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Two of several statutes governing the composition and organization of the major political parties in Washington, R.C.W. § 29.42-020 and R.C.W. § 29.42.030, require that certain pairs of party representatives consist of one man and one woman. Following an intraparty dispute various interested persons filed suit, challenging, inter alia, the constitutionality of R.C.W. §§ 29.42.020-.030 under Washington's Equal Rights Amendment (ERA). The trial court granted the plaintiffs summary judgment on this claim. In a five to four decision the Washington Supreme Court reversed, upholding the constitutionality of both statutes under the ERA because they did not discriminate on the basis of gender. Marchioro v. Chaney, 90 Wn. 2d 298, 582 P.2d 487 (1978).

1. Section 29.42.020 provides in relevant part: "The state committee of each major political party shall consist of one committeeman and one committeewoman from each county elected by the county committee at its organization meeting. It shall have a chairman and vice chairman who must be of opposite sexes." WASH. REV. CODE § 29.-42.020 (1976).

2. Section 29.42.030 provides in relevant part: "At its organizational meeting, the county central committee shall elect a chairman and vice chairman who must be of opposite sexes; it shall also elect a state committeeman and a state committeewoman." WASH. REV. CODE § 29.42.030 (1976).

3. In 1976 the Washington State Democratic Convention adopted a new charter for the Democratic State Committee. Under the previous charter, the State Committee consisted of two representatives from each of the 39 counties in Washington. Brief of Respondents at 2, Marchioro v. Chaney, 90 Wn. 2d 298, 582 P.2d 487 (1978). In an attempt to reflect more closely the distribution of the population, the amended charter added one delegate for each legislative district. CHARTER OF THE DEMOCRATIC PARTY OF WASHINGTON art. IV, para. G(4). The State Committee elected prior to the 1976 Convention refused to recognize the new charter or to seat the delegates elected pursuant to it. Brief of Respondents, supra at 2–3.

In an attempt to force the State Committee to operate under the new charter, the plaintiffs challenged R.C.W. §§ 29.42.020-.030 because the new charter was inconsistent with the statute. The plaintiffs included the party chairpersons from King, Pierce, and Spokane counties, several legislative district organization representatives, several members of the Commission which drafted the 1976 charter, and one State Committee member.

4. The court also considered a challenge to R.C.W. § 29.42.020 based on the right to freedom of association. It should be noted that the Supreme Court has noted probable jurisdiction on this issue. Marchioro v. Chaney, 99 S. Ct. 718 (1979). This challenge, however, is beyond the scope of this note.

5. The Washington Equal Rights Amendment provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. 31, § 1.
The importance of *Marchioro* is twofold. First, the standards of review adopted by state courts under their respective equal rights provisions may influence the standard of review under, and hence, the impact of, the federal ERA.\(^6\) Second, *Marchioro's* interpretation of Washington's ERA constitutes substantive state law, which will continue to be applied even if the federal ERA is ratified.\(^7\)

I. BACKGROUND

Seventeen states have adopted equal rights provisions prohibiting discrimination based on gender.\(^8\) A variety of review standards has been adopted under these provisions. In determining which standard to apply, one of the most influential factors has been the language of the particular provision. Most states have opted for some form of equal protection analysis.\(^9\)

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6. The proposed Amendment XXVII to the United States Constitution provides:

   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.

   Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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


7. There has been a growing tendency in state courts to find broader protection for individual rights in state constitutional provisions than those afforded under recent interpretations of the Federal Constitution. See Brennan, *State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)*; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976).* See also Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L.J. 421 (1974); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky. L.J. 873 (1975).* This same analysis applies to the ERA. Even if a less restrictive standard of review was adopted under the proposed federal ERA, a state could continue to apply a stricter standard of review under its own equal rights provision.


9. Nine states have adopted constitutional equal rights provisions similar to the proposed federal ERA, which provides that equality under the law shall not be denied or abridged because of sex: Colorado, Hawaii, Maryland, Massachusetts, New Hampshire,
A. Equal Protection Analysis

Although it may no longer be doing so, the United States Supreme Court traditionally has used a two-tiered approach in reviewing legislation challenged under the equal protection clause.\(^\text{10}\)

The first tier, or "rational basis" test, has been adopted by a few state courts for reviewing equal rights challenges.\(^\text{11}\) Under this standard, the challenged statute is upheld if there is a rational relationship between the classification and a legitimate legislative objective.\(^\text{12}\) Courts have not hesitated to infer such a relationship.\(^\text{13}\) As a result,

New Mexico, Pennsylvania, Texas, and Washington (citations in note 8 supra). B. Brown, A. Freedman, H. Katz & A. Price, Women's Rights and the Law 19 (1977) [hereinafter cited as A. Freedman]. Eight states have adopted other constitutional provisions prohibiting or limiting sex discrimination: Alaska, Connecticut, Illinois, Louisiana, Montana, Utah, Virginia, and Wyoming (citations in note 8 supra). A. Freedman, supra at 19. In the nine states with provisions similar to the federal ERA, courts have generally applied the "suspect classification" standard of the equal protection clause. See note 23 infra. In the other states, what little authority there is has tended toward applying the traditional or heightened rationality test. A. Freedman, supra at 31; see note 11 infra.


