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Gender Discrimination--The ERA v. Ladies Night, One State's Perspective

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RECENT DEVELOPMENTS

GENDER DISCRIMINATION—THE ERA V. "LADIES NIGHT," ONE STATE'S PERSPECTIVE—*MacLean v. First Northwest Industries of America, Inc.*, 24 Wash. App. 161, 600 P.2d 1027 (1979).

I. INTRODUCTION

The often bitter debate continues. Should a twenty-eighth amendment be added to the United States Constitution declaring that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex?"[1] As voting continues on ratification until the 1982 extended deadline[2] is reached, the question remains unanswered.

The major question raised in this debate is the potential effect of the Equal Rights Amendment (ERA).[3] Advocates pro and con the ERA have answers. Legal commentators have compared the Supreme Court's treatment of racial discrimination with the Court's probable

1. U.S. CONST. amend. XXVIII, § 1 (proposed).

2. The amendment was proposed by Congress on March 22, 1972, and submitted to the state legislatures for ratification. Using its article V powers for proposing amendments, Congress set a seven-year limitation period for passage by the necessary three-fourths of the states. H.R. Res. 264, 91st Cong., 2d Sess., 116 CONG. REC. 36862 (1970); 117 CONG. REC. 35815 (1971). In that period of time (which should have ended March 22, 1979), only thirty-five of the requisite thirty-eight votes for passage were acquired. Supporters of the Equal Rights Amendment, aware that chances for passage were slim, proposed House Joint Resolution 638 to extend the period for ratification. H.R.J. Res. 638, 95th Cong., 1st sess., 123 CONG. REC. H11631 (1977) and S.J. Res. 134, 95th Cong. 2nd sess., 124 CONG. REC. S7639 (1978). The new deadline set by that Resolution was June 30, 1982. Since the time for an extended deadline was set, no other state has voted for its ratification. Five states, on the other hand, have voted to rescind. The constitutionality of rescinding has not been determined. *See* Emerson & Duker, *E.R.A.: Stretching The Deadline*, 7 HUMAN RIGHTS 20 (1978).

3. Among legal commentators the single goal of achieving equal rights for women appears unchallenged. The means to achieve that goal, however, are several. There appear to be two general approaches. Proponents of the ERA find it a necessary and fundamental change which will most effectively achieve the goal. Opponents approach the argument from the standpoint that enforcement of the fourteenth amendment, specific congressional acts, and Supreme Court pronouncements, would be adequate and more beneficial. *See* Treadwell & Page, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086, 1087 (1977). *See also* Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234 (1971).

treatment of sex discrimination after ratification of the ERA.[4] Also, court opinions from states with equal rights amendment in their constitutions also provide useful predictions of the likely interpretation of a federal ERA.[5] At least sixteen states have added an equal rights amendment to their state constitutions. These amendments are similar (frequently identical) to the proposed federal one.[6] The judicial interpretation of cases brought under such state amendments may provide insight into the application of a federal ERA.

Recently *MacLean v. First Northwest Industries of America, Inc.*[7] was decided by the First Division of the Washington Court of Appeals. This case answers one question concerning equal rights for women—the fate of "Ladies' Night."[8] It is not the first Washington decision interpreting that state's equal rights amendment,[9] but is one in a series of cases cumulatively building a framework for the determination of gender discrimination in Washington.[10] This note will analyze the decision in *MacLean* as well as examine prior Washington cases leading to this decision. In so doing, this note will examine Washington's con-

4. Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). Rubin, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (1974).

5. Several results have occurred, depending upon the standard of review used by that particular court. If a "rational relationship" test was used, rarely were sex discrimination findings upheld. Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975). Warshafsky v. Journal Co., 63 Wisc. 2d 130, 216 N.W.2d 197 (1974). The standard of strict scrutiny has been used by at least one court to find a violation of a state equal rights amendment. People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974). Finally, a standard even more restrictive than strict scrutiny has been used by some states. *See infra*, notes 34-59 and accompanying text. *See also* Treadwell & Page, *supra* note 3.

