Study I-100 March 8, 2023

# Memorandum 2023-17

## Equal Rights Amendment: Scope of Sex Equality Provision — "Equality of Rights Under the Law"

In 2022, the Legislature adopted a resolution that authorizes and requests the Commission[1] to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[2] More specifically:

> [The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination….[3]

The Commission commenced work on this topic in 2022, considering an introductory memorandum describing a proposed approach for the study.[4] The proposed approach has two stages: first, the Commission will examine the possibility of codifying a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission would use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).

---

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2022 Cal. Stat. res. ch. 150.
3. *Id*.
4. Memorandum 2022-51.

This memorandum continues the discussion about the scope of a sex equality provision.

## EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[5]

In order to codify a sex equality provision to achieve the effect of this language, the Commission must first consider how this language should be understood. As noted in Memorandum 2023-10, there is no binding legal authority as to the meaning of the ERA's language.

Memorandum 2023-10 discussed the scope of the term "sex" for the purposes of codification of a sex equality provision.[6]

This memorandum focuses on the ERA's guarantee of "equality of rights under the law." It provides legal background for one important broad effect of the ERA — increasing the level of scrutiny accorded to sex-based equal protection claims under the U.S. Constitution — often noted in materials discussing the ERA's effects.[7] This effect was also acknowledged in the opinions in the U.S. Supreme Court's 1973 case, *Frontiero v. Richardson*.[8]

In general, however, the staff wants to note that the ERA is an entirely separate constitutional protection. While adjusting the treatment of sex-based equal protection claims may be a practical effect of the ERA, the ERA does not itself adjust the language of the U.S. Constitution's Equal Protection Clause, nor should

---

5. H.J. Res. 208 (1972), 86 Stat. 1523.

6. The Commission concluded that the term "sex" should be understood broadly, consistent with federal discrimination law, to include issues related to pregnancy, sexual harassment, sexual orientation, and gender identity. See Minutes (Feb. 2023), p. 3; see also generally Memorandum 2023-10.

7. See generally, e.g., R. Bleiweis, Center for American Progress, The Equal Rights Amendment: What You Need to Know (Jan. 29, 2020), *available at* https://www.americanprogress.org/article/equal-rights-amendment-need-know/; K. Fossett, *What Would the ERA Change?*, Politico (Feb. 4, 2022), *available at* https://www.politico.com/newsletters/women-rule/2022/02/04/what-would-the-equal-rights-amendment-do-00005702; J. Neuwirth, Equal Means Equal: Why the Time for an Equal Rights Amendment is Now (2015); https://www.equalrightsamendment.org/why.

8. Compare *Frontiero v. Richardson* (1973) 411 U.S. 677, 688 (plurality opinion, citing to Congress' passage of the ERA and other legal protections for sex, states "[w]ith these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.") with *id*. at 692 (Powell, J., concurring) (opinion concurring in the judgment declines to apply strict scrutiny to the claim, noting "[t]here is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The [ERA], which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.").

its effects be understood only in the context of changing the treatment of sex-based equal protection claims. The discussion of equal protection law should, in that vein, be understood as informing how the Commission may want to think about the ERA's guarantee of "equality of rights under the law."

Regarding the ERA's effects more broadly, the staff also notes that a number of articles and papers highlight specific federal legal effects, as well as philosophical or symbolic effects of the ERA (or, more generally, expressly addressing sex equality in the U.S. Constitution).[9]

## BACKGROUND ON EQUAL PROTECTION LAW

The ERA's guarantee of "[e]quality of rights under the law"[10] is similar to the language of the equal protection clauses of the federal and state constitutions, which provide guarantees of equal protection of the laws.[11]

After some brief general discussion about equal protection doctrine, this memorandum discusses the treatment of sex-based equal protection claims, focusing first on the U.S. Constitution, then noting differences in California's equal protection doctrine.

In some instances, other constitutional doctrines (aside from equal protection) have been determinative in cases involving issues of sex equality. After the equal protection discussion, this memorandum briefly notes some other constitutional provisions that could be relevant to the Commission's work or sex equality more broadly.

