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THE EQUAL RIGHTS AMENDMENT: SOME PROBLEMS OF CONSTRUCTION

by Philip B. Kurland*

Before I begin to discuss the problems of construction that I see in the Equal Rights Amendment proposed to the Ninety-first Congress, I think it appropriate to reveal some of my conscious prejudices, so that the reader may discount my bias in evaluating my arguments. First is my notion of the proper function of constitutional amendments. I think that they are clearly the best—and should be the exclusive—means of bringing about changes in governmental structure. I think that they also offer an appropriate means for reversal of constitutional decisions of the Supreme Court. I think that they may be the necessary means for protecting minorities from being imposed on by the majority and for protecting the unenfranchised against imposition by the enfranchised. Women, however, are neither a minority nor unenfranchised. This suggests to me that the most appropriate means for bringing about the desired changes would be by appropriate legislation rather than constitutional amendment.

Second, I am convinced that women in this country suffer from unreasoned discrimination against them in many phases of their lives, not least in the sphere of employment. But I am also of the view that this unjustified discrimination does not derive primarily from governmental action, except insofar as the government, as employer, behaves like other employers.¹

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Much of the data on which I rely was compiled by Peter H. Fritts, Esq., when he was a student in my seminar on the legislative process in 1966. He is, of course, not responsible for the use to which I put the contents of his seminar paper here. His paper is available in The University of Chicago Law School's Library. I am grateful to him.

¹See note 26 *infra*.

For those who believe that personal factors are also relevant in determining bias, I would add some biographical data. I am a male. I am married. I have never been divorced. My wife is a professional who is temporarily, probably, by personal predilection, surely, devoting full time to housekeeping and child raising. We have three lovely children, all girls. My job is certainly one that could be filled by a female no less adequately than by a male. I belong to no organization that discriminates on the basis of race, creed, sex, or national origin. I have no religious beliefs that direct my attitude to discrimination on the basis of sex. But I do have a Jewish mother. I find humor in Thurber's *War between the Sexes*. I do not subscribe to, but I do read and look at, from time to time, *Playboy* magazine.

I. SOME LEGISLATIVE HISTORY

Forty-seven years after it was first proposed in Congress,² originally sponsored by those who had successfully waged the battle for the women's suffrage amendment,³ a joint resolution to initiate an "equal rights amendment"⁴ was sprung from the tight grasp of Representative Celler, chairman of the House of Representatives Committee on the Judiciary, rushed through the House after a debate of less than one hour,⁵ and failed of endorsement in the Senate by a whisker. The 1923 version was put simply and ambiguously: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." Obviously, this language was rife with problems of appropriate construction. The 1970 language, in essentially the same form that had been used for the last fifteen years or so, afforded different, but no less challenging ambiguities. It read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."

The proposal for an "equal rights" amendment obviously had not lain dormant between 1923 and 1970. After the initial impetus provided by the suffragettes, it had emerged again in the period following the Second World War, during which much of what had theretofore been considered "men's work" had been ably performed by women. Indeed, in the years 1942, 1943, 1946, 1948, 1949, 1951, 1953, 1956, and 1962, the Senate Committee on the Judiciary had reported favorably on essentially the same proposal as that under consideration in 1970.⁶ And, in 1950 and 1953, the Senate had approved those resolutions with votes of 63 to 19

²H.R.J. Res. 75, 68th Cong., 1st Sess. (1923).

³*Cf.*, e.g., the statement of Miss Mabel Vernon, Executive Secretary of the National Woman's Party, before the Committee on the Judiciary of the House of Representatives: "... as we were working for the national suffrage amendment ... it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step, but a very important step, it seemed to us, toward the gaining of this equality." *Hearings on H.R.J. Res. 75 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 2 (1925).

⁴H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

⁵The vote was 350 to 15, 116 CONG. REC. H7984 (daily ed. Aug. 10, 1970).