11. For example, in State v. Barton, 315 So. 2d 289 (La. 1975), a statute holding only husbands criminally liable for nonsupport was found to be a reasonable legislative classification, so that it did not violate the Louisiana equal rights provision. In Cox v. Cox, 532 P.2d 994 (Utah 1975), the court held that although a mother does not have absolute right to custody, there is wisdom in the traditional thinking that children should be in the care of their mother, and the equal rights amendment does not require the law to ignore obvious and essential biological differences. Finally, in Archer v. Mayes, 194 S.E.2d 707 (Va. 1973), the court held that a statute allowing any woman selected for jury duty to be exempted for care of a child 16 years old or younger did not violate the Virginia Constitution's equal rights provision because the state had a substantial interest in the care of children and because the classification bore a rational relationship to that objective.

12. E.g., Goesaert v. Cleary, 335 U.S. 464 (1948). In Goesaert the Court upheld a statute making it illegal to license a woman bartender unless she was the wife or daughter of the owner of a licensed liquor establishment on the ground that it was not without basis in reason. See generally L. Tribe, American Constitutional Law 994–96 (1978).

13. In McDonald v. Board of Election Comm'n, 394 U.S. 802 (1969), the Court upheld an Illinois absentee voting statute which made no provision for inmates awaiting trial who are qualified voters but are unable to reach the polls because they are charged
legislation reviewed under the rational basis standard is rarely struck down. For example, Louisiana, which applies the "rational basis" test under its equal rights provision, has used the traditional societal role of women as a rational basis for upholding differing treatment of the sexes.

Under the prevailing federal analysis, a statute which utilizes a "suspect classification" such as race, alienage, or national origin, or interferes with a "fundamental right" such as the right to vote, is properly tested under "strict scrutiny." Once the party challenging

with unbailable crimes or cannot post the bail: "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." Id. at 809 (emphasis supplied). See generally L. Tribe, supra note 12, at 996.

14. Gunther describes the rational basis standard as "minimal scrutiny in theory and virtually none in fact." Gunther, supra note 10, at 8. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961) (affirming a conviction for violation of Sunday closing laws because the statutory classification could reasonably be related to the legislative goal of providing a general day of rest). In McGowan, the Court declared: "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Id. at 425 (emphasis supplied).

15. In Broussard v. Broussard, 320 So. 2d 236, 238 (La. App. 1975), the trial court's preference for custody by the mother was held not unreasonable because the "simple fact" was that the day-to-day care of minor children has "traditionally" been in the hands of the mother. See also State v. Barton, 315 So. 2d 289 (La. 1975), discussed in note 11 supra.


17. See, e.g., In re Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971). However, in Foley v. Connellie, 435 U.S. 291 (1978), the Court indicated that alienage classifications involving " 'matters . . . within a State's constitutional prerogatives,' " could be justified "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." Id. at 1070.


20. Before Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court applied the traditional rationality test to gender-based classifications. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a statute which gave women an absolute exemption from jury duty); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a statute which prohibited a female from being licensed as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment). Beginning with Reed, the Court appeared to modify the rational basis test for gender-based classifications. In that case the Court struck down a provision of the Idaho Probate Code which created a preference for men over women as administrators of estates. The Court held:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make
Equal Rights Amendment

the statute establishes that a suspect classification is used or a fundamental interest affected, the burden of upholding the statute shifts to its proponent. The classification must be shown to advance a compelling state interest. A substantial congruity between the classification used and the purpose behind the statute must be demonstrated. Few statutes can withstand such rigorous examination and the decision to apply strict scrutiny is generally dispositive of the case.

Several states use strict scrutiny in evaluating classifications under equal rights provisions. Illinois has developed a substantial body of law applying this standard. Relying on the recognition by the fram-

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22. Gunther describes it as “'strict' in theory and fatal in fact.” Gunther, supra note 10, at 8. But see Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of Japanese on West Coast during World War II despite strict scrutiny); People v. Boyer, 63 Ill. 2d 433, 349 N.E.2d 50 (1976) (upholding a statute which punished sexual activity between father and daughter more severely than sexual activity between mother and son despite strict scrutiny because of the compelling state interest in protecting female incest victims, who were exposed to greater potential harm than male victims).

