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ERA IS STILL THE WAY

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INTRODUCTION

Much progress has been made in the field of sex discrimination, yet it is clear, even to those who have not studied the topic, that there are still unresolved issues of inequality. To those involved in the women's movement the problems that remain stand out glaringly against the great amount of progress that has been made.

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While women have gained access to many areas from which they were once excluded, there are still ways in which women are treated unequally.

One of the most persistent forms of sex discrimination is based on women's biological ability to bear children. This characteristic has been used to disadvantage women throughout history. Our society has failed to treat pregnancy as what it is: a medical condition occurring only in women. This results in many forms of sex discrimination, including the denial of funding for medically necessary abortions, and the exclusion of pregnancy from medical coverage. The unequal treatment of pregnancy prevents women from achieving all they can and keeps them in a secondary position in society.

Another barrier to equality between the sexes is gender stereotyping. Rigid sex roles continue to pervade our society and constrain women's choices, and their detrimental effects are felt by men as well. Both sexes are forced to conform to generalizations about how they should act based on their sex. One area where this is most visible is parenting. The stereotype of mothers as the caretakers does much to perpetuate inequality.

These two forms of sex discrimination are closely related because they often have the combined effect of making it difficult for women and men to take on non-traditional roles. For example, although women are represented equally in higher education they rarely reach the highest levels of their professions. This fact has been repeated often and studies of women in various fields have shown that the most common reason women leave the professional world is family responsibilities. Men are discouraged from taking the primary role in parenting and caretaking while women sometimes feel forced into this role. This form of sex discrimination, while perhaps more subtle than those faced in previous decades, is just as important to overcome. The sexes will never be truly equal if women continue to be disadvantaged in these ways. We must stop punishing women for their biology and equalize the parenting and caretaking responsibilities of both sexes.

At least part of the problem is the way in which our society in general, and particularly our legal system, has chosen to deal with sex discrimination. There has never been a clear, straightforward policy against this discrimination, nor a uniform method for evaluating claims. As a result, sex discrimination is treated differently in different areas of the country and, more specifically, in different courts. The courts vary greatly on the level of protection provided to victims and on defining what constitutes sex discrimination.

The result is that the message about sex discrimination is unclear and it is because of this ambiguity that equality of the sexes has yet to be achieved in American society. It is not surprising that we, as a society, have been unable to eradicate sex discrimination since we have yet to take a firm stance against it. We can only hope to accomplish true equality of the sexes by establishing a clear message that discrimination is prohibited. The best way to achieve this is by passing an Equal Rights Amendment (ERA) to the federal constitution. This would provide more protection against sex discrimination by establishing the strict scrutiny standard (the highest standard of constitutional review) for classification based on sex. In addition to providing more stringent protection against sex discrimination, strict scrutiny would provide much-needed clarity. Some argue that a constitutional amendment is unnecessary given the progress that has been made.[1] However, this note will demonstrate that the equality issues we face today reveal the inadequacy of previous attempts to deal with sex discrimination. Only a constitutional amendment will uniformly eradicate this discrimination.

Part I will examine the history of attempts to pass an ERA to the federal constitution. It will examine closely the goals of such an amendment and show that, despite significant progress, many of them were never fully achieved. The specter of sex discrimination is still present in some areas of American society, and the equality problems that persist today stem from, and are related to, many of

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[1] *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1478 (2001).

the problems the women's movement has faced for decades. In sum, although instances of sex discrimination may seem less severe, the roots of the problem have endured. Our attempts at equality have not reached deeply enough to affect the kind of change necessary for true equality.

Part II will examine the constitutional standard of intermediate scrutiny as used in equal protection challenges. This test has been the main weapon used to combat sex discrimination since the 1970's. Despite the development and strengthening of this standard, it remains an inadequate tool for solving the problem of sex discrimination. This is true not only because it falls short of the strictest level of constitutional review (strict scrutiny), but also because of its inherent vagueness. The result of this vagueness is that intermediate scrutiny varies greatly in strength from one case to the next, and sex discrimination cases victims face uncertainty regarding just how the standard will be applied. Even *US v. Virginia*, the case which gave this standard its most powerful articulation, did not create an adequate proscription against sex discrimination.[2] This point is illustrated by a more recent Supreme Court case, *Nguyen v. INS*, in which the court, while defining the standard in similar language, seemed to apply a much less rigorous test.[3]

Part III, will examine the jurisprudence of states that have implemented ERAs of their own to show what changes a federal constitutional amendment could produce. I will focus on three states where, as a result of state ERAs, sex discrimination faces strict scrutiny (rather than intermediate scrutiny). The cases examined involve parental rights, pregnancy discrimination, and abortion funding: three of the most egregious areas of sex discrimination remaining today. These state cases provide proof that a federal ERA could have a profound effect on the treatment of sex discrimination and constitute a big step towards achieving equality. The examples chosen highlight three of the most important areas of inequality that persist between the sexes.

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[2] 518 U.S. 515 (1996).
[3] 533 U.S. 53 (2001).

I. THE ONGOING STRUGGLE FOR EQUALITY THROUGH AN ERA

The Equal Rights Amendment was proposed by Alice Paul, founder of the National Women's Party, in 1923.[4] Paul was disappointed with the progress that had been made towards equality for women since the passage of the Nineteenth Amendment, which had given women the right to vote.[5] She felt that another constitutional amendment was needed to effect real change in women's status.[6] While the amendment did not take hold when Paul proposed it, neither did it disappear. The amendment was introduced into each session of Congress from 1923 until the early 1970's,[7] when pressure from the women's movement finally pushed it into the spotlight.[8] In 1970, Congressional hearings were held on the proposal.[9] In 1972, the amendment finally passed through Congress and on to the states for ratification.[10] Unfortunately, the amendment came just short of the approval it needed from the states to become an amendment to the U.S. Constitution.[11] Congress extended the deadline for passage, but the movement had lost steam. The amendment was never ratified.[12]

The idea of an Equal Rights Amendment is not dead, but remains a goal of many women's rights activists.[13] Opponents have argued that an amendment is no longer necessary because the position of women has improved and women now share equal constitu-

