Separating Dick and Jane: Single-Sex Public Education under the Washington State Equal Rights Amendment

Inessa Baram-Blackwell

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Education Law Commons, and the Law and Gender Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wlr/vol81/iss2/4

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
Separating Dick and Jane: Single-Sex Public Education Under the Washington State Equal Rights Amendment

Inessa Baram-Blackwell

Abstract: Single-sex education in public school systems has become increasingly popular in recent years. The Equal Rights Amendment to the Washington State Constitution (ERA) requires that males and females be treated equally where state action, such as public education, is involved. As demonstrated by the ERA's legislative history and Washington case law, the ERA prohibits differentiation on the basis of sex alone, which occurs where an individual would be treated differently in a given situation if that person were of the opposite sex. Legislative history and case law recognize two narrow exceptions to the ERA. Under the first exception, classification based on sex is permissible if it is based on actual physical differences between the sexes. The second exception allows sex-based distinctions in the context of affirmative action programs intended solely to ameliorate the effects of past discrimination. This Comment argues that based on the Amendment's plain meaning and legislative history, as well as both binding and persuasive precedent, single-sex public education contravenes the ERA by differentiating on the basis of sex alone. Single-sex public education violates the ERA based on the plain meaning of the Amendment, which mandates equality between the sexes. Single-sex public education also runs afoul of the ERA by effecting arbitrary sex-based classifications: but for a given student's sex, that student would be allowed into a particular class or school. Moreover, a Pennsylvania court has held that single-sex public education violates Pennsylvania's ERA, which parallels Washington's ERA in language, purpose, and application. Finally, single-sex public education does not currently satisfy either of the two narrow exceptions to Washington's ERA: learning does not involve an actual physical difference between the sexes, and single-sex classes and schools are not affirmative action programs intended solely to mitigate the effects of past discrimination.

Sam, a public school student, is excited about the upcoming academic year, and especially about biology class with a new biology teacher. The school recruited the new teacher because of his charisma and impressive credentials. Biology is Sam's best subject, and Sam has been in a study group with Josh and Daniel for the last four years. All three students aspire to be biologists and have been good friends since they met in the first grade. Even though summer vacation has not yet ended, the three have already begun brainstorming what they hope will be the winning entry in the school's science fair. Before the academic year begins, however, the school board decides to make all science classes single-sex. Josh and Daniel will be together in the new biology teacher's class, but because Sam (Samantha) is a girl, she will be required to take

1. Hypothetical scenario created by the author for illustrative purposes.
biology with the other girls. Sam is upset, and her parents worry that their daughter's chances of receiving a meaningful education in biology have been squelched.

Although the overwhelming majority of public schools in the United States today are coeducational, interest in single-sex public education has surged in recent years. Ten years ago, only a handful of single-sex public schools existed in the United States. By the 2005–06 academic year, however, a single-sex learning experience was available at more than 200 public schools across the country. In Washington, Seattle's Thurgood Marshall Elementary School and Olympia's Washington Middle School offer their students a single-sex learning experience. Its proponents contend that, among other things, single-sex education counteracts stereotypes, reduces discrimination in the classroom, and

---


3. See id. The term "single-sex school" is actually somewhat of a misnomer because single-sex educational opportunities can take multiple forms. See, e.g., Ashley Elizabeth Johnson, Note, Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students, 57 Vand. L. Rev. 629, 633 (2004). At one end of the spectrum are schools that admit students of only one sex. See NASSPE, Schools, supra note 3. Baltimore's Western High School, which serves only girls, is one of the oldest examples. Id. Further along the single-sex education spectrum are coeducational schools in which all classes are single-sex. Id. Seattle's Thurgood Marshall Elementary School is one example. Id. Both boys and girls attend Thurgood Marshall, but all classes are comprised of either all boys or all girls. Id. At the far end of the spectrum are coeducational schools that have a limited number of single-sex classes, with the remaining classes being coeducational. See Nat'l Ass'n for Single Sex Pub. Educ., Single-Sex Classrooms, http://www.singlesexschools.org/schools-classrooms.htm (last visited Apr. 25, 2006) [hereinafter NASSPE, Classrooms]. Washington Middle School, located in Olympia, Washington, falls into this category of schools. Id.

4. See id. The term "single-sex school" is actually somewhat of a misnomer because single-sex educational opportunities can take multiple forms. See, e.g., Ashley Elizabeth Johnson, Note, Single-Sex Classes in Public Secondary Schools: Maximizing the Value of a Public Education for the Nation's Students, 57 Vand. L. Rev. 629, 633 (2004). At one end of the spectrum are schools that admit students of only one sex. See NASSPE, Schools, supra note 3. Baltimore's Western High School, which serves only girls, is one of the oldest examples. Id. Further along the single-sex education spectrum are coeducational schools in which all classes are single-sex. Id. Seattle's Thurgood Marshall Elementary School is one example. Id. Both boys and girls attend Thurgood Marshall, but all classes are comprised of either all boys or all girls. Id. At the far end of the spectrum are coeducational schools that have a limited number of single-sex classes, with the remaining classes being coeducational. See Nat'l Ass'n for Single Sex Pub. Educ., Single-Sex Classrooms, http://www.singlesexschools.org/schools-classrooms.htm (last visited Apr. 25, 2006) [hereinafter NASSPE, Classrooms]. Washington Middle School, located in Olympia, Washington, falls into this category of schools. Id.

5. See NASSPE, Schools, supra note 3; NASSPE, Classrooms, supra note 4. The website of the National Association for Single Sex Public Education (NASSPE) also lists Cedar River Middle School in Maple Valley, Washington, as a school with single-sex classes. Id. According to a school official, however, the school has discontinued its single-sex offerings. Telephone Interview with Valerie Karlsson, Para-educator, Cedar River Middle Sch. (Mar. 16, 2006).


7. See, e.g., Johnson, supra note 4, at 631–32.
shrink the gender gap in math and science. Some proponents also argue that single-sex education is particularly beneficial for female students, minority students, and students from low-income homes. Furthermore, single-sex public education provides poor and minority children with single-sex educational opportunities that their families might not otherwise be able to afford.

The Equal Rights Amendment to the Washington State Constitution (ERA) places substantive limits on how state actors, such as public schools, may operate. The ERA is predicated on equality between the sexes. Thus, under the ERA, nearly all classifications based on sex are invalid. Specifically, the ERA prohibits distinctions on the basis of sex alone, by which, but for an individual’s sex, that person would be treated


9. See, e.g., Lee & Marks, supra note 6. But see, e.g., CHRISTINA HOFF SOMMERS, THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN 14, 24–27 (2000) (arguing that “it is boys, not girls, who are languishing academically” and highlighting various educational problems that boys face).