6. ALAS. CONST., art. I, § 3; COLO. CONST., art. II, § 29; CONN. CONST., art. I, § 20; HAWAII CONST., art. I, § 21; ILL. CONST., art. I, § 18; LA. CONST., art. I, § 3; MD. CONST., Declaration of Rights, art. 46; MASS. CONST., pt. I, art. I; MONT. CONST. art. II § 4; N.M. CONST., art. II, § 18; PA. CONST., art. I, § 28; TEX. CONST., art. I, § 3a; UTAH CONST., art. IV, § 1; VA. CONST., art. I, § 11; WASH. CONST., art. XXXI, § 1; WYO. CONST., art. I, § 3; WYO. CONST., art. VI, § 1. The above statutes are compiled in Treadwell & Page, *supra* note 3, at 1111-12.

7. 24 Wash. App. 161, 600 P.2d 1027 (1979).

8. *Id.* at __, 600 P.2d at 1028.

9. *See* City of Seattle v. Buchanan, 90 Wash. 2d 584, 584 P.2d 918 (1978); Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

The Washington equal rights amendment is essentially identical to the proposed federal ERA. Washington adds the phrase, "and responsibilities." In full, the Washington equal rights amendment provides, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Wash. Const. amend. LXI, § 1. Whether this additional language is significant has not been made known. The *MacLean* court did not rely on this language in determining that the ticket-pricing practice was unconstitutionally discriminating on the basis of sex.

10. *See* notes 39-52 *infra*.

struction of its equal rights amendment and those effects of the federal ERA which this decision may foretell.

II. THE WASHINGTON DECISION

MacLean was decided on September 10, 1979. The defendants were First Northwest Industries of America, Inc., owner of the Seattle Supersonics, and the City of Seattle, lessor of the coliseum where Supersonics games are held.[11] The named plaintiff sought damages for the owner's ticket pricing practice known as "Ladies' Night," alleging that it constituted sex discrimination. Tickets for Sunday night Supersonics games were sold to women for half the price they were sold to men. The purpose was to encourage women to attend.[12]

The trial court granted the defendants an order of dismissal pursuant to summary judgment. The appellate court reversed. In so doing, two fundamental issues were addressed. The first was whether the "Ladies' Night" policy of selling tickets to women at half the price of a man's ticket constituted gender discrimination. Resolving the first issue required a finding of state action. The second issue, arising only if the refusal to sell a basketball ticket to a man for the same price that a woman could pay constituted sex discrimination, was whether such discrimination was prohibited by law—constitutional, statutory, or both.[13] The court of appeals answered each question affirmatively.[14]

A. *State Action*

To find actionable discrimination under the state constitution, the court had to determine that the ticket pricing practice could be characterized as state action.[15] Because of the particularly close ties between the defendants, the court had little difficulty in finding state action.[16]

11. 24 Wash. App. at __, 600 P.2d at 1028 (1979). The suit was a class action filed by plaintiff MacLean after his demand to purchase a Supersonics game ticket at the "Ladies' Night," half-price rate was denied.

12. *Id.* at __, 600 P.2d at 1029.

13. *Id.* at __, 600 P.2d at 1028.

14. *Id.* at __, 600 P.2d at 1034.

15. *Id.* at __, 600 P.2d at 1029. The court here construed the 61st amendment of the Washington constitution to constrain only government action. The same interpretation has been given to most of the United States constitution. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Brown v. Board of Educ., 347 U.S. 483 (1954); Shelly v. Kraemer, 334 U.S. 1 (1948); Civil Rights Cases, 109 U.S. 3 (1883).

16. The Supreme Court in Gilmore v. City of Montgomery, 417 U.S. 556 (1974), a case involving race discrimination, maintained without deciding that "the question of the existence of state action centers in the extent of the city's involvement . . . and in whether that involvement makes the city 'a *joint participant* in the challenged activity, which, on that account, cannot be

The role of the City of Seattle as lessor of the colliseum provided the nexus[17] needed to find state action.[18] As lessor to First Northwest Industries, the city owned and operated the coliseum for public events. The court characterized the coliseum as "a public-owned facility for public accommodation assemblies and amusement."[19]

The lease itself provided further proof of the state connection. It provided that "said Lessee will comply with all laws of the United States, and of the State of Washington. . . . The Lessee agrees to comply with all state and local laws prohibiting discrimination with regard to race, color, creed, sex, age or national origin."[20] Supersonic or not fans, whether they realized it, were involved with the state each time they attended a game.