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[4] Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2034 (2000).
[5] *Id.*
[6] *Id.*
[7] Patricia Thompson, *The Equal Rights Amendment: The Merging of Jurisprudence and Social Acceptance*, 30 W. ST. U. L. REV. 205, 209 (2003).
[8] *See* Kay, *supra* note 4, at 2059.
[9] *Id.*
[10] *Id.*
[11] Thompson, *supra* note 7, at 210 n.22.
[12] *Id.* at 209 n.19.
[13] Kim Gandy, Executive Vice President of NOW, argues, "No matter how much legislation is in place, we are only one president or one Congress or one Supreme Court away from losing what we've gained. We need a guarantee of equality as much now as we did then." Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J. 52, 54 (1999).

tional rights with men.[14] Women have equal access to education, and their numbers are growing in many fields from which they were traditionally excluded. Yet sex discrimination continues to be a problem. In fact, many of the arguments offered in support of the Equal Rights Amendment in the 1970's are still quite relevant today.

One important goal of the amendment was to force legislative reform. Proponents urged that the amendment would "provide an immediate mandate, a nationally uniform theory of sex equality, and the prospect of permanence to buttress individual and political efforts to end discrimination."[15] Sex discrimination, mostly against women, was widespread and thus difficult to eradicate. Sex-based classifications tended to have far reaching effects; instances of discrimination in one field often impacted other areas of society.[16] The amendment was proposed as a way to wipe out sex discrimination in the law in a uniform manner.[17]

Much progress has been made reforming and repealing laws that discriminate based on sex. Yet, there are still areas in which equality has not been reached, three of which will be discussed in part three below. In addition, the lack of a uniform standard means that sex discriminations that have been successfully defeated in some jurisdictions persist in others.

Another objective of the amendment was to mandate a standard of judicial review for laws that discriminate based on sex. Justice Ginsburg, then a law professor, stressed that the Supreme Court's jurisprudence on the subject of sex discrimination was unclear because the court was ambivalent about how to deal with this type of discrimination.[18] She felt the amendment "would provide a firm conceptual foundation for judicial development of a coherent

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[14] *See generally* Phyllis Schlafly, *How the Feminists Want to Change our Laws*, 5 STAN. L. & POL'Y REV. 65 (1994).
[15] Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 884 (1971).
[16] *Id.* at 892.
[17] *Id.* at 884.
[18] Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L. J. 19, 24-25 (1978).

opinion pattern."[19] The Supreme Court has subsequently ruled on many cases involving sex discrimination, and the result has been the development of the intermediate scrutiny standard. However, the precedents have ultimately failed to coherently define an intermediate scrutiny test.

Intermediate scrutiny is not functional because it does not provide a consistent and predictable rule. A clear rule would not only provide social utility (for example, helping companies to understand better how to avoid sex discrimination), it would also propel advances in equality of the sexes by making reliance on gender stereotypes unacceptable. In addition, it would create a stronger mandate for judges, thus preventing vacillation in the strength of the standard applied to sex-based classifications.

Proponents also hoped that the amendment would help to eradicate gender stereotypes that persisted in society. They argued that the push for equal rights in the legal field was "only a part of a broader claim by women for the elimination of rigid sex role determination."[20] That this concern is still relevant today will be illustrated in the subsequent discussion of recent Supreme Court jurisprudence on sex discrimination. This is perhaps the area of sex discrimination that has seen the least amount of progress since the 1970's. Stereotypes still pervade many areas of society, including the law. It is clear that gender stereotyping is still a problem for both sexes.

II. INTERMEDIATE SCRUTINY: AN UNWORKABLE STANDARD

At the same time that proponents were campaigning for the Equal Rights Amendment, another pathway was being developed to combat sex discrimination via the courts. The Equal Protection Clause of the Fourteenth Amendment was being used to challenge sex discrimination.[21] The Supreme Court first recognized sex discrimination as a violation of equal protection in 1971. After decades

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[19] *Id.* at 21.
[20] Brown et al., *supra* note 15, at 885.
[21] Kay, *supra* note 4, at 2062.

of allowing them[22], the court finally recognized that classifications based on sex were problematic in *Reed v. Reed*.[23] Subsequently, the court vacillated on the proper standard of review for alleged sex discrimination.[24] While some members of the court wanted to apply strict scrutiny, it seemed there was not enough support for this.[25] Eventually, a compromise was reached in the intermediate scrutiny standard, first set out in *Craig v. Boren*.[26]

From the very beginning, it was clear that the standard would be impossible to apply uniformly because of its vague nature. Whereas strict scrutiny creates a clear rule that classification on the basis of a suspect class is almost always impermissible, intermediate scrutiny is much more ambiguous. It has no clear application; rather it occupies the vast gray area between rational basis and strict scrutiny.

It is no surprise then, that the Supreme Court's decisions since the articulation of the intermediate scrutiny standard have been muddled and unpredictable. The doctrine has created confusion in the lower courts.[27] Intermediate scrutiny has never become a uniform standard, but seems instead to take a slightly different form in each case in which it appears. Even when the same words and phrases are invoked their strength and meaning varies. Thus while some instances of sex discrimination are indeed struck down, others are allowed to continue. The important goal of equality of the sexes will never be achieved with such a standard. An ERA is necessary for exactly this reason: it would take the reins away from the judiciary, which, with some notable exceptions, has proven incapable of taking a firm stance against sex discrimination by refus-

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[22] Thompson, *supra* note 7, at 213.
[23] 404 U.S. 71 (1971).
[24] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Thompson, *supra* note 7, at 213-14.
[25] *See Frontiero*, 411 U.S. at 682, 688 (Brennan, J.) (writing for a four justice plurality and recognizing sex as a suspect classification that requires strict scrutiny); *see also* Thompson, *supra* note 7, at 213-14.
[26] 429 U.S. 190, 197-98 (1976).
[27] *See* Lisa Baldez et al., *Does the U. S. Constitution Need An Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 250 (2006).

ing to adopt a strict scrutiny standard for classifications based on sex.

