

COMMENTARY

STATUS VERSUS BEHAVIOR

THOMAS SOWELL*

The central issue regarding the Equal Rights Amendment has been posed as whether men and women should have equal status. A more fundamental question is whether social decisions must be based on status rather than behavior—and “must” is the proper word when speaking of a constitutional amendment. This is part of a larger issue in social decisionmaking in general—where it should be located, and on what principle it should be based.

Perhaps the point is easiest to illustrate with an example remote enough to be seen as a problem in institutional decisionmaking, rather than as a categorical moral choice. Some years ago, Quebec authorities imposed a requirement that airline pilots speak with control towers in that province only in French. To the Quebec authorities it was an issue of the equal status of their language with English. To virtually everyone else—including international airline pilots, who organized a boycott of Quebec airports—it was a question of behavior, not status. What mattered behaviorally were the likely consequences of requiring pilots familiar with English as an international language to risk hundreds of lives on communication in a less familiar tongue. In short, the pilots’ concerns involved precisely those elements missing from the status perspective; namely, probabilities and costs.

There are decisionmaking processes in which treating people the same implies or requires no similarity in behavior, as when a government counts all citizens’ votes the same, or when a sports official applies the same rules to players of widely differing abilities. This cannot be universalized, however, and universalizing is what is at issue with constitutional amendments. Other decisions and institutions require that individuals be sorted by performance—prospectively as well as ret-

* Professor of Economics, University of California, Los Angeles. A.B., 1958, Harvard University; M.A., 1959, Columbia University; Ph.D., 1968, University of Chicago.

respectively, so that probabilities and high knowledge costs become considerations.

The behavior of women differs from that of men not only in gross physical terms and in volitional behavior, but also in longevity, susceptibility to disease, and rates of maturation. Courts have already substituted status equality for behavioral difference as the basis for retirement premiums and benefits. With a decade's difference in life expectancy, a woman's retirement years specifically are some multiple of a man's. The cost of given retirement benefits per year, therefore, varies enormously according to the sex composition of the recipients—a fact not likely to be lost sight of by employers when choosing among job applicants, or when deciding whether to have a company retirement plan at all, or how large to make it.

The extension of more status-based decisions, imposed by the central government on millions of other decisionmakers concerned with behavioral realities, is the crucial danger in many contemporary schemes that feature the word "equal," including the Equal Rights Amendment. Proponents of such schemes depict the issue as being equality versus inequality, when in fact such centrally directed, status-based schemes have common features and effects, whether the ascribed status is equality, inferiority, or superiority. Moreover, the problems entailed by such schemes adversely affect not only efficiency, but—more importantly—freedom.

By status-based decisionmaking, I mean decisions based on or constrained by an ascribed status or ranking, centrally imposed, as distinguished from decisions based on individual assessments of behavioral performance or prospects by each decisionmaker independently. The status involved may be, as I say, equality, inferiority, superiority, to any degree. Examples would be Jim Crow laws, royal privileges, Nazi racial ideology, class enemies under Communism, or equality by any criterion one wants to use. What this implies, first of all, is that there must be some authoritative truth, regardless of empirical realities or differing individual perceptions by people who have to make decisions. Among the consequences of this kind of decisionmaking constraint is a divergence between the official status and the actual behavior, and between the actual behavior and the behavior as perceived by the immediate decisionmakers. Even in societies imbued with a particular ideology, such as the South during slavery, there are numerous opportunities for individual economic or social gains by diluting or disregarding

ascribed status. For example, urban slaves typically were allowed a greater level of freedom, largely in the interest of the slave owners—and despite laws and constant complaints from the rest of the white population.

In the Soviet Union there is a prescribed status, or in this case, a proscribed status for descendants of the former capitalist class. Nevertheless, it has been found that the offspring of those capitalist classes have certain managerial talents useful to the Soviet state. So despite various attempts in the law to give them a lower status, in point of fact, they are heavily overrepresented among the current generation of Soviet managers. In terms of efficiency, status-based decisions inhibit the achievement of optimum performance, so this is a reason why these exceptions are made even in systems that are considered monolithic.

It may be that our society is sufficiently prosperous that a little loss of efficiency here and there may not mean quite as much as it might somewhere else. The individual losses perhaps might be bearable, looked at that way. The most serious question is the question of freedom.

