I. Introduction

This paper offers a brief overview of Washington’s Equal Rights Amendment, Washington Constitution Article XXXI, focusing on the landmark case of Darrin v. Gould, 85 Wn.2d 859, 871 (1975). It begins by looking at the federal ERA movement and considering Washington’s adoption of the ERA in this context. It then examines the text and purpose of the amendment, its relationship to federal and state equal protection and privileges and immunities clauses, and the standard of review under the Washington ERA. Finally, it briefly summarizes selected cases that mark milestones in judicial interpretation of the ERA.

II. The National ERA Movement

The Equal Rights Amendment was first introduced into Congress in 1923. Congress finally passed it and submitted it to the states for ratification on March 22, 1972. The Federal ERA reads:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

1 This paper borrows heavily from a paper prepared for the 2007 Washington State Historical Society CLE by Debra L. Stephens and Bryan P. Harnetiaux.
Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.


The original ratification deadline of seven years was extended by Congress to June 30, 1982. When this deadline expired, only 35 states (of the necessary three-fourths, or 38 states) had ratified the ERA. It has been reintroduced into every session of Congress since that time.

There remains a movement to ratify the Federal ERA, based on a three-state strategy. This movement was reinvigorated by ratification of the 27th Amendment—the so-called Madison Amendment in 1992—more than 200 years after it was originally passed in Congress. Acceptance of this ratification period as sufficiently contemporaneous has led ERA supporters to argue that Congress has the power to maintain the legal viability of the ERA’s existing 35 state ratifications. They contend that the ERA’s time limit is open to change, as Congress demonstrated in extending its original deadline, and that any rescission votes are invalid. Therefore, Congress could accept state ratifications that occur after 1982 and keep the existing 35 ratifications alive. See Alison L. Held, et al., “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,” 3 William & Mary Journal of Women and the Law 118 (Spring 1997).

The Congressional Research Service has concluded that acceptance of the Madison Amendment does in fact have implications for the three-state strategy premise. Since 1995,
ratification bills have been introduced in eight of the non-ratifying states: Arizona, Arkansas, Florida, Illinois, Mississippi, Missouri, Oklahoma, and Virginia.

Incidentally, it would be inaccurate to view the Federal ERA movement as the first attempt to establish gender equality as a constitutional principle. Two states had provisions guaranteeing gender equality dating from the late 19th century. See Utah Const. art. IV, sec. 1 (1896) (guaranteeing gender equality of “all civil, political and religious rights and privileges.”); Wyo. Const. art. I, sec. 3; art. VI, sec. 1; art. VII, sec. 10 (1890) (provisions for gender equality in political, civil, religious and educational rights). In addition, several states including Washington had provisions addressing gender equality in specific contexts. See Cal. Const. art. I, sec. 8 (1879) (prohibiting employment discrimination on account of sex); Wash. Const. art. IX, sec. 1 (1889) (recognizing paramount duty of the state to provide education “without distinction or preference on account of race, color, caste, or sex.”)

III. Washington’s ERA, Washington Constitution Art. XXXI

On January 11, 1972, Seattle Republican representative Lois North introduced an amendment to the Washington State Constitution providing that equality of rights could not be taken away from any person on account of his or her sex. The house resolution was amended to include the words “and responsibility” after “rights.” H.J.Res. 61, 42d Leg., 2d Ex. Sess., 1972 Wash. Laws 526.

Supporters of the measure heralded the state ERA as ending discriminatory benefits or obligations on account of sex, but emphasized that it would not require same sex public
restrooms or disrupt family life. Opponents argued that the ERA would go far beyond the goal of eliminating discrimination and would result in unintended consequences such as requiring homosexual marriage, integrated school athletic teams and mandatory combat duty for military women. See Official Voters Pamphlet, General Election, Nov. 7, 1972, at 52.

Washington voters adopted the ERA by a slim margin: 50.13% in favor to 49.87% opposed. In the wake of the measure’s passage, the legislature amended 129 existing laws to make the statutory language gender-neutral. Ch. 154, 1st Ex. Sess., 1973 Wash. Laws 1118. Commentators noted that this was largely unnecessary because a codified rule of construction already provided that “words importing the masculine gender may be extended to females also.” RCW 1.12.050; see Gunnar Dybwad, Implementing Washington’s ERA: The Problem with Wholesale Legislative Revision, 49 Wash. L. Rev. 571 (1974).