The most powerful form of the intermediate scrutiny standard appeared in the case of *US v. Virginia* in 1996.[28] The court's holding in this case raised the bar for scrutiny of sex-based classifications to its highest point. Written by Justice Ginsburg, who had been one of the pioneers in equal protection litigation for sex-based classifications, the decision vastly strengthened the intermediate scrutiny standard. In fact, the form of intermediate scrutiny applied in *Virginia* was so strong it was almost comparable to strict scrutiny.

The issue in *Virginia* was the policy of the Virginia Military Institute (VMI) denying women admission to the school. VMI had a long history as a state-sponsored single sex school.[29] The suit was brought by the federal government on behalf of female students who wanted the chance to attend VMI.[30] The Fourth Circuit ruled that if Virginia wanted to continue funding VMI it had to either allow women entrance to VMI or provide them with another equivalent option.[31] Virginia chose to maintain VMI as a male-only institution and create a single sex educational program for women called Virginia Women's Institute for Leadership (VWIL).[32] In reviewing Virginia's remedial plan, the Fourth Circuit found that Virginia had fulfilled the requirements of intermediate scrutiny because while VMI and VWIL were not identical, "sufficiently comparable" educational prospects were provided to both sexes.[33]

The Supreme Court reversed, holding that VWIL did not cure the constitutional violation. Justice Ginsburg, writing for the court, began by pointing out that the skepticism with which the court confronts sex-based classifications is based on a long history of sex discrimination.[34] She noted that the court examines more

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[28] 518 U.S. 515 (1996).
[29] *Id.* at 521.
[30] *Id.* at 523.
[31] *Id.* at 525-26.
[32] *Id.* at 526
[33] *Id.* at 529.
[34] *Id.* at 531.

closely policies that result in the denial of opportunities to one sex. While sex classifications are not entirely banned, they cannot be used "as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[35] The opinion highlighted a long history of the denial of educational opportunities to women in Virginia.[36]

In defining the intermediate scrutiny test, the opinion held that the defender of a law that creates a sex-based classification must produce an "exceedingly persuasive justification" for upholding the law.[37] The inclusion of this language and the extent to which the phrase was repeated seemed to heighten the extent of the state's burden. In fact, it was the inclusion of this language which caused Chief Justice Rehnquist to write a separate opinion, even though he concurred with the result reached by the majority.[38] The court went on to find that Virginia had shown "no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI."[39]

Virginia's contention that VMI furthered the state's interest in providing diverse educational opportunities to its citizens was rejected. The court concluded that this rationale had been concocted solely in response to litigation.[40] The court stressed that intermediate scrutiny requires the defender of a challenged law to carry the burden of justifying it. Moreover, the court would not simply accept any justification a litigant offered up. The intermediate scrutiny test required that the justification proffered describe a genuine objective.[41]

The court found Virginia's second justification equally unpersuasive. Virginia argued that admitting women would lower the status of the school and destroy its adversative training method.

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[35] *Id.* at 534 (citation omitted).
[36] *Id.* at 537.
[37] *Id.* at 534.
[38] *Id.* at 559 (Rehnquist, C.J., concurring).
[39] *Id.* at 534 .
[40] *See id.* at 535-40.
[41] *Id.*

The court noted that this line of reasoning had been used, in the past, to routinely deny women entrance to a large number of educational institutions, as well as various other areas of American society.[42] In addition, it concluded that these concerns were unfounded, considering that women have been incorporated into comparable traditionally all-male environments, such as the federal military academies. The fact that these institutions still operated successful training programs and maintained their reputations after women were admitted considerably weakened Virginia's stance.[43]

Finally, the court reviewed VWIL to determine if VWIL could cure the constitutional deficiency VMI's single-sex admissions presented. The court concluded that VWIL was not an adequate solution because it was not equal to VMI. To begin with, VWIL did not employ the adversative method that made VMI so unique.[44] Virginia claimed this was a reflection of the fact that this type of training was not effective for women, as a group. The court felt this justification reflected a generalization that the adversative method was inappropriate for women.[45] Such a generalization was not acceptable because it denied the capacity of individual women. The court held that Virginia could not rely on averages or gender stereotypes to justify the exclusion of all women, since it was clear that there were women with the desire and capacity to be trained under the adversative method.[46]

In addition, there were several other areas in which VWIL simply did not offer equivalent opportunities. VWIL offered a smaller range of possible degrees, had less prestigious faculty and alumni, had inferior athletic facilities, and had a vastly smaller endowment than VMI. In sum, the court found VWIL to be a "pale shadow" of VMI.[47]

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[42] *See id.* at 536-37.
[43] *Id.* at 544-45.
[44] *Id.* at 549.
[45] *Id.* at 550.
[46] *Id.*
[47] *Id.* at 553.

US v. Virginia provided the greatest victory for equality of the sexes in Supreme Court history, but there is room for doubt about its strength as a precedent. While the opinion did much to fortify the intermediate scrutiny test, it probably did not create a permanent change. The strong language employed by Justice Ginsburg to define the intermediate scrutiny test may be abandoned or watered down in subsequent decisions written by other justices. This possibility, while not unique to sex discrimination cases, is of particular concern in this context because such a dilution would result in a much weaker stance against sex discrimination and stagnation of progress towards equality of the sexes.

Several aspects of *Virginia*'s version of intermediate scrutiny made it a more demanding standard than what had been seen in previous cases: placing the burden on the state, highlighting a history of past sex discrimination, determining whether non-sex based options existed, and rejecting reliance on gender stereotypes. While the central elements of intermediate scrutiny (important governmental interest and substantially related means) are clear, it is impossible to tell whether the aspects of the test stressed in *Virginia* will survive in future cases. Moreover, even the stronger version of intermediate scrutiny defined in *Virginia* does not go as far as the strict scrutiny standard that would be applied under an Equal Rights Amendment.

After writing the decision in *Virginia*, Justice Ginsburg stated that "there is no practical difference" between current Supreme Court jurisprudence regarding sex-based classifications and the Equal Rights Amendment.[48] Her form of intermediate scrutiny had achieved what the women's movement had been trying to accomplish for decades. However, Justice Ginsburg remains a supporter of the ERA. She has admitted that she "would still like it as a symbol to see the E.R.A. in the Constitution for [her] granddaughter."[49] Even assuming that the law as announced in *Virginia* is

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[48] Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 65.
[49] *Id.*

equivalent to the ERA, the question remains whether one case creates a precedent strong enough to bring about a permanent change in Supreme Court jurisprudence. It is not certain whether the *Virginia* version of the intermediate scrutiny standard will be maintained or whether the court will continue to revise and redefine the test. Recent Supreme Court jurisprudence on sex discrimination has suggested the latter.