23. E.g., Mercer v. Board of Trustees, 538 S.W.2d 201 (Tex. App. 1976) (holding that any classification based on sex is a suspect classification and subject to strict judicial scrutiny); Wright v. Action Vending Co., 544 P.2d 82 (Alas. 1975) (holding strict scrutiny appropriate in deciding cases under Alaska's ERA); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973) (requiring that a legislative classification based solely on sex receive the closest judicial scrutiny); Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (including sex within the ambit of suspect classifications).

24. The Illinois Constitution provides: “The equal protection of the laws shall not be denied or abridged on account of sex by the State . . . .” ILL. CONST. art. 1, § 18. Cases interpreting this provision include People v. Boyer, 63 Ill. 2d 433, 349 N.E.2d 50 (1976), discussed in note 22 supra; People ex. rel. Irby v. Dubois, 41 Ill. App. 3d 609,
ers of the Illinois Constitution of the two traditional levels of equal protection review, and on the wording of the Illinois ERA, the court in *People v. Ellis* found a legislative intent to treat gender as a suspect classification.

It should be noted that prior to the adoption of the ERA, Washington also applied strict scrutiny in reviewing gender-based discrimination claims under Washington's equal protection clause.

**B. Absolute Standard of Review**

Proponents of the federal ERA have long contended that the amendment would make sex an impermissible factor in determining legal rights. The Senate Judiciary Committee's report on the proposal of the Illinois ERA of 1970 echoed the sentiment that sex should be treated as a suspect classification. The court quoted a member of the Illinois constitutional convention:

"But I might point out then that this equal protection clause... [ILL. CONST. art. 1. § 2, a provision similar to the federal equal protection clause] has never been held to apply to women, in the same way, say, that it has been held to apply to blacks; and until that time comes—and that may be another long case-by-case development—I think the need for this amendment to make explicit that we do mean that women cannot be denied this type of equality is necessary." 311 N.E.2d at 100.

Similarly, the Washington court in *Marchioro*, 90 Wn. 2d at 304–05, 582 P.2d at 491, building on *Darrin v. Gould*, 85 Wn. 2d 859, 871, 540 P.2d 882, 889 (1975), evidenced a willingness to consider the history and purpose of the ERA in determining which standard of review to apply. See note 46 infra.

27. Under the challenged statutes, females were considered minors for purposes of criminal prosecution until age 18, while males were considered minors until age 17. The court could find no compelling state interest in treating 17-year-old males differently from 17-year-old females and struck down this portion of the statute. 311 N.E.2d at 101.


29. See Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871. 889 (1971) [hereinafter cited as Emerson]. This article explains that "The fundamental legal principle underlying the Equal Rights Amendment... is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermis-
posed federal ERA points out, "The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women. The Amendment thus recognizes the fundamental dignity and individuality of each human being." Legislative history indicates, however, that Congress contemplated certain exceptions to the absolute prohibition of gender-based classifications. For example, a statute which classifies on the basis of a physical characteristic unique to one sex would be permissible. Likewise, rights under the ERA should be placed within the entire constitutional framework and balanced against other constitutional rights, such as the right to privacy. Finally, the ERA would not affect the "traditional power of the State to regulate cohabitation and sexual activity by unmarried persons." Only Pennsylvania has approached adopting an absolute standard. In *Conway v. Dana*, the court abolished a presumption that

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*sensible attribute of sex." *Id.* at 893. Although sex is an impermissible classification the legislature could "continue to classify on the basis of real differences in the life situations and characteristics of individuals." *Id.* at 896. Also, the ERA must be balanced against other constitutional rights. *Senate Comm. on the Judiciary, Equal Rights for Men and Women, S. Doc. No. 92-689, 92d Cong., 2d Sess. 11-12 (1976).*

30. *Senate Comm. on the Judiciary, supra* note 29, at 2. The legislative history of the federal ERA also indicates that although “[t]he law may operate by grouping individuals in terms of existing characteristics or functions, [it may not do so] through a vast over-classification by sex." *Id.* at 12.

31. Emerson, *supra* note 29, at 896. The Senate Report points out: “[T]he original resolution does not require that women must be treated in all respects the same as men. ‘Equality’ does not mean ‘sameness.’ As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.” *Senate Comm. on the Judiciary, supra* note 29, at 12.

32. Emerson, *supra* note 29, at 900-02. The Senate Report also contends that “the principle of equality . . . does not prohibit the States from requiring a reasonable separation of persons of different sexes under some circumstances. . . . [The constitutional right of privacy] would permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.” *Senate Comm. on the Judiciary, supra* note 29, at 12. As regards the Washington ERA, the Official Voters Pamphlet for the 1972 election explains: “Supreme Court decisions guarantee the right to privacy in situations involving sleeping, disrobing, or performing bodily functions.” Secretary of State, Official Voters Pamphlet 52 (1972) [hereinafter cited as Voters Pamphlet]. The authoritativeness of the Voters Pamphlet is discussed in note 78 infra.