The ERA was the 61st amendment to the Washington Constitution, and became Article XXXI. It reads:

SEX EQUALITY – RIGHTS AND RESPONSIBILITIES

Sec. 1  EQUALITY NOT DENIED BECAUSE OF SEX. Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

Sec. 2  ENFORCEMENT POWER OF LEGISLATURE. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this article.

[This is the version of Article XXXI prepared by the Washington Office of the Code Reviser, which added the title and captions.]
Judicial interpretation of Article XXXI has focused on Section 1. In fact, a recent Shepard’s search of Section 2 revealed no case cites. However, the inclusion of Section 2 follows the structure of the federal ERA, and Section 2 of the federal ERA has not been construed as imposing any limitation on Section 1, for example by requiring legislation to implement it. (To the contrary, critics attacked Section 2 of the federal ERA as a power grab by the federal government. However, several other federal amendments have the same or similar language, and it has not been construed as enlarging the jurisdiction of the federal government at the expense of the states.) Without citing Section 2 in particular, the Washington Supreme Court has suggested the purpose of this provision in noting that the Washington ERA allows the legislature “to take measures designed to assure women actual as well as theoretical equality of rights.” *Marchioro v. Chaney*, 90 Wn.2d 298, 306 (1978) (quoting, Brown, et al., “The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,” 80 Yale L.J. 871, 904 (1971)), aff’d, 442 U.S. 191 (1979). Moreover, with respect to Section 1, the Court has recognized its operative language as mandatory. *Id.* at 308; *see also Darrin v. Gould*, 85 Wn.2d 859, 871 (1975) (noting “the broad, sweeping, mandatory language of the Equal Rights Amendment”).

Since the adoption of Article XXXI in 1972, Washington courts have construed it in various contexts, ranging from same sex marriage to “ladies’ night” promotions. Some of the milestone cases are summarized below in Section V. Before considering these cases, however, it is helpful to briefly discuss the relationship of the Washington ERA to equal protection/privileges and immunities analysis, and the particular standard of review required under the ERA.
IV. The ERA and Federal and State Equal Protection/Privileges & Immunities Clauses

One of the first challenges in interpreting the Washington ERA was to determine its relationship to existing equal protection and privileges and immunities clauses. The Court in *Darrin v. Gould* observed:

> Presumably the people in adopting Const. art. 31 intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests.

85 Wn.2d at 871.

At the time the ERA was passed in Washington, federal equal protection analysis under the 14th Amendment to the U.S. Constitution provided that classifications based on sex were subject to mere rational basis scrutiny, as gender was not regarded as a “suspect” statutory classification. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971); *see also Darrin*, 85 Wn.2d at 864-66 (discussing federal rational basis review of sex-based classifications). In a case brought just before passage of the ERA, Washington had construed its privileges and immunities clause, art. I, sec. 12, as providing greater protection than under federal law, subjecting sex-based statutory classifications to strict scrutiny. *See Hanson v. Hutt*, 83 Wn.2d 195, 201 (1973). In *Hanson* the Court observed that, “[s]ex, like race and lineage, is an immutable trait,” which like other suspect classifications “frequently bears no relation to ability to perform or contribute to society.” *Id.* at 199 (quoting *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 18, 485 P.2d 529 (1971)). The ERA passed while the *Hanson* case was pending, and the Court noted its significance in determining whether sex-based classifications warrant strict scrutiny. *Id.* at 200 n.3.
Subsequent federal cases have recognized an intermediate level of scrutiny under the 14th Amendment. Under this test, if the statutory objectives are important and the means to accomplish them are substantially related to the statute’s goals, then a sex-based classification withstands a federal equal protection challenge. *See Craig v. Boren*, 429 U.S. 190 (1976) (introducing “substantial relationship” analysis in scrutinizing sex-based classification); *United States v. Virginia*, 518 U.S. 515 (1996) (applying intermediate scrutiny standard as stated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