⁶S.J. Res. 8, S. REP. No. 1321, 77th Cong., 2d Sess. (1942) [Apparently the Report was never actually written. See 88 CONG. REC. 4033 (1942) (remarks of Senator Hughes)]; S.J. Res. 25, S. REP. No. 267, 78th Cong., 1st Sess. (1943); S.J. Res. 61, S. REP. No. 1013, 79th Cong., 2d Sess. (1946) [This resolution received a majority but not a two-thirds vote in the Senate, 52 CONG. REC. 9405 (1946)]; S.J.

and 73 to 11 respectively.⁷ There was, therefore, some irony in the fact that the proposal that had in the past succeeded in the Senate but languished in the House of Representatives should, in 1970, have met its doom in the upper house after passage in "the other body."

There is an explanation for this. The Senate had not changed its position in the interim. The two successful Senate forays, in 1950 and 1953, had been accomplished only after the proposal had been amended by Senator Hayden's language, which appended the following: "The provisions of this article shall not be construed to impair any rights, benefits or exemptions conferred by law upon persons of the female sex."⁸ Had the proponents of the 1970 proposal taken cognizance of this history and accepted the conditions of the Hayden qualifications, I venture that the proposal would have again readily secured Senate acquiescence. The refusal by some protagonists to accept the qualification was probably not, however, inadvertent; it was calculated.⁹ It represented a deliberate choice between two different objectives, either but not both of which the proposed amendment might fully serve.

II. CONSTRUCTION AND RECONSTRUCTION

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effectuate a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design.¹⁰

Res. 76, S. REP. No. 1208, 80th Cong., 2d Sess. (1948); S.J. Res. 25, S. REP. No. 137, 81st Cong., 1st Sess. (1949); S.J. Res. 3, S. REP. No. 356, 82nd Cong., 1st Sess. (1951); S.J. Res. 49, S. REP. No. 221, 83rd Cong., 1st Sess. (1953); S.J. Res. 39, S. REP. No. 1991, 84th Cong., 2d Sess. (1956); S.J. Res. 142, S. REP. No. 2192, 87th Cong., 2d Sess. (1962).

⁷96 CONG. REC. 872 (1950); 99 CONG. REC. 8974 (1953).

⁸96 CONG. REC. 870 (1950); 99 CONG. REC. 8973-74 (1953).

⁹See, e.g., 116 CONG. REC. E5452, E5454 (daily ed. June 10, 1970) (Memorandum in support of the amendment by Marguerite Rawalt); 116 CONG. REC. E2588, E2589 (daily ed. March 26, 1970) (Memorandum by the Citizens' Advisory Council on the Status of Women). Both memoranda were inserted into the *Congressional Record* by the amendment's sponsor, Representative Martha W. Griffiths of Michigan.

¹⁰Frankfurter, *The Reading of Statutes*, in OF LAW AND MEN 60 (Elman ed. 1956).

If it is the duty of the judiciary to effectuate the aim of legislation, it is no less the duty of the legislature, to the best of its capacity, to make clear what its aims are. It ought to say what mischief it wishes to obviate, what inadequacy it wants to supply, what change of policy it desires to effectuate, or what plan of government it seeks to formulate. If it is an act of usurpation for the judiciary to read legislation to effect its own aims and purposes, it is an act of abdication for the legislature to fail to state its purposes and aims in framing the legislative act that it promulgates.

The prime difficulty with the proposed "equal rights" amendment was that the national legislature came close to approval of constitutional legislation without defining—without knowing?—its aims and purposes. This is not a lawyer's cavil. It was a defect so patent that newspaper editorial writers could see it. Thus, the *New York Times* wrote:¹¹

Equal rights for women is a proposition so unarguable in principle and so long overdue in practice that it is a pity to have it approached by the House of Representatives as an exercise in political opportunism. For 47 years that body regularly rejected out of hand all proposals for a women's rights amendment to the Constitution. Now it approves, without committee hearings and after only an hour's debate, a constitutional change of almost mischievous ambiguity.