The court, in determining that state action was involved, relied on federal discrimination cases under the fourteenth amendment.[21] For example, the court cited *Burton v. Wilmington Parking Authority*, a case concerning race discrimination, in support of the finding of state action. In *Burton*, a private restaurant leased parking space for its customers from the Wilmington Parking Authority.[22] When the restaurant refused to serve a black solely on the basis of his race, the Supreme Court found that state action was involved. Because of the existing lease from the public authority, the restaurant owner could not characterize his actions as purely private.[23] As would later be the case in *MacLean*,

considered to have been so purely private as to fall without the scope of the Fourteenth Amendment.' " *Id.* at 573 (emphasis added).

17. The term nexus is used here to describe the necessary connection between the discriminatory act and the state entity involved. The Supreme Court has avoided delineating a definite test for finding the connection needed for state action. The "[C]ourt has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations." Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

18. Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965). In *Wimbish* the court focused on the language of the lease and determined that the county as lessor exercised a considerable amount of control over the golf course in conjunction with the lessee, a private corporation. Interestingly, the *Wimbish* lease made no reference to discrimination with regard to race, color, creed, sex, age, or national origin as did the lease in *MacLean*.

19. 24 Wash. App. at __, 600 P.2d at 1028.

20. *Id.* "When a municipality leases its property, it is engaged in state action." *Id.* at __, 600 P.2d at 1028.

21. *Id.* The court stated, "We are guided in this inquiry by an examination of federal cases which sought to determine, in a similar context, whether a state or local government had so participated in the discrimination that it had violated the Fourteenth Amendment . . . ."

22. 365 U.S. 715 (1961).

23. The Wilmington Parking Authority was created by the City of Wilmington to alleviate the parking crisis in that city by building and maintaining facilities for public parking. The facilities were publicly funded for public purposes. *Id.* at 715.

merely leasing from a government entity resulted in state action.[24]

The *MacLean* court also cited two other similar federal cases as authority. Both of these involved sex discrimination. Both found state action on the basis of state licenses under which private parties were operating. The degree of state involvement in both cases, as well as in *Burton*, nearly parallels that found in *MacLean*.[25] In *Bennett v. Dyer's Chop House, Inc.*,[26] two women were refused service at the defendant's restaurant. The restaurant was state licensed. Its policy was to serve only men from 11:00 a.m. to 1:30 p.m. Monday through Friday although it served women during its other open hours. The court found that such refusal of service was unconstitutional discrimination under the fourteenth amendment of the United States Constitution.[27]

The finding of state action *Bennett* was based on the economic benefit given the defendant by the state in issuing him a license. Had the issue turned on licensing alone, the court said it would have hesitated to find state action, noting that the Supreme Court had never definitely made a statement regarding that matter.[28] Rather, the *Bennet* finding rested on an economic benefit conferred by the issuance of a license. That benefit derived from the limited number of liquor licenses issued by the state.

The next federal case cited by *MacLean* was a forerunner of *Bennett*. On facts almost identical to *Bennett*, the Southern District of

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24. *Id.*

25. The method by which state action is found is difficult to pinpoint. In *Burton* the Court said, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722.

The *MacLean* court, in weighing the state involvement with the team through the lease agreement and the team's use of the city facility, found ample evidence of state involvement. The result was a finding of state action.

26. 350 F. Supp. 153 (N.D. Ohio 1972).

27. *Id.* at 156.

28. *Id.* at 154. The court cited the differences between the opinions of Justices Douglas and Black on the issue of whether licensing alone constitutes state action. *Compare* Reitmann v. Mulkey, 387 U.S. 369, 384-86 (1967) (California real estate brokerage industry is state-licensed and subject to the prohibitions of the fourteenth amendment) (Douglas, J., concurring), *with* Bell v. Maryland, 378 U.S. 226, 326-35 (1964). "Businesses owned by private persons do not become agencies of the State because they are licensed . . . ." *Id.* at 333 (Black, J., dissenting).

