable against the

74. Id. at 75, 389 A.2d at 475.

75. Id. Citing King v. South Jersey Nat'l Bank, 66 N.J. 161, 177, 193-94, 330 A.2d 1, 9-10, 18-19, (1974).

76. Id. (quoting Brennan v. United Hatters of North America, Local No. 17, 73 N.J.L. 729, 742-43, 65 A. 165, 170-71 (1906).

77. In 1947, New Jersey adopted a new constitution, which contained the following clause: "Wherever in this Constitution the term 'person', 'persons', 'people' or any personal pronoun is used, the same shall be taken to include both sexes." N.J. Const. art. X, ¶ 4.

78. *Peper*, 77 N.J. at 78, 389 A.2d at 477.

79. The court went on to hold against the plaintiff on the merits of the case. Id. at 80-87, 389 A.2d at 478-81.

80. N.J. Const. art. I, ¶ 1.

state government.[81]

In sum, the claimant suffering from purely private discrimination faces a tough challenge even in state court. Those states whose equal protection clauses are affirmative limits on legislative power, as well as those which rely on special emoluments sections,[82] contain sufficient references to the activities of state legislatures to enable any state court to follow its bias in favor of the state action requirement. In addition, the strength of this bias may be enough to overcome language which is not facially susceptible to a state action requirement, as has happened in New York.[83] But, for the state court that chooses to follow it, New Jersey has offered an alternative. Its *Peper* analysis can be of great benefit to the sex discrimination plaintiff in a state whose equal protection clause enumerates rights, or, at least, does more than limit state legislative powers.

B. Facially Neutral Statutes

A statute may discriminate against any particular group in three ways. First, by explicit language it may prescribe different treatment for members of that group vis-a-vis society at large; an example would be a sex-specific draft registration statute.[84] Second, the statute may set up a classification which, though facially neutral, necessarily impacts on one class of persons differently than on another class. An example of such a disparate impact would be height and weight requirements for civil service employment.[85] Finally, a statute

81. Another limit on the impact of *Peper* has come from within New Jersey itself. In Lloyd v. Stone Harbor, 179 N.J. Super. 496, 32 A.2d 572 (Ch. Div. 1981) the plaintiff brought suit against the borough of Stone Harbor for alleged sex discrimination in employment. The *Lloyd* court viewed *Peper* as a constitutional tort case. Id. at 511-12, 432 A.2d at 580. It then noted that tort claims against public entities such as the defendant borough were governed by the New Jersey Tort Claims Act. That Act barred recovery unless a claim had been filed within 90 days of accrual. N.J. Stat. Ann. § 59: 8-8 (1972). The court reasoned that the time restriction applied to constitutional torts as well as common-law torts. The plaintiff's failure to file such a notice was therefore fatal to her action for damages. *Lloyd*, 179 N.J. Super. at 512, 432 A.2d at 580. Thus in New Jersey, the victims of public, "state action" discrimination bear a procedural burden not faced by the victims of private discrimination.

The *Lloyd* holding is potentially dangerous because the doctrine of sovereign immunity and, thus, the restrictions of the Tort Claims Act, should not apply to constitutional torts. If it did, courts would be powerless to enjoin constitutional torts without a statutory waiver of sovereign immunity. Where a waiver of sovereign immunity does not exist, the *Lloyd* doctrine effectively bars the claims of "state action plaintiffs" and renders the state constitution ineffective against the very group whose actions a written constitution is designed to limit. Admittedly, the New Jersey Torts Claim Act bars only damages, thus leaving an effective enforcement mechanism in the form of injunctive relief. *Lloyd*, 179 N.J. Super. at 512, 532 A.2d at 580. There is no guarantee, however, that a state will provide such an enforcement mechanism in its waiver of sovereign immunity. Although *Lloyd* has not been followed in the courts, it suggests a possible retreat from *Peper*'s groundbreaking rejection of the state action requirement.

82. See text accompanying notes 62-69 supra.

83. See text accompanying note 37 supra.

84. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981).

85. See, e.g., Hardy v. Stumpf, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974); see generally notes 99-117 and accompanying text infra.

which is both facially neutral and capable of neutral administration may be administered in a discriminatory manner. A classic example of such selective enforcement would be an anti-prostitution statute enforced against prostitutes, but not their customers.[86]

The doctrines of disparate impact and selective enforcement become crucial where the *facial* classification is subjected to scrutiny under the lenient rational basis test, but the group *actually* affected is a suspect class. For example, classifications based on race are inherently suspect and are examined under the strict scrutiny test. Without the disparate impact doctrine, a state could avoid strict scrutiny, for example, of a state regulation designed to limit insurance benefits received by blacks via the use of facially neutral language; i.e., an exclusion from coverage of expenses incurred in the care and treatment of sickle cell anemia, but not other blood diseases. Similarly, absent the doctrine of selective enforcement, a state could establish a curfew for all citizens and enforce it only against blacks without being subject to strict scrutiny. The obvious necessity of these doctrines does not, however, mean that they have been welcomed by the federal courts.

Since 1976, the Supreme Court has adhered to the notion that to be invidiously discriminatory, a law must stem from purposeful, intentional discrimination.[87] Facially sex-specific statutes clearly fulfill this requirement.[88] However, facially neutral statutes may not. In the area of sex discrimination, the issue is most often raised in a disparate impact context.

The Supreme Court has accepted the notion that selective enforcement may rise to the level of purposeful discrimination.[89] However, the Court now maintains that a litigant must establish a specific discriminatory intent underlying the differences in enforcement.[90] Despite this restriction, the use of statistical enforcement data has become an increasingly common method of establishing purposeful discrimination.[91]

In the state courts, the sex discrimination litigant raising a selective enforcement claim is usually defending against a prostitution charge.[92] Although police commonly arrest prostitutes and not their customers, it is difficult to demonstrate a discriminatory motive. The police justify their policies by pointing out that police decoys acting as customers are approached by prostitutes, while decoys acting as prostitutes must approach customers,

86. See notes 92-94 and accompanying text infra.

87. Washington v. Davis, 426 U.S. 229 (1976); see also Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265 (1977); see generally Note, Proving Intentional Discrimination in Equal Protection Cases: The Growing Burden of Proof in the Supreme Court, 10 N.Y.U. Rev. L. & Soc. Change 435 (1980).

88. Cf. Strauder v. West Virginia, 100 U.S. 303 (1880).

89. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

90. See Oyler v. Boles, 368 U.S. 448, 456 (1962); Snowden v. Hughes, 321 U.S. 1, 8 (1944).

91. G. Gunther, Constitutional Law 709-10 (10th ed. 1980).

92. See Bell v. State, 369 So. 2d 932 (Fla. 1979); City of Minneapolis v. Buschette, 307 Minn. 60, 240 N.W.2d 500 (1976); In re P, 92 Misc. 2d 62, 400 N.Y.S.2d 455 (1977), rev'd sub nom. In re Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979).

which raises questions of entrapment.[93]

Nevertheless, state courts can in theory accept a selective enforcement challenge in prostitution cases. They must either accept enforcement of a neutral statute against only one party to prostitution transactions as per se evidence of discriminatory intent, or reexamine the factors which have heretofore been used to justify this discriminatory police practice. Thus far, the state courts have been unwilling to do the latter.[94]

The states have been more willing to break with the federal rejection of disparate impact claims,[95] perhaps because the federal status of the disparate impact doctrine in sex discrimination cases is rooted in an ultraformalistic view of gender classification.[96] *Geduldig v. Aiello*,[97] the earliest federal case which involved disparate impact claims, is framed in terms of the sex-neutral nature of the classification involved.