The *Times* itself was guilty of "confounding the confusion," for it fell into the trap of thinking that "equal rights" and "women's rights" are necessarily descriptive of the same legislative objectives. As discussed below, it is of the essence of the problem that frequently they are not. Thus, there is merit in the *Times*' desire for elimination of "almost mischievous ambiguity," just as there is merit in the editorial proposal of the *Wall Street Journal*: "Well, we're all for the ladies, but even so, before we write some new words into the Constitution it'd be nice to know what they really do mean."¹²

A. A Basic Conflict of Purpose

The primary problem of construction offered by the proposed "equal rights" amendment derives from the fact that the movement for "women's rights" is Janus-faced. The proposed amendment presented one aspect, while much of its support was voiced in terms of its other visage. The first would command the treatment of men and women as if there were no

¹¹N.Y. Times, Aug. 12, 1970, at 40, col. 1.

¹²Wall Street Journal, Aug. 13, 1970, at 6. col. 1.

differences between them, even at the price of removing protections and benefits that have otherwise been afforded to females. It was a demand for legal "unisex" by constitutional mandate. And much of the benefit of such a proposal, to the extent it was possible to effectuate it, would inure to males rather than females, since equality may be attained by applying to all the rules that had theretofore been applied only to females, such as a lower age of emancipation, no legal obligation of family support, and exemption from military service.

The second attitude towards "women's rights" would seek only the elimination of discrimination against women, a ban on treating females as a disabled class. Legislation purporting to afford—and in fact affording—privileges to women that were not also available to men would not run afoul of such constitutional provision. But disabilities legally imposed on women because of their sex, such as denial of equal education or employment opportunities, would be invalidated because grounded in a suspect or invidious classification.

The difference between the two is essentially the difference between the amendment without the qualifying Hayden language and with it. And herein lies the conflict among those who would support some constitutional change to abate the legal incapacities of women, certainly a sufficient majority of both the House and the Senate to promulgate an amendment, if they could but agree on its purpose and function.

There are some basic difficulties with the "unisex" approach, not the least of which is that there are physiological and biological differences between men and women that are not subject to eradication even by constitutional amendment. Practically, of course, this may present no difficulties because nature cannot be subjected to human laws, while humans must bow to the laws of nature. The essential claim for such a declaration of "equality of the sexes" is its symbolic value. The temper of our times demands instant and simplistic answers to complex problems, and it is this temper that assumes that the cure for such problems lies in the incantation of the word "equality" by our highest governmental means, the Constitution, or by the voice of the Constitution, the Supreme Court of the United States. Without denying the importance of symbols, it is necessary to recognize that when they are only the creatures of the Constitution their effect, thus far at least, has been less than pervasive.

A second difficulty with a constitutional mandate of instant equality of the sexes is that proffered by history. Times have changed in such a way that it may well be possible for the generation of women now coming to maturity to surrender all special legal protection and privileges. A great majority of them have had all the opportunities for education and training afforded their male peers, with an expectation of full opportunity to put that education and training to the same use. They may well be able to

succeed in a competitive society in which all differences in legal rights between men and women are eradicated. There remains, however, a very large part of the female population on whom the imposition of such a constitutional standard could be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. A multitude of women still find fulfillment in this role. This may be unfortunate in the eyes of some; but it remains a fact. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for this change. Certainly the desire to open opportunities to some of them can be achieved without the price of removing the protection of others.

On the other hand, there are also difficulties in an amendment that does not ban all legislative distinctions in treatment of men and women, which would leave unchallenged laws that purported to confer, in Senator Hayden's language, "rights, benefits or exemptions . . . upon persons of the female sex." Deciding when a statute confers a benefit rather than imposing a disability is often difficult. The most cited example are those laws which provide for minimum wages, maximum hours, limitations on night work, and requirements of sanitary conditions for women workers. Certainly since Louis D. Brandeis fought for the validity of such legislation,¹³ it has been assumed by "right-thinking people" that the legislation was for the benefit of women. Classical economists, on the other hand, believe that such laws put women at a competitive disadvantage in the employment market. An early Department of Labor study, however, purported to show that there was no difference in women's employment between those states that had laws providing minimum wages, or banning night work, and those that did not, and only a very small difference between the states that banned women's overtime work and those that did not.¹⁴ This sort of question, whether the legislation affords privilege or imposes disability, however, may be one appropriate for judicial resolution on a case by case basis, with the results dependent on the facts adduced and the values assigned to them. Unfortunately, the proposed amendment and its legislative history offer little guidance to a court attempting to resolve these difficult issues.