---

9. See sources cited in *supra* note 7.

Regarding the federal legal effects, Section 2 of the ERA provides "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." See H.J. Res. 208 (1972). This authority could permit a broader range of federal actions related to sex equality. It could, for instance, provide authority for the civil rights remedy in the federal Violence Against Women Act, which was previously struck down as being beyond Congress' authority to enact. See K. Spillar, *Survivors Need VAWA—But the ERA Would Make It Even More Powerful*, Ms. Magazine (Feb. 11, 2022), *available at* https://msmagazine.com/2022/02/11/vawa-violence-against-women-act-era-equal-rights-amendment/.

Regarding the symbolic effects, see generally Bleiweis, *supra* note 7 ("The ERA has certain symbolic importance, communicating unequivocally that people across the gender spectrum are innately equal and deserving of constitutional protection. It would demonstrate fundamental respect for the value and support of women and people across the gender spectrum …."); https://www.equalrightsamendment.org/why ("The ERA would improve the United States' standing in the world community with respect to human rights. The governing documents of many other countries affirm legal gender equality, however imperfect the global implementation of that ideal may be.").

10. See *supra* note 5.

11. U.S. Const. amend. XIV ("No State shall … deny to any person within its jurisdiction the equal protection of the laws."); Cal. Const. art. I § 7 ("A person may not be … denied equal protection of the laws….").

Although there are often strong connections between federal and state constitutional protections, state and federal constitutional doctrines are separate and distinct. While California's Constitution cannot impair rights protected by the U.S. Constitution, it can provide more protection and it can address matters that the U.S. Constitution does not. Along these lines, it is worth noting that California's Constitution expressly provides that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[12]

Finally, the staff notes that the equal protection case law regularly uses the term "gender" as an apparent synonym for "sex." In other words, the equal protection case law quoted in this memorandum that uses the term "gender" does not involve claims related to gender identity.

**Principles of Equal Protection**

Very generally, the legal scholarship discussing equal protection law (primarily focused on race discrimination) describes different principles of equal protection.[13] These principles are noted briefly here, as they may provide helpful context in thinking about the outcomes in the equal protection case law and the goals of equal protection more broadly.

These principles may be described somewhat differently across the scholarship (or identified using different terminology), but, in broad terms, the principles, along with a brief description from the legal scholarship, are as follows:

- **Anticlassification**: "Focused on the wrongs of classification, the anticlassification principle tolerates practices that are facially neutral but have a disparate impact on minorities; but it is intolerant of any use of racial classification, and hence it views benign discrimination as just a fancy name for plain old discrimination."[14]
- **Antisubordination:** "[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification. It is concerned with practices that disproportionately harm members of

12. Cal. Const. art. I § 24.

13. See generally, e.g., J.M. Balkin & R.B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9 (2003-04); R.B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L. J. 1278 (2011); see also materials cited in R.B. Siegel, 120 Yale L. J. at 1288, n. 21-23.

The terminology used to describe these principles is not always consistent. For instance, the anticlassification principle has also be referred to as the antidifferentiation principle, while the antisubordination principle has also been referred to as the group disadvantaging principle. J.M. Balkin & R.B. Siegel, 58 U. Miami L. Rev. at 10-11.

14. R.B. Siegel, 120 Yale L. J. at 1288.

> marginalized groups and so condemns facially neutral practices that have a racial disparate impact when such practices are not justified by a weighty public purpose. Because the antisubordination principle focuses on practices that disproportionally harm members of marginalized groups, it can tell the difference between benign and invidious discrimination."[15]

Initially, the scholarship focused on these two principles and later expanded to include a third to better describe more recent jurisprudence, which seems to sit somewhere between the two principles above (i.e., allowing, but limiting race-conscious government initiatives to address inequities).[16]

The outcome in individual cases might be different depending on which of these principles guides a court's equal protection analysis. Effectively, these different principles describe different goals and outcomes that would achieve equal protection (e.g., does equal protection demand facial neutrality vs. differences driven by addressing historical and practical inequities?).

**Levels of Scrutiny in Equal Protection Case Law**

In assessing whether there has been a denial of equal protection, courts have developed different tests, depending on the particular right or classification at issue.