The inefficiencies are important in this context in that they provide a continuing set of incentives for individual decisionmakers to behave in ways at variance with the centrally ascribed status—again, regardless of whether that status is equality or inequality or otherwise. Even where the ascribed status attempts to correct some injustice, it clearly creates other injustices to other people as a result of the inefficiencies involved. That is, when someone loses an income or a standard of living, it is by no means clear a priori that these losses will be greater or smaller than the gains in correcting the injustice. The losses are no less real because the individuals who suffer them may not belong to some group that is readily categorizable by sex, race, or some other easily recognizable feature. Given the divergence between the officially ascribed uniform status, whatever it might be, and the actual performance of diverse human beings, and the perceptions of diverse decisionmakers, the initial centralization of decisionmaking tends to be followed by further curtailments of freedom to enforce the decision on recalcitrant decisionmakers who do not want to be bound by something that is inapplicable in their circumstances.

There is a loss of freedom among even the privileged groups in a highly status-based society such as the antebellum South. In South Africa, clearly in Nazi Germany, and in the USSR, there have been such things as increasing surveillance and a shift in the burden of proof

when the status-based rulings are at issue legally—as also, for example, under affirmative action here, where things we once regarded as confidential are not regarded as confidential any more. Such records must be routinely forwarded to federal agents in order that they may rummage through and find what they will. This shift of the burden of proof has been fairly dramatic also, particularly when you compare it with the legislative history of the Civil Rights Act in which it was quite clear that the sponsors of the Act wanted people convicted when they intentionally engaged in discrimination. Now the administration of the law, in point of fact, simply infers such intentions wherever the numbers do not please the bureaucrats.

One of the other costs that should not be minimized, even if it cannot be quantified, is the sense of demoralization that takes over as people are engaged in some basically fraudulent process—as when they pretend to be able to hire various numbers or percentages of various groups, knowing in advance that they either will not or cannot.

Another of the consequences of this system is that social issues are dealt with not in terms of policies that are adjustable incrementally according to situations, but according to rights; that is, rigidities that apply categorically over very broad areas, regardless of the individual circumstances. There must be rights in any society; that is, things that are rigid and categorical. But because there must be some of these things does not mean that they are incrementally beneficial in all areas. Rights have a cost to the individual who has the rights as well as a cost to society at large. There would be no waivers, for example, of the right to see faculty recommendations when you apply to graduate school, if in fact that right did not entail more cost to the individual than the benefits. The problem arises when the individual no longer has that choice, when he has certain rights that cannot be waived. One of the costs is the number of voluntary transactions that tends to be reduced as the number of rights is increased. This is not a peculiarity in American society. In the Soviet Union, for example, young workers have special rights that older workers don't have. One of the consequences, of course, is that Soviet managers try not to hire younger workers. A very common phenomenon is that relatives of people on a job tend to acquire special rights *de facto* because they are relatives. One of the consequences of that is a rule against nepotism.

Imagine three individuals with whom you might transact, either as a landlord, employer, or marriage partner for that matter. One is an ille-

gal alien, one is a diplomat with diplomatic immunity, and the other is an ordinary citizen. Clearly, it would cost you the least to transact with the illegal alien because he would have fewer rights that he could exercise. The citizen would be next, and the person with whom you would be most reluctant to transact is the one who has the most rights, the diplomat.

One of the other things that comes along with the rights approach to public policymaking in this area is a certain crudity in the manner in which the rights are applied. We have seen this to some extent in affirmative action programs in which numbers supposedly prove intentions, and more generally, in a certain zeal for pushing some of the principles as far as they can be pushed. I suspect that a large part of the opposition to the Equal Rights Amendment is based not on the principle that is stated in the amendment, but on the history of the kind of zeal that has been seen in other areas when similar words were used over the past couple of decades. What has been delicately referred to as the "potty problem" is only the tip of the iceberg of the kind of mindless application of a principle, which carries it just as far as it can be carried regardless of the consequences.