¹³ See A.T. Mason, *BRANDEIS* 245-53 (1946).

¹⁴ See *Hearing on S.J. Res. 61 Before a Subcomm. of the Senate Comm. on the Judiciary*, 79th Cong., 1st Sess. 84 (1945).

B. The Problem of Equality

If an amendment were passed that in effect prohibited all legislative classification in terms of sex, the results might not be desirable but the problems of construction would be minimal. The judicial answers could be mechanical and, therefore, easy. The difficulty is that not even the sponsors of such a "unisex" amendment have made the claim for rigid classification. Apparently embarrassed by the prospect of the abolition of such existent requirements as separate toilet facilities for men and women or the availability of "maternity leaves," proponents of the "equal rights" amendment asserted that certain distinctions could continue to be maintained, so long as the principle of equality is assured.¹⁵ The concept of equality is not, however, one that is easily defined or confined.¹⁶

The phrase "equal rights" might be repeated an infinite number of times without providing additional guidance to the speaker or listener. Mr. Justice Cardozo noted some time ago that "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."¹⁷ And it was almost a century ago that Sir James Fitzjames Stephen asserted that "equality is a word so wide and vague as to be by itself almost unmeaning."¹⁸ Nothing that has happened in the intervening years has made it more specific.

There are suggestions in some of Mr. Justice Frankfurter's opinions to mark the perimeter of a constitutional notion of equality that have an appeal, if only to a small audience. In *Whitney v. Tax Commission*,¹⁹ he pointed out that: "The Equal Protection Clause was not designed to compel uniformity in the face of difference." And, in the same Term of Court, he announced in *Tigner v. Texas*,²⁰ "The constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." Applying this notion in the context of the "equal rights" amendment, one might work out some generalizations. Governmental distinction between males and females would have to be justified in fact before it could pass muster under the proposed amendment. If the distinction were based on reason, the legislation should be presumptively valid. The mere fact that there are two sexes should not

¹⁵See 116 CONG. REC. E2588, E2891 (daily ed. March 26, 1970)(memorandum of the Citizens' Advisory Council on the Status of Women).

¹⁶See, e.g., P.B. Kurland, POLITICS, THE CONSTITUTION, AND THE WARREN COURT ch. 4 (1970).

¹⁷*Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936).

¹⁸J.F. Stephen, LIBERTY, EQUALITY, AND FRATERNITY 201 (1873).

¹⁹309 U.S. 530, 542 (1940).

²⁰310 U.S. 141, 147 (1940). The Justice was also of the view that "there is no greater inequality than the equal treatment of unequals." *Dennis v. United States*, 339 U.S. 162, 184 (1950).

be reason in itself for distinguishing between them in legislation. On the other hand, the mere fact that a distinction was drawn between them ought not suffice to invalidate the law. I should think, therefore, that appropriate data of sociological conditions, especially those deriving from a history of different treatment of the sexes, might warrant the continuance of certain benefits and protections. This should certainly be true of laws relating to domestic relations, where marriage contracts were made under laws creating certain expectations of the obligations of one spouse to the other, including the male's duty to support both his wife and his children.

C. The Equal Protection Clause

Such a construction necessarily raises the question whether the equal protection clause of the fourteenth amendment does not already afford all that the proposed "equal rights" amendment would offer. The difficulty is that the only informed answer must be that it probably does, but we have no definitive construction by the Supreme Court to give us adequate assurance. Certainly some cases in the past raise doubts that the notion of nondiscrimination on the ground of sex has yet been established. *Breedlove v. Suttles*,²¹ *Goesaert v. Cleary*,²² and *Hoyt v. Florida*,²³ to the extent that they remain viable precedents, do not make it clear that classification by sex is regarded, under the fourteenth amendment, as a "suspect classification" like race or religion.