In general, equal protection case law assesses equal protection claims using one of the following levels of scrutiny, listed in order from most to least stringent:

- *Strict scrutiny*. Strict scrutiny is used when a fundamental right or suspect classification is at issue in the case. Strict scrutiny requires that the law be necessary to satisfy a "compelling state interest" and that the law be "narrowly tailored" to achieve that interest.[17]
- *Intermediate scrutiny*. Intermediate scrutiny is used for certain protected classes that are not deemed suspect (in some cases, referred to as quasi-suspect). Intermediate scrutiny requires an

15. *Id.* at 1288-89.
16. See generally *id.* at 1300-03 (describing the "antibalkanization" principle).
"Justices reasoning from this antibalkanization perspective enforce the Equal Protection Clause with attention to the forms of estrangement that both racial stratification and practices of racial remediation may engender." *Id.* at 1300.
"Proponents of antibalkanization recognize that, to get beyond race, it may be necessary to take race into account; but, for them, taking race into account means crafting interventions that ameliorate racial wrongs without unduly aggravating racial resentments." *Id.* at 1302.
17. See generally https://www.law.cornell.edu/wex/strict_scrutiny; see also, e.g., *Adarand Constructors v. Peña* (1995) 515 U.S. 200.

"important government interest" and the law further that interest by means "substantially related" to the interest.[18]

- *Rational basis review*. Rational basis review is used when no fundamental rights, suspect classes, or protected classes are at issue. To satisfy this test, the law must further a "legitimate state interest" and there must be a "rational connection" between the law and the interest.[19]

These distinctions are helpful generally in understanding the way courts scrutinize different equal protection claims, however the whole of equal protection case law may not be adequately described by the three-tiered level of scrutiny categorization presented above.[20]

**Equal Protection Clause of the U.S. Constitution**

The Fourteenth Amendment of the U.S. Constitution provides, in part:

> …[N]or shall any State … deny to any person within its jurisdiction the equal protection of the laws.[21]

*Intermediate Scrutiny*

Under the U.S. Constitution equal protection case law, sex-based classifications are subject to a moderate level of scrutiny, referred to as intermediate scrutiny.[22] To satisfy intermediate scrutiny, the law must further an "important government interest" and do so by means that are "substantially related to that interest."[23]

The intermediate scrutiny test was described in the U.S. Supreme Court decision in *Craig v. Boren*.[24] That case involved a challenge to the different treatment of males and females under an Oklahoma law that prohibited the sale of 3.2% beer to males under 21 and females under 18.[25] In summarizing the previous case law, the decision set out an intermediate scrutiny standard:

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those

18. See generally https://www.law.cornell.edu/wex/intermediate_scrutiny; see also, e.g., *Craig v. Boren* (1976) 429 U.S. 190; *United States v. Virginia* (1996) 518 U.S. 515.
19. See generally https://www.law.cornell.edu/wex/rational_basis_test.
20. See generally, e.g., J. Mitten et al., *Equal Protection*, 23 Geo. J. Gender & L. 267, 277–78 (2022) (describing a fourth tier of "active" rational basis or rational basis "with bite," as well as broad alternative understanding of the equal protection case law as involving a "fluid, fact-intesive standard").
21. U.S. Const. amend. XIV, § 1.
22. See generally *supra* note 18.
23. See *Craig v. Boren* (1976) 429 U.S. 190, 191-92.
24. 429 U.S. 190.
25. *Id.* at 191-92.

> objectives. Thus, in *Reed*, the objectives of "reducing the workload on probate courts" and "avoiding intrafamily controversy" were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. And only two Terms ago, *Stanton v. Stanton*…, expressly stating that *Reed v. Reed* was "controlling" held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds.
>
> *Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.[26]

More recently, in *United States v. Virginia* (1996), the U.S. Supreme Court considered a constitutional challenge to the Virginia Military Institute's male-only admissions policy.[27] In that case, the majority opinion (drafted by former Justice Ginsberg) applied what some have described as a more exacting level of intermediate scrutiny (focusing on the requirement of an "exceedingly persuasive" justification, from language in earlier Supreme Court case law[28]). Specifically, the decision states:

> Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the

26. *Id.* at 197-99 (citations omitted).
27. *United States v. Virginia* (1996) 518 U.S. 515.
28. See *Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718, 724 (citing *Kirchberg v. Feenstra* (1981) 450 U.S. 455 and *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256).

> Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.
>
> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."
>
> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.[29]

In specifying that any sex-based distinction "must not rely on overbroad generalizations about … males and females," the opinion suggests that distinctions based on sex stereotypes would also be subject to intermediate scrutiny. And, in noting situations where sex classifications would be permitted (e.g., to "compensate…for particular economic disabilities" suffered by women), the opinion implicitly rejects an anticlassification view of equal protection.

In a dissenting opinion in this case, former Justice Scalia suggested that this decision applied a higher level of scrutiny to sex-based equal protection claims than previous case law (and indicated that the better course would be to reduce the level of scrutiny for sex-based classifications to rational basis review).[30] In a

29. *United States v. Virginia* (1996) 518 U.S. 515, 532-34 (citations and footnotes omitted).

30. See *United States v. Virginia*, 518 U.S. at 574-75 (Scalia, J., dissenting) ("[I]f the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate

later interview, Justice Scalia suggested that the U.S. Constitution does not prohibit sex discrimination at all.[31]

In short, under the U.S. Constitution, sex- and gender- based equal protection claims have been subject to an intermediate level of scrutiny (between rational basis review and strict scrutiny), although the case law indicates some disagreement about the precise contours of the intermediate scrutiny test. While some on the Supreme Court have suggested that the level of scrutiny for these claims should be increased, others have suggested the opposite. Finally, it is worth noting that the U.S. Supreme Court, considering an equal protection claim around the time that Congress passed the ERA, discussed how the ERA should be understood to affect the level of scrutiny accorded to sex- and gender- based equal protection claims.[32] This decision came prior to the U.S. Supreme Court's application of the intermediate scrutiny test in *Craig v. Boren* (discussed above).

*Scope of Application for Intermediate Scrutiny*

The Equal Protection Clause does not include the word "sex." And, under equal protection case law, some of the issues that the Commission previously concluded were within the scope of "sex" for the purposes of its work have been assessed using a lower level of scrutiny in the equal protection jurisprudence (or the U.S. Supreme Court has either not considered or not clearly identified the level of scrutiny that would apply).

Pregnancy is an issue that has gotten a lower level of scrutiny in equal protection case law. In the 1974 case *Geduldig v. Aiello*, the U.S. Supreme Court declined to apply intermediate scrutiny to a claim involving the exclusion of pregnancy-related disability from a disability insurance program, noting that:

> [T]his case is thus a far cry from cases like *Reed v. Reed* [challenging a law that gave preference to males to be named estate administrators] and *Frontiero v. Richardson* [involving different standards for male and female military spouses to be deemed dependents and receive benefits] involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely

subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review.").

31. See P. Courson, "Scalia comments show need for new rights amendment, backers say" CNN (Jan. 6, 2011), *available at* http://www.cnn.com/2011/POLITICS/01/06/era.scalia/index.html (Scalia is "quoted as saying, 'Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.'").

32. See *supra* note 8 presenting quotes from plurality and concurring opinions in *Frontiero v. Richardson* (1973) 411 U.S. 677.

> removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[33]

It is worth noting, however, that the disability program at issue did not simply exclude all sex-specific conditions.[34] More recent case law cites to *Geduldig* for the proposition that equal protection claims involving pregnancy do not receive heightened scrutiny.[35]

Some Courts of Appeal have subjected equal protection claims related to sexual orientation and gender identity to intermediate scrutiny (or a similar heightened scrutiny test).[36] The Supreme Court has yet to directly address the question of what level of scrutiny applies to such claims.[37]

**Equal Protection Clause of California Constitution**

In California, the state's equal protection doctrine generally accords a higher level of scrutiny to sex-based equal protection claims.