In 2001, the Supreme Court once again considered an Equal Protection Clause challenge to a law that created a classification based on sex. *Nguyen v. INS* involved an immigration law that dealt with the requirements for obtaining United States citizenship for foreign born non-marital children with one US citizen parent.[50] The law imposed different requirements for such a child to acquire citizenship depending on whether the US citizen parent was the child's mother or father. In the case of a US citizen mother the child automatically gained US citizenship at birth as long as a residency requirement was fulfilled by the mother. If the US citizen parent was a father, however, an affirmative step acknowledging paternity was required before the child's eighteenth birthday. In addition, the father had to agree to financially support the child until the age of 18.[51]

The law was challenged by Tuan Anh Nguyen and his father Joseph Boulais. Nguyen had been born in Vietnam in 1969 to Boulais, a US citizen, and his Vietnamese girlfriend. Nguyen had never spent a significant amount of time with his mother. When his parents' relationship ended he lived with the family of his father's new girlfriend. At the age of 6, he came to the United States to live with Boulais. Nguyen became a lawful permanent resident and was raised by Boulais.[52] Apparently unaware of the statute in question, Boulais did not take any affirmative steps to recognize Nguyen as his son until after Nguyen had reached 18 years old. Thus Nguyen failed to meet the requirements of the statute for obtaining US citi-

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[50] 533 U.S. 53, 56-57 (2001).
[51] *Id*. at 59.
[52] *Id*. at 57.

zenship.[53] There was no doubt that Boulais was indeed Nguyen's biological father, as DNA tests had confirmed this fact.[54] Nguyen, who had pleaded guilty to two counts of sexual assault, was being deported by the INS under a statute that allowed deportation of aliens convicted of two "crimes of moral turpitude" since he had failed to show he was entitled to US citizenship.[55]

The Supreme Court, in a 5-4 ruling, upheld the statute, finding it satisfied the intermediate scrutiny standard. A comparison of the majority and dissenting opinions in *Nguyen* reveals significant differences between the application of intermediate scrutiny in *Nguyen* and *Virginia*. As noted by the dissent, there were several aspects of the majority opinion that were in direct contrast to the intermediate scrutiny considerations laid out in *Virginia*.[56]

The majority opinion began by setting out its definition of intermediate scrutiny; one which did not include the "exceedingly persuasive justification" language used in *Virginia*. The court did mention this phrase at the end of its opinion, but it was used only to restate the opinion's findings.[57] In *Virginia*, the inclusion of this language in the definition of intermediate scrutiny served to intensify the burden of proof carried by the defender of the sex-based classification, but in *Nguyen* it did not have the same effect because the language was merely an empty recitation. The court claimed to apply the same test that was applied in *Virginia* but in reality the standard was considerably more lenient toward the state.

The majority opinion found two arguments that it felt reached the level of "important governmental objectives." Both of these interests concerned parental relationships, a situation where the court felt men and women were not similarly situated. First, the majority opinion found that the law furthered an interest in estab-

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[53] *Id*.
[54] *Id*. at 85 (O'Connor, J., dissenting).
[55] *Id*. at 57.
[56] *Id*. at 74 (O'Connor, J., dissenting) ("While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents."). Justices Souter, Breyer and Ginsburg joined Justice O'Connor's dissent.
[57] *Id*. at 70.

lishing a biological link between the child seeking US citizenship and the US citizen parent.[58] The court held that the act of giving birth made the biological bond between a mother and child obvious and easy to verify. There would be witnesses to the birth and other evidence that could be presented, such as a birth certificate. The court found that fathers were not similarly situated because there was no guarantee a father would be present at the birth. Furthermore, the court explained that a father's presence during birth did not have the same evidentiary value because presence does not ensure paternity.[59] The majority was very concerned with the possibility the father might be unaware that he even had a child. The opinion cited various statistics regarding the number of Americans that travel abroad.[60] The court also noted that even the mother might not be sure of the paternity of the child.[61]

The majority found a second important interest that justified the law: the opportunity for a meaningful relationship between the child and the US citizen parent. The court felt this interest qualified as an "important governmental interest" because a relationship with a parent who is a US citizen creates a link between the child and the United States, which in turn justifies granting the child US citizenship.[62] Once again, the court focused on the idea that a father might not be present at the birth and might not even be aware of it. The court reasoned that, due to this possibility, fathers may not have any opportunity of establishing a meaningful relationship with the child. In contrast, the court found that for mothers, the opportunity to establish a meaningful relationship with the child is inherent in the act of giving birth. Because a mother must be present at birth, she automatically has an opportunity to develop a deeper relationship with the child. The court found that the government was therefore justified in setting different evidentiary requirements

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[58] *Id.* at 62.
[59] *Id.* at 63.
[60] *Id.* at 66.
[61] *Id.* at 65.
[62] *Id.* at 64-65.

for fathers and mothers because real biological differences prevented them from being similarly situated.[63]

The dissent criticized the majority for ignoring several aspects of the intermediate scrutiny test laid out in *Virginia*. To begin with, the majority failed to consider the historical background of the statute. Historical sex discrimination was described in *Virginia* as the main impetus for using a higher level of scrutiny (rather than basic rational basis) to review sex-based classifications.[64] The dissent showed that immigration laws had, for decades, reflected a stereotypical assumption that children born out of wedlock were the sole responsibility of the mother.[65] These laws had absolved fathers of any responsibility.

The majority opinion ignored exactly the type of historical bias that intermediate scrutiny was developed to combat and reinforced the stereotypical gender roles it was meant to break down. The opinion made mothers more responsible for non-marital children by allowing fathers to escape responsibility for their children by simply refusing to acknowledge them. This stereotypical view was continued in the majority's discussion of the second interest. The dissent noted that the majority's contention that a mother's presence at birth is enough to provide an opportunity to develop a relationship with the child "rest[ed] only on an overbroad sex-based generalization."[66] The majority's reasoning reflected a view that women are more likely to develop bonds with their children than men are. This is the exact type of generalized, stereotypical argument that was held unacceptable in *Virginia*.[67] This contrast highlights how radically different the form of intermediate scrutiny applied in *Nguyen* really is.