33. *Senate Comm. on the Judiciary, supra* note 29, at 12.


the primary duty of support of minor children lay with the father. It first declared that "[s]uch a presumption is clearly a vestige of the past and incompatible with the present recognition of equality of the sexes." The presumption was replaced with a sexually neutral standard, requiring both parents to contribute to child support according to their abilities. In *Henderson v. Henderson*, a divorce action, the Pennsylvania court invalidated a statute requiring payment of alimony, counsel fees and expenses to the wife but not to the husband. It thus reaffirmed the principle that gender is "no longer a permissible factor in the determination of . . . legal rights." The purpose of the amendment, as the court interpreted it, was to eliminate gender as a basis for distinguishing between the legal rights of men and women.

In *Darrin v. Gould*, the Washington Supreme Court appeared to adopt the Pennsylvania approach. *Darrin* involved a Washington Interscholastic Activities Association regulation prohibiting females from participating in contact sports with males. Relying heavily on a Pennsylvania case, the court held the regulation unconstitutional because it classified solely on the basis of gender, without regard to the individual's abilities. *Darrin* marked the Washington court's first attempt at determining the appropriate standard of review under the ERA. *Marchioro* represented the court's first opportunity to refine the *Darrin* standard.

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36. 318 A.2d at 326.
37.  Id.
39.  327 A.2d at 62.
40.  Id. The court expounded, "The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."  Id.
41.  85 Wn. 2d 859, 540 P.2d 882 (1975).
42.  The *Marchioro* dissent interpreted *Darrin* as having adopted "a standard for application of the new constitutional amendment, namely, outright prohibition of classifications on the basis of sex, even where such a classification would have been permissible under the equal protection clause. All classifications based on sex are prohibited." 90 Wn. 2d at 316, 582 P.2d at 487 (emphasis in original).
43.  *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*, 18 Pa. 645, 334 A.2d 839 (1975) (striking down a similar provision as violative of the Pennsylvania ERA), *discussed in Darrin*, 85 Wn. 2d at 872–74, 540 P.2d at 890–91. The *Darrin* court quoted lengthy portions of, and relied on, the rationale of the Pennsylvania court. The court even cited with approval the general rule in Pennsylvania that ""sex may no longer be accepted as an exclusive classifying tool."" 85 Wn. 2d at 872, 540 P.2d at 891 (quoting *Pennsylvania Interscholastic Ass'n*, 334 A.2d at 843).
44.  *Id.* at 875, 540 P.2d at 891.
II. THE MARCHIORO COURT'S REASONING

The Marchioro court rejected the argument that under Darrin gender-based classifications were forbidden. It viewed Darrin as rejecting the “strict scrutiny/equal protection” approach, but not prohibiting all gender-based classifications. The equal protection analysis was replaced with a single inquiry: “Is the classification by sex discriminatory?” The court saw the adoption of the ERA by referendum as requiring more than “repeat[ing] 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.” The amendment prohibited discrimination, not classification, on the basis of sex.

46. See note 49 and accompanying text infra. The Marchioro court overlooked the primary principle of Darrin, that classification cannot be based solely on gender, absent a relation to the individual's ability to perform the activity regulated.

47. 90 Wn. 2d at 305, 582 P.2d at 491. The tone of the decision implies that the court viewed the new standard as falling somewhere between strict scrutiny and an absolute prohibition of gender-based classifications. In the Marchioro court's view, strict scrutiny did not go far enough in implementing the ERA, while the absolute standard advocated by the plaintiffs went too far.

48. As the court put it more fully:

Under the equal rights amendment the [strict scrutiny] test is replaced by 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? In the language of Darrin v. Gould at page 877, "under our ERA discrimination on account of sex is forbidden."

Id. at 305, 582 P.2d at 491 (emphasis in original).

49. Id. at 304, 582 P.2d at 491 (quoting from Darrin v. Gould, 85 Wn. 2d 859, 871, 540 P.2d 882, 889 (1975)). The court continued as follows:

"Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination, except possibly to make the validity of a classification based on sex come within the suspect class under Const. art. 1, sec. 12 . . . . Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment."

Id. at 304–05, 582 P.2d at 491 (quoting Darrin, 85 Wn. 2d at 871, 540 P.2d at 889).