11. See, e.g., id. at 147.


13. For the ERA to be applicable, “state action” must be involved. See MacLean v. First Nw. Indus. of Am., Inc., 96 Wash. 2d 338, 347, 635 P.2d 683, 688 (1981). Public schools are state actors and thus subject to the ERA. See Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 906 (1971). This Comment does not address private schools, which generally do not fall under the ambit of the ERA. See id. at 906–07.


the same as others in a given situation. Under the first of two narrow exceptions to the ERA, differentiation based on sex is lawful where the classification is based on actual physical differences between the sexes. Under the second exception, sex-based distinctions are permissible as part of an affirmative action program intended solely to ameliorate the effects of past discrimination.

This Comment argues that single-sex public education in Washington State violates the ERA by differentiating solely on the basis of sex. Single-sex public education contravenes the ERA's plain meaning and its legislative history, and disregards both binding and persuasive judicial precedent. But for a particular student's sex, that student would be assigned to a different class or school with a different teacher, peer group, and classroom dynamic. This Comment further argues that single-sex public education does not currently satisfy either of the two narrow exceptions to the ERA.

Part I of this Comment outlines the method by which Washington courts interpret the state constitution. Part II describes the ERA's prohibition of distinctions based solely on sex, as evidenced by the ERA's plain meaning and legislative history, as well as Washington case

20. See infra Part IV.B.
21. See infra Part IV.B.
22. See infra Part IV.C. As the interest in and availability of single-sex public education has increased, its legality is increasingly questioned. In Washington, various sources of state law bear on the issue of whether single-sex public education is permissible. This Comment focuses exclusively on the legality of single-sex public education under the ERA. However, the Washington State Constitution contains other relevant bases for analysis, including the Education Article, WASH. CONST. art. IX, § 1 (providing in relevant part that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of...sex"), and the Privileges and Immunities Clause, id. art. I, § 12 (mandating that "[n]o law shall be passed granting to any citizen [or] class of citizens...privileges or immunities which upon the same terms shall not equally belong to all citizens"). In addition to these constitutional provisions, Washington's Law Against Discrimination, see WASH. REV. CODE §§ 49.60.010-.401 (2004), other state statutes, see, e.g., id. §§ 28A.640.010-.900 (sexual equality in public education), and portions of the Washington Administrative Code, see, e.g., WASH. ADMIN. CODE 392-190-050 (2005) (sex discrimination in public education), bear on the legality of single-sex public education. Although also outside the scope of this Comment, the legality of single-sex public education in the context of federal law is still up for debate, especially given high-profile cases such as United States v. Virginia, 518 U.S. 515, 519 (1996) (holding that the Virginia Military Institute, a prestigious military academy, may not deny women admission).
Single-Sex Public Education

law. Part II also discusses the two exceptions to the ERA that Washington courts recognize. Part III details the method by which a Pennsylvania court has interpreted an analogous constitutional provision. Part IV argues that in light of the plain meaning of the ERA, the Amendment’s legislative history, and binding and persuasive precedent, single-sex public education violates the ERA by using sex as an exclusive classifying tool. Part IV further argues that single-sex public education does not presently satisfy either of the two narrow exceptions to the ERA.

I. WASHINGTON COURTS CONSIDER VARIOUS SOURCES IN INTERPRETING THE STATE CONSTITUTION

When Washington courts interpret the state constitution, they look to a provision’s plain meaning, its legislative history, and binding and persuasive precedent. Washington courts first examine a section’s plain language, according it “its reasonable interpretation.” If the ordinary meaning of a provision is ambiguous, Washington courts next look to extrinsic sources, such as the official voters’ pamphlets that are part of an amendment’s legislative history. Washington courts also look to existing precedent when interpreting the state constitution. Finally, Washington courts may consider how other state courts interpret similar constitutional provisions.

II. WASHINGTON’S ERA PROHIBITS DISTINCTIONS BASED SOLELY ON SEX

Washington’s ERA, which voters approved in 1972, generally

---
26. See Yarbrough, 151 Wash. 2d at 477, 90 P.3d at 45.
28. See Zachman, 123 Wash. 2d at 671, 869 P.2d at 1080.
30. See Waremart, 139 Wash. 2d at 638–39, 989 P.2d at 532.
prohibits state action that discriminates against individuals solely on the basis of sex. The express language of the ERA mandates that neither rights nor responsibilities may be denied on account of sex. Both the legislative history surrounding the passage of Washington's ERA and subsequent case law interpreting the Amendment indicate that the ERA prohibits distinctions on the basis of sex alone. Such distinctions occur in situations where, but for an individual's sex, state actors would treat that person in the same manner as they treat members of the opposite sex. The ERA's legislative history and subsequent case law recognize two limited exceptions to the prohibition of sex-based discrimination.

A. The Plain Meaning of the ERA Requires Sex-Based Equality Under the Law

According to the plain meaning of the ERA, males and females are equal under the law with respect to both rights and responsibilities. The ERA provides that "[e]quality of rights and responsibility under the law

32. See Darrin, 85 Wash. 2d at 864, 540 P.2d at 885.
33. See WASH. CONST. art. XXXI, § 1.
37. See, e.g., Elec. Contractors, 100 Wash. 2d at 127-28, 667 P.2d at 1102; City of Seattle v. Buchanan, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978); Brown et al., supra note 14, at 893-94, 903-05, cited with approval in JUDICIARY COMM. OF THE WASH. STATE LEGISLATIVE COUNCIL, THE POTENTIAL IMPACT OF HOUSE JOINT RESOLUTION NO. 61—THE EQUAL RIGHTS AMENDMENT—ON THE LAWS OF THE STATE OF WASHINGTON 2-4 (1972) [hereinafter POTENTIAL IMPACT] (identifying two possible interpretations of the ERA—the subjective view of Brown et al., supra note 14, and the literal view propounded by Washington State Senator Sam Ervin; rejecting the latter as inapplicable to Washington's ERA; and noting that "[b]ecause of the widespread acceptance of the [Brown et al.] article by women's rights advocates, we have in this report relied on it to determine the possible impact of the adoption of [the ERA] on the statute law of Washington").
38. See WASH. CONST. art. XXXI, § 1.
shall not be denied or abridged on account of sex.”

According to the most recent edition of *Webster’s Dictionary* available at the time that the ERA was passed, “equal” signifies being “of the same quantity, size, number, value, degree, intensity, quality, etc.” and “having the same rights, privileges, ability, rank, etc.” A “right” is defined as a “power, privilege, etc. that belongs to a person.” A “responsibility” evinces an “obligation.” The language of the ERA indicates that males and females have the same powers, privileges, and obligations under the law. Therefore, under a plain-meaning analysis, state action that impinges on individuals’ rights and responsibilities on the basis of sex violates the ERA.