Following adoption of the Washington ERA, the Washington Supreme Court in *Darrin* addressed existing law, including its earlier decision in *Hanson*, in light of the ERA’s mandate. It held that “Const. art. 31 added something to the prior prevailing law by eliminating otherwise permissible sex discrimination if the rational relationship or strict scrutiny tests were met.” *Darrin*, 85 Wn.2d at 871. The Court described the intent of the ERA “to outlaw interpretations of the equal protection and due process clauses that permitted exceptions to the prohibition against sex discrimination,” *id.* at 871-72, relying on Pennsylvania’s strict interpretation of its ERA. *Id.* at 871-73. It later retreated from its equal protection and privileges and immunities analysis in *Hanson*, looking solely to the ERA rather than these provisions in addressing sex-based classifications. *See Southwest Wash. Ch., Nat’l Elec. Contractors Ass’n v. Pierce Cy.*, 100 Wn.2d 109, 127 (1983). It described the test under the ERA as replacing any prior classifications with “the single criterion: Is the
classification by sex discriminatory? or, in the language of the amendment, Has equality been denied or abridged on account of sex?” *Marchioro*, 90 Wn.2d at 305.

In one sense, the ERA appeared to simplify the analysis of sex-based statutory classifications. The Court’s early analysis in *Darrin* suggested that any sex-based classification would be per se invalid. *See* 85 Wn.2d at 877. *Marchioro* clarified that not every sex-based distinction constitutes discrimination, however, and recognized that the ERA allows laws that further gender equality. *See* 90 Wn.2d at 306-08. Later decisions confirm that the ERA’s seemingly absolute language admits of narrow exceptions: when differential treatment is based upon actual differences between the sexes and when affirmative action laws alleviate the effects of past discrimination. *See* Guard v. Jackson, 132 Wn.2d 660, 664 (1997).

These exceptions have not been read expansively. Washington is one of only two states that apply a standard of review under its ERA that is more rigorous than strict scrutiny. *See* Darrin, 85 Wn.2d at 872, 877. (Pennsylvania is the other state. *See, e.g.*, Commonwealth v. Pennsylvania Inter. Athletic Ass’n, 334 A.2d 839 (1975) (invalidating rule that prohibited girls from playing interscholastic sports with boys)). The evolution of Washington’s interpretation of the ERA can be traced through several milestone cases. A brief review of some of the leading cases in Washington follows.
V. Case Law Milestones in Interpreting Washington’s ERA

The case synopses here focus on that part of the particular court opinion addressing interpretation and application of the ERA, and do not discuss resolution of other legal issues before the court.


Background:
Two men were denied a marriage license and challenged the marriage law as violating the ERA.

Holding:
The ERA does not prohibit a statute requiring marriage to be between persons of the opposite sex. The Court of Appeals reasons that the purpose of the ERA is to prohibit discriminatory treatment of men or women, and the marriage statute does not discriminate on the basis of sex. Simply put, it applies equally to men and women. The plaintiffs were denied a marriage license because they were members of the same sex, not because they were men. See Singer, 11 Wn. App. at 259-60 (premising holding on nature of marital relationship and impossibility of reproduction between members of the same sex).

Comment:
Singer is generally regarded as Washington’s false start in interpreting the ERA. Compare Seattle v. Buchanan, infra. (articulating “unique characteristic” exception to ERA). Also, it
is noteworthy that this first case interpreting the ERA in Washington involves the same
subject as the most recent case. See Andersen v. King County, infra.

_Darrin v. Gould, 85 Wn.2d 859 (1975)_

**Background:**

Two high school girls sought to play football for their high school but were prohibited from
doing so by a state athletic association regulation. The only football program at the high
school was for boys. The constitutionality of the prohibition was challenged on state and
federal equal protection grounds, and under Washington’s ERA. It was understood that the
girls were capable of competing in boys’ football. The superior court upheld the regulation
prohibiting girls from participating in football on boys’ teams, and denied injunctive relief.