In *Geduldig*, the Supreme Court upheld a state disability insurance system which excluded pregnancy-related medical expenses from coverage. The Court reasoned that a distinction based on pregnancy is not sex-related, but merely distinguishes between pregnant and non-pregnant persons.[98] As a non-sex-based classification, the pregnancy exclusion was not subject to the higher standard of scrutiny accorded classifications based on sex.[99] The extra cost to the state of pregnancy benefits provided the rational basis for the action.[100]

Geduldig is not a traditional disparate impact case because the court could have invalidated the insurance plan by recognizing distinctions based on pregnancy as facially sex-based.[101] Nonetheless, because everyone excluded

93. *Buschette*, 307 Minn. at 69-70, 240 N.W.2d at 505-06 (note that while the court accepts this as basis for selective enforcement, the rationale does not account for the disproportionate number of female prostitutes, as opposed to male prostitutes, charged under the statute).

94. See, e.g., In re Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (App. Div. 1979), overruling a decision by the lower court that the selective enforcement of the prostitution statutes constitutes a violation of equal protection. Courts are reluctant to recognize these selective enforcement claims for reasons outlined in the text following note 153 infra. In addition, courts may hesitate to force police departments to arrest the largely white, middle-class customers of poor, non-white prostitutes.

95. See text accompanying notes 111-18 infra.

96. The author is indebted for this construction to Professor Anne Simon of New York University School of Law and the Center for Constitutional Rights.

97. 417 U.S. 484 (1974).

98. Id. at 496-97 n.20.

99. Id. at 495-96.

100. Id. at 493-96.

101. Such a construction could have acknowledged that one of the main benefits of a medical care program, like life insurance, is the peace of mind and ability to plan for the future which the promise of benefits provides. Under this construction, the classifications created by the statute are not "pregnant persons," an all female class, as opposed to "non-pregnant persons," a male and female class, but rather, the "non-potentially pregnant participants in the plan," an all-male group, as opposed to the "potentially pregnant plan participants," an all female group. Only the former group can rest assured that its medical expenses will be covered; the latter group cannot. Cf. Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, cert. denied, 434 U.S. 825 (1977) (use of sex specific actuarial tables in teachers' retirement system invalidated on the grounds that the purpose of the program was to provide young teachers with incentive by

from benefits under the pregnancy clause was female, the court could have also used a disparate impact analysis to apply the higher standard of scrutiny applicable to sex based classifications. The Court's refusal to do so did not bode well for disparate impact claimants.

Five years later, in *Personnel Administrator v. Feeney*[102] the Supreme Court made explicit the determination that had been relegated to a footnote in *Geduldig*: state actions which disparately impact on one sex are not for that reason subject to a heightened standard of scrutiny. The plaintiff in *Feeney* challenged a veteran's hiring preference which resulted in a strong bias toward hiring men simply because the vast majority of veterans are male.[103] While noting that the disparate impact of the preference did necessitate an inquiry into the purposes behind the legislation, the Court took the position that "the Fourteenth Amendment guarantees equal laws, not equal results."[104] Finding no actual hidden legislative intent to discriminate against women, the Court rejected the assertion that it should nonetheless invalidate the classification. The Court refused to bar legislatures from employing facially neutral statutes which advance some proper, non-sex-related objective but have a disparate impact, stating:

> The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and forseeable consequences of his voluntary actions . . . . It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not forseeable.
>
> Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.[105]

Thus, without proof that the classification was designed specifically to exclude women from the facially neutral statute's benefits, the law was not gender discriminatory.

At least two state courts, when faced with a claim of disparate impact, have followed the lead of the Supreme Court. In *Maryland State Board of Barber Examiners v. Kuhn*[106] the Maryland Supreme Court was faced with an equal protection challenge to a statute which permitted barbers to cut the hair of both women and men, but which limited cosmetologists to cutting the hair

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brightening their retirement prospects; expectations of women teachers facing smaller monthly benefits would not serve this purpose).

102. 442 U.S. 256 (1979).

103. Id. at 270. The figures before the court indicated that 98.2% of the veterans applying for the preference were male and 1.8% were female.

104. Id. at 273.

105. Id. at 278-79 (footnotes and citations omitted).

106. 270 Md. 496, 312 A.2d 216 (1973).

of women. The court refused to treat the classification as sex-based, even though the overwhelming majority of cosmetologists were women.[107] However, the court did invalidate the law as having no rational basis.[108] Therefore, failure to recognize the disparate impact claim was mere dicta.

In *Commonwealth v. King*,[109] a Massachusetts statute written to avoid a selective enforcement claim was challenged instead on disparate impact grounds. The statute outlawed solicitation by prostitutes, but did not prohibit the customer from hiring them. Thus, in arresting only prostitutes and not their customers, the police were not engaging in the selective enforcement typical in this area of the law. The law itself, however, had a disparate impact on women, as it was aimed at the participant in this mutual transaction who was most likely to be female. The Massachusetts Supreme Court addressed this disparate impact claim in a brief footnote stating that "[t]he argument that discrimination exists because most prostitutes are women, and most customers are men, is not convincing, just as it would not be convincing if offered by male defendants accused of certain crimes of violence, the great majority of which are committed by men."[110] The analogy is flawed; in outlawing crimes of violence, the legislature does not also refuse to outlaw companion acts necessarily part and parcel of the violent crimes. Nonetheless, the validation of this statute stands as a rejection of the disparate impact theory of sex discrimination.

Not all state courts, however, have followed the federal rejection of disparate impact claims. California has taken the lead among states accepting disparate impact claims. In *Hardy v. Stumpf*[111] the court invalidated height requirements imposed as employment criteria by a local police department.

> A classification may be considered discriminatory against one sex or another even though it does not do so directly. Thus a seemingly neutral job requirement which has the effect of disqualifying a disproportionate number of one sex is discriminatory. . . . It is not necessary to conclude that these standards were adopted with intent to discriminate; it is enough if statistics show that the standards imposed in fact exclude virtually all women.[112]

Another California court accepted a disparate impact claim in *Boren v. California Department of Employment Development*,[113] which challenged an unemployment compensation scheme denying benefits to persons who left work due to domestic responsibilities, unless they had been the family's pri-

107. Id. at 506, 312 A.2d at 222. The court noted, however, that male customers were explicitly denied the services of cosmetologists, and that if this suit had been brought by a customer, the court may have been inclined to recognize the law as sex-discriminatory.

108. Id. at 508-12, 312 A.2d at 222-25.

109. 374 Mass. 5, 372 N.E.2d 196 (1977).

110. Id. at 16-17 n.10, 372 N.E.2d at 204 n.10.

111. 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (App. Div. 1974).