Let us look briefly at the picture of women in American society and some misconceptions, I think, that are fairly widespread. One misconception is about the history of women in the American society, particularly in the labor market.¹ Professor Ginsburg's article refers to the trend toward opening opportunities to women. Like many trends, its validity depends entirely upon the base year that you choose. In the image that has been projected, there has been a rise of women occupationally as a result of rising consciousness and political action in recent years. In reality, if you look back through history, you will find women far more represented in high level positions forty or fifty years ago than today.² This is not only an interesting isolated fact; it has some implications for the kinds of explanations that are given for why women are "underrepresented" in various fields. Forty or fifty years ago, a higher percentage of all the M.D.'s, Ph.D.'s, professors, and college presidents in this country were women. As of about 1900, higher percentages of people in *Who's Who* were women than in the 1950's.

1. See T. SOWELL, AFFIRMATIVE ACTION RECONSIDERED 11 (1975). See also J. BERNARD, ACADEMIC WOMEN 39 (1964); Parrish, *Professional Womanpower as a National Resource*, 1961 Q. REV. OF ECON. & BUS. 58-59.

2. See T. SOWELL, *supra* note 1, at 11.

The rise and fall of women occupationally is very heavily correlated with the age of marriage of college-educated women. When college-educated women married later in life, they were far more represented in these high level professions. As the average age of marriage of college-educated women fell, the proportions of women in these professions also declined.³ There has indeed been a rise in recent years. That rise is much more highly correlated with demographic trends than with any discernible political trends. In many areas it has not yet reached the level that was reached half a century ago.

One of the things that some of the women's movement arguments have done is to parallel the arguments in various other kinds of movements; namely, to argue that there has been a past that was highly dishonorable not merely on the part of the general society, but on the part of the group that is in question. There are a number of problems with that approach. One is that one finds the very same pattern of the decline in women in high level positions in women's colleges administered by women—where the presidents are women, the deans are women, professors are women. That is, one finds in many leading women's colleges a domination of women at the full-professor level, say, in the 1930's, and of men by the 1950's.⁴

When we look at a male-female public opinion poll, one finds negligible differences between the sexes on most issues of "women's liberation" (so-called), and in a number of cases the males responded more favorably to liberation than the females.

The historical data would suggest that marriage and family responsibilities have had a great effect on the woman's role in the labor force, and contemporary data seem to reinforce that. For example, single women in their thirties who have worked continuously since high school have slightly higher incomes than single men in their thirties who have worked continuously since high school.⁵ If you look at single female Ph.D.'s who received their degrees in the 1930's and 1940's and you ask what percentage of them were full professors in 1950's, it was a slightly higher percentage than their male counterparts. In short, much of the difference between men and women that appears in the gross statistics

3. See J. BERNARD, *supra* note 1, at 62, 74, 215.

4. See generally *The Economic Role of Women*, in ECONOMIC REPORT OF THE PRESIDENT (1973).

5. See T. SOWELL, *supra* note 1, at 32-33; *The Economic Role of Women*, *supra* note 4, at 105.

is, in fact, a difference between married women and all other persons. Sometimes this is concealed in the data because they define single women in such a way as to include women who are widowed, divorced, or separated; that is, women who have had a part of their work lives interrupted by marriage and childbearing. When we restrict it to women who were never married, an entirely different picture emerges. That is why I emphasize the phrase “never married.”

If we assume that what is happening in marriage is that women are in effect contributing towards jointly earned income (even if only the husband’s name appears on the paycheck), then much of the internal breakdown we see makes much sense. That is, given that a married man has someone helping him earn his wages, if only by freeing up great amounts of time to devote to his profession by virtue of his wife’s homemaking and other efforts, then we would expect married men to be making more than single men, other things equal. We would expect married women to be making less than single women because they are contributing towards men’s earnings. We would expect to find single men and single women earning about the same. And that is what we do find when we break down the statistics.

We need to separate different kinds of decisionmakers—some of whom operate in a competitive, economic market; some of whom operate in a highly insulated market such as in the public utilities or the government itself. Insofar as we deal with people who operate in an economic market, we deal with people whose errors in judgment on women’s capabilities create costs that they themselves have to bear. It may well be that there are general illusions among certain classes of employers about women, but it is very unlikely that millions of human beings will have the same illusions in exactly the same degree. A decisive competitive advantage would be gained by whatever employer who—by either intelligence or dumb luck—happened to have picked a belief that coincided more closely with the facts. There is no such force at work in government. There is no reason why a government agency cannot be wrong for fifty consecutive years. One could, in fact, put together an impressive list of agencies that fit this description.