California's Constitution specifies:

---

33. *Geduldig v. Aiello* (1974) 417 U.S. 484, 496 n. 20 (citations omitted).
34. *Geduldig*, 417 U.S. at 499-501 (Brennan, J., dissenting).
35. See, e.g., *Dobbs v. Jackson Women's Health Org.* (2022) 142 S.Ct. 2228, 2245-46 (citing *Geduldig* for the proposition that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'").
36. See, e.g., *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312; *Windsor v. United States* (2nd Cir. 2012) 699 F.3d 169, *aff'd* 570 U.S. 744; *SmithKline Beecham Corp. v. Abbott Laboratories* (9th Cir. 2014) 740 F.3d 471 (referring to the test as "heightened scrutiny"); see also J.P. Cole, Congressional Research Service, Transgender Students and School Bathroom Policies: Equal Protection Challenges Divide Appellate Courts LSB10902 (Jan. 17, 2023), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10902.
37. See *Windsor v. United States* (2013) 570 U.S. 744, 769-70 (finding that the Defense of Marriage Act violated equal protection without identifying level of scrutiny applied); *Lawrence v. Texas* (2003) 539 U.S. 558, 580 (O'Connor, J., concurring) (noting that the Court, in striking down laws that exhibit "a desire to harm a politically unpopular group," has applied "a more searching form of rational basis review."); *Romer v. Evans* (1996) 517 U.S. 620, 632 (concluding that a Colorado constitutional provision seeking to prohibit state or local government action to extend protections on the basis of sexual orientation would fail "even th[e] conventional inquiry [of rational basis review]" as it "lacks a rational relationship to legitimate state interests").

A person may not be … denied equal protection of the laws[.][38]

When evaluating equal protection claims under the state Constitution, California courts have treated sex-based classifications as suspect classifications and subjected such classifications to strict scrutiny.[39]

In a 2008 California Supreme Court case involving the right to marry, the court applied strict scrutiny to equal protection claims involving sexual orientation, concluding that sexual orientation was itself a suspect classification for equal protection purposes.[40]

**Concerns about Equal Protection Jurisprudence, Generally**

Although this is not an issue that the staff has reviewed in detail, the staff wants to note issues raised in the legal scholarship about the limitations and flaws in equal protection jurisprudence.

One broad concern involves the different principles of equal protection[41] and identifying the overall goals and outcomes for equal protection jurisprudence generally. As indicated above, the anticlassification principle focuses heavily on whether the statute or government action classifies people, and views

38. Cal. Const. art. I § 7(a).

39. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 ("[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution…." (citations omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 ("In *Sail'er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that 'classifications based upon sex should be treated as suspect.' *Sail'er Inn* thus clearly established the principle that gender-based differentials are to be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers' Comp. Appeals Bd.*, the court stated that 'the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,' and in *Hardy v. Stumpf*, the court acknowledged that '(c)lassifications predicated on gender are deemed suspect in California.'"(citations omitted)); *Boren v. Dep't of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 ("According to California decisional law, a statute establishing 'suspect classifications' or trenching upon 'fundamental interests' is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect." (citations omitted)).

40. *In re Marriage Cases* (2008) 43 Cal.4th 757, 783-84 ("[W]e conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.").

41. See discussion of "Principles of Equal Protection" *supra*.

classification itself as the wrongful treatment that violates equal protection.[42] On the other hand, antisubordination views equal protection as "protecting members of historically disadvantaged groups from the harms of unjust social stratification."[43] Applying these different approaches to assess whether a provision, particularly one that is facially neutral, but has disparate impacts, is consistent with equal protection can lead to different outcomes.[44]

Another concern involves equal protection jurisprudence's general focus on a single characteristic. That key characteristic is then used to identify the level of scrutiny accorded to the claim (and, in that way, could be determinative as to whether there has been an equal protection violation). However, in practice, discrimination against an individual can involve multiple characteristics.

The problems with this single characteristic focus have been highlighted in the legal scholarship on intersectionality.[45] The problem is summarized in the following passage focused on how the tiers of scrutiny would apply to an equal protection claim by a Black woman (referencing Justice Powell's analysis in *University of California v. Bakke*,[46] a case where the Court found that racial quotas in higher education admissions violate the Equal Protection Clause):

---

42. See *supra* note 14 and associated text.
43. R.B. Siegel, 120 Yale L. J. at 1288.
44. See generally discussion of "Principles of Equal Protection" *supra*.