The Official Voters Pamphlet for the 1972 elections in discussing the proposed Washington ERA described pre-ERA law in much the same way as did the Marchioro and Darrin courts: “[T]he present federal and state constitutions contain general prohibitions . . . against governmental actions which discriminate among persons or classes of persons without a reasonable basis.” Voters Pamphlet, supra note 32, at 53. But the court's argument that by adopting the ERA the people intended that the standard of review go beyond strict scrutiny is not necessarily sound. The people could merely have been affirming and permanently affixing the court's treatment of sex discrimination. But see notes 77–78 and accompanying text infra.

50. 90 Wn. 2d at 304–05, 582 P.2d at 491–92, discussed in notes 64–66 and accompanying text infra.
The court explicitly rejected both the strict scrutiny and absolute standards of review. The court saw the basic thrust of the ERA as ending "special treatment for or discrimination against either sex." But fulfillment of these purposes did not necessarily require invalidation of R.C.W. §§ 29.42.020-.030. The legislature remained free under the ERA to take affirmative steps to ensure the actual as well as theoretical equality of women. The statutes were viewed as creating equality of right to hold office. The legislature's attempt to affirmatively promote equality through passage of R.C.W. §§ 29.42.020-.030 justified the gender-based classifications of the statutes. The legislative determination that there should be absolute equality in the hierarchy of the major political parties did not amount to discrimination because it prevented either sex from predominating. The court was unable to find any authority that statute-mandated equality violated the ERA. Because equality under the statute does not violate the ERA, the court reasoned that the state may adopt rational means, here requiring the election of one man and one woman from each county, to achieve the equality required.

Washington's ERA is unique in explicitly requiring equality of both rights and responsibilities. R.C.W. §§ 29.42.020-.030 were found to implement the requirement of equal responsibility by insuring that both sexes participate in political party policymaking. The court

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51. The court disposes of both standards in one paragraph:

In memoranda to the trial court and briefs to this court, plaintiffs assert the equal rights amendment forbids any classification based on sex. They cite Darrin ... in support of this view. This is not, however, what Darrin said. The determination that classification by sex is suspect, which is the key to the analysis used under equal protection ... has been replaced by the new demands of the equal rights amendment.

90 Wn. 2d at 304, 582 P.2d at 491.

52. Id. at 305, 582 P.2d at 491.

53. The court supported this assertion as follows: "'[Passage of the ERA] does not mean, however, ... that the government would be powerless to take measures to assure women actual as well as theoretical equality of rights.'" 90 Wn. 2d at 306, 582 P.2d at 491 (quoting Emerson, supra note 29, at 904). The court appears to have quoted this statement slightly out of context, especially in light of the article's assertion that benign quotas would be impermissible under the ERA. See note 75 infra.

54. The effect of these statutes was to require, in the court's opinion, "[t]he state committee of each major political party [to] be composed of an equal number of men and women." 90 Wn. 2d at 306, 542 P.2d at 492. In the court's opinion this was clearly not an abridgement or denial of equality of rights under the law. Id.

55. Id. at 306-08, 582 P.2d at 492-93.

56. Id. at 306-07, 582 P.2d at 492.

57. Id. at 307-08, 582 P.2d at 492-93.

58. Id. at 306, 308, 582 P.2d at 491, 493. But see text accompanying notes 70-71 infra.
concluded that striking down the statute for violating the very constitutional provision it sought to implement would be illogical.59

III. ANALYSIS AND CRITICISM

The court in Marchioro abandoned the definitive standard of review adopted in Darrin for a more vague, general prohibition of gender-based discrimination. This represents a departure from principled decisionmaking—a departure without basis. Alternative standards of review were rejected without analysis or discussion. Finally, the standard adopted does not carry out the mandate or purposes of the ERA.

A. The Standard of Review After Marchioro

The purpose of the ERA was to prevent gender-based discrimination.60 The Washington court, rather than developing a practical standard of review which implements this goal, has offered no clearer test than whether the challenged statute discriminates on the basis of gender.61 In effect, the court’s standard of review under the ERA can be characterized as one of “no discrimination.” The court does not define “discrimination,” nor does it clarify the amount or type of disparity in the treatment of the sexes it would tolerate.62 The only clue as to what constitutes discrimination is the court’s holding that a statute which mandates absolute equality of numbers between sexes does not. Close analysis of the holding in Marchioro reveals, however, that the court may be applying the strict scrutiny standard sub silentio, while purporting to reject it.63

The court’s test focuses on whether the classification discriminates, and therefore is impermissible, or does not discriminate, and therefore

