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## ERA And Homosexual "Marriages"

The drive to legalize homosexuality is currently going on at the national, state and local levels. Often it is covered by such euphemisms as "the right to be different" or "the right of sexual orientation" or "sexual preference." When first presented, some people are inclined to be tolerant and assume a live-and-let-live attitude.

Upon examination, however, it becomes clear that homosexuals and lesbians are not merely seeking the right of consenting adults to be different. They want the right to teach in schools and colleges. They want the right to "marry" and thereby qualify for joint income tax and homestead benefits enjoyed by husbands and wives. They want the right to adopt children.

To use the law to extend such rights to homosexuals would be a grave interference with the rights of the rest of our citizens. It would interfere with our right to have a country in which the family is recognized, protected, and encouraged as the basic unit of society. It would interfere with the right of an adoptable child to be placed in a home with a mother and a father.

It would interfere with the right of parents to have their children taught by teachers who respect the moral law. Surely the right of parents to control the education of their children is a right of a higher order than any alleged right of, say, the two college-educated lesbian members of the Symbionese Liberation Army to teach our young people.

College officials have a right to decide that dormitories are no place for homosexuals. The firemen, who constantly risk their lives in our behalf, should have the right to make a judgment that their close living and working conditions make a homosexual co-worker intolerable.

These are some of the reasons why the various proposed homosexual and lesbian bills are being rejected by state and local units of government. The New York City Council dealt one of many similar defeats to these local bills for "sexual orientation."

### Opportunity Through ERA

What the homosexuals and lesbians have failed to achieve at the Federal, state and local levels, they are planning on accomplishing through the Equal Rights Amendment. While no one can predict with absolute certainty how the U.S. Supreme Court will rule on any issue, the leading legal authorities are convinced that ERA will legalize homosexual "marriages" and grant them the special rights and benefits given by law to

husbands and wives.

One reason for this is the language of the Equal Rights Amendment, which says 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." A homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination "on account of sex."

A second reason for the effect of ERA on homosexuality is the fact that it will require State Legislatures (or the courts, if the legislatures fail to act) to delete the "sexist" language from state laws (e.g., man, woman, husband, wife, male, female) and replace all such words with sex-neutral language (e.g., person, spouse). Thus, a law that defines a marriage as a union of a man and a woman would have to be amended to replace those words with "person." A "marriage" between a "person" and a "person" is not the same thing at all as a marriage between a man and a woman.

Professor Paul Freund of the Harvard Law School testified before the Senate Judiciary Committee:

**"Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the Amendment shrink from these implications is not clear."**

And Professor James White of the Michigan Law School testified:

**"Conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex."**

Senator Sam J. Ervin, Jr., who placed both the above statements in the *Congressional Record* on March 22, 1972, page S4578, added:

**"This matter illustrates as well as any the radical departures from our present system that the ERA will bring about in our society."**

Since then, a most important study entitled "The Legality of Homosexual Marriage" by Professors Samuel T. Perkins and Arthur J. Silverstein was published in the *Yale Law Journal* of January 1973. This scholarly study shows clearly that the Equal Rights Amendment will authorize homosexual "marriages" because of ERA's "stringent requirements" and because under ERA "sex is to be an impermissible legal classification." The article persuasively rebuts Senator Birch Bayh and others who try to deny this. Excerpts from this article are printed on the following pages.



# Excerpts from "The Legality of Homosexual Marriage"

by Samuel T. Perkins and Arthur J. Silverstein  
Yale Law Journal, January 1973

The Court's decision that the denial of marriage licenses to homosexuals does not abridge existing equal protection law would not save that practice from attack under the proposed Twenty-seventh Amendment. The version of the Amendment which is now before the states for ratification declares, in relevant part, 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." The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex. A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines.

The possibility that such a classification would violate the Equal Rights Amendment was raised during both the congressional hearings and debates on that proposal. The Amendment's chief sponsor in the Senate, Birch Bayh, rejected that interpretation, reasoning that a prohibition against homosexual marriage would not constitute impermissible discrimination so long as licenses were denied equally to both male and female pairs. Senator Bayh's opinion should, of course, be given considerable weight in determining the legislative intent in phrasing and passing the Equal Rights Amendment. However, it cannot be seen as controlling unless it is at least reasonably consistent with established constitutional doctrine and the more general interpretation of the proposed Amendment as evidenced in the legislative history.