**Holding:**

A unanimous Supreme Court holds that the regulation constituted “state action,” was clearly
based upon sex as opposed to the ability to play, and was unconstitutional under
Washington’s ERA. _Darrin, 85 Wn.2d. at 874-77_. The Court finds no compelling state
interest that trumps that of the ERA itself. _Id_. The regulation prohibiting girls from playing
on the boys’ high school football team is invalidated.

**Comment:**

The Court acknowledges three possible exceptions have been recognized in commentary
regarding the federal Equal Rights Amendment: regulation of cohabitation in sexual activity
between unmarried persons; protection of fundamental rights of privacy; and dissimilar treatment on account of a characteristic unique to one’s sex. *Darrin*, at 872 n.8. It finds none of these exceptions apply in these circumstances. *Id.*

Although the opinion is unanimous, there is a somewhat begrudging four-justice concurrence that finds, with “some qualms,” the result is correct under the ERA. *Id.* at 878 (Hamilton, J., concurring). The concurrence questions whether the people fully appreciated the consequences of the amendment, but concludes that “it is beyond the authority of this court to modify the people’s will. So be it.” *Id.*

*Bolser v. Liquor Control Board*, 90 Wn.2d 223 (1978)

**Background:**

Plaintiff dancers challenged the validity of a Washington State Liquor Control Board regulation placing restrictions on topless dancing in establishments serving intoxicating liquor. The regulations were challenged under the First Amendment and Washington’s ERA. The superior court concluded that the dancers lacked standing to challenge the regulation, and also concluded plaintiff dancers’ rights and privileges had not been impaired.

**Holding:**

In a 6-3 opinion, the majority finds plaintiff dancers have standing, but that the regulations do not violate the First Amendment. The majority also rejects the claim that the regulation constituted sex-based discrimination in violation of the ERA, concluding that the regulation:
would apply equally to male and female dancers. Nothing in the regulation itself distinguishes between the sexes.

*Bolser*, 90 Wn.2d at 231. The majority notes that the state administrative agency applied the ordinance to both male and female dancers. *Id.*

**Comment:**

The dissent does not address the ERA issue. *Id.* at 232-34 (Rosellini, J., dissenting in part).

*Marchioro v. Chaney, 90 Wn.2d 298 (1978), aff’d, 442 U.S. 191 (1979)*

**Background:**

In this case plaintiffs sought declaratory and injunctive relief, challenging the constitutionality of state statutes that required that the two State Democratic Committee members elected by any county central committee be of the opposite sex, and that the chair and vice chair of the State Democratic Committee be of the opposite sex. The plaintiffs urged these provisions violated the ERA, and other state and federal constitutional provisions. The superior court upheld these challenges, concluding among other things, that the ERA was violated by the “opposite sex” requirements of the statutes.

**Holding:**

In a 5-4 opinion, the majority upholds the “opposite sex” provisions of the statutes, concluding there is no violation of the ERA. *Marchioro*, 90 Wn.2d at 303-08. In so doing,
the Court defines the inquiry in the following terms: “Is the classification by sex discriminatory? or, in the language of the amendment, Has equality been denied or abridged on account of sex?” *Id.* at 305. Ultimately, the majority concludes that the *purpose* of the “opposite sex” provisions is to assure women actual as well as theoretical equality of rights, and they are thus valid under the ERA. *Id.* at 305-06. The majority holds:

The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. An equal number of both sexes must be elected to the committee and as chairman and vice-chairman of the state committee. Neither sex may predominate. Neither may discriminate or be discriminated against. There is an equality of numbers and an equality of rights to be in office and to control the affairs of the state committee.

*Id.* at 306.

A four-justice dissent accuses the majority of departing from what it portrays as the absolutist view of the ERA reflected in *Darrin v. Gould*, supra. *See Marchioro*, 90 Wn.2d at 314-18 (Horowitz, J., dissenting). The dissent notes that “[a]ll classifications based on sex are prohibited,” finding that none of the three possible exceptions referenced in *Darrin* apply here. *Id.* at 316. The dissent concludes the “opposite sex” provisions offend the ERA because once one position is filled, the remaining position must be filled by a member of the opposite sex, regardless of qualifications or abilities. *Id.* at 317.