59. 90 Wn. 2d at 308, 582 P.2d at 493.
60. Id. at 304, 582 P.2d at 491.
61. In short, the court has defined the standard of review under the ERA as the ERA.
62. Hanson v. Hutt, 83 Wn. 2d 195, 517 P.2d 599 (1973), which involved a woman’s right to unemployment compensation during pregnancy, may provide some insight into what constitutes “discrimination.” There the court said the question whether a classification whether the classification is in fact discriminating. Rather, in holding that the classification was discriminatory, the court looked to the fact that the statute’s requirement applied to only one gender, and that it placed a heavier burden on women than on men.
63. 90 Wn. 2d at 304, 582 P.2d at 491 (rejection of strict scrutiny standard).
is permissible. Thus, gender-based classifications may be upheld under the ERA, so long as the classification has a legally supportable basis in achieving the ends of a statute. In other words, the court is labeling as "no discrimination" legally permissible discrimination. Likewise, equal protection analysis determines whether a challenged classification has a legally supportable basis in achieving the ends of a statute. In Marchioro the court held that the one man/one woman requirements of R.C.W. §§ 29.42.020-.030 do not discriminate because they result in absolute equality of numbers and rights. One plausible explanation and the one suggested by the court's language is that the attempt to affirmatively promote equality justifies the sex classification. This result is consistent with equal protection analysis; the court, in essence, upholds the statute because the classification promotes a compelling state interest—the actual as well as theoretical equality of women.

The result under this standard, as pointed out by Justice Horowitz in his dissent, is undesirable. Justice Dolliver's majority opinion equates equality of numbers with equality of rights, an interpretation

64. Marchioro gives no guidelines in determining first, what the strength of the connection between the statute's purpose and the classification must be, and second, if the court's decision will turn on the purpose of the statute.

65. In Marchioro the end of the statutes appears to be to ensure an equal voice for women in the political process. See note 68 infra.

66. Under equal protection analysis, if the classification is "suspect," "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary...to the accomplishment' of its purpose or the safeguarding of its interest." In re Griffiths, 413 U.S. 717, 721-22 (1973) (footnotes omitted).

67. 90 Wn. 2d at 306, 582 P.2d at 491.

68. See 90 Wn. 2d at 306-08, 582 P.2d at 492-93. The closing comment of the court is indicative of its view that promoting equality of numbers effectuates rather than violates the ERA. "When the state, by statute, mandates an equality of responsibility, it is hardly appropriate for this court to hold this statutory mandate to be stricken by the very constitutional provisions which approve it." 90 Wn. 2d at 308. 582 P.2d at 493. Justice Horowitz in dissent describes this reasoning as "error," noting:

The sex-related provisions of the statutes have the effect that once a woman is chosen to represent her county on the state committee... no other woman is eligible... even though she may be the best qualified candidate and the person who would receive the most votes in a free election. ... All women desiring to seek and hold the remaining office are denied the right to do so merely because of their sex. Obviously, the same inequity applies to men seeking office under these statutes. ... Clearly the majority opinion prevents the Equal Rights Amendment from achieving its purpose of making sex a neutral factor, one to be disregarded in favor of ability and performance.

Id. at 317, 582 P.2d at 497 (emphasis in original).

69. See note 66 supra.
"obviously at odds with both the language and the spirit of the amendment."\textsuperscript{70} Equality of right to seek and hold office is not guaranteed when those offices are allocated on the basis of gender in order to achieve equality of numbers. Once one of the "paired" offices is filled, all other persons of the same gender are denied the right to hold the other office, solely on the basis of their gender, regardless of their respective abilities.\textsuperscript{71} Justice Horowitz reasoned, "Here the activity regulated is representation of a constituency on the Democratic Party's county or state committees. It should be obvious that sex is completely unrelated to the ability of an individual to perform these duties. This classification based on sex is . . . prohibited by the equal rights amendment."\textsuperscript{72}

The statutes are, in effect, a quota, reserving fifty percent of the seats on the Democratic State Committee for each gender.\textsuperscript{73} The court's decision suggests that it viewed R.C.W. §§ 29.42.020-.030 as means of effectuating the ERA.\textsuperscript{74} Such quotas, however, appear to violate the absolute nature of the amendment.\textsuperscript{75}

\textsuperscript{70} 90 Wn. 2d at 316, 582 P.2d at 497 (Horowitz, J., dissenting).
\textsuperscript{71}  Id. at 316–17, 582 P.2d at 497.
\textsuperscript{72}  Id.
\textsuperscript{73}  The court suggests that under this absolute equality, "[n]either sex may predominate," and "[n]either may discriminate or be discriminated against." 90 Wn. 2d at 306, 582 P.2d at 492. This suggests that if the division of positions had not been exactly equal the legislation would not have been upheld. Thus, if laws were enacted requiring apportionment on the basis of gender, a percentage other than 50–50 would violate the ERA.
\textsuperscript{74}  See note 68 and accompanying text supra.
\textsuperscript{75}  Using sex as the basis of a quota may violate the equal protection clause of the federal Constitution. In a recent case dealing with affirmative action, the United States Supreme Court held that although race may be considered in passing on medical school applications, a special admissions program assuring minority students a specified percentage of the available spots solely on the basis of race was invalid. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978). Justice Powell, delivering the Court's judgment that the admissions plan was unlawful, reasoned that preferring certain persons solely because of their race or ethnic origin was "discrimination for its own sake. This the Constitution prohibits."  Id. at 307. Bakke is not directly on point because it deals with racial discrimination under the equal protection clause. Nor does Justice Powell's reasoning represent the opinion of a majority of the Court. One may analogize, however, from the general premise that it is unlawful to save a specified percentage of available seats for one class of persons on the basis of an impermissible classification, that the Marchioro court is doing what the Bakke Court rejected.