The court's stereotypical description of women as the more attached and involved parents reinforces the notion that women are

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[63] *Id.* at 68.
[64] *See* United States v. Virginia, 518 U.S. 515, 531 (1996).
[65] Nguyen v. INS, 533 U.S. 53, 91 (2001) (O'Connor, J., dissenting).
[66] *Id.* at 86 (O'Connor, J., dissenting).
[67] *Virginia*, 518 U.S. at 533-34.

biologically destined to be the caretakers. These sex-based stereotypes about parenting can be seen as equally detrimental to men because they deny men the ability to take on the primary parental role with their children. Indeed the facts of *Nguyen* provide the perfect illustration of this. The statute upheld by the court makes it more difficult for fathers to assert their parental rights. Nguyen had been raised by his father, who had obviously established a much deeper relationship with him than his mother, whom he barely knew.[68] The facts of the case directly contradicted the majority's view that mothers are more likely to develop meaningful relationships with their children. By reinforcing the stereotype that mothers are more involved, responsible parents, while fathers are irresponsible, the decision rebuffs fathers who want to assume the role of caretaker.

The majority opinion also ignored what the dissent considered "the crucial matter of the burden of justification" by straying from the arguments proffered by the defender of the statute, the INS.[69] In its argument to uphold the statute, the INS had not relied on the biological link argument the majority touted as the first "important governmental interest."[70] The majority's second interest did start with an argument the INS had given but modified this argument to fit the court's view.[71] In *Virginia* the court had held that in cases involving sex-based classifications not only would the defender bear that burden of proof but the court would only consider genuine arguments (as opposed to those driven by litigation) that the defender had put forward.[72]

The disparity between the "important interests" proffered by the INS and those relied upon by the majority was "striking, to say the least."[73] It seemed that the majority had gone out of its way to uphold the statute. This practice was in stark contrast to the

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[68] *Nguyen*, 533 U.S. at 89 (O'Connor, J., dissenting).
[69] *Id.* at 78 (O'Connor, J., dissenting).
[70] *Id.* at 79 (O'Connor, J., dissenting).
[71] *Id.* at 84 (O'Connor, J., dissenting).
[72] United States v. Virginia, 518 U.S. 515, 533 (1996).
[73] Nguyen v. INS, 533 U.S. 53, 79-80 (2001) (O'Connor, J., dissenting).

court's findings in *Virginia* which noted that the court would rely entirely on the state's arguments.[74] The validity of the important governmental interests in *Nguyen* is doubtful; it is hard to support the contention that these interests qualify as "important" ones if they were not even argued by the defender of the statute (the INS).

The majority's evaluation of whether the statute was "substantially related" to the objectives sought was also faulty. Regarding the first interest (biological link), the dissent noted that there were non-sex based alternatives that could fulfill this goal.[75] It further argued that neutral alternatives were "a powerful reason to reject a sex-based classification"[76] in determining whether the classification was narrowly tailored. DNA testing would be an extremely accurate alternative that would apply equally to both sexes.[77]

Another alternative the dissent highlighted was to rely on a section of the immigration statute that required the blood relationship between father and child to be "established by clear and convincing evidence."[78] This standard, if applied to both mothers and fathers, would create a sex-neutral way to achieve the objective of ensuring a biological relationship. The majority dismissed this argument because in practice it would often prove more difficult for fathers to fulfill.[79] Yet, the majority had missed the point: a neutral standard was preferable even if it had a disparate impact.

The dissent particularly criticized how the means fit the ends with regard to the majority's second interest.[80] The majority opinion itself was careful to qualify this interest stating that an opportunity for a meaningful relationship did not ensure that one would actually develop.[81] This qualification laid bare the weakness of the argument; if the classification did not produce the desired

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[74] *Virginia*, 518 U.S. at 533 ("The burden of justification is demanding and it rests entirely on the State.").
[75] *Nguyen*, 533 U.S. at 81 (O'Connor, J., dissenting).
[76] *Id.* at 82 (O'Connor, J., dissenting).
[77] *Id.* at 80 (O'Connor, J., dissenting).
[78] *Id.* at 79-80 (O'Connor, J., dissenting).
[79] *Id.* at 64.
[80] *Id.* at 83-84 (O'Connor, J., dissenting).

result how could it be "substantially related"? The majority argued that Congress might have found it too difficult to inquire into whether a meaningful relationship existed in each particular case,[82] but the dissent pointed out that administrative convenience had been rejected as a justification for sex discrimination in previous cases.[83]

It is clear that the majority opinion in *Nguyen* applied a different form of intermediate scrutiny than that defined in *Virginia*. The dissent's criticisms of the opinion were based on these differences. Many of the considerations articulated as informing the analysis under intermediate scrutiny in *Virginia* were not even discussed by the majority in *Nguyen*. In addition, much of the reasoning was in direct contrast to *Virginia*'s definition of acceptable and unacceptable justifications. *Nguyen* shows that despite the hopes of feminists, including Justice Ginsburg, *Virginia* did not create a powerful and uniform prohibition of sex discrimination.

Before intermediate scrutiny was developed, there were only two standards of review for Equal Protection challenges: rational basis and strict scrutiny. These two standards were relatively easy to define because they represented opposite extremes. Rational basis requires very little justification for a particular policy, and thus almost every law passes this test. On the other hand, strict scrutiny is so stringent a test that it almost always results in the policy being struck down. Intermediate scrutiny occupies the middle of this spectrum.