112. Id. at 962-64, 112 Cal. Rptr. at 742-43.

113. 59 Cal. App. 3d 250, 130 Cal. Rptr. at 683.

mary breadwinner. The court first asked, in language contrary to the *Geduldig* reasoning, whether the statute in fact used sex as a classifying tool:

> That § 1264 does not disqualify all females who leave work for domestic reasons does not dilute the sexual basis of the classification. . . . Section § 1264 divides claimants into two groups—members of both sexes who provide primary family support and females who provide secondary support . . . .
>
> The intended effect of § 1264 is the disqualification of female claimants and the prolongation of their disqualification past that of other claimants. . . . [I]t establishes a sex-based disqualification. . . .[114]

The court met the state's objection that it had not intended the discriminatory effect of the regulation:

> In measuring these classifications against the equal protection clause, the court deals not so much with the state's neutral language as with its practical impact. Its ultimate effect is the criterion of equal treatment. The courts must inquire into the statute's actual purposes. Discrimination may be demonstrated by statistics showing the statute's actual operation. A seemingly neutral statute which actually disqualifies a disproportionate number of one sex is discriminatory and vulnerable to the strict scrutiny test; it is enough if statistics show that the standard affects women only.
>
> . . . .
>
> Contrary to the state's argument, it is the statute, not [the social patterns which have normally seen males taking the role of primary breadwinner] which centers its adverse effect [on women]. The social patterns long antedated the statute . . . . The statute's effect was obvious to its authors.[115]

Thus, the *Boren* court's definition of discriminatory intent includes the knowledge that an act must necessarily have a disparate impact upon one sex—the precise step the *Feeney* court had been unwilling to take.

An Arizona court has also addressed, in dicta, the problem of disparate impact. In *Godfrey v. Industrial Commission of Arizona*,[116] the Court of Appeals was presented with the precise question decided by the *Geduldig* court: may a state program of medical benefits deny coverage for pregnancy-related claims? The *Godfrey* court held that the legislature lacked the statutory authority to exclude the pregnant employee from worker's compensation.[117] However, the court went on to say in *dicta* that "[w]e strongly believe that any *per se* pregnancy disqualification from entitlement to disability benefits could

114. Id. at 258-59, 130 Cal. Rptr. at 688.
115. Id. at 257-58, 130 Cal. Rptr. at 687-88 (citations omitted).
116. 124 Ariz. 153, 602 P.2d 821 (Ct. App. 1979).
117. Id. at 157, 602 P.2d at 825.

only be classified as unlawful sex discrimination."[118]

Initial analysis of the apparent conflict between Maryland and Massachusetts decisions on the one hand, and California and Arizona decisions on the other, might suggest that the latter courts are more sensitive to issues of sexual equality than are the former. However, that analysis is rather pat and does little to educate the advocate about means of moving a state court to either accept or reject the disparate impact construct. Moreover, it does not accord well with the facts. Massachusetts and Maryland have demonstrated their commitment to sexual equality via adoption[119] and rigorous judicial enforcement[120] of state ERAs, while California and Arizona have not. Thus, another basis for distinguishing between these two groups of cases must be sought.

The disparate impact concept permits courts to apply higher standards of scrutiny to classifications which on their face would otherwise be subject only to a rational basis test. Where an action can be invalidated under a rational basis test, as in *Kuhn*, or where it could withstand even strict scrutiny, as in *King*, then there is little incentive for a state court to depart from the federal norm as embodied in *Feeney*. When, however, a state action can withstand a rational basis analysis, but not a higher standard of scrutiny, as was true of *Hardy*, *Boren*, and *Godfrey*, then a state court has an incentive to recognize the disparate impact claim. If it does not apply a disparate impact analysis, the legislature may succeed in thwarting the constitutional mandate of equal protection by the use of classifications worded so as to avoid heightened scrutiny.

The California-Arizona cases fall between the two extremes exemplified by *Kuhn* and *King*. A rational basis existed in each case for the facial categories imposed; taller people are more likely to have the strength necessary for police work, and both pregnancy benefits and unemployment compensation are enormous drains on limited state funds.[121] Yet the elimination of the classifications did not unduly threaten any compelling state interests. Given this need to address the disparate impact question, and to be free from the fear of compromising, these state courts have thus demonstrated a willingness to accept a disparate impact doctrine.

This is not to say, however, that the disparate impact question has disappeared or collapsed entirely into a search for the proper standard of scrutiny. It is still a hurdle to the sex discrimination claimant. For example, where the highest court in a state has mandated that sex discrimination claims be granted strict scrutiny, the facial neutrality of a statute can enable a lower state court to apply the more lenient rational basis test. Thus, the acceptance by a state of a higher standard of scrutiny for sex discrimination cases is but a

118. Id.

119. See Rand v. Rand, 280 Md. 508, 515, 374 A.2d 900, 904 (1977); Attorney General v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 354-57, 393 N.E.2d 284, 291-93 (1979).

120. See cases cited at notes 139 and 142 infra.

121. See cases cited at notes 111-18 supra.

partial victory. For a complete victory, state judiciaries and legislatures must acknowledge that the term "sex discrimination cases" includes facially neutral, disparately impacting statutes.

C. *The Standard of Scrutiny*

The odyssey of the Supreme Court in its search for the proper standard of scrutiny for sex discrimination cases is generally familiar. The court moved from a pure rational basis test[122] to the *Reed v. Reed*[123] requirement that a classification rest upon some ground of difference having a fair and substantial relationship to the object of the legislation,[124] and then, for a brief period, to a suspect class-strict scrutiny test in *Frontiero v. Richardson*.[125] Most recently the Court has applied an intermediate level of scrutiny, first announced in *Craig v. Boren*.[126] The intermediate standard, which is more stringent than a rational basis test but less stringent than strict scrutiny, requires that sex-specific statutes serve important governmental objectives and be substantially related to the achievement of those objectives.[127] In addition, several Justices have suggested that the multi-tiered approach to equal protection claims be abandoned altogether in favor of sliding scale application of a single standard. This standard would balance the rights of the claimant against the interests of the state, giving weight to each in accordance with its importance and the level of infringement threatened by the proposed action.[128] However, the full Court has not yet seen fit to abandon the tiered level of analysis.[129]

State courts thus have a variety of models from which to choose; the only closed door is a rational basis test which fails to meet the federal constitutional minima as defined by *Craig*. States may choose among four alternate positions on sex-based classifications. They may: 1) accept the *Craig* test; 2) apply strict scrutiny; 3) place an absolute prohibition on gender classifications; or 4) develop a non-tiered, sliding scale analysis of equal protection claims.

The earliest state sex discrimination claims were analyzed under a rational basis test.[130] Unlike the federal courts, however, the state courts did not wait until the 1970's to invalidate sex-based classifications as irrational. As early as 1893, the Supreme Court of Indiana sustained an equal protection

122. See Goesaert v. Cleary, 335 U.S. 464 (1948).
123. 404 U.S. 71 (1971).
124. Id. at 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
125. 411 U.S. 677 (1973).
126. 429 U.S. 190 (1976).
127. Id. at 197.
128. Id. at 212 (Stevens, J., concurring). See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) ("A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination. . . .");Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).
129. But see G. Gunther, supra note 91, at 673-74. (The increasing use of a middle tier of scrutiny may signal a move away from the polarization inherent in the strict scrutiny-rational basis paradigm.).
130. Brown v. Foley, 158 Fla. 734, 29 So. 2d 870 (1947); Henson v. City of Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953); In re Dunkerton, 104 Kan. 481, 179 P. 347 (1919).

challenge to a state statute which prohibited women from practicing law.[131] In 1947, the Florida Supreme Court struck down as irrational an ordinance prohibiting the employment of women as bartenders;[132] the following year, the Supreme Court of the United States upheld such a law.[133] Thus, even when all courts were applying a rational basis test to claims of sex discrimination, the sex discrimination plaintiff could on occasion find a haven in state court.