**B. Washington Courts Review Sex-Based Classifications Under the ERA Using an Absolutist Standard**

Washington courts employ an absolutist standard in reviewing sex-based classifications under the ERA. Before the ERA was approved, classifications based on sex were subject to a more deferential standard of review. Under the prior method of analysis, Washington courts used a two-tiered approach: classifications satisfied the first tier if a rational basis existed to support the classification. Under the second tier, if the classification affected a suspect class (such as sex) or a fundamental right, it also needed to withstand strict scrutiny. With the passage of the ERA, Washington courts began analyzing sex-based classifications

---

39. *Id.*
41. *Id.* at 1225.
42. *Id.* at 1211.
44. *Id.*
47. *See id.*
48. *See*, e.g., State v. Wood, 89 Wash. 2d 97, 100, 569 P.2d 1148, 1150 (1977) (noting that Washington courts consider sex to be a suspect class necessitating strict scrutiny).
using a higher, absolutist standard.\textsuperscript{50} The Washington State Supreme Court explained the change: "The ERA alone now governs . . . review of sex-based classifications."\textsuperscript{51} The court reasoned that by approving the "broad, sweeping, [and] mandatory language" of the ERA, voters intended to "add[] something to the prior prevailing law by eliminating otherwise permissible sex discrimination if the rational relationship or strict scrutiny tests were met."\textsuperscript{52}

C. Both Legislative History and Case Law Demonstrate that the ERA Prohibits Differentiation on the Basis of Sex Alone

The ERA's legislative history and subsequent case law confirm the ERA's plain meaning.\textsuperscript{53} Specifically, legislative history and case law indicate that the ERA was intended to mandate equality between the sexes by prohibiting sex-based distinctions, including separate-but-equal treatment and the use of sex as a proxy for other characteristics.\textsuperscript{54} Courts look to whether, but for an individual's sex, a state actor would have treated that person in the same manner in a given situation.\textsuperscript{55}

1. Legislative History Indicates that the ERA Forbids Differentiation Based Solely on Sex, Including Separate-but-Equal Treatment and the Use of Sex as a Proxy for Other Characteristics

The ERA's legislative history demonstrates that distinctions based solely on sex, including separate-but-equal treatment and the use of sex as a proxy, run counter to the ERA.\textsuperscript{56} The ERA is founded on the basic

\textsuperscript{50} See Elec. Contractors, 100 Wash. 2d at 127, 667 P.2d at 1102; Linton, supra note 34; Treadwell & Page, supra note 34.

\textsuperscript{51} Elec. Contractors, 100 Wash. 2d at 128 n.3, 667 P.2d at 1102 n.3.


\textsuperscript{53} See, e.g., Darrin, 85 Wash. 2d at 877, 540 P.2d at 893; Senate Journal, S. 42, 2nd Ex. Sess., at 346 (Wash. 1972); Statement for HJR 61, supra note 15.


\textsuperscript{56} See, e.g., Senate Journal, S. 42, 2nd Ex. Sess., at 345–46 (Wash. 1972); Brown et al., supra note 14, at 889–90, cited with approval in Potential Impact, supra note 37.
principle “that both sexes be treated equally under the law.” Legislators and voters intended for the ERA to further equality by disallowing arbitrary sex-based classifications. Washington State Senator Pete Francis noted:

[U]p until now it has been presumed that a distinction on the basis of sex alone, not on the basis of characteristics, but simply on the basis of whether you are male or female is an allowable distinction. . . . [The ERA] changes that and shifts the burden so that a great many discriminatory laws will be regarded as unconstitutional. Newspaper articles and the voters’ pamphlet informed voters that the ERA would prohibit laws that classified solely on the basis of sex.

Legislators did not intend for separate-but-equal treatment to pass scrutiny under the ERA. A Washington State Legislative Council report detailing the laws that would violate the ERA contemplated two possible interpretations of the Amendment—a literal view and a subjective view—and concluded that Washington would follow the subjective interpretation. The subjective view described in the legislative report was based on the seminal article The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women (“Equal Rights for Women”) that continues to be cited.

---

57. Statement for HJR 61, supra note 15.
61. Effect of HJR No. 61 if Approved into Law, supra note 58. For example, courts could no longer uphold laws that limited the number of hours per day that women, but not men, were allowed to work in certain industries. See Law as It Now Exists, in Official Voters Pamphlet: General Election Tuesday, November 7, 1972, at 53 (1972).
63. See Potential Impact, supra note 37.
64. Brown et al., supra note 14; see Potential Impact, supra note 37. The reasoning and conclusions of Equal Rights for Women apply to Washington’s ERA because even though that article discusses the proposed federal ERA, Washington’s ERA is nearly identical to the federal version. See Potential Impact, supra note 37 (noting that the language of Washington’s ERA is virtually identical to that of the proposed federal ERA, under which “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex”).
view, any separate-but-equal treatment of males and females is illusory and violates the ERA.66 "[T]he constitutional mandate must be absolute. The issue under the [ERA] cannot be different but equal... Equality of rights means that sex is not a factor."67

Both legislators and voters intended for the ERA to prohibit the use of sex as a proxy for other traits.68 Sex serves as a proxy when laws differentiate on the basis of sex instead of on the basis of a particular characteristic, such as strength.69 For example, although men on average are physically stronger than women, a public employer filling a position that required the ability to lift 100 pounds could not choose to interview only men.70 Instead of phrasing the criterion in terms of the sex of the potential employee, the employer would need to frame it in terms of the ability to lift 100 pounds. Under this reformulation, the employer would need to interview all qualified potential employees, irrespective of their sex.

Under the subjective interpretation of the ERA that legislators adopted,71 sex may not serve as a proxy.72 Senator Francis noted that sex-based distinctions remain valid under the ERA only if they "relate[] to the particular attributes of individuals and not to an attribute of their sex."73 One may not "simply... lump everyone together and say, [for


66. See Brown et al., supra note 14, at 890.


69. See Brown et al., supra note 14, at 889. Under the ERA, "differences in treatment... shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation." Id. at 909.


71. See POTENTIAL IMPACT, supra note 37.

72. See Brown et al., supra note 14, at 889. Senator Francis explained that by eliminating the use of sex as a proxy, the ERA would affect "discriminatory practices." See SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 346 (Wash. 1972). For example, the legal presumption at the time was that after a divorce, mothers always received custody of children. Id. According to Senator Francis, the ERA would give men "an equal chance" at gaining custody. Id.

example,] 'No woman can administer her husband's estate....'

Similarly, a public employer may not prohibit men from applying for a secretarial position merely because the employer does not want to hire a male secretary. Courts may have upheld those types of distinctions in the past, but, explained Senator Francis, such distinctions "have no valid relationship whatsoever to the characteristics of the sexes" and should no longer be acceptable.

Like legislators, voters envisioned that the ERA would disallow the use of sex as a substitute for particular characteristics. The voters' pamphlet gave examples of situations in which sex had previously been the sole basis for decisions but would no longer be so under the ERA. For example, child custody decisions would no longer be based on sex but on an individual's ability to "provide a proper environment and financial support." In addition, courts would no longer be able to uphold laws that discriminated on the basis of sex in approving mortgages, extending credit, or issuing insurance.