As Professor Paul Freund observed during the congressional debates, the Bayh reasoning runs counter to the Supreme Court's handling of the anti-miscegenation statutes under the Fourteenth Amendment. In *Loving v. Virginia*, the Court ruled that a marriage license cannot be denied merely because the applicants are of different races. Such a denial was deemed to be an impermissible racial classification, even though it affected the races equally.

In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least the degree that the Fourteenth Amendment presently prohibits racial discrimination, *Loving* would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-seventh Amendment. That presumption can only be overcome by a showing that homosexual marriage falls within the scope of a particular countervailing interest or outright exception to the Equal Rights Amendment which would not have applied to the equal protection analysis in *Loving*. Such a showing cannot be made.

It was the clear intent of Congress to forbid classifications along sex lines regardless of the countervailing government interests which might be raised to justify such classifications. The language of the Equal Rights Amendment, which speaks of an "equality" that "shall not be denied or abridged," is much less flexible than that of the Fourteenth Amendment, which has been held to permit the consideration of countervailing interests. Professor (Thomas I.) Emerson explained that

the new Amendment "means that a differentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be 'reasonable,' to be beneficial rather than 'invidious,' or to be justified by 'compelling reasons.'" The legislative history supports this proposition that the new Amendment represents an unqualified prohibition -- an absolute guarantee.

## Effort to Amend ERA

In order to forestall this construction, the House Judiciary Committee recommended the following addition to the Amendment: "This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people."

The purpose of the addition was to make it clear "that Congress and the State legislatures can take differences between the sexes into account in enacting laws which reasonably promote the health and safety of the people." The proposed addition was rejected in the House by a vote of 87-265.

## Absolutist Nature of ERA

While even an absolutist interpretation would not prevent the courts from balancing the Equal Rights Amendment against other constitutional provisions which conflict with its commands, no such considerations were raised in defense of the anti-miscegenation laws and none would appear to be relevant to homosexual marriage. In discussing the Equal Rights Amendment, the only constitutional conflict envisioned by the commentators and legislators concerned the right to privacy, and it can hardly be argued that the denial of a marriage license to a same-sex couple would in any way serve the interest of the individual in being *protected* from government intrusion into his private life.

The "absolute" prohibition contained in the Equal Rights Amendment is subject to only one exception, or what Professor Emerson and his associates have termed a "subsidiary principle": the Amendment "would not prohibit reasonable classifications based on (physical) characteristics that are unique to one sex." This exception was designed to shield laws, such as many of those applying to pregnancy or sperm donation, which affect only one sex but which cannot realistically be said to "discriminate" against the other. It might be argued that heterosexual intercourse and procreation are activities which, because of the unique physical characteristics of men and women, may only be performed by different-sex couples, that these activities are central to the societal concept of marriage, and that the state can therefore restrict the granting of marriage licenses to different-sex couples.

This reasoning, however, would import into the Equal Rights Amendment precisely those traditional societal judgments that the Amendment was designed to circumvent. For example, a law regulating the manner in which hospitals treat pregnant persons would not ordinarily discriminate against men, because it deals directly and narrowly with a unique physical characteris-



tic which men do not possess. However, a law which stated that persons subject to pregnancy may not enlist in the armed services would probably be considered discriminatory, because it deals not only with an objective physical characteristic but also with overbroad societal judgments about the capabilities of persons having that characteristic.

In order to guard against illegitimate use of the "unique physical characteristics" principle, Professor Emerson and his associates have developed a series of factors which should be weighed by a court in determining the constitutionality of a physical characteristics classification under the Equal Rights Amendment. These factors, which are not readily applicable to the peculiar circumstances presented by a ban on homosexual marriage, can be restated in terms of two more general tests: (1) are the physical characteristics upon which the classification is based truly unique to the class being regulated, and (2) is the regulation involved "closely, directly and narrowly confined to (those) unique physical characteristic(s) . . . ?"