The kinds of constraints under which different decisionmakers operate create a need for different kinds of legal approaches; that is, different degrees to which the government will prescribe to decisionmakers what their decisions should be.

There are many behavioral differences between men and women;

they are not exhausted by purely gross physical differences. For example, young male drivers have far higher accident rates than young female drivers. In some states, as I see from Professor Ginsburg's article, the legislature has apparently judged that young women have more maturity for handling drinking than young men. The question is not whether the legislatures are right; the question is whether that is a reasonable judgment for them to make. There is still, I hope, a difference between saying that there is some reasonable area in which a person may exercise judgment and saying that one agrees with the way he exercised it.

There are also behavioral differences not because women are different from men, but because both women and men behave differently in each other's presence than they do separately. The military would be one such area. In the military, there is some reluctance, for example, to assign brothers to the same combat unit because there are very strong nonmilitary attachments involved that in combat can interfere with the performance of military tasks. If one brother is wounded and the order is to pull back, one may not want to leave one's brother out there on the battlefield to the mercy of the enemy, though in fact that may be what is dictated by military considerations at the moment. There is even some concern in the military about promoting officers to be in charge of larger units that include a unit of which they were previously in charge; that is, to make a platoon leader head of a battalion that includes his platoon and other platoons, because of the possibility (or certainly the suspicion) of favoritism that would arise when he had to choose different platoons for different hazardous assignments.

I think we could say even in this day and age that there are tendencies for men and women to form strong nonmilitary attachments. This might also be a reason for having some concern about their interaction, quite aside from any differences between the two of them. Similar kinds of considerations obviously would be involved in other kinds of hazardous areas where group morale is very important.

There are different labor force participation rates between men and women. More important than the gross difference in rates is the fact that women's labor force participation rates have been found to be highly correlated with the number of children they have and with the

size of their husband's income.⁶ A special problem is created for those females whose career patterns are much more similar to the career patterns of males than they are to the patterns of other females. One of the problems with separating out such women is that there are large sorting costs. One of the concepts that I find completely missing from so many discussions of these status-based arguments is the notion of cost.

There is a very easy temptation to speak of treating each individual as an individual. It has a good ring to it, but in reality we do not do that in almost any area of our lives, however much we talk about it. Even those who think we should judge each individual as an individual have generally presorted the individuals first, and then treated each individual as an individual. We may treat each individual on campus as an individual. We do not necessarily treat someone that we run into on skid row in exactly the same way as someone we run into on campus. If we see someone lurking in the shadows at night on a side street, we don't judge him as an individual; we cross the street because the cost of judging him as an individual may be too high. He may just be the neighborhood doctor, or the kindly gentleman down the block out walking his dog, but then again, he may not.

One of the phrases that enters the discussion over and over again is sexual stereotyping. Undoubtedly, this is something that happens. The question is do we apply that phrase to any level of sorting and labeling that goes on, regardless of the empirical basis for it?

Much of the opposition to and questioning of the Equal Rights Amendment derives from a fear of the runaway interpretations that are likely to be made of the law. This kind of argument obviously can be made against any law. The great problem is that the history of the last ten or twenty years gives all too much evidence of people ready to make such runaway interpretations. There are already people who are talking about how the representation of women in this or that occupation indicates how much discrimination there has been by employers, for example; that is, people who confuse opportunity on the one hand and results on the other.

In Professor Ginsburg's article, there was some discussion of how physical characteristics would still be allowed to be taken into account in decisionmaking under the Equal Rights Amendment. The question

6. See generally W. BOWER & T. FINEGAN, *THE ECONOMICS OF LABOR FORCE PARTICIPATION* (1969).

is what is peculiar about physical characteristics as distinguished from other characteristics that may be of equal weight in the decision?

One of the real problems in talking about the Equal Rights Amendment in any rational way is that to many it appears as a sort of referendum on the ultimate worth of women. I think that is unfortunate because it is hard enough to formulate social decisions with which society can live without also treating this decision as some sort of measure of the ultimate worth of one-half of the human race.