More specifically, using an anticlassification approach, "laws with racial disparate impact that do not use racial classifications are presumptively constitutional, *unless plaintiffs could prove discriminatory purpose*. … [This approach would allow] state action with a disparate group impact — even state action undertaken in awareness that it would have disparate group impact — so long as the policy was not *intended* to inflict 'adverse effects upon an identifiable group.'" R.B. Siegel, 120 Yale L. J. at 1309-10 (citations omitted and emphasis added).

On the other hand, an antisubordination approach "condemns facially neutral practices that have a racial disparate impact when such practices are not justified by a weighty public purpose." *Id*. at 1289.

45. See generally, e.g., K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal. F. 139, *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf.
46. See D.W. Carbado & K.W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 Yale L. J. Forum 108, 116-17, *available at* https://www.yalelawjournal.org/forum/an-intersectional-critique-of-tiers-of-scrutiny ("We begin with Justice Powell's assertion that 'the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.' This reflects what one of us has called an 'intersectional failure' in at least two respects. First, the claim ignores the fact that slavery and Jim Crow — both of which presumably are part of the 'lengthy and tragic history' to which he refers — were gendered in ways that shaped how Black women experienced themselves as women. Implicit in Justice Powell's account is the view that what happened to Black women in the context of Jim Crow and slavery was not gendered or, alternatively, that the gendered dimensions of slavery were somehow distinguishable. …

> To borrow from Anna Julia Cooper, where and when do Black women enter the tiers-of-scrutiny landscape? Are policies that focus on Black women a suspect classification (because Black women are Black) or a quasi-suspect classification (because Black women are women)? Had Black women's experiences figured as women's experiences in Justice Powell's analysis, he would have been forced to confront the fact that their identity implicates both strict and intermediate scrutiny. Justice Powell did not have to engage this doctrinal tension because his colorblind intersectionality made Black women illegible as women. This illegibility is part of a broader representational position, whereby Black women's race either overdetermines their gender (Black women are Black people, not women) or overly particularizes it (Black women are Black women, not women). Both problems limit the ability of Black women's experiences to stand in for those of women.[47]

The article also notes that "people's existential realities are structured by intersecting regimes of power — for example, racism and sexism and homophobia"[48] and "the tiers-of-scrutiny regime is fundamentally at odds with how power functions."[49]

## OTHER CONSTITUTIONAL PROTECTIONS RELEVANT TO SEX EQUALITY

This discussion briefly highlights other constitutional protections related to sex equality. Federal and state constitutional protections are discussed in turn below.

This discussion is not intended to be exhaustive or complete. The material presented below is simply an initial discussion of constitutional provisions that are potentially relevant to the Commission's work or issues of sex equality more broadly. The staff will provide additional information on constitutional provisions as they are identified and as the Commission's work requires.

### U.S. Constitution

Under the U.S. Constitution, the Equal Protection Clause is not the only provision that extends protections related to sex equality.

---

Another reason Justice Powell's analysis might be described as an intersectional failure is that it reflects the view that Black women's experiences do not (and presumably cannot) stand in for or represent the category of women per se." (footnotes omitted)).

47. *Id.* at 121-22.

48. *Id.* at 122; see also generally, e.g., D.L. Hutchinson, "Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse, 85 Cornell L. Rev. 1358 (2000).

49. D.W. Carbado & K.W. Crenshaw, *supra* note 46, at 126.

*Protections of Privacy and Liberty, Generally*

In general, although the U.S. Constitution does not contain express language about privacy, the constitutional case law has recognized that the Constitution provides some protection for autonomy privacy (i.e., the right of an individual to make decisions about important personal matters free from government interference).[50]

The exact contours of this right are difficult to define. The U.S. Supreme Court's assessment of the relevant constitutional language for the privacy right, as well as the scope of that right in practice, has changed over time. In a 1965 case involving the right to contraceptives, the decision discussed "specific guarantees in the Bill of Rights hav[ing] penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[51] The constitutional privacy right is also discussed as an aspect of liberty protected by the Due Process Clauses[52] or a component of "substantive due process."[53]

Below is an excerpt from the 1973 U.S. Supreme Court decision in *Roe v. Wade*, summarizing the prior case law on the constitutional privacy right.