A statute restricting marriage licenses to heterosexuals would fail both of these tests. While it is perfectly true that no one has the physical characteristics to accomplish either procreation or heterosexual intercourse with a member of the same sex, it is equally true that many individuals, perhaps because of age or illness, are incapable of engaging in these activities with members of the opposite sex. Nor is there the necessary close relationship between these activities and the institution of legal marriage as it is now permitted. As shown above, the ability or willingness to procreate is not a prerequisite of legal marriage in this country, nor is the legality of an existing marriage in any way affected by the decision of both partners to forgo heterosexual intercourse. More generally, the belief that two persons having the same primary sexual characteristics *cannot* benefit from many of the emotional, social and legal consequences of the legal status of marriage is factually untrue; the belief that they *should* not so benefit is a subjective conclusion beyond the scope of the unique physical characteristics principle.

With no relevant or countervailing interests to place against the rule of "absolute" equality of treatment, the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples. If such a denial were to be permitted, it would have to be on the basis of an analysis which was consistent with the strict interpretation described above, and in addition, as Professor Emerson has pointed out, in matters as important as marriage "the burden of persuasion is on those who would impose different treatment on the basis of sex." In the case of laws prohibiting homosexual marriage, such a burden cannot be carried.

### Quasi-Marital Status

Although private consensual homosexual activity might be legalized in this country without creating many problems, as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it. If such proves to be the case, particular legal benefits available only to married

## NOW, Lesbians, and ERA

It is no accident that the principal organization spearheading the push for ratification of the Equal Rights Amendment is the National Organization for Women -- known as NOW -- an organization whose membership includes admitted lesbians and whose major political objectives include pro-lesbian legislation.

1. The 1973 national convention of NOW adopted a lesbian workshop resolution placing NOW on record in support of legislation to "end discrimination based on sexual orientation, especially in the areas of housing, employment, credit and finance, child custody and public accommodations." (Source: *AP Dispatch* from Washington, February 20, 1973.)

2. At that same 1973 NOW convention, gay-liberationist Ms. Sidney Abbott told reporters that "10 percent of the approximately 2,000 NOW members attending the convention were lesbians." It is clear from the news accounts that this admitted-10 percent was extremely active at the leadership level. (Source: *St. Louis Post-Dispatch*, February 19, 1973.)

3. Among the officers of NOW who are lesbians is Ms. Jan Welch, who was elected president of the Philadelphia NOW on June 26, 1973 after she informed fellow NOW members that she is a lesbian. (Source: *Philadelphia Evening Bulletin*, June 27, 1973.)

4. The official pre-convention booklet issued by NOW in 1973, called *Revolution: Tomorrow is NOW*, and defined as "a summary of NOW's existing resolutions and policies by issue," states that NOW acknowledges "the oppression of lesbians as a legitimate concern of feminism," and boasts that the Los Angeles chapter of NOW gained membership after it passed a resolution supporting lesbians. (Source: *Revolution: Tomorrow is NOW*, pages 20-21.)

couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits -- without compelling states to grant marriage licenses -- it might eventually create in effect a "quasi-marital" status. State legislatures might explicitly grant such a status, and specify the attendant rights. For example, benefits such as tax advantages, wrongful death rights and intestate inheritance could be granted more easily to the homosexual couple than could inclusion within the complete maintenance-divorce-alimony complex of laws involving substantial state regulation. An analogy can be drawn to the line of Supreme Court decisions which has given illegitimate children certain rights, albeit a less-than-equal status in comparison to their legitimate siblings.

### Conclusion

In the final analysis, the Court should not avoid granting full relief from discriminatory legislation simply because that legislation is based on deeply held beliefs. A quasi-marital status might satisfy many of the interests of homosexuals in gaining marriage licenses, but it would inevitably fall short of fully normalizing their relationships. A legislative stigma of deviance would remain. The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications.



# Will The Real Jerry Ford Please Stand Up?

On August 22 President Gerald Ford invited reporters, photographers, and 16 women members of Congress to the White House to watch him sign a proclamation of Women's Equality Day and to hear him urge ratification of the Equal Rights Amendment. Undoubtedly this is the prelude to putting a political squeeze on State Legislators. They will be told to hurry up and ratify ERA because President Ford wants it.