The state courts also led the way in applying a heightened level of scrutiny to sex discrimination claims. Six months before *Reed*, the California Supreme Court, in *Sail'er Inn Inc. v. Kirby*,[134] became the first state judiciary to award suspect class status to gender discriminations. Prior even to that case, however, Pennsylvania had implictly accorded heightened scrutiny to classifications based on sex. In *Commonwealth v. Daniel*,[135] the Pennsylvania Supreme Court indicated that a classification based on sex would survive scrutiny only if directly related to some "biological, natural and practical" difference which would justify separate treatment.

It is virtually impossible to determine the major trend in the state standards of scrutiny today. Each of the four possible models has been utilized by one state or another.[136] This diversity may stem in part from the Supreme Court's inability throughout the 1970s to definitively determine the proper standard of scrutiny. It has been extremely difficult for any state court to simply identify itself with the federal position. As the Court moved from *Reed*

131. In re Leach, 134 Ind. 665, 34 N.E. 641 (1893).

132. *Brown*, 158 Fla. 734, 29 So. 2d 870 (1947).

133. *Goesaert*, 335 U.S. 464.

134. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

135. 430 Pa. 642, 648-49, 243 A.2d 400, 402-03 (1968).

136. States applying the *Craig* test: see, e.g., In re Estate of Greenberg, 390 So. 2d 40 (Fla. 1980); Purvis v. State, 377 So. 2d 674 (Fla. 1979); Lewis v. Till, 395 So. 2d 737 (La. 1981); Beal v. Beal, 388 A.2d 72 (Me. 1978). States applying strict scrutiny: see, e.g., People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); Op. of the Justices to the Senate, 373 Mass. 83, 366 N.E.2d 733 (1977). States applying an absolute or near-absolute ban on gender classifications: see cases cited at notes 137-40 infra. States seeking a non-tiered approach: see Isakson v. Rickey, 550 P.2d 359, 362-63 (Alaska 1976) (Applying tiered scrutiny, but noting, "[W]e will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard. . . . This new standard will, in short, close the wide gap between the two tiers of equal protection. . . ."); Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 257-58, 625 P.2d 779, 781, 172 Cal. Rptr. 866, 868 (1981) in part applying Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) (challenge to state prohibition of medicaid payments for abortions).

> [T]his court has developed and applied a three-part test for evaluating the constitutionality of statutory schemes . . . that condition the receipt of benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approves.
>
> In order to sustain the constitutionality of such a scheme under the California Constitution, the state must demonstrate that (1) "the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege"; (2) that "the utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights"; and 3) that that there are no "less offensive alternatives" available for achieving the state's objectives.

to *Frontiero* to *Craig*, it left a trail of states crystalized at various points in its wake.

State ERAs have also increased diversity. Interpretation of these amendments runs the gamut from absolute to permissive. In the states most strictly interpreting the standard of scrutiny under their ERA—Colorado[137] and Pennsylvania[138] — only physical requirements may justify a classification based on sex. Maryland[139] and Washington[140] add to this list the desire to ameliorate past discrimination against women. These cases reject even compelling state interests as grounds for such discrimination on the theory that the citizens of their prospective states have determined that equality of rights is "the overriding compelling state interest."[141] Courts in four other ERA states have held instead that the amendment requires that sex be treated as a suspect classification, the use of which may be justified by a compelling state interest.[142] Finally, courts in three ERA states have negated totally the effect of their state amendments by finding that the provision is no broader than the normal fourteenth amendment protection.[143] Thus, even the presence of a state ERA is no guide to the standard of scrutiny to be employed in any given state.

What does this diversity of standards mean to the sex discrimination litigant? It means that no general blueprint for structuring an attack in this area is possible. Nonetheless, the standard of scrutiny debate of the past decade has created such a wide diversity of standards that any compulsion to conform to current federal standards has been severely weakened. Thus, the sex discrimination claimant urging a state court to impose a standard of scrutiny more stringent than that currently applied by the Burger Court has two advantages in this area. First, she will not be faced with blind acceptance of federal standards. Second, she has a number of already proven paradigms from which to draw her suggested standard. This means both that she need not fear that the court will be in the uncomfortable role of trail-blazer, and that her model will be functional (and, indeed, will probably be functioning in some other state). These advantages offer possibilities which more than make up for the nebulous state of the law. For the claimant whose case hinges on

137. People v. Salinas, 191 Colo. 171, 174, 551 P.2d 703, 706 (1976).

138. Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974); Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).

139. 65 Op. Md. Attorney General 103, 108 (1980); Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977).

140. Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

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

142. Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976); Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); Op. of the Justices to the Senate, 373 Mass. 883, 366 N.E.2d 733 (1977); Mercer v. Board of Trust., North Forest Indep. School Dist., 538 S.W.2d 201 (Tex. Civ. App. 1976).

143. Williams v. Williams, 331 So. 2d 438 (La. 1976); Salt Lake City v. Wilson, 46 Utah 60, 68, 148 P. 1104, 1107 (1915); Archer & Johnson v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973).

the application of a standard other than that mandated by *Craig*, a state suit is particularly attractive.

D. Court Perpetuation of Sexual Stereotypes

Equal protection of the laws has long been defined by the courts as requiring similar treatment of similarly situated groups.[144] The economic, physical and cultural differences between men and women have been used by the courts to uphold facially sex-specific statutes on the grounds that they address real differences between dissimilarly situated groups. By permitting legal distinctions between men and women on the basis of supposed differences between them, courts can implement and perpetuate stereotypical notions of what those differences are. The Supreme Court's habit of doing just that creates one of the most subtle and destructive obstacles for the federal claimant.

The distinctions between men and women which have been used to justify differential treatment fall into three categories: economic, physical, and cultural. Only in the realm of economic differences has the Supreme Court successfully balanced the need to ameliorate the effects of actual inequities with the need to avoid furthering stereotypical notions of a woman's place. Thus, where statutes or government policies provide an economic benefit to women in an attempt to bring men and women into economic parity, they have been upheld.[145] Where, however, a statute has been tied to a stereotype of the male as primary breadwinner, without providing any economic benefit to women, the Court has rejected it.[146] For example, a benefit statute which presumed that a widow had been financially dependent upon her husband, but which required that a widower prove prior dependence before receiving benefits, was held invalid.[147]

Unfortunately, the Court has been unwilling to engage in such balancing when physical or cultural differences are involved. The Court has continually recognized and made allowance for physical dissimilarities which may not, in fact, exist.[148] For example, in *Muller v. Oregon*,[149] the Court accepted the "obvious" fact that women were physically unable to work as long as men. The

144. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981); Gardner v. Michigan, 199 U.S. 325 (1905).

145. See, e.g., Califano v. Webster, 430 U.S. 313 (1977) (upholding regulation permitting women to exclude three more lower earning years than men in computing social security benefits); Schlesinger v. Ballard, 419 U.S. 498, reh'g denied, 420 U.S. 966 (1975) (upholding army up-or-out scheme granting women, but not men, a guaranteed 13 year tenure); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding property tax exemption for widows, but not widowers).

146. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating requirements that widowers prove prior dependence upon their wives to receive survivors' benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating statute providing benefits to widows but not widowers).

147. *Wengler*, 446 U.S. 142; *Goldfarb*, 430 U.S.199.