**Comment:**

There is an “affirmative action”-type component to the majority’s ERA analysis, not present or foreshadowed in prior case law.

Background:

Five women were convicted of “lewd conduct” under a Seattle ordinance for sunbathing and swimming in public with their breasts exposed. They challenged the constitutionality of the ordinance on a number of grounds, including under the ERA. The superior court upheld the municipal court convictions of the women.

The ordinance in question defined “lewd conduct” as public exposure of one’s genitals or female breasts. Buchanan, 90 Wn.2d at 586.

Holding:

In a 5-4 opinion, the majority upholds the ordinance under the ERA, invoking one of the three possible exceptions enumerated in Darrin v. Gould, supra, at 872 n.8 (“dissimilar treatment on account of a characteristic unique to one’s sex”). The majority concludes that the requirement that female breasts be covered in public is based upon “a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals.” Buchanan, at 590. The majority accepts the notion that female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal. Id. at 589. As such, the majority concludes that exposure of female breasts in public is a proper subject of government police power. Id. at 590.
Neither of the two dissents that comprise the four-justice minority disagrees with the majority’s holding regarding the ERA. In fact, Justice Horowitz’s dissent reaffirms the applicability of the exception noted in *Darrin v. Gould*, *supra*. *See Buchanan* at 617 (Horowitz, J., dissenting).

**Comment:**

This is the first Supreme Court case where a concrete exception to Washington’s ERA is identified as such. *Compare Singer, supra.*


**Background:**

A male patron (MacLean) of a Seattle Sonics basketball game sued under Ch. 49.60 RCW for sex discrimination because he was not also allowed to purchase a game ticket at half price for himself under a “ladies’ night” promotion, as he was able to do for his wife. The superior court granted summary judgment, concluding that the practice complained of was not within the intended scope of the statutory prohibition. After the judge ruled on the summary judgment motion, MacLean sought to amend his complaint to allege violation of the ERA, and the motion was denied. The Court of Appeals found a violation of the ERA. *See MacLean*, 96 Wn.2d at 341. The Supreme Court granted review.

**Holding:**
In a 5-4 opinion, which is without precedential value because two justices concurred with the 3-justice lead opinion “in result only,” the Court upholds dismissal of the statutory discrimination claim and finds no abuse of discretion in denying the motion to amend the complaint to allege violation of the ERA. See id. at 341-48.

The lead opinion by Justice Rosellini finds it significant that “[t]here can be perceived in this scheme no intent to discriminate against men.” Id. at 341. This opinion also finds no classification “based solely on sex.” Id. It concludes there was no violation of Ch. 49.60 RCW and the ERA. Id. Further, the lead opinion finds no injury to MacLean because the savings for his wife’s half-price ticket inured to the benefit of the community. Id. at 342-43.

A three-justice dissent concludes that the promotional scheme violates Ch. 49.60 RCW, which expressly bars gender-based price differentials. See MacLean at 348-53 (Utter, J., dissenting). In passing, this dissent also notes that gender-based promotions fail under the ERA. Id. at 353 n.6.

The remaining dissenting opinion concludes that MacLean is entitled to injunctive relief for violation of the ERA, even though he otherwise did not incur any damages. Id. at 353-59 (Dolliver, J., dissenting). Incidentally, Justice Dolliver also found that any “state action” requirement for relief is met here, because the City of Seattle leased the playing facility to the Sonics. Id. at 355-56.

Comment:
The two dissents in this case reflect the absolutist, “plain language” view of the ERA. Whether “state action” is a requirement under the ERA remains unclear.


Background:
Two contractor associations and a subcontractor challenged a Pierce County affirmative action plan for minority and women contractors applicable to county public works contracts. In the preamble to the ordinance, the county proposed to seek to correct the problem of historical underrepresentation of minorities and women in the county workforce. The law was challenged on a number of statutory and constitutional grounds, including the ERA.

The superior court upheld the affirmative action plan against all challenges.

Holding:
The Supreme Court upheld the affirmative action plan, with two justices concurring in result only, and one justice filing a special concurrence.