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [an 1891 case], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities

50. See generally https://www.justia.com/constitutional-law/docs/privacy-rights/.
51. *Griswold v. Connecticut* (1965) 381 U.S. 479, 484.
52. See also U.S. Const. amends. 5, 14.
53. "Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation." E. Chemerinsky, *Substantive Due Process*, 15 Tuoro L. Rev. 1501, 1501 (1999), *available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship.

> relating to marriage; procreation; contraception; family relationships; and child rearing and education.[54]

The constitutional privacy right case law has addressed a variety of issues, including access to contraception,[55] access to abortion,[56] sexual privacy rights,[57] and the right to marry.[58]

However, the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* dramatically shifted the jurisprudence in this area, expressly overruling two cases involving abortion: *Roe v. Wade* and *Planned Parenthood v. Casey*.[59] In addition, a concurring opinion in that case called into question the constitutional privacy right protections more broadly. Specifically, the concurring opinion provided, in part:

> The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut* (right of married persons to obtain contraceptives); *Lawrence v. Texas* (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges* (right to same-sex marriage), are not at issue. The Court's abortion cases are unique and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised[.]" Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."
>
> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.[60]

---

54. *Roe v. Wade* (1973) 410 U.S. 113, 152-54, *overruled by Dobbs v. Jackson Women's Health Org.* (2022) 142 S. Ct. 2228, and *holding modified by Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833.

55. See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.

56. See, e.g., *Roe v. Wade* (1973) 410 U.S. 113; *Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833; *Dobbs v. Jackson Women's Health Org.* (2022) 142 S. Ct. 2228.

57. See, e.g., *Bowers v. Hardwick* (1986) 478 U.S. 186; *Lawrence v. Texas* (2003) 539 U.S. 558.

58. See, e.g., *Loving v. Virginia* (1967) 388 U.S. 1; *Zablocki v. Redhail* (1978) 434 U.S. 374; *Obergefell v. Hodges* (2015) 576 U.S. 644.

59. (2022) 145 S.Ct 2228, 2284. ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

60. *Id.* at 2301-02 (Thomas, J., concurring) (citations and footnote omitted).

**California Constitution**

In the California Constitution, there are multiple provisions that may bear on the Commission's work on sex equality or are relevant to the issue of sex equality more broadly. Several such provisions are noted briefly below, presented in the order that they are found in the California Constitution.

*Right to Privacy*

California's Constitution includes an express right to privacy, enacted in 1972 (Proposition 11).[61] That provision provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.[62]

For this provision, it is particularly important to note that California's constitutional protection of privacy is separate and distinct from any protection of privacy derived from the federal constitution.[63] As one commentator described:

> The California constitutional right to privacy is distinct from the federal right. Like its federal counterpart, the state right to privacy extends to both [] informational and autonomy privacy. Yet the federal right is only implied, while the California right is codified in the state constitution. The California Supreme Court has taken this to suggest the state right should be broader than its federal counterpart. As a result, in theory Californians have privacy protections that extend beyond the "penumbral" protections under the federal charter, in both liberty and informational privacy. [64]

Informational and autonomy privacy have been described as follows: Informational privacy involves "'interests in precluding the dissemination or misuse of sensitive and confidential information;" and 'autonomy privacy[]' … encompasses the 'interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.'"[65] For this

61. See Cal. Const. art. I § 1.
62. *Id.*
63. See Cal. Const. art. I § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."); see also generally D.A. Carrillo et al., *California Constitutional Law: Privacy*, 59 San Diego L. Rev. 119 (2022).
64. R.R. Aquino, California's constitutional privacy guarantee needs a reset, SCOCAblog (Apr. 9, 2021), http://scocablog.com/californias-constitutional-privacy-guarantee-needs-a-reset/.
65. D.A. Carrillo et al., 59 San Diego L. Rev. at 136 (quoting Justice Lucas' opinion in *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1).

work, the staff anticipates that the autonomy privacy issues might be most relevant, although the informational privacy right may also be important.