\textsuperscript{75}  The legislative history of the federal ERA points out that the ERA "does not require that any level of government establish quotas for men or for women in any of its activities; rather, it simply prohibits discrimination on the basis of a person's sex." SENATE COMM. OF THE JUDICIARY, supra note 29, at 11. Brown, Emerson, Falk, and Freedman discuss the use of benign quotas at some length in their article. They note:

In the field of race relations various methods for taking affirmative action to secure actual, as well as theoretical, equality have been employed. One is the benign
The ERA constitutes an independent basis for challenging a statute, namely, denial or abridgement of rights and responsibilities under the law on account of sex. Thus courts interpreting ERA's are not bound by standards used in other contexts and may develop new standards or apply analogous ones. The Marchioro court summarily considered and rejected both the strict scrutiny and absolute standards of review described above.

In rejecting strict scrutiny, the court relied on Darrin's statement that the people's adoption of the ERA mandated more than continued application of the strict scrutiny standard. Adoption of the ERA, however, was more than a rejection of strict scrutiny. The Voters Pamphlet suggests that the passage of the proposed ERA would prohibit all gender-based classifications: "This proposed amendment would add to the Washington State Constitution the principle that sex is not a permissible factor to be considered in determining the legal rights of women or of men." Thus, the intent of the voters, to the extent it can be inferred from the language of the Voters Pamphlet, was to adopt an absolute standard prohibiting all classifications based on gender.

The Supreme Court has not passed on the constitutional issues raised by these devices. It is not improbable, however, that in the field of race relations they will be sustained. In equal protection theory, while classification by race would be "suspect," it is not totally prohibited. And where the courts determine the purpose of the differentiation is to benefit members of the minority race, rather than impose a status of inferiority, they are likely to find there are "compelling reasons" for the special treatment. Such an approach would not be permissible under the Equal Rights Amendment. . . . [T]he guarantee of equal rights for women may not be qualified in the manner that "suspect classification" or "fundamental interest" doctrines allow.

Emerson, supra note 29, at 903–04 (footnotes omitted).

76. 90 Wn. 2d at 304–05, 582 P.2d at 491, quoted in note 49 and accompanying text supra.

77. Voters Pamphlet, supra note 32, at 53 (emphasis added). Also, in discussing the nineteenth amendment, the Voters Pamphlet describes it as the only present prohibition of "legal classification of persons solely on the basis of sex." Id. This also suggests the amendment prohibits classification based solely on sex, in other words, the absolute standard of review.

78. Pre-ERA law was explained as follows:

Both the present federal and state constitution contain general prohibitions (commonly referred to as "equal protection" clauses) against governmental actions which discriminate among persons or classes of persons without a reasonable basis. It is presently permissible under these provisions, in some instances, to base legal classifications of persons solely upon sex . . . . The only area in which there is now an explicit constitutional prohibition against the legal classification of persons
Equal Rights Amendment

In order to carry out effectively both the purpose and mandate of the ERA it is necessary to adopt an absolute standard of review under the ERA. The language of the Voters Pamphlet, the legislative history of the almost identical federal ERA, and the contentions of the ERA’s proponents, all support the absolute prohibition of gender-based classifications. Gender should not be a factor in determining legal rights.

B. A Suggested Analysis

The court, in reviewing a statute challenged under the ERA, should make both of the following determinations:

1. Does the statute classify on the basis of gender?

Essential to any analysis under the ERA is the determination that the challenged statute contains a gender-based classification. Until solely on the basis of sex is that of voting, under the 19th Amendment to the United States Constitution . . . .

Voters Pamphlet, supra note 32, at 53 (emphasis added). The Darrin court based its decision in part on the intent of the voters in adopting the ERA. Darrin, 85 Wn. 2d at 871, 540 P.2d at 889.