On the other hand, there can be little doubt that the fourteenth amendment and the commerce clause give the national legislature more than adequate authority to ban discrimination on the basis of sex. And the Civil Rights Act of 1964 affords ample evidence that the power will be utilized where the legislature finds that such invidious discrimination needs extirpation.²⁴

If, as is likely, the laws of biology and judicial construction blunt the extreme effects of the "unisex" concept, and the amendment, if adopted, is interpreted in a fashion similar to the fourteenth, the "equal rights" amendment will become more important for its enabling clause than its direct substantive effect. As proposed, it adds little to what is already provided by the fourteenth amendment together with the commerce clause. Nor does the proposal resolve the ambiguities that inhere in a direct

²¹ 302 U.S. 277 (1937).

²² 335 U.S. 464 (1948).

²³ 368 U.S. 57 (1961).

²⁴ Title VII, 42 U.S.C. §§ 2000e-2000e-15 (1964). See *Phillips v. Martin Marietta Corp.*, 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971).

restraint on governmental action: To what extent is the constitutional ban to be read as one against state action only? When is individual action to be treated as state action? And to what degree does the constitutional ban on discrimination authorize legislation providing for "reverse discrimination" or "benign quotas"?²⁵

The amendment may actually decrease the existing scope of congressional authority. If the phrase "within their respective jurisdictions" is to have any meaning, its effect may be to prohibit congressional interference with matters traditionally left to the states, such as family and domestic relations laws, although currently expanded notions of what Congress may do to regulate interstate commerce and enforce the requirements of equal protection would presently permit federal intervention. Once again, the amendment's legislative history is most unhelpful.

III. CONCLUSIONS

As a step towards full equality of men and women in this society, the proposed "equal rights" amendment covers very little ground. The area of governmentally compelled or sanctioned discrimination against women is very limited and constantly diminishing.²⁶ Some of the primary planks of the "women's liberation" platform, such as the right to abortion, or to "child care centers," would be totally unaffected by the proposal even in its "unisex" version. Nor is it possible to measure in advance how far even this limited amount of progress will extend, as the conflict between the two disparate objectives of women's rights remains unresolved. The debate over the adoption of the amendment is seriously hampered by its supporters' indecisiveness about its effects and duplicity about its meaning.

If, however, an amendment is to be proposed by Congress, its aims and purposes should be clearly delineated in the legislative history by answers to the questions raised herein. Congress should particularly indicate whether it is fostering a "unisex" approach or one that bars only invidious discrimination against women. My preference is for the latter, which can be accomplished by adding Senator Hayden's language to the present proposal or by shifting its substantive provision to read: "Neither the

²⁵ See P.B. Kurland, *supra* note 16, at 157-60.

²⁶ See generally President's Commission on the Status of Women, AMERICAN WOMEN (1963); U.S. Women's Bureau, Dept. of Labor, STATUS OF WOMEN IN THE UNITED STATES, 1952, at 9-10; Inter-American Commission on Women, A COMPARISON OF THE POLITICAL AND CIVIL RIGHTS OF MEN AND WOMEN IN THE UNITED STATES, S. DOC. No. 270, 74th Cong., 2d Sess. (1936).

United States nor any State shall make any law that [discriminates against] [imposes disabilities on] women because of their sex.”

Better still would be legislation, effectively administered, directed to specific evils in lieu of a broadly directed amendment. Congress and the states already possess sufficient power to alleviate much of the very real discriminations now suffered by women in American society. The “equal rights” amendment would add little, if any, to this power. A protracted struggle for its adoption, however, could spend the public energies needed to effect the exercise of this power. Only martyrs enjoy Pyrrhic victories.