148. Barbara Ehrenreich and Deirdre English have documented the use of scientific and medical opinion to limit women to home and child. B. Ehrenreich & D. English, For Her Own Good: 150 Years of the Experts' Advice to Women (1979). But see Berkman v. City of New York, 536 F. Supp 177 (E.D.N.Y. 1982), aff'd, 705 F.2d 584 (2d Cir. 1983) (City failed to rebut

modern Court has also mistaken gender-based assumptions for physical differences. For example, it has shown great deference to the "irresistible" male sexual impulse as a basis for legislative distinctions between men and women.[150]

Cultural differences—differences between men and women resulting from past, non-economic discrimination—have also been misused by the Court. The Supreme Court has legitimated and perpetuated these cultural differences by using them as a justification for discrimination. The best recent example of this practice is *Rostker v. Goldberg*,[151] which upheld the male-only draft registration requirement. The Court concluded that because women are excluded from combat positions, Congress could exclude them from a draft designed to raise a combat-ready fighting force.[152] Such a decision perpetuates the effects of the discriminatory exclusion itself. The Court could have either struck down the exclusion or required a sex-neutral draft in spite of it.

States have generally followed the federal example in cases of economic disparities between the sexes.[153] Unfortunately, they tend to follow the federal lead in the areas of physical and cultural differences as well. State court opinions addressing the efficacy of using physical differences to distinguish between men and women have generally held that such differences justify differential treatment.[154] For example, some state court opinions demonstrate the same tendency as federal courts to confuse physical differences with cultural norms. In *Holdman v. Olim*,[155] the Supreme Court of Hawaii upheld a directive that all female visitors to the state prison wear brassieres.[156] Similarly, the maternal preference in custody hearings has been upheld in Maryland because of the supposedly stronger biological ties between mother and child.[157]

Nor are the federal courts alone in perpetuating the effects of past legal

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plaintiff's prima facie case of discriminatory impact because it failed to establish that the physical portion of the firefighters qualifying test was job-related.).

149. 208 U.S. 412, 421 (1908).

150. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 355 (1977) (Sex is a bona fide occupational qualification for prison guards because of the "real risk that . . . inmates, deprived of a normal heterosexual environment, would assault women guards because they were women."). See also Aiken, supra note 6.

151. 453 U.S. 57 (1981).

152. Id. at 77-79.

153. E.g., Duley v. Caterpillar Tractor Co., 44 Ill. 2d 15, 253 N.E.2d 373 (1969). But see Kellems v. Brown, 163 Conn. 478, 313 A.2d 53 (1972) appeal dismissed, 409 U.S. 1099 (1976).

154. See, e.g., People v. Salinas, 191 Colo. 171, 551 P.2d 703 (1976); State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980); People v. Boyer, 63 Ill. 2d 433, 349 N.E.2d 50 (1976), cert. denied, 429 U.S. 1663 (1977); Wenham v. State, 65 Neb. 394, 91 N.W. 421 (1902); People v. Smith, 97 Misc. 2d 115, 411 N.Y.S.2d 146 (Albany County Ct. 1978); People v. Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732 (Westchester County Ct. 1976); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

155. 59 Hawaii 346, 581 P.2d 1164 (1978).

156. Id. at 353-54, 581 P.2d at 1169-70.

157. Cooke v. Cooke, 21 Md. App. 376, 319 A.2d 841 (1974) (maternal preference to be used when all other factors between parents are equal).

and cultural discrimination. In *Friedrich v. Katz*,[158] a New York court faced a challenge to a statute which permitted women to marry without parental approval at age eighteen, while men were required to obtain parental consent until age twenty-one. The court rested its decision to uphold the statute on another state statute, which made the husband liable for the support of his wife and children. This added responsibility, the court held, justified requiring a higher age of consent for males.[159]

Nonetheless, this area presents the greatest potential for divergence between state and federal analysis. Many distinctions made by the courts rest on a particular subjective reaction to the form of discrimination involved. The high degree of subjectivity makes an appeal to the "feminist conscience of the court" particularly effective in this area. Indeed, some state courts have specifically indicated that a change in cultural norms has caused them to consider changes in their interpretations of constitutional provisions.[160]

A state court may thus be more sensitive than the federal courts to the distinction between recognizing real differences between the sexes and merely perpetuating discrimination. This is demonstrated by a pair of Indiana decisions which refused to allow physical differences between the sexes to justify sex-based classifications. In each case the court recognized that allowing the physical distinctions between the sexes to justify the questioned state action would reinforce and perpetuate inappropriate cultural distinctions based on sex.

In *Haas v. South Bend Community School Corp.*,[161] the Supreme Court of Indiana struck down a regulation which prohibited co-educational teams in non-contact sports in local high schools. In so doing, the court distinguished between denying women students of inferior athletic ability the right to play on such teams and denying all women the right to try out for them:

> This Court is of the opinion that at this time no reasons have been presented, nor do any exist, which justify denying female high school students the *opportunity to qualify* for participation with male high school students in interscholastic athletic contests which do not involve physical contact between the participants. Due to the apparent superior level of athletic ability possessed by most males, it will probably be difficult for most females to qualify for the team. However, this factor, by itself, can have no bearing upon the issue of a female's right to the opportunity to qualify.[162]

In *Reilly v. Robertson*,[163] the Indiana court refused to allow the longevity dif-

158. 73 Misc. 2d 663, 341 N.Y.S.2d 932 (N.Y. Sup. Ct. 1973), rev'd on other grounds, 34 N.Y.2d 987, 1 N.E.2d 606, 360 N.Y.S.2d 415, (1974).

159. Id. at 664-65, 341 N.Y.S.2d at 934-35.

160. See, e.g., New York State Hairdressers Ass'n v. Cuomo, 83 Misc. 2d 154, 162-65, 569 N.Y.S.2d 965, 972-75 (1975).

161. 259 Ind. 515, 289 N.E.2d 495 (1972) (reh'g denied, Feb. 8, 1973).

162. Id. at 526, 289 N.E.2d at 500-01 (emphasis in original).

163. 266 Ind. 29, 360 N.E.2d 171 (1977), cert. denied, 434 U.S. 825 (1977).

ference between men and women to justify reduced annuity payments to female participants in a state teacher's retirement plan. The plan was not designed, said the court, to equalize the total benefits paid to men and women after retirement; its purpose, instead, was to provide young participants with protection against "risks arising from daily human needs."[164] "No difference in those risks as between men and women exists, justifying the additional protection afforded men."[165] Indiana, at least, has kept a wary eye on distinctions supposedly based on physical differences.

The Indiana Supreme Court has refused to perpetuate the effects of past legal discrimination as well. In the 1883 case of *In Re Leach*,[166] the court faced a state regulation which admitted only registered voters to the bar. The regulation served to exclude women from the practice of law. Rather than perpetuate this particular form of discrimination, the court invalidated the regulation, without even discussing the existence of a tie between eligibility to vote and the practice of law.

Thus, the very factor which makes this final barrier such a difficult one to overcome—its origin in the court's own subjective stereotypical notions of the "real" differences between men and women—is ultimately the key to an assault against it. Granted, this assault will be effective only in those courts which are significantly more sensitive to "women's issues" than is the Supreme Court. Nonetheless, this final area of deviation from that Court's standards could potentially make the best use of the state courts' greatest asset—their independence from the Supreme Court's increasingly traditional view of women and the law.