2. Washington Case Law Demonstrates that the ERA Forbids Distinctions Based on Sex Alone, Including the Use of Sex as a Proxy for Other Traits

Washington state courts have held that differentiation on the basis of sex alone violates the ERA. Differentiation is based solely on sex if the state actor would have treated a given individual differently in a particular situation had that individual been of the opposite sex. In

---

74. Id.
75. Id. at 346.
76. See id. at 347.
77. See Statement for HJR 61, supra note 15.
78. See id.
79. Id.
80. Id.
82. See Guard v. Jackson, 132 Wash. 2d 660, 661, 940 P.2d 642, 642–43 (1997) (holding that a statute violated the ERA by placing a specific requirement on the unmarried father but not on the mother of a child); Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 96, 614 P.2d 1272, 1275 (1980) (holding that both husband and wife may recover for loss of consortium because allowing only the husband such recourse violates the ERA). Washington courts have likewise found the converse to be true, namely, that actions are in compliance with the ERA where an individual's sex does not result in that person being treated in a particular way. See, e.g., Bolser v. Wash. State Liquor Control Bd., 90 Wash. 2d 223, 224, 231, 580 P.2d 629, 630, 633 (1978) (upholding a regulation prohibiting tavern owners from allowing topless table dancing at floor level and within six feet of a
other words, the relevant test is whether, but for an individual’s sex, that
person would have been treated the same as members of the opposite sex
in a given situation. In Darrin v. Gould, a school district had denied
two female students, Carol and Delores Darrin, the opportunity to play
on an interscholastic high school football team due to a regulation
prohibiting girls from playing on boys’ football teams. The Washington State Supreme Court ruled that the regulation violated
the ERA, reasoning that because the Darrin sisters had met all other
eligibility requirements, sex per se rather than the girls’ ability to play
formed the basis for the refusal. The regulation effected a sex-based
classification in violation of the ERA because the Darrin sisters would
have been treated differently had they been male.

Consistent with the ERA’s legislative history, Washington state
courts have held that the ERA forbids the use of sex as a proxy for other
traits. For example, in Willard v. Department of Social & Health
Services, the court held that a government agency had not violated
the ERA by billing an appellant for overpayment of public assistance
benefits where the agency had billed him not because of his sex but
because he was the payee of an assistance grant. Similarly, the court in

customer on the grounds that the regulation applied equally to dancers of both sexes); Linda D. v.
not denied or abridged a father’s rights on account of sex in violation of the ERA because neither he
nor the mother could raise certain claims).

83. See Darrin, 85 Wash. 2d at 877–78, 540 P.2d at 893 (reasoning that but for their sex, two
female students would have been able to play on an interscholastic football team); see also Guard,
132 Wash. 2d at 666, 940 P.2d at 645 (reasoning that but for an unmarried father’s sex, he would
not be required to prove that he financially supported his child before being allowed to make a
wrongful death claim); Lundgren, 94 Wash. 2d at 96, 614 P.2d at 1275 (noting that but for a wife’s
sex, she would have qualified for damages for loss of consortium).
84. 85 Wash. 2d 859, 540 P.2d 882 (1975).
85. Id. at 861, 540 P.2d at 884.
86. Id. Eligibility requirements included attending the requisite number of practice sessions,
passing a physical examination, and meeting medical insurance requirements. Id.
87. See id. at 875–77, 540 P.2d at 891–93.
88. Id. On the same day that the Darrin sisters were denied, an unqualified male student was
allowed to play on the same football team. Id. at 876, 540 P.2d at 892.
89. See, e.g., Senate Journal, S. 42, 2nd Ex. Sess., at 346–47 (Wash. 1972); Brown et al.,
supra note 14, at 889.
90. See, e.g., Willard v. Dept’ of Soc. & Health Servs., 91 Wash. 2d 759, 765, 592 P.2d 1103,
92. Id. at 765, 592 P.2d at 1107.
Single-Sex Public Education

In re Welfare of Hauser\(^93\) held that a decision to deprive a petitioner of his parental rights did not violate the ERA where the decision was based not on the petitioner's sex but on his lack of fitness as a parent.\(^94\)

D. Legislative History and Washington Case Law Recognize Two Narrow Exceptions to the ERA

Legislators contemplated,\(^95\) and Washington courts recognize,\(^96\) two exceptions to the ERA. Specifically, the ERA is circumscribed in two narrowly defined sets of circumstances: (1) situations in which the classification is based on actual physical differences between the sexes;\(^97\) and (2) situations involving affirmative action programs intended solely to ameliorate the effects of past discrimination.\(^98\) The first exception allows classification by sex where a characteristic is unique to one sex.\(^99\) A characteristic is unique to one sex if all or some members of one sex, but no members of the other sex, exhibit that trait.\(^100\) This exception is subject to an important limitation: sex-based distinctions must derive

\(^{94}\) Id. at 236–37, 548 P.2d at 337.
\(^{95}\) See POTENTIAL IMPACT, supra note 37 (relying on the subjective view propounded by Brown et al., supra note 14, that allows for these two exceptions to the general rule prohibiting sex-based classifications).

The privacy provision of the Washington State Constitution, article I, section 7, states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Both legislators, see SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 346–47 (Wash. 1972), and voters, see Statement for HJR 61, supra note 15, contemplated that the ERA would not supersede the constitutional right to privacy whenever individuals undressed, slept, or performed bodily functions. The right to privacy would thus ensure that restrooms and hospital wards did not become unisex. Statement for HJR 61, supra note 15. The right to privacy might also arise in an employment context: it would be permissible for employers to consider only members of a particular sex for a position if hiring someone of the other sex would result in an invasion of privacy. See SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 346 (Wash. 1972). For example, employers would still be allowed to advertise for a member of a particular sex to be a masseuse or a restroom attendant. Id. This Comment does not address the right to privacy because single-sex public education does not implicate the right to privacy.

\(^{96}\) See Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 127–28, 667 P.2d 1092, 1102 (1983) (holding that affirmative action programs designed solely to mitigate the effects of past discrimination do not violate the ERA); City of Seattle v. Buchanan, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (holding that laws based on actual physical differences between the sexes do not violate the ERA).