Regarding the ERA, the Court reinforces the notion that the ERA “absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny’.” Electrical Contractors, 100 Wn.2d at 127 (citation omitted). Nonetheless, the Court concludes that “[t]his absolute mandate of equality does
not, however, bar affirmative governmental efforts to create equality in fact.” _Id._ (citation omitted). The Court holds:

As long as the law favoring one sex is intended solely to ameliorate the effects of past discrimination, it simply does not implicate the ERA.

_Id._ at 127-28 (footnote omitted). Under this holding, an affirmative action program will be upheld if intended solely to eliminate the effects of past discrimination and has a rational basis for concluding such effects remain. _Id._ at 128.

**Comment:**

Here, as in _Marchioro, supra_, if the purpose of the particular law is to ameliorate the effects of past discrimination, different treatment under the law on the basis of sex will be upheld.

In a footnote, the Court also indicates that the ERA is the sole basis under the state constitution for determining the validity of sex-based classifications. _See id._ at 128 n.3.

**Blair v. Washington State University, 108 Wn.2d 558 (1987)**

**Background:**

Female athletes and coaches of Washington State University (WSU) sued the university for sex discrimination in operating the women’s athletic program, under both the ERA and Ch. 49.60 RCW. The superior court concluded that the women’s athletic program was operated in violation of these laws. In fashioning appropriate relief, the court entered an injunction requiring certain calculations for participation opportunities, scholarships, and distribution of
non-revenue funds regarding operation of the women’s athletic program. The injunctive remedy excluded football, an all male program, from its calculations, concluding the nature of that program was unique. See Blair, 108 Wn.2d at 565.

The female athletes and coaches appealed a number of rulings by the superior court, including its exclusion of the men’s football program in fashioning the injunctive remedy. WSU only cross-appealed regarding the award of certain attorney fees and costs.

**Holding:**

The Supreme Court strikes down that portion of the injunctive remedy which excluded the men’s football program from consideration in calculating participation opportunities, scholarships, and distribution of non-revenue funds. Blair at 564. The basis for the Court’s decision is twofold. On the one hand, the Court notes “[i]t is stating the obvious to observe the Equal Rights Amendment contains no exception for football.” Id. at 566. On the other hand, the Court also appears to invoke the “affirmative action” rationale, when it concludes:

This absolute mandate of equality does not, however, bar affirmative governmental efforts to create equality in fact; governmental actions favoring one sex which are intended solely to ameliorate the effects of past discrimination do not implicate the Equal Rights Amendment.

Id. at 565 (citation omitted).

The Court further holds that in fashioning injunctive relief, the superior court properly exercised its discretion in excluding from the division of university financial support the revenue generated by any specific sport or program. Id. at 566. It found this formula was “gender neutral,” and did not violate the ERA. Id. at 568.
Comment:

The “affirmative action” rationale is drawn from the Supreme Court’s prior opinions in *Electrical Contractors, supra*, and *Marchioro, supra*.

*State v. Brayman, 110 Wn.2d 183 (1988).*

Background:

Criminal defendants charged with driving while under the influence of alcohol challenged amendments to Washington statutes permitting conviction based upon a driver’s breath-alcohol ratio attaining certain levels. The amendments were challenged on a number of constitutional grounds. *See Brayman*, 110 Wn.2d at 200. The county district court found the amendments unconstitutional, and the superior court affirmed. The Supreme Court granted direct review.

Holding:

A unanimous Supreme Court reverses the lower courts, and upholds the constitutionality of the amendments. In the course of its decision, the Court addresses an additional constitutional argument based upon the ERA, rejecting the contention that the statutory amendments violate the ERA because of the breath-alcohol ratio formula’s disparate impact on women. *See Brayman* at 200. In particular, the criminal defendants contended that the ratios employed in the statutes were based upon studies conducted on mostly male subjects, thus rendering inflated blood alcohol readings for women. *Id.* at 202. The Court rejects this
and other similar arguments. Ultimately, it finds that the record is inadequate in proving that the formula authorized in the statutory amendments for measuring blood alcohol levels has a disparate impact on women. Consequently, the amendments were not found to violate the ERA. *Id.* at 203-04.