III
STATE DEVIATION FROM FEDERAL NORMS

The foregoing discussion makes clear the potential protection provided sex discrimination plaintiffs by state equal protection clauses. The key to tapping that potential, however, is convincing the state court to interpret its own equal protection clause differently from prior federal interpretations of the federal clause. The plaintiff must first encourage the state court to develop its own separate analysis, and reserving the substantive attack on the federal analysis for later.

A. The Court's View: Theoretical Issues Surrounding Separate State Analysis

While theoretically the state and federal constitutions, and the rights which adhere under each, are separate and distinct, state courts often fail to accord the dignity of separate analysis to state claims.[167] The court may either

164. Id. at 43, 360 N.E.2d at 178.
165. Id.
166. 134 Ind. 665, 34 N.E. 641 (1893).
167. Also, when state courts do give separate consideration to state provisions, that consideration is often too cursory to be deemed an actual analysis of the state provision. E.g., State

merely note that both state and federal claims are raised and proceed to analyze only the federal claim,[168] or it may address the state claim just long enough to explicitly tie its analysis to federal standards.[169] Neither approach explains why supposedly independent state protection of individual liberties is circumscribed by the parameters of federal protection.

The ways in which courts have justified or explained their use of federal analysis, as opposed to merely stating that such analysis would be used, or using it without separate mention of the state provision, fall largely into two groups. The first cites the supremacy of the federal Constitution as grounds for tying state interpretations to that document.[170] The second relies on the similar wording and/or aims of state and federal provisions as grounds for identical interpretation of these provisions.[171]

The first rationale is flawed. The fact that the provisions of the federal Constitution establish the minimum acceptable criteria of equal protection[172] does not prevent the state from providing additional protection for its citizens. Where an action violates federal equal protection guarantees, it is clearly invalid. A state court in such a case could properly forego separate state analysis.[173] However, a provision which does not violate the minimum federal constitutional protections is not necessarily valid under state provisions. In such a case it is an error to forego separate state analysis, as the federal analysis may not be dispositive of the state claim.[174]

The second rationale for identifying state with federal analyses — the

v. Murphy, 117 Ariz. 57, 60, 570 P.2d 1070, 1073 (1977) (examination of state privacy provisions considered in one paragraph; balance of opinion devoted to federal analysis).

168. See, e.g., Pattie A. Clay Infirmary v. First Presbyterian Church, 605 S.W.2d 52 (Ky. Ct. App. 1980); Primeaux v. Libersat, 307 So. 2d 740 (La. Ct. App. 1975), rev'd, 322 So. 2d 147 (La. 1975); Lambert v. Wentworth, 423 A.2d 527 (Me. 1980); State v. Rundlett, 391 A.2d 815 (Me. 1978); Beal v. Beal, 388 A.2d 72 (Me. 1978); State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976); People v. Mndange-Pfupfu, 97 Misc. 2d 496, 411 N.Y.S.2d 1000 (Tompkins County Ct. 1978).

169. See, e.g., Peddy v. Montgomery, 345 So. 2d 631 (Ala. 1977), aff'd, 355 So. 2d 698 (Ala. 1978); Jefferson County v. Braswell, 407 So. 2d 115 (Ala. 1981); Fox v. Michigan Employment Security Comm'n, 379 Mich. 579, 153 N.W.2d 644 (1967); Anderson v. City of St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948); People v. Smith, 97 Misc. 2d 115, 411 N.Y.S.2d 146 (Albany County Ct. 1978); People v. Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732 (Westchester County Ct. 1976).

170. E.g., Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972); People v. Andrea, 48 Mich. App. 310, 210 N.W.2d 474 (1973); Emery v. State, 177 Mont. 73, 580 P.2d 445, cert. denied, 439 U.S. 874 (1978).

171. E.g., Iowa Indep. Bankers v. Bd. of Governors, 511 F.2d 1288 (D.C. Cir. 1975), cert. denied, 423 U.S. 875 (1975) (federal court interpreting state constitution); State v. Davis, 304 N.W.2d 432 (Iowa 1981); Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919).

172. State v. Glass, 583 P.2d 872, 876 n.12 (Alaska 1978); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970); Horton v. Meskill, 172 Conn. 615, 641, 376 A.2d 359, 371 (1977); Angwin v. City of Manchester, 118 N.H. 336, 336-37, 386 A.2d 1272, 1273 (1978); Op. of the Justices, 118 N.H. 347, 349-50, 387 A.2d 333, 335 (1978). See also Brennan, supra note 16; Linde, supra note 15.

173. *Haas*, 259 Ind. at 526, 289 N.E.2d at 501.

174. State v. Kaluna, 55 Hawaii 361, 369, 520 P.2d 51, 58 (1974).

similar language and aims of the state and federal constitutions[175] — actually benefits a few sex discrimination claimants. Claimants in ERA states may use this rationale to their advantage by arguing that the specific inclusion of language not found in the federal Constitution is a mandate for a different standard of review under the state constitution.[176] The majority of claimants, however, are in non-ERA states. They can be harmed by the argument that "[w]here a provision of a state constitution is similar in meaning and application to the federal Constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts involved."[177]

In addition, this reasoning avoids the real issue. One must first conduct a separate state analysis before deciding that a state constitution is similar in meaning to the federal constitution. Even assuming that one can make this determination, the value thus placed on federal-state uniformity of decision is inappropriate. The provision of a separate state equal protection clause, even one identical to the federal clause, indicates a desire to provide additional protection to state residents; if the measure of state protection is the current scope of federal protection, then the state provision becomes mere surplusage. Our federalist system anticipates divergence and even tension between state and federal authority; its essence is linked to state court autonomy in state matters.[178] State courts pay but lip service to this system of government if in the name of uniformity they sacrifice their autonomy by conforming their analyses to those of the federal courts.

If there is little to be said in favor of unquestioning state acceptance of federal equal protection standards and tests, there is much to be said in favor of a more critical evaluation of these federal norms. Courts have used four major theories to justify interpreting their own constitutions differently from analogous or identical federal provisions. The first centers on federalism.[179] The second recognizes the unique makeup and concerns of the populace and constitutional framers of a particular state.[180] The third concerns the status of federal or state precedent at the time the case is brought.[181] The final consideration, the desire to avoid the outcome dictated by the federal analysis, is an explanation rather than a justification for diverging from federal norms.[182]

175. See cases cited note 171 supra; see also *Smith*, 97 Misc. 2d at 118, 411 N.Y.S.2d at 149.

176. Page v. Welfare Comm'r, 170 Conn. 258, 264, 365 A.2d 1118, 1122 (1975); cf. *Ravin*, 537 P.2d at 514-15 (addition of privacy clause requires separate analysis).

177. *Sperry & Hutchinson*, 118 Ind. at 180, 122 N.E. at 587.

178. See State v. Hogg, 118 N.H. 262, 264, 385 A.2d 844, 845 (1978) ("The same separate sovereignty concept under which the United States Supreme Court has held that the Federal Constitution does not protect citizens from dual prosecutions permits the States independently to construe their own constitution as affording such protection."); Comm. to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 260, 625 P.2d 779, 783, 172 Cal. Rptr. 866, 870 (1981).