But see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a case decided just a few months prior to *Bennett*, wherein the Court determined that the licensing of the Lodge's private club by the Pennsylvania Liquor Control Board did not amount to such state involvement with the club's activities as to constitute state action. Even though the Board had extensive regulatory authority over liquor licensees in Pennsylvania, the Court reasoned that this in no "way foster[ed] or encourage[d] racial discrimination. . . . The limited effect of the prohibition against obtaining additional club licenses when the maximum number of retail licenses allotted . . . has been issued . . . falls far short of conferring upon club licensees a monopoly . . . ." *Id.* at 176-77.

New York, in the case of *Seidenberg v. McSorley's Old Ale House, Inc.*,[29] found state action because "the licensing practices of the SLA [State Liquor Authority] . . . restrict[ed] competition between vendors of alcoholic beverages, thus conferring on license holders a significant state-derived economic benefit approximating the state support provided by the lease involved in *Burton v. Wilmington Parking Authority*."[30]

Based on the above precedent, the Washington court concluded that the lease of the coliseum by the City of Seattle was state action.[31] The City of Seattle was not merely a licensor and regulator but the owner and operator of the facility where the games were played. Although the Supreme Court itself has recognized that there can be no infallible test for state action,[32] the finding of state action in this instance seems consistent with prior decisions.[33]

B. *Violation of Washington's Equal Rights Amendment*

Once the *MacLean* court found state action, the next step was to determine whether the equal rights amendment to the Washington Constitution had been violated. That amendment states, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."[34] The amendment was first interpreted in *Darrin v. Gould*.[35] The court in *MacLean* relied heavily on *Gould* because of its treatment of the constitutional standards used in determining the existence of discrimination. In *Gould*, a public high school had prohibited two qualified girls from playing football. The court found that the prohibition, made solely on the ground that these students were girls, was discrimination based on gender and therefore unconstitutional.[36]

Gould has been characterized as one of the most far-reaching sex discrimination cases.[37] Thus, it is not surprising that the *MacLean*

29. 317 F. Supp. 593 (S.D.N.Y. 1970).
30. *Id.* at 603 (citation omitted).
31. 24 Wash. App. at __, 600 P.2d at 1030.
32. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).
33. For a more detailed analysis of the state action question, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1 at 1147 (1978). Professor Tribe advances the argument that one consideration in the state action is whether the target of the relief sought is a governmental body or merely a private person. State action, he proposes, is more likely to be found when the relief sought is to be obtained from the governmental body. *Id.* at 1148 n.7.
34. WASH. CONST. amend. LXI § 1.
35. 85 Wash. 2d 859, 540 P.2d 882 (1975).
36. *Id.* at __, 540 P.2d at 883-84.
37. Treadwell & Page, *supra* note 3, at 1100.

court's reliance on this case resulted in the finding of a violation of the Washington ERA. The standard of review applied in *Gould* to find that the discrimination was unconstitutional was even more penetrating than that of strict scrutiny, the test usually applied in race discrimination cases. Strict scrutiny has never been applied by a majority of the United States Supreme Court in cases of sex discrimination.[38] As a result of this far-reaching approach, the *Gould* court easily found unconstitutional sex discrimination under the Washington ERA. The court justified its broad application in this manner:

> Const. art. 31, provided the latest expression of the constitutional law of the state, dealing with sex discrimination, as adopted by the people themselves. Presumably the people in adopting Const. art. 31 intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests. Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination, except possibly to make the validity of a classification based on sex come within the suspect class under Const. art. 1, § 12. Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.[39]

Although *Gould* made it apparent that classifications based upon sex will trigger judicial scrutiny somewhat more rigid than even tradi-

38. Under the strict scrutiny test of equal protection analysis, only compelling state interests will allow the classification that results in discrimination. The test is harsh and almost inevitably results in the classification being struck down as unconstitutional. *See* Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Strict scrutiny is employed when legislative or administrative classifications "distribute benefits or burdens in a manner inconsistent with fundamental rights." L. TRIBE, *supra* note 32, § 16-7. The rights which have been treated with strict scrutiny by the Supreme Court have included: the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to criminal appeals, Griffin v. Illinois, 351 U.S. 12 (1956). The categories which have received strict scrutiny include: race, Loving v. Virginia, 388 U.S. 1 (1967); and alienage, Hernandez v. Texas, 347 U.S. 475 (1954).