*Reproductive Freedom*

In the aftermath of the U.S. Supreme Court's decision in *Dobbs*, California enacted a new constitutional provision (in November 2022) to protect reproductive freedom. That provision provides:

> The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection. [66]

*Same-Sex Marriage*

California's Constitution contains language limiting marriage to opposite-sex unions ("between a man and a woman").[67] In a 2010 case, this provision was deemed unconstitutional.[68] There is a pending effort in the Legislature to amend the Constitution to address this language and marriage equality.[69]

*Protection for Employment and Professions*

California's Constitution has a provision that provides protection for employment and professions. The provision expressly includes sex as a protected class. It provides:

> A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.[70]

This provision has been cited as an example of a state constitution equal rights amendment.[71] However, it is important to note that the more tailored scope of this

66. Cal. Const. art. I § 1.1; see also 2022 Cal. Stat. res. ch. 97 (SCA 10 (Atkins)).
67. Cal. Const. art. I § 7.5. The language was added by an initiative measure, Proposition 8, in 2008.
68. *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921.
69. See ACA 5 (Low), as introduced Feb. 14, 2023; see also generally https://www.gov.ca.gov/2023/02/14/governor-newsom-statement-on-constitutional-amendment-to-repeal-prop-8/.
70. Cal. Const. art. I § 8.
71. See generally, e.g., https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments;
https://en.wikipedia.org/wiki/State_equal_rights_amendments.

provision (focusing specifically on employment and professions) is significantly different from the federal ERA (addressing equality of rights more generally).

*Prohibition on Discrimination or Preferential Treatment for Public Employment, Public Education, and Public Contracting*

Another California constitutional provision that the Commission should be aware of is the 1996 enactment of Proposition 209. This provision provides in part:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[72]

This provision effectively prohibits affirmative action programs in the specified areas.[73] The Legislative Analyst's Office description of Proposition 209 notes that the measure provides exceptions to the ban on preferential treatment in the following situations:

- "To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting."[74]

The staff has not assessed how the legal guarantees of the ERA might interact with Proposition 209, but notes this issue as one that may need to be addressed going forward if the Commission's work addresses the issues covered by

72. Cal. Const. art. I § 31(a).

73. See Legislative Analyst's Office Analysis of Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (Nov. 1996), *available at* https://lao.ca.gov/ballot/1996/prop209_11_1996.html (hereafter, "LAO Analysis of Prop 209") ("This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered 'preferential treatment' and (2) whether federal law requires the continuation of certain programs."); see also, e.g., T. Watanabe, *California banned affirmative action in 1996. Inside the UC struggle for diversity*, L.A. Times (Oct. 31, 2022), *available at* https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity.

Regarding the effects of Proposition 209 in California, see generally materials discussed at https://www.ucop.edu/academic-affairs/prop-209/.

74. See LAO Analysis of Prop 209, *supra* note 73.

Proposition 209 (i.e., public employment, public education, and public contracting).

The staff also notes that there was a recent effort to repeal this provision and there is a pending effort to amend this provision (relating to the use of state funds for specified interventions or programs related to health, education, and economic well-being of "specific ethnic groups or marginalized genders").[75]

*Admission to University of California*

The California Constitution includes a provision related to the University of California that provides, in part, that:

> [N]o person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex.[76]

## CONCLUSION

This memorandum presents an initial discussion of equal protection and other constitutional provisions related to sex equality to inform the development of a sex equality principle for California law. This memorandum does not call for a Commission decision. However, the staff would welcome the thoughts of the Commissioners regarding how the Commission should understand the ERA's guarantee of "equality" for the purpose of this work.

Respectfully submitted,

Kristin Burford
Senior Staff Counsel

75. Regarding the recent repeal effort, see results for Proposition 16 in Secretary of State, Statement of Vote — General Election November 3, 2020, p. 14, *available at* https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf; see also 2020 Cal. Stat. res. ch. 23 (ACA 5 (Weber))

Regarding the pending effort to amend, see ACA 7 (Jackson), as introduced Feb. 16, 2023. Quoted material is from the language of the proposed amendment in ACA 7.

76. Cal. Const. art. IX § 9(f).