Before this Presidential endorsement of the Equal Rights Amendment is taken at face value, State Legislators should realize that Gerald Ford's endorsement of the Equal Rights Amendment is a classic case of political double-dealing, of do-as-I-say-and-not-as-I-do, and of buckpassing. Here is the way the *New York Times* of August 23, 1974 (page 34) related President Ford's chameleon behavior:

**"Mr. Ford not only voted for the Amendment in 1970, but also worked to bring it before the House for a vote, under an unusual procedure that required a majority of the members of the House to sign a petition asking that the Amendment be released from the Judiciary Committee, which had refused to approve it. Mr. Ford got from among his Republican colleagues 14 of the 15 final signatures that were needed to bring up the Amendment in the House.**

**"The Amendment passed the House in 1970, but was killed in the Senate.**

**"The following year, when a delegation of women asked Mr. Ford to support the Amendment again, he told them that he would be unable to vote for it because his constituents were upset over the fact that the Amendment, if enacted, would require women to be drafted into the armed services, if men were.**

**"He told the group, however, that he would work to get other Republican votes for the Amendment and that he would arrange to be absent when the vote was taken, rather than vote against the Amendment. That is what he did."**

Any State Legislator who is asked to ratify ERA "because the President has endorsed it" should remember that he is asking you to take the rap from your angry constituents so that Ford can be on both sides of this issue. And for what? To appease a few militant females, he is willing to urge *other Legislators* to make American girls subject to the draft.

## Bella Abzug and the Rockettes

At the same White House ceremony on August 22, President Ford put his arm around Congresswoman Bella Abzug of New York (sponsor of the Equality Day Resolution) and said: "You girls are the Rockettes."

To anyone who has ever seen the Radio City Music Hall Rockettes, that is a most unrealistic statement. In trying to unravel the explanation for President Ford's strange remark, we have come up with five possible alternatives:

- 1) He was being sarcastic.
- 2) He was indulging in flattery so crass as to be downright dishonest.
- 3) He is living in some kind of dream world in which he really thinks that Bella Abzug looks like a Rockette.
- 4) Somebody else is putting words into his mouth.
- 5) He is a man whose good judgment is badly shaken

by determined women. Some evidence of this possibility surfaced in his first Presidential news conference on August 28. He opened the conference with the sheepish admission that his wife Betty had scheduled her first news conference on the same day as his, and this is what he had to do to persuade her to postpone it: "We worked this out between us in a calm and orderly way. She postponed hers until next week -- and until then, I'll be making my own breakfast, making my own lunch, and making my own dinner."

Whatever the reason, his comment about the Rockettes, plus his own refusal to vote for ERA, cast doubt on his sincerity in urging ratification of the Equal Rights Amendment.

## Jurisdiction Over Amendments

Quite apart from the external trappings of the Presidential endorsement of ERA, Gerald Ford was clearly out of order in presuming to tell State Legislators whether they should or should not ratify a constitutional amendment. The amending process is the only part of our entire governmental system in which the Executive Branch has *no* part. The Founding Fathers in their wisdom set up an amendment process under which a constitutional amendment travels directly from the U.S. Congress to the State Legislatures. The U.S. President has no part in the procedure. He cannot sign the amendment, and he cannot veto it. The same is true for the Governor of each of the States. To put it bluntly, a constitutional amendment is none of their business.

Every U.S. citizen is, of course, entitled to his opinion. But it is improper of the President or any Governor to use the funds, power, and prestige of his office to interfere in the amending process. With all the power that has moved from the legislative to the executive branch in recent years, legislators would be unwise to give up their last area of sole jurisdiction.

Yet, President Ford has just appointed a new woman to his White House staff who has announced that her principal objective will be to push for ratification of the ERA. This means that Federal salary and expense money will be spent to push ratification of ERA, which is essentially a grab for power at the Federal level and will result in a hoard of new Federal bureaucrats to implement it through "affirmative action" and "reverse discrimination."

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