The case of *Frontiero v. Richardson* brought the Supreme Court close to finding that sex classifications should be regarded with strict scrutiny. The plurality opinion stated that sex should be regarded as a suspect classification; however, the concurring opinions found that the statement was unnecessarily broad for the determination of the case and that it was improper to make such a finding at a time when the ERA was in the process of being voted upon. 411 U.S. 677, 691-92 (1973).

39. 85 Wash. 2d at __, 540 P.2d at 889 (citations omitted).

tional strict scrutiny, the rationale to be used in applying this stricter test was not made altogether clear. Did the court intend to ban the use of sex as a classification on which laws could be based? Or, does the court simply require a closer nexus between the sex-based classifications and the assumptions providing the basis for statutory classifications?[40] An examination of other Washington cases considering this question provides some insight into the matter.

One case discussing the effects of the *Gould* opinion was *State v. Wood*.[41] In *Wood*, the natural father of an illegitimate child was required by statute to contribute equally with the mother to the "care, education and support of such child."[42] In determining that the statute was constitutional, the Washington Supreme Court said that *Gould* declared sex to be a suspect classification requiring strict scrutiny.[43] A different interpretation of the *Gould* opinion was rendered in *Marchioro v. Chaney*,[44] also decided by the Washington Supreme Court. There the court upheld a state statute governing the administration of state political committees and requiring an equal number of males and females on such committees.[45] In reference to Washington's equal rights amendment, the court stated:

> Under the equal rights amendment, the equal protection/suspect classification test is replaced by the single criterion: Is the classification by sex discriminatory? or, in the language of the amendment, Has equality been denied or abridged on account of sex?[46]

The *Marchioro* court went on to say that this reading of the Washington ERA did not prohibit the government from taking steps "to assure

40. To ban the use of sex as a relevant classification is to adopt a totally "sex-blind" standard. *See* Treadwell & Page, *supra* note 3, at 1101-02. Such a standard may be analogized to the color-blind standard enunciated by Justice Harlan's dissent in Plessey v. Ferguson, 163 U.S. 537, 559 (1896). Were such a standard adopted, no statute or regulation apparently classifying by gender could be upheld unless a court can determine that the legislation was not motivated by a desire to classify by gender. *See* note 52, *infra*. *See also* Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974), wherein the court found that Washington's prohibition against same-sex marriage was not based solely on sex and therefore was constitutional. For a discussion of *Singer*, *see* Comment, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 TULSA L.J. 141, 145 (1979).

To require only a shorter nexus between the sex-based classifications and the assumptions providing the basis for statutory classifications is a more tolerant method of review. Under this approach, a court would consider justifications for sex-based classifications and not automatically reject all such enactments. *See* Treadwell & Page, *supra* note 3, at 1102.

41. 89 Wash. 2d 97, 569 P.2d 1148 (1977).

42. *Id.* at __, 569 P.2d at 1150-51, construing WASH. REV. CODE § 26.24.090 (1965).

43. 89 Wash. 2d at __, 569 P.2d at 1150.

44. 90 Wash. 2d 298, 582 P.2d 487 (1978).

45. WASH. REV. CODE §§ 29.42.020, 29.42.030 (1965).

46. 90 Wash. 2d at __, 582 P.2d at 491.

women actual as well as theoretical equality of rights"[47] even though *Gould* held that "discrimination on account of sex is forbidden."[48] *Marchioro*, then, represents a softening of the standard of review announced in *Gould*.

City of Seattle v. Buchanan,[49] a recent case involving a Seattle city ordinance forbidding the public exposure of female breasts as lewd conduct,[50] illustrates the standard of review that now seems applicable to gender-based classifications in Washington. The court cited *Gould* in its decision to uphold the ordinance. It found that the *Gould* opinion was based on a recognition that individual characteristics, not sexual categories, can serve as distinguishing qualifications. The statute is permissible so long as it "serves a rational purpose based upon actual differences which are present in every member of the particular sex."[51] The discrimination in *Buchanan* was based on unique physical characteristics of the female sex and, therefore, held not to be a violation of equal protection.[52]

Although it is apparent that the Washington courts, in applying their ERA, will use a test more stringent than that currently favored by the United States Supreme Court,[53] it is equally apparent that when traditional values are at stake, those courts are willing to short-circuit the analysis by finding that the statute in question is not gender-based. The *MacLean* court had available persuasive authority from another

47. *Id.* (quoting Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 904 (1971).