It is settled that the court may rely on the language of the Voters Pamphlet in determining the purposes and meaning of enacted legislation in Washington. The Washington court has stated, “In determining the meaning of legislation enacted through initiative or referendum, the courts have the right to look to, and may consider, the published arguments made in connection with the submission of such measures to the vote of the electorate.” Lynch v. Department of Labor & Indus., 19 Wn. 2d 802, 812, 145 P.2d 265, 270 (1944). “In determining the purpose and import of initiative measures we may consider ‘. . . the common understanding of the purpose of the law, according to arguments supporting that view submitted to the people for their support at the general election.’” State ex. rel. Public Util. Dist. No. 1 v. Wylie, 28 Wn. 2d 113, 127, 182 P.2d 706, 714 (1974) (quoting from Denny v. Wooster, 175 Wash. 272, 27 P.2d 328 (1933)).

79. The leading article by Brown, Emerson, Falk, and Freedman takes the following position:

The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. . . . [T]he fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular function does not allow the law to fix legal rights by virtue of membership in that sex. In short, sex is a prohibited classification.

Emerson, supra note 29, at 889. Note that the same wording appears in the Voters Pamphlet statement and in the article quoted above regarding the effect of the adoption of the ERA: “sex is not a permissible factor in determining the legal rights of women or of men.” Voters Pamphlet, supra note 32, at 53.

80. See notes 77–78 and accompanying text supra.

81. See note 30 and accompanying text supra.

82. See Emerson, supra note 29, at 889, quoted in note 79 supra.
that determination is made the ERA would appear to have no application.\textsuperscript{83} There are three ways in which a statute can classify on the basis of gender. First, the statute can impose a burden or grant a privilege to one gender which it denies to the other.\textsuperscript{84} Second, the statute can use a facially neutral classification that, in practical application, has a discriminatory impact.\textsuperscript{85} Such a classification would seriously undermine the purposes of the ERA. Therefore, the court must look beyond the "neutral" classification to the realities of its application.\textsuperscript{86} Third, a statute can expressly classify on the basis of gender.\textsuperscript{87}

2. Does the classification depend solely on gender, without any relation to the individual’s ability to perform the activity regulated?

Gender is often used by the legislature as a shorthand for other classifications it really wants to regulate but which are much more difficult to administer.\textsuperscript{88} This inquiry forces the legislature to fashion statutory classifications which are more congruent with the activity regulated.\textsuperscript{89}

Application of this standard, while not problem free,\textsuperscript{90} would result


\textsuperscript{84} Cf., e.g., City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (holding that requiring female employees to make larger contributions to its pension fund than male employees is unlawful sex discrimination under Title VII of the Civil Rights Act of 1964); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (holding that denying a woman her accumulated seniority when returning from pregnancy leave is unlawful sex discrimination).

\textsuperscript{85} Cf., e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that minimum height and weight requirements, which by national statistics excluded more women than men from prison work, were unlawful sex discrimination under Title VII of the Civil Rights Act of 1964).

\textsuperscript{86} It is important to guard against the use of non-gender-based classifications which, in effect, fall more heavily on one sex than the other and circumvent the ERA. For this reason an examination of a statute challenged under the ERA should include a determination that the law is gender-neutral in effect. Emerson, supra note 29, at 898–99.

\textsuperscript{87} Marchioro meets this test. See note 92 and accompanying text infra.

\textsuperscript{88} Emerson, supra note 29, at 897.

\textsuperscript{89} The concern here is to make sure that the previously discussed three exceptions to the absolute standard of review are properly applied and not used to circumvent the ERA’s purpose. See notes 31–33 and accompanying text supra.

\textsuperscript{90} For some insight into the problems involved, see Emerson, supra note 29, at 889–909.
in an interpretation of the Washington ERA consistent with its purpose and history. Clearly, under this suggested standard of review, R.C.W. §§ 29.-42.020-.030 would have been struck down as violating the ERA. First, the statutes contain the most obvious kind of gender-based classifications, requiring “one committeeman and one committeewoman for each county” and a “chairman and vice chairman who must be of opposite sexes.” Second, the classifications are based solely on gender, without any relation to the individual’s ability to represent the county on the Democratic State Central Committee.

IV. CONCLUSION

While the vague “no discrimination” standard adopted by the Marchioro court may provide it with more flexibility to develop an appropriate standard of review, it also leaves the law unclear and provides inadequate guidance for future decisions. This is particularly true if the court is applying strict scrutiny sub silentio.

Because the ERA provides a new constitutional basis for challenging legislation the court must develop a method of resolving such challenges, including a standard of review which reflects the purposes and mandate of the ERA. This can best be accomplished by adopting an absolute standard of review under the Washington Equal Rights Amendment.

Irene Hecht

91. See notes 77-78 and accompanying text supra (discussion of history and purpose of Washington ERA).
92. Marchioro falls within the third category mentioned in the text: it expressly classifies on the basis of gender. Once one position is filled by a woman, all other women are automatically excluded solely on the basis of their gender.
93. See text accompanying notes 71-72 supra.