The problem is that the middle is necessarily hard to define because it covers a broad range of possibilities. The intermediate scrutiny test therefore produces unclear results in practice. The definition of intermediate scrutiny review seems to shift back and forth on the spectrum. Although it produced the correct result in *Virginia*, it failed to do so in *Nguyen*. The best solution to this problem is simply to do away with the intermediate scrutiny test all to-

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[81] *Id*. at 70.
[82] *Id.* at 69.
[83] *Id*. at 88 (O'Connor, J., dissenting).

gether. It is clear that Justice Ginsburg, in *Virginia*, was trying to push it toward strict scrutiny, the standard she had supported as a women's rights advocate. An Equal Rights Amendment would institute strict scrutiny, which is the only standard that can produce the goal of equality of the sexes.

The adoption of strict scrutiny as the standard for sex-based classifications would have another benefit beyond that of clarity: it would increase the burden on the state and force the court to engage in a more searching inquiry into the validity of the classification at issue. This would force the Supreme Court to re-examine some of its decisions regarding women's reproductive autonomy. The court has consistently refused to recognize discrimination based on women's reproductive capabilities as sex discrimination.

In 1980, the Court decided *Harris v. McRae*, which challenged the constitutionality of the Hyde Amendment.[84] The plaintiffs argued that the law was a violation of equal protection because, while Medicaid generally funded medically necessary procedures, the Hyde Amendment denied coverage to some medically necessary abortions.[85] The court found that the class of people affected by the law was poor women. Since poverty was not a suspect class, the court declined to apply strict scrutiny.[86] Instead it applied the rational basis standard and held that law was supported by the government's "legitimate interest in protecting the potential life of the fetus."[87]

The court failed to discuss the fact that the Medicaid standards treated men and women differently. It did not even discuss sex as part of the classification at issue. Instead the court compared abortion to treatment for tuberculosis which was also not funded by Medicaid.[88] The court did not take note of the fact that the tuberculosis restriction applied equally to both men and women while the

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[84] 448 U.S. 297 (1980).
[85] *Id.* at 322.
[86] *Id.* at 323.
[87] *Id.* at 324.
[88] *Id.* at 325 n.28.

abortion funding restrictions necessarily only applied to women. By turning a blind eye to the sex classification inherent in the Hyde Amendment, the court avoided even having to apply the intermediate scrutiny standard.

The court dealt another blow to women's reproductive autonomy with *Geduldig v. Aiello*.[89] The case challenged California's disability insurance program on equal protection grounds because pregnancy was excluded from coverage. The court found that the state's program did not violate equal protection in part because it did not treat men and women differently.[90] Instead, the court held that the distinction made under the plan was between pregnant people and those who were not pregnant. The court found that discrimination was not an issue since the second group (non-pregnant people) included both men and women.[91] Thus the court avoided the sex discrimination issue entirely. Although the court did acknowledge that the exclusion of pregnancy only affected women, it explicitly refused to consider pregnancy a sex-based classification.[92] The court found that pregnancy could be treated just like any other physical condition regardless of the fact that it only occurs in women.[93]

A strict scrutiny standard would require the court to reevaluate its position on the treatment of pregnancy and the related issue of abortion funding. It would also require the court to examine the circumstances of a case more deeply rather than relying on gender stereotyping. The strict scrutiny standard would force the court to analyze these issues in greater detail and very likely would result in a different outcome. We can see this possibility more clearly by examining the reasoning of state courts who have applied strict scrutiny to these same problems.

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[89] 417 U.S. 484 (1974).
[90] *Id.* at 496-97.
[91] *Id.* at 497.
[92] *Id.* at 496 n.20.
[93] *Id*. at 497.

III. SUCCESS OF STATE ERAS

The best guide to determining the possible effect of a federal ERA is to look at the jurisprudence of the states that have passed their own ERAs. Since the 1970's, many states have passed ERAs to their state constitutions.[94] The states relevant to this inquiry are those whose courts have adopted strict scrutiny as the standard for sex discrimination as this is the standard that would apply under a federal ERA. Some scholars have argued that state ERAs have made little difference and have not helped advance women's equality.[95] The utility of state ERAs in combating sex discrimination has admittedly been varied.[96] Even among the states that have adopted strict scrutiny, some have made little progress beyond that of the rest of the country.[97] However, there are several examples where state ERAs have been successfully used to ensure greater protection against sex discrimination than that offered under federal law.[98]

This section will examine three cases that provide reasoning and results that directly contradict the Supreme Court's findings on

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[94] Alaska (1972) ALASKA CONST. art I, §3; Colorado (1973) COLO. CONST. art. II §29; Connecticut (1974) CONN. CONST. art. I, §20; Florida (1998) FLA. CONST. art. I §2; Hawaii (1972) HAW. CONST. art. I, §3; Illinois (1971) ILL. CONST. art. 1, §18; Iowa (1998) IOWA CONST. art. 1, §1; Lousiana (1974) LA. CONST. art. 1, §3; Maryland (1972) MD. DEC. OF R. art. 46; Massachusetts (1976) MASS. CONST. pt. 1, art. I; Montana (1972) MONT. CONST. art. II, §4; New Hampshire (1974) N.H. CONST. pt. 1, art. II; New Mexico (1973) N. M. CONST. art. II, §18; Pennsylvania (1971) PA. CONST. art. I, §28; Rhode Island (1986) R.I.. CONST. art. I, §2; Texas (1972) TEX. CONST. art. 1, §3a; Utah (1898) UTAH CONST. art. IV, §1; Virginia (1971) VA. CONST. art. I, §11; Washington (1972) WASH. CONST. art. XXXI, §1; Wyoming (1889) WYO. CONST. art. 1, §§2, 3. Language in the New Jersey state constitution also grants equal rights to all persons (regardless of sex). N.J. CONST. art. I, para. 1.

[95] *See, e.g.,* Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907 (1997).

[96] *Compare* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 117-118 (Pa. 1985) (rejecting the argument that limitations on abortion funding violate Pennsylvania's ERA), *with* Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (finding that such limitations do violate Connecticut's ERA).

[97] *See, e.g.,* Hon. Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. L. 743, 744 (1994) (suggesting that Pennsylvania's ERA has not contributed to any substantial changes in sex discrimination law in that state).

[98] *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005).

the issues of gender stereotyping and reproductive autonomy. Focusing on these key issues will provide insight into exactly what effect a federal amendment could have on sex discrimination. The holdings described below demonstrate that a federal ERA (and the strict scrutiny standard that would accompany it) could in fact make a big difference in combating the remaining problems of discrimination and inequality between the sexes.