48. 85 Wash. 2d 859, __, 540 P.2d at 882, 893.

49. 90 Wash. 2d 584, 584 P.2d 918 (1978).

50. SEATTLE, WASH. ORDINANCES § 12A.12.150.

51. 90 Wash. 2d at __, 584 P.2d at 919.

52. *Id.* In *Buchanan*, the defendant charged with violation of the lewd conduct ordinance contended that there is no difference between the breasts of the male and the female "sufficient to justify a law forbidding the exposure of the breasts of one and not the other . . . ." *Id.* The court, however, believed that the city's concern was with the protection of morals and that there is a difference between the breasts of a man and a woman. "The female breats, which, unlike male breasts, constitute an errogenous zone and are commonly associated with sexual arousal." Id. at __, 584 P.2d at 920.

This is not the first time that a Washington court has allowed a seemingly sex-based classification to escape being struck down as unconstitutional. In a prior case, Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974), the court found no discrimination in the statutory prohibition of same-sex marriage. WASH. REV. CODE § 26.24.010 (1965). The court reasoned that the definition of marriage allowed such a legal relationship to exist only between one man and one woman. Neither two men nor two women could marry, therefore no discrimination was present. Such a decision in a state with one of the strongest interpretations of its ERA demonstrates the effect of characterizing the classification so that sex is not at issue. So, even those the state courts holding that their ERA requires the strictest of strict scrutiny can find that the statute was not sex based and save it from a binding of unconstitutionality.

53. *See* note 38 *supra* and accompanying text.

jurisdiction. A New York case, *Abosh v. New York Yankees, Inc.*,[54] also involved sex discrimination in the form of "Ladies' Night," which was found to be sex discrimination under a New York statute.[55] New York has no equal rights amendment but the statute prohibited preferential treatment between men and women. The defendant's argument that the price would encourage family bonds between the male and female family members was found to be unsupportable.

> Respondents' argument, although praiseworthy, is untenable in that it presupposes intact families where every woman has a man to take care of her. Unfortunately, that is not the case in America today, where 11.5% of all families are headed by woman and where 40% of all working women are either single, divorced, deserted, widowed, separated or abandoned.[56]

In addition to *Abosh*, the *MacLean* court had recent Supreme Court authority sufficiently analogous to lend support to its opinion. In *Orr v. Orr*,[57] the Court declared an Alabama statute that provided for alimony payments by husbands but not wives to be unconstitutional. The Court particularly warned against the danger of prolonging the effects of past discrimination by attempting to compensate for it by supposedly favoring females.[58]

The *MacLean* court concluded that the ticket-pricing practice violated the state's ERA. Although the Washington courts in the prior cases were willing to circumvent application of the state ERA by finding no sex classification, the *MacLean* Court was not.[59]

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54. No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), as cited in MacLean v. First N.W. Indust. of Am. Inc. 24 Wash. App. __, 600 P.2d 1027, 1031.

55. N.Y. EXEC. LAW § 296.2 (McKinney).

56. No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), as cited in MacLean v. First N.W. Indust. of Am. Inc. 24 Wash. App. __, 600 P.2d 1027, 1031.

57. 99 S. Ct. 1102 (1979).

58. The Court cited Craig v. Boren, 429 U.S. 190 (1976), to uphold its right to scrutinize discrimination against males as well as females. 99 S. Ct. at 1111.

59. The *MacLean* court also found that the ticket-pricing scheme complained of violated Washington's Law Against Discrimination," WASH. REV. CODE § 49.60 (Supp. 1979). This violation was not a condition precedent to a finding that the state ERA had been violated and accordingly is not particularly relevant to the scope of this note. Whatever influence this statute had on the outcome of the ERA issue cannot be determined by examining the court's opinion. However, one particular analogy drawn by the court deserves repeating here:

> The injustice of the case at bar would readily be recognized as impermissible if it arose in the context of race. It would be inconceivable to have a "Blacks' Night" or a "Whites' Night" or a "Filipinos' Night" at the Seattle Center Coliseum. It would be unsupportable for the City of Seattle to increase its coffers or take in any revenues on the basis of race classifications.