179. See notes 183-89 and accompanying text infra.

180. See notes 190-95 and accompanying text infra.

181. See notes 196-98 and accompanying text infra.

182. See notes 199-203 and accompanying text infra.

A number of state courts have spoken of their "duty,"[183] "constitutional responsibility,"[184] "or obligation"[185] to apply an independent analysis to state constitutional claims. These courts find in the balance of state and federal authority not merely permission to freely interpret their own state constitutions, but a mandate to do so. The Supreme Court of California has stated:

> [J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.[186]

The same court in other circumstances found the chronological priority of the state's bill of rights to be a compelling justification for independent state interpretation: "It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise. [Thus, the states are] independently responsible for safeguarding the rights of their citizens."[187] This rationale gains at least implicit authority with every plea by the Burger Court[188] or the Reagan administration[189] for a return of authority to the states under the aegis of the "new" federalism.

The second consideration which has compelled state courts to deviate from previously announced federal standards is their perception of the unique concerns of the particular state's populace. Courts differ, however, in the sources they look to as a measure of this perspective.

The clearest evidence that citizens in a particular state have a different "agenda of values" than that developed by the nation as a whole is their explicit provision for constitutional protections different from or broader than federal protections. Thus, where a state constitution explicitly provides for a right of privacy, as opposed to a right to be free from search and seizure from

183. Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970).

184. Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).

185. *Myers*, 29 Cal. 3d at 261, 625 P.2d at 784, 172 Cal. Rptr. at 871.

186. People v. Chavez, 26 Cal. 3d 334, 352, 605 P.2d 400, 412, 161 Cal. Rptr. 762, 773 (1980) (citations omitted); see also Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972); State v. Browder, 486 P.2d 925, 936 (Alaska 1971); *Baker*, 471 P.2d 386, 401-02 (Alaska 1970); *Roberts*, 458 P.2d at 342; *Myers*, 29 Cal. 3d at 256, 625 P.2d at 783, 172 Cal. Rptr. at 870; *Hogg*, 118 N.H. at 263-64, 385 A.2d at 845.

187. People v. Brisendine, 13 Cal. 3d 528, 551, 531 P.2d 1099, 1114, 119 Cal. Rptr. 315, 330 (1975).

188. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976).

189. See, e.g., N.Y. Times, March 3, 1981, at B13, col. 1 (speech by Ronald Reagan before the National League of Cities announcing the creation of a "Task Force on Federalism" to study the proper relationship of national and local governments).

which a privacy right can be derived, "it can only be concluded that that right is broader in scope than that of the Federal Constitution."[190] The explicit provision is taken as evidence of "citizens['] . . . strong emphasis on individual liberty"[191] and that emphasis in turn spurs a state court decision to ignore, reject, broaden or otherwise amend an accepted federal solution to the problem in question.[192]

Courts have not always required such concrete evidence of the separate agenda of the state citizenry before departing from the federal path. In some cases, the court assumes the existence of a specialized interest based on a specialized characteristic of that citizenry.[193] In others, the court has seen in the intent of the framers of the state constitution,[194] or, more generally, in the purpose of the provision in question,[195] a separate state interest not served by federal standards of interpretation. Of course, the farther the court moves from specific differences in constitutional language in its search for some evidence of a unique set of state concerns, the more speculative their elaboration of those concerns becomes.

Courts have also felt it necessary to analyze a state claim differently than an analogous federal claim where the status of federal or state precedent in the area is in question. Where federal precedents are "suspect"[196] or where the federal courts have not yet reached a consensus on a particular problem,[197] the state courts have turned to their own constitutions to avoid the federal morass. Where a case presents an issue in a factual setting or legal framework not yet addressed by either state or federal courts, the state court may choose to proceed toward this new frontier within the area of its primary interpretive

190. Ravin v. State, 537 P.2d 494, 515 (Alaska 1975), criticized, 558 P.2d 310. See also *Myers*, 29 Cal. 3d at 262-63, 625 P.2d at 788, 172 Cal. Rptr. at 871 (1981); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130 n.3, 610 P.2d 436, 440, 164 Cal. Rptr. 539, 543 (1980).

191. *Ravin*, 537 P.2d at 514.

192. See also Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977), limited, 424 A.2d 276 (education a fundamental right in Connecticut because of explicit provision for a right to education, although federal decisions state that education is not a fundamental right); Governor v. State Treasurer, 389 Mich. 1, 203 N.W.2d 457 (1972), vacated sub nom., Milliken v. Green, 390 Mich. 389, 212 N.W. 711 (1973) (same); *Page*, 170 Conn. 258, 365 A.2d 1118 (state ERA suggests separate state analysis of sex discrimination claims); People v. Ellis, 57 Ill. 2d 127, 132, 311 N.E.2d 98, 100 (1974) (same); Op. of the Justices, 373 Mass. 883, 366 N.E.2d 733 (1977) (same); cf. Cooke v. Cooke, 21 Md. App. 376, 379, 319 A.2d 841, 843 (1974) (Court noted that the presence of an ERA in the state constitution meant that the case was decided in the shadow of the state constitution even though neither party had raised the ERA as grounds for their claim.).

193. *Breese*, 501 P.2d at 169 (extends state privacy protection to hairstyles because "[t]he United States of America, and *Alaska in particular*, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles") (emphasis added).

194. See Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 992, 394 N.E.2d 855, 864-65 (1979).

195. State v. Kaluna, 55 Hawaii 361, 368-69, 520 P.2d 51, 58-59 (1974).

196. State v. Huelsman, 60 Hawaii 71, 88, 588 P.2d 394, 405 (1978).

197. *Breese*, 501 P.2d at 166.

responsibility, the state constitution.[198] By its nature, this approach is case specific and applies to a limited number of issues.

Finally, some courts have conceded that their break with federal analysis is simply to avoid the outcome to which that analysis would lead in the case at hand.[199] In fact, all the talk of duty, special state concerns, and ill-defined federal precedents may be said to merely conceal a desire for a particular outcome. To a limited extent, this is true, for no state court, satisfied that the federal analysis of an issue was the correct analysis, would deviate from it. The duty to establish a separate state analysis does not, after all, imply a duty to establish a different state analysis.

Still, state opinions are not nearly so outcome-oriented. Some opinions differ from federal analysis while reaching the same outcome; the best example is the state which affords strict scrutiny to a sex-based statute only to uphold the law as necessary to the implementation of a compelling state interest.[200] Here, the impetus to break with federal analysis cannot be the desire to change the outcome of the case. Furthermore, it is not always necessary for a state court to break with federal analysis in order to avoid an undesirable outcome.[201] In 1893, the Indiana courts held that there was no rational basis for denying women the right to practice law,[202] even though the Supreme Court had previously upheld such a ban in the case of *Bradwell v. Illinois*.[203] Here, the desire to avoid the federally-dictated outcome was insufficient to spur a break with federal analysis. Thus, the concerns previously mentioned, though they often coexist with a desire to deviate from the federal outcome, serve as separate incentives to the desire of the state courts to independently analyze their constitutional provisions.

B. The Advocate's View: Structuring the Argument for Separate State Analysis

A sex discrimination litigant who has decided to bring an action in state court usually does so to avoid some unfavorable federal precedent. While, as noted above,[204] a state court may overcome that unfavorable precedent without deviating from federal standards of analysis, the greatest benefits of litigating in state court arise from the possibility of avoiding federal standards

198. See Commonwealth v. Soares, 377 Mass. 461, 477, 387 N.E.2d 499, 510, cert. denied, 444 U.S. 881 (1979).

199. State ex rel. J.D.S. v. Edwards, 574 S.W.2d 405, 409 (Mo. 1978); see also Op. of the Justices, 118 N.H. 347, 349-50, 387 A.2d 333, 335-36 (1978).