\(^{97}\) See Buchanan, 90 Wash. 2d at 591, 584 P.2d at 921.
\(^{98}\) See Elec. Contractors, 100 Wash. 2d at 127–28, 667 P.2d at 1102.
\(^{99}\) See Brown et al., supra note 14, at 893.
\(^{100}\) Id.
from physical characteristics unique to one sex, not secondary biological or cultural characteristics found in greater or lesser degrees in both sexes.\textsuperscript{101} Examples of secondary traits shared by males and females include “interests in literature or athletics” and “degrees of physical strength or weakness.”\textsuperscript{102} Senator Francis gave examples of distinctions based on physical characteristics that would remain valid under the ERA.\textsuperscript{103} He noted that where only employees of a particular sex are able to carry out certain functions, such as wet nurses who must necessarily be female, sex-based distinctions would remain valid.\textsuperscript{104}

Consistent with the ERA’s legislative history, the Washington State Supreme Court recognizes an exception to the ERA based on actual physical differences.\textsuperscript{105} In \textit{City of Seattle v. Buchanan},\textsuperscript{106} the court concluded that an ordinance prohibiting the public exposure of female breasts but not male breasts violated the ERA on its face.\textsuperscript{107} Nonetheless, the \textit{Buchanan} court held that female breast exposure may be illegal even if male breast exposure is not because an actual physical difference exists between male and female breasts.\textsuperscript{108}

Under the second exception to the ERA, otherwise permissible affirmative action programs that are designed solely to mitigate the effects of past discrimination do not violate the ERA.\textsuperscript{109} This exception presumes that sex-based classifications in the context of affirmative action programs may be necessary “in order to undo what has been done” in the past.\textsuperscript{110} In \textit{Southwest Washington Chapter, National Electrical Contractors Ass’n v. Pierce County},\textsuperscript{111} the court held that an ordinance requiring county contractors to affirmatively seek female and minority subcontractors violated the ERA on its face.\textsuperscript{112} Nevertheless, the Washington State Supreme Court held that the affirmative action

\begin{thebibliography}{112}
\bibitem{101} Id. at 893–94.
\bibitem{102} Id. at 893.
\bibitem{104} Id. at 346.
\bibitem{105} See City of Seattle v. Buchanan, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978).
\bibitem{106} 90 Wash. 2d 584, 584 P.2d 918 (1978).
\bibitem{107} See \textit{id}. at 591, 584 P.2d at 921.
\bibitem{108} See \textit{id}.
\bibitem{110} See Brown et al., \textit{supra} note 14, at 904–05.
\bibitem{111} 100 Wash. 2d 109, 667 P.2d 1092 (1983).
\bibitem{112} See \textit{id}. at 111, 667 P.2d at 1094.
\end{thebibliography}
program did not contravene the ERA because it was designed to help women and minorities win contracts in an arena in which they were underrepresented due to past discrimination.  

The ordinance at issue in *Gary Merlino Construction Co. v. City of Seattle* was nearly identical to the one in *Electrical Contractors* in that it required contractors to use a specified percentage of female and minority subcontractors. Again, the Washington State Supreme Court held that, although the ordinance effected a sex-based classification on its face, it ultimately squared with the ERA because it fell under the ERA’s affirmative action exception. The court thus found that the classification was permissible.  

In sum, the express language of the ERA prohibits the denial of rights or responsibilities under the law based on sex. Courts employ an absolutist standard when reviewing any such attempts to use sex as a basis for classification. The ERA’s legislative history and subsequent case law demonstrate that the ERA forbids differentiation based on sex alone. Such differentiation occurs where, but for an individual’s sex, a state actor would have treated that individual the same as members of the opposite sex in a given situation. Finally, in line with the ERA’s legislative history, Washington courts recognize two narrow exceptions to the ERA: (1) where actual physical differences exist between the sexes, and (2) in the context of affirmative action programs intended solely to ameliorate the effects of past discrimination.

113. See id. at 111, 123, 667 P.2d at 1093–94, 1100. In a case predating *Electrical Contractors*, the Washington State Supreme Court upheld the validity of a state law on similar grounds. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 308, 582 P.2d 487, 493 (1978). In *Marchioro*, members of Washington State’s Democratic Party contended that two state statutes violated the ERA. *Id.* at 300, 582 P.2d at 489. One statute required that the two State Democratic Committee members elected by the county central committees be of opposite sexes, while the other provided that the State Democratic Committee chair and vice-chair be of opposite sexes. *Id.* In holding both statutes constitutional, the Washington State Supreme Court quoted from the section of *Equal Rights for Women* that describes an affirmative action exception to the ERA. *Id.* at 305–06, 582 P.2d at 491 (quoting *Brown* et al., supra note 14, at 902–04). The *Marchioro* court reasoned that by countering existing sex-based discrimination in politics, the statutes furthered the purpose of the ERA. See id.  


115. See id. at 599, 606, 741 P.2d at 35–36, 39.  

116. See id. at 606, 741 P.2d at 39.  

117. See id.
III. SINGLE-SEX PUBLIC EDUCATION VIOLATES PENNSYLVANIA’S ANALOGOUS ERA

Pennsylvania’s ERA,\(^{118}\) which mirrors Washington’s in language, intent, and application,\(^{119}\) prohibits single-sex public education.\(^{120}\) Of the numerous states with equal rights amendments,\(^{121}\) only Pennsylvania has employed an absolutist standard similar to Washington’s.\(^{122}\) Pennsylvania’s ERA, like Washington’s, prohibits distinctions on the basis of sex alone, including separate-but-equal treatment and the use of sex as a proxy for other characteristics.\(^{123}\) A Pennsylvania court has held that single-sex public education violates Pennsylvania’s ERA.\(^{124}\)

A. Pennsylvania’s ERA Mirrors Washington’s ERA in Language, Purpose, and Application

The text, intent, and application of Pennsylvania’s ERA parallel those of Washington’s.\(^{125}\) Approved in 1971, Pennsylvania’s ERA provides that “[e]quality of rights under the law shall not be denied or abridged in—

---

118. \(\text{PA. CONST. art. I, } \S\ 28.\)

119. \(\text{See, e.g., Linton, supra note 34; Treadwell & Page, supra note 34; compare, e.g., PA. CONST. art. I, } \S\ 28, \text{ with WASH. CONST. art. XXXI, } \S\ 1; \text{ compare, e.g., Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974), with SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 345–46 (Wash. 1972).}\)


121. \(\text{See Phyllis W. Beck & Patricia A. Daly, Pennsylvania’s Equal Rights Amendment Law: What Does It Portend for the Future?, 74 TEMP. L. REV. 579, 580 (2001) (noting that although the required number of states failed to ratify the federal ERA, many states nonetheless approved their own state versions of the federal amendment). Currently, seventeen states have ERAs. See ALASKA CONST. art. I, } \S\ 3; \text{ COLO. CONST. art. II, } \S\ 29; \text{ CONN. CONST. art. I, } \S\ 20; \text{ HAW. CONST. art. I, } \S\ 3; \text{ ILL. CONST. art. I, } \S\ 18; \text{ LA. CONST. art. I, } \S\ 3; \text{ MD. CONST. art. 46; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, } \S\ 4; \text{ N.H. CONST. pt. 1, art. 2; N.M. CONST. art. II, } \S\ 18; \text{ PA. CONST. art. I, } \S\ 28; \text{ TEX. CONST. art. I, } \S\ 3a; \text{ UTAH CONST. art. IV, } \S\ 1; \text{ VA. CONST. art. I, } \S\ 11; \text{ WASH. CONST. art. XXXI, } \S\ 1; \text{ WYO. CONST. art. VI, } \S\ 1.}\)

122. \(\text{See Linton, supra note 34; see also Treadwell & Page, supra note 34.}\)


124. \(\text{See Newberg, 26 Pa. D. \& C.3d at 709.}\)

125. \(\text{See Linton, supra note 34; Treadwell & Page, supra note 34; compare, e.g., PA. CONST. art. I, } \S\ 28, \text{ with WASH. CONST. art. XXXI, } \S\ 1; \text{ compare, e.g., Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974), with SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 345–46 (Wash. 1972).}\)
the Commonwealth of Pennsylvania because of the sex of the individual."126 This language is nearly identical to that of Washington’s ERA.127 The intent of Pennsylvania’s ERA—“end[ing] discriminatory treatment on account of sex”128—also mirrors that of Washington’s.129 Additionally, of the states with equal rights amendments,130 only courts in Washington and Pennsylvania have taken an absolutist approach in ERA application, under which nearly all classifications based on sex are invalid.131 Given these similarities in language and intent, Pennsylvania and Washington courts have similarly interpreted their respective state ERAs.132

Differentiation on the basis of sex alone is unconstitutional under both Pennsylvania’s and Washington’s ERAs.133 Such differentiation occurs where individuals would have been treated the same as others but for their sex.134 In Commonwealth v. Pennsylvania Interscholastic Athletic Ass’n (PIAA),135 an interscholastic athletic association’s regulation prohibited girls from “compet[ing] or practic[ing] against boys” in

127. See WASH. CONST. art. XXXI, § 1 (providing that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex”).
128. Butler, 328 A.2d at 855; see also Henderson, 327 A.2d at 62 (noting that the “thrust” of the ERA is “to insure [sic] equality of rights under the law and to eliminate sex as a basis for distinction”)
130. See supra note 121.
131. See Linton, supra note 34; see also Treadwell & Page, supra note 34.
134. See, e.g., Commonwealth v. Butler, 328 A.2d 851, 856–57 (Pa. 1974) (holding that a provision prohibiting trial courts from imposing minimum sentences on female criminals where male criminals were subject to minimum sentences violated Pennsylvania’s ERA); Lashe v. N.Y. County Sch. Dist., 9 Pa. D. & C.3d 772, 778 (1978) (holding that a provision of a school district resolution under which husbands, but not wives, were liable for their spouses’ occupation taxes, violated Pennsylvania’s ERA).
athletic competitions. The *PIAA* court held that under Pennsylvania’s ERA, the regulation was unconstitutional on its face, regardless of whether a separate girls’ team existed. The court ordered the athletic association to allow male and female students to practice and compete with each other in athletics, including the contact sports of football and wrestling. The Washington State Supreme Court reached a similar conclusion in *Darrin* when it held that an interscholastic athletic association could not constitutionally prohibit girls from participating in activities for which they were otherwise qualified, solely on account of their being female. The *Darrin* court was persuaded by the reasoning in *PIAA* and quoted extensively from the *PIAA* decision.

In addition, sex may no more be used as a proxy in Pennsylvania than it may be in Washington. Rather, the criterion that sex is standing in for must itself be articulated and implemented. Additionally, Pennsylvania cases demonstrate an exception for physical differences similar to the one that the Washington State Supreme Court enunciated in *Buchanan*.

136. *Id.* at 840.
137. *See id.* at 841–42 (reasoning that even if a separate girls’ team existed, a girl sufficiently skilled to earn a place on a boys’ team whose members played at a higher level would still be denied equality by being refused the opportunity to play at the level at which she was otherwise capable).
138. *See id.* at 843.
141. *See Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (holding that financial need, not sex, must be the deciding factor in determining whether a spouse receives certain costs associated with divorce actions); Commonwealth ex. rel. Wasiok v. Wasiok, 380 A.2d 400, 403 (Pa. Super. Ct. 1977) (holding that child custody decisions must be based on “sexually-neutral grounds” and reasoning that mothers are no longer presumed to be more fit to care for children than are fathers); *PIAA*, 334 A.2d at 843 (holding as violative of the ERA a regulation prohibiting girls from participating in sports alongside boys, and noting that the mere fact that members of one sex exhibit certain characteristics in larger numbers than do members of the other sex does not justify classification by sex rather than by characteristic); Bilotta v. Palmer Twp. Athletic Ass’n, 33 Pa. D. & C.3d 402, 408–09 (1984) (holding that an athletic association may not constitutionally prohibit men from coaching a girls’ sports team simply because its members believe that women are more likely than men to possess traits that make them suitable to coach a girls’ team).
143. *See supra* note 141.
144. *Compare, e.g.*, Wise v. Commonwealth, 690 A.2d 846, 849 (Pa. Commw. Ct. 1997) (upholding a Pennsylvania regulation allowing female inmates, but not male inmates, to wear their hair long because, among other things, physical differences between the sexes validated the regulation’s purpose of ensuring inmate health, security, and hygiene), with *City of Seattle v.*
B. Single-Sex Public Education Violates the Pennsylvania ERA, Regardless of Whether an Equal or Unequal Alternative Opportunity Exists for the Other Sex

Although the issue has not yet come before Washington courts, a Pennsylvania court has held that Pennsylvania’s ERA forbids single-sex public education.\footnote{145 See Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 709 (1983).} In Newberg v. Board of Public Education,\footnote{146 26 Pa. D. & C.3d 682 (1983).} a class-action proceeding,\footnote{147 Id. at 683.} the Newberg court found in favor of female students who either had applied or were eligible for admission to an all-male public school but were or would have been rejected solely on the basis of their sex.\footnote{148 See id. at 683, n.1, 710.} Invoking PIAA, the court reasoned that because male and female students cannot be prohibited from participating in athletic activities together, even those involving contact sports, it would be illogical to prohibit them from “intellectual interplay” in a classroom setting.\footnote{149 Id. at 709.} The Newberg court rejected the concept of separate-but-equal treatment, invalidating arguments that relied on the existence of an all-female counterpart to the school that had rejected or would have rejected the plaintiffs.\footnote{150 Id.} Because the court held that the school board’s policy did not meet the standard of strict scrutiny,\footnote{151 Id. at 711.} the policy could not meet the higher absolutist standard required under Pennsylvania’s ERA.\footnote{152 See Linton, supra note 34; see also Treadwell & Page, supra note 34.}

In sum, the language and purpose of Pennsylvania’s ERA parallel those of Washington’s, and only Pennsylvania and Washington courts employ an absolutist standard in analyzing sex-based classifications under their state ERAs. Courts in both states have held that their respective ERAs prohibit sex-based distinctions, which occur where, but for an individual’s sex, a state actor would have treated the individual in the same manner as members of the opposite sex in a given situation.

Buchanan, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (upholding an ordinance prohibiting the public exposure of female but not male breasts because of actual physical differences between male and female breasts). Although Pennsylvania courts have not addressed the possibility of an affirmative action exception in published opinions, they have cited Equal Rights for Women, see, e.g., Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974) (citing Brown et al., supra note 14), which propounds such an exception, see Brown et al., supra note 14, at 903–05.
Additionally, a Pennsylvania court has held that single-sex public education contravenes Pennsylvania’s ERA.

IV. SINGLE-SEX PUBLIC EDUCATION VIOLATES WASHINGTON’S ERA

Single-sex public education runs afoul of Washington’s ERA by effecting distinctions based solely on sex. The ERA expressly forbids the denial of equality that single-sex public education necessitates.\textsuperscript{153} The ERA’s legislative history and interpretive case law, as well as persuasive precedent from another jurisdiction, also demonstrate that single-sex public education violates the ERA by using sex as an exclusive classifying tool.\textsuperscript{154} But for a particular student’s sex, that student would be able to enroll in a given class or school. Additionally, single-sex public education does not currently satisfy either of the narrow exceptions to the ERA.\textsuperscript{155}

A. By Separating Students According to Their Sex, Single-Sex Public Education Violates the ERA’s Express Prohibition Against Denying Equality of Rights and Responsibilities

Single-sex public education runs afoul of Washington’s ERA based on the ERA’s plain meaning. According to the text of the ERA, male and female students must be treated in the same manner, with the same rights and responsibilities.\textsuperscript{156} Male and female students are not treated equally, however, when on the basis of sex alone they are separated into different classes or schools with, among other things, different teachers, assignments, books, supplies, peers, and classroom dynamics.\textsuperscript{157} Single-sex educational settings therefore differentiate between male and female students with respect to rights and responsibilities in contravention of the

\begin{footnotes}
\item[153.] See WASH. CONST. art. XXXI, § 1.
\item[156.] See WASH. CONST. art. XXXI, § 1.
\item[157.] See supra note 4 (highlighting the differences between single-sex schools, coeducational schools comprised entirely of single-sex classes, and coeducational schools consisting of limited numbers of single-sex classes).
\end{footnotes}
ERA.

B. In Light of Legislative History and Binding and Persuasive Precedent, Single-Sex Public Education Violates the ERA by Differentiating on the Basis of Sex Alone

Based on the ERA’s legislative history and binding and persuasive precedent, single-sex public education contravenes the ERA by failing the “but for” test for sex-based distinctions. Legislative history and binding and persuasive precedent demonstrate that if a state actor would not have treated an individual differently but for that individual’s sex, that state actor has violated the ERA.158 In a single-sex educational setting, male students are assigned to one class or school and female students to another. Single-sex public education thus violates the ERA by creating a situation in which students, but for their sex, would be able to enroll in a particular class or school.159 Equal Rights for Women explicitly states that “[t]here is no doubt that the [federal ERA] would eliminate differentiation on account of sex in the public schools and public university systems.”160 As noted above, the federal ERA, which was never ratified, is nearly identical to Washington’s.161

The Washington State Supreme Court’s holding in Darrin strongly suggests that single-sex public education runs afoul of the ERA. Darrin involved public-school students who were otherwise qualified to play on an interscholastic athletic team.162 Single-sex public education involves students who are otherwise eligible to enroll in a given class or school. Like the denial of permission to play a sport in Darrin, assignment to a particular class or school in a single-sex educational setting is based on sex alone, not on a criterion valid under the ERA. The Darrin sisters

158. See, e.g., Newberg, 26 Pa. D. & C.3d at 709 (persuasive authority); Darrin, 85 Wash. 2d at 877–78, 540 P.2d at 893 (binding precedent); SENATE JOURNAL, S. 42, 2nd Ex. Sess., at 345–46 (Wash. 1972) (legislative history).

159. This assumes two options: a boys’ option and a girls’ option. Given enough students, additional boys’ or girls’ options might be available, but this does not alter the analysis. None of the boys’ options would be available to any girl, nor any of the girls’ options to any boy. The analysis also remains unchanged regardless of whether the educational setting at issue is a single-sex school, a coeducational school consisting exclusively of single-sex classes, or a coeducational school offering a limited number of single-sex classes. Being of the other sex forecloses a student from admission to a single-sex school, just as it prevents that student from enrolling in a given single-sex class.


161. See supra note 64.

162. See Darrin, 85 Wash. 2d at 860–62, 540 P.2d at 883–84.
could have been constitutionally denied the right to play on the athletic
team for valid reasons, such as failing to attend the required number of
practice sessions or lacking sufficient athletic ability.\footnote{163} However, the
Darrin sisters otherwise met the stated criteria and were thus
impermissibly denied permission to play.\footnote{164} Similarly, public schools
may, without violating the ERA, enroll only those students who live
within the school district’s geographic area.\footnote{165} Public schools may also
rightfully deny a student entry into a calculus class, for example, if that
student has not demonstrated sufficient ability in a prerequisite algebra
class.\footnote{166} That said, in a single-sex educational setting, a student who
otherwise meets a school’s residency requirements or any applicable
course aptitude requirements is impermissibly denied admission if that
student is simply of the “wrong” sex. Thus, as was true with the Darrin
sisters,\footnote{167} students in a single-sex educational setting are denied
opportunities based solely on their sex in violation of the ERA.

Single-sex public education also contravenes the ERA to the extent
that it uses sex as a proxy, which is prohibited under the ERA according
to legislative history, Washington case law, and persuasive precedent.\footnote{168}
Washington legislators specifically approved of the subjective view of
the ERA,\footnote{169} under which sex may not be used as a proxy.\footnote{170} Senator
Francis explicitly stated that distinctions must be predicated on
individuals’ characteristics and not on sex alone.\footnote{171} Under Washington
and Pennsylvania case law, using sex as a substitute for other traits is
unconstitutional.\footnote{172} Single-sex education uses sex as a proxy to the
extent that it classifies students not by their individual abilities but by

\begin{itemize}
  \item \footnote{163} See \textit{id.} at 861, 540 P.2d at 884.
  \item \footnote{164} See \textit{id.} at 860–62, 540 P.2d at 883–84.
  \item \footnote{165} Cf. \textit{id.} at 861, 540 P.2d at 884 (noting that valid criteria under the ERA for participating in
interscholastic athletic activity included attending the requisite number of practice sessions, passing
a physical examination, and meeting medical insurance requirements).
  \item \footnote{166} Cf. \textit{id.}
  \item \footnote{167} See \textit{id.} at 877–78, 540 P.2d at 893.
  \item \footnote{168} See, e.g., Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (persuasive authority);
Willard v. Dep’t of Soc. & Health Servs., 91 Wash. 2d 759, 765, 592 P.2d 1103, 1107 (1979)
(binding precedent); \textit{SENATE JOURNAL}, S. 42, 2nd Ex. Sess., at 346–47 (Wash. 1972) (legislative
history).
  \item \footnote{169} See \textit{POTENTIAL IMPACT}, \textit{supra} note 37.
  \item \footnote{170} See Brown et al., \textit{supra} note 14, at 889.
  \item \footnote{171} See \textit{SENATE JOURNAL}, S. 42, 2nd Ex. Sess., at 345–46 (Wash. 1972).
  \item \footnote{172} See, e.g., \textit{Willard}, 91 Wash. 2d at 765, 592 P.2d at 1107; \textit{Commonwealth v. Penn.
\end{itemize}
Single-Sex Public Education

their sex. If one rationale for single-sex education is strengthening female students' performance in science classes,173 as in the hypothetical that begins this Comment, then sex is being used as a proxy to identify students who do poorly in science. One way to reframe this distinction so that the ERA is not implicated—while still providing female students who need additional assistance in science with the help that they need—is to separate students by ability: students (both male and female) who have done poorly in science study together in one class, while students (both male and female) who have already demonstrated skill in science study together in a different class. Even if classes are not split evenly across genders, all students would receive instruction at an appropriate level. However, the decision to deny a student admission to a particular class or school based solely on the student's sex, rather than on an appropriate characteristic such as residency or ability, contravenes the ERA.

C. Single-Sex Public Education Does Not Currently Satisfy Either Exception to the ERA

Single-sex public education does not presently satisfy either of the two narrow exceptions to the ERA contemplated in the Amendment's legislative history and later set forth by Washington state courts.174 First, learning does not involve an actual physical difference between the sexes.175 Second, single-sex classes and schools are not affirmative action programs designed solely to ameliorate the effects of past discrimination.176

Single-sex public education does not fall under the actual physical differences exception to the ERA.177 An actual physical difference is one that all or some members of one sex and no members of the other sex possess.178 It must be a physical difference, not one based on "psychological, social or other characteristics of the sexes," because

173. See Mael, supra note 8.
176. Cf., e.g., Elec. Contractors, 100 Wash. 2d at 127–28, 667 P.2d at 1102.
178. See id.
such characteristics are shared by the sexes.\textsuperscript{179} For example, members of both sexes exhibit “active [and] passive attitudes” and are interested in athletics and literature.\textsuperscript{180} Learning is an example of a shared trait, rather than an actual physical difference, because it is not something that all or some members of one sex, and no members of the other sex, do, or do in a particular way. Differences in learning abilities and styles are unlike the physical differences between male and female breasts that the Buchanan court recognized.\textsuperscript{181} Single-sex public education thus does not come within the actual physical differences exception to the ERA.\textsuperscript{182}

Single-sex public education also fails to satisfy the other narrow exception to the ERA under which sex-based differentiation is permissible if it is part of an affirmative action program intended solely to mitigate the effects of past discrimination.\textsuperscript{183} In both Electrical Contractors and Gary Merlino, the Washington State Supreme Court found that the programs in question satisfied the affirmative action exception.\textsuperscript{184} Both programs explicitly supported women’s involvement in a traditionally male-dominated arena, namely, subcontracting.\textsuperscript{185} Single-sex classes and schools, however, do not constitute “affirmative action programs” pursuant to the term’s commonly understood meaning. The ordinances at issue in Electrical Contractors and Gary Merlino

\textsuperscript{179} Id. at 893.
\textsuperscript{180} Id.
\textsuperscript{181} See City of Seattle v. Buchanan, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978).
\textsuperscript{182} The actual physical differences exception might still apply if educators ultimately found conclusive physical evidence that all males learn differently from all females.
\textsuperscript{184} Moreover, Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978), see supra note 113, is inapposite. The Marchioro court followed the same approach as did the Electrical Contractors court. Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County, 100 Wash. 2d 109, 127–28, 667 P.2d 1092, 1102 (1983); Marchioro, 90 Wash. 2d at 305–06, 582 P.2d at 491–92. Consequently, Marchioro is merely a precursor to the affirmative action exception to the ERA which, although it had been contemplated at the time of the ERA’s passage, see supra Part II.D, Washington courts had not yet articulated. Furthermore, Marchioro is inapposite because the statutes at issue aimed to equalize men and women by including women in an arena in which they were traditionally underrepresented, thereby allowing them to work alongside men in furtherance of the ERA’s purpose. Marchioro, 90 Wash. 2d at 306, 582 P.2d at 492. Conversely, in single-sex education, the aim is to segregate the sexes, rendering them unequal.
sought to *integrate* women into the subcontracting workforce, whereas single-sex public education *segregates* male and female students into separate classes or schools. Moreover, even if the sole purpose of single-sex public education is ameliorating the effects of past discrimination, as opposed to simply creating a more effective educational environment, single-sex public education will not correct the problem because separate-but-equal treatment is inherently unequal. Curing the historical disenfranchisement of women by relegating female students to their own class or school does not make them equal to male students; rather, it perpetuates their inferior position. As *Equal Rights for Women* makes clear, as long as there is "any differentiation in legal treatment on the basis of sex," women will continue to bear an inferior role in society.

Single-sex public education could potentially come within the affirmative action exception if a study definitively concluded that single-sex education ameliorates the effects of past discrimination against female students. If such a finding were limited to math and science classes, then single-sex schools would not escape the purview of the ERA, but single-sex math and science classes could. Presently, however, single-sex public education does not satisfy the affirmative action exception to the ERA.

In sum, the express language of the ERA, its legislative history, and binding and persuasive precedent all demonstrate that state actors may not treat individuals differently on the basis of sex alone. Single-sex public education thus violates the ERA by effecting distinctions based solely on sex. Furthermore, single-sex public education does not currently satisfy either of the two narrow exceptions to the ERA.

---


188. *See Brown*, 347 U.S. at 495.


191. *Id.*
V. CONCLUSION

Washington’s ERA prohibits single-sex public education. The ERA expressly forbids distinctions on the basis of sex alone, thereby preventing a state actor from treating an individual differently in a given situation based solely on that person’s sex. Washington state courts employ an absolutist standard in ERA analysis and accordingly find nearly all classifications based on sex invalid. Single-sex public education, including separate-but-equal educational settings, results in impermissible sex-based classifications by limiting, on the basis of sex alone, the educational opportunities available to a given male or female student. Single-sex public education also violates the ERA to the extent that it uses sex as a proxy, where, for example, a school board forces a female student like Sam to enroll in a single-sex biology class because it concluded that on average, female students do poorly in science classes as compared to male students, rather than because Sam herself needs extra support in science. Furthermore, single-sex public education does not presently fall under either of the two narrow exceptions to the ERA: learning does not involve an actual physical difference between the sexes, and single-sex classes and schools are not affirmative action programs designed solely to ameliorate the effects of past discrimination. By effecting sex-based discrimination that does not currently satisfy either of the recognized exceptions, single-sex public education thus denies the equality that is the touchstone of the ERA.