A. TEXAS – EQUAL PARENTAL RIGHTS FOR FATHERS

The Texas Supreme Court faced the issue of paternal rights in 1987 with *In the Interest of McLean*.[99] Like *Nguyen*, *McLean* concerned the rights of fathers in relation to their non-marital children. The case involved a section of the Texas Family Code that provided for establishment of paternity.[100] Mothers of children born out of wedlock automatically had parental rights.[101] Fathers, on the other hand, needed to go to court to have a decree of paternity issued. They could obtain such a decree either through the consent of the mother or, in lieu of consent, by showing the court that the decree would be in the best interests of the child.[102]

The facts of the case, like those of Nguyen, illustrate the injustice of failing to recognize and sufficiently protect paternity rights. The case was brought by Billy Dean Wise, the undisputed father of the child in question.[103] The child was the result of an extramarital affair between Wise and the mother. Subsequently, Wise returned to his wife and the mother decided to give the child up for adoption. Wise attempted to establish paternity in order to get custody of the child so that he and his wife could raise it. The mother refused to consent to Wise's legitimation, and the trial court found that it was not in the best interests of the child to have Wise recog-

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[99] 725 S.W.2d 696 (Tex. 1987).
[100] *Id*. at 697.
[101] TEX. FAM. CODE ANN. § 12.04 (Vernon 1986) (repealed 1995).
[102] TEX. FAM. CODE ANN. § 13.21 (Vernon 1986) (repealed 1995).
[103] *McLean*, 725 S.W.2d at 696.

nized as the father.[104] Wise appealed this judgment challenging the Texas Family Code provision as sex discrimination under the Texas Equal Rights Amendment.[105]

The Texas Supreme Court analyzed the Family Code under the Texas ERA to determine if the code provided for differential treatment based on the sex of the parent. The court noted that while mothers were automatically granted parental rights, fathers of children born out of wedlock received those rights only if the mother consented.[106] If not, the father was forced to prove to the state that he should be recognized as the father and granted parental rights. Fathers faced a higher burden of proof which could result, as it had in *McLean*, in a father being denied any rights with regard to a child that was undisputedly his. Mothers never faced this possibility. The court found that this distinction between mother and fathers in the Family Code was sex based.[107]

After evaluating the background and history of the Texas ERA the court determined that the correct standard for evaluating sex discrimination under the amendment was strict scrutiny.[108] The court noted that this standard was appropriate in order to combat the discrimination the ERA was meant to eliminate. Thus the proponent of a law that discriminated based on sex would need to show not only that the state had a compelling interest to protect but that there was "no other manner" to protect this interest.[109] This language is significant because it illustrates the vast difference between the intermediate scrutiny test applied to sex discrimination in federal cases and the strict scrutiny test which Texas adopted based on its ERA.

The court found that Texas did indeed have a compelling interest in protecting the welfare of a child born out of wedlock. However, the court held this interest could be protected "without

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[104] *Id*.
[105] *Id*. at 696-697.
[106] *Id*. at 697.
[107] *Id*.
[108] *Id*. at 698.
[109] *Id*.

discriminating solely on the basis of sex."[110] The court's argument is especially interesting when compared to the majority opinion in *Nyugen*. The Texas Supreme Court found that the important consideration was the father's relationship to the child, stating, "A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet a higher burden of proof solely because he is male."[111] This simple holding took a great step towards equalizing the parental roles of mothers and fathers and rejected stereotypes about which sex has better parenting skills.

It has been almost twenty years since the Texas Supreme Court eliminated this obstacle to fathers seeking to have their paternity recognized and yet *Nguyen* shows that fathers still face these obstacles in other jurisdictions. The case illuminates the distinction between the constitutional standard now used by the Supreme Court in sex discrimination cases and what would be applied under an ERA. It also points out a significant area of sex discrimination that still exists. This is just one example of the advances in equality of the sexes that result from a federal ERA.

B. COLORADO – PROHIBITING DISCRIMINATION AGAINST PREGNANCY

The Colorado Supreme Court addressed the issue of pregnancy discrimination in *Colorado Civil Rights Commission v. Travelers Insurance Co*.[112] It held that the Colorado Equal Rights Amendment prohibits pregnancy discrimination.[113] In *Travelers*, the issue was an employee group insurance plan that covered complications during pregnancy but excluded expenses of a normal pregnancy. An employee challenged the policy as sex discrimination since it treated pregnancy differently than other medical conditions.[114] The Colorado Supreme Court overruled the Court of Appeals and found that

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[110] *Id.*
[111] *Id.*
[112] 759 P.2d 1358 (Colo. 1988).
[113] *Id.* at 1361.
[114] *Id.* at 1359-60.

the insurance policy was unconstitutional sex discrimination under the Colorado state constitution.[115]

The court noted that the Court of Appeals had relied on a U.S. Supreme Court decision called *Gilbert* which had quoted *Geduldig* in holding that pregnancy discrimination does not constitute sex discrimination.[116] The court held that the Colorado Equal Rights Amendment requires that classifications based on sex receive the highest level of scrutiny (strict scrutiny).[117] Thus the reliance on a federal precedent was inappropriate, given the different standards of review.

The court reasoned that "because pregnancy is a condition unique to women, an employer offers fewer benefits to female employees on the basis of sex when it fails to provide them insurance coverage for pregnancy while providing male employees comprehensive coverage for all conditions, including those conditions unique to men."[118] The court noted that this discrepancy in benefits was the same as paying women a lower wage than men.[119] Thus, the court held the policy constituted sex discrimination.