24 Wash. App. at __, 600 P.2d at 1032. This reasoning seems as applicable to an analysis of the ERA issue and gives a strong indication that the court did not view the "Ladies' Night" as a

III. A FEDERAL ERA?

The *MacLean* decision provides one piece of the puzzle in predicting the effect of a federal ERA. Regarding the state action issue, *MacLean* likely represents the approach the Supreme Court would take, were it called upon to resolve a similar issue.[60] To test for state action in sex discrimination cases by the precedent set in Equal Protection could mean a broad potential for enforcement of the federal ERA. As demonstrated by *Burton* and *MacLean*, even an act so seemingly insignificant as renting space from a government agency could result in a finding of state action.

Opponents of the ERA fear this far-reaching effect on their lives.[61] Perhaps this fear is somewhat unfounded if the purpose and effect of the state action analysis is properly considered.[62] Where purely private action is involved, the ERA would not apply. The ERA would prohibit only *state* discrimination on the basis of sex. It is readily apparent that the approach taken by the courts to find state action will have a significant effect on the reach of the ERA if it is ever ratified.

Beyond state action, the issue which *MacLean* exposes is the potential for a federal ERA to strike down every example of discrimination based on sex. Washington has moved beyond the Supreme Court's rational relationship test and perhaps beyond even the strict scrutiny test used for determining race discrimination.[63] The *MacLean* court justified its adoption of such a strict test on Washington's ERA.[64] Whether the federal ERA will be applied with similar enthusiasm is an unanswerable question at this time. The Washington court viewed the

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traditional practice worthy of a non-sex-based characterization as was previously done in the cases involving breast exposure, *Buchanan*, and same-sex marriage, *Singer*.

60. *See generally* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

61. *See* Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234, 234, 238 (1971): Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. C.R.-C.L. L. REV. 243, 246-47 (1971).

62. A finding of state action is not automatic. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), wherein a privately owned and operated utility company that held a certification of public convenience issued by the state's regulatory commission, was granted a partial monopoly on public utilities in the area, and was subject to extensive government regulation was not required to comply with due process notice and hearing procedures prior to terminating service to a customer. The Supreme Court found insufficient state action to justify application of the fourteenth amendment. *Id.* at 358. *See* notes 26-33 *supra* and accompanying text. Under the current mode of finding state action it seems clear that if the Seattle Supersonics had played their games in a privately owned facility and did not receive other governmental support for their franchise, "Ladies' Night" would be an allowable practice.

63. *See* note 52 *supra* and accompanying text.

64. *See* note 38 *supra*.

passage of its ERA as a statement by the people that they desired a more severe prohibition on sex discrimination than had previously been applied.[65] It remains to be seen whether the courts will find this to be the case for the federal ERA and just how strict the test for sex discrimination will become.

Good or bad, a federal ERA could be a broad, sweeping pronouncement, preventing nearly every form of discrimination based on sex. As the Washington courts have sometimes held, it could possibly ban gender as an allowable classification.[66] In that event, only characterization of classifications as non-sex-based,[67] or a finding that the classification was based on physical differences inherent in every member of the gender affected, would allow the classification to stand.[68]

IV. CONCLUSION

The decision in *MacLean* illustrates one state's interpretation of its equal rights legislation. It has further clarified Washington's stand on sex discrimination. Additionally, the decision provides insight into the difficult question of what effect a federal ERA, if ratified, would have on the Supreme Court's treatment of sex discrimination cases. Opponents of the ERA will point to the *MacLean* decision as an example of more government intrusion into their private lives. Those in favor of the ERA will applaud the decision. They may be heard to say, "Give me equal prices for equal entertainment along with equal pay for my job. The spending of money for entertainment can then be done with more freedom."

Jane Diggs

65. Darrin v. Gould, 85 Wash.2d 859, __, 540 P.2d 882, 889 (1975).
66. *See* note 52 *supra* and accompanying text.
67. *See, e.g.*, Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (prohibition of same-sex marriage not a sex-based classification).
68. *See, e.g.*, note 52 *supra*.