200. State v. Rivera, 62 Hawaii 120, 123, 612 P.2d 526, 529 (1980); Holdman v. Olim, 59 Hawaii 346, 354, 581 P.2d 1164, 1169 (1978); People v. York, 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975).

201. Boren v. California Dep't of Employment Dev., 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976); In re Leach, 134 Ind. 665, 34 N.E. 641 (1893).

202. *Leach*, 134 Ind. at 665, 34 N.E. at 641.

203. 83 U.S. (16 Wall.) 130 (1873).

204. See text accompanying notes 77-78 supra.

altogether.[205]

The advocate building an argument in favor of diverging from federal standards must appeal to the four theories, described earlier, which are used by the courts to justify such a move. These theories—state court independence, special concerns of the state populace, the unsettled status of state or federal precedent, or the desire to avoid the federally-dictated outcome—are not utilized in the same way by all state sex discrimination litigants. Instead, each litigant must determine which theory or group of theories offers the best hope of convincing a particular court to abandon federal precedent.

In deciding which of the four enumerated arguments to emphasize, the litigant must assess three factors: 1) precedent, both federal and state, on the issue involved; 2) the commitment of the state's citizenry to equal rights; and 3) the nature of the federal precedent being attacked. The first factor obviously alerts the plaintiff to any previous deviation by the state court from federal standards in the area. Yet, even if the state has traditionally followed federal precedent and federal analysis, this initial inquiry is still useful. It warns the litigant of those few cases in which the federal circuits are so divided, or the issue is so novel, as to militate in favor of relying solely on state grounds.

The litigant next looks for grounds on which she might claim that the state citizenry's commitment to equal rights exceeds national commitment, and therefore mandates rejection of the federal standards of protection. Ideally, evidence of state commitment will be found in explicit language in the state constitution. Litigants in the sixteen ERA states[206] thus have the strongest evidence to support this argument. Litigants in other states may find evidence of heightened sensitivity to sex discrimination claims, or other civil rights claims, in a particularly strong legislative commitment to equal rights.

Finally, the litigant must investigate the federal precedent being challenged. If the federal construct in question has been widely criticized or questioned, then the litigant should argue for rejection of this construct. If, however, the federal construct is of such long standing as to be almost beyond question, then the claimant must stress the independence of state courts in a federalist system. It is not enough in such a case to convince the court that a rejection of the federal construct would be equitable, or that the construct has outworn its usefulness. The claimant must also appreciate the difficult position of the state court in challenging a well-established rule, and must provide the court with an adequate authority for its obligation to leave the fold.

This final inquiry is best illustrated by contrasting two hypothetical sex

205. See authorities cited in note 18 supra; see also notes 7-11 and accompanying text supra.

206. Litigants in Louisiana and Utah must be careful here, as those states' ERAs have incorporated a rational basis test for sex discrimination into their constitutions, evincing in fact a lesser commitment to equality than that possessed by the nation as a whole. State v. Barton, 315 So. 2d 289, 292 (La. 1975); see Salt Lake City v. Wilson, 46 Utah 60, 68-69, 148 P. 1104, 1107 (1915).

discrimination litigants, John and Mary. John is the victim of a discriminatory law which would survive intermediate level examination under *Craig* and its progeny but would not survive a strict scrutiny analysis. John need only point to the widespread criticism of the *Craig* standard[207] to provide an adequate basis for state court divergence from the federal norm. Since the state court will find strong support for its defection in the legal community, it can readily establish its authority to abandon this unpopular construct. The court, and therefore the advocate's argument, can rest entirely on the desire to avoid the federal outcome.

Mary, on the other hand, is the victim of sex discrimination which involves no state action. She is thus faced with a well-established federal construct.[208] The state court needs a theory to legitimate its defection from the federal fold. Mary can provide this legitimation by stressing the duty of state courts to exercise independent judgment. The state court can rely on this theory to simultaneously reject one of the oldest and most widely followed federal constructs and lay claim to protecting the federalist system of government.

CONCLUSION

There is, theoretically, no need for the litigant contemplating an equal protection claim to choose between state and federal courts. Since federal minima are incorporated into state constitutions, the claimant retains a bedrock of federal protection in state court. Furthermore, under *England v. Louisiana State Board of Medical Examiners*,[209] a state litigant can reserve federal claims for later federal adjudication. Nonetheless, many litigants must make the choice between state and federal court because of lack of time or money or both. Too often the result is a blind dive into federal court.

Yet, as has been shown, the state courts have a great deal to offer the sex discrimination litigant. Certain states have begun to make inroads in the area of state action and disparate impact; still more have departed from the limited *Craig* standard of scrutiny to a heightened standard of analysis for sex discrimination claims. While state courts, like the federal courts, currently misuse physical and cultural distinctions between men and women to justify further discrimination, there is great potential for improvement in this highly subjective area.

A litigant seeking to take advantage of these state innovations must consider several factors when crafting her argument. Where the precedents on the issue are in disarray in the federal courts, or where the question has not yet been addressed by the state courts, she can argue that caution suggests independent state analysis avoiding slavish adherence to the ill-defined federal trend. State demonstration of special concern for sexual equality through the provision of a state ERA or in some other way also provides an excellent

207. See text accompanying notes 122-43 infra.
208. See text accompanying notes 49-56 infra.
209. 375 U.S. 411 (1964).

argument for state divergence. Where the federal construct is widely disfavored in the legal community, the litigant may argue that the construct should be avoided. Finally, where the federal barrier is rarely questioned, the litigant must rest her argument for separate state analysis on the constitutional prerogative and duty of the state courts to analyze their own constitutions independently.

One final point must be addressed. While state protection is no substitute for federal protection, and fundamental rights should not vary with domicile, state protections should nevertheless be used to their full potential. The present constitutional situation is analogous to the pre-*Roe v. Wade*[210] status of abortion rights. Even prior to *Roe v. Wade*, a few states, such as New York, had legalized abortion.[211] Abortions were thus available to those women who lived in states like New York or who could afford to travel to them. While it is far preferable to have a nationwide, federally-protected right to abortion, these statutes provided a stopgap—a haven for pregnant women in the pre-*Roe v. Wade* world. Further, the *Roe* Court cited, as support for its extension of privacy rights to protect abortion, state decisions which had similarly struck down anti-abortion statutes.[212] It therefore can be argued that the state acceptance of abortion rights spurred federal acceptance.

State constitutional protection of gender equality can thus serve the same two functions served by those jurisdictions which protected abortion rights prior to *Roe*. First, the state constitution can provide a haven from the harshest barriers facing sex discrimination litigants. Second, a groundswell of state innovation in this area may serve as a model— or an impetus—for federal action.

Extolling the praises of federal protection does not weaken the case for vigorous pursuit of that protection through state constitutions. Greater federal protection may indeed be the ultimate goal. But along the way, the state court independently analyzing its state constitution is an ally not yet fully exploited. As the Supreme Court retreats from the commitment to full equality for women, that ally becomes more powerful, and more necessary.

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210. 410 U.S. 113 (1973).

211. See e.g. N.Y. Penal Law § 125.05 (3) (McKinney 1975). In 1962, the American Law Institute in its Model Penal Code included a liberalized abortion statute. Model Penal Code § 230.3 (1962). Between 1967 and 1970, 12 states adopted this provision or one substantially similar. See generally Hechtman, Practice Commentary, N.Y. Penal Law § 125.05 (McKinney 1975).

212. *Roe*, 410 U.S. at 154-56.