**Comment:**

The claim of invalidity based upon the ERA was resolved on the facts.

*Guard v. Jackson, 132 Wn.2d 660 (1997)*

**Background:**

This case involves a challenge under the ERA to a statute that prevents a father of a child born out of wedlock, against whom paternity had been established, from maintaining or joining in an action for wrongful death of the child if he has not kept up with child support obligations. No similar requirement is imposed upon the mother of the child. The superior court dismissed the father as an intervenor-plaintiff in the wrongful death action. The Court of Appeals reversed, finding the support provision imposed upon the father violated the ERA. The Supreme Court accepted review.

**Holding:**

A unanimous court concludes that the father is disadvantaged under the wrongful death statute on account of sex, and that the offending provision is violative of the ERA. In so doing, the Court identifies two recognized exceptions to the ERA’s otherwise “absolute”
prohibition: First, where actual differences between the sexes justify a particular classification; and second, where some affirmative action is undertaken which is designed to alleviate the effects of past discrimination and attain equality in fact. Guard, 132 Wn.2d at 664. The Court rejects the argument that the difference in treatment of fathers and mothers under the statute is based upon any “actual difference” between the sexes. Id. at 666-67.

Comment:
This case represents the latest word regarding what exceptions exist to the ERA’s otherwise absolute prohibition against discrimination on account of sex.

*Andersen v. King County, 158 Wn.2d 1 (2006).*

Background:
These are consolidated cases involving challenges to Washington’s 1998 Defense of Marriage Act (DOMA), codified in amendments to RCW 26.04.010-.020. Both superior courts struck down DOMA on constitutional grounds, but upheld the enactment under the ERA. See Andersen, 158 Wn.2d at 11-12. The Supreme Court granted direct review.

Holding:
In a 5-4 decision, the Supreme Court upholds the constitutionality of DOMA, including its validity under the ERA. Regarding the ERA, a five-justice majority, consisting of the lead opinion by Justice Madsen and the concurring opinion of Justice J.M. Johnson, concludes that because DOMA treats both sexes the same, it does not involve discrimination on account
of sex. *See Andersen*, 158 Wn.2d at 10, 47-53 (lead opinion by Madsen, J.) & *id.* at 53, 90-91 (J.M. Johnson, J., concurring). Both of these opinions rely upon the Court of Appeals decision in *Singer v. Hara*, *supra*, which involved a similar constitutional challenge to denial of same sex marriages. (*Singer* is discussed, *supra.*)

**Comment:**

Of the dissenting justices, only Justice Bridge specifically addresses the ERA, and disagrees with the holding of the majority court on this issue. *See Andersen* at 115-19 (Bridge, J., dissenting). Justice Bridge finds the ERA is violated because DOMA does affect an individual person’s choice based upon sex. *See id.* at 115 (recognizing DOMA violates the ERA because “[a] woman cannot marry the woman of her choice but a man can marry the woman of his choice.”)

**Also noteworthy:**

*Roberts v. Dudley*, 140 Wn.2d 58 (*2000*). This case involved a claim of wrongful termination in violation of public policy. In addition to anti-discrimination statutes, the plaintiff invoked the ERA as a source of public policy prohibiting termination based on gender discrimination. While the majority opinion declines to reach the issue, relying solely on the public policy expressed in Chs. 49.60 and 49.12 RCW, *see Roberts*, 140 Wn.2d at 62 n.2, four justices note that the ERA provides a “more powerful source of public policy.” *Id.*, 140 Wn.2d at 77 (Alexander, C.J., concurring); *see also id.* at 78 (Talmadge, J., concurring).

**VI. Conclusion**
Though inspired by the national ERA movement, Washington’s Article XXXI is an example of a unique state provision with no federal constitutional counterpart. As it has been construed in case law spanning the 35 years since its adoption, the ERA is a near categorical prohibition on sex-based classifications, admitting of only narrow exceptions. In this regard, the ERA is one of the strongest guarantees of equal treatment of individuals in the constitution, a fact that underscores why Washington courts have looked to this provision, rather than equal protection or privileges and immunities provisions, to address challenges of gender discrimination.