The court rejected the idea that classifications based on pregnancy are not sex discrimination because all pregnant people are treated alike. Pregnancy, the court held, is a medical condition occurring only in women, therefore denying coverage of pregnancy deprived women of coverage based on their sex.[120] It noted that excluding a condition unique to men, such as prostate cancer, from the plan's coverage would be equally discriminatory. The court concluded that men and women do not have precisely the same health risks, however, a plan that purported to provide comprehensive benefits to both sexes must treat conditions unique to one sex

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[115] *Id*. at 1361.
[116] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)).
[117] *Travelers*, 759 P.2d at 1363.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 1364.

the same. It did not matter that covering pregnancy might mean that more costs were associated with covering women than men.[121]

The court also found unpersuasive the employer's argument that pregnancy is different from other disabilities because it is often voluntary.[122] The court held that many conditions requiring medical attention resulted from voluntary activities, such as consumption of tobacco products or participation in sports. Yet, these medical conditions were covered by the plan. In addition, the court highlighted the fact that pregnancy may be the result of non-voluntary action.[123]

The reasoning of the Colorado Supreme Court in *Travelers* shows that with the adoption of strict scrutiny for sex-based classifications would require the United States Supreme Court to re-examine its decision in *Geduldig*.

C. NEW MEXICO – PROVIDING FUNDING FOR MEDICALLY-NECESSARY ABORTIONS

The New Mexico Supreme Court struck down limitations on public funding of abortions as a violation of the New Mexico ERA in *New Mexico Right to Choose/NARAL v. Johnson*.[124] NARAL challenged the revision of a rule defining under what circumstances New Mexico Medicaid recipients would be eligible to have abortions covered by state funds.[125] The rule had provided abortions to Medicaid recipients when medically necessary.[126] The revision restricted funding of abortions to those "certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest."[127] The plaintiffs challenged the revision as a violation of the New Mexico state ERA. The New Mexico Supreme Court held that it was re-

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] 975 P.2d 841, 844 (N.M. 1998).
[125] *Id.*
[126] *Id.*
[127] *Id.* at 846.

quired to apply strict scrutiny to sex-based classifications; any other interpretation would have nullified the Amendment.[128] The court went on to hold that the rule, which did not cover medically necessary abortions, was unconstitutional because it applied a different standard to women from that applied to men.[129]

The court stated that a determination that men and women are similarly situated in relation to a classification could not be denied simply because the classification was based on a condition unique to one sex.[130] The court reviewed the history of discrimination against women based on their biological ability to bear children and found this to be an important consideration.[131] It cited several cases in which gender stereotyping based on women's physiology and "maternal functions" were used as excuses to deny them opportunities.[132]

In addition, the court found error in the reasoning that biological differences between the sexes meant that the law was not discriminatory (this reasoning had been used by the lower courts in this case, but it came from the U.S. Supreme Court's treatment of the issue in *Geduldig*). The court noted that when biological differences are present the constitutional analysis requires a deeper inquiry to determine if those characteristics are being used to disadvantage the group being classified.[133] Given the background of discrimination, the court held that strict scrutiny analysis was the appropriate standard of review for all classifications based on women's ability to become pregnant and bear children.[134] Thus the state would be required to provide a compelling justification for the rule.

The court then analyzed the position of men and women in relation to the rule. It found that both sexes were similarly situated

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[128] *Id.* at 851.
[129] *Id.* at 844.
[130] *Id.* at 854.
[131] *Id*.
[132] *Id* at 855.
[133] *Id.* at 854.
[134] *Id.* at 855.

in relation to Medicaid coverage; the criteria for Medicaid eligibility were the same.[135] The state was required to fund "services that are medically necessary" according to precedent.[136] The court noted that the result of the rule revision would be that not all medically necessary abortions would be covered. There was no comparable restriction on coverage of any condition that was unique to men.[137] The court then described pregnancy as a "gender-linked condition that is unique to women," holding that refusing to cover a medically necessary treatment for such a condition constituted sex discrimination when all medically necessary expenses were covered for men.[138] Thus the court found the rule was presumptively unconstitutional.

The court found that the state had not proffered any compelling justification in support of the rule revision. The state's argument that the new rule was a cost-saving measure was unconvincing to the court in light of the cost of the alternative, bringing the pregnancy to term (which might cost more, even with federal funding).[139] The court also found that the state's interest in protecting the potential life of the unborn did not justify the rule because it was not the least restrictive means of accomplishing that goal.[140] The rule was too broad because it failed to sufficiently balance the state's interest in potential life with its interest in the health of the mother.[141] Thus, the court enjoined the state from applying the revised version of the rule.[142]

This case shows that passage of a federal Equal Rights Amendment would require a review of the Hyde Amendment and the U.S. Supreme Court cases upholding it.

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 856.
[138] *Id.*
[139] *Id* at 857.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 859.

CONCLUSION

While the issues of paternity rights, abortion funding and pregnancy discrimination may seem to be separate problems they are, in fact, closely related. All three involve gender stereotypes which cause discrimination against women based on their biological ability to give birth. They conflate the idea of biological motherhood with the societal view that this is the proper role for women.

Treating pregnancy as a medical condition that occurs only in women properly recognizes the link between sex and biology in this unique circumstance. Allowing discrimination (either in the workplace or in funding of abortions) based on the idea that the classification is not sex but pregnancy perpetuates the historical discrimination that women have endured for centuries based on their reproductive capabilities. Reproductive autonomy is an essential step in the direction of equalizing the sexes.

The societal conception of motherhood hurts women by forcing them into a rigid gender role. Women are expected not only to be mothers in the biological sense of giving birth, but also to be maternal in a sociological sense. Mothers are still seen as the more responsible parents, the centers of home life, and the caregivers. This vision of motherhood is also harmful to men because in glorifying mothers it also denigrates fatherhood. Fathers are considered second-class parents, regardless of the role they might want or choose to have. If a particular father takes on the role of caregiver he will be viewed as an aberration and he will not be granted the same rights a mother receives. Two problems are created in a system that has greater restrictions for paternal rights. By allowing fathers to escape their parental responsibilities by choosing not to take the steps required to establish their paternity we are sending a message that society does not expect fathers to be responsible parents. At the same time, fathers that do want to take responsibility for their children may be denied that right. We need to treat parents equally in order to encourage them to take equal roles in caretaking and raising children.

A strict scrutiny test for sex discrimination at the federal level would prohibit reliance on gender stereotypes. In addition it

would force re-evaluation of any policies which discriminate against women based on their reproductive capabilities. These two issues have limited the progress that can be made towards equality of the sexes. A federal ERA could solve both of these problems and serve as a catalyst for further social change in the direction